Question Paper 8 – The structure and hierarchy of sentencing options

Hierarchy of sentences

Question 8.1

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

The Committee is in favour of a statutory hierarchy of sentences. A statutory hierarchy would make the sentencing process more transparent and provide guidance to the courts (particularly the Local Court).

Section 33 of the *Children (Criminal Proceedings) Act 1987* provides an example of a sensible approach to a sentencing hierarchy.

The need for flexibility

Question 8.2

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

The Committee supports the creation of a sentencing hierarchy with a degree of flexibility as to components, and allowing combinations of sentences.

Particular sentencing combinations

Question 8.3

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

The Committee supports the court having a wide discretion to impose an appropriate sentence, including using combinations of sentences, provided that appropriate safeguards are implemented to avoid net-widening.

The Committee notes that fines are often imposed where the accused has no rational prospect of paying, and this can result in licence suspension (further discussed at Question 10.2(2)). The use of fines and the impact on the accused requires more research and attention. Section 6 of the *Fines Act 1996* requires the court to consider an accused's ability to pay the fine. It would be useful if the *Crimes (Sentencing Procedure) Act 1999* contained a similar provision.

Question Paper 9 – Alternative approaches to criminal offending

Early diversion

Question 9.1

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

The Committee supports the establishment of an early diversion program that is available throughout NSW. The diversionary program would require a legislative basis and police protocols to ensure that the scheme is administered consistently across NSW.

The Committee does not support the introduction of conditional cautions.

Program-based diversion

Question 9.2

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

The Committee supports the Court Referral of Eligible Defendants into Treatment (CREDIT) program as an effective way to reduce reoffending rates and address the causes of offending through appropriate treatment and services. The BOCSAR evaluation of CREDIT found high levels of satisfaction among participants and stakeholders.[1]

The CREDIT program should be made available state-wide and should be supported by a specific legislative basis.

Question 9.3

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

The Committee strongly supports the Magistrates Early Referral Into Treatment (MERIT) program as an effective pre-sentence diversionary program.

Research by the Bureau of Crime Statistics and Research has shown that MERIT is having great success in reducing rates of reoffending.[2] The MERIT program receives a high level of judicial support and provides positive outcomes for both offenders and the community. The Committee considers that the demonstrated success of MERIT in reducing recidivist behaviour, and the associated benefits this creates for the community,

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[1] *'NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation'*, Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 159, 2012, p21.

[2] *'Magistrates Early Referral Into Treatment Program'*, Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 131, July 2009, p11.

justifies the allocation of substantial resources to the program. The Committee supports the expansion of alcohol MERIT, which is currently only available at select courts.

The MERIT program ensures that the court process has a rehabilitative component for eligible adult defendants who present at a participating Local Court and who have a demonstrable drug or alcohol problem. People with a cognitive impairment often fall into this category and could benefit from participation in the MERIT program.

Acceptance into the program is conditional on the defendant being assessed as suitable by the MERIT caseworker and the Magistrate, and the defendant remaining committed to volunteering for the program. The determination of an appropriate treatment module is a matter solely within the discretion of the MERIT caseworker. While a defendant with a cognitive impairment may be considered both eligible and suitable, they may not ultimately be accepted into the MERIT program as a result of perceived literacy requirements for treatment.

The Committee supports changing the way the MERIT program is structured and delivered so that more offenders with a cognitive impairment may participate in, and benefit from, the program. For instance, having a less literacy based method of treatment and a more verbal and narrative based method of treatment would not be an unreasonable variation to the MERIT program. There could also be established within the MERIT program, a team of caseworkers with specialist capacity in assessing and meeting the drug and alcohol treatment needs of defendants with a cognitive impairment.

Question 9.4

1. Is the Drug Court operating effectively? Should any changes be made?

The Committee strongly supports the Drug Court. BOCSAR evaluations have indicated that the Drug Court is more cost effective and more successful at lowering the rate of recidivism than prison.[3]

The Committee strongly supports expanding the geographical availability of the Drug Court. The Committee also supports expanding the program to include alcohol and amending the eligibility criteria so that more offenders might become eligible to participate in the program.

2. Should the eligibility criteria be expanded, or refined in relation to the "violent conduct" exclusion?

The Committee supports refining the 'violent conduct' exclusion so that more offenders might become eligible to participate in the program.

Section 11 adjournment

Question 9.5

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

[3] *'The NSW Drug Court: A Re-evaluation of its Effectiveness'*, Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 121, 2008.

The Committee supports section 11 adjournments as a useful option to allow for an assessment of an offender's prospects for rehabilitation, or to enable an offender to demonstrate rehabilitation or participate in an intervention program.

The Committee supports section 11 adjournments; however they are not working effectively due to administrative problems. The period of adjournment often falls outside court guidelines for finalising a matter (six months), and difficulties arise when judicial officers move courts and the accused has to appear before a different judicial officer.

Intervention programs under the Criminal Procedure Act 1986 (NSW)

Question 9.6

1. Is the current scheme of prescribing specific intervention programs operating effectively? Should any changes be made?

The current scheme is working well.

2. Is there scope for extending or improving any of the programs specified under the scheme?

Circle sentencing should be available in more geographical locations across NSW. The effectiveness of the program could be improved by ensuring that adequate support services such as drug and alcohol treatment and counselling are readily available to target the underlying causes of offending.[4]

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

The Committee submits that CREDIT and MERIT should be prescribed as intervention programs.

Approaches to criminal offending

Question 9.7

1. Should restorative justice programs be more widely used?

The Committee supports a wide use of restorative justice programs. Recent research by BOCSAR indicates public support for restorative justice programs, and a high level of victim satisfaction with the process.[5]

2. Are there any particular restorative justice programs in other jurisdictions that we should be considering?

Not that the Committee is aware of.

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[4] NSW Attorney General's Department, *Evaluation of Circle Sentencing Program: Report* (2008), p6.

[5] *'Restorative Justice Initiatives: Public Opinion and Support in NSW'*, Bureau Brief 77, Bureau of Crime Statistics and Research, 2012, p1.

Question 9.8

1. Should problem-solving approaches to justice be expanded?

The Committee supports a greater focus on problem-solving approaches to justice. The Committee also supports mainstreaming problem solving approach, so that its application is not limited to a certain group of offenders or geographical areas.

2. Should any of the models in other jurisdictions, or any other model, be adopted?

The community court model adopted in Collingwood, Melbourne, appears to have been successful in reducing re-offending and engaging the local community in the justice system.

Any other approaches?

Question 9.9

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

Not that the Committee is aware of.

Question Paper 10 – Ancillary orders

Compensation orders

Questions 10.1

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

It is appropriate that the court has the power to make a compensation order as an ancillary order. However, compensation orders are not working effectively due to difficulties with enforcement.

The Committee does not support the integration of compensation orders into the sentencing matrix. An offer to pay on the initiative of the offender should continue to be taken into account on sentence as a mitigating factor.

Driver licence disqualification

Question 10.2

1. What changes, if any, should be made to the provisions governing driver licence disqualification or to its operational arrangements?

Roads and Traffic Authority of New South Wales v O'Sullivan [2011] NSWSC 1258

The decision of *Roads and Traffic Authority of New South Wales v O'Sullivan* [2011] NSWSC 1258 necessitates a legislative amendment so as to give the court clear power to date any period of disqualification from the date of any suspension.

On application by the Roads and Traffic Authority (RTA)[6], the Supreme Court made a decision regarding the Local Court and how periods of suspension and disqualification for major traffic offences are to be determined, calculated, announced and implemented.

The court has decided that any disqualification is to date from the date of conviction but it also acknowledged that under section 205(6)(b) of the *Road Transport (General) Act 2005* it is possible for a period of suspension to be regarded as satisfying all or part of a period of disqualification imposed by a court.

The Committee is concerned that the practical application of the decision may cause confusion and uncertainty, especially amongst those people who are appearing before the Local Court in NSW and having their licences disqualified.

The Committee understands that the Local Court has, as a result of the decision, implemented a system whereby if a Court invokes section 205(6)(b) of the *Road Transport (General) Act 2005* this will be noted on the JusticeLink system and then transmitted to the RTA. This will be in the form of an order by the court that **"Section 205(6)(b) RT (Gen) Act applies"**.

[6] The Committee notes that as of 1 November 2011 the RTA is now Roads and Maritime Services. For ease of reference this correspondence refers to Roads and Maritime Services as the RTA.

The Committee wishes to ensure that as a result of this notification there will be no difficulty in licences being reissued to persons at the correct time i.e. after the period imposed by the court having regard to both the suspension and disqualification period. In other words, the calculation of the period dates from the date of suspension and not from the date of conviction.

If this does not occur then the system will be open to criticism, which may reflect badly on the administration of justice in NSW.

It is for this reason that the Committee submits that action needs to be taken to ensure that the practical effect of the court's decision is properly managed and that the RTA will properly recognise the orders made by the court.

This can be done by ensuring that if the court makes a section 205(6)(b) order then the RTA will calculate the relevant period that the person will be without their licence from the date of suspension and not from the date of conviction.

The Committee also notes that James J in *O'Sullivan* endorsed remarks made by the Court of Criminal Appeal in *Hei Hei v R* [2009] NSWCCA 87 that the purpose of the road transport legislation would be best served by giving Courts the discretion and flexibility to set appropriate commencement and conclusion dates for disqualification periods. This would also include cumulative periods, which, in view of *O'Sullivan*, cannot now be done by the court.

It is for this reason that in addition to ensuring the RTA correctly implements court decisions that flow from *O'Sullivan* the Committee submits that legislative amendment is required so as to give the court clear power to date any period of disqualification from the date of any suspension.

Mandatory periods of disqualification

The Committee agrees with Magistrate Farnan's preliminary submissions to the review that the current automatic 3 year disqualification for a person convicted for the second time for driving unlicensed (never licensed) (section 25(3) *Road Transport (Driver Licensing) Act 1998*) should be abolished, and the court should have the discretion to impose an appropriate disqualification period.

The Committee supports the suggestion to amend section 25A(7)(a) and (b) to give the sentencing court the discretion to date a mandatory disqualification period from any date, and where appropriate, make disqualification periods concurrent rather than cumulative.

The Committee agrees with her Honour's suggestion that a scheme should be introduced to enable people who are subject to lengthy periods of disqualification to apply to the court, after a specified period without committing a driving offence, to reapply for a driver's licence and have the remaining period of disqualification quashed. Lengthy periods of disqualification are particularly crippling for people in rural and remote areas where public transportation is not available which has an impact on the person's employment, interactions with the community, and family obligations, and the chances of reoffending are therefore high.

The Committee also submits that the automatic imposition of Habitual Traffic Offender Declarations should be abolished.

2. Should driver licence disqualification be made available in relation to offences that do not arise under road transport legislation?

No. The Committee is opposed to the imposition of driver licence sanctions for offences that are completely unrelated to driving. The most significant problem with the fine enforcement system is the link between non-payment of fines and suspension/refusal of driver licences. Where the unpaid fines are traffic fines, this makes some sense and is perhaps justifiable; however, to impose licence sanctions for non-traffic fines is illogical and may result in injustice.

Nearly one quarter of all Indigenous appearances in the NSW Local Court are for road traffic and motor vehicle regulatory offences.[7] Many of these offences are committed by people who have been caught driving a motor vehicle after having had their driving license suspended for non-payment of a fine.[8]

The Committee submits that licence sanctions for non-traffic fines should be abolished.

Non-association and place restriction orders

Question 10.3

1. Should non-association and place restriction orders be retained?

The Committee does not support the retention of non-association and place restriction orders.

A review by the NSW Ombudsman found that only twenty orders were imposed at sentencing over a two year period.[9] Non-association and place restriction orders were introduced in an attempt to deal with gang-related crime. The review found that none of the orders were to that effect.[10]

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

The Committee is of the view that non-association and place restriction orders should be abolished.

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[7] Bureau of Crime Statistics and Research, *'Reducing Indigenous Contact with the Court System'*, Issue Paper No. 54, December 2010, p3.
[8] Ibid.
[9] NSW Ombudsman, *Review of the Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*, Final Report (2008) 33.
[10] Ibid., 42.

Question paper 11 – Special categories of offenders

Indigenous 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?

BOCSAR has found that the most effective way to reduce Indigenous over-representation in the court system is to decrease the rate of recidivism through effective rehabilitation programs.[11]

The Committee suggests that an emphasis on alternative sentencing models, restorative justice and diversion as part of an integrated and equitable sentencing regime should improve outcomes for Indigenous people.

2. Are there any forms of sentence other than those currently available that might more appropriately address the circumstances of Indigenous people?

Not that the Committee is aware of.

3. Should the Fernando principles be incorporated in legislation and if so, how should this be achieved and what form should they take?

The Fernando principles are well known and should be left to develop and evolve in the common law.

The Committee recommends that the Commission give consideration to incorporating a cultural recognition provision in the Act. The provision should specify that the courts should take into account an Indigenous offender's cultural background and community ties.

Offenders with cognitive and mental health impairments

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?

Yes, the Act should contain a more general statement directing the court's attention to the special considerations that arise when sentencing an offender with cognitive or mental health impairments.

That statement should be framed to reflect the principles in *R v Hemsley* [2004] NSWCCA by directing the court to consider the specific circumstances of an offender's

[11] '*Why are Indigenous imprisonment rates* rising?', Bureau Brief 41, Bureau of Crime Statistics and Research, 2009, p6.

impairment when applying the common law sentencing principles, and the effect that such an impairment may have in relation to some of the aggravating and mitigating factors listed in the Act.

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

The Act be should be amended to make it mandatory for a court to order a pre-sentence report when considering sentencing offenders with cognitive or mental health impairments to prison where the offender is unrepresented.

The report should contain an assessment of:

- the nature and severity of the offender's impairment;
- the type and availability of community based services;
- the offender's suitability for semi and non-custodial sentencing options, taking into account the type and availability of community-based services, and
- the availability of a mental health facility, or a specialist unit for intellectual disability in which the offender might serve a sentence of imprisonment, rather than a prison.

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?

Yes. The Act should be amended to require that:

- where the offender has a cognitive or mental health impairment; and
- the impairment is considered sufficient to mitigate the severity of the sentence, or to reduce an offender's moral culpability for an offence, and
- the court intends to impose a sentence of full-time imprisonment,

the court order that the offender serve that sentence in a mental health facility, or a specialist unit for intellectual disability, rather than a prison, where such facilities are available.

4. Do existing sentencing options present problems for people with cognitive and mental health impairments? If so, how should this be addressed?

Yes. Experience suggests that the level of compliance required by Intensive Correction Orders and home detention is often too high for people with cognitive or mental health impairments. As a result, many such orders are breached, and offenders face full-time imprisonment.

Community service orders (CSOs) and good behaviour bonds are more appropriate options for people with a cognitive or mental health impairment because a court dealing with a breach has more discretion. Where a CSO is breached, the court can re-sentence the offender for the original offence. Where a bond is breached, the court can waive the breach or adjourn the proceedings to give the offender another chance to comply.

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?

The Committee strongly supports diversionary options for people with cognitive and mental health impairments.

Women

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?

Research by Corrective Services NSW has found that despite representing only a small proportion of the overall imprisoned population, the needs of women in the criminal justice system are greater and more complex than those of men.[12]

The way in which existing sentencing options are delivered, and the way that eligibility is assessed, should be tailored to fit the special circumstances of women (e.g. women are often the primary carer for children).

3. What additional options should be developed?

The Committee supports more targeted and specialised non-custodial programs for women.

Corporations

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?

The Committee has no comment to make on this topic.

Any other categories

Question 11.5

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

The review should consider how to take into account the situation where as a result of criminal offending a non-resident is likely to be deported by the Department of Immigration.

[12] 'Women Offenders', Corrective Services NSW, <http://www.correctiveservices.nsw.gov.au/offender-management/offender-services-and-programs/women-offenders>.

Question Paper 12 – Procedural and jurisdictional aspects

Accessibility of sentencing law

Question 12.1
How can information technology be used to improve the accessibility of sentencing law while maintaining judicial independence?

The Committee supports innovations such as the Victorian Sentencing Advisory Council's "Virtual You be the Judge" website as a useful educative tool for the public.

The Committee has concerns about broadcasting court proceedings. In addition to the impact it may have on the independence of the judiciary, it also risks compromising the privacy of the victim, witnesses and the accused.

Question 12.2
Could publicity orders and databases be a useful tool in corporate or other sentencing cases?

The Committee has no comment to make on this topic.

Procedural reforms

Question 12.3
What procedural changes should be made to make sentencing more efficient?

The Committee supports several of the measures to improve the internal efficiency of traditional courts in the criminal justice system as set out in paragraph 12.40 of the discussion paper as follows:

- parties, the Registry and the Judge's Associate or Magistrate's Assistant exchanging their email addresses and telephone numbers at the commencement of the proceedings;

- parties and the Registry making a search of the listings database and attempting to bring any of the offender's other outstanding, uncontested matters together to be dealt with in the one sentencing matter, including sentencing for Local Court matters in the higher courts making use of the "Form 1" provisions in s 31-35 of the Act;

- emailing pre-sentence reports covering all sentencing options to the Registry at least two days before the sentence date and the registrar giving clearance for the reports to be forwarded to the parties and the judge or magistrate, and

- the courts engaging in dedicated case management of all unrepresented matters in a separate list (including appeals), with newly drafted Rules of Court if required, to confine the issues, limit submissions, and limit the use of time and resources by the court and prosecution.

The Act should provide that co-offenders should appear before the same sentencing judge, unless there are substantial reasons as to why this cannot occur.

Question 12.4

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

The Committee suggests that there could be more of a focus, by all parties, on the necessity of ordering a pre-sentence report.

The Committee supports the Commission's suggestion to enable the Court to request a single pre-sentence assessment report from one government agency that addresses the offender's eligibility and suitability for all sentencing options.

Question 12.5

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

No. Courts can already give oral rather than written reasons for sentences where appropriate. Oral sentencing remarks should not be encouraged by legislation.

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)?

The Committee does not support changing the appeal process from the Local Court to the District Court. The Chief Magistrate's suggestion would require the appellant to demonstrate an error on the part of the Magistrate. The current system works efficiently, and the suggested change would result in more detailed judgments from Magistrates with a consequent adverse impact on the efficiency of the Local Court.

2. Should greater emphasis be given to the existing provision in s 43 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?

Yes, in appropriate cases.

3. Should appellate courts be able to determine appeals 'on the papers' if the parties agree?

No, the Committee supports the status quo. Appeals should be determined in open court.

Question 12.7

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

The Committee was very disappointed that the criminal case conferencing pilot was cancelled. Cultural change takes time, and the Committee is of the view that changes were starting to occur that would have resulted in an increase in earlier pleas of guilty.

A proper system needs to be implemented which allows a reasonable period of time for negotiations to take place between the defence and the DPP. The Committee recognises that in many cases the DPP has not been consulted on the charges that have initially been laid by police. The late service of the brief of evidence is an on-going problem.

There should be recognition of the fact that when dealing with serious criminal matters it is sometimes necessary that a reasonable amount of time is taken before the matter is forced to trial. While efforts to make sentencing more efficient are understandable, the Committee does not support achieving "efficiency" at all costs.

Jurisdictional reforms

Question 12.8

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

a. having specialist criminal law judicial officers who are only allocated to criminal matters;

No.

b. establishing a Criminal Division of the District Court;

No.

c. establishing a single specialist Criminal Court incorporating both the District Court and Supreme Court's criminal jurisdictions, modelled on the Crown Court;

Some members consider this to be an interesting proposition worthy of further consideration. However, other members are of the view that if such a proposal were implemented it would lead to a reduction of resources for the criminal jurisdiction.

d. amending the selection criteria for the appointment of judicial officers;

This is not a matter for the Committee to comment on.

e. in any other way?

No.

Question 12.9

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

The Committee does not support the adoption of a comprehensive guideline judgment system as it would constitute an inappropriate fetter on judicial discretion. The Committee understands that in some cases the guideline system in England and Wales is used to assist lay justices.

2. Should the current guideline judgment system 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?

The Committee strongly supports broadening the type of information that should be considered by the CCA. The Sentencing Council could play a greater role in the formulation of guideline judgments by undertaking public consultations and preparing an expertly researched report for the parties and the court.

b. allowing parties other than the 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 Committee does not support this proposal.

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

No.

Question 12.10

1. Should a sentence indication scheme be reintroduced in NSW?

The Committee supports revisiting the possibility of a sentence indication scheme.

2. If so, should it apply in all criminal courts or should it be limited to the Local Court or the higher courts?

It should apply in all criminal courts.

3. Should a guideline judgment be sought from the Court of Criminal Appeal to guide the operation of the scheme?

Yes. A guideline judgment could guide the operation of the scheme in a similar way to the *Goodyear* model in England and Wales. The scheme would require additional resources so that the prosecution and defence can properly prepare for sentence indication hearings.

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?

The Committee notes that a lot of criticism of the previous scheme was due to the way resources were allocated.

It would be incumbent on the head of jurisdiction to ensure that the scheme is presided over by the appropriate members of the court. The misuse of sentence indications could be guarded against by a guideline judgment.

The role of victims in sentencing proceedings

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?

The Committee does not support the court being permitted to consider a victim impact statement (VIS) made by family members when determining an offender's sentence in homicide cases.

There are a number of concerning features of such a proposal including misstating the sentencing task of judges. The VIS is likely to cover factors judges take into account in sentencing in any case, of which the effect on the victim and community is one, but only one. In addition, the criminal law and criminal justice process proceeds on the basis of the equal value of lives of all individuals, something which is invoked in the broad categories of wrongfulness in homicide (murder and manslaughter). More broadly, perhaps the key distinguishing feature of criminal law is the idea that a charge is brought on behalf of the public, on the basis that a wrong has been committed against the public. Enhancing the role of the VIS moves too far away from this core feature of criminal justice.

As the Honourable Justice Levine said in his keynote address at the May 2011 '*Meeting the Needs of Victims of Crime*' conference:

> "To permit further intrusion in the sentencing process, by either or both the jury or the victims, could be seen to amount to the privatisation of the quintessential act of the State on behalf of the whole community, that is, the imposition of punishment. It also could be seen to amount to the validation of vengeance and vendetta which hitherto the whole of the rule of law and the administration of criminal justice has been at pains to prevent."

The Committee agrees with the position of the NSW Court of Criminal Appeal in *R v Previtera* (1997) 94 A Crim R 76, that it is not appropriate to take a VIS into account when sentencing for a homicide case for the following reasons:

- a sentence must be proportionate to the objective seriousness of an offence;
- the sentence will already take into account the value of a human life;
- it is "offensive to fundamental concepts of equality and justice for criminal courts to value one life as greater than another"; and
- it is "inappropriate to impose a harsher sentence upon an offender because the value of the life lost is perceived to be greater in the one case than in the other".

In *R v FD; R v FD; R v JD* (2006) 160 A Crim R 392, Justice Scully raised the following problems with allowing a VIS to be taken into account when determining the sentence for a homicide case:

- offenders should not be sentenced under a "lynch mentality";
- the offender should not be sentenced in a manner that is dictated by the victim;
- victims still deserve a forum in which they can make a public statement to allow for the "emotional catharsis" of putting their grief and loss on record; and
- VIS provide a means of implementing a political imperative originating from the perceived lack of trust voters have in the sentencing process. It is not easy to deal with this issue in a way that "does not lay waste to the accumulated wisdom of the common law of crime and punishment".

Significant difficulties would arise in NSW if a VIS were to be treated as material affecting the sentence otherwise properly imposed. There would need to be considerable extra time and trouble taken to settle the VIS by the prosecution, ensuring

that any factual assertions were capable of proof if necessary, and that assertions of psychological or medical impact, for example, could be supported by expert evidence. Sentencing proceedings would become longer and more complex than they already are.

As a matter of principle, where there are facts in dispute on sentence, the fact in issue must be determined beyond reasonable doubt during a sentencing hearing. If a court is to adjust a sentence because of the content of a VIS, then the laws of evidence should apply to that content since it would affect the sentence and would therefore be a matter relevant to sentencing. This may require cross-examination of the author of the VIS. It would be extremely difficult for the defence to cross-examine a family victim on their emotions, feelings and grief.

Giving weight to a VIS may impact negatively on family victims in the following ways:

- cross-examination could be traumatic for a family victim and may undermine the therapeutic value of making a VIS;
- consideration of a VIS in homicide cases could cause family victims to have false expectations that the sentence imposed will reflect the harm that they perceive they have suffered. If a court is perceived not to have given sufficient weight to a VIS, the therapeutic benefits of making the VIS will be limited and indeed, may aggravate the harm caused to family victims and damage the public's confidence in the justice system, and
- some victims choose not to make a VIS because they feel that the trial process is already traumatic enough. There is a risk that if a VIS is accepted in sentencing for homicides, family victims will feel increased pressure to make a VIS when they might otherwise choose not to.

These risks appear to outweigh any perceived benefit to the victim of having the VIS considered by the court when determining an offender's sentence in homicide cases.

A VIS should remain primarily as a therapeutic, cathartic process for victims, and should not be taken into account when determining an offender's sentence in homicide cases.

2. Should any changes be made to the types of offences for which a victim impact statement can be tendered?

No.

3. Are there any other ways in which victims should be able to take part in the sentencing process which are presently unavailable?

Not that the Committee is aware of.

Other options

Question 12.12

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

The Committee supports the retention of the Table system, and is of the view that the two Tables should be combined into one. Either party should be able to make an election, as is the case with current Table 1 offences.

There are a number of strictly indictable offences that often receive Local Court type penalties and should be inserted into the merged Table. The following are examples of offences that should be capable of being dealt with summarily:

- section 60E(3) – wound or cause grievous bodily harm to a school student of member of staff;

- section 94 – robbery;

- section 112 - aggravated break and enter and commit a serious indictable offence, particularly when the offence is malicious damage or stealing and the aggravating factor is "in company", and

- there are a number of offences under the *Drug Misuse and Trafficking Act 1985* that should be capable of being dealt with summarily. Various amendments to Schedule 1 have perverted the legislative intention of the Act.

An analysis of Judicial Commission sentencing statistics shows a significant number of persons sentenced for these offences in the District Court receive a sentence that is well within the jurisdictional limit of the Local Court. In more serious cases the prosecution will elect.