REVIEW OF *CRIMES (SENTENCING PROCEDURE) ACT* 1999 (NSW)

Response to Sentencing Question Papers 8- 12

Submission by Legal Aid NSW to the

New South Wales Law Reform Commission

September 2012

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW criminal law practice provides legal assistance and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Courts and Children's Courts, committals, indictable sentences and trials, and appeals. Our specialist criminal law services include the Children's Legal Service, Prisoners' Legal Service and the Drug Court.

Legal Aid NSW welcomes the opportunity to provide these comments. Should you require further information, please contact Samantha Lee, Senior Policy Officer, Legal & Policy Branch at [redacted] or by telephone on ([redacted] or Annmarie Lumsden, Executive Director, Strategic Policy Planning and Management Reporting Division at [redacted] or by telephone on [redacted].

Hierarchy of sentences

Question 8.1

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

Legal Aid NSW is of the view that the legislation should contain headings and categories that reflect the quasi hierarchy already outlined in the Act. The following is a suggested sentencing hierarchy model. It is based on Parts 3-8 of the *Penalties and Sentences Act 1992* (Qld):

- no conviction: dismissed no penalty, fine, bond, cso
- conviction-non custodial: s.10A, fine, bond, cso
- conviction-quasi custodial: suspended sentence, ICOs
- conviction custodial: home detention, full-time custody.

It is also proposed that the sentencing options contained in the CSPA be listed sequentially to reflect the sentencing hierarchy. For example, Part 2 of the Act (Penalties that may be imposed) currently begins with 'custodial sentences' followed by 'non-custodial alternatives'. These should be reversed. In a rewritten Act the 'non-custodial alternatives' division could reflect the sentencing hierarchy by listing 'dismissal of charges' first, and 'suspended sentences' last.

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?

Legal Aid NSW does not support a single omnibus community based sentence because it would give insufficient guidance to courts on how to measure the overall severity of the sentence. However, Legal Aid NSW does support creating a more flexible sentencing hierarchy and allowing certain sentences to be combined.

Particular sentencing combinations

Question 8.3

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

Legal Aid NSW supports two particular sentence combinations: suspended sentences and community service orders, and fines and s.10 dismissal of charges.

2. Should there be limits on combinations with:

a. **fines;**
b. **imprisonment; or**
c. **good behaviour requirements?**

Imprisonment should not be combined with any other sentencing option. If the sentence contains a non-parole period then the person is subjected to supervision and conditions set by the Parole Authority. It is difficult enough for offenders to re-establish their lives after incarceration. To then have to abide by a good behaviour bond or repay a fine would make this transition even harder. Such a combination may also lead to net-widening and potentially duplicate some conditions that are set by the Parole Authority.

Early diversion

Question 9.1

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

Legal Aid NSW supports early diversion programs but advocates for limits to be placed on such programs. Cautions play an important role in the criminal justice system and help to divert persons away from the court system. However, imposing penalties is the role of the judiciary and such decisions need to be transparent and open to scrutiny. For this reason, Legal Aid NSW does not support the UK "conditional caution" model set out at point 9.20 in Question Paper 9.

Program-based diversion

Question 9.2

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

The CREDIT program is a valuable diversionary program that should be extended to certain categories of offenders currently excluded namely, offenders charged with violent, sexual or serious drug offences, or a wholly indictable offence, or who are serving an existing court order or are currently attending a court-ordered treatment program.

Question 9.3

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

Legal Aid NSW supports the MERIT program and is of the view it should be extended to young people and to offenders charged with some indictable offences under the *Crimes Act 1900* (NSW). For example: aggravated break and enter (s.113 (2)), stealing property in a dwelling with menace (s.149), rob/steal from person with aggravation (s.95). Legal Aid NSW also advocates for changes to the program to ensure it better caters for the needs of female participants. See our response to question 11.3.

Question 9.4

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

Please refer to the submission prepared by Legal Aid NSW for Question Papers 5-7, questions 6.1(1) & (2).

Legal Aid is of the view the NSW Drug Court is an effective program, but believes it could not be considered a comprehensive program because very few have the opportunity to participate.

One of the barriers to participating in the program is the strict eligibility criteria. The experience of Legal Aid NSW Drug Court lawyers is that a number of persons are being excluded by virtue of the fact that they do not meet the requirement under section 5A(1)(c) of the *Drug Court Act 1998* (NSW) that the person has been convicted of at least 2 prior offences in the previous five years that resulted in a sentence of imprisonment, community service order or bond. Section 5A(1)(c) should be amended to allow the participation of offenders who have committed one offence in the previous five years.

Outlined below are recent cases examples experienced by Legal Aid NSW lawyers, which highlight the problems with eligibility:

Case 1

A 48 year old man pleaded guilty to one count of Supply Prohibited Drug. A number of other drug-related matters were included on a Form 1. He had served two prior gaol sentences for supply prohibited drug. He had been using drugs since he was nine years of age, and all his offending behaviour was drug related.

He wanted to go to the Compulsory Drug Treatment Centre (CDTC) to serve his gaol sentence, and he would have been eligible but for the fact that he required two other drug-related convictions in the previous five years. One of the gaol terms he served was a conviction which was just outside that five year period, and thus he was not eligible.

Case 2

A client was in custody for the offence of break and enter. Immediately before he was sentenced for this offence he had received a gaol term for two other offences. He was convicted of these offences within a period of five-years and two months previous to being sentenced for the break and enter. But since the legislation specifies at s.5A(1)(c) the a person must be convicted of at least two other offences within a five-year period he did not qualify for the Drug Court.

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

A person should not be excluded on the basis of a pending or current offence involving violent conduct. The matter should be considered on a case-by-case basis, especially if the offence was at the lower level of seriousness.

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?

The deferral of sentencing under s.11 of the CSPA is working well and is a valuable option for some offenders.

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?

Legal Aid NSW supports the current scheme of prescribing specific intervention programs and believes it is operating effectively.

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

In regard to Forum Sentencing, Legal Aid NSW advocates for the widening of the eligibility criteria for offenders who receive 'relevant sentences', and would also like to see Forum Sentencing made available uniformly across the State.

Legal Aid NSW proposes the following factors be considered if changes to the eligibility criteria are supported:

- appropriate levels of administrative and operational support be put in place to manage the anticipated increase in Forum participants, in order to ensure that the expanded Forum maintains current standards of operation and complies with optimum timeframes for assessment and facilitation of Forums as set out in the Regulation;
- forum administrators and facilitators be trained to ensure that intervention plans relating to newly eligible Forum participants appropriately reflect the criminality of the offence and criminal history (if any) of the participant; and
- cost implications for Legal Aid NSW resulting from an expected increase in the number of clients participating in the Forum and requiring representation.

Legal Aid NSW also supports the proposed removal of the prior offences exclusion. Rather than having a blanket exclusion for certain prior offences under Regulation 63(1)(c), it is more appropriate for the Magistrate to exercise discretion to determine whether an offender should be excluded from the Forum based on all the relevant circumstances. For example, an offender with a history of certain personal violence offences or drug offences should have the opportunity to benefit from participation in the Forum where a Magistrate deems it appropriate.

Finally, consideration should be given to amending the Regulation to specify the grounds upon which a court can reject a draft intervention plan. Presently magistrates who refer offenders to the Forum may then reject a plan and impose a harsher sentence. Providing specific grounds upon which such a decision can be made would improve the integrity of the process and assist the court in meeting the objectives of the program.

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

The Violent Offender Therapeutic Program (VOTP) operated by Corrective Services NSW is a valuable program and should be added to the prescribed interventions.

Approaches to criminal offending

Question 9.7

1. Should restorative justice programs be more widely used?

Please refer to our response to question 9.6(2).

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

Legal Aid NSW would like to see improved resourcing for current Restorative Justice Programs before considering additional programs.

Question 9.8

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

As addressed in our previous submission in response to Question Papers 5-7, the termination of the Youth Drug Court scheme has left a gap in alternatives to custody for young people who require drug rehabilitation. Legal Aid NSW supports problem solving initiatives for young people with complex needs which bring together resources from other relevant agencies, for example, MERIT for young people.

However, Legal Aid NSW has concerns that the piloting stage for new problem-solving alternatives to custody programs is often lengthy and the roll-out across the State can take considerable time. Legal Aid NSW is of the view that a time limit to be placed on the piloting stage, and subject to proper evaluation and satisfactory resourcing, a commitment made to rolling-out programs across the State within a set time period.

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

Legal Aid NSW would like to see improved resourcing for current models, along with a problem-solving model to divert young people with drug problems away from the criminal justice system.

There are several problem-solving models in other jurisdictions tackling young people with drug problems that could be explored. These models include: the Wakefield Youth Alcohol Diversion Program[1] and the Youth Supervised Treatment Intervention Regime in Western Australia and the All Drug Diversion Program also in Western Australia.[2]

Any other approaches?

Question 9.9

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

The existing diversion, intervention and deferral options need to be better resourced before other options are considered. Some existing programs such as the Forum Sentencing program have yet to be made available to all offenders, which has resulted in a two tier intervention system operating across NSW.

[1] Office of Crime Statistics and Research (June 2008), *'Wakefield Youth Alcohol Diversion Pilot Program – Final Evaluation Report'*.
[2] J Joudo (2008), *'Responding to substance abuse and offending in Indigenous communities: review of diversion programs'*, Australian Institute of Criminology, No.88.

Compensation orders

Question 10.1

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

A recent report published by the NSW Auditor-General regarding victims compensation found that during 2010-2011, a total of $63.4 million in compensation was awarded to victims of crime, but only $4.3 million in restitution was received from offenders. At 30 June 2011, $289 million was recorded as restitution debt.[3] The average amount reportedly owed by an inmate to the State Debt Recovery Office is $12,161.[4]

In addition, a 2009 NSW Auditor-General's Report about victims compensation noted the difficulties in recovering restitution from convicted offenders because they are frequently: hard to find once released from prison; from low socio-economic backgrounds with few assets; serving prison sentences and do not earn much money; former prisoners, which lowers their employment capacity and income; unemployed and on social security payments; and/or living in State housing with dependants that would be affected.[5] This in turn creates a victims compensation backlog, which has negative implications for victims of crime.

In light of the above information, Legal Aid NSW is of the view a victim's compensation scheme should not be reliant on funding from offenders. The Prisoners Legal Service (PLS) at Legal Aid NSW sees many inmates who have received a gaol sentence for an offence and have been ordered to pay compensation. This often leads to problems when the offender is released as he is unable to contribute any funds to address the large compensation order. As a result, if a person does not abide by the order, he may be subject to enforcement proceedings and liable to return to prison for not repaying the compensation.

However, in the meantime, while offenders are still required to meet such orders, Legal Aid NSW supports the proposal to allow compensation orders to be taken into account during sentencing. Such a proposal acknowledges that having to pay compensation is burdensome and a form of penalisation.

[3] NSW Auditor-General's Report (2011), *'Department of Attorney General and Justice'*, Vol Seven, p. 27.
[4] Kristy Martire, Sandra Sunjic, Libby Topp and Devon Indig (August 2011), Australian & New Zealand Journal of Criminology, Vol. 44, No 2, pp. 258 – 271.
[5] NSW Auditor-General's Report (2009), *'Department of Attorney General and Justice'*, Vol Nine, p. 22.

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?

Legal Aid NSW would like to see significant changes made to the provisions governing driver licence disqualification and to its operational arrangements.

The laws operate in a particularly harsh way for Indigenous people and those from low socio-economic backgrounds.[6] A driver's licence can assist with: identification, employment, travel and economic security. If a licence is revoked it can impact on all of these factors.

In a 2009 submission to the New South Wales Ombudsman *Criminal Infringement Notices on Aboriginal Communities* the Law Society of New South Wales made the following comment in relation to the impact of licence disqualification on remote Aboriginal communities:

> *For reasons such as remoteness, lack of transport, hot climate etc, Aboriginal people will often drive their cars even when they do not have a licence. Public transport is almost non-existent in remote areas and taxis are only available in the large towns. Activities such as shopping, going to the doctors, driving kids to school etc are functions that Aboriginal families participate in as we all do, but the difference is that in these areas, many will drive unlicensed and risk a fine and disqualification and invariably prison.*

In 2009 more than 1000 people were imprisoned where unauthorised driving was their principal offence. In 2010, drive whilst disqualified had the highest custodial rate of the top 20 offences dealt with by the Local Court.[7]

Legal Aid NSW does not support mandatory disqualification and the Habitual Traffic Offender scheme because it is unduly harsh, does not allow for the consideration of subjective circumstances, and does not allow for judicial discretion.

Mandatory disqualification can also result in a person being disqualified from driving for extraordinarily long periods of time. The BOCSAR study referred to in the Question Paper 10, highlights that long licence disqualifications can have little, if no impact at all on deterrence.

Legal Aid NSW would also like to see greater flexibility in the level of penalties for unauthorised driving offences.

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[6] Bureau of Crime Statistics and Research (December 2010), '*Reducing Indigenous Contact with the Court System'*, Issue Paper No. 54, p.3.

[7] Judicial Commission of NSW (May 2012), *'Common Offences in the NSW Local Court'*, 2010.

Legal Aid NSW supports the interlock program but understands the fees associated with installing and servicing the device is costly (i.e. around $1,000), making it inaccessible to many offenders.[8]

Legal Aid NSW advocates for increased judicial discretion by removing the provision that imposes an automatic three year disqualification for a person convicted for the second time of driving while unlicensed (point 10.34, Question Paper 10).[9] The court should have discretion to impose an appropriate disqualification period with a lesser minimum disqualification period.

Legal Aid NSW also strongly supports a relicensing scheme whereby offenders who have not committed a driving offence for a specified period of time may make an application to a court for an order permitting them to reapply for a drivers licence. If the application is successful, the remaining period of disqualification could be quashed.

Legal Aid NSW supports the recommendation of the Sentencing Council at point 10.37 for the implementation of "good behaviour licences" for those found guilty of drink-driving offences. However, this sentencing option should be limited to those who have received a conviction. Such an option is too harsh for someone who has received a non-conviction order.

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

Legal Aid NSW does not support driver licence disqualification being made available in relation to offences unrelated to driving.

Non-association and place restriction orders

Question 10.3

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

Legal Aid NSW does not support the retention of non-association and place restriction orders. As outlined in Question Paper 10, the NSW Ombudsman found that the orders have not been used for the purpose they were implemented for, namely, to target gang-related crime.

In addition, Legal Aid NSW clients include people who are homeless, mentally ill or drug addicted and young people. Their lives are often disorganised and they often have little social support, which can make abiding with the orders very difficult. If they breach the orders, they are then likely to be subjected to harsher sentences which entrenches them deeper into the criminal justice system.

[8] https://www.guardianinterlock.com.au/database/files/PriceNSWInterlockProgram.pdf
[9] *Road Transport (Driver Licensing) Act 1998* (NSW) s.25(3).

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

It has been the experience of Legal Aid NSW lawyers that such orders are often sought by police without any warning and the defence has little time to consider the consequences before such orders are imposed. If such orders are retained, Legal Aid NSW proposes that police wishing to seek an order should be required to provide sufficient warning to the defence and the defence given the opportunity to make submissions in response. Such a process will help to ensure the defence has sufficient time to consider the application and make submissions, and the Court has adequate time to fully consider the implications relating to imposing such an order.

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?

There have been many reports published over the years that have proposed ways to decrease the rate of Indigenous incarceration. Question Paper 11 includes a summary of some of these relevant reports. Legal Aid NSW notes the observations made by J Fitzgerald in her report, 'Why are Indigenous imprisonment rates rising?".[10] The report notes that while the rate of Indigenous incarceration in NSW rose 48 per cent between 2001 and 2008, the rate of Indigenous court appearances and Indigenous convictions fell in the same period. The report concluded that the rise was not the result of any change in patterns of Indigenous offending, but rather could be explained by the increased use of imprisonment (rather than non-custodial options), longer prison sentences, increased rates of bail refusal and longer periods on remand.

These findings suggest that if improvements are to be made to reducing the Indigenous incarceration and recidivism rates then consideration needs to be directed towards the impact that standard non-parole periods, tougher penalties and constraints on judicial discretion are having on the Indigenous population.

Legal Aid NSW supports Circle Sentencing and refers the Commission to a paper prepared by the Aboriginal Legal Service, 'Is Circle Sentencing in the NSW Criminal Justice System a Failure?'[11] The paper outlines and discusses some of the key findings of four evaluations conducted into the operation of Circle Sentencing in New South Wales. The findings include: a high level of satisfaction amongst all those who participated in the program; elders observed positive changes in the behaviour of some of the defendants and a reduction in the rate of offending.

Legal Aid NSW notes that a conference was being held on the 26th and 27th of September 2012 on 'Reducing Indigenous Youth Incarceration' in Sydney. The NSW Attorney-General was a keynote speaker the conference included a diversity of speakers. The papers from this conference could assist with developing a response to this question.[12]

[10] J Fitzgerald (2009), *'Why are Indigenous imprisonment rates rising?'* Bureau Brief 41, NSW Bureau of Crimes Statistics and Research, p. 6.
[11] Tumeth, Robert (June 2011), *'Is Circle Sentencing in the NSW Criminal Justice System a Failure?'*, Aboriginal Legal Service.
[12] http://youthincarceration.com/

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

Legal Aid NSW would like to see more programs like the Work and Development Orders Scheme targeted at Indigenous offenders. The program could link Indigenous offenders back into the community, and in particular, with Indigenous working programs.

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

Legal Aid NSW does not support the Fernando principle being incorporated into legislation. The principle at common law has been distilled after lengthy consideration by Justice Wood.[13]

Although it has been observed that the application of the principle has been narrowed over time with a distinction made between 'full' and 'part' Indigenous people, and people in remote and urban Indigenous communities[14], incorporating the principle within legislation is likely to narrow its application and fetter judicial discretion.

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?

Legal Aid NSW would support an amendment to the *Crimes (Sentencing Procedure) Act 1999* (NSW) that better directed the court's attention to the special circumstances that arise when sentencing an offender with cognitive or mental health impairments.

In 2010, Legal Aid NSW contributed to the report prepared by the NSW Law Reform Commission into 'People with Cognitive and Mental Health Impairments in the Criminal Justice System'.[15] Legal Aid NSW refers the Commission to this submission[16] and its additional submission regarding young people with cognitive and mental health impairments in the criminal justice system.[17]

[13] *R v Fernando (1992) 76 A Crim R 58*. Also see: *Neal v The Queen (1982) 149 CLR 305*
[14] Anthony, Thalia (March 2010), *'Sentencing Indigenous Offenders'*, Indigenous Justice Clearinghouse, Brief 7.
[15] NSW Law Reform Commission (June 2012), *'People with Cognitive and mental health impairments in the criminal justice system'*. To see the submission prepared by Legal Aid NSW go to:
[16] To view the sub: http://intranet/Practice/LawReform/Pages/LawReform-Crime.aspx
[17] http://intranet/Practice/LawReform/Pages/LawReform-Crime.aspx

Legal Aid NSW also refers the Commission to the Judicial Commission of New South Wales paper, 'Sentencing Mentally Disordered Offenders: The Causal Link'.[18] The paper examines the developments in case law in relation to sentencing offenders with a mental illness and cognitive impairment. The paper discusses how general deterrence is less applicable to both those with a mental illness and those with an intellectual disability because of a lack of a capacity to reason as an ordinary person might, about the wrongfulness of the conduct.

The paper also notes that punishment, in the sense of retribution and denunciation, may not require significant emphasis in light of an offender's limited moral culpability for his offence.

The recent High Court case *Muldrock v The Queen [2011] 244 CLR 120* will also assist in drawing the court's attention to such matters. In particular, the case notes the causal connection between the offending behaviour and the offence [at 55]. The Court of Criminal Appeal case *R v Hemsley* [2004] NSWCCA also directs the court to consider the specific circumstances of an offender's 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 pre-sentence report when considering sentencing offenders with cognitive and mental health impairments to prison?

Legal Aid NSW supports the proposal to make the ordering of pre-sentence report mandatory only where the offender is unrepresented. All other cases should be considered on a case-by-case basis.

3. Should the court 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?

Legal Aid NSW acknowledges it would be ideal in most circumstances if the court had the power to order that offenders with cognitive and mental health impairments be detained in facilities other than prison.

However, Legal Aid NSW is concerned that before such a power was introduced an audit of potential facilities would need to be completed, along with an assessment of whether ongoing resourcing of such facilities could be met, to ensure offenders receive a better rehabilitative outcome than what is currently available through the prison system.

In addition, legislative safe guards would need to be put in place similar to the sentencing of forensic patients under the *Mental Health Act 2007* and the *Mental Health (Forensic Provisions) Act 1990.*

[18] I Potas and S Trayor (Sept 2002), *'Sentencing Mentally Disordered Offenders: The Causal Link'*, Judicial Commission of New South Wales, No.23.

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

The Prisoners Legal Service (PLS) at Legal Aid NSW represents many clients with cognitive and mental health impairments. It is the experience of the PLS that the State Parole Authority (SPA) frequently find such offenders unsuitable for release because they have nowhere to reside. This is the case even though an offender may be serving a sentence of three years or less and be eligible for automatic parole under s.50 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW).

Under s.51(1A) and (1AA) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW), supervision is a mandatory condition of parole unless the court expressly excludes it. Under clause 232(1)(c) of the Regulation, the Probation and Parole Service can revoke a parole order before release if it decides that unsatisfactory accommodation arrangements or post-release plans have not been made or are not able to be made.

It is often the case that offenders with cognitive and mental health impairments have very limited options for residency and as a result their parole is revoked before release. This means these offenders serve the full length of their sentence in prison and because they have not been granted parole they are then released without support from PPS. Legal Aid NSW proposes that:

- the *Crimes (Sentencing Procedure) Act 1999* be amended to empower the court, when considering imposing a sentence of imprisonment on an offender with a mental condition other than a mental illness or a cognitive impairment, to request that the Mental Health Review Tribunal (MHRT) assess the offender with a view to making a community treatment order pursuant to s 67(1)(d) of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

- the purposes of sentencing as set out in s 3(1)(a) of the *Crimes (Sentencing Procedure) Act 1999* be modified to ensure it is clear that an aim of the sentencing process is to promote the offender's prospects of rehabilitation, to be balanced against the harm done to the victim and the community, and to protect the community from any serious risk likely to be posed by the offender.

- the *Crimes (Sentencing Procedure) Act 1999* be amended to specifically provide for the transmission to the Department of Corrective Services (DCS) of psychiatric and psychological reports tendered in proceedings. It is the experience of the PLS lawyers at Legal Aid NSW that the courts seldom transfer such reports to the DCS as required by District Court, Practice Note 3. This leads to the DCS not being fully informed of the psychiatric and psychological needs of offenders when they arrive at prison.

- the *Crimes (Sentencing Procedure) Act 1999* be amended to provide for the sentencing court to make recommendations on the warrant of commitment concerning the need for psychiatric evaluation, or other assessment of an offender's mental condition as soon as practicable after reception into a correctional centre.

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?

Prison is rarely the best place for those with cognitive and mental health impairments. Legal Aid NSW would support exploring new diversionary sentencing options.

Women

Question 11.3

1. Are existing sentencing and diversionary options appropriate for female offenders?

Legal Aid NSW is aware that some diversionary options are either not available to women or do not adequately cater for the needs of women. Some of the identified gaps with current options include:

- Drug treatment services available to women, including the Drug Court NSW, do not take into consideration that women have the primary responsibility for childcare, and this can make it difficult for them to fulfil the requirement of the program.[19]

- The NSW Drug Court facilities and services available to women in the Detoxification Unit at Mulawa Correctional Centre were considered to be inferior to those for men, and in need of improvement.[20]

- Core rehabilitation programs offered in prison are generic and as a result are not specifically tailored towards the differing needs of women compared to male offenders (e.g. anger management courses, living skills, and drug and alcohol programs).[21]

- The NSW Sentencing Council report on periodic detention found that there was limited availability of periodic detention, particularly in regional areas, for female offenders when the program existed.[22] If the program was reintroduced (as suggested in the Question Paper 5-7) the needs of women would need to be considered.

[19] R Johns (2004), *'Drug Offences: An Update on Crime Trends, Diversionary Programs and Drug Prisons'*, NSW Parliamentary Library Research Service, Briefing Paper No 7/04, p. 46.
K Freeman (2002*), 'New South Wales Drug Court Evaluation: Health, Well-being and Participant Satisfaction*', BOCSAR.
[20] S Taplin (2002), *'New South Wales Drug Court Evaluation: A process Evaluation',* BOCSAR.
[21] Mental Health Coordinating Council, *'The Psychological needs of Women in the Criminal Justice System: Considerations for Management and Rehabilitation'*, May 2010, Page 6.
[22] NSW Sentencing Council (2007), *'Review of Periodic Detention'.*

- Indigenous females make up a higher proportion of MERIT referrals than non-Indigenous females (27% vs. 20%). But while significantly more female non-Aboriginal women referred were accepted into MERIT, significantly fewer Aboriginal women referred were accepted.[23]

- An analysis of female participation in the MERIT program noted that the program could be improved by: greater availability of detoxification and rehabilitation services specifically for women (i.e. with capacity and willingness to deal with more complex client presentations); greater availability of general detoxification and rehabilitation places for females; more resources (i.e., referral networks) for female clients with children; and improved access to, and cooperation with, non-crisis mental health networks and services.[24]

- A recent review of Indigenous-specific alcohol and other drug interventions noted that there were few community-based or residential treatment projects addressing the needs of women.[25]

2. If not, how can the existing options be adapted to better cater for female offenders?

Diversionary options could better cater for female offenders by:

- evaluating existing diversionary programs and assessing whether they are meeting the needs of women

- providing adequate resources to ensure a comprehensive delivery of programs

- consulting with Indigenous communities and organisations in the planning and implementation stage of programs

- ensuring diversionary programs are available at all stages of the criminal justice process

- not precluding participation in diversionary programs for women who have previously participated

- ensuring programs are as flexible as possible and cater for possible minor breaches of conditions without jeopardising ongoing participation in programs

- ensuring that law enforcement officials involved in the administration of diversion should be specifically instructed and trained to meet the needs of women

- ensuring that diversionary programs cater for the specific needs of women, especially the responsibilities women have in relation to children and family.

[23] Cited in Dr Bartels, *'Diversion Programs for Indigenous Women'*, Research in Practice No 13, Australian Institute of Criminology, December 2010.
[24] Martire, K.A, & Larney, S, 'Women and the MERIT program', Crime Prevention Issues, NSW Attorney General's Department, June 2009.
[25] Gray D et al. *'Indigenous-specific alcohol and other drug interventions: Continuities, changes and areas of greatest need'*, *ANCD Research Paper* no. 20. Canberra: Australian National Council on Drugs, 2010.

3. What additional options should be developed?

Legal Aid NSW has consulted with the NSW Corrective Service Women's Advisory Council (the Council) regarding this question and supports the following proposals made by the Council:

- A gender analysis of women's access and participation in community-based sentencing options. The aim of such analysis would be to identify successful programs for women and programs that may require improvement.

- An expansion of the criteria to be considered in bail applications under s 32(1)(b)(ii)-(iii), to include but not be limited to a person's right to work, obtain an education, participate in family life, access health services and maintain housing.

- An increased access to CREDIT and other diversionary options for women.

- A Compulsory Drug Treatment Program for women. Given the success of the Compulsory Drug Treatment Program for male inmates and the high numbers of women in custody for drug-related offences there is a need for a similar legislated treatment and supported transition program 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?

Legal Aid NSW does not have expertise in the area of sentencing of corporations to provide comment.

Any other categories

Question 11.5

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

<u>Homelessness</u>

At every stage of the sentencing process those who have no place of residence may be excluded from non-custodial programs and denied parole opportunities. For example, a person who is homeless may not be granted parole on the basis that they have nowhere to stay, they are ineligible for home detention, and they are vulnerable to breaching bail or bond conditions because their lives are often chaotic and they have little social support.

A paper prepared by E Baldry, D Desmond, P Maplestone and M Peeters on ex-prisoners and homelessness noted that the combination of poverty and not having a place to live acts as a precipitator for ex-prisoners to re-enter the criminal justice system.[26]

Legal Aid NSW proposes the review of sentencing laws address the disadvantages faced by those who are homeless and investigates the need for supported housing options for those being released from the prison system.

Sex offenders

Legal Aid NSW is of the view that sex offenders should be considered as part of this review. Legal Aid NSW represents sex offenders at trial, for continuation orders and for breaches of such orders. Sex offenders are a unique category of offenders because they are the only offender able to be detained in prison after the expiry of their sentence or upon their release placed on a supervised detention order. They are also likely to spend their sentence in protection and are highly vulnerable to harassment and harm in prison and upon release.

Penalties for sex offences have dramatically increased since 2008 with the doubling of the maximum penalty for possessing child pornography, and the adding of a new aggravated offence of having sex with a child under 10 to a maximum of 25 years in prison.[27]

Legal Aid NSW is of the *Crimes (Sentencing Procedure) Act 1999* could be amended to allow the judiciary to take into account the specific conditions pertaining to those who have been convicted of a sex offence. For example, s.24A of the *Crimes (Sentencing Procedure) Act 1999* prevents the judiciary from taking into account upon sentence the fact a person may be or, may become the subject of, a supervision order under the *Child Protection (Offenders Prohibition Orders) Act 2004* or the Crimes (*Serious Sex Offenders) Act 2006*. Such an order can be extremely onerous as it subjects the offenders to several restrictive conditions and should be taken into account upon sentence.

Older persons

Legal Aid NSW is concerned that current sentencing legislation does not adequately address the legal needs of older Australians. A recent paper published by the Australian Institute of Criminology noted that the number of older people in Australian prisons is increasing.[28] The paper shows that the greatest growth in the prison population has been observed among those aged over 65, with a rise of over 140 percent in the decade 2000 to 2010.[29] In NSW there has been an observed increase of 151 per cent in prisoners aged 65 and over (2001-10).[30]

[26] E Baldry and others (2006), *'Ex-Prisoners, Homelessness and the State in Australia'*, The Australian and New Zealand Journal of Criminology, Vol 39 Number 1.
[27] *Crimes Amendment (Sexual Offences) Act 2008*
[28] S Baidawi and others (August 2011), *'Older prisoners-A challenge for Australian corrections'*, Trends & Issues in crime and criminal justice, Australian Institute of Criminology.
[29] Ibid at p.3
[30] Ibid at p.2

The paper explores a number of challenges facing Australian corrections as the number of older people increase in the prison population. These challenges include:

- ageing and associated declines in mental and physical health
- a considerable number of older prisoners experience depression and other psychological problems
- prison environments are primarily designed for young and able-bodied
- with an increase in older prisoner comes increase in healthcare costs
- prisoner programs have been designed with the needs of younger prisoners
- older prisoners are perceived to be more vulnerable to victimisation
- poor post-release panning and support for older prisoners

With an aging population, it is more likely that increasing numbers of people will be sentenced to imprisonment that may require some form of special physical care. This fact needs to be considered in light of sentencing trends.

The issue for the criminal justice system is balancing the purposes and principles of sentencing to ensure that the sentence reflects not only the offence but the offender. This is particularly important where certain purposes of sentencing are irrelevant to a particular offender. For many older people, rehabilitation and specific deterrence, for example, may have no or little relevance.

It is also important where the priority given to general deterrence results in a harsh or oppressive sentence. Incarceration without effective geriatric prison care can result in deterioration of physical and mental health, reduce life expectancy and can result in premature death.

When determining the sentence of an older offender, the court should be required to take into account the following factors:

- The physical frailty and mental condition of the older offender;
- The life expectancy of the older offender; and
- The probable effect on the older offender of a particular sentencing option, including that the offender's circumstances may result in imprisonment having an unusually severe impact on him or her.

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 judiciary is best placed to determine what may need to be considered in order to improve levels of public confidence in the judicial system.

Question 12.2

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

Legal Aid NSW supports the proposal outlined at point 12.30, developing a searchable database that shames corporate offenders. Legal Aid NSW agrees that corporate offenders place a premium on good reputation and the potential for adverse publicity may act as a deterrent against corporate offences.

Procedural reforms

Question 12.3

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

Sentencing delays can have drastic consequences for offenders and victims. Legal Aid NSW shares the concerns of the NSW Office of the Director of Public Prosecutions outlined at point 12.34.

Legal Aid NSW supports online courts but is of the view the process needs to be made more interactive. The current online process can be slow and tedious. Parties often have to wait a few days before receiving a response to a message. The process would work better if the online court dealt immediately with the proceedings and it worked in the same way as a conference call.

Question 12.4

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

Legal Aid NSW supports a streamlined assessment process that would involve the court requestioning 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?

While the sentencing process remains complex and onerous oral sentencing remarks should not be encouraged by legislation.

The reasons for judgment provide an explanation to the parties, to the victims, to the public at large, and an appellate court if required. As stated in the case *R v Thomson and Houlton (2000) 49 NSWLR 383 at [42]*

> "*Sentencing judges are under an obligation to give reasons for their decisions. Remarks on sentence are no different in this respect from other judgments. This is a manifestation of the fundamental principle of the common law that justice must not only be done but must manifestly be seen to be done. The obligation of a Court is to publish reasons for its decision, not merely to provide reasons to the parties."*

As noted throughout the Question Papers, sentencing law has become more complicated. The complexity has been partly due to the introduction of sentencing principles, standard non-parole periods and guideline judgments. While these changes have sought to increase transparency and consistency they also have had the negative effect of increasing the volume of sentencing remarks.

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)?

Legal Aid NSW does not support a single test on appeal from the District Court to the Court of Criminal Appeal, namely that the sentence is manifestly excessive or manifestly inadequate.

Not every error will give rise to an appeal. Error must be sufficiently material[31] to satisfy the test in *House v The King (1936) 55 CLR 499 at 505*.

The proposed test would disallow all sentence appeals where there has been demonstrated error and where the court, if it applied the correct principle, it would have imposed, unless it can be found to be manifestly excessive. Such a test would not allow parity appeals or appeals for procedural unfairness where a sentence has been increased without notice from that which had been previously indicated (e.g. *Button v R [2010] NSWCCA 48*).

To the extent that the proposal raises a single test it increases raises the prospect of Crown appeals. This is inconsistent with the stated aim of reducing appeals generally. Legal Aid is of the view that discretionary factors allowing for the dismissal of Crown appeals should be retained.

The proposed changes risk:

[31] Baxter v R (2007) 173 A Crim R 284 at 83

- judgments from the sentencing court (District or Supreme Court) becoming less transparent

- judgments of the sentencing court incorporating submissions of a party in a way that may be not apparent to other interested parties (victims, relatives, members of the public)

- Unfairness in the sense that cases with demonstrated error would not have that error corrected. This includes particular categories of appeal currently available (e.g. parity)

- The Court of Criminal Appeal provides a mechanism for a measure of consistency in sentencing, and authoritative judgments on questions of principle. The proposed changes reduce the utility of this mechanism.

- An increase in Crown appeals.

It is suggested that if the number of appeals were to be reduced that this would involve appeals that were currently unsuccessful. It is submitted that the current proposal is not to achieve that end.

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?

Legal Aid NSW agrees that the circumstance where s.43 *Crimes (Sentencing Procedure) Act 1999* (NSW) applies is unclear. Greater clarification is desirable. A legally aided appeal is listed for hearing on 24 October 2012 before the Court of Criminal Appeal regarding the application of this section. It may be inappropriate to consider any significant review of the provision until that appeal is resolved.

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

Legal Aid NSW supports matters in the Court of Criminal Appeal being able to be determined 'on the papers' but only if the parties agree.

Question 12.7

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

Legal Aid NSW committal lawyers have experienced the following bottlenecks in committals for sentence.

<u>Delay by the prosecution</u>

A significant bottleneck exists due to the delay in police being able to collate the full brief of evidence and provide it to the defence. Legal Aid NSW lawyers rarely receive a full brief by the first return date. Most briefs require a certificate from the Division of Analytical Laboratories (DAL) and there is often significant delay in receiving these

certificates. A NSW Auditor General's Report found there is a significant backlog in DNA processing.[32] Possible ways the issues of delay could be addressed are:

- The ODPP could give an indication to DAL of the urgency of the certificate. A five point scale could operate reflecting how essential it is for the committal process. The scale could be based on whether the accused is in custody, and whether there is any other evidence which can substantiate the charge. Priority could also be given to matters awaiting committal rather than a cold case.

- Some offenders are identified by preliminary DNA or fingerprint testing, but the brief of evidence is delayed until the outcome of the formal testing. It is suggested preliminary testing could be included in the brief of evidence as a matter of course to allow the majority of the matters to move through the committal stage.

There are delays in receiving SAIK (Sexual Assault Investigation Kit). The majority of the information contained in the SAIK is notes taken on the day the complainant attends for examination. The notes could be served as partial service of the SAIK without having to wait for the DNA testing to be completed.

There is an increasing use of CCTV material as evidence. As this footage comes in various different formats it is often the case that when the CCTV footage is received, it is in a format that cannot be accessed. Often the police are required to re-serve in an accessible format, which takes time.

On occasions where it is agreed that alternative charges are to be proceeded with, the ODPP encounters delays in getting the police officer to lay those charges, which then delays the plea being entered.

Delay by defence

There are some delays occasioned from a defence perspective when clients are in custody.

Remand prisoners are being housed in country gaols and conferences usually take place via an Audio Visual Link (AVL). It takes at a minimum two days notice to arrange an AVL. AVL conferences are 30 minutes in duration, which often requires clients to have considered the brief of evidence in advance of the conference. It takes roughly 10 days for a brief of evidence to reach a client after it has been sent to them from a Legal Aid office. If the client cannot read and write, has a mental illness or cognitive impairment or if there is a particularly complicated brief, conducting one AVL is not enough to obtain full instructions.

It is not always possible to obtain instructions in one sitting. Legal Aid NSW clients are frequently poorly educated, have low IQs, suffer from mental illness or cognitive impairments or are from non English speaking backgrounds. Explaining complex legal matters (e.g. concepts such as standard non-parole periods, joint criminal enterprise, and benefit for a plea of guilty) can take considerable time and a number of AVL conferences.

[32] Auditor-General's Report (February 2010), Performance Audit, *'Managing Forensic Analysis Fingerprints and DNA'*.

There is difficulty showing CCTV footage to clients in gaol. It would greatly assist if defence lawyers could copy the material and send it to clients in custody for them to view in gaol prior to a conference.

Legal Aid NSW is supportive of measures to avoid bottlenecks and to move matters expeditiously through to sentence or trial. However, the case management of matters should be flexible enough to recognise that it is not always beneficial to the accused, victims, or the courts to have matters rushed through. Time spent in the committal stage may often mean that a greater amount of resources are not expended at the trial stage.

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;**
b. **establishing a Criminal Division of the District Court;**
c. **establishing a single specialist Criminal Court incorporating both the District Court and Supreme Court's criminal jurisdictions, modelled on the Crown Court;**
d. **amending the selection criteria for the appointment of judicial officers;**
e. **in any other way?**

The proposal for specialist courts and judicial officers requires greater exploration.

Advantages with allowing specialised judicial officers and courts could include:

- ensuring a higher level of judicial expertise and knowledge in criminal law
- reducing the likelihood of sentencing errors being made
- preventing judges from having to hear matters outside their expertise
- ensuring offenders are sentenced in a more consistent manner
- ensuring sentences are delivered quickly and judges are less likely to reserve their remarks on sentences.

On the other hand, a benefit of the current system is that judicial officers are able to bring a diversity of experience and expertise to criminal case matters, which reflects the wider community. Another possible disadvantage of the proposal is that courts in rural areas might not be able to sustain specialist courts because of limited resources. This would create a two tier justice system.

However, Legal Aid NSW advocates for emphasis and additional resources to be directed towards problem-orientated courts (i.e. drug court mental health courts and community courts). According to Arie Frieberg from the University of Melbourne, problem-orientated courts differ from specialised courts as they seek to: achieve tangible outcomes for victims and offenders and society; attempt to inform the way a

government response to the societal problems; actively use judicial authority to solve problems and work collaboratively with other agencies.[33]

Question 12.9

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

Legal Aid NSW does not support the guideline judgement system in England and Wales being adopted in NSW because it places an inappropriate restriction on judicial discretion.

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 judgements, and if so, how should they be involved?

Legal Aid NSW supports the current process for developing guideline judgments. This process ensures it is the judiciary that formulates the guideline judgement. The Attorney-General of NSW may apply for a guideline judgment, based on information provided by the NSW Sentencing Council.

b. Allowing parties other than the Attorney General to make an application for a guideline judgement, and if so, which parties, and on what basis should they be able to apply for a guideline judgement?

Legal Aid NSW does not support allowing parties other than the Attorney General making an application for a guideline judgement.

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

Legal Aid NSW is of the view that the diverse range of matters that come before the Local Court would make it very difficult to develop a guideline judgement for this jurisdiction.

Question 12.10

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

The 1993 sentence indication scheme was introduced to reduce the court back log of sentence matters by encouraging earlier guilty pleas. However, over time, the court backlog and clearance rate has improved significantly. A 2010 NSW Auditor-General's Report to Parliament on 'Law and Order' services states, *"Most criminal court jurisdictions appropriately managed their case load, clearing approximately as many cases as were lodged during the year"*.[34] The Report also states, *"New South Wales continued to record some of the best results for court timeline compared to other States and Territories"*.

[33] A Frieberg (September 2002), *'Specialised Courts and Sentencing'*, Probation and Community Corrections: Making the Community Safer Conference convened by the Australian Institute of Criminology and the Probation and Community Corrections Officers Association Inc. Perth, pp.23-24.
[34] Auditor-General's Report to Parliament (2010), *Law and Order Overview*, Volume Eight, p. 7.

Although the sentence indication scheme increased the number of early guilty pleas, it also did not reduce the proportion of persons committed for trial who actually proceeded to trial. [35]

Legal Aid NSW can see no compelling reason to re-introduce the scheme.

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

Legal Aid NSW does not support the reintroduction of the scheme.

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

Legal Aid NSW does not support the reintroduction of the scheme.

How could the problems identified with the previous sentence indications and 'judge shopping', be overcome?

Legal Aid NSW does not support the reintroduction of the scheme.

The role of victim 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?

Currently the judiciary has the discretion to receive and consider a victim impact statement at any time after it convicts, but before it sentences (s.28 (4)(b)) of the CSPA). The proposal would change this process by allowing the judiciary to consider VIS when fixing a sentence. Legal Aid NSW does not support such a proposal for the reasons outlined below.

The court already has the discretion take into consideration the impact of a crime on family victims and the community by:

- considering the purpose of sentencing and nature of harm caused to the victim and the community under s.3A(g) of the CSPA
- allowing the prosecution to bring these issues to the court's attention
- having the discretion to consider a VIS after it convicts and before it sentences (s.28(4)(b)) of the CSPA)

[35] D Weatherburn (1995), '*Sentence Indication Scheme Evaluation-Interim Report: The Impact of the NSW Sentence indication Scheme on Plea Rates and Case Delay'*, Bureau of Crime Statistics and Research ,p. 22

- taking into consideration the harm done to the victim and community through considering mitigating or aggravating circumstances (s.21) CSPA

An introduction of family victim impact statements could raise a number of difficult issues. For example, consider a homicide victim not held in high regard by the community, known to be a violent person and not close to his family. Would the accused attract a lesser sentence than in a case where the homicide victim had a loving family who provided a family victim impact statement?

Other examples include: a case where there are multiple homicide victims and the victims' families have conflicting views about the appropriateness of giving a victim impact statement; or a case where the victim impact statement includes information inconsistent with the facts found in the verdict.

The proposal may also make sentencing more complex and lengthy as it opens up the possibility of a higher sentence where the impact is greater. This could also lead to an increase in sentence appeals.

Such a proposal may have negative consequences for the victim's family as well. For example, if family victim impact statements were to formally be given weight the author of the statement would have to be cross-examined as is the case in Victoria. Victims may face questioning about some very confronting issues, which could be traumatic.

Another issue to consider is that most homicide incidents are domestic homicides involving one or more victims who shared a family or domestic relationship with the offender. Intimate partner homicide comprises the largest proportion of domestic homicides (60 per cent).[36] These statistics indicate that homicide cases often involve complex family relationships. Adding family victim impact statements to the scenario may add another level of sentencing complexity to an already difficult court process.

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

Legal Aid NSW does not support any changes to the types of offences for which a victim impact statement can be tendered. As stated above, the law currently allows for the court to take into consideration during sentence the impact of a crime on family victims and the community.

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

Diversionary programs like Circle and Forum Sentencing offer excellent examples of how victims of crime can partake in the sentencing process.

Other options

Question 12.12

[36] M Virueda, J Payne (Dec 2010), *'Homicide in Australia: 2007 – 08 National Homicide Monitoring Progam annual report',* Monitoring report no.13, Australian Institute of Criminology.

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

Legal Aid NSW has provided a range of options in response to the sentencing question papers for the possible reform of the sentencing system.