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New South Wales
Law Reform Commission

Sentencing
Question Paper 12

Procedural and jurisdictional aspects

July 2012
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ISBN 978-0-7347-2676-6 (electronic)

Question Paper 12:
Procedural and jurisdictional aspects

12.1 This question paper deals with procedural and jurisdictional aspects of sentencing, looking particularly at innovations that could be adopted to simplify the operation of the law and enhance the transparency and consistency of decision-making. We invite your feedback on these ideas and welcome new ideas on how the sentencing process can be made to work more effectively in the future.

Accessibility of sentencing law

12.2 The first part of this paper will explore how the courts can use recent advances in information technology. The internet, social networking sites, smart phones and other mobile devices mean that people now *expect* information to be available at the touch of a button. Moreover, the traditional media is no longer the only means by which people can communicate widely on issues of social importance.

Individuals have their own platforms to express their views and they can double-check and comment on what government agencies and the media tell them.

12.3 It was observed many years ago that the criminal law "must be operated within society as a going concern" and that it should "reflect and correspond with the sensible ideas about right and wrong of the society it controls".[1] More recently in 2008, the former Chief Justice of the High Court of Australia said that citizens in a modern democracy demand that judicial power be exercised independently, according to law and also that the law be "demonstrably rational and fair".[2] A key challenge for the criminal justice system in an information rich age is to demonstrate to the public that it still meets their needs.

12.4 There are concerns about the level of public confidence in the criminal justice institutions, especially in the courts. NSW Chief Justice Bathurst has recently spoken on the issue,[3] drawing on research conducted by the NSW Bureau of Crime Statistics and Research ('BOCSAR')[4] and reported by the NSW Sentencing Council[5] and the Australian Institute of Criminology.[6] In 2003, less than a third of Australians (29%) reported that they have a great deal or quite a lot of confidence in the courts and the legal system.[7] This is low by international standards (the European average was 45% in 2001, and Great Britain reports 49%, Canada 57%, but the US 27%).[8] However, research suggests that:

- people who have had contact with the courts tend to have more confidence;[9]
- there are correlations between misperceptions that crime is increasing and that conviction rates are low and more negative views of the outcomes of the system;[10]
- people who have better information about crime and court outcomes tend to have more positive views about the system.[11]

12.5 A recent study of Tasmanian jurors found that:

1. J Barry, *The Courts and Criminal Punishments* (1969) 14.
2. M Gleeson, "The Role of a Judge in a Representative Democracy" (Speech delivered to Judiciary of the Commonwealth of the Bahamas, 4 January 2008).
3. T Bathurst, "Community participation in Criminal Justice" (2012) 50(2) Law Society Journal 55.
4. C Jones and others, *Public confidence in the New South Wales Criminal Justice System,* Crime and Justice Bulletin 118 (NSW Bureau of Crime Statistics and Research, 2008).
5. A Butler and K McFarlane, *Public Confidence in the NSW Criminal Justice System*, NSW Sentencing Council Monograph 2 (2009).
6. D Indermaur and L Roberts, *Confidence in the Criminal Justice System* Trends and Issues in Crime and Criminal Justice 387 (Australian Institute of Criminology, 2009).
7. D Indermaur and L Roberts, *Confidence in the Criminal Justice System* Trends and Issues in Crime and Criminal Justice 387 (Australian Institute of Criminology, 2009) 2.
8. D Indermaur and L Roberts, *Confidence in the Criminal Justice System* Trends and Issues in Crime and Criminal Justice 387 (Australian Institute of Criminology, 2009) 2, citing J Roberts "Public Confidence in Criminal justice in Canada: A Comparative and Contextual analysis" [2007] *Canadian Journal of Criminology and Criminal Justice* 153, 167.
9. D Indermaur and L Roberts, *Confidence in the Criminal Justice System* Trends and Issues in Crime and Criminal Justice 387 (Australian Institute of Criminology, 2009) 3.
10. C Jones and others, *Public confidence in the New South Wales Criminal Justice System,* Crime and Justice Bulletin 118 (NSW Bureau of Crime Statistics and Research, 2008).
11. C Jones and others, *Public confidence in the New South Wales Criminal Justice System,* Crime and Justice Bulletin 118 (NSW Bureau of Crime Statistics and Research, 2008).

> Based upon jurors' responses from 138 trials, the study found that more than half of the jurors surveyed suggested a more lenient sentence than the trial judge imposed. Moreover, when informed of the sentence, 90 percent of jurors said that the judge's sentence was (very or fairly) appropriate.[12]

12.6 Based on research of this nature, it has been suggested that strategies to improve public knowledge and relationships with the media are important to improving confidence.[13]

12.7 In this paper we will explore the opportunity for the courts to improve levels of public confidence by communicating directly with the public. In doing so, it is important to remember that, whatever changes might be made, the courts must remain independent of private and political influences in order to discharge their functions effectively. As Freiberg has noted:

> A criminal justice system which loses touch with its community risks losing its legitimacy. However, a criminal justice system which attempts to respond to every passing mood, crisis or trauma will soon lose its ability to function as an institution which stands between the state and the individual and whose primary task is to uphold and reinforce the principles of justice.[14]

12.8 One of the keys to public confidence in the courts is the accessibility to members of the public of court processes and decision-making. This increasingly means *online accessibility*. The question is how to improve the online accessibility of the NSW criminal courts and particularly their sentencing decisions. We set out the current position in NSW and then present some ideas based on recent innovations in other jurisdictions.

12.9 NSW courts are online already to some extent:

- daily court lists and details about court locations and procedures are available on a dedicated court website and an online registry website;[15]
- case law, including judgments of the NSW appellate courts and some sentencing remarks in the higher courts, can be found through www.caselaw.nsw.gov.au and other online legal sites such as AustLII;[16] and
- there is an online registry service for NSW courts with plans to expand the registry's services.[17]

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12. K Warner and others, *Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study*, Trends and Issues in Crime and Criminal Justice 407 (Australian Institute of Criminology, 2011) 1.
13. A Butler and K McFarlane, *Public Confidence in the NSW Criminal Justice System*, NSW Sentencing Council Monograph 2 (2009) 29.
14. A Freiberg, *Pathways to Justice: Sentencing Review 2002* (Victorian Department of Justice, 2002) 185.
15. NSW Department of Attorney General and Justice, *Courts and Tribunal Services*, 2012, <www.courts.lawlink.nsw.gov.au>. Victoria has recently introduced an interactive daily court list that can be accessed on smart phones and other mobile devices. The website allows for searches by court, case type, name and time; provides contact information and court locations; and remembers the user's preferences for future logins: Victorian Government, *Victoria Online*, "Victorian Courts Interactive Hearing List", 19 April 2012 <www.vic.gov.au/news-detail/victorian-courts-interactive-hearing-list.html>. Accessibility of NSW courts' websites for smart phones and mobile devices is obviously an important issue for web design.
16. Australian Legal Information Institute website <www.austlii.edu.au>.

12.10 The higher courts in NSW have a Public Information Officer ('PIO') who assists in media enquiries and helps to advise media outlets of suppression orders.[18] The PIO provides a conduit through which reporters can seek and obtain information about court proceedings.

Broadcasting court proceedings

12.11 Under a policy issued by Chief Justice Spigelman in 2009, media outlets may also apply to the PIO to record proceedings electronically. The PIO then refers the request to the presiding judge in the case. Members of the media may apply to make a transmission of the vision and sound of the presiding judge giving remarks on sentence. The footage must be recorded by a single recording device and must be available equally to all media outlets on a 'pooled' basis. Media representatives wishing to record sound or images of anyone else in the courtroom, such as the Crown Prosecutor or defence representative, must first seek the permission of the presiding judge.[19]

12.12 The sentencing of an offender in the NSW Supreme Court was shown live on television and streamed on the Internet for the first time in 2010.[20] The judge's sentencing remarks in two other high profile cases have been electronically recorded by the media, but not shown live.[21]

12.13 The UK Supreme Court has introduced several technological innovations in recent years to communicate directly with the public. Since May 2011, it has been possible to watch a live video stream of its hearings on its own website, or via the website of a dedicated news channel.[22] A press release by the court explained that the court

17. NSW Courts, *Online Registry: Supreme, District and Local Courts* <www.onlineregistry.lawlink.nsw.gov.au/onlineregistry/onlineregistry_aboutus.html>.
18. NSW Supreme Court, *Annual Review 2009*, 32.
19. J Spigelman, "Media Recording of Court Proceedings Policy", 16 December 2009, 1-2. The Attorney General referred to the policy in a media release when he opened a new high-security courtroom in Sydney in May 2012, which includes TV screens outside the courtroom which can be used if the public gallery overflows in high profile cases: G Smith, "High-Security Court Sets New Benchmark" (Media Release, 13 May 2012) 1.
20. A brief extract of the sentencing remarks is available on You Tube, as part of a report by a Sydney commercial television station: <www.youtube.com/watch?v=w1x_RRbkxFw>.
21. "Justice is Seen to be Done, Live", 4 September 2010 <www.watoday.com.au/technology/technology-news/justice-is-seen-to-be-done-live>. One of the cases related to the sentencing of company directors and office holders: see *Australian Securities and Investments Commission v MacDonald and others (No 12)* [2009] NSWSC 714. Brief excerpts of the judge's sentencing remarks were broadcast on ABC TV's "7:30 Report" <www.abc.net.au/7.30/content/2009/s2662307.htm>. As early as 1998, the Federal Court allowed television cameras to broadcast the reasons for judgment at first instance and on appeal in the Patrick Stevedores and Maritime Union of Australia case, as well as allowing cameras to film proceedings in many other cases.
22. Accessible from the UK Supreme Court's homepage <www.supremecourt.gov.uk>. Excerpts of the video streaming from the court were re-broadcast recently on Australian TV in the high profile extradition case of *Assange v Swedish Prosecution Authority* [2012] UKSC 22. Soon after the court's judgment was handed down on 30 May 2012, the court issued a statement on its website explaining the court proceedings immediately after the judgment was announced, namely, that Mr Assange's Counsel could apply to re-open the matter as argument had not been heard by the court on one aspect of its judgment (the interpretation of Vienna Convention on the Law of Treaties): see <www.supremecourt.gov.uk/news/julian-assange-v-swedish-judicial-authority-judgment.html>. Detail such as this could easily be lost in conventional news reporting. It has also been reported that the Missouri Supreme Court allowed a newspaper to broadcast live video

had set up several cameras in each of its courtrooms and that live streams would be available of proceedings. It was anticipated that the video streaming also would include a link to the court's own summary of the issues in that case, to assist viewers by providing some background material when they watched the case.[23] Future sittings are published in advance on the website.[24]

12.14 The International Court of Justice broadcast a live stream of its proceedings on the web as early as 2010 in both official languages of French and English.[25]

12.15 On 1 July 2012, the International Criminal Court launched its own Facebook page and it has videostreaming of its hearings translated into both official languages.[26]

Websites

12.16 A basic but important way to improve the accessibility of sentencing law is to simplify the language of the Act and Regulations and their online presentation.

12.17 In its preliminary submission, the Mental Health Coordinating Council referred to the *Mental Health Act 2007* (NSW) as an example of an Act that is intelligible to the layperson. The Council suggested that it would be useful to have an 'Objects of the Act' "describing the intention of the Parliament in the Act and connecting / directing the user to other pieces of relevant legislation".[27]

12.18 The UK Ministry of Justice has produced a "You Be the Judge Online" website which depicts real cases such as criminal damage and robbery but the participants are played by actors. The website aims to provide an educative role and allows people to compare their judgment on an appropriate sentence to the actual sentence handed down.[28] Similarly, the Victorian Sentencing Advisory Council has a "Virtual You Be the Judge" website.[29]

12.19 The UK Supreme Court offers an email 'sign up' service for judgments on its website[30] and the Court publishes a 'press summary' to accompany its judgments. Each is about two pages long, gives a brief background to the issues in the case,

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streaming of the parties' oral submissions in an appeal as an experiment in 2010: Missouri Press News (April 2010) <www.mopress.com> 18.

23. UK Supreme Court, "'Justice Being Seen to be Done' with Launch of 'Supreme Court TV'" (Press Notice, 06/2011, 16 May 2011) 1.
24. UK Supreme Court, *Court Sittings*, 2012 <www.supremecourt.gov.uk/visiting/sittings.html>.
25. International Court of Justice, Press Release, 14 July 2010 <www.icj-cij.org/docket/files/141/15971.pdf>.
26. International Criminal Court website <www.icc-cpi.int/Menus/ICC>.
27. Mental Health Coordinating Council, *Preliminary Submission PSE09*, 4. See also the *Electronic Transactions Act 2000* (NSW) s 3 and s 4 as another example of clear objectives of an Act and a "simplified outline" provided at the start of an Act to explain its provisions.
28. UK Ministry of Justice, *You Be the Judge*, 2012 <www.ybtj.justice.gov.uk>.
29. Victorian Sentencing Advisory Council, *Virtual You Be the Judge*, 2012 <www.sentencingcouncil.vic.gov.au/page/education/virtual-you-be-judge>.
30. UK Supreme Court, *FAQs* (*Frequency Asked Questions)*, 2012 <www.supremecourt.gov.uk/faqs.html#5i>. The Australian High Court offers an email alert subscription service for advanced notice of judgments, summaries of judgments and its monthly Bulletin: <www.hcourt.gov.au/publications/judgment-summaries/2012-judgment-summaries>.

states the court's decision and summarises the judgments with references to paragraph numbers. There is also a link to the full judgment.

12.20 The NSW Sentencing Council has an educative function and provides information through its website, and through public forums. One option would be for the NSW Sentencing Council to further develop this function, to develop a standalone sentencing website providing further information and to be provided with more resources for public outreach work.

Twitter

12.21 In February 2012 the UK Supreme Court took the further step of launching its own Twitter account, apparently the first superior appellate Court in the world to do so.[31]

12.22 The Court's Twitter policy states, "If you follow this account, you can expect 2-3 tweets a week covering the cases, judgments, and corporate announcements of the Supreme Court". The site is managed by the court's communications team who undertake to read all tweeted comments, but cannot guarantee a reply in every case due to resource constraints. The site stresses that it does not offer legal advice and "will not enter into discussion about published judgments" nor engage in any party political discussion.[32]

12.23 Victorian Chief Justice Warren is considering opening a court Twitter account. She has been quoted as saying on radio that the courts were "getting to the stage where they have had enough of the inappropriate criticism, the skewing of information in the media, and we really need to try and seize the day ourselves and give some information to the community". She added that one option being considered is an anonymous blogging judge who could "reach out to the community".[33]

12.24 Twitter can be an effective way of disseminating short bursts of information – such as the release of a judgment – widely and quickly. However, it is not a means in itself of providing detailed or complex information. Often tweets consist of links to longer material including press releases or websites. A twitter policy may therefore need to be supported by a broader communications policy including court issued short summaries of key judgments. The High Court of Australia currently provides such summaries in key cases. Obviously any communications policy would be a matter for the courts to determine.

12.25 The idea of a courts blog is perhaps more complex. A blog site would provide more detailed information. Often blog sites invite comments; not necessarily appropriate or valuable in relation to a judgment that has been delivered.

12.26 There would need to be appropriate technological support and resources for these ideas to work, for example, making use of the court's information and technology personnel. It is apparent that the UK Supreme Court's emphasis on using

31. "Supreme Court to Tweet Proceedings", *The Telegraph* (UK), 6 February 2012.
32. UK Supreme Court, *Twitter Policy*, February 2012 <www.supremecourt.gov.uk/twitter.policy.html>.
33. "Victorian Courts Look at Tweeting Rulings", *CIO*, 1 September 2011 <www.cio.com.au/article/399317/victorian_courts_look_tweeting_rulings>.

information technology means that they have invested in skilled personnel, but also contracted out for broadcasting services.[34]

Question 12.1

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

Publicity orders and searchable databases

12.27 Part of the criminal law's effectiveness is its ability to denounce criminal conduct to a broad audience. Clearly this requires an effective means of communicating sufficient details of the offence, the offender and the penalty to reach members of the public. An obvious drawback in relying on the traditional media is that it cannot report on more than a fraction of all the cases coming before the courts.

12.28 In a relatively recent innovation, the NSW Food Authority has established a website with a searchable database of penalty notices issued to food providers, including name, suburb and date, details of the offence and a summary of the penalty notice issued by the inspecting authority.[35]

12.29 The concept of a searchable database could be extended more generally to criminal sanctions imposed by the courts.

12.30 In our 2003 report on the sentencing of corporate offenders we observed that corporations and corporate officers generally place a premium on their good reputation. The potential for adverse publicity, and its consequent effects on the prestige of the company and customers' attitudes and spending patterns, may act as a potent deterrent against corporate offences. We noted that:

> Many corporate executives care deeply about avoiding adverse publicity because they view both their personal reputation and that of the corporation as priceless assets.[36]

12.31 One of the sentencing options we discussed was the expansion of "publicity orders" to be available in all sentencing cases involving corporations, building on existing provisions in NSW legislation in the field of environmental protection and occupational health and safety. Publicity orders included "orders designed to inform specific people, groups of people or the community, of details relating to the offender, the offence and the penalty imposed for the offence".[37] These kinds of orders were available historically in the UK, NZ and Australia, and under

34. UK Supreme Court, *Annual Report 2011-12*, 50.

35. NSW Food Authority, *Register of Penalty Notices,* 2012 <www.foodauthority.nsw.gov.au/penalty-notices>. For further detail on the content of the register, see <www.foodauthority.nsw.gov.au/news/offences>. We note that Corrective Services NSW also publishes online the identification details of escapees, including their photographs: Corrective Service NSW, *Information: Escapes and Recaptures*, 2012 <www.correctiveservices.nsw.gov.au/information/escapes-and-recaptures>. The accessibility of this kind of information might be enhanced if it was linked up more effectively to search engines.

36. NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.35]. See also the discussion at [2.38], [3.5]-[3.12], [5.14]-[5.18], [11.4], [14.26].

37. NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [5.17].

contemporary environmental protection legislation in Victoria and SA, and fair trading regulation by the Commonwealth.[38]

Question 12.2

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

Procedural reforms

12.32 We turn now to procedural reforms and look specifically at reducing delays, making use of online courts and reducing the number of appeals.

The problem of delay

12.33 There have been laudable efforts over many years by the judiciary and court administrators to reduce delays at different stages in the sentencing process, but it is quite apparent that there remains a frustrating degree of delay in finalising criminal cases.[39] Data published by the NSW Bureau of Crime Statistics indicate that the median delay in sentencing matters in the District Court increased significantly between 2001 and 2010.

Table 12.1. Median delay (in days) for NSW District Court matters that proceeded to sentence only, 2001 and 2010

Bail status of offender	2001	2010
On bail	126 days	147 days
Bail refused	90 days	135 days

Source: NSW Bureau of Crime Statistics, NSW Criminal Court Statistics (for 2001 and 2010) Tables 3.14 and 3.13, respectively.

12.34 In its preliminary submission, the NSW Office of the Director of Public Prosecutions ('ODPP') summed up its concerns about sentencing delays in this way:

> There is now generally an unacceptable delay of 4 to 6 months between plea or conviction and sentence in the District Court. This has had a significant impact across the criminal justice sector and to members of the community involved in the process. Judges rarely proceed to sentence on the first occasion, ex tempore [oral] judgments are being replaced by lengthy written judgments, extensively citing case law, evidence and written submissions from both parties. Court listing practices have not accommodated the increased duration in proceedings meaning adjournments are granted as the rule rather than the exception. The problems this creates include:

38. NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [5.13], [5.17], [11.17]-[11.18].
39. I Temby, *Preliminary Submission PSE02*, 1; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 2; R Blanch, *Preliminary Submission PSE03*, 1.

- challenges for continuity of legal representation by the prosecution, if continuity cannot be maintained then a matter may be handled by two or three or more lawyers,[40]
- the increases [in] the cost of proceedings for the accused and the community,
- stress, anxiety, inconvenience and expense for victims, particularly those who wish to read victim impact statements in court, and more so where the Court venue changes over time with the Judge moving on circuit. The same considerations apply to the offender and his/her supporters.[41]

12.35 A further issue is that delay may reduce the effectiveness of the criminal justice system as a means of correcting criminal behaviour. In our first question paper we discussed whether the lack of an immediate punishment for a crime limits the criminal law's capacity to deter crime.[42]

Practical procedural possibilities to reduce delay

Online Courts

12.36 In 2011, the NSW Chief Magistrate issued a new Practice Note for the trial of an "Online Court" system which applies to committal proceedings at the Downing Centre Local Court in State prosecution matters that are either strictly indictable or where there could have been an election by one of the parties for the matter to be dealt with on indictment. The system is available only in cases where the defendant is legally represented and the first appearance date was on or after 15 February 2011.[43] The online court model makes use of the *Electronic Transactions Act 2000* (NSW), which allows the Attorney General, by order published on the government's website, to authorise NSW courts to use electronic case management.[44]

12.37 Under this online court system, a Magistrate may invite parties to conduct the proceedings by way of an online court, described as a "virtual courtroom", in which the parties log in and post messages which are treated in the same way as oral submissions in court (and must also use language that is appropriate for an ordinary courtroom). If any aspect of the proceedings is contested, it is to be listed in the physical court. Documents must continue to be filed in the court registry, but can be annexed to the posted messages by way of a pdf electronic copy. The Magistrate can terminate and re-instate the online court in a matter as appropriate and issue instructions on the appropriate length of messages posted in the online court and the time and date by which messages must be posted by the parties. Any person

40. A footnote to this point stated that: "Double handling exposes the process to other problems such as a different approach to the matter, changes to agreed facts, discontent by victims and so on".
41. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 2.
42. NSW Law Reform Commission, *Purposes of Sentencing*, Sentencing Question Paper 1 (2012) [1.40].
43. Local Court of NSW, "Online Court Protocol for Committal Matters at Downing Centre" Practice Note No 1 of 2011.
44. *Electronic Transactions Act 2000* (NSW) sch 1.

may request a printed copy of the online proceedings (in a similar way to persons seeking transcript of proceedings held in open court).[45]

12.38 Depending on the success of this pilot program, clearly there may be potential for its extension to other courts, and also to other aspects of preliminary or procedural mentions in sentencing matters as well. It is conceivable that most preliminary mentions, including the filing and serving of written submissions, could be by way of the Online Court. The model could be expanded to the preliminary proceedings in the higher courts. To maintain transparency and accountability, the sentencing hearing itself and the delivery of remarks on sentence should continue to be in open court, and consideration could be given to having the orders given at each virtual mention uploaded to the court website to be freely available to anyone searching the web. Applications of substance, such as a bail application by a person held in custody, would still be in open court (but could be assisted by making use of audio-visual technology from prison as often occurs already).

12.39 A clear advantage of expanding this online system is that the legislation is already in place that allows the Attorney General to authorise electronic case management by the courts.

Making traditional courts more efficient

12.40 Computer technology can be used in other ways to improve the internal efficiency of traditional courts in the criminal justice system. Some procedural possibilities to reduce delays, both at first instance sentencing and on appeal, that would involve enforcing or revising relevant court Rules and Practice Notes, could include:

- parties, the Registry and the Judge's Associate or Magistrate's Assistant exchanging their email addresses and telephone numbers at the commencement of the proceedings;[46]
- parties and the Registry making a search of the listings database and attempting to bring any of the offender's other outstanding, uncontested matters together to be dealt with in the one sentencing matter, including sentencing for Local Court matters in the higher courts making use of the "Form 1" provisions in s 31-35 of the Act;
- parties emailing written submissions to the court and one another several days before the sentencing date;
- emailing pre-sentence reports covering all sentencing options[47] to the Registry at least two days before the sentence date and the registrar giving clearance for the reports to be forwarded to the parties and the judge or magistrate;
- strictly enforcing (unless the court grants leave) limits on the length of written submissions (for example, 10 pages), the time allowed in court for parties to make oral submissions (for example, a default of 20 minutes for each party and

45. Local Court of NSW, "Online Court Protocol for Committal Matters at Downing Centre" Practice Note No 1 of 2011.

46. Local Court of NSW, "Case management of criminal proceedings in the Local Court " Practice Note Crim 1 (24 April 2012) Annexure A.

47. See para [12.45]-[12.46] in relation to streamlining the process of ordering pre-sentence reports.

five minutes in reply by the applicant/appellant) and a written outline of any oral submissions (for example, three pages);[48]

- parties notifying opponents of an intention to call a witness at the sentence hearing and providing a summary of the anticipated area of evidence, with a view to agreeing that evidence as a fact, or at least securing from the other parties that the tender of the summary would not be objected to so that the witness will not have to attend court);[49] and
- the courts engaging in dedicated case management of all unrepresented matters in a separate list (including appeals), with newly drafted Rules of Court if required, to confine the issues, limit submissions, and limit the use of time and resources by the court and prosecution.

Question 12.3

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

Streamlining the assessment process

12.41 As we foreshadowed in an earlier question paper, sentencing can be delayed by the multi-stage process in seeking pre-sentence reports for the suitability of an offender and the availability of home detention and intensive correction orders ('ICO').[50]

12.42 Courts often follow the practice of asking defence counsel, once a finding of guilt has been made, whether a pre-sentence report should be requested from the Probation and Parole Service. It is common for sentence proceedings to be adjourned for approximately six weeks in order to obtain a pre-sentence report. Sometimes defence will prefer to obtain a psychological or psychiatric report privately in order to present their client's subjective circumstances in a single report, and so a pre-sentence report will not be required. This is more likely to occur when full-time imprisonment is the most likely sentencing outcome.

12.43 While pre-sentence reports generally address the eligibility and suitability of the offender for sentencing options, and may also contain helpful background subjective material (and, in some cases, the offender's version of events in relation to the offence), the first pre-sentence report will not contain any recommendation in relation to home detention or an ICO.[51]

12.44 If the court is considering sentencing the offender to home detention or an ICO, a further assessment report must be requested by the court from the Probation and Parole Service in the case of home detention[52] or the Commissioner of Corrective Services in the case of an ICO.[53] Apart from this separate assessment process, the Act also requires the court to have determined that a sentence of imprisonment is

48. See, eg, *High Court Rules 2004* (Cth) r 41.07, 41.11, 44.08.
49. Using the model for agreeing facts at trial as a precedent: see *Evidence Act 1995* (NSW) s 191.
50. NSW Law Reform Commission, *Intermediate Custodial Sentencing Options,* Sentencing Question Paper 6 (2012) [6.26], [6.42].
51. Legal Online, *Commentaries: Criminal Procedure NSW* [25.1170].
52. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 80-81.
53. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 69-70.

appropriate before it seeks either of these reports[54] and the court is precluded from seeking a home detention assessment for an offence if it has already sought an ICO assessment unless it has determined not to impose an ICO.[55] The potential for delays and frustration to enter the sentencing process are obvious.

12.45 An improved and streamlined assessment process could involve the court requesting a single pre-sentence assessment report from one government agency that addresses the offender's eligibility and suitability for all of the sentencing options. For example, supervision suitability reports are being piloted in South Australia with the aim of providing information based on an offender's risks and needs so that a court can better tailor the conditions of a community based order and identify the time required to comply with those conditions.[56]

12.46 An improved and streamlined assessment process would obviously be advantageous for the court and has the potential to speed up the sentencing process. However, there may be practical difficulties and it may place onerous duties on the government agency responsible for the reports.

Question 12.4

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

Reducing appeals

12.47 Despite the criticisms of the complexity of the Act, the number of sentence appeals to the NSW Court of Criminal Appeal ('CCA') has declined steadily since about 2001/02.[57] The question remains, however, whether the number of appeals could be reduced still further.

Legislative support for oral sentencing remarks

12.48 It is an essential part of sentencing law that adequate reasons be given for every sentence that is imposed on an offender by a court. Considerable amounts of time are spent particularly in the higher courts not only to explain the reasons for the sentence to the parties but also in case of appeal. Given the complexity of the sentencing law, there is a risk, however, that too much time may be taken in writing long sentencing remarks. The Chief Judge of the District Court commented in his preliminary submission that judges are "taking more time to impose sentences than is desirable" because sentencing law has become too complicated and technical arguments are being run on appeal.[58]

54. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 69(2), 80(1).
55. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 80(1A).
56. South Australia, Attorney-General's Department, *South Australian Government Response to Smart Justice* (2012) 17.
57. NSW Law Reform Commission, *Factors to be Taken into Account on Sentence*, Sentencing Question Paper 3 (2012) Annexure 4, charts 1-3.
58. R O Blanch, *Preliminary Submission PSE03*, 1.

12.49 One idea to reduce both sentencing delays and appeals would be to amend the Act to encourage courts to give oral rather than written reasons for sentences – that is, once any preliminary mentions have taken place (for example, to order a pre-sentence report) and the parties have finished presenting their evidence and making submissions to the court on an appropriate sentence, the court immediately gives its reasons for the sentence and imposes the sentence, avoiding the need for a further adjournment to prepare detailed and sometimes very lengthy written reasons. The court could have regard to the level of detail already provided in the parties' written and/or oral submissions and agreed statements of facts and would not need to offer an in depth analysis of the relevant sentencing principles.

12.50 As a protection, the Act would provide that the fact that a judgment was given orally must be taken into account on appeal if it was suggested by either party that there was an appellable error. Obviously, there would continue to be a need for the court to record the relevant findings it had made and to provide sufficient detail to explain its reasons for imposing the sentence, so that the appellate court can review the decision if it is appealed, but excessive subtlety and unnecessary discussion of the legal principles could be avoided. As the High Court has observed recently in the context of the standard non-parole period scheme in the Act, the full statement of reasons for a sentence assists appellate review, promotes consistency in sentencing and may also increase public awareness of the sentencing process.[59] But the focus of sentencing in the usual case should be on the application of the law to the case at hand and an explanation by the court of the particular reasons for its decision in that case.

12.51 Appropriate legislative protection for these sentences would enable courts to spend more court time on resolving any issues of fact, applying the sentencing law to the facts and explaining their reasoning, rather than spending time drafting lengthy reasons to protect their judgments from technicalities on appeal.[60]

Question 12.5

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

Changes to appellate jurisdictions?

12.52 We have received preliminary submissions suggesting that changes should be made to the tests applied on sentence appeals and it will be helpful if we briefly explain some of the law surrounding sentence appeals in NSW.

12.53 To succeed on an appeal against the sentence imposed by one of the higher courts, the applicant must demonstrate to the Court of Criminal Appeal ('CCA') that there has been an *error* made in the sentence, applying the principles of *House v The King*.[61] In an offender's appeal against sentence, he or she must further demonstrate that a lesser sentence was warranted in law and should have been

59. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [30].
60. We discuss the option of introducing specialist criminal judges at para [12.68]-[12.74].
61. *House v The King* (1936) 55 CLR 499, 505.

passed.[62] In a Crown (or prosecution) appeal against sentence, the Crown must further persuade the CCA to intervene notwithstanding the significant discretionary restrictions placed on Crown appeals, in particular that the offender may suffer the "double jeopardy" of possibly being sentenced for a second time for the same offence and receiving a more severe sentence.[63] Thus the court's sentencing discretion at first instance is protected and it is not open to the CCA simply to substitute its opinion of a more appropriate sentence. The CCA must take into account the correct legal principles before it can change the sentence.

12.54 The initial focus in these sentence appeals, therefore, is in identifying a relevant error in the sentence and much of the work of the CCA and the parties revolves around detailed analysis of the proceedings and sentencing remarks. Errors can be categorised as *patent*, that is, obvious on reading the transcript, or *latent*, that is, they are not obvious but nonetheless it can be concluded that an error must have occurred because the sentence itself is unreasonable or plainly unjust, and, as a result, can be described as "manifestly excessive" if it is too severe, or "manifestly inadequate" if it is too lenient.[64]

12.55 By contrast, if it is an appeal against the sentence imposed by the Local Court of NSW, there is no need to demonstrate error. The provisions of the *Crimes (Appeal and Review) Act 2001* (NSW) govern such an appeal and the appellate court (in this case, the District Court) may substitute a different sentence without the need for an error in the Local Court's exercise of sentencing discretion.

12.56 Both the Chief Judge of the District Court and the Chief Magistrate of the Local Court ideally would like to see scope for sentence appeals from their courts reduced significantly by changing the tests that are applied on appeal from their courts.

12.57 The Chief Judge would like a single test to apply on appeal from the District Court to the CCA, namely, is the sentence manifestly excessive or manifestly inadequate?[65]

12.58 The Chief Magistrate, beginning from the present position that error must be shown in the sentence in an appeal from the District Court to the CCA, argues that there should be a requirement that error be shown in a sentence on appeal from the Local Court to the District Court, rather than the present situation in which the District Court reviews any sentence that is appealed to it under the *Crimes (Appeal and Review) Act 2001* (NSW) and substitutes a different sentence if it sees fit. The Chief Magistrate argued 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".[66]

12.59 A requirement for error to be shown in appeals from the Local Court to the District Court could be based on the currently existing requirements for appeals from the

62. *Criminal Appeal Act 1912* (NSW) s 6(3).
63. See *Green v The Queen* [2011] HCA 49.
64. *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 [25].
65. R O Blanch, *Preliminary Submission PSE03*, 3.
66. G Henson, *Preliminary Submission PSE 05*, 5-6; see also NSW Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 7 which suggested that manifest inadequacy or excessiveness should be a threshold test and then error may be considered.

District Court to the CCA, or it could be further restricted by confining appeals to cases of error where sentences can be shown to be manifestly excessive or manifestly inadequate. Appeals from the District Court to the CCA could be similarly restricted. This would remove the possibility of appeals being based solely on the grounds of specific or "patent" error, such as acting upon a wrong principle, allowing extraneous or irrelevant matters to guide the court, mistakes of fact, or failure to take into account some material consideration.[67] While each of these grounds of specific error may be the underlying cause of a manifestly excessive or manifestly inadequate sentence, resulting in a latent error, they would not, of themselves, be grounds for allowing an appeal unless the resulting sentence is shown to be either manifestly inadequate or manifestly excessive.

12.60 Such an approach to appeals, which looks only for latent error, could potentially reduce the number of appeals, thereby saving resources. However, it could also lead to courts producing judgments that do not adequately identify the processes by which they determine sentences. Such an outcome would be contrary to the objective of ensuring transparency and could reduce the ability of the appellate courts to provide direction on sentencing principles. On the other hand, a requirement for specific error to be shown in appeals from the Local Court to the District Court could result in a need for more complex or detailed judgments from magistrates with a consequent adverse impact on the efficiency of the Local Court.[68]

Greater emphasis on s 43

12.61 An alternative approach, which was also suggested by the ODPP in their preliminary submission,[69] would be to place greater emphasis on the existing provision in the Act for the court at first instance to correct an error. Section 43 provides that a court may re-open proceedings on its own motion or on the application of one of the parties to correct a penalty that was contrary to law, or to impose a penalty that is required to be imposed by law if it had failed to do so. The section has been interpreted to mean that the court has power to re-open proceedings and correct errors without the need for an appeal.[70] In practice, however, the section is not always used as a first step, as the likelihood of persuading the court that its sentence is unreasonable or plainly unjust is low, and the parties prefer to seek redress from the appellate court. In practice, the focus on lodging an appeal rather than using s 43 means that many patent errors are not corrected by the first court (for example, properly backdating the sentence for pre-sentence custody if it has been overlooked). In its preliminary submission, the ODPP suggested that:

67. *Carroll v The Queen* [2009] HCA 13 [8].
68. See R O Blanch, *Preliminary Submission PSE03*, 3.
69. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 7.
70. See the case law cited in *Erceg v The District Court of NSW* [2003] NSWCA 379; 143 A Crim R 455 [102]-[109]. See also *Meakin v DPP* [2011] NSWCA 374.

> there be an expansion or clarification of the circumstances where [s 43] applies – making it clear that you can apply to the court any time before the sentence expires [which] may reduce [the] number of appeals.[71]

12.62 One possibility to increase the use of s 43 would be to tighten the availability of a sentence appeal to the District Court or CCA unless steps were taken first to make use of s 43 if possible. For example, before an appeal could be listed for hearing by the Registrar of the appellate court, an applicant would have to demonstrate what steps have been taken to have the alleged error or errors corrected by the sentencing court, or to explain why s 43 does not assist in the circumstances of the case.

Determining appeals 'on the papers'

12.63 Another possibility to improve the capacity of the appellate court to deal more efficiently with appeals would be to allow it, if both parties agreed, to determine the appeal 'on the papers' in chambers without the need for a hearing. This occurred recently in the CCA when a party contended that the Court had not fully determined the grounds of appeal and asked the Court to set aside its earlier orders. In one appeal, the CCA did so after considering the parties' written submissions and there was no need for a further hearing.[72] In another case, the court determined on the papers that it would not re-open the appeal.[73]

12.64 For appeals that do not involve any new or significant points of law, this might become the norm rather than the exception. The relevant forms initiating the appeal process could be amended to ask whether the parties consider that it is necessary that there be a hearing and consent to the appeal being determined on the papers. Judgment could still be delivered in open court and be accessible to the public in the usual way. This may reduce the pressure on court listings and resources and be attractive particularly to offenders as it would tend to reduce the time they must wait before receiving a hearing date for the appeal.

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)?

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?

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

71. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 7.

72. *Baghdadi v The Queen (No 2)* [2012] NSWCCA 77. See the headnote which records the hearing date as "On papers" and [1]-[5] for the procedural background.

73. *TWL v The Queen (No 2)* [2012] NSWCCA 93.

Bottlenecks

12.65 At present the ODPP faces barriers in its attempts to settle matters, often involving multiple counts, which have been committed from the Local Court to the higher courts, generally for trial but sometimes for sentence. The ODPP must consult with the police officer-in-charge and victims or their relatives as appropriate, review and finalise the appropriate charges, prepare agreed facts if possible or prepare for contested hearings on sentence ('disputed facts hearings'), as well as attend preliminary mentions and the sentence hearings (or alternatively, prepare for trial if the matter will not settle into a plea). The ODPP has established a Pre-Trial Unit ('PTU') to deal with some of these issues, but the problem of adequate resourcing remains. Less senior solicitors in the ODPP who are given carriage of these new matters in the higher courts lack the delegated authority to settle the counts on an indictment, or to finalise the charges on Court Attendance Notices if it is a committal for sentence,[74] and so progress in the matter may be stalled until a Crown Prosecutor can be allocated to the brief to prepare it in more detail. Sometimes this only occurs shortly before the trial date.

12.66 An attempt was made to encourage earlier pleas of guilty with the *Criminal Case Conferencing Trial Act 2008* (NSW), including procedural requirements for the prosecution and defence to attempt to resolve charges before committal and also by codifying the discounts available for guilty pleas entered before or after committal from the Local Court. However, the codification of the discounts was complicated[75] and the pilot program has now been repealed.[76] The evaluation of the pilot found only very weak evidence of a reduction in committal for trial (which was the main aim).[77] Resources were allocated to this pilot to enable early involvement of the ODPP, but funding was withdrawn following the unfavourable evaluation.[78] The reasons for the failure of the pilot are not entirely clear. The BOCSAR evaluation suggests a number of possibilities including inconsistent implementation.[79]

12.67 If there is going to be a guilty plea in a matter, clearly it is preferable that it be entered at the earliest opportunity, that is to say, in the Local Court, rather than after committal to the higher courts. The Law Society of NSW has submitted that "emphasis should be placed on funding for the Office of the Director of Public Prosecutions so that Crown Prosecutors can be briefed early".[80] Given the experience of the conferencing pilot, it is not entirely clear that resourcing is the only issue, or whether additional resourcing early in the process would produce efficiencies later. Nonetheless, it would appear worthwhile to consider whether there

74. See NSW Office of the Director of Public Prosecutions, *Prosecution Guidelines*, Guideline 20.
75. NSW Law Reform Commission, *Other Discounting Factors*, Sentencing Question Paper 4 (2012) [4.15]-[4.23].
76. *Criminal Case Conferencing Trial Repeal Act 2012* (NSW).
77. W Y Wan, C Jones, S Moffatt and D Weatherburn, *The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court*, Bureau Brief 44 (NSW Bureau of Crime Statistics and Research, 2010).
78. NSW, *Parliamentary Debates*, Legislative Council, 16 February 2012, 8401
79. W Y Wan, C Jones, S Moffatt and D Weatherburn, *The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court*, Bureau Brief 44 (NSW Bureau of Crime Statistics and Research, 2010) 8; NSW, *Parliamentary Debates*, Legislative Council, 16 February 2012, 8401-8402.
80. Law Society of NSW, *Preliminary Submission PSE08*, 8.

are ways of overcoming bottlenecks in the trial process that may encourage early appropriate guilty pleas, and may enable committal for sentence to proceed as swiftly as possible.

Question 12.7

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

Jurisdictional reforms

Specialist judges or a specialist criminal jurisdiction

12.68 One of the ongoing criticisms of the Act is that its interpretation has created too much complexity and is too time consuming, particularly for judges seeking to apply standard minimum non-parole periods, but more generally under provisions such as s 21A which contains a long list of 'aggravating' and 'mitigating' factors.[81]

12.69 We are considering possible reforms to the individual sections of the Act, but a wider issue is whether specialist criminal law judges or a specialist criminal jurisdiction would improve the transparency and consistency of sentencing. The ODPP suggested in its preliminary submission that the use of specialist judges may reduce the number of errors made in sentencing.[82] Justice McClellan has referred to the difficulties that face newly-appointed judges, some of whom have little experience in criminal matters, when they confront the burden of sentencing offenders.[83] As his Honour observed, "an experienced judge, particularly one with access to colleagues constantly involved in the sentencing process and the benefit of exchanges in an appellate court, may find the task less burdensome".[84]

12.70 The protocol in place for the appointment of judges to the higher courts and of magistrates includes a list of personal and professional selection criteria which have been approved by the Attorney General. The criteria include a "high level of professional expertise and ability in the area(s) of professional specialisation". However, the criteria do not seem to require specialisation by the candidate in a particular area, such as sentencing, for a judicial appointment to be made.[85]

12.71 In the context of reducing the likelihood of sentencing errors being made, the NSW Sentencing Council discussed the possibility of specialist judges hearing criminal matters as part of its 2011 background report on standard minimum non-parole periods. Without expressing a view on such proposals, the Council observed:

81. NSW Law Reform Commission, *Factors to be Taken into Account on Sentence*, Sentencing Question Paper 3 (2012).
82. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 7.
83. *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 [263]-[266].
84. *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 [263].
85. NSW Department of Attorney General and Justice, "Careers for Judicial and Other Statutory Officers", 2012 <www.lawlink.nsw.gov.au/lawlink/corporate/ll_corporate.nsf/pages/LL_Homepage_career_ appointment>.

> Specialised jurisdictions have been suggested in the past. For example, in its 1998 report, *Access to Justice*, the NSW Law Society suggested the establishment of a single superior trial court, which would have specialised divisions and combine the jurisdiction of the District and Supreme Courts of NSW, handling all matters above the Local Court's jurisdictional limit.
>
> There are arguments for and against introducing a specialist criminal trial court system that would assign cases for trial by judges of the District and Supreme Courts, depending on their seriousness and public interest significance. The Council takes no position on such a structure, other than to say that 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 specialised knowledge and experience in the criminal courts.[86]

12.72 The Australian Law Reform Commission recommended that one option to introduce specialisation in relation to Federal offences would be for:

> state and territory courts [to] consider implementing some degree of specialisation in hearing and determining federal criminal matters where this is practicable having regard to the nature and volume of the court's caseload. This may include the setting aside of particular days, or parts of a day, to hear all federal matters together; or the establishment of specialist panels of judicial officers to deal with federal criminal matters.[87]

12.73 Arguments in favour of the proposal for specialist criminal judges or a special criminal jurisdiction include that specialist judges may sentence offenders in a more consistent manner, deliver sentences more quickly and be less likely to reserve their remarks on sentence, and that appeals may be reduced. Specialist judges would not be rostered in and out of the civil jurisdiction at regular intervals. This could speed up the finalisation of the matters and ease the practical difficulties for the continuity of legal representation as well as anxiety for offenders and victims (and the relatives of each).

12.74 On the other hand, the common law courts traditionally have had generalist jurisdictions and, arguably, the proposal for specialisation is not necessary provided that sufficient support and training is available to judges,[88] for example, through the Judicial Commission, and/or provided that sufficiently experienced judges are allocated to hear criminal matters in each jurisdiction. Changing the criminal jurisdiction may also have wider implications on the administration of the courts' civil jurisdiction and resource allocation.

Question 12.8

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

86. NSW Sentencing Council, *Standard Non-parole Periods: A Background Report*, 2011 [4.70]-[4.71].
87. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [18.6] and rec 18-1.
88. See discussion of submissions received in relation to Federal offences by the Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [18.9]-[18.16].

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?

Guideline judgment systems involving the community

12.75 Earlier we discussed the importance of the courts taking account of public views on sentencing issues. At common law, the community's view of the seriousness of a crime is reflected in the maximum penalty for the offence fixed by Parliament, as well as any changes made to the maximum penalty. Judges also take into account the community's views about sentencing from their own experiences and knowledge of human life.[89]

12.76 Guideline judgments are an existing means for an appellate court to distil its collective wisdom about appropriate sentencing standards, inclusive of community views about the seriousness of the offence, for the guidance of the courts. In NSW, guideline judgments can be issued by the CCA of its own motion or on the application of the Attorney General.[90] Between 1999 and 2004, a total of seven guideline judgments were issued. However, the scope for further judgments was curtailed by the introduction of the standard non-parole period scheme in 2003 and its subsequent expansion to cover further offence categories.

12.77 There is an opportunity to consider whether the current guideline judgment system can be strengthened in any way and we will discuss two broad possibilities: a comprehensive guideline judgment system drawn up by an independent body; or the strengthening of the current system by a variety of amendments.

Option A: Comprehensive guideline judgments in England and Wales

12.78 The ODPP drew attention in its preliminary submission to the comprehensive sentencing guidelines model in England and Wales.[91] The Sentencing Council of England and Wales is an independent, non-departmental public body and has been given the role of engaging in public consultation and drawing up definitive sentencing guidelines taking into account expert and community views on appropriate sentences.[92] The courts are then required to apply the comprehensive

89. R N Howie and P A Johnson, *Criminal Practice and Procedure NSW* (LexisNexis Butterworths, 2012) [5-s 21.1]; *House v The Queen* [2005] NSWCCA 88 [17].

90. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 4.

91. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 5-6.

92. *Coroners and Justice Act 2009* (UK) pt 4; see also <www.sentencingcouncil.judiciary.gov.uk/about-us.htm>.

guidelines published by the Council, unless in the individual case it is contrary to the interests of justice to do so.[93]

12.79 The Sentencing Council summarises its functions in this way:

> **Functions**
> The Sentencing Council has responsibility for:
>
> - developing sentencing guidelines and monitoring their use;
> - assessing the impact of guidelines on sentencing practice. It may also be required to consider the impact of policy and legislative proposals relating to sentencing, when requested by the Government; and
> - promoting awareness amongst the public regarding the realities of sentencing and publishing information regarding sentencing practice in Magistrates' and Crown courts.
>
> **Additional functions**
> In addition to the functions above, the Council must:
>
> - consider the impact of sentencing decisions on victims;
> - monitor the application of the guidelines, better to predict the effect of them; and
> - play a greater part in promoting understanding of, and increasing public confidence in, sentencing and the criminal justice system.[94]

12.80 As at 1 June 2012, the Council has published 21 definitive guidelines which can be downloaded from its website.[95] The guidelines range from being offence-specific, such as for assault, attempted murder, burglary, causing death by dangerous driving, drug offences, robbery, fraud, sexual offences, theft and burglary; to providing guidance for jurisdictions such as the Magistrates Court; to providing overarching guidance for the sentencing of offences committed against children and domestic violence offences, sentencing youths and discounts for guilty pleas.

12.81 The Sentencing Council for England and Wales has a budget of approximately £1.439 million,[96] and is constituted by eight judicial members and six non-judicial members having specialised experience in relevant disciplines.[97]

12.82 In its favour, a comprehensive guideline judgments system may create a neutral, expert and apolitical process for giving courts guidance on sentencing. Arguably it could foster a greater degree of public legitimacy for the standards ultimately adopted. An independent body that was appropriately resourced and constituted could be a suitable, politically independent body to draw up comprehensive

93. *Coroners and Justice Act 2009* (UK) s 125(1).
94. Sentencing Council for England and Wales, "About the Sentencing Council", 2012 <www.sentencingcouncil.judiciary.gov.uk/about-us.htm>.
95. Sentencing Council, for England and Wales, "Guidelines to Download", 2012 <www.sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm>.
96. Sentencing Council for England and Wales, *Annual Report 2010/11*, 31.
97. *Coroners and Justice Act 2009* (Eng) sch 15.

sentencing guidelines in consultation with the public, taking into account sentencing law, statistics, judicial, expert and community views.

12.83 A potential argument against the England and Wales model is that the courts may be resistant to yet another external body determining 'appropriate' sentencing standards and it could be seen as yet another intrusion on judicial independence.

12.84 To some extent, this seems to have been overcome in England and Wales by a majority of the Sentencing Council being comprised of serving judicial officers drawn from different levels of the court hierarchy. However, in Australia there are potential conflicts with Chapter III of the *Constitution* (Cth) in the appointment of judicial officers to quasi- or non-judicial bodies and, perhaps even more importantly, in a quasi- or non-judicial body other than Parliament having binding authority over the courts on what sentencing standard to apply in a given case.

Option B: Enhance the current guideline judgment system

12.85 An alternative approach would be to maintain the current NSW guideline judgment system, but strengthen it by broadening the type of information that should be considered by the CCA, with a view to including more directly the community's views on appropriate sentencing standards, and giving greater scope for other parties to apply for a guideline.

12.86 For example, the Act could be amended so that as part of the guideline judgment process the CCA would seek a preliminary report from a specialist body with research expertise, such as the NSW Sentencing Council which could undertake public consultations and provide the Court with an expert report summarising public views and presenting statistical data on current sentencing standards for a particular offence, the frequency of the offence, public views on sentencing standards for the offence, approaches in other jurisdictions and so on. That preliminary report would be circulated to the parties in the case so that they could make submissions on the report to the CCA. The CCA would then determine the guideline taking into account the report, the parties' submissions and any other relevant information, in the usual way.

12.87 This model may avoid possible constitutional problems. It would make the process less burdensome for the court and the parties. The process of an independent agency undertaking public consultations as part of preparing its report could acknowledge and take into account public views and arguably give greater public legitimacy to the sentencing standards adopted in the guideline.

12.88 It would be consistent with the former Queensland system in which the Court of Appeal was required to notify the Queensland Sentencing Advisory Council (now disbanded) of its intention to promulgate a guideline and to consider the Council's written views provided they were submitted within a reasonable timeframe.[98]

98. *Penalties and Sentences Act 1992* (Qld) s 15AH. Exceptions were allowed in cases such as where consultation with the Council would have produced an unjust delay to an offender who was a party to the proceedings.

12.89 However, the model may delay the process of developing guideline judgments. It may foster unrealistic expectations among some members of the public about the sentencing standards that ought to be imposed by the CCA. It would not be necessary in every case to engage independent agencies because some guidelines relate exclusively to matters of procedure and do not involve the setting of numerical guides.

12.90 Another possibility to strengthen the current system is that parties other than the Attorney General might be allowed to apply for a guideline.[99] For example, the Director of Public Prosecutions and the Senior Public Defender could be permitted to make an application for a guideline (as is the case in Queensland[100]), either individually or on a joint basis, being able in the latter case to make differing submissions on the details of the proposed guideline.

12.91 This may make the guideline judgment system more dynamic and responsive to the practical issues that regularly arise. However, it could also lead to the CCA being overloaded with applications, adding to delay, complexity and uncertainty of sentencing. A restriction, such as the leave of the court, might need consideration.

12.92 In Western Australia, the Chief Magistrate has the power to publish guidelines for courts of summary jurisdiction "for the purpose of reducing any disparity in sentences". The guidelines are not binding and may include guidance on assessing the seriousness of offences, the sentencing process, when it may be appropriate to impose particular sentencing options and suggestions as to appropriate sentencing for particular offences or classes of offences.[101]

12.93 In NSW, there is no similar statutory power for the Chief Magistrate. The guideline judgments issued by the CCA since 1999 generally have focussed on sentencing in the higher courts. However, its guideline judgment for driving with a high range prescribed concentration of alcohol ('PCA') is particularly relevant to sentencing in the Local Court.[102] The former NSW Director of Public Prosecutions has observed that the PCA guideline judgment "has been very useful in bringing a greater degree of consistency in sentencing into being" and assisted when determining whether there should be a prosecution appeal against the sentence imposed by the Local Court in a PCA matter.[103]

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99. The CCA may give a guideline of its own motion or on the application of the Attorney General: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37, s 37A.

100. *Penalties and Sentences Act 1992* (Qld) s 15AE(1). On appeal, an offender may apply to the court for a review of a guideline under s 15AE(3). In Victoria, the Court of Appeal has a discretion to give or review guidelines on the application of one of the parties: *Sentencing Act* 1991 (Vic) s 6AB(1).

101. *Sentencing Act 1995* (WA) s 143A, inserted by the *Sentencing Legislation Amendment and Repeal Act 1999* (WA). The Court of Appeal also has the power to issue guidelines under s 143, but, unlike NSW, it appears that guidelines have not been issued in WA.

102. *Attorney-General's Application under s 37 Crimes (Sentencing Procedure) Act (No 3 of 2002)* [2004] NSWCCA 303; 61 NSWLR 305.

103. N Cowdery, "Guideline Judgments: It Seemed Like a Good Idea at the Time" (Speech delivered at the International Society for the Reform of Criminal Law, Twentieth International Conference, Brisbane, 4 July 2006) 15.

Question 12.9

1. Should the comprehensive guideline judgment system in England and Wales be adopted in NSW?
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?
   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?
3. Should the Chief Magistrate have the power to issue guideline judgments for the Local Court? If so, what procedures should apply?

Sentence indication scheme with a guideline judgment

Background

12.94 The NSW Bar Association, the Law Society of NSW and the ODPP, in their preliminary submissions, all favour revisiting the possibility of a sentence indication scheme.[104]

12.95 Under this model, an accused person can seek an indication from the court of the sentence he or she would be likely to receive on a plea of guilty to the offence.

12.96 A sentence indication pilot scheme was in operation in NSW from 1993 until it became discredited and was discontinued in 1996. It was introduced in the District Court in Western Sydney and gradually spread to all District Court sittings in NSW. It was intended to "attract more frequent and earlier guilty pleas",[105] but a major difficulty was that sentence indications from some judges in the District Court became so lenient that a significant number of accused persons did not enter guilty pleas in the Local Court and instead withheld their pleas in the hope of obtaining a favourable sentence indication in the District Court. The Bar Association has observed that part of the problem was "the selection of particular judges allocated the task of sentence indication".[106] It has also been observed that:

> The late Paul Byrne SC, a noted defence barrister in NSW, was a harsh critic of the scheme. He observed that "generous and attractive" sentence indications soon resulted in fewer pleas in the Local Court and a backlog of cases in the District Court.

104. NSW Bar Association, *Preliminary Submission PSE04*, 1; Law Society of NSW, *Preliminary Submission PSE08*, 8; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 7.
105. D Weatherburn, *Sentence Disparity and its Impact on the NSW District Criminal Court* (NSW Bureau of Crime Statistics and Research, 1994) 15.
106. NSW Bar Association Criminal Justice Reform Submission, 4, annexed to Jumbunna Indigenous House of Learning, *Preliminary Submission PSE15*.

> An even more serious failing in his view was that the scheme "facilitates 'judge shopping'." This was a point echoed by Weatherburn who remarked that defendants may have believed that they had a better chance of obtaining a sizeable discount by maintaining their not guilty plea "until listed before the 'right' judge in the District Court".[107]

12.97 The Bar Association has suggested that a possible solution would be to consider applying for a CCA guideline judgment which could guide the operation of the sentence indication scheme, in a similar way to the *Goodyear* model in England and Wales.[108]

The Goodyear model in England and Wales

12.98 In *R v Goodyear*,[109] the English Court of Appeal (Criminal Division) established guidelines for courts in relation to sentence indications. The Bar Association has helpfully summarised the guidelines:

> (i) The judge should only give an indication where one has been sought by the accused. However, the judge may remind the defence advocate that the accused is entitled to seek an indication. Guidance is given to defence lawyers regarding their ethical responsibilities;
>
> (ii) It would normally be sought at the plea and case management hearing (although it may be sought at a later stage);
>
> (iii) The judge has an unfettered discretion to refuse to give an indication (guidance is provided on circumstances where it would not be appropriate) or to postpone giving one (until, for example, more information is available);
>
> (iv) An indication should not be sought on the basis of hypothetical facts but on agreed facts in writing;
>
> (v) Guidance is provided regarding the approach of the prosecution to indications;
>
> (vi) Any indication 'should normally be confined to the maximum sentence [that would be imposed] if a plea of guilty were tendered at the stage at which the indication is sought';
>
> (vii) Once an indication has been given, it is binding and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case. However, if, after a reasonable opportunity to consider his or her position in the light of the indication, the accused does not plead guilty, the indication will cease to have effect;
>
> (viii) Any reference to a request for an indication, or the circumstances in which it was sought, would be inadmissible in any subsequent trial;

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107. S Thomson, *Crown Appeals Against Inadequacy of Sentence in New South Wales* (PhD Thesis, UNSW, 2010) 262, citing P Byrne, "Sentence Indication Hearings in New South Wales" (1995) 19 *Criminal Law Journal* 209, 213-214, 220, and D Weatherburn, *Sentence Disparity and its Impact on the NSW District Criminal Court* (NSW Bureau of Crime Statistics and Research, 1994) 15. See also Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [15.6].
108. NSW Bar Association Criminal Justice Reform Submission, annexed to Jumbunna Indigenous House of Learning, *Preliminary Submission PSE15*.
109. *R v Goodyear* [2005] EWCA Crim 888.

(ix) The procedure would not affect the right of the accused or the Crown to appeal against sentence.[110]

Other jurisdictions

12.99 The Australian Law Reform Commission has noted that there is a variety of sentence indication schemes in other jurisdictions such as Victoria, Tasmania, ACT and New Zealand. Generally, they are limited to an indication of whether or not the sentence would be custodial.[111] However, the NZ model includes sentence indications which can include sentence types, a sentence range or a particular quantum of penalty. Notably, the scheme is available in the lower courts, building on the pre-existing sentence indication component of the 'status hearing' system in the lower courts, which was designed to encourage appropriate pleas of guilty at the earliest possible stage in the proceedings.[112]

12.100 This raises the broader issue of whether any re-introduction of a sentence indication scheme in NSW should be extended to the Local Court to encourage early pleas of guilty at the earliest possible time in matters to be dealt with summarily, or whether perhaps it ought even to begin in the Local Court as a pilot scheme.

Arguments for and against sentence indications

12.101 The Bar Association argued that a sentence indication scheme has "obvious potential benefits":

(i) It would permit the accused to make a better informed decision whether to plead guilty, or not;

(ii) It may result in more guilty pleas, with a consequent reduction in the number of trials; and

(iii) If the sentence indication is provided well in advance of trial, it may result in more early guilty pleas.[113]

12.102 Moreover, the misuse of sentence indications could be guarded against by a guideline judgment.

12.103 Against this, the Bar Association recognised that there is a potential problem of the creation or appearance of judicial pressure on the accused person to plead guilty.[114]

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110. NSW Bar Association Criminal Justice Reform Submission, 4, annexed to Jumbunna Indigenous House of Learning, *Preliminary Submission PSE15* [omitting paragraph references from the judgment].

111. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [15.7]-[15.8] which recommended the introduction of a sentence indication scheme for Federal offenders, but the "indication should be limited to the choice of sentencing option and a general indication of severity or sentencing range": rec 15-1. See also NSW Bar Association Criminal Justice Reform Submission, 4, annexed to Jumbunna Indigenous House of Learning, *Preliminary Submission PSE15*.

112. *Criminal Procedure Act 2011* (NZ) pt 3.4; NZ Ministry of Justice and Law Commission, *Status Hearing Evaluation: A New Zealand Study of Pre-trial Hearings in Criminal Cases* (2004) [8.4].

113. NSW Bar Association Criminal Justice Reform Submission, 3, annexed to Jumbunna Indigenous House of Learning, *Preliminary Submission PSE15*.

114. NSW Bar Association Criminal Justice Reform Submission, 4, annexed to Jumbunna Indigenous House of Learning, *Preliminary Submission PSE15*.

Accused persons may also be influenced in their pleas by a range of factors, including family pressure or simply the reality of having to deal with a court situation and advice from Counsel. A sentencing indication scheme may carry with it an added risk of inappropriate pleas of guilty.

12.104 We also note that an accused person who does not enter a plea of guilty until after committal for trial cannot generally expect to receive the same discount on sentence for the plea, because some of the utilitarian value of an early plea of guilty would have evaporated by that time.[115] Any sentence indication scheme in the higher courts would have to recognise that principle or it would undermine early pleas in the Local Court, which was the same failing of the previous system in NSW. If a guideline judgment was sought to guide the operation of the scheme, time would need to be allowed for that guideline judgment to be issued and the details of the guideline may not necessarily be as anticipated. This suggests the need to formally review the operation of whatever form of the model might be introduced after a specified period of time.

12.105 There is also the issue of adequate resourcing for the prosecution and defence to prepare for sentence indication hearings, particularly if the *Goodyear* model was adopted and agreed facts had to be settled for the sentence indication hearing. As discussed earlier, at present there is a challenge for the ODPP to find adequate resources for senior Crown Prosecutors to review matters with a view to commencing or concluding plea negotiations. The sentence indication scheme might be a good way of trialling the use of additional resources at plea negotiation stage for the ODPP and the Legal Aid Commission, with a view to settling cases much more quickly before or after they have been committed for trial or sentence.

Question 12.10

1. Should a sentence indication scheme be reintroduced in NSW?
2. If so, should it apply in all criminal courts or should it be limited to the Local Court or the higher courts?
3. Should a guideline judgment be sought from the Court of Criminal Appeal to guide the operation of the scheme?
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 role of victims in sentencing proceedings

12.106 Another area that could be considered is the role of victims in sentencing proceedings.

Victim impact statements

12.107 A court may receive and consider a victim impact statement ('VIS'), at any time after it convicts but before it sentences an offender, "if it considers it appropriate to do

115. *R v Borkowski* [2009] NSWCCA 102 [31]-[32].

so".[116] A VIS is a statement containing particulars of the personal harm suffered by the victim as a direct result of the offence (in the case of a "primary victim"), or particulars of the impact of a primary victim's death on the members of his or her immediate family (in the case of a "family victim").[117] Since 2003, victims or representatives of victims have had the option of reading out a VIS in court at the sentence hearing.[118]

12.108 There are various restrictions relating to when VISs may be considered by a court. In the higher courts, the offence must be one that results in the death of, or actual physical bodily harm to, a person, or involves an act of actual or threatened violence, or be an offence in which there is a higher maximum penalty available if either of those factors is present, or it must be a prescribed sexual offence.[119] It follows that VISs are not available in less serious cases, such as property offences.

12.109 In sentencing, a VIS may be taken into account as evidence of the aggravating factor of "substantial" injury, emotional harm, loss or damage caused by the offence to the victim under s 21A(2)(g) of the Act, with the exception of an offence in which the primary victim has died.

12.110 In those cases involving the death of the primary victim, although the Act states that the court "must" receive a VIS from a family victim, acknowledge its receipt and make an appropriate comment on it, and further that the court may consider it in connection with the determination of punishment if it is considers that it is "appropriate" to do so, the NSW courts have adhered to the view expressed in 1997 in *R v Previtera* that the contents of a family victim's VIS cannot be taken into account when fixing the penalty for the offence involving the victim's death because it is "offensive to fundamental concepts of equality and justice for criminal courts to value one life as greater than another"; and, as a result it is "wholly inappropriate to impose a harsher sentence upon an offender because the value of the life lost is perceived to be greater in the one case than in the other".[120]

12.111 Moreover, when considering the weight to be given to a VIS in cases not involving the death o*f the primary* victim, the court may decide not to give substantial weight to the contents of the VIS,[121] because the VIS has not been made on oath and, as is commonly the case in NSW, its contents have not been tested by the victim being cross-examined by the offender or his or her counsel.

116. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1).
117. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26.
118. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A.
119. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2). In the Local Court, there is a further restriction (in cases not involving death) that the offence is referred to in *Criminal Procedure Act 1986* (NSW) sch 1 table 1, that is, it is an offence for which the prosecution or the offender may have elected to have the matter dealt with in the higher courts.
120. *R v Previtera* (1997) 94 A Crim R 76, 86-87 (Hunt CJ at CL), applied in later cases and not reversed on appeal despite discussion in some cases as to whether the law as stated continues to apply.
121. *Slack v The Queen* [2004] NSWCCA 128 [58]-[63].

Current review by the Department of Attorney General and Justice

12.112 The NSW Government has proposed to legislate to provide that courts may consider VISs from family victims when determining an offender's sentence in homicide cases. The NSW Department of Attorney General and Justice released a background policy paper in May 2011 which discussed the current VIS law in NSW and also reviewed legislation in other jurisdictions.[122] In light of that paper, our discussion of the VIS issues can be shortened; but in considering the questions at the end of this section, we encourage you to read that background paper, including its discussion of the competing arguments against any change to the VIS system.

12.113 The background paper notes the observations of Chief Justice Spigelman in *Berg v The Queen*, that the enactment in 2003 of statutory 'purposes of sentencing' in s 3A of the Act, and in particular s 3A(g) which states that a purpose of sentencing is "to recognise the harm done to the victim of the crime and the community", makes it arguable that it may be appropriate, in some cases, to consider the contents of a family VIS when sentencing for an offence in which the victim has died.[123]

12.114 The background paper noted that a family VIS "can inform a court of the community's response to an offence" and:

> Seen in this way, consideration of a family VIS in sentencing forms part of an expanded doctrine of proportionality where the court makes an objective assessment of the offence, balancing at times competing interests, including a family's perspective of the impact of the crime on the community.[124]

12.115 However, the paper recognised that there are arguments against giving greater weight to family VISs, such as: creating false expectations among family members that the sentence will reflect their loss; putting pressure on families in the future to provide a VIS, which are not compulsory; and exposing family members to the stress of cross-examination in court if the contents of the VIS are challenged by the offender thereby potentially undermining the therapeutic effect of family members giving voice to their emotions and representing the victim in court.[125]

12.116 The paper observed that if family VISs were to be given greater weight in sentencing, fairness to the offender dictated that they "should be subject to the usual evidentiary standards", which might also assist in enhancing the objectivity of the sentencing process.[126] This would mean, though, that a family member would need to depose to the accuracy of its contents and be subject to cross-examination in the same way that a witness can be cross-examined. In rare cases, the offender may be unrepresented, raising the prospect of the offender personally cross-examining the relative of a deceased person. The prospect of cross-examination in

122. NSW Department of Attorney General and Justice, *Family Victim Impact Statements and Sentencing in Homicide Cases*, Background Policy Paper (2011).
123. *Berg v The Queen* [2004] NSWCCA 300 [44]. Examples would include murder, manslaughter and death by dangerous driving.
124. NSW Department of Attorney General and Justice, *Family Victim Impact Statements and Sentencing in Homicide Cases*, Background Policy Paper (2011) 7.
125. NSW Department of Attorney General and Justice, *Family Victim Impact Statements and Sentencing in Homicide Cases*, Background Policy Paper (2011) 8-9.
126. NSW Department of Attorney General and Justice, *Family Victim Impact Statements and Sentencing in Homicide Cases*, Background Policy Paper (2011) 7.

this situation raises the concern that family members may be traumatised or harassed by the process. On the other hand, it is possible that offenders and their lawyers might be reluctant to engage in cross-examination of a victim or family member out of concern that this might be seen to weaken any claim they make to contrition or remorse, or out of a concern that this might inflame their situation.

Discussion

12.117 There appear to be at least two issues involved in the possible reform of VISs:

- First, whether the contents of a family VIS should be given weight when sentencing an offender for an offence in which the victim had died; and
- Secondly, whether there should be any change to the types of offences for which a VIS can be tendered.

12.118 When we reviewed sentencing in 1996, we were generally in favour of VISs because they tend to assist in advising the court of the full impact of a crime.[127] Nonetheless, at that time, we were strongly opposed to a family victim VIS being taken into account in determining the sentence in cases involving death, for the reasons identified above in *Previtera*.[128]

12.119 Since our report, Parliament has legislated to introduce different standard non-parole periods ('SNPPs') for murder depending on the status of the victim. The SNPP for murder is generally 20 years, but if the victim was engaged in public or community functions, including for example law enforcement, emergency and health services, and the offence arose became of those functions, or if the victim was a child, a SNPP of 25 years applies.[129]

12.120 Arguably, a higher SNPP applies because these categories of victims are vulnerable, or are exposed to risks in the course of their public duties or service that are not faced by other members of the community, and the community faces a special loss when a child or a victim engaged in public or community functions is killed.

12.121 When introducing the Bill that created the 25 year SNPP for murdering a child, the former Attorney General said:

> This offence will be included in the most serious category of murder that demands the harshest sentences. That category already includes those offences of murder where the victim was a police officer, emergency services worker or other public official, exercising public or community functions, and where the offence arose because of the victim's occupation. This most serious

127. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [11.38]-[11.39].
128. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [11.51]; our reasoning was expressly referred to in *R v Previtera* (1997) 94 A Crim R 76, 87 (Hunt CJ at CL). See also NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [2.20]-[2.25].
129. Items 1A, 1B and 1 in the Table following *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D. We note that there are also a number of aggravating factors under s 21A which specifically relate to the effect of the crime on the victim or the victim's circumstances.

> category of murder recognises the terrible loss when the victim is both a vulnerable and valuable member of the community.[130]

12.122 It could be argued that in passing a proportionate sentence that recognises the loss to families and the harm done to the community under s 3A(g) of the Act, the court would be assisted by a family VIS.

12.123 Quite apart from the issue of passing an appropriate sentence, in our 1996 discussion paper on sentencing, we recognised that a VIS can play a useful role in the rehabilitation or reformation of the offender, by forcing him or her to confront the repercussions of the crime:

> In the Commission's view, reformation is a purpose much more likely to be furthered by the tendering of a VIS which confronts the offender with the consequences of the offence and which could … prompt the offender to take responsibility for those consequences.[131]

12.124 If VISs are viewed as having a role in relation to offenders' rehabilitation, and hence of assistance in reducing recidivism, it can be argued that their availability should be extended to all offences involving an identifiable victim and not just those involving violence or sexual assault. For example, property offenders who commit offences of break, enter and steal and motor vehicle theft, and who as a group have a relatively high rate of recidivism,[132] may acquire a greater understanding of the adverse consequences of the offending from VISs being available in those cases.

12.125 Moreover, as the CCA has recognised, a victim of a break, enter and steal may have suffered loss beyond the physical loss of an item, because the item stolen may have had particular sentimental value,[133] such as a wedding ring or photograph of a deceased loved one, or the victim's sense of security may have been violated because of someone else entering his or her home. Providing an opportunity for the victim to express feelings of loss or anxiety may also assist as part of the sentencing process for these crimes, and of the healing process of the victim.

Other possibilities for victims to play a greater role in sentencing

12.126 There may be other possibilities for victims to play a greater role during the sentencing process and we would welcome your ideas. For example, in South Australia, the Commissioner for Victims' Rights may furnish the court with a neighbourhood impact statement that describes the effect of the offence, or of offences of the same kind, "on people living or working in the location in which the offence was committed", or a social impact statement that describes the effect of the offence or offences of the same kind "on the community generally or on any particular sections of the community".[134]

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130. NSW, *Parliamentary Debates (Hansard)*, Legislative Council, 17 October 2007, 2668 (J Hatzistergos).
131. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [11.34].
132. D Weatherburn and others, "Rates of Participation in Burglary and Motor Vehicle Theft" (2009) 130 *Contemporary Issues in Crime and Justice* 1.
133. *R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327 [48](viii).
134. *Criminal Law (Sentencing) Act 1988* (SA) s 7B.

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?
2. Should any changes be made to the types of offences for which a victim impact statement can be tendered?
3. Are there any other ways in which victims should be able to take part in the sentencing process which are presently unavailable?

Other options

12.127 Finally, there may be other options for reform of the sentencing system that have not been discussed in this paper and which should be considered, either separately to or perhaps as part of the options discussed here. We welcome your views in relation to any other options. For example, the following areas are outside our Terms of Reference, but might prompt consideration of sentencing reforms or options which we have not discussed:

- the parole system, including eligibility for parole and breach of parole, under the *Crimes (Administration of Sentences) Act 1999* (NSW);
- the classification of offences – for example, the division of offences into strictly indictable offences that must be dealt with in the higher courts and so-called "Table" offences that are serious but can be dealt with in the Local Court, where lower maximum penalties apply, under the *Criminal Procedure Act 1986* (NSW) s 260; and
- maximum penalties fixed for offences.

Question 12.12

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

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ISBN 978-0-7347-2676-6

Law Reform Commission
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