

**NSW LAW REFORM COMMISSION SENTENCING REVIEW**

**QUESTION PAPER 8 – THE STRUCTURE AND HIERARCHY OF SENTENCING  
OPTIONS**

**NSW POLICE FORCE SUBMISSION**

**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?*

Notwithstanding, "It is fairly clear in practice that sentencing is approached on the basis of an assumed hierarchy",<sup>1</sup> we currently do not have a legislated hierarchy. If any future legislation is to be simple, there is no need to specifically state that one form of sentencing option is more serious than another apart from imprisonment being a last resort.

If there was to be any sentencing hierarchy, one similar to the Victorian approach with the guidance offered by the ACT and Tasmanian approach, appears suitable.

**Question 8.2**

*Should the structure of sentences be made more flexible by:*

*a. creating a single omnibus community-based sentence with flexible components*

Yes. However, this answer assumes the future availability of fines and imprisonment as well. Please see our answer to Question 8.1.

*b. creating a sentencing hierarchy but with more flexibility as to components*

No. Please see our answer to Question 8.1.

*c. allowing the combination of sentences*

Yes. Please see our answer to Question 8.1.

*d. adopting any other approach*

No.

**Question 8.3**

*1. What sentence or sentence component combinations should be available?*

Please see our answer to Question 8.1.

---

<sup>1</sup> NSW Law Reform Commission, Sentencing Question Paper 8, paragraph 8.10.

2. *Should there be limits on combinations with:*

a. *fines*

It is the view of the NSW Police Force that there should not be any limits or restrictions on combinations with fines, but instead guidance similar to that provided by the ACT legislation.<sup>2</sup>

b. *imprisonment*

No. We refer you to our answer to Question 5.3 in Sentencing Question Paper 5 in which we drew upon the recent finding of the Bureau of Crime Statistics and Research concerning increasing the risk of imprisonment as opposed to increasing the length of the sentence. In our answer we stated:

*The NSW Police Force believes that the NSW Law Reform Commission's 2004 finding that minimum sentences fail to achieve the purpose of deterrence is out of date.<sup>3</sup> The maxim that punishment swiftly follows crime has greater application in a modern deterrence context than previously recognised.<sup>4</sup>*

*Our results suggest that the criminal justice system does exert a significant effect on crime but some elements of the criminal justice system exert much stronger effects than others. Increasing the risk of arrest or the risk of imprisonment reduces crime while increasing the length of prison sentences exerts no measurable effect at all.*

Similarly, in our response to the Review of the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987* we stated that "It is arguably better to stem the flow of criminal behaviour early, than provide for a system where real support, control or an intervention strategy is only provided once a juvenile is entrenched in criminal behaviour."

If imprisonment can be combined with other sentencing options, this may call into question or blur the principle within section 5 of the *Crimes (Sentencing Procedure) Act 1999* that a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate. A term of full time imprisonment on its own may not be more appropriate than another form of sentence on its own. However, a short term of full time imprisonment combined with another sentencing option may be more appropriate than both.

In appropriate circumstances, a combination of a swift term of imprisonment, with an intensive correction order (this is perhaps available if an offender is sentenced to a term of imprisonment and a consecutive intensive correction order), community service then a bond and / or other conditions will have a greater deterrent effect than simply placing an offender on a bond because of the current blend of a sentencing hierarchy and the inability to combine sentences.

c. *good behaviour requirements?*

No.

---

<sup>2</sup> NSW Law Reform Commission, Sentencing Question Paper 8, paragraph 8.26

<sup>3</sup> NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) [6.1], referring to the reasons for the introduction of the prohibition on short sentences in Western Australia, p19-20.

<sup>4</sup> Wan, Moffatt, Jones and Weatherburn, 'The effect of arrest and imprisonment on crime' (2012) 158 *Crime and Justice Bulletin* at 15, 16

[http://www.bocsar.nsw.gov.au/law/link/bocsar/il\\_bocsar.nsf/vwFiles/CJB158.pdf/\\$file/CJB158.pdf](http://www.bocsar.nsw.gov.au/law/link/bocsar/il_bocsar.nsf/vwFiles/CJB158.pdf/$file/CJB158.pdf) (16.4.12)

**NSW LAW REFORM COMMISSION SENTENCING REVIEW**  
**QUESTION PAPER 9 – ALTERNATIVE APPROACHES TO CRIMINAL  
OFFENDING**

**NSW POLICE FORCE SUBMISSION**

**Question 9.1**

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

Yes, subject to evidence that such programs efficiently assist to reduce crime.

Knowing that early diversion programs, intermediate court-based diversions and drug courts sit at dissimilar points along the criminal justice continuum, ostensibly targeting diverse types of offenders, providing different levels of intervention and placing different emphases on diversion versus therapeutic jurisprudence, **evaluations are required that compare and contrast these various types of initiatives amongst themselves and against normal criminal procedure.**

**Question 9.2**

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

An evaluation of the program has been conducted and demonstrated that there was high level satisfaction amongst participants and stakeholders. Further, stakeholders advocated for State-wide implementation.<sup>1</sup> It is noted that BOCSAR's second evaluation report dealing with the CREDIT program is currently being undertaken and this will focus on the effectiveness of the program specific to the risk of re-offending. The Bureau will observe the re-offending rate of approximately 300 program participants and relevant control groups over a minimum period of 12 months. Once this study has been completed we will be in a better (and more informed) position to comment on any possible program changes.

**Question 9.3**

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

The NSW Police Force supports a review of the way the MERIT program is structured and delivered.

---

<sup>1</sup> L Trimboil, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159, NSW Bureau of Crime Statistics and Research (2012) 21.

## Question 9.4

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

Data acquired from the most recent custody survey in NSW revealed that lifespan frequency of illicit drug use is higher amongst those in custody (84%) when compared to the 38% self-reported by the general community.<sup>2</sup> Furthermore, a self-reporting survey conducted in 2010 revealed that 44% of those surveyed in custody used illicit drugs daily in the year prior to being in given a custodial sentence.<sup>3</sup> In another self-reporting independent NSW study undertaken the same year, it was established that 72% of males in custody and 67% of females in custody attributed at least one of their offences to the use of illicit drugs or alcohol use.<sup>4</sup> With this evidence, it is clear that the association between drug use and crime continues to exist.

The operationalisation of therapeutic jurisprudence into the drug court appeals to the contradictions apparent in modern sentencing processes, ie being tough on crime versus the need for therapy.<sup>5</sup> The drug court allows sentencing and therapy to cohere and respond to illicit drug use and its connected criminal behavior. The drug court caters to the sentencing principles of present punitive ideals whilst providing an open therapeutic method of community justice. In this context, the jurisdiction does not discard one system of transformation for the other. Rather, the court negotiates the divergence between being hard on crime and the resolve to rehabilitate.

Clearly, illicit drug use and criminal behaviour are closely aligned and while the relationship between drugs and crime remains unquestionably complex, the evidence suggests that the drug courts of NSW can reduce the harm arising from drug dependency.<sup>6</sup> **The question is: do they do this efficiently from a cost perspective?** There is a research opportunity to establish whether there is a need to extend the drug court operational principals to further areas in NSW.

### 2. *Should the eligibility criteria be expanded, or refined in relation to the “violent conduct” exclusion?*

The NSW Police Force’s view is that the eligibility criteria should be refined.

A legislative amendment to section 5(2)(b) of the *Drug Court Act 1988* (the Act) should be considered. Specifically, consideration should be given to:

- whether it is the elements of the offence charged or the actual conduct of the offender that determines whether the offence is “an offence involving violent conduct”, and
- the meaning of “violent conduct” under the Act.

Under section 5(2)(b) of the Act, a person is not eligible to enter a Drug Court program if the person is charged with an “offence involving violent conduct” or “sexual assault”. Neither “violent conduct” nor “charged” are defined in the Act.

---

<sup>2</sup> Australian Institute of Health and Welfare (2008) *2007 National Drug Strategy Household Survey: First results*, Drug Statistics Series (No 20). Canberra.

<sup>3</sup> Indig, D, Topp, L, Ross, B, Mamoon, H, Border, B, Kumar, S, & McNamara, M (2010) *2009 NSW Inmate Health Survey: Key findings report*, Sydney: Justice Health.

<sup>4</sup> Kevin, M (2010) Drug-related patterns and trends in NSW inmates: Overview of the 2007-08 biennial data collection, *Correction Services NSW Corporate Research, Evaluation and Statistics Research Bulletin*, 27.

<sup>5</sup> Tonry, M (2004) *Thinking About Crime: sense and sensibility in American penal culture*, New York: Oxford University Press.

<sup>6</sup> NSW Bureau of Crime Statistics and Research (2002) *NSW Drug Court evaluation: cost-effectiveness*. Sydney, NSW Bureau of Crime Statistics and Research (2008) *The NSW Drug Court: A re-evaluation of its effectiveness*.

In the recent case of *DPP v Hilzinger*<sup>7</sup> the Court affirmed the position it had taken in *Chandler v DPP*<sup>8</sup> and *DPP v Ebsworth*<sup>9</sup> that it is the elements of the offence charged, not the nature of the actual conduct alleged that is determinative for the purposes of section 5(2)(b) of the Act. The Court also held that “violent conduct” meant violence to a person. That is, damage to property was not relevant to exclude an offender from a Drug Court program.

### The Judgment

In *Hilzinger*, Whealy JA stated:

*There is every reason to suppose that the legislature had in mind that a constant and certain test would be set for eligibility. The elements of the offence test meet that criterion.*<sup>10</sup>

And, in relation to if the expression “violent conduct” should be restricted to violence to a person:

*In my view, however, despite the generality of the language employed in section 5(2)(b), it should not be given the wider meaning”<sup>11</sup> (to include damage to property).*

In this vein, it is instructive to consider the Minister’s second reading speech on 27 October 1998 in which the intent of the legislation in relation to eligible applicants was described:

*The Drug Court program will deal only with offenders who commit certain categories of offences. These offences will be mainly non-violent theft offences. Those offenders who commit sexual offences and offences involving violent conduct will not be eligible. The types of offences that will be included are break, enter and steal, fraud and forgery offences, offences involving stealing from a person or unarmed robberies, provided there is no violence.*<sup>12</sup>

It is clear that the intent of the legislature – and the expectation of the community –was that only non-violent offenders would have access to a Drug Court Program. It is submitted that the recent matter of *Hilzinger* has highlighted the need to amend the legislation to ensure that it achieves this intent.

### The impracticality of the ‘elements test’

The ‘elements’ test is an impractical approach to the relevant legislation and one which can lead to anomalous consequences. By way of example, where an offender is charged with an offence contrary to section 112 (2) of the *Crimes Act 1900* (break and enter in circumstances of aggravation), one element of the offence is that it is carried out in “circumstances of aggravation”. These “circumstances of aggravation” are set out in section 105A of the said Act. It has long been the practice for the NSW Police Force to aver one such circumstance of aggravation by way of generating *one* charge. The case law makes it quite clear that it is only necessary to aver one such circumstance in order to ground the charge. The selection of that circumstance is arbitrary. In the case of *Hilzinger*, all six of the statutory circumstances of aggravation came into play and would have been given appropriate weight on sentence. Yet, because the particular circumstance nominated on the indictment was that he was “in

<sup>7</sup> [2011] NSWCA 106.

<sup>8</sup> [2000] 49 NSWLR 1.

<sup>9</sup> [2001] 121 A Crim R 410.

<sup>10</sup> [2011] NSWCA 106 at [52].

<sup>11</sup> [2011] NSWCA 106 at [76].

<sup>12</sup> Hansard, NSW Legislative Assembly, 27 October 1998 at p9031.

company” rather than, for example, that he “used violence upon a person”, he was deemed to be *eligible* to enter the Drug Court.

### The anomaly of the ‘elements test’

Where the offence is one that involves violence for the purpose of sentencing law, but does not have any “violent conduct” as an element there would seem no logic in excluding such offences from the ambit of section 5(2)(b). In cases where it holds that the elements are not determinative then the court is required to take into account violent conduct in sentencing (eg An offender for his role in an armed robbery pursuant to common purpose principles), which would be inconsistent with the scheme of the legislation excluding violent offences from the Drug Court program.

### Wording of the legislation

If the legislature had intended to clearly connote that it is the strict elements of the charge rather than the actual conduct that led to the charge that was to be determinative of eligibility, it would surely have worded the section as being “an offence of violence” or even “an offence having as an element violent conduct.” Instead the wording “an offence involving violent conduct” read in the ordinary meaning of the words strongly suggests that it is the actual conduct that should be considered not the specific wording of the charge.

### On-Program Matters

The Drug Court has the power under section 10 of the Act to terminate a participant’s program if the participant is unlikely to make any further progress on the program, or if their continued participation on the program poses too great a risk of re-offending.

This section calls for an ongoing and ever-extending set of judgements of the degree which the participant has adopted the therapeutic perspective. As such, it is social norms, not the law, which emerges as the imperative of the Drug Court. If this were not the case, the participant would be terminated following a guilty plea to an offence as opposed to the court determining if there is a *further risk* to the community as a result of this offence having been committed. To assess this risk, the court is required to consider the conduct or behaviour of the participant.

Accordingly, the test for eligibility onto a Drug Court program is somewhat different to that which is applied when determining the ongoing risk to the community under section 10 of the Act. Section 10 requires a considerable degree of evaluation of the behaviour and actions of the participant, whereas section 5(2)(b) considerations are confined by the narrow “elements” test. Therefore, an offence that has given rise to consideration of section 10, which may lead to the termination of the participant’s program, may in fact be considered an eligible offence for the purposes of entrance to the program.

### Guideline Suggestion

The NSW Police Force recommends that consideration be given to defining “violent conduct” under the Act. A suggested definition is as follows:

“Violent Conduct”

- (a) includes violent conduct towards property and persons, and

- (b) is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does hit or falls short).

### 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?*

The deferral of sentencing under section 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) can work effectively. The Court of Criminal Appeal has suggested that its use should be only likely to arise for consideration in a relatively small number of cases.<sup>13</sup> We support the views of the higher courts to the extent that it should only be applied if the court is satisfied that an adjournment will be of support in formulating the appropriate sentence.

The application of section 11 provides a statutory structure which allows the court to continue to focus upon a lower rather than higher sentencing disposition. Rehabilitation of offenders should be evaluated against other sentencing options as one mechanism available in sentencing by which, in appropriate cases, **protection of the community** can be achieved. In this regard, more heinous offences may call for sentences requiring punishment involving isolation by incarceration for significant periods.

### Question 9.6

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

The NSW Police Force has no comment

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

Yes, if there is empirical evidence that suggests the programs are effective from a cost perspective.

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

Subject to a review that conclusively suggests that such a program would reduce crime in NSW, we support the imposition of early intervention schemes for offenders, particularly children, who are likely to benefit.

### Early Intervention

The risk factors that underpin juvenile recidivism are social, demographic and economic in nature. In 1989 Farrington identified a common set of predictors of offending at different ages:

---

<sup>13</sup> *R v Trindall* (2002) 133 A Crim R 119; [2002] NSWCCA 364; *R v Palu* (2002) 134 A Crim R 174; [2002] NSWCCA 381.

economic deprivation, family criminality, parental mishandling, and school failure.<sup>14</sup> Howell states, “the only way to realize a substantial reduction in serious and violent offending, therefore, is through prevention and early intervention with those who are on paths toward becoming serious, violent and chronic offenders”.<sup>15</sup> Whilst the writer uses the term “early intervention” below in the context of post offence or post apprehension, in their true form early intervention strategies need to be employed prior to juveniles committing offences and coming into contact with police and the criminal justice system. Policy makers should recognise that once a juvenile comes in contact with the criminal justice system it is likely they will re-offend regardless of what intervention is put in place by the police or courts. By that time, it's often too late.

In 1992 Lipsey stated:

It is no longer constructive for researchers, practitioners, and policy makers to argue about whether delinquency treatment and related rehabilitative approaches “work”, as if that were a question that could be answered with a simple “yes” or “no”. As a generality, treatment clearly works. We must get on with the business of developing and identifying the treatment models that will be most effective and providing them to the juveniles they will benefit.<sup>16</sup>

On what works, many commentators identify early intervention strategies to combat recidivism. The NSW Police Force proposes three possible additions to the current legislative framework, noting that options 2 and 3 cannot operate concurrently.

#### *Option 1*

We support Lind's approach of screening cautioned young people for further assessment and intervention:

The ideal approach would be to 'triage' young offenders coming into contact with the criminal justice system using a few objective and readily obtained indicators of risk, so that those in the higher risk categories can be referred for more thorough assessment (and treatment).<sup>17</sup>

#### *Option 2*

Noting that not all first time offenders are cautioned, we also propose a system whereby young persons who:

- (i) commit a particular type of offence for which there are high juvenile recidivism rates (e.g. Break, Enter and Steal; theft and deception offences);
- (ii) commit a second or subsequent offence within twelve months; or
- (iii) by virtue of other identifiers are at a high risk of re-offending

---

<sup>14</sup> Farrington, D P (1986b) Age and crime, in M Tonry & N Morris (Eds), *Development of antisocial and prosocial behaviour* (pp. 359-384), New York: Academic Press in Howell JC, *Juvenile Justice and Youth Violence*, Sage Publications, California, 1997 at 158.

<sup>15</sup> Howell JC, *Juvenile Justice and Youth Violence*, Sage Publications, California, 1997 at 167.

<sup>16</sup> Lipsey, M W (1992b, September) *What do we learn from 400 research studies on the effectiveness of treatment with juvenile delinquents?* Paper presented at the “What Works” Conference, University of Salford, UK in Note 9 at 171.

<sup>17</sup> Lind B, *Crim and Justice Bulletin*, BOCSAR, 2011, at

[http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/pages/bocsar\\_pub\\_itol#juveniles](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_pub_itol#juveniles) (1 December 2011).



be targeted for early intervention strategies.

In their 2007 report "Screening juvenile offenders for further assessment and intervention", BOCSAR provide a number of indicators of risk of re-offending and a table on the cumulative effect of risk factors on re-offending risk. Seventy-one per cent of the juveniles in the cohort studied (all placed on a supervised, community-based, order) re-offended within four years. The risk factors and percentage risk of re-offending include:

- one previous contact (caution/conference/court appearance) with the Criminal Justice System - 74.3%. This figure rises if the juvenile has more than one previous contact.
- index offence is Break, Enter and Steal - 82.1%
- index offence is other theft and deception - 83.3%
- not attending school at time of offence - 73.8%
- being suspended or expelled from school - 82.1%

From BOCSAR's 2011 report, "Reoffending in NSW", the following is clear: 40% of juveniles re-offend within 12 months. The majority of those who are convicted in the NSW criminal courts are eventually reconvicted of a further offence. This is especially so for juveniles.

We know that many juveniles simply grow out of offending behaviour or simply do not re-offend. These are not the juveniles we seek to target by early intervention.

Findings from evaluation studies have shown that high risk young people assigned to high-risk-only groups increase their rate of antisocial behaviour, whereas high risk young people assigned to groups with low risk peers decrease their antisocial behaviour rate. The success of Father Chris Reilly's Youth off the Streets program demonstrates this. However, his program is expensive and has limited places. Whilst not indicating that control orders are not a legitimate sentencing option for juveniles, the failure of control orders to rehabilitate juveniles is also testament to this.

Assigning high risk young people to low risk peers may be achieved utilising other community resources via court orders such as conditions of bonds and probation orders. However, police prosecutors report that it is often the case that efforts to place children into such programs fail at the last minute due to limited places. Further, such programs may not adhere to the said notion of assignment, in that many high risk young people may be involved in the same program. However, many religious, community and sporting organisations have coordinated programs for youth where the young people involved are low risk. Assigning targeted youth by way of bond or probation order conditions to community programs where they mix with low risk peers may reduce recidivism.

Ensuring that targeted youth do not associate with other high risk peers should be catered for more readily through greater use of non-association and place restriction orders. The current test for such orders is that a court may make a non-association or place restriction order if it is satisfied that it is reasonably necessary to do so to ensure that the person does not commit any further certain offences.

The NSW Police Force believes that this test is too high. Where a young person falls within one of the three categories in proposal two, the court should inquire who they associate with and whether these persons also fit within one of the three categories. An automatic non-

association order should be made if such persons are identified as associates.

### *Option 3*

We propose that juveniles be subject to control orders early, rather than waiting for the juvenile to become entrenched in their criminal behaviour. Upon a juvenile:

- committing a particular type of offence for which there are high recidivism rates (e.g. Break, Enter and Steal; theft and deception offences);
- committing a second or subsequent offence within twelve months; or
- by virtue of other identifiers that show they are at a high risk of re-offending

they should be sentenced to short, sharp periods of control, segregated from juveniles already entrenched in their criminal behaviour.

This proposal may receive criticism but the effect of deterrence through control at this early stage would be far more viable than when they become entrenched in criminal behaviour. It is better to stem the flow of criminal behaviour early, than provide for a system where real support, control or an intervention strategy is only provided once a juvenile is entrenched in criminal behaviour as is arguably currently the case.

It appears from BOCSAR's 2007 report, "Screening juvenile offenders for further assessment and intervention", the more contact a juvenile has with the criminal justice system, the more likely they are to re-offend. Note that "contact" for the purposes of this report meant caution, conference or court appearance. Further, this study involved a cohort of juvenile offenders who were placed on a supervised (community-based) order the NSW Children's Court in the 2000/2001 financial year. By the time 53% of these juveniles were placed on a supervised order, they had already committed at least one other offence. Twenty-six per cent had one previous contact (caution/conference/conviction); 13% had two previous contacts; and 14% had three or more previous contacts.

The process within the *Young Offenders Act 1997* whereby juveniles are diverted from attending court means that a juvenile can commit four or five offences, whether dealt with by way of (or a combination of) warnings, cautions or conferences, prior to attending court for the first time. Moreover, these are only offences that have been detected. Weatherburn estimated that less than six per cent of children who offended in 1996 were apprehended for that offence.<sup>18</sup>

Diversionsary strategy and late court intervention of themselves do not effectively prevent recidivism. As such, the suggested options are viable additions/amendments to the current legislative framework.

### **Question 9.7**

1. *Should restorative justice programs be more widely used?*

No.

---

<sup>18</sup> Weatherburn, D J (2011) 'Law and Order in Australia', Sydney: Federation Press, 2004, 147.

On the operation of the Youth Justice Conferencing scheme the NSW Police Force has made the following comments:

It is strongly evident that the current JJ (Juvenile Justice) Conferencing system is not administering conferences in a timely (and therefore meaningful) manner; and therefore the practices and management of conferences remains the most significant issue requiring examination. These lengthy delays result in both victims and offenders being less likely to attend conferences, this diminishing their effectiveness.

The Young Offenders Act 1997 stipulates that Conferences should be held within 28 days from referral; however, the Noetic Report indicates the average Conferencing wait time is 112.5 days for police and 143.4 days for the Children's Court. During this review, police have also identified that Conference outcomes are taking between six to 12 months to complete. This further diminishes the rehabilitative impact of Conferencing on the juvenile offender, which reduces community and police confidence in the effectiveness of the system.<sup>19</sup>

The comments are consistent with the statistics contained within the February 2012 BOCSAR report, 'Youth Justice Conferences: Participant profile and conference characteristics':

*A typical conference took place two months after referral, lasted 71 minutes, and nine weeks later the Outcome Plan was completed, although there were regional differences.*

...

*One quarter of conferences were held within 42 days, 75 per cent within 91 days, and 95 per cent within 168 days. The maximum time taken was just over 3 years (1,120 days).*

...

*the median time from the conference to completing the last outcome task was 76 days. One-quarter of the last tasks were completed within 35 days, 75 per cent were completed within 132 days, and 95 per cent were completed within 194 days. The minimum time was 0 days, and the maximum time was 743 days.<sup>20</sup>*

There is a question as to whether most children who receive warnings / cautions or take part in youth justice conferences do not re-offend. Based on cases from 1999, BOCSAR, in their 2006 report, "Reoffending among young people cautioned by police or who participated in a youth justice conference", found that 58% of juveniles cautioned did not re-offend. However, 58% of juveniles who took part in conferences did re-offend. In their 2011 report, "Screening cautioned young people for further assessment and intervention", based on cases from 2006, BOCSAR indicate that 52% of the juveniles cautioned in 2006 had at least one further contact, whether that be by way of caution, conference or court appearance, in the three years after their index caution. Even if re-offending rates for diversionary strategies are lower than those against juveniles who are brought before the court, this is no indication of the success of diversionary programs:

---

<sup>19</sup> South West Metropolitan Region Intelligence Unit, *New South Wales Police Force Bail Compliance Review*, NSW Police Force, 29 Aug 2007 at 35 (confidential document).

<sup>20</sup> Isabel Taussig at pp. 1, 7 & 8 -

[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/BB75.pdf/\\$file/BB75.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/BB75.pdf/$file/BB75.pdf) (6.9.12)

BOCSAR has cautioned that the lower rates of re-offending observed among those given a caution or a conference in these studies might have been a result of selection bias. In other words, it is possible that lower-risk young offenders are more likely to receive a caution or a conference. BOCSAR is currently re-evaluating the effectiveness of youth justice conferencing to address this issue.<sup>21</sup>

In Feb 2012 BOCSAR published a report titled, “Youth Justice Conferences versus Children’s Court: A comparison of re-offending” which found:

**Results:** After adjusting for other factors in the intention-to-treat analyses, **no significant differences were found between conference and court participants in the proportion re-offending, the seriousness of their re-offending, the time to the first proven re-offence or the number of proven re-offences.** Non-significant results were obtained regardless of whether the definition of re-offending included or excluded justice procedures offences. In the as-treated analyses, the results were similar.

**Conclusion:** **The evidence strongly suggests that the conference regime established under the NSW Young Offenders Act (1997) is no more effective than the NSW Children’s Court in reducing juvenile re-offending among young persons eligible for a conference.**<sup>22</sup>

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

The NSW Police Force has no comment.

### **Question 9.8**

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

The NSW Police Force has no comment.

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

Yes.

In 1997 a team of international drug court practitioners developed a report which outlined the principles of an effective drug court.<sup>23</sup> Named the ‘*ten key components*’, this document provides guidance for developing drug courts and offers a measurable performance benchmark for effective evaluating of those drug courts that are already institutionalised into the mainframe criminal justice system. The ten key components include:<sup>24</sup>

---

<sup>21</sup> Department of Attorney General and Justice, October 2011, Review of the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987*, Consultation Paper at p.30.

<sup>22</sup> Nadine Smith and Don Weatherburn at p.1 -

[http://www.lawlink.nsw.gov.au/lawlink/bocsar/!!\\_bocsar.nsf/vwFiles/CJB160.pdf/\\$file/CJB160.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/!!_bocsar.nsf/vwFiles/CJB160.pdf/$file/CJB160.pdf) (6.9.12)

<sup>23</sup> National Association of Drug Court Professionals. (1997). *Defining drug courts: The key components*. Washington, DC: National Institute of Justice.

<sup>24</sup> National Association of Drug Court Professionals. (1997). *Defining drug courts: The key components*. Washington, DC: National Institute of Justice. Pages 1-24.

1. Drug courts integrate alcohol and other drug treatment services with justice system case processing.
2. Using a non-adversarial approach, prosecution and defence counsel promote public safety while protecting participants' due rights.
3. Eligible participants are identified early and promptly placed in the drug court program.
4. Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.
5. Abstinence is monitored by frequent alcohol and other drug testing.
6. A coordinated strategy governs drug court responses to participants' compliance.
7. Ongoing judicial interaction with each drug court participant is essential.
8. Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.
9. Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.
10. Forging partnerships among drug courts, public agencies, and community-based organisations generates local support and enhances drug court program effectiveness .

The ten key components are significant because firstly, they create a set of model processes that a standard drug court ought to adopt. Secondly, they provide professionals attached to the operation of drug courts, either directly or indirectly, with a set of established benchmarks that can be utilised to measure their performance outcomes. Although the implementations of the components are not mandated, they have, however, amalgamated the drug court community through the use of a set of shared principles.<sup>25</sup>

Similarly, in the event that alternative approaches to criminal offending endure to flourish, consideration should be given to applying the outlined principles on the basis that they are used as a monitoring schedule whilst allowing for variation in how they operate.

### **Question 9.9**

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

The NSW Police Force has no comment.

---

<sup>25</sup> Fox, A & Wolf, R. (2004). *The Future of Drug Courts: How States are Mainstreaming the Drug Court Model*. Center For Court Innovation.

# NSW LAW REFORM COMMISSION SENTENCING REVIEW

## QUESTION PAPER 10 – ANCILLARY ORDERS

### NSW POLICE FORCE SUBMISSION

#### Question 10.1

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

The NSW Police Force believes that the position of the Australian Law Reform Commission should be adopted in that compensation orders should not be a stand alone sentencing option. If it were, courts are likely to use this to avoid any significant punishment of the offender and focus merely on the compensation aspect.

Further, it may be useful for a mechanism allowing for the prosecution to bring an application for compensation after the conclusion of the criminal proceedings (which is arguably not possible at present). The prosecution is not always aware of all of the people who may be eligible for compensation. An additional provision would allow the prosecution to make application on behalf of victims (where there has been an oversight, or the damages could not be quantified in time) without the need to resort to civil proceedings.

#### Question 10.2

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

The significant period of disqualification for unlicensed (never held) is somewhat of an anomaly. However, to provide for the court to determine flexible periods would be inconsistent with the disqualification periods for other licence offences, all of which are fixed by statute. Some reduction would not be inappropriate.

Having some mechanism for a person to have their driver licence reinstated would be a positive thing. If there was the ability for a person to reapply after serving a minimum proportion of their disqualification, it could provide an incentive for people to comply. It may also be possible to link such a mechanism with additional driver testing or education to improve their skills.

There is not enough information to comment on the suggestion of “good behaviour licences”.

Interlock orders should not be compulsory. Such orders should not be preferred over disqualification.

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

No.

### **Question 10.3**

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

Yes.

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

Non-association and place restriction orders are difficult to obtain due to the significant amount of information required. The orders would be of more benefit if they could be made for longer periods. They may also be more effective if the penalty for non compliance was more significant.

**NSW LAW REFORM COMMISSION SENTENCING REVIEW**

**QUESTION PAPER 11 – SPECIAL CATEGORIES OF OFFENDERS**

**NSW POLICE FORCE SUBMISSION**

**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?*

The NSW Police Force makes no comment.

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

The NSW Police Force makes no comment.

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

The NSW Police Force supports the *Fernando*<sup>1</sup> principles *where relevant*. For that reason, they should not apply generally within legislation. This answer must be considered in light of the decision in *Newman*:

... there was nothing in the material that indicated that his Aboriginality was a relevant matter ... There was not the slightest material before the sentencing judge to suggest that the principles enunciated in that case had any relevance to the sentencing of the applicant ...

It has been pointed out on numerous occasions by this Court, including those benches of which the Chief Judge has been a member, that the principles and statements set out in *Fernando* have to be read in context. It is not every case of deprivation and disadvantage suffered by an offender of Aboriginal race or ancestry that requires, or even justifies, the special approach adopted in that case.<sup>2</sup>

Even noting what Brennan J stated in *Neal v The Queen*,<sup>3</sup> a fact should not be ‘material fact’ for the purposes of sentencing if it has little, if any relevance to a particular offender. For example, if an indigenous offender has not suffered the disadvantages frequently suffered by Indigenous people, the *Fernando* principles should not apply to that offender.

---

<sup>1</sup> *R v Fernando* (1992) 76 A Crim R 58, 62-63

<sup>2</sup> *R v Newman* (2004) 145 A Crim R 361, 60-62.

<sup>3</sup> As referred to in paragraph 11.17 of Sentencing Question Paper 11.



## 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 following comments are specific to matters dealt with by the District and Supreme Courts.

Yes. The statement should be framed to reflect the principles in *Hemsley*.<sup>4</sup>

Further, the purposes of sentencing outlined in the Crimes (Sentencing Procedure) Act<sup>5</sup> should allow for offenders with cognitive and mental health impairments. Specifically, a further section within the Act should state that in sentencing an offender with a cognitive or mental health impairment, where the impairment is considered sufficient to mitigate the severity of the sentence, or to reduce an offender's moral culpability for an offence, the aim of the sentencing process is to support the offender's prospects of rehabilitation, to be balanced against the harm done to the community and the victim, and protecting the community from any serious risk likely to be posed by the offender.

The following comments are specific to matters dealt with in the Local Court.

No. Part 3 of the *Mental Health (Forensic Provisions) Act 1990* sufficiently deals with such offenders.

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?*

The Crimes (Sentencing Procedure) Act should be modified 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:

- category and severity of the offender's impairment.
- type and availability of community based services.
- offender's suitability for semi and non-custodial sentencing options, taking into account the type and availability of community-based services
- 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.

---

<sup>4</sup> [2004] NSWCCA 228 [33]-[36].

<sup>5</sup> Section 3A.

*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. Facilities should be able to adequately prevent the offender from escaping. The courts should have the power to order that offenders with cognitive and mental health impairments be detained in facilities other than prisons under the following conditions:

- 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 should then 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?*

Please refer to our answer to question 11.2.3.

*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?*

No. In the Local Court, Part 3 of the Mental Health (Forensic Provisions) Act sufficiently deals with such offenders.

However, a sentencing option, similar to those in place for young offenders may be considered for people with cognitive and mental health impairment. The rationale underlying the establishment of a legislative scheme for police at the pre-court stage to deal with persons with a cognitive impairment or mental illness by way of cautions and warnings (in specific circumstances) parallels the reasoning for such a legislative scheme already existing regarding young offenders.

However, with juveniles, the threshold test is easily interpreted. An offender is either under eighteen and is alleged to have committed a particular type of offence, or not. Applying the option to persons with a cognitive and / or mental health impairment is not so cut and dry due to the question of whether their particular type of impairment is considered sufficient to mitigate the severity of any sentence, or to reduce an offender's moral culpability for an offence. This question is better decided by a judicial officer.

### **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?*

The NSW Police Force makes no comment.

#### **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 question of the sentencing of corporations for their crimes has been repeatedly re-examined in Australia in the face of ongoing debate as to whether on the one hand, the most common penalty, a fine, is an adequate punishment for such offences and on the other, whether corporations and their “innocent” shareholders should be punished, rather than the individuals involved in the commission of the offence (the “true offenders”).<sup>6</sup> With this in mind, the NSW Police Force recommends the adoption of alternatives to the imposition of a fine such:

- incapacitation orders
- correction orders
- orders in relation to the dissolution of a company
- publicity orders
- disqualification orders preventing corporations from engaging in commercial activities,
- community service orders
- disqualifying the corporation from entering certain contracts

These alternatives warrant further consideration by both prosecutors in applicable cases when available under the relevant legislative scheme, as well as by the legislature on a more general basis. In appropriate cases such alternatives may be a more effective punishment than a fine.

#### **Question 11.5**

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

The NSW Police Force makes no comment.

---

<sup>6</sup> See for example, James McConvill and Mirko Bagaric, *Criminal responsibility based on complicity among corporate officers* (2004) 16 Australian Journal of Corporate Law 1.

## NSW LAW REFORM COMMISSION SENTENCING REVIEW

### QUESTION PAPER 12 – PROCEDURAL AND JURISDICTIONAL ASPECTS

#### NSW POLICE FORCE SUBMISSION

##### **Question 12.1**

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

The NSW Police Force believes that the use of mobile devices such as tablets could improve the accessibility of sentencing law.

Websites such as NSW Caselaw and Lawlink, and the proposed standalone sentencing website are limited in their usefulness because they are reliant on real-time internet access to information and their availability from a mobile device is restricted by the strength and speed of the user's internet service provider. A downloadable "app" that contains or can obtain information from a website that then "sits" on the user's mobile device independent of internet access and that is periodically updated is a better option as it overcomes reliance on the internet.

Another drawback to websites is that sentencing judgments can be very long and difficult to digest. The Judicial Information Research System (JIRS) overcomes this problem by providing cogent summaries of lengthy cases. The NSW Police Force understands that JIRS is currently developing an "app" similar to that envisaged above. It is suggested that any stand-alone website or "app" development be guided by the approach taken by JIRS.

Another observation about stand-alone websites is that the use of search bars to find information on a particular topic can provide too many possible results. A better option is for the user of any stand-alone sentencing website or "app" to be able to locate highly relevant legal resources in limited number. Similarly, the "home" pages often contain too many words and little diagrammatic content. It is suggested that a better option is to divide sections of a webpage or home screen of an "app" into limited subject areas diagrammatically, and allowing the user to filter down from there.

##### **Question 12.2**

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

Yes.

The NSW Police Force expends a lot of money completing criminal records checks for the public. If this information was publicly available, specific and reliable from an electronic database, such checks could be more efficiently completed.

### **Question 12.3**

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

The NSW Police Force considers all the points in paragraph 12.40 to be appropriate for achieving efficiency.

### **Question 12.4**

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

The options within the question papers for streamlining the process appear suitable.

For persons that are represented, pre-sentence reports duplicate information already available to the legal representative, such as the background of the offender and their attitude to the offence or the finding of guilt following a defended hearing. It appears that in many cases the court is simply interested in whether the offender is suitable for any non-custodial or, in fact, a specific non-custodial option. The opportunity exists for pre-sentence reports to be prepared more efficiently by not containing subjective background information or the offender's attitude to the offence or finding of guilt.

### **Question 12.5**

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

The NSW Police Force agrees with this proposal.

### **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)?*

Yes. In relation to appeals from the Local Court to the District Court, the NSW Police Force agrees with the Chief Magistrate's position that "appeals against sentence should be limited to sentences that are manifestly excessive or inadequate, and should require the appellant to demonstrate an error on the part of the magistrate".<sup>1</sup>

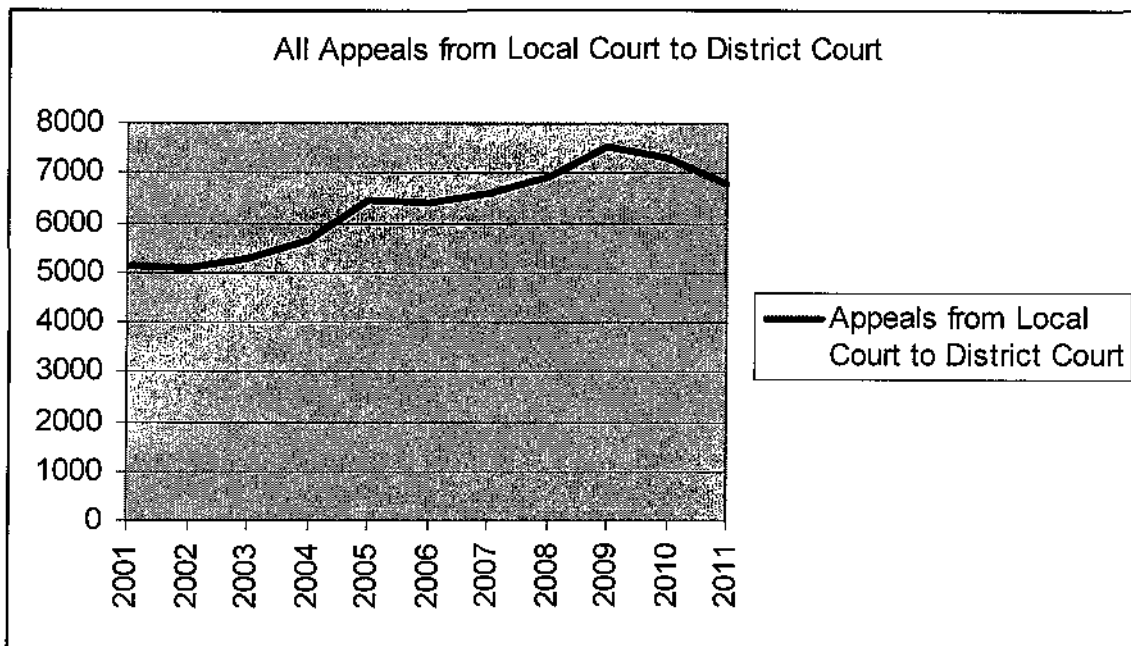
At the round-table discussion on 28 August 2012 the Chief Magistrate's position was met by opposition from at least from some other agencies on the basis that the current system was working. Notwithstanding this view, the number of appeals could be reduced further if the Chief Magistrate's position was adopted.

---

<sup>1</sup> G Henson, Preliminary Submission PSE 05, 5-6; see also NSW Office of the Director of Public Prosecutions, Preliminary Submission PSE 10, 7 which suggested that manifest inadequacy or excessiveness should be a threshold test and then error may be considered on page 14 of Question Paper 12.

An examination of the BOCSAR statistics since 2001 indicates that the percentage of all appeals including sentence appeals from the Local Court to the District Court as against “total finalisations - persons charged” has increased.<sup>2</sup>

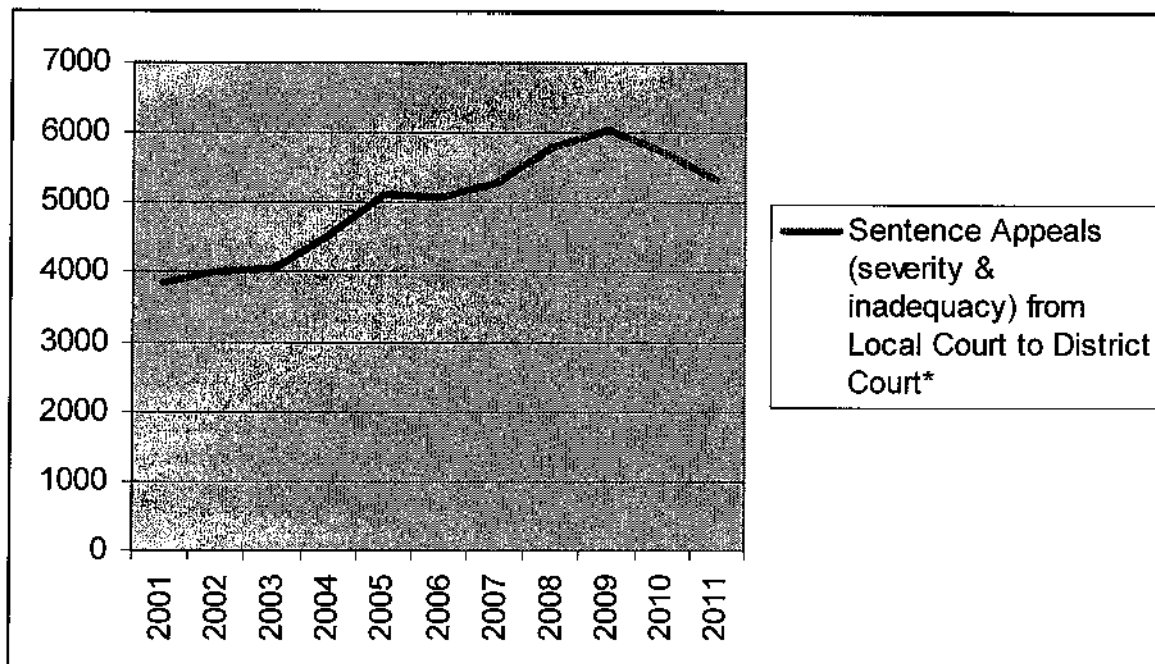
Year	Appeals from Local Court to District Court	Total Finalisations - Persons Charged	Percentage of Appeals against Total Finalisations - Persons Charged	Number of Appeals
2001	5107	130,555	3.91%	
2002	5103	130,888	3.90%	-4
2003	5258	133,105	3.95%	155
2004	5661	135,497	4.18%	403
2005	6454	138,423	4.66%	793
2006	6423	135,574	4.74%	-31
2007	6594	136,312	4.84%	171
2008	6,932	138,872	4.99%	338
2009	7518	133240	5.64%	586
2010	7271	120,662	6.03%	-247
2011	6760	115,206	5.87%	-511



<sup>2</sup> Derived from BOCSAR's archived Annual Criminal Court Statistics at [http://www.bocsar.nsw.gov.au/Lawlink/bocsar/ll\\_bocsar.nsf/pages/bocsar court stats archived](http://www.bocsar.nsw.gov.au/Lawlink/bocsar/ll_bocsar.nsf/pages/bocsar%20court%20stats%20archived) (3.9.12)

2001	3856	130,555	2.95%	
2002	4023	130,888	3.07%	167
2003	4058	133,105	3.05%	35
2004	4516	135,497	3.33%	458
2005	5104	138,423	3.69%	588
2006	5071	135,574	3.74%	33
2007	5279	136,312	3.87%	208
2008	5802	138,872	4.18%	523
2009	6029	133240	4.52%	227
2010	5738	120,662	4.76%	291
2011	5334	115,206	4.63%	-404

\*Does not include 'conviction and sentence' appeals



Compared to 2001, in 2011 the District Court dealt with an extra 1653 appeals, including 1478 sentence appeals. Even though the trend since 2009 is downwards, the overall trend is upwards and the reduction in appeals since 2009, including sentence appeals, is not proportionate to the reduction in total finalisations.

It has been argued that the Chief Magistrate's suggestion would result in delays due to magistrates having to deliver lengthy sentencing remarks so as not to fall into appealable error. The suggestion was that the Local Court would have to become a 'court of record'. Against this intimation, the "manifestly excessive/inadequate" threshold looks to the *result* of the

sentence, taking into account the nature and seriousness of the offence plus the background of the offender, not to *how* the result was reached or whether it was reached by way of error. Where manifest excessiveness or inadequacy is shown, noting our answer and the discussion relevant to Question 12.5 plus the assumption that this whole review will militate against the availability of technical grounds of appeal, the District Court could continue to determine sentence appeals on the transcript of the oral sentencing remarks of the magistrate, without magistrates having to resort to excessive subtlety and unnecessary discussion of legal principles. Anecdotally, whilst there may be a few exceptions, magistrates already provide cogent reasons. A sample of transcripts obtain by the District Court following a sentence appeal from the Local Court would provide evidence of this.

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?*

Yes.

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

Yes.

### **Question 12.7**

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

The NSW Police Force has no comment.

### **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*

Yes.

- b. *establishing a Criminal Division of the District Court*

Yes.

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

The NSW Police Force has no objection to this suggestion.

- d. *amending the selection criteria for the appointment of judicial officers*

Yes.



The current criteria for appointment to the magistracy are governed by section 13(2) of the *Local Court Act 2007* which provides:

*(2) For the purposes of this section, a person is qualified for appointment as a Magistrate if the person is:*

*(a) an Australian lawyer of at least 5 years' standing, or*

*(b) a person who holds, or has held, a judicial office of this State or of the Commonwealth, another State or Territory.*

Whilst the former Director of Legal Services and a former General Counsel of the NSW Police Force have been appointed as Magistrates, Police Prosecutions has not seen a legally qualified serving police prosecutor appointed as a Magistrate since former Sergeant Terry Lucas in May 2000. Even prior to that, appointments from the ranks of police prosecutors that are Australian Lawyers were inversely proportionate to that of the Legal Aid Commission, Aboriginal Legal Service, Office of the Director of Public Prosecutions and remainder of the legal profession generally.

We note the following observation of the Sentencing Council:

*...such an arrangement, which could bear some similarity to that which was adopted in the UK when the Crown Court system was established in 1971, has the potential to minimise the requirement for judges to hear matters outside their area of expertise by **promoting the appointment of individuals with specialized knowledge and experience in the criminal courts**...*<sup>3</sup>

A police prosecutor's right of appearance is now enshrined in sections 36 and 36A of the *Criminal Procedure Act 1986*. In *Connor v Petelo Adams J* stated:

*The Police Prosecutor habitually appears in local courts; **he or she will usually have a great deal of useful experience**; and is, at all events, at the court to prosecute other matters.*

...

*Representation by qualified persons (**and for the present case I think a Police Prosecutor would be qualified**) is, as I have mentioned, of considerable experience [assistance] to courts at every level, no less in the Local Court. The long line of authority that permits leave to be given to Police Prosecutors in a wide range of cases to appear for informants is powerful evidence supporting this conclusion.*

...

*Prosecutors are subject to Commissioner's instructions about the performance of their duties, and I do not doubt that they understand fully the ethical obligations placed upon them in relation to the performance of their duties. This is another consideration which should be borne in mind when considering whether to grant leave to a Police Prosecutor to appear for an informant, who may simply be a charging officer unlikely to have **the objectivity of a Police Prosecutor or an understanding of the proper role***

<sup>3</sup> NSW Sentencing Council, *Standard Non-parole Periods: A Background Report*, 2011 [4.70]-[4.71] at p19 of Question Paper 12

*such a Prosecutor should play in conducting the case, quite apart from the useful knowledge of the relevant procedures which a Prosecutor is likely to have.*<sup>4</sup>

In *McCarthy (Blacktown City Council) v Prasad McClellan* CJ at CL stated:

*Although a police prosecutor may not be a qualified legal practitioner, and this is the case in the present matter, he may not be without very considerable experience. Police prosecutors are, of course, employed to appear every day in the courts prosecuting both relatively straightforward matters and some with greater complexity. They do so with the burden of the disciplinary structure of the police service and mindful of their responsibilities to the court. Although not an officer of the court they are nevertheless obliged to conduct themselves in a responsible manner assisting in the efficient and just disposition of the court's business. They are not just ordinary members of the public, they are certainly not "unqualified, unaccredited and uninsured"...*

*...there is a long history of police prosecutors also being granted leave. This practice recognises the experience and skill which prosecutors bring to the presentation of criminal proceedings in the summary jurisdiction of the Local Court.*<sup>5</sup>

Police prosecutors work in court rooms on a daily basis. They are thoroughly aware of the workings and procedures of the Local Court. They have specialised knowledge and experience in the Local Court jurisdiction.

Legally qualified police prosecutors often do not commence or complete their legal education until about five years after they are appointed a police prosecutor. Notwithstanding they may have more or comparable in court experience and knowledge of practice and procedure than a corresponding legal practitioner of five years' standing, they are not qualified for appointment as a Magistrate until they themselves have been admitted to the legal profession for at least five years. As such, for the purposes of promoting the appointment of individuals with specialised knowledge and experience in the criminal courts, we suggest amending the section 13(2) of the *Local Court Act 2007* to read:

(a) *an Australian lawyer of at least 5 years' standing,*

(b) *an Australian lawyer who has at least 5 years' standing as a police prosecutor, or*

(b) *a person who holds, or has held, a judicial office of this State or of the Commonwealth, another State or Territory.*

e. *in any other way?*

The NSW Police Force makes no comment.

---

<sup>4</sup> [2005] NSWSC 1025

<sup>5</sup> [2007] NSWSC 997

## Question 12.9

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

The NSW Police Force holds concerns about a quasi or non-judicial body other than Parliament having binding authority over the courts in relation to what sentencing standard to apply in a given case. However, it could work as long as the non-judicial members of any proposed council are objectively drawn from the community and that one seat is reserved for a member of the NSW Police Force.

Our answer to Questions 11 and 12 of the NSW Law Reform Commission's Confidential Staff Paper, "Sentencing – SNPPs Options for Reform" also has application:

### Question 11

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

We have no objection to such a model in principle. Our concern is that the body providing the guideline judgements be independent and not only seek but obtain representations from a *balanced* cross section of stakeholders and the public. All too often we attend roundtable discussions concerning various areas of law and justice issues where the representation of bodies that align themselves with offenders interests predominates and perhaps does not align itself with the actual general public's views.

Further what is espoused as the general public's view should be scrutinised. For example, the representative of the Dept of Corrective Services advocated a Feb 2012 BOCSAR report, indicating that incarcerating offenders may in fact have a detrimental effect on rates of recidivism and the general public are not as punitive as one may think. His comments received support and applause from some members of the round-table.

Perhaps the representative was referring to issue paper 77 of Feb 2012 titled, "Restorative Justice Initiatives: Public opinion and support in NSW."<sup>6</sup> Referring to previous studies, this report stated:

In general, members of the public (both in Australia and internationally) tend to show little confidence in the response of the criminal justice system to crime.<sup>7</sup> For example, around two-thirds of randomly selected members of the New South Wales (NSW) public suggested that sentences are 'too lenient' or 'much too lenient' when questioned about the appropriateness of penalties imposed by the courts (Jones et al., 2008). These punitive attitudes tend to diminish, however, when members of the public are given specific information about the cases. For example, the attitudes of jurors (who are presented with the same information as judges) on the adequacy of sentencing are much less punitive than would be indicated by general public opinion polls (e.g., Warner et al., 2011).

---

<sup>6</sup> [http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/BB77.pdf/\\$file/BB77.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/BB77.pdf/$file/BB77.pdf) (13.4.12)

<sup>7</sup> Jones, Weatherburn, & McFarlane, 2008; Roberts, Stalans, Indermaur, & Hough, 2003; Smart Justice, 2010; Warner, Davis, Walter, Bradfield, & Vermeij, 2011 in note 20

The Warner Tasmanian Sentencing Study referred to can hardly be relevant to offences that carry a SNPP when the Jurors in the study, when asked to select an appropriate sentence, did so from a menu of options that **was designed to alert them to the range of possible alternatives and to avoid too great a focus on sentences of imprisonment.**<sup>8</sup>

Whilst the study subject of the Feb 2012 report found that the majority of respondents agreed with restorative justice principles, there is nothing to suggest that the respondents were either asked whether they knew or informed that restorative justice may be in lieu of a term of imprisonment. This was also against the following figures:

- 70.7% perceived sentences imposed by the court were too lenient.
- 61.8% perceived a prison sentence as being effective to prevent crime and disorder.

Perhaps he was also referring to the Feb 2012 BOCSAR Crime and Justice Bulletin "The effect of arrest and imprisonment on crime."<sup>9</sup> The actual finding of this report is:<sup>10</sup>

Increasing the risk of arrest or the risk of imprisonment reduces crime while increasing the length of prison sentences exerts no measurable effect at all.

This is far from providing basis to and is perhaps actually inconsistent with any assertion that incarcerating offenders may in fact have a detrimental effect on rates of recidivism.

## Question 12

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?

We have no objection to the model proposed in principle, however, the concerns as illustrated in the answer to Q.11 continue to prevail.

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?

---

<sup>8</sup> Warner, K., Davis, J., Walter, M., Bradfield, R., & Vermeij, R. (2011). *Public judgement on sentencing: Final results from the Tasmania Jury Sentencing Study* (Trends & Issues In Crime and Criminal Justice No. 407). Retrieved from Australian Institute of Criminology website: <http://www.aic.gov.au/documents/A/B/7/%7BAB703D46-E913-4384-B3DB646DC27EF2D3%7Dtandi407.pdf> (13.4.12)

<sup>9</sup> [http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/CJB158.pdf/\\$file/CJB158.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB158.pdf/$file/CJB158.pdf) (16.4.12)

<sup>10</sup> Note 23 at pp.15, 16

If limited to the Director of Public Prosecutions and the Senior Public Defender and restricted by a leave requirement, we have no objection to the model proposed.

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 NSW Police Force is not against this approach. However, we do have concerns as per our answer to Question 12.9.1 above.

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?*

If limited to the Director of Public Prosecutions and the Senior Public Defender and restricted by a leave requirement, we have no objection to the model proposed in the NSW LRC's Confidential Staff Paper, 'Sentencing – SNPPs Options For Reform.'

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

The NSW Police Force has concerns about one person holding this power. If the process was similar to that within Division 4 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999* in that the court was comprised of at least three experienced magistrates, such as the Chief Magistrate and his two deputies, our concerns would dissipate. Further, we believe that the Commander, Police Prosecutions, NSW Police Force should be able to make application for such a guideline judgement.

#### **Question 12.10**

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

Yes. There may be significant efficiency savings, especially in the Local Court, by adopting an approach whereby the magistrate may indicate the category of sentence to be imposed. Anecdotally, accused persons may enter a plea of not guilty and actually expose themselves to a higher penalty, for fear of receiving a sentence that would be manifestly excessive.

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 have application 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.

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 "Goodyear" model is a step in the right direction.

To overcome the problem with magistrate shopping, accused persons should be prohibited from seeking an indication from more than one magistrate. Similarly, accused persons should be required to indicate to the Registrar of the Court or judicial officer presiding over a list court that they seek a sentence indication. The Registrar or judicial officer presiding over the list court then decides which (other) judicial officer is to provide the sentence indication.

To guard against leniency, allow the prosecution to reject the indication and seek an indication from another judicial officer of the Registrar or judicial officer presiding over the list court's choosing. This would guard against magistrate shopping by the prosecution.

### **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?*

Yes.

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

Victim impact statements should not be restricted to offences of violence. The impact of offences such as fraud and property damage on victims cannot be underestimated.

Arguably, the role of the victim in the current sentencing process is not given as much weight as that of the subjective features of the accused person. A change in the legislative restriction imposed upon victim impact statements should be reviewed to include a wider field of offences, if not all offences that can be charged on indictment. Judicial officers, particularly magistrates, would be better informed and more victims would feel that they are more involved in the process if this was to be the case.

At the roundtable meeting of the 24 October 2011 a further issue of how victim impact statements are introduced to the sentencing process was raised. For the purpose of sentencing in the Local Court, noting the volume of matters dealt with in this jurisdiction, if the field of offences to which they apply is widened, compliance with section 30A of the Crimes (Sentencing Procedure) Act could result in a less efficient justice system. As such, compliance in this jurisdiction should either be waived or provision for a judicial discretion to waive this requirement should be inserted. Instead, if the statement complies with the requirements of the regulation, it should be automatically tendered.

Currently, there is no provision for the victim to be cross-examined on the contents of their victim impact statement. Our primary position is that the status-quo remains in this respect. If change is to be adopted, cross-examination should be subject to the defendant being granted leave to cross-examine the victim on a limited identified issue or issues.

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

Drawing from particular communities and locations, the Director of Victims Services of the Department of Attorney General and Justice could perform the same role as the South Australian Commissioner for Victims' Rights in furnishing neighbourhood or social impact statements.

### **Question 12.12**

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

At the meeting of the 28 August 2012, Mr Wood tabled a copy of sections 718 to 718.2 of the Canadian Criminal Code for comment. This portion of the Code contains many positive aspects that align with proposals either supported or put forward by the NSW Police Force.

In answer to Question 1.1 we proposed that retribution be included as a purpose of sentencing.

The Canadian Code provides as objectives:

...

*(e) to provide reparations for harm done to victims or to the community; and*

*(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.*<sup>11</sup>

In answer to Question 1.6 we supported "deterrence" continuing to be a valid purpose of sentencing. At the roundtable meeting of the 28 August 2012 we provided reasons to retain "deterrence" as a sentencing principle. The Canadian Code provides "deterrence" as an objective.

In answer to Question 1.4.2 we stated that for certain types of offences, promoting rehabilitation should yield to the other sentencing purposes within section 3A of the *Crimes (Sentencing Procedure) Act 1999* and that of providing retribution for victims, their family and the community. At the roundtable discussion of the 22 August 2012 concerning a "broadly framed provision" in lieu of the current section 21A of the Act, specific to the proposed factor concerning vulnerable victims, we agreed with the suggestion made by Mr Woods to provide a footnote to any resulting subsection that provides for police officers as an example of a vulnerable victim.

At sections 718.01 and 718.02 the Code provides that the objectives of denunciation and deterrence shall have primacy with regard to offences of abuse against children, assaulting a public officer (police officer) or justice system participant etc. and resisting arrest.

With regard to section 718.2(a), we prefer the "broadly framed provision" in lieu of the current section 21A of the Act proposal as discussed at the roundtable meeting of the 22 August 2012.

---

<sup>11</sup> s.718

Section 718.2(b) of the Code militates against the issues raised in our answer to Question 2.3. As such the NSW Police Force does not support it.

Section 718.2(c) of the Code is an appropriate succinct statement explaining the principle of totality.

With regard to sections 718.2(d) and (e), we prefer the current principle within section 5 of the Crimes (Sentencing Procedure) Act. If the wording within section 718.2(d) was adopted, the court may be of the view that no penalty other than imprisonment is appropriate, whilst still being of the view that a less restrictive sanction may be appropriate. The word “may” inappropriately introduces a level of ambiguity and could lead to inappropriately lenient sentences.