NSW Law Reform Commission
Sentencing Question Papers 5-7
Consolidated Questions
Office of the Director of Public Prosecutions (ODPP)

Question Paper 5 – Full-time imprisonment

The ratio of the non-parole period and balance of term

Question 5.1

1. Should the "special circumstances" test under s 44 of the Crimes (Sentencing Procedure) Act 1999 (NSW) be abolished or amended in any way? If so, how?

We agree that the "special circumstances" test under section 44 of the Crimes (Sentencing Procedure) Act 1999 has effectively become meaningless because of overuse. However, this interpretation has provided judges with the necessary discretion to sentence. A possibility, is to vary the ratio to 50%. Arguably, if the ratio was 50% there would not be a need to find "special circumstances". However, the 50% ratio might be out of step with community expectations of the term to be served in prison. A two thirds ratio may be a compromise.

2. Should a single presumptive ratio be retained under s 44 or should a different ratio apply for different types of offences or different types of offender; and, if so, what ratio should apply to different offences or different offenders?

We are against the idea that different ratios should apply to different types of offences, as this would introduce undue complexity into sentencing.

Top-down and bottom-up approaches

Question 5.2

1. Should the order of sentencing under s 44 of the Crimes (Sentencing Procedure) Act 1999 (NSW) return to a 'top down' approach?

We can see arguments in favour of both approaches. Ultimately, our view would be that the approach which invites the least error, if this is ascertainable, is the one to be adopted. Arguably the top down approach is a more logical and instinctive way to approach the sentencing task, as the penalty as a whole is considered in the first instance with adjustments made according to how long it is necessary for the offender to spend in gaol.

2. Could a 'top down' approach work in the context of standard minimum non-parole periods?

No, standard minimum non-parole periods are counter intuitive to a top down approach.

Short sentences of imprisonment

Question 5.3

1. Should sentences of six months or less in duration be abolished? Why?

While acknowledging the negative effects of sentences of six months or less we do not support their abolition, as sentences of six months or less are a necessary link in the continuum of sentences.

2. Should sentences of three months or less in duration be abolished? Why?

See above.

3. How should any such abolition be implemented and should any exceptions be permitted?
Not applicable.

4. Should sentences of imprisonment of six months or less continue to be available as fixed terms only or are there reasons for allowing non-parole periods to be set in relation to these sentences?

Sentences of six months or less should continue to be available only as fixed terms.

Aggregate head sentences and non-parole periods

Question 5.4

1. How is the aggregate sentencing model under s 53A of the Crimes (Sentencing Procedure) Act 1999 (NSW) working in practice and should it be amended in any way?

ODPP lawyers report that aggregate sentencing does not appear to be being used that often. We are aware of one Crown appeal which is yet to be heard where aggregate sentencing was used. In that matter the aggregate sentence could not be reconciled with any of the indicated sentences. There are another two appeals pending where aggregate sentencing was used.

2. Should a court be required to state the individual sentences that would have been imposed if an aggregate sentence had not been imposed by the court?

We appreciate the Chief Judge's argument, that questions the need when sentencing for multiple offences to indicate separate sentences when an aggregate sentence is being fixed. In our view, there needs to be some flexibility so judges can sentence for a wide variety of circumstances. Our main concern is to ensure that sentences are structured sufficiently clearly to be easily understood by the relevant stakeholders and address any issues should there be an appeal.

Accumulation of sentences and special circumstances

Question 5.5

1. Should a court be required to state reasons if the effective sentence does not reflect the special circumstances finding on the individual sentences?

No, the judges individual discretion or style should not be hampered or hindered. "Special circumstances", if applied should apply to the whole sentence. This difficulty is another argument in favour of a "top down" approach to sentencing.

2. Are there any other options to deal with these cases?

There is a possibility that the slip rule could apply to cases where it is clear that the judge has made an error in explaining the sentence or making appropriate adjustments for "special circumstances".

Directing release on parole

Question 5.6

What limit should be applied to the automatic release of offenders to parole on expiry of a non-parole period?

We do not support a change from the current three-year limitation.

Back end home detention

Question 5.7

1. Should back end home detention be introduced in NSW?

This form of imprisonment would suit particular types of prisoners, namely those who come from a stable home environment and have a supportive family. So, while this may be appropriate in some circumstances we do not see that it would have wide application.

2. If so, how should a person's eligibility and suitability for back end home detention be determined and by whom?

The eligibility and suitability for back end home detention should be determined by the Probation and Parole Service at the time of sentencing and then endorsed by the sentencing judge.

Local Court's sentencing powers

Question 5.8

1. Should the sentencing jurisdictional limits in the Local Court be increased and, if so, by how much?

There are very divergent views in my Office about whether the sentencing jurisdiction of the Local Court should be increased.

2. Should a magistrate be able to refer a sentencing matter to the District Court if satisfied that any sentence imposed in the Local Court would not be commensurate with the seriousness of the offence?

We do not support this for a number of reasons. Our principal objection is that as a matter of fairness an accused should be entitled to plead guilty in the Local Court with the certainty that they will be sentenced in the Local Court. There are practical difficulties with this proposition as well, including the need for the prosecuting authority to change if the matter is sent to the District Court.

Question Paper 6: intermediate custodial sentencing options

Compulsory drug treatment detention

Question 6.1

1. Is the compulsory drug treatment order sentence well targeted?

The current eligibility criteria set out in the Act is well targeted as the compulsory drug treatment order (CDTO) is a sentencing option that is aimed at those offenders considered to be at the end of the continuum for drug diversionary programs in New South Wales. That is, offenders that have been sentenced to an unexpired NPP of 18 months to 3 years. CDTO allows for those offenders that would be deemed ineligible and inappropriate for the Drug Court program to also engage in rehabilitation.

The program is set up for treatment and supervision plans that are for a minimum of 18 months that focuses on working towards breaking the drug-crime cycle of this type of high - risk offender with a comprehensive treatment program of rehabilitation under judicial supervision for drug dependent persons who repeatedly resort to criminal activity to support their dependency.

We submit the gateway minimum non parole periods of 18 months and a maximum of 3 years is well targeted and should not be changed.

Pharmacotherapy for the centre was introduced for all participants as of April 2012. We strongly support this initiative.

2. Are there any improvements that could be made to the operation of compulsory drug treatment orders?

There has been one review conducted in respect of the program by the NSW Bureau of Crime Statistics and Research (BOCSAR) conducted in 2010.[1] The review outlined

[1] Dekker. J., O'Brien. K., Smith. N. (2010). An Evaluation of the Compulsory Drug Treatment Program (CDTP) NSW Bureau of Crime Statistics and Research

positive outcomes in terms of three of the four aims of the legislation, however it was not capable of evaluating the long term effectiveness of the program in relation to the fourth objective, preventing and reducing crime by reducing those persons' need to resort to criminal activity in support of their drug dependency. We suggest that rigorous research should be undertaken to ensure there is some evidence to support whether it is an effective program that also meets the community needs.

In response to the statutory review of compulsory drug treatment orders in 2010 we submitted that the following improvements could be made;

The first issue relates to the definition of "eligible convicted offender".

S5A Drug Court Act 1998 provides :

(1) A person is an eligible convicted offender if:

(a) the person is convicted of an offence, other than an offence referred to in subsection (2), and

(b) the person has been sentenced to a term of imprisonment for the offence to be served by way of full-time detention and the unexpired non-parole period in relation to that sentence is:

(i) at the time the Drug Court is determining whether to make a compulsory drug treatment order with respect to the person—a period of no more than 3 years, *and*

(ii) at the time that the sentence was imposed—a period of at least 18 months, and....

Section 5A(1) (b) (i) may be interpreted to allow a delay in assessment so an inmate with a substantially longer non parole period than 3 years could be found eligible.

There was an instance of a District Court Registry not forwarding the referral papers for 9 months, the papers had been marked by the Judge "to be referred at the appropriate time". If the person had been referred immediately post sentence they would have been ineligible as the unexpired Non Parole Period was 3 years 6 months at the time of sentence.

The wording of the section and the beneficial nature of Drug Court legislation, allows for it to be read in the applicant's favour. However an equity issue arises as other applicants to the Drug Court are routinely excluded from the program as they have sentences longer than 3 years.

If the policy is that only offenders who receive sentences within this range are to eligible for this program then the original wording of s5A(1) (b) achieves this policy, namely

> *"b) the person has been sentenced to a term of imprisonment for the offence to be served by way of full-time detention and the unexpired non-parole period in relation to that sentence is a period of at least 18 months but not more than 3 years*" (s5A(1)(b)Compulsory Drug Treatment Act , No 42 of 2004.)

It would be an appropriate time to review this section and the issue could be easily overcome by a minor amendment to the wording of the section and a regulation or practice note in respect of timing for referrals.

The second issue relates to the definition of an "old sentence" in the *Crimes (Administration of Sentences) Act, 1999.* Section 106W provides:

"(1) If an offender is convicted and sentenced to a term of imprisonment (a ***new sentence****) for an offence that occurred before the offender's compulsory drug treatment order was made, the court that sentenced that offender is to refer the offender to the Drug Court to determine whether the offender's compulsory drug treatment order should:*
(a) be varied so as to apply also in relation to the new sentence, or
(b) be revoked.
(2) The Drug Court may vary a compulsory drug treatment order so as to direct an offender to serve a new sentence of imprisonment by way of compulsory drug treatment detention.
(3) Subject to subsection (4), the Drug Court must not vary a compulsory drug treatment order under this section unless the offender is an eligible convicted offender (within the meaning of the Drug Court Act 1998).
(4) Despite section 5A (1) (b) of the Drug Court Act 1998, the Drug Court may vary a compulsory drug treatment order under this section if the cumulative unexpired non-parole period for the offender's term of imprisonment under all sentences in force is greater than 3 years but not more than 4 years."

This section allows outstanding eligible matters to be brought to the Drug Court that may have been dealt with by other Courts for a Compulsory Drug Treatment participant and it was drafted on the assumption that this would occur post Compulsory Drug Treatment Order (CDTO). This is a very practical provision that acknowledges that it is in the nature of recidivist offenders to have outstanding "old" matters that may come to light at a later date and result in a further sentence. However an issue could arise in respect of timing given the current section.

The problem occurs in this way, while a referred eligible convicted offender is awaiting assessment for suitability they are not subject to CDTO. The period for assessment for suitability can be lengthy, due to intensive health assessment and drafting of intricate treatment plans. If they are sentenced in the assessment period that sentence cannot be referred as it pre-dates the order. For example, Smith is referred for Compulsory Drug Treatment Correctional Centre consideration on 2/2/10 and is found legally eligible but is awaiting suitability assessment and subsequent treatment plan, therefore pre-CDTO. On 28/2/10 Smith is sentenced before another Court to an "old" matter and then CDTO is made on 31/3/10. Smith would be unable to have 28/2/10 matters brought over under s106W as 28/2/10 sentence pre-dates the CDTO.

We suggest that the section should be reviewed and amended to overcome such an issue. A subsection covering the issues as outlined below could be drafted by Parliamentary Counsel:

Or if the Drug court is made aware of a ***new sentence****, (as defined in section (1)), imposed by another Court, whilst an eligible convicted offender is awaiting their CDTO, the Drug Court may request it be referred to the Court to determine whether the offender's compulsory drug treatment order should:*
(a) be varied so as to apply also in relation to the new sentence, or
(b) be revoked.

Suspended sentences

Question 6.4

1. Are suspended sentences operating as an effective alternative to imprisonment?

Yes they have a place in the sentencing continuum if they are effectively enforced.

2. Are there cases where suspended sentences could be used, but are not? If so what are the barriers?

We cannot think of any cases where suspended sentences could be used but are not.

3. Are there any improvements that could be made to the operation of suspended sentences?

Yes, consideration could be given to allowing a non-parole period being set in a suspended sentence.

Another issue we would like to raise for consideration concerns the power of the District Court Judge on appeal to set aside the original suspended sentence ab initio and impose a less severe sentence in lieu. There is a divergence of views on the District Court bench about the interpretation of section 20 of the *Crimes (Appeal and Review) Act.* One interpretation is that "setting aside the sentence", allows every part of the orders following conviction to be set aside by the appeal Court.

The alternate view is the revocation of the suspended sentence, which is included in the definition of "sentence" in section 3 (1) (ba) *Crimes (Appeal and Review) Act* is a discrete sentence, capable of being appealed to the District Court, but still a separate and distinct "sentence" from the original section 12 sentence. In this case the sentence being appealed is only the order expressly listed in section 3 (1) (ba), that is the revocation of the bond and consequent orders, and does not include the imposition of the original suspended sentence that was the subject of the breach proceedings.

4. Should greater flexibility be introduced in relation to:
a. the length of the bond associated with the suspended sentence?
Yes.

b. partial suspension of the sentence?
No.

c. options available to a court if the bond is breached?
The consequences of breaching a section 12 bond need to remain rigid otherwise it undermines the integrity of the sentencing process. However, anecdotally section 98(3) (a) in providing that conduct may be excused if it is "trivial in nature" is not being applied equitably; as trivial means different things to different people and in different contexts. We understand that for instance a low range PCA offence may be considered "trivial" by some Magistrates and serious by an equal number of others. A possible improvement could be to remove sub section (a) and in subsection (b) elaborate on what "good reasons" are, and include the seriousness of the conduct constituting the breach.

Rising of the court

Question 6.5

1. Should the "rising of the court" continue to be available as a sentencing option?

There are divergent views in our office. Some considered that "Rising of the Court" sentences can be useful at times. In reality it is less likely to be an option in the serious crimes dealt with by my Office.

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

Question 6.6

1. Should any of the maximum terms for the different custodial sentencing options in the Crimes (Sentencing Procedure) Act 1999 (NSW) be changed?

Yes. Home detention should be two years.

2. Should there be a uniform maximum term for all of the custodial alternatives to full-time imprisonment?

All the custodial alternative sentencing options should be set at two years.

3. Should the terms of custodial alternatives to full-time imprisonment continue to be tied to the sentence of imprisonment that the court initially determined to be appropriate?

Yes.

4. Should the Local Court's jurisdictional limit be increased for custodial alternatives to full-time imprisonment?

No.

Other options

Question 6.7

What other intermediate custodial sentences should be considered?

No comment.

Question 6.8

Should further consideration be given to the reintroduction of periodic detention?

No.

Question Paper 7: Non-custodial sentencing options

Community service orders

Question 7.1

1. Are community service orders working well as a sentencing option and should they be retained?

Community service orders represent an important sentencing option and from our limited perspective are working well.

2. What changes, if any, should be made to the provisions governing community service orders or to their operational arrangements?
No comment.

Section 9 bonds

Question 7.2

1. Is the imposition of a good behaviour bond under s 9 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should s 9 be retained?

Yes.

2. What changes, if any, should be made to the provisions governing the imposition of good behaviour bonds under s 9?

No changes should be made.

Good behaviour bonds

Question 7.3

1. Are the general provisions governing good behaviour bonds working well, and should they be retained?

Yes.

2. What changes, if any, should be made to the general provisions governing good behaviour bonds or to their operational arrangements?

No changes should be made.

Fines

Question 7.4

1. Are the provisions relating to fines in the Crimes (Sentencing Procedure) Act

1999 (NSW) working well, and should they be retained?

Yes.

2. Should the provisions relating to fines in the Crimes (Sentencing Procedure) Act 1999 (NSW) be added to or altered in any way?

No.

3. Where a particular offence specifies a term of imprisonment but does not specify a maximum fine, how should the maximum fine be calculated?

The majority of criminal offenders have a limited capacity to pay a fine. A fine should only ever be calculated according to the offender's ability to pay it, accordingly there is limited utility in setting a maximum fine.

Conviction with no other penalty

Question 7.5

1. Is the recording of no other penalty under s 10A of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should it be retained?

Yes.

2. What changes, if any, should be made to the provisions governing the recording of no other penalty or to its operational arrangements?

No changes should be made.

Non-conviction orders

Question 7.6

1. Are non-conviction orders under s 10 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should they be retained?

Yes.

2. What changes, if any, should be made to the provisions governing s 10 non-conviction orders or to their operational arrangements?

No changes should be made.

Question 7.7

Should it be possible to impose other sentencing options in conjunction with a non-conviction order? If so, which ones?

Allowing judges to impose fines or community service orders on offenders without conviction would be of benefit in increasing sentencing options.

Other options

Question 7.8

Should any other non-custodial sentencing options be adopted?

No comment.

Question 7.9

Should a fine held in trust be introduced as a sentencing option? If so, how should it be implemented?

We have concerns that only a limited number of offenders are capable of paying a fine. We are also of the view that it is inappropriate for a third party to pay the fine.

Question 7.10

1. Should work and development orders be adopted as a sentencing option?

We do not support work and development orders as a sentencing option.

2. Alternatively, should the community service order scheme be adapted to incorporate the aspects of the work and development order scheme that assist members of vulnerable groups to address their offending behaviour?

The community service order scheme could be adapted to incorporate some aspects of the work and development order scheme.

Office of the Director of Public Prosecutions
August 2012