NEW SOUTH WALES

The Chief Magistrate of the Local Court

17 August 2012

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

Dear Chairperson

Submission – Sentencing Question Papers 5 – 7

I write in response to your invitation of 28 June 2012 to make a submission in response to Question Papers 5 - 7 as part of the NSW Law Reform Commission's review of sentencing. A response to further Question Papers 8 – 12 will be provided in due course.

QP 5 – Full-time imprisonment

Special circumstances

I do not consider that the current test in s 44 of the *Crimes (Sentencing Procedure) Act 1999* ('the Act') is in need of significant reform beyond amending the terminology of "special circumstances". The main concern appears to be that the term "special circumstances" has become something of a misnomer. Reasons such as the age of the offender or that it is the offender's first time in custody are routinely given for such a finding. However, in my view it is entirely appropriate that factors such as these, while perhaps not being extraordinary or unique to a particular offender, are taken into account when structuring a sentence.

Sentencing legislation should continue to provide a consistent starting point or guidepost for the relationship between the non-parole period and the parole period, from which departure may be made in order to either increase or decrease the ratio if appropriate reason to do so is identified. There is no need for a requirement that a reason for so finding should be "special" in the sense of it being particularly exceptional or uncommon.

'Top-down' sentencing

I do not have anything further to add to the comments in my preliminary submission on this issue.

Short sentences of imprisonment

Sentences of imprisonment of less than 3 or 6 months should not be abolished. Such a course would unduly constrain judicial discretion to impose a sentence that is appropriate

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in all the circumstances, particularly in the context of many matters finalised in the Local Court. This is reflected in the average length of a term of imprisonment imposed, which in 2011 was 5.7 months.[1] This figure has remained relatively consistent over the past decade.

The Question Paper cites the objective of encouraging the use of non-custodial and community-based sentences for less serious offences as a central argument in favour of abolishing short sentences. Magistrates continue to report concerns about the unavailability of options such as ICOs and home detention in some part of the State, and in practical terms the lack of options available for completing a Community Service Order. In discussions with my office, Corrective Services has indicated that it is working towards addressing those issues. In the meantime, I do not believe the situation would be assisted by the removal of short sentences of imprisonment. The concern that the removal of short sentences of imprisonment would leave the court without appropriate sentencing options may in some instances be borne out.

I do not think the possibility raised in the Question Paper of upwards 'sentence creep' necessarily follows. To the contrary, the more likely scenario is that courts might sentence with a degree of leniency to avoid unfairly punishing an offender for their geographic location. The NSW Bureau of Crime Statistics and Research (BOCSAR) has previously found that despite the assumption magistrates may have no option but to impose full-time custodial sentences where community-based options are not available, offenders in regional NSW are actually less likely than their city counterparts to receive a sentence of full-time imprisonment, a likely reason being that courts are sensitive to the issue and react by being more sparing in ordering full-time imprisonment.[2]

A further concern is that the abolition of short sentences of imprisonment would in some instances affect the sentencing of an offender for multiple offences, unless an exception was made to allow short sentences where the total term of imprisonment exceeds 6 months. In the Local Court, the imposition of multiple short sentences can be a valuable sentencing tool to enable identification of an appropriate penalty for the individual offence itself and its place in the overall context of the offending conduct. The individual seriousness of each offence may not warrant a lengthier custodial term but the course of conduct, when considered as a whole, may necessitate a total sentence of imprisonment approaching the Court's jurisdictional limit. For instance, the offender might have been convicted of a series of fraud-type offences where each transaction was the subject of a separate charge. In circumstances such as this, it is useful to be able to accumulate multiple short sentences for each charge within the overall sentence being imposed.

In addition to this, difficulties may arise if short sentences continue to be available for other custodial orders. I understand the present discussion relates only to full-time imprisonment and not to suspended sentences, ICOs or home detention. This raises the question of what is to be done if an offender breaches the terms of that order. The question paper notes there would be "no option available to impose a short period of full-time imprisonment for the breach". It is not clear what course it is proposed the courts could take instead.

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[1] NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics 2011*, Table 1.9

[2] NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 111 (January 2008), *"Does the lack of alternatives to custody increase the risk of a prison sentence?"* at 4

A final observation is that a prohibition on sentences of up to 6 months imprisonment would require the review of numerous offences that currently specify this as the maximum penalty, in order to assess whether a sentence of full-time custody should remain an available option (thereby requiring an increase to the maximum statutory penalty). An example of an offence that is frequently prosecuted in the Local Court is goods in custody under s 527C of the *Crimes Act 1900*. It is not unusual for sentences of full-time imprisonment to be imposed in such matters.

Aggregate sentences

I have few comments to make in relation to aggregate sentencing because, to my knowledge, use of the model under s 53A of the Act is fairly limited in the Local Court. This is possibly because in practical terms the model is seen as changing little, insofar as the court is still required to indicate the sentences that would have been imposed for each offence.

Jurisdictional limit of the Local Court

Since my preliminary submission to the Commission's reference on sentencing, the Sentencing Council has published its report on whether the Local Court's sentencing jurisdiction should be increased. As noted in the Question Paper, the report proposed that magistrates be empowered to refer matters to the District Court for sentencing if satisfied a sentence commensurate with the seriousness of the offence could not be imposed in the Local Court.

In essence, this proposal would amount to a return to the system in use prior to the adoption of the Table offences scheme, in which a magistrate could abstain from hearing a matter if of the view that the case could not properly be disposed of summarily pursuant to the former section 476 of the *Crimes Act 1900*.

I disagree with this recommendation and do not consider that any compelling reason has been presented as to why a step backwards to the pre-1995 approach is a logical response to the undoubted success of the Table system, nor why such an approach would be preferable to the more straightforward approach of an appropriate increase to the Local Court's jurisdictional sentencing limit.

I have previously written to the Director General of the Department of Attorney General and Justice to address the matters set out in the Sentencing Council's report in some detail. A copy of my letter is enclosed for your reference, together with a copy of the Court's submission to the Sentencing Council review.

Briefly, a few further difficulties arising out of the current jurisdictional limit include:

- In some instances where *R v Doan* (2000) 50 NSWLR 115 is to be applied, particularly where sentences are being accumulated, it is not possible to give effect to a finding of special circumstances as the sentence would become inadequate.

- In cases where an offender is sentenced for a single offence, options for rehabilitation where appropriate may not be available. A number of Corrective Services programs require a period of at least 2 years to complete.

QP 6 – Intermediate custodial sentencing options

Structure and hierarchy of sentencing options

Although the structure of sentencing options is addressed in more detail in Question Paper 8, it is helpful to briefly set out what would in my view be an appropriate range of sentencing options, as this informs my comments in response to the current papers:

Custodial	Full-time imprisonment
	A single alternative custodial option in which the features of home detention and ICOs are merged
Non-custodial	A 'non-custodial ICO' that enables the imposition of conditions currently contained in an ICO, other than restrictive aspects such as the curfew and electronic monitoring conditions
	Community service order
	Good behaviour bond
	Fine
	Conviction without further penalty
	Non-conviction orders

Further to my earlier comments supporting the abolition of suspended sentences provided sufficient other options are available and effective, I am of the view that consideration should also be given to whether home detention and Intensive Correction Orders would benefit from being consolidated into a single alternative custodial order, with standard components such as work, community service, rehabilitative or other programs, curfew and monitoring, to be administered by Probation and Parole in such a manner as it assesses as being appropriate. It has become increasingly apparent that in practice there seems to be little differentiation between ICOs and home detention, insofar as many features are common and the measures applied in instances of both can be the subject of considerable administrative flexibility.

Home detention

As mentioned above, Corrective Services has indicated to my office that it is aware of and in the process of responding to the issue of statewide availability of home detention.

I have no further comments to make in relation to home detention other than to note the question paper at [8.21] refers to the Local Court making eight home detention orders in 2011. The relevant BOCSAR data actually records the Local Court as making 125 such orders (the figure attributed in the report to the District Court).

Intensive Correction Orders

In my observation, ICOs are not being delivered effectively in many instances. To a large extent I agree with the comments of the Probation and Parole Officers' Association of NSW that in their current form, ICOs do not provide an intensive penalty option. In practice, the restrictive aspect of ICOs appears to be minimal despite the order being custodial in nature. Prior to the introduction of ICOs, the intended restrictive nature of the order was highlighted, with the Court advised that an offender commencing on an ICO would be required to comply with restrictive aspects such as a curfew and electronic monitoring and/or unannounced home visits. Such aspects are apparently discretionary in

the case of an offender who commences an ICO on Level 2, and in my observation they do not seem to be required in many cases.

In addition to that issue, a number of other particular operational difficulties, including those mentioned in my preliminary submission, have been raised with Corrective Services. Notwithstanding my concern in relation to the overall efficacy of ICOs as a custodial sentence, I am satisfied Corrective Services is considering and taking steps to respond to those issues.

Lastly, the Question Paper raises the Court of Criminal Appeal's decision in *R v Boughen; R v Cameron* [2012] NSWCCA 17, in which it was held that an ICO is not a suitable penalty in relation to an offender with little risk of re-offending and no need for rehabilitation. I understand a five-judge bench of that Court considered the issue in an appeal heard on 6 August, in respect of which a decision is pending.

Suspended sentences

My preliminary submission has already set out my views in relation to suspended sentences, including various difficulties being experienced in the Local Court.

In the Question Paper, the argument is raised that a suspended sentence may be the last available option other than imprisonment for those "who are not assessed as suitable for bonds, community service orders, ICOs or home detention". I do not agree. Given that a suspended sentence shares with three of those options a requirement that an offender be of good behaviour, in many instances a suspended sentence will not be a suitable option either. It is concerning to observe that in sentencing proceedings before the Local Court, the use of suspended sentences is often advocated in circumstances where there is a strong likelihood of a breach that will lead to the sentence being served in custody. For instance, if an offender is vulnerable to breaching an ICO insofar as it precludes use of illegal drugs, they may be equally vulnerable to such a breach of a suspended sentence.

Such observations reinforce my view that there is a widespread perception of the suspended sentence as a lenient option to be sought in preference to some non-custodial penalties, in spite of its status as an alternative custodial option. Possible options suggested to give greater flexibility when suspending a sentence do not address the fundamental "inherent paradox" of the process, in which a finding is first required that there is no appropriate sentence other than imprisonment but a decision is then made to suspend the sentence.

Rising of the court

The rising of the court should not continue to be available as a sentencing option. Since the introduction of s 10A of the Act, in practice it has fallen into disuse, perhaps not surprisingly given the process for imposing a custodial sentence mandated by the Act. It is difficult to envisage circumstances in which a decision could be made that the penalty to be imposed must be a sentence of imprisonment under s 5 of the Act, yet the appropriate length that sentence is only until the court adjourns.

Maximum terms of imprisonment that may be served by way of custodial alternatives

I have previously suggested a consistent maximum sentence for all alternative custodial sentences of 2 years, based on the Local Court's current jurisdictional limit for a single

offence. I am supportive of a uniform increase to the maximum terms to 3 years if an increase to the Local Court's general jurisdictional limit is also made. However, based on the current process for imposing a custodial penalty and the steps that follow in the event an alternative custodial order is revoked upon breach, an increase to the Court's jurisdiction only for the purpose of custodial alternatives to full-time imprisonment is not workable.

I do not consider there is need to depart from the approach when imposing a custodial sentence in *R v Zamagias* [2002] NSWCCA 17, where the manner in which the sentence is to be served in no way affects the term. It is entirely appropriate that the sentencing court should fix the length of the sentence before determining the form of custody.

Although it might be argued that to fix the length of sentence first and then determine the manner of sentence does not take account of the less severe nature of the sanction, the potential consequences of such an approach are troubling. The basis for determining the form of custody prior to the length of the sentence seems to be so that longer sentences can be imposed to balance the comparative leniency of the penalty. However, in the event of a breach, upon revocation of the alternative custodial order, the offender may be liable to serve a longer period in custody than would have been imposed if a sentence of full-time imprisonment was imposed in the first instance.

QP 7 – Non-custodial sentencing options

My comments in response to this Question Paper are limited, as the range of non-custodial sentencing options available to the court generally appears to be adequate and operating relatively effectively in practice.

Community Service Orders

Although CSOs are available across the State, logistical difficulties such as there not being community work available for an offender to complete continue to be reported in a number of areas. However, in view of the definition of community service work as including "participation in personal development, educational or other programs", there appears to be some capacity for this issue to be addressed administratively. I understand Corrective Services is reviewing the scope of performance of a CSO.

Non-conviction orders

While I am mindful of the clear dicta of the Court of Criminal Appeal in *R v Ingrassia* (1997) 41 NSWLR 447, there is merit in the suggestion that, in appropriate circumstances, the court should be able to impose a penalty in addition to deciding not to record a conviction. This is an option that has operated in Victoria for many years.

A possible option could be that the court, when imposing a s 10(1)(b) bond, could specify a penalty, such as a fine, to which the offender will become liable in the event of a breach of the bond due to commission of a further offence. The penalty could arise automatically upon a conviction being recorded for the new offence, without the need for the breach to be brought before the court. Such an option could also have the benefit of building a degree of deterrence into the outcome, while still making a non-conviction order.

Fines held in trust

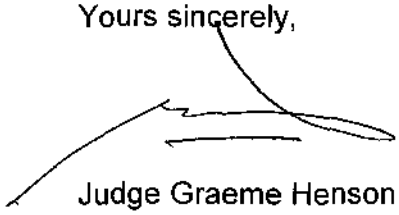
I do not support the introduction of a fine held in trust as a sentencing option. Such an option is likely to unfairly favour those wealthy enough to afford to pay a fine up-front. Although an offender's capacity to pay will inform the sentencing court's determination of the fine amount, the reality is that many offenders appearing before the Local Court will not be in a position where they are able to immediately pay the entire fine amount.

Work and development orders

In view of the apparently positive response to an administratively based scheme for WDOs, it seems preferable for the current course to continue rather than for WDOs to be adopted as a sentencing option.

Thank you for the opportunity to make a submission in response to these Question Papers. I would be pleased to discuss the above comments or any other aspect arising in the course of the current review of sentencing with the Commission further should you wish to do so.

Yours sincerely,



Judge Graeme Henson
Chief Magistrate