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?

It should be amended to an across the board test of "exceptional circumstances".

Noting the common law principle reflected in s.5 of the Act that imprisonment is a sentence of "last resort",[1] persons who are sentenced to terms of full time imprisonment are 'serious offenders'.[2] With regard to the test to increase the additional term, we do not support treating persons sentenced to full time imprisonment differently solely based on the type of offence they have been charged with. Since Spigelman CJs comments in *Fidow v The Queen*[3] it is doubtful that the situation has changed so that Parliament's intent or anticipation regarding the current 'special circumstances' test has been realised. If the caution of the former Chief Judge of the Supreme Court of NSW has not been taken heed of and acted upon by the remainder of the judiciary, legislative change to strengthen the test as indicated is appropriate.

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?

A single presumptive ratio should be retained.

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?

As the NSWLRC's interim report on Standard Minimum Non-parole Periods has not yet been publically released our answer may depend on the recommendations within that report. However, considering the question paper appears to support a 'top down' approach, we deduce that the recommendations we made for the purposes of the interim report were not adhered to.

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[1] *Way v The Queen* (2004) 60 NSWLR 168 [115] – see Note 4 on p.3 of questions paper.

[2] NSW, *Parliamentary Debates*, Legislative Assembly, 12 November 1987, 15914 (B Unsworth) – even though s.20A *Probation and Parole Act 1983* (NSW) was confined to a list of offences considered to be serious.

[3] [2004] NSWCCA 172 [20]-[22]

We submitted that the SNPP legislation and its operation as a two-tiered sentencing regime should take precedence. We supported legislation that, for SNPP offences, provides for the SNPP to be the starting point. As such, determining a non-parole period first is not a risk to be controlled or eliminated, it is a process that should be adopted. Whilst is it arguable that the debate over reforming the top down or bottom up approach has no practical consequence, to ensure a two-tiered sentencing regime for SNPP offences, the order of sentencing should not return to a 'top down' approach.

If the above argument is not accepted, there does not appear to be any evidence produced that judicial officers are misinterpreting the bottom up approach. That being the case, there is no need for change, or any change should do away with either approach rather than preferring one over the other. The advantage of this would be a process whereby SNPPs are not affected by either.

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

If SNPP legislation and its operation as a two-tiered sentencing regime that provides for the SNPP to be the starting point is re-adopted, a 'top down' approach would provide for confusion.

Question 5.3

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

No.

From the discussion in the question paper, the emphasis is on recidivist offenders receiving short sentences. Noting the common law principle reflected in s.5 of the Act that imprisonment is a sentence of "last resort",[4] recidivist offenders who are sentenced to short terms of full time imprisonment are already entrenched in their criminal behaviour with little chance of benefiting from assistance (benefiting in this context meaning stopping their offending behaviour). Non-custodial, diversionary and rehabilitative options for these offenders have already been exercised by the courts. We do not see value in assisting offenders who fall within this category especially where non-custodial options such as Intensive Correction Orders are considered, "a sentence that has inherent in it a high degree of leniency".[5] By the time these offenders get to the point where full time imprisonment is the only appropriate sentence, there are no other appropriate alternatives. The protection and

[4] *Way v The Queen* (2004) 60 NSWLR 168 [115] – see Note 4 on p.3 of questions paper.
[5] *R v Boughen* [2012] NSWCCA 17 per Simpson J at [111]

welfare of the community is then preserved for at least the time the offender spends in jail.

Whatever the basis of the NSWLRC's 2004 finding that minimum sentences fail to achieve the purpose of deterrence, it is out of date.[6] The maxim that punishment swiftly follow crime has greater application in a modern deterrence context than previously recognised:[7]

Our results suggest that the criminal justice system does exert a significant effect on crime but some elements of the criminal justice system exert much stronger effects than others. **Increasing the** risk of arrest or the **risk of imprisonment reduces crime while increasing the length of prison sentences exerts no measurable effect at all.**

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

No. See answer to Q5.3.1

3. How should any such abolition be implemented and should any exceptions be permitted?

We are not in favour of abolition.

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?

The status quo should remain.

Question 5.4

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[6] NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) [6.1], referring to the reasons for the introduction of the prohibition on short sentences in WA on pp. 19 & 20

[7] Wan, Moffatt, Jones and Weatherburn, 'The effect of arrest and imprisonment on crime' (2012) 158 *Crime and Justice Bulletin at 15, 16* http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB158.pdf/$file/CJB158.pdf (16.4.12)

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?

No comment

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?

Yes as it provides for transparency.

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.

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

Yes. To require the court to state the intended effective non-parole period.

Question 5.6

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

For the reasons in para 5.106 and 5.107 of the question paper, the status quo of three years should remain.

Question 5.7

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

No.

2. If so, how should a person's eligibility and suitability for back end

home detention be determined and by whom?

In circumstances where corrective services would have a financial interest in 'admitting' offenders to back end home detention, they should not be the sole assessor of suitability or be at all involved in the decision to admit the offender to back end home detention. It should be a judicial decision or a decision of a body akin to the parole board.

Recognising there are flaws, one option is, at initial sentence, the judicial officer indicate whether or not an application for back-end home detention would be available to be entertained in the future and when. If such an order was made, the offender would make an application for assessment for back end home detention after the period of full time imprisonment indicated by the judicial officer at initial sentence. The judicial officer would decide whether or not to order an assessment based on sentencing principles and considerations current at the time of application. If the offender is assessed at suitable for home detention, the same considerations and suitability criteria that applied at initial sentence would apply. This option would result in more court time spent finalising individual criminal proceedings, logistical effort and reliance on records management systems.

Again recognising there are flaws, the same initial process would occur. However, the order for assessment and order for back end home detention would be decided upon and made by a body akin to the parole board.

Question 5.8

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

Yes – to five years. Police Prosecutions' Oct 2011 preliminary submissions concerning the NSW Law Reform Commission's Review of the *Crimes (Sentencing Procedure) Act 1999* stated:

> The Chief Magistrate proposes increasing the jurisdiction limit in the Local Court to five years.
>
> ...
>
> Our concern is that if the jurisdictional limit increased to five years, less matters that we do refer to the ODPP for election will be taken up. Whilst there is provision for the ODPP to prosecute matters in the Local Court, our concern is that the ODPP may see this as an opportunity to divert more prosecutions to police prosecutors.
>
> We agree with the Chief Magistrate's reasoning behind increasing the jurisdictional limit, however, propose an increase to three years combined with, not dissimilar to the process outlined in ss.31(3) & (5)

of the Children's (Criminal Proceedings) Act 1987, the re-introduction of the power of a magistrate to commit a person to the District Court for trial or sentence.

State Crime Command in their 20 Feb 2012 response to the Sentencing Council's Review of the Local Court's Sentencing Jurisdiction stated:

The initial recommendation was to increase the maximum sentence allowed to be handed down by the Local Court to five (5) years. However, the Chief Judge of the District Court, the Law Society, the Bar Association, Aboriginal Legal Centre and others did not support that proposal

...

Recommendation 2 - That the Criminal Procedure Act be amended to apply a uniform 2 year maximum for all table 1 and 2 matters

This recommendation is supported.

Considering the recent questions posed by the Attorney concerning Table offences, the Chief Magistrate's proposal of a 5 year jurisdiction limit now appears most appropriate. As indicated, his reasoning is sound. Further, it is relevant to the questions posed for the purposes of the Table review. The current two year jurisdiction limit in one sense limits options for the purpose of this review.

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?

Yes.

Question 6.1

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

Not if 50% have their order revoked.

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

We question the viability of the scheme in circumstances where it costs a lot of money with little, if any, evidence that it acts to prevent and reduce crime by reducing the offenders' need to resort to criminal activity in support of their drug dependency.

Compare or contrast the NSWLRC's examination of the effectiveness of police bail compliance checks[8] against the effectiveness of compulsory drug treatment orders. If the same yard stick and reasoning process is utilised, compulsory drug treatment orders will be proved to be ineffectual and inefficient.

Question 6.2

1. Is home detention operating as an effective alternative to imprisonment?

Yes.

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

We object to AOABH being added to the list of offences that may be dealt with by way of Home Detention.

3. Are there any improvements that could be made to the operation of home detention?

No comment.

Question 6.3

Lack of comprehensive statistics and an evaluation of their effectiveness lead to no comment from Police Prosecutions on the issue of ICOs.

Question 6.4

[8] NSW Law Reform Commission, *Report 133 – Bail* (2012) [5.116]-[5.120].

As stated in our preliminary submission, the NSW Police Force agrees with and adopts the Chief Magistrate's preliminary submissions.

The following statistics are from the NSW Bureau of Crime Statistics and Research:

NSW Criminal Courts Statistics 2007 to March 2011

Number of persons given a section 12 suspended sentenced for their principal offenc

Penalty	2007	2008	2009	2010	Jan to March 2011
S12 Suspended sentence with supervision	3029	3334	3453	3070	734
S12 Suspended sentence	2541	3027	2924	2526	518

*Where a person has been found guilty of more than one offence, the offence which receive most serious penalty is the principal offence.

One can see the steady decline in use of suspended sentences. If the trend indicated by the Jan to March 2011 figures continued, the ultimate 2011 figures would show a very considerable drop in the use of suspended sentences.

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

No – see above.

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

No comment.

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

No comment

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

No

b. partial suspension of the sentence?

No

c. options available to a court if the bond is breached?

No. Proponents of flexibility fail to appropriately appreciate that a suspended sentence is a form of imprisonment. Providing for greater flexibility will result in lack of public confidence in this sentencing option, if indeed such does not already exist. There is already sufficient flexibility within s.98(3)(a)&(b) of the Act. Indeed, s.98(3)(b) provides for too much flexibility and leniency in relation to breach of what is a custodial sentence.

Question 6.5
1. Should the "rising of the court" continue to be available as a sentencing option?

Due to the practice as indicated in para 6.75 of the questions paper, No.

2. If so, should the penalty be given a statutory base?

No.

3. Should the "rising of the court" retain its link to imprisonment?

No.

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?

See answer to 6.6.2.

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

Yes. 2 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?

In the main, yes. However, our answer to question 6.8 provides for an exception.

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

Police Prosecutions supports an increase in the full time imprisonment jurisdictional limit to five years, however, see answer to 6.6.2.

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.

If so:

a. what should be the maximum term of a periodic detention order or accumulated periodic detention orders;

We support the status-quo in this respect.

b. what eligibility criteria should apply;

Bar should be lifted to only exclude those offenders who:

Have not within the past five years served a period of full time imprisonment or have not served a period of full time imprisonment of longer than 6 months duration.

The offender must not have any underlying health condition that would prevent them from completing the whole term of PD.

Offenders who have previously had a PD order revoked are not suitable.

Eligibility criteria run for the currency of the order, such that if the offender becomes unsuitable during the term of the order the PD order is revoked.

c. how could the problems with the previous system be overcome and its operation improved;

If an offender absents themselves from PD on more than one occasion for reasons such as sickness falling short of a major physical injury that prevents them from attending, the order is to be revoked and the offender serve the remaining portion by way of full time imprisonment. If a health condition otherwise is the issue, the offender is not suitable for period detention.

and

d. could a rehabilitative element be introduced?

In Stage 2 introduce an option of short courses of vocational learning for unemployed offenders that may be used towards certificate and/or advanced diploma (TAFE) awards in conjunction with work experience or apprenticeship. This option would only be available to those unemployed offenders who undertook to complete a certificate and/or advanced diploma once their periodic detention had concluded. This option could include a sub-option to reduce the PD order once the detainee had successfully completed a portion of the course and made the undertaking following by a period of recognisance or bond. The condition of early release and the bond being that the offender continue to complete or actually complete the course. Failure to:

- complete a stage of the course in line with the course curriculum, or
- Appear and apply themself at work experience

would result in revocation of this type of period detention order and the offender would revert to the non-rehabilitative and longer periodic detention process. Government incentives could be introduced to encourage private employers to take on such work experience students or apprentices.

This Stage 2 option would be communicated to the unemployed detainee during Stage 1, indicating both the positives and conditions of the option. It is recognised that this option would be expensive, hence the strict revocation guidelines. Those offenders who see it as an easy out without any real intent to rehabilitate would be culled from the process. The goal for those offenders who see it as an opportunity to actually rehabilitate themselves would be to gain employment.

Question 7.1

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

The NSWPF support the retention of Community Service Orders (CSOs).

2. What changes, if any, should be made to the provisions governing community service orders or to their operational arrangement?

No comment.

Question 7.2

1. *Is the imposition of a good behaviour bond under s9 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should s9 be retained?*

s.9 orders should be retained because of:

- their flexibility as a sentencing option, given the range of conditions that can be attached to a bond;
- their capacity to increase the opportunity for access to services and programs that address health issues.

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

The stipulation that a sentence offender be 'of good behaviour' in the view of the NSWPF is somewhat 'vague'. Since, in practice, the condition is considered to be breached upon the commission of a further offence (and not necessarily by other forms of inappropriate or 'bad behaviour' falling short of an offence), the condition should be reworded to make it clear that what is contemplated is that the recipient of the bond is to not commit any 'further offence' and comply with any condition of the bond.

Question 7.3

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

The NSWPF emphasises the importance of closely monitoring an offender's adherence to bond conditions and of promptly bringing breaches to the notice of the court. Breaches should be dealt with seriously since failure to do so will potentially bring into disrepute the system of non-custodial sentencing options. Unless a breach is technical, trivial or can be readily excused in the light of the offender's circumstances or circumstances beyond his or her control, it should result in revocation of the bond and the imposition of an

appropriate sentence.

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

There are situations where a suspended sentence is appropriate, however, the length of the appropriate custodial term is shorter than would be appropriate to act to deter the offender from committing further offences or provide for an effective rehabilitation program. Courts should be able to impose suspended sentences where the term of the bond contains a custodial element or term with a consecutive bond or recognizance term. Another option is to allow for the imposition of two different sentences for the same offence. i.e.

> *For the offence of *****, I sentence you to imprisonment for 6 months to be suspended upon you entering into a s.12 bond for a period of 18 months.*

Breach of the bond during the custodial term would attract the considerations now within s.98(3) of the Act and consequences within s.99(1)(c). After the custodial term, any breach would attract the considerations within s.98(2) and consequences within s.99(1)(a) or (b). If a breach during the custodial term results in revocation of the bond and imposition of an actual term of imprisonment, the revocation would act to revoke the whole term of the bond.

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?

The NSWPF acknowledge that fines have numerous advantages when utilised as a sentencing option, therefore, the provisions contained within the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be retained.

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

Given that a fine is advantageous only if an offender has the capacity to pay, consideration should be given to allowing an impecunious offender to apply to the court, at the time of the imposition of a fine or thereafter, for an order that he or she be approved to work off the fine by way of community service.

It is imperative that the courts do not impose sentences that cannot be enforced. If magistrates are obliged to impose fines because no other options are available, even in cases where they know the fine is unlikely to be paid, this is likely to challenge the court system. Judicial attempts to avoid potentially unjust outcomes brought about by undue severity, can in turn, lead to unjust outcomes because of disproportionate leniency, such as an over-

reliance on s 10 orders resulting either in outright dismissal, or a conditional discharge that avoids the usual consequences of a recorded conviction and sentence.

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

Providing for a calculation cannot sit with the instinctive synthesis approach to sentencing. The very fact that this question is asked militates against instinctive synthesis as an appropriate sentencing process overall.

The maximum fine should take into account the objective seriousness of the circumstances of the offence balanced against the offender's financial means.

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?

s. 10A should be retained.

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

We propose no changes to the provisions governing the recording of no penalty or its operation arrangement, however, it should be retained under the condition that it is used for circumstances where a s.10 bond is considered inappropriate, because for example the offence is not trivial, but it is problematic to impose any further penalty.

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?

s.10 orders should be retained.

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

s.10(3)(a) – (c) should be an exhaustive list. Allowing the court to take into account any other matter it thinks proper to consider is too wide a discretion for what is a lenient sentencing option.

Question 7.7

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

No. The Criminal Law Review Division of the Dept of Attorney General and Justice often use the notion of 'net widening' as a reason for not adopting new legislative processes. The problem is that persons are being dealt with under section 10 when they shouldn't be, because judicial officers are concerned about the ramifications of a conviction on, for example, an offenders future employment prospects rather than giving due consideration to the objective seriousness of the nature and circumstances of any offence. Providing for this option will give credence to such inappropriate sentences and inappropriately increase the amount of offenders dealt with under this section that should not be.

Responding to the above paragraph by saying that the number of appeals against matters being dealt under s.10 do not indicate that the section is being inappropriately used does not appreciate the reality and practicality of situation. Commencing appeal proceedings costs a lot of money. The test for commencing a Crown appeal is manifest inadequacy. Dealing in with a matter under s.10 may be inadequate, but not manifestly inadequate. These issues militate against the DPP deciding to commence appeal proceedings following s.10 being employed inappropriately.

Question 7.8

1. Should any other non-custodial sentencing options be adopted?

Apart from a 'fine held in trust', no. There are already sufficient sentencing options available to judicial officers, including diversionary options. Any additional non-custodial sentencing option might unnecessarily add to the complexity of the sentencing task.

Question 7.9

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

Yes.

- There should be no maximum amount.
- 28 days to pay. Reminder notice sent by Registry at 28 days and providing for a further 28 days to pay with notice that if payment is not made a warrant for their arrest will be issued. Registrar has power to issue warrant without need to relist proceedings before a magistrate. After the issue of a warrant the option of fine held in trust is no longer available.
- Third parties not permitted to make payment.
- Forfeiture after the commission of any further offence, including one that is dealt with under s.10.
- Inappropriate for use against any offence where there is a mere possibility that the proceeds of the crime may be used to pay the fine held in trust.

Question 7.10

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

The NSWPF supports measures that begin to address the negative impact of the fines system on vulnerable people in the community. To this extent, the NSWPF recognize that the evidence suggests that the current WDO scheme has been successful in achieving its objects. Thus, we support the expansion of the program.

If implemented as a sentencing option, consideration should be given to restricting its use to non-serious offences and/or non-recidivist offending.

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?

This appears to be a viable option.

Furthermore, as drivers licence and vehicle registration sanctions imposed by the SDRO are lifted when a person enters into a WDO, the WDO is likely to have an impact on secondary offending. Given the size of the pilot (600 offenders), the impact of the scheme on state wide re-offending is not apparent from state-wide statistics, however, it is self evident that lifting licence sanctions imposed by the SDRO will reduce the risk of people in fine

debt being charged with Drive whilst licence suspended or cancelled licence due to fine default. It is important though to restrict the scheme to fine defaulters; not drivers who have had their license suspended due to exceeding their allocated demerit points.

Should the community service order scheme be adapted to incorporate the aspects of the work and development order scheme to assist members of vulnerable groups to address their offending behaviour, it would allow the mainstream criminal justice system to provide more efficient supervision and monitoring of sentencing through the traditional methods, (i.e. Probation and Parole Service).