Question Paper 8 – The structure and hierarchy of sentencing options

Hierarchy of sentences

Question 8.1

Should the Crimes (Sentencing Procedure) Act 1999 (NSW) set out a hierarchy of sentences to guide the courts? What form should such a hierarchy take?

Specifying a statutory hierarchy of sentences would have utility in settling the appropriate level of sentencing and making the sentencing process more transparent.

We support change to the current requirement that first imprisonment must be decided as the appropriate penalty and then the sentencer turns his or her mind to whether or not an alternative to prison can be imposed. A simple hierarchy representing the severity of sentences would be more transparent and logical.

The need for flexibility

Question 8.2

Should the structure of sentences be made more flexible by:
a. creating a single omnibus community-based sentence with flexible components;

b. creating a sentencing hierarchy but with more flexibility as to components;

c. allowing the combination of sentences; or

d. adopting any other approach?

Greater flexibility in the structure of sentences has an initial appeal. However on closer consideration it potentially introduces further complexity to the sentencing exercise, and could have adverse resource implications or other undesirable consequences. For instance it may be the case that unless the sentencer is completely up to date on the resources and programs available for particular sentencing options they might inadvertently be exposing the prisoner to unnecessarily repetitive programs or conversely the prisoner may miss out on appropriate programs.

Also in the case of combining a sentence of imprisonment with a suspended sentence, it is difficult to see how in substance this really differs from a non-parole period and a parole period.

Particular sentencing combinations

Question 8.3

1. What sentence or sentence component combinations should be available?

Generally we would support combinations of community-based sentencing with bonds. In many circumstances there will be more than one offence for which the offender is being sentenced and thereby there is already capacity to combine sentences.

We also recognise that for many offenders the option of a short period of imprisonment might be far more desirable than a combination of sentences, as they are less likely to be set up for failure. We are also not sure if a combination of sentencing options will in fact stretch limited probation and parole resources more than the current options do.

2. Should there be limits on combinations with:
a. fines;

b. imprisonment; or

c. good behaviour requirements?

Imprisonment should not be combined with other sentences, as imprisonment should be seen as sufficient punishment.

There needs to be limitation on the duration of any of these options. The capacity for fines and good behaviour bonds to be monitored for an extended period have resource implications and we would expect limited utility.

Question Paper 9 – Alternative approaches to criminal offending

Early diversion

Question 9.1

Should an early diversion program be established in NSW? If so, how should it operate?

We are in favour of an early diversion scheme that applies to offenders generally, and is not limited by virtue of special characteristics of the offender or geography. We have no firm views on what sort of scheme could apply in New South Wales, however the minimum requirement of any scheme would appear to be that the offender accepts responsibility for the offence, there should also, in certain circumstances, be capacity for recompense being made to any victim of the offence and opportunity for the offender to make some reparation by either donation or

performance of community work or voluntary attendance of a program or treatment in appropriate circumstances.

Ideally a person or body independent of the police would assess the appropriateness of the diversion before diversion occurred. However, we can see that this would have significant resource implications, particularly for instance if the DPP were to be the approving agency. It may be that the Ombudsman's oversight of the police could adequately monitor such a scheme.

Program-based diversion

Question 9.2

Is the Court Referral of Eligible Defendants into Treatment program operating effectively? Should any changes be made?

We are not in a position to comment about this scheme.

Question 9.3

Is the Magistrates Early Referral into Treatment program operating effectively? What changes, if any, should be made?

We are not in a position to comment about this scheme.

Question 9.4

1. Is the Drug Court operating effectively? Should any changes be made?

The evaluations by BOCSAR have indicated that NSW Drug Court is operating effectively and is achieving the aims set out in the legislation. The program meets the therapeutic needs of the referred offender, at the same time addressing needs of the wider community with better outcomes in respect of cost effectiveness and lowering recidivism rates than other diversionary programs in the criminal justice system. [1]

The Court has a strong policy development ethos and does address those necessary changes to program and operational requirements as each challenge presents itself. The Drug Court has grown into a specialist area that has made a number of policy developments over time, improving outcomes for the program and its participants.

There are a number of checks and balances already built into the Court's multi-disciplinary team allowing issues to be addressed for all stakeholders.

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[1] NSW Bureau of Crime Statistics and Research, *The New South Wales Drug Court Evaluation: A Process Evaluation* . (2002); NSW Bureau of Crime Statistics and Research *The NSW Drug Court: A Re-evaluation of its Effectiveness:* (2008).

2. Should the eligibility criteria be expanded, or refined in relation to the "violent conduct" exclusion?

The question paper suggests 3 ways of expanding the drug court:

- ***Expand to cover alcohol and any drugs that are not presently covered (for examples, Benzodiazepines)***

Expansion to include person's suffering from Alcohol addiction alone, is firstly a treatment issue and may be better suited to other programs and may change the dynamics of this jurisdiction given the obvious addiction/crime nexus for this type of person may see the referral of large number of violent offenders.

"any drugs that are not presently covered":

This is not an issue because the NSW Drug Court deals with persons that are addicted to a whole range of drugs, prohibited as well as prescription/restricted substances. Poly substance abuse is a complex and common issue for all participants, although section 3 of the Act refers to prohibited drugs, this is a very fine distinction when you take into account the type of person referred to the Court. This distinction has never been raised by Justice Health when an applicant is assessed to determine that they are an addict, nor should it be raised as a gateway issue.

- ***Expand the geographical availability of the program by reference to the usual place of residence of the offender and the location of the referring court***

A more equitable system would arise if more Drug Courts were rolled out to include all of the greater metropolitan and large regional centres to allow greater access for those eligible and appropriate persons. Essentially replication of the current Drug Court model in other catchment areas would be the most effective approach as evidenced by the Toronto Drug Court. A roll-out of Courts is a more practical way to address these issues rather than merely increase the numbers of places available at the two Courts that currently exist.

However, Local Government areas and geographical boundaries are an important consideration in expansion of the program. A catchment or easily accessible hub is required, as participants must report to the Court at least once per week, attend three drug tests per week, attend health services, dosing clinics and other programs. All of these services are provided within local networks.

Furthermore geographical boundaries take into account the socio-economic circumstances of a participant, most are unlicensed or disqualified from driving, or only have access to public transport and may be unable to afford fares for travelling great distances. For example time and cost of travel has

been an issue for a number of participants meeting their program commitments at Toronto, given the geographical size of the Hunter catchment.

Expansion of the geographical boundaries and referring courts as suggested above is the most appropriate way in which to expand the program and should be considered as an essential part of a sound State plan, it would greatly assist in diverting and rehabilitating a greater number of offenders away from the traditional criminal justice system.

- ***amend criteria relating to offender' eligibility for the program.***

The paper suggests on pages 19 at 9.93 to 9.97 that refining "violent conduct" would be another way to expand the program and such an amendment would then enable referrals for offenders who have committed robbery offences. The paper states that current interpretation of the section s5 (2) is contrary to the approach anticipated by the Government and cites the second reading speech, where the Minister stated that the program would deal with "unarmed robberies provided there is no violence", however it neglects to cite the whole of that paragraph, which clearly outlines the Governments intention for a program that would deal with only non-violent offence categories .[2]

The ODPP has submitted to the CLRD on the violent conduct issue from an opposite view point, that is, to refine "violent conduct" to allow for both elements and conduct rather than the current situation post Hilzinger that arises, where the Court is able to deem a person eligible if the of fence meets the elements test, then at sentencing take into account violent conduct.

The Drug Court program has always been aimed at non-violent offenders and that the type of reasoning outlined in 9.94 and 9.95 is at odds with this. The Drug Court is a conditional liberty program of a relatively short duration and to submit that a serious violent offender being referred to the program is appropriate and a to expand the current program is problematic on a number of levels.

- The adequacy of the sentence for this type of offender is a real issue for this jurisdiction given the duration of the program is 12 months and at graduation participants are invariably given a good behaviour bond.

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[2] *The Drug Court program will deal only with offenders who commit certain categories of offences. These offences will be mainly non-violent theft offences. Those offenders who commit sexual offences and offences involving violent conduct will not be eligible. The types of offences that will be included are break, enter and steal, fraud and forgery offences, offences involving stealing from a person or unarmed robberies, provided there is no violence. NSW, parliamentary Debates, Legislative Counsel, 25 November 1998, 10576 (P.Welan).*

- The likelihood of relapse and the risk to the community of further violence from this category of offender may be too great.
- Evaluations of the program have been assessed on a program that has only been available to non-violent offenders it could change the very nature of the program and the positive outcomes identified by BOCSAR.

There is a current program that meets the needs of offenders who commit drug motivated robberies. The CTDCC was a program that was set up to fill the gap for this type of offender's rehabilitation in the appropriate setting.

The Drug Court program is always in high demand and operates at capacity with the current eligibility criteria. It is agreed that geographical boundaries are inequitable and this should be addressed. However, to suggest refining the criteria in relation to violent conduct exclusion in the way the papers suggests is inappropriate in light of the program success over the last 13 years with the current pool of non-violent applicants.

In our submission the violent conduct exclusion should be refined to exclude offences where violence is an element of the offence charged and if the circumstances of the offence include violent conduct towards the person. This is essential to maintain the program's success and the continued support of the community.

Section 11 adjournment

Question 9.5

Is deferral of sentencing under s 11 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working effectively? Should any changes be made?

Deferral of sentencing under section 11 is a very useful scheme in appropriate circumstances provided in the period of adjournment is not more than six months.

One of the problems with the option is administrative, as courts, particularly busy Local Courts, have limited capacity to effectively monitor a section 11 bond, and using this option means that the matter will not dealt with in the time standards set by the Courts. Judicial officers do not sit at the same centre continuously, and if the offender is to be called up they may be required to either appear before a different judicial officer or have to travel some distance. Continuity of the prosecutor is also difficult to achieve.

Intervention programs under the *Criminal Procedure Act 1986* (NSW)

Question 9.6

1. Is the current scheme of prescribing specific intervention programs operating effectively? Should any changes be made?

2. Is there scope for extending or improving any of the programs specified under the scheme?

3. Are there any other programs that should be prescribed as intervention programs?

We are not in a position to comment on any of the current schemes however generally we support of the principles of restorative justice and the extension of forums sentencing to first-time offenders.

Approaches to criminal offending

Question 9.7

1. Should restorative justice programs be more widely used?

As stated above we would support the extension of forum sentencing to a wider category of offenders.

2. Are there any particular restorative justice programs in other jurisdictions that we should be considering?

Not that we are aware of.

Question 9.8

1. Should problem-solving approaches to justice be expanded?

In principle we are in favour of problem solving approaches to justice, however these approaches tend to be limited by the availability of resources and to a particular area, so are inequitably applied across the state. As such these approaches tend to be no more than token or band-aid solutions to issues.

Rather than adopting or importing ad hoc approaches from other jurisdictions, it seems that New South Wales would benefit from a holistic, integrated and equitable approach to sentencing, diversion and restorative justice. To this end we support mainstreaming of the problem-solving approaches to justice.

2. Should any of the models in other jurisdictions, or any other model, be adopted?

The Neighbourhood Justice Centre Model appears to have had success in involving the local community in the administration of justice.

Any other approaches?

Question 9.9

Are there any other diversion, intervention or deferral options that should be considered in this review?

Not that we are aware of.

Question Paper 10 – Ancillary orders

Compensation orders

Questions 10.1

Are compensation orders working effectively and should any changes be made to the current arrangements?

We agree with the observations that compensation orders present many of the same practical problems as fines when it comes to the question of enforcement. For that reason we have some reservations about the New Zealand model where there is a presumption in favour of reparation.

Driver licence disqualification

Question 10.2

1. What changes, if any, should be made to the provisions governing driver licence disqualification or to its operational arrangements?

We agree that the automatic imposition of disqualification period can lead to the situation where the disqualification period exceeds any reasonable notion of an appropriate disqualification period. On this basis, the mandatory disqualification periods should be reviewed, we would be in favour of more discretion on the part of sentencer as to the period of disqualification or the introduction of a re-licensing scheme to operate as an incentive for the offender to comply with the court orders and become a responsible driver.

2. Should driver licence disqualification be made available in relation to offences that do not arise under road transport legislation?

We do not support the use of driver licence disqualification in relation to offences that do not relate to driving.

Non-association and place restriction orders

Question 10.3

1. Should non-association and place restriction orders be retained?

Non-Association and place restriction orders are rarely imposed. Arguably, the need for orders to deal with gang-related crime is reduced in light of new consorting offences. Despite this there is some utility in maintaining the orders as a sentencing option.

2. Should any changes be made to the regulation and operation of non-association and place restriction orders?

Not that we are aware of.

Question paper 11 – Special categories of offenders

Indigenous offenders

Question 11.1

1. How can the current sentencing regime be improved in order to reduce:
a. the incarceration rate of Indigenous people; and
b. the recidivism rate of Indigenous offenders?

The holistic improvements to the sentencing regime being considered by this reference will be an important starting point to reduce the imprisonment rate of indigenous people. The Fernando principles are well-known and applied by courts and a return to an emphasis on the common law can only elevate those principles further.

The imposition of sentences that do not set up the offender to fail, will be an important contributing factor to the recidivism rate. The restorative justice models and the Koori Courts have had positive evaluation and should be considered as part of an integrated mainstream sentencing model.

2. Are there any forms of sentence other than those currently available that might more appropriately address the circumstances of Indigenous people?

Not that we are aware of.

3. Should the Fernando principles be incorporated in legislation and if so, how should this be achieved and what form should they take?

We do not think it is necessary to incorporate the Fernando principles into legislation. Codification may produce unintended results and may limit the evolution of these principles.

Offenders with cognitive and mental health impairments

Question 11.2

1. Should the Crimes (Sentencing Procedure) Act 1999 (NSW) contain a more general statement directing the court's attention to the special circumstances that arise when sentencing an offender with cognitive or mental health impairments? If yes, what form should these principles take?

The extent of cognitive or mental health impairment needs to be carefully defined in this context, as a significant proportion of offenders at the time of sentencing will present the court with a psychological report that will indicate some form of mental health disturbance. Even then there are a significant range of conditions, responses to those conditions and prognoses, on which evidence may be presented.

For this reason we would be apprehensive about a generalised statement about mental health or cognitive impairment in the Sentencing Act.

2. In what circumstances, if any, should the courts be required to order a pre-sentence report when considering sentencing offenders with cognitive and mental health impairments to prison?

The only circumstance where a court should be required to order a pre-sentence report is where the offender is unrepresented.

3. Should courts have the power to order that offenders with cognitive and mental health impairments be detained in facilities other than prison? If so, how should such a power be framed?

While this option might be appropriate in a limited number of cases there does appear to be quite significant problems with the court having the power to order detention in somewhere other than prison, in terms of the capacity of an alternative detention place to accommodate the prisoner. We also note that currently there is a critical shortage of facilities for treatment in the community.

4. Do existing sentencing options present problems for people with cognitive and mental health impairments? If so, how should this be addressed?

Yes some of the community-based sentencing options will present problems for people with cognitive and/or mental health impairments in terms of their compliance with those orders, in these circumstances imprisonment may be the most expedient option. The only way that these problems can be addressed is by the sentencer having a very complete picture of the capacity of the offender to comply with orders and not be encouraged to impose a penalty in which the offender will almost inevitably be unable to comply with.

5. Should any new sentencing options be introduced for people with cognitive and mental health impairments? If yes, what types of sentencing options should be introduced?

We are in support of more diversionary options for people with cognitive and mental health impairments.

Women

Question 11.3

1. Are existing sentencing and diversionary options appropriate for female offenders?

We do not have sufficient information to properly comment to make on this topic.

2. If not, how can the existing options be adapted to better cater for female offenders?

3. What additional options should be developed?

Corporations

Question 11.4

Are additional sentencing options required in order to achieve the purposes of sentencing in relation to corporations? If yes, what should these options be?

We have no comment to make on this topic, because we have not had the experience that other organisations have had in prosecuting corporations.

Any other categories

Question 11.5

Are there any other categories of offenders that should be considered as part of this review?

Not that we are aware of.

Question Paper 12 – Procedural and jurisdictional aspects

Accessibility of sentencing law

Question 12.1

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

The Victorian Sentencing Advisory Council website "You Be the Judge" is an innovative and effective way of educating the public about the sentencing task.

We have some reservations about greater access to the courts through audiovisual links and broadcasting because of the tendency of material to be disseminated through the Internet therefore compromising the privacy of victims, witnesses and other participants in the criminal justice system.

Question 12.2

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

We have no comment on this topic.

Procedural reforms

Question 12.3

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

We support all the options suggested at 12.40 of Question Paper 12. In addition we think it is important that the District Court in its listing practices is realistic as to the amount of work that a judge may complete in a day. Sentences need to be listed with some priority and certainty.

Another area that could possibly be improved concerns sentencing of co-offenders. Ensuring that co-offenders appear before the same judge is something that the

ODPP strives to facilitate however often fails to achieve. In our view a statutory provision concerning a requirement that co-offenders are sentenced by the same judge, unless there are compelling reasons for this not to occur, would greatly assist this process.

Question 12.4

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

We strongly support streamlining the assessment process and the ordering of pre-sentence reports. Originally pre-sentence reports were only ordered if the court was seriously considering an alternative to full-time custody, the practice has now developed whereby a pre-sentence report becomes a background report in every case. Greater consideration of the issue by the judge before the report is ordered is required, this may include the judge having regard to the facts and antecedents on the mention date, this is a stage where something akin to a sentence indication may be appropriate.

Possibly a statutory provision prescribing the ordering of pre-sentence reports would address this situation.

Question 12.5

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

Yes, it is desirable to attempt to encourage oral sentencing remarks if it is possible. Perhaps a legislative provision as suggested may assist in doing that.

It is always possible for a court to deliver an ex tempore judgement, and invariably it will be done by judges in particular types of cases, usually the less complicated ones.

The line of authority dating back to *House v King* is built upon finding error - which demands scrutiny of the reasoning, and hence a considered judgment. Judgments need not be lengthy, but they do need to address all relevant considerations.

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)?

We support in principle changes that would reduce the scope and number of sentencing appeals to the CCA. The suggested "manifest excess or inadequacy" test has the potential to do that, although we do query what the CCA would do if the sentencing judge had clearly made an error, by for example failing to take a relevant consideration into account.

We query whether changing the appeal process from the Local Court to the District Court to require establishing error may not have the effect of increasing the amount of work to be done on the appeal and increasing the workload in the Local Court, because:

- Magistrates may need to provide lengthier and more detailed judgments. When the number of matters that are currently appealed are balanced against the total number of matters dealt with in the Local Court, this change may have a significant impact on the workload and efficiency of the Local Court.

- Currently a transcript of the proceedings is not taken out in severity appeals to the District Court. For an appeal to be determined on error then it will be necessary for the transcript to be available. This will bring about considerable delay in determining severity appeals. If delay results, then an appellant appealing a custodial sentence runs the risk of the sentence expiring before the appeal can be heard, unless granted bail.

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?

Where there is a discrete ground asserting a clear s43 error, the proposal for the CCA Registrar to be satisfied that appropriate steps have been taken to attempt relief under s43 before a CCA appeal is listed seems reasonable. We note however that many appeals may have claims of multiple errors in sentencing and some not amenable to s43 correction.

We agree that the use of s43 should be encouraged - where it is appropriate. The appropriate use of s43 saves the CCA having to re-sentence on the basis of a sentencing judge acting under a misapprehension as to facts or some other error. However, the remedy should be available only in instances where the error is objectively present at the time the sentence was imposed. Where an appellate court decision alters the law as set out by a previous appellate court in our view s43 is not an available option. The sentence was in accordance with the law as it stood at the time.

To have the CCA deal with such cases is not necessarily inefficient. Recently there have been many appeals filed in the CCA on the basis of sentencing judges sentencing for SNPP offences in accordance with Way, as opposed to Muldrock. In a number of cases, these grounds have been dismissed despite the error in approach and the CCA has developed principles in this area that are useful to all judges. Were such issues to have been ventilated solely before the original sentencing judges in discrete instances, outcomes may have been quite different, particularly where there was, for a time, a paucity of appellate guidance.

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

This proposal certainly has merit, though in practice it may be difficult for the Crown to make a proper assessment at the outset as to whether or not it is appropriate for an appeal to be heard simply on the papers. For the Crown to make a determination it is likely to need the appellants written submissions. Only then would the possible complexities in the matter be apparent.

Presently, once appeal papers are filed, the appeals are generally listed for hearing. Allocation and briefing of the Appeal Crown happens later. If appeals are to be determined on the papers where there is agreement and the election occurs early in he process, this will mean that Crown resources must be tied up earlier in the process once. We are not resourced for this.

One of the other problems is that although an appeal may seem straightforward, one cannot not always predict what the Court will take an interest in, and listing appeals solely for determination on the papers has the potential to affect one party where their written submission may not be as thorough on a particular issue, unless the Court ensures due process by informing the parties of an issue they are concerned about and seeking additional guidance and assistance.

Question 12.7

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

The bottlenecks that exist that prevent committal for sentence proceeding as swiftly as possible include

- a delay in finalising and serving the brief of evidence, particularly the provision of analytical reports and other expert evidence

- the current Local Court practice note is being strictly enforced, this is having the effect of pushing the matter along, however it operates on the assumption that there will be a plea of not guilty. This has the effect of diverting attention from trying to settle the matter to complying with the timetable.

- We accept that problems can arise when a Crown Prosecutor is briefed late in the proceedings, however appropriate representation for the defendant is also important. Often it is the case that Counsel is not briefed until shortly before the trial and at that late stage the offender gets the first realistic advice about the matter's prospects.

In our view it is most unfortunate that the criminal case conferencing trial ceased, as amongst other things, a change in culture was being achieved whereby legal practitioners were beginning to realise the benefits of a

conference. Unfortunately, one of the greatest impediments to committal for sentences being identified early in the proceedings, is a question of perception and culture on the part of defense lawyers, namely that the best plea "offer" is available only when the Crown who is going to run the trial is briefed, and the Crown witnesses proofed prior to trial.

Jurisdictional reforms

Question 12.8

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

a. having specialist criminal law judicial officers who are only allocated to criminal matters;

We support the idea of specialist criminal judges, on the basis that a significant amount of appeal work in the CCA is generated by a small number of judges.

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;

There are a variety of views in the Office about the establishment of a Crown court. Some consider it an idea worth considering.

d. amending the selection criteria for the appointment of judicial officers;

e. in any other way?

Question 12.9

1. Should the comprehensive guideline judgment system in England and Wales be adopted in NSW?

Yes, we are in support of this approach.

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?

Specialist research bodies could play a role in the formation of guideline judgments under the present scheme.

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

The power to seek a guideline properly resides with the Attorney General. In our view any other party should require leave before a guideline case proceeds. So much preparatory work goes into a guideline application that it is undesirable to prepare an application where leave might simply be refused.

3. Should the Chief Magistrate have the power to issue guideline judgments for the Local Court? If so, what procedures should apply?

No.

Question 12.10

1. Should a sentence indication scheme be reintroduced in NSW?

There is no consensus within the ODPP as to whether the sentence indication scheme should be reintroduced into New South Wales. The concern that sentence indications in the District Court work to discourage pleas in the Local Court was voiced by some prosecutors. Those against sentence indications are critical of sentence indications as they operated in New South Wales in the 1990s. The criticisms center upon the fact that particular judges were rostered to provide the sentence indications. The Goodyear model may go some way to addressing the criticisms made of the earlier scheme. Others prosecutors consider that sentence indications could work well with a comprehensive system of sentencing guidelines and may increase early pleas.

The ability for an indication to be provided at the Local Court stage, to encourage a committal for sentence would definitely encourage pleas being entered at an earlier point in time, but we cannot think of a way this could be practically achieved.

2. If so, should it apply in all criminal courts or should it be limited to the Local Court or the higher courts?

We tend to think that sentence indications should be of the greatest utility in the District Court.

There would seem to be limited scope for a sentence indication in the Local Court for a matter being dealt with summarily. There may be some utility however in circumstances where the defendant wished to elect to proceed on indictment and the prosecution didn't.

3. Should a guideline judgment be sought from the Court of Criminal Appeal to guide the operation of the scheme?

Yes this option should be considered.

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?

One of the problems with the previous scheme was that the scheme had a clear incentive to reduce the amount of work in the District Court. To achieve this judges that were widely regarded as "lenient" were regularly rostered to conduct the sentence will indication list. Initially sentence indications were also limited to the

Sydney region. If sentence indications were more generally available in the District Court, and considered an option in the process used in conjunction with sentencing guidelines and streamlined pre-sentence reports, then they would come before various judges as a matter of course.

The role of victims in sentencing proceedings

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?

In our view *Previtera* is sound in principle. Sentencing judges should not be required to or have the discretion to impose a harsher penalty upon an offender who causes the death of a person who is widely loved than upon one who caused the death of an unloved victim. The death of the victim is already an element of the offence in homicide cases and clearly recognised in the sentencing process.

We are concerned about the feasibility of establishing an evidentiary basis for the statement. The maker would be exposed cross-examination. While most defence lawyers would exercise their forensic judgement and choose not to cross examine a family victim, the prosecution would still need to warn and explain to the statement maker what may happen. Also, it would be necessary to ensure any factual assertions were capable of proof, and in some cases it may require the assertions of, for example, psychological or medical impact being supported by expert evidence.

Also we note that notwithstanding that victim impact statements are not required to be made, we are concerned that there is an increasing expectation by the courts that a victim impact statement will be made on sentence. This increases the pressure on families who would rather not make a statement to make one or otherwise make them feel they have failed in some way if they do not make a statement.

2. Should any changes be made to the types of offences for which a victim impact statement can be tendered?

Not that we are aware of.

3. Are there any other ways in which victims should be able to take part in the sentencing process which are presently unavailable?

Not that we are aware of.

Other options

Question 12.12

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

Not that we are aware of.