NEW SOUTH WALES

The Chief Magistrate of the Local Court

14 June 2012

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

Dear Chairperson

Submission – Sentencing Question Papers 1 – 4

I write in response to your invitation of 23 April 2012 to make a submission in response to Question Papers 1 – 4 released by the NSW Law Reform Commission as part of its review of sentencing.

I note that the scope of the issues raised in the question papers largely does not include the areas identified in my preliminary submission of 21 October 2011 that from the Local Court's perspective appear to be most in need of revision, although I appreciate further papers are intended for release in due course.

So as not to lose sight of the overarching issues faced by the Court in the sentencing process, I have sought to provide a more holistic response rather than attempting to address every question raised. With this in mind, my comments are as follows:

QP 1 - Purposes of sentencing

Section 3A and its application

The legislative statement of the purposes of sentencing currently set out in s 3A of the *Crimes (Sentencing Procedure) Act* 1999 ('the Act') is useful and adequate. It should be retained without amendment.

I do not consider the creation of an overarching purpose of sentencing or a hierarchy of sentencing purposes would be helpful to the overall sentencing exercise. The legislative elevation of a single purpose or the ranking of purposes may unnecessarily complicate the sentencing exercise while also constraining judicial discretion by affecting the weight to be afforded to each purpose, without regard to the objective and subjective circumstances of an individual case.

Specific purposes of sentencing

The specific matters currently set out in s 3A in my view represent a sufficiently balanced and comprehensive enunciation of the various purposes of sentencing. They do not require amendment.

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Particular issues are raised in the question paper concerning the effectiveness and validity of general and specific deterrence as objectives of sentencing. In this respect it should be recognised that there are undoubtedly some types of offences or classes of offender where deterrence properly plays a more significant role upon sentence, and others less so.

Case law emphasises that there are instances where the imposition of a sentence that features general and/or specific deterrence as significant objectives will be particularly appropriate. In the Local Court context, one example is PCA offences, where factors such as the prevalence of the offence, issues of public safety and the fact that such offences are often committed by individuals who are otherwise of good character all contribute to the need for deterrent sentences.[1] Conversely, well-recognised categories where deterrent purposes in sentencing may be less appropriate include cases involving mentally incapacitated or young offenders.[2]

Flexibility is needed to ensure appropriate weight can be given to general and/or specific deterrence on a case-by-case basis. The current s 3A accommodates this insofar as it does not unduly constrain the exercise of discretion to attribute more or less weight to a particular purpose depending on the circumstances of the case. With this in mind, while objectives of general and/or specific deterrence as sentencing objectives may be of limited application in some circumstances, and while debate continues as to whether the sentencing process effectively achieves these objectives, I do not see merit in the abolition of either or both.

The question paper further raises whether certain other factors should be added to s 3A as purposes of sentencing, namely:

- Reparation and restoration: it is not clear precisely what is envisaged by restoration and reparation, nor how such an objective would operate in a meaningful sense beyond what is already contemplated by existing factors including recognition of the harm done to the victim of the crime and the community, promotion of the rehabilitation of the offender and making the offender accountable for his or her actions.

  Rather than adding reparation and restoration as a purpose in s 3A, it may be of greater utility to clarify existing aspects of the sentencing process that bear upon such concerns. For example, if it is sought to strengthen opportunities for a victim to be heard in relation to the harm caused by the offence, consideration might be given to the provisions of Division 2 of Part 3 of the Act allowing the court in some circumstances[3] to receive and consider a victim impact statement. Currently, the use of such statements is not without difficulty due to divergence and uncertainty in judicial views as to their purpose and permissible uses.[4]

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[1] For example, see the Court of Criminal Appeal Guideline Judgement in respect of high range PCA offences: *Application by the Attorney-General Under Section 37 Crimes (Sentencing Procedure) Act For a Guideline Judgment Concerning the Offence of High-Range Prescribed Concentration of Alcohol Under Section 9(4) Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002)* (2004) 61 NSWLR 305

[2] *R v Harrison* (1997) 93 A Crim R 314

[3] In the Local Court, use of a VIS is limited to the offences falling within s 27(3) of the Act, namely (a) an offence resulting in the death of a person; (b) an offence where a higher penalty applies where the offence results in the death of a person than where it does not; (c) a Table 1 offence resulting in actual bodily harm or involving an act of actual or threatened violence; or (d) a Table 1 offence that is a prescribed sexual offence as defined in the *Criminal Procedure Act 1986*.

[4] For example, see J Spigelman, 'Address to Parole Authorities Conference 2006' (2006) 8(1) TJR 11 at 20

The Act is currently silent on how a court should use a victim impact statement. Section 29(1) provides, simply, that "If it considers it appropriate to do so, a court may receive and consider a victim impact statement at any time after it convicts, but before it sentences, an offender." While different approaches have been taken, several ways in which a victim impact statement might be used can be inferred, such as:

- In sentencing, "to recognise the harm done to the victim of the crime and the community" in accordance with s 3A(g);
- In sentencing, as an aggravating factor insofar as the statement goes to demonstrating that "the injury, emotional harm, loss or damage caused by the offence was substantial" pursuant to s 21A(2)(g); and/or
- As a means of providing a victim with a voice in the courtroom; for instance, under s 30A, where a statement is received by a court, the victim is entitled to read all or part of the statement to the court.

Clarification would assist. I understand issues such as how victim impact statements may be used and the evidentiary requirements of such statements have been under consideration by the Legislation and Policy Division of the Department of Attorney General and Justice.

- Effective operation of the criminal justice system: this proposed purpose is nebulous without definition of what measures are to be taken into account in assessing effectiveness. Assuming effectiveness is measured in terms of the capacity of a sentence to reflect the stated purposes of sentencing, the inclusion of the effective operation of the criminal justice system as a purpose of sentencing in itself becomes somewhat circular in nature. Once again, it is difficult to envision what the inclusion of such a factor in s 3A would meaningfully add to the sentencing process.

- Purposes relating to particular groups of offenders: I do not agree that the enunciation within the Act of specific purposes for particular groups of offenders is necessary or appropriate. There are sufficient existing measures to take into account the characteristics of a particular offender or class of offenders without adding to s 3A. As the question paper notes, principles relevant to the sentencing of children are already set out in s 6 of the *Children (Criminal Proceedings) Act 1987*. In respect of indigenous individuals, there is ample case law relating to specific considerations that may arise when sentencing such offenders, notably *R v Fernando*[5] and subsequent cases applying the principles arising from that decision.

QP 2 - General sentencing principles

Imprisonment as a last resort

The legislative statement in s 5 of the Act that imprisonment is a sentencing option of last resort should be retained in its current form. It is difficult to identify any reason to depart from this accepted approach.

Proportionality

As indicated in my preliminary submission, particular concerns in respect of ensuring proportionality between an offence and the sentence imposed arise in the Local Court. Under the Table offences scheme, a jurisdictional limit of two years imprisonment applies in

[5] (1992) 76 A Crim R 58

respect of a sentence for a single offence. In practice, pressures on the operational capacity of the DPP have resulted in increasingly serious matters being kept in the Local Court. In such circumstances, I consider there may be some value in legislative recognition of the common law principle that the imposition of a sentence at the Local Court's jurisdictional limit is not reserved for a 'worst case' offence.

Parity

Guidance from case law on the common law principle of parity is adequate and does not require codification.

Sentencing for multiple offences

A significant difficulty arises in attempting to reconcile the disconnect between the mathematical approach in sentencing for multiple offences and the instinctive synthesis approach to sentencing mandated by the High Court.

As the question paper notes, the instinctive synthesis approach described in *Markarian v The Queen*[6] contemplates a single-step process in which the objective circumstances of the offence and the subjective features of the offender are considered and a value judgment made as to the appropriate sentence in light of all those factors. The apparent simplicity of such an approach is belied by the convoluted mathematical process of actually structuring the sentences imposed for multiple offences in order to arrive at an appropriate overall sentence that takes proper account of the need to address the total criminality of the offences.

The approach stipulated by the High Court in *Pearce v The Queen*[7] when sentencing for multiple offences is for the court to determine an appropriate sentence for each offence before determining the structure of an overall sentence by considering issues of concurrence and accumulation. The complexity of this process is compounded by s 44 of the Act, requiring a non-parole period and balance of term to be set for each offence, where the balance is not to exceed one-third of the non-parole period unless a finding of special circumstances is made. At the same time, when structuring the total sentence, an appropriate overall ratio between the two should also be maintained – an often awkward calculation once issues of concurrence and accumulation are considered.

Bearing in mind the need to ensure the sentence imposed reflects the total criminality of the offences, it is likely that the determination of an appropriate sentence for each individual offence occurs in circumstances where the court already has in mind an approximate overall sentence, including the appropriate period for which an offender should be in custody.

This may be another situation where a somewhat artificial distinction is drawn in an attempt to reconcile principle with reality by distinguishing between the process of deciding upon a sentence and the pronouncement of sentence, akin to the reasoning enunciated in *R v Moffitt*[8] in respect of setting a non-parole period and balance of term. As I have previously indicated, I am of the view such an approach affects the clarity and transparency of the sentencing process.

[6] (2005) 228 CLR 357
[7] (1998) 194 CLR 610
[8] (1990) 20 NSWLR 114

To simplify the sentencing process for multiple offences where a sentence of imprisonment is required, consideration should be given to allowing the court to identify a single total sentence (subject to articulation of relevant subjective and objective features and consideration of any relevant jurisdictional limit) rather than requiring ponderous articulation of separate sentences for each individual offence.

Sentencing the offender only for the offence proved

There would be significant value in legislatively addressing issues arising from the principle articulated in *R v De Simoni* that a sentencing court cannot take into account a factor that would constitute an element of a more serious offence than the one with which the offender was charged and for which they have been convicted or pleaded guilty.[9]

Numerous cases since *De Simoni* have identified difficulties that arise in the application of the principle. In the Local Court, perhaps due to the increasing frequency with which decisions are made not to elect to proceed on indictment, matters are frequently encountered in which charges and/or agreed facts possess a level of artificiality. In such matters, the legitimacy of the sentencing exercise can be compromised by the need to maintain conformity with the *De Simoni* principle. Two common examples are where:

- The Court is presented with charges that have been split so an offender is to be sentenced in relation to multiple offences that would together constitute the elements of a more serious offence, despite the facts disclosing no temporal hiatus between the offences. For example, the Court frequently encounters matters in which a robbery charge is later converted by the prosecuting authority to two separate charges - assault and steal from the person - in return for a plea of guilty to each. The question of how to reflect the principle of totality while sentencing in respect of the offences charged in this manner is a vexed one.

- The agreed facts disclose a more serious element than the conduct charged. For instance, an offender may stand for sentence in relation to a charge of actual bodily harm where the facts disclose injuries more properly described as grievous bodily harm. In this instance, questions arise as to whether a permissible approach is to find that the conduct is a more serious or worst-case instance of the lesser offence, or whether the extent of the injuries might legitimately allow a finding that "the injury, emotional harm, loss or damage caused by the offence was substantial" pursuant to s 21A(2)(g).

Reasons for sentencing

The common law duty to give reasons is well accepted and codification is not necessary.

Retention of existing statutory requirements to give reasons in specific circumstances, such as when imposing a custodial sentence of less than 6 months' duration, occasions no practical difficulty.

QP 3 - Factors to be taken into account on sentence

I understand the reason for criticism of section 21A by other stakeholders. I also understand the association of the provision with the issue of transparency in sentencing.

[9] (1981) 147 CLR 383 at 398 per Gibbs CJ

While it has been suggested that the repeal of s 21A would simplify the sentencing process, because the provision largely (though not exhaustively) replicates the common law, its repeal may ultimately change little in the substance of the sentencing process. The current complexity in sentencing law appears to be more a consequence of other issues, such as the approach to structuring sentences for multiple offences where custody is required (as discussed above), than due to the existence of s 21A.

To the extent that the range of factors that may be relevant on sentence is large, efforts are made in the Local Court to ensure that sentencing issues receive significant attention in its annual education program conducted jointly with the Judicial Commission. The voluminous nature of the Court's criminal jurisdiction means that sentencing is an everyday aspect of magistrates' work and often requires the making of sound decisions within limited timeframes. To address this, the Court's education committee seeks to ensure magistrates receive relevant training that includes advanced sentencing exercises covering all aspects of the sentencing process, including the application of s 21A and common law factors.

The question paper raises the possibility of reframing the section to return to an approach similar to that utilised in s 16A of the *Crimes Act 1914* (Cth), involving a single list of neutral factors rather than dichotomous lists of aggravating and mitigating factors. I agree there may be benefit in such an approach.

QP 4 - Other discounting factors

Discount for plea of guilty

In my view, the Act should continue to provide that the court may take into account an offender's plea of guilty upon sentence (whether under s 21A or s 22). Further codification is not required. The experience of the Court in relation to the now-repealed *Criminal Case Conferencing Trial Act 2008* was that the legislative scheme of specifying the discounts available at given stages of the proceedings led to an undesirable rigidity in application and thinly disguised manipulation of the statutory entitlement by defendants and their legal representatives.

Many of the issues arising in respect of allowing discounts for pleas of guilty do not seem to be those that would be assisted by legislative intervention. The common law principles articulated in *R v Borkowski*[10] should continue to operate. This decision states the general principle that as a matter of general practice, the maximum discount for the utilitarian value of the plea of guilty should be awarded only to accused persons who plead guilty in the Local Court and continue that plea in the District Court.[11]

The recognition at common law that there may be instances in which it is not appropriate to allow a discount for an offender's guilty plea remains appropriate.

Discount for assistance to authorities

In the area of allowance of a discount for assistance to the authorities, in the Court's experience it can be difficult to quantify the discount to be given and to articulate transparent reasons for doing so. For instance, how does one quantify a discount for assistance where part of the 'deal' is reflected in a decision to leave the matter in the Local Court?

[10] [2009] NSWCCA 102
[11] At [31]. A number of further general principles are set out at [32].

The typical practice is for material describing the assistance (often in non-specific terms due to its sensitive nature) to be handed up to the bench by the prosecution in a sealed envelope and returned after being read. As the information provided may be limited, the Court may not be in a proper position to assess its value. When explaining the discount ultimately given, in order to avoid compromising the material's sensitive nature or due to its imprecision, the Court may only be able to give its reasons in very general terms.

As a result, there may be merit in contemplating a different approach to the allowance of discounts for assistance. One possibility might be to require the parties to consult on the issue and jointly identify a proposed discount or range that they propose may be appropriate.

Discounts in the Local Court

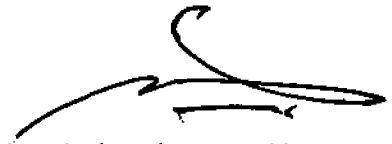
One issue that should be noted is unique to the Local Court. It is the question of how the allowance of discounts for pleas of guilty interacts with the Court's jurisdictional limit and the application of the *Doan* principle. Approaches differ as to how a discount should be allowed in situations where the objective criminality of the offence properly requires the imposition of a penalty that exceeds the Court's jurisdictional limit.

On one approach, because a sentence beyond the jurisdictional limit cannot be imposed, the starting point when determining the sentence should be the jurisdictional limit and a further discount allowed from there. Otherwise, in real terms the offender will not receive any recognition of, or benefit for, the utilitarian value of the plea. However, if this approach is taken, the ultimate sentence may be manifestly inadequate.

The alternate approach is to identify, upon a consideration of all the objective and subjective features of the offence and the offender, what the appropriate sentence would be but for the jurisdictional limit of the Court. Allowing for a plea of guilty from that point, the sentence may still be beyond the jurisdictional limit, such that the appropriate sentence is the maximum available to the Court. This is a rationally preferable approach and appears to better accord with the case law applying *Doan*.[12]

Thank you for the opportunity to make a submission in response to these Question Papers. I look forward to considering the further question papers intended for release in due course. In the meantime, I would be pleased to discuss the above comments or any other aspect arising in the course of the current review of sentencing with the Commission further should you wish to do so.

Yours sincerely,



Judge Graeme Henson
Chief Magistrate

[12] In particular, see *Lapa v R* [2008] NSWCCA 331 at [15]-[17]