CORRECTIVE SERVICES NSW
SUBMISSION TO THE NSW LAW REFORM COMMISSION
REVIEW OF THE *CRIMES (SENTENCING PROCEDURE) ACT 1999*
QUESTION PAPERS 8-12

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?

Corrective Services NSW (**CSNSW**) notes that while a 'hierarchy' of sentencing options is apparent in the current legislation, this hierarchy has not been articulated as such in the legislation.

In responding to Question Paper 8, CSNSW understands the need to:
1. actively prevent net-widening, and
2. promote early intervention and rehabilitation of offenders.

Both of these objectives can be achieved by:
1. the identification of those at higher risk of further offending at the earliest point in their offending careers, and
2. the provision of intensive services to this group of offenders which directly address their offending needs.

For this to happen, there is a need for continued or greater flexibility in the legal orders imposed by the courts. This flexibility includes the continuation of the practice of including a condition in Good Behaviour Bonds giving CSNSW discretion in relation to the duration of active supervision of an offender. It also includes the proposal outlined in the below response to Question 8.2(d) that, in relation to Community Service Orders, CSNSW has the flexibility to convert work hours to program hours and vice versa to address offending behaviour at the optimum and appropriate level of intensity.

The NSW Government has made a commitment to continue to reduce the custodial population and this commitment appears to have implications for the review of sentencing practices in NSW. CSNSW recommends the retention of the hierarchy of sentencing as such a hierarchy provides further community-based options for courts to consider when 'lower level' community-based options have not been successful. A reduction in the number of community-based options may limit the opportunities a court has to divert offenders from custody and to enhance opportunities for offender rehabilitation.

A range of community-based sentencing alternatives in the context of a sentencing hierarchy also appears to be well aligned with the evidence in relation

to offending careers. Desistance from offending is a process by which the offending rate declines steadily over time to zero or to a point close to zero (Bushway, Piquero, Broidy, & Mazerolle, 2001; Laub and Sampson, 2001; Leblanc and Loeber, 1998). This gradual desistance pattern is consistent with life-course changes from high levels of impulsivity, to basic maturation and the formulation of adult social bonds. The imposition of custodial sentences may be seen as detrimental to this maturation/desistance process. A further community-based option imposed by the court in response to a breach would actively promote the development of skills, knowledge and values that allow the offender to develop pro-social bonds which promote the desistance process.

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;

CSNSW recommends that the current separation of components by way of separate orders should remain so that courts continue to have a range of community-based options as a response to a breach.

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

Flexibility in the components of the sentencing hierarchy allows CSNSW to effectively manage offenders both in relation to the conditions imposed by courts and in accordance with international evidence-based practice to reduce re-offending. For example, conditions on Good Behaviour Bonds to “comply with all reasonable directions of the Probation and Parole Officer” allows offenders to attend intervention programs as required at a level of intensity commensurate with the level of risk the offender poses to the community. Similarly, CSNSW strongly recommends that the inclusion of the condition for supervision should be retained as this promotes the efficient use of resources, including targeting of resources to those offenders who pose a higher risk of further offending. These practices actively protect the community from harm.

(c) allowing the combination of sentences; or

The combination of components of sentences already exists at the higher end of the sentence hierarchy. The Intensive Correction Order essentially combines community service and rehabilitation orders with some options for movement restrictions on the offender.

CSNSW does not support the combination of sentences for one offence.

Combining sentences for one offence would only make the administration of such orders complex and resource intensive for CSNSW.

Combining sentences for one offence may be a barrier to the retention of the current hierarchy of sentences.

Further, combining sentences may, unintentionally, have a net widening effect in hastening custodial sentences for those who do not successfully complete a 'lower' level community-based order. This would be inconsistent with the NSW Government's focus on diversion from custody.

Finally, a combination of sentences may be perceived as 'double sanctions'. Many offenders have multiple offences sentenced concurrently. Accordingly, there are already opportunities for courts to combine sentences in a large number of cases where there are multiple offences and where the court sees fit to do so.

(d) adopting any other approach?

CSNSW recommends changes to Community Service Order practices to promote flexibility for evidence-based practice to be applied to higher-risk offenders. The current practice is for the court to specify both the number of work hours and the number of program hours on Community Service Orders.

The number of program hours can generally be accurately specified by the Probation and Parole Officer when a full Pre-Sentence Report has been prepared for the court, unless further issues come to light. However, in cases where a Probation and Parole Court Duty Officer has prepared court advice, a full assessment of the offence-related needs and appropriate intervention may be inaccurate because it is difficult to verify information provided by the offender in the timeframe required by the court. In such circumstances, program hours imposed by the Community Service Order may be insufficient or may not be required.

Under section 3(1) of the *Crimes (Administration of Sentences) Act 1999* (NSW) (**CAS Act**), "***community service work*** means any service or activity approved by the Minister, and includes participation in personal development, educational or other programs".

CSNSW recommends changes to the current practice of the court of specifying the number of program hours and number of work hours for Community Service Orders. CSNSW recommends that the court should specify the total hours at sentencing and that the division of those hours between work and programs should be left to the discretion of CSNSW. This would allow higher risk offenders to be targeted with intensive programs and services, including one-to-one interventions as required, to address their offending behaviour at an appropriate level and to facilitate community protection. Changes to legislation appear not to be necessary for this to occur. However, this proposal would require negotiations between CSNSW and the Attorney General's Division of the Department of Attorney General and Justice.

Particular sentencing combinations

Question 8.3
1. What sentence or sentence component combinations should be available?

CSNSW does not recommend that sentences or sentence components should be further combined.

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

See above.

(b) imprisonment; or

See above.

(c) good behaviour requirements?

See above.

Summary

CSNSW recommends that:

- The current sentencing hierarchy should be retained.
- The current practice of the inclusion of conditions on Good Behaviour Bonds should continue.
- The current practice of courts specifying both the number of program hours and number of work hours on a Community Service Order should cease and the court should instead specify the total number of hours and the division of those hours between work and programs should be left to the discretion of CSNSW.

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?

While diversion is currently a highly salient topic, CSNSW believes it is important to clearly specify:

1. what an individual is being **diverted from**, and
2. where an individual is being **diverted to**.

For example, it should be clear if the individual is to be diverted from the criminal justice system or from custody. Secondly, it should be clear where an individual is to be diverted to, that is, which services, support and programs in the community are available to provide alternatives to the criminal justice system or custody.

Finally, where an individual is being diverted from the criminal justice system, there should be careful consideration of the relationship between the offending behaviour and the characteristics of the individual that provide the rationale for diversion. For example, if the defendant is to be diverted from the criminal justice system on the basis of mental impairment, this course of action would only maintain community safety if the mental impairment was directly related to the offending behaviour. If the mental impairment was not directly related to the offending behaviour, providing treatment for the mental impairment would have no impact on the risk of further offending and the safety of the community may be placed in jeopardy. In addition, the mandated mental health treatment may be considered unethical since this would not be related to the offending.

There are limited programs and services in the community which address the anti-social values and beliefs and other offence-related needs that underpin offending behaviour. Accordingly, if individuals are diverted from the community or custodial management of CSNSW, they are effectively being diverted from programs and services which address offending behaviour.

CSNSW believes that there are a number of junctions that are available for diversion and each of these should be considered. For example, diversion prior to arrest, post-arrest, prior to conviction, post-conviction and post-sentence. However, in each case there should be consequences for non-compliance.

Early diversion once the offender is charged or convicted is available by way of:

Section 32 / Justice Health Court Liaison Service

The Justice Health Court Liaison Service identifies and diverts defendants from the criminal justice system to mental health treatment in the community.

At present, to be eligible to be dealt with under section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW), a defendant must not be a "mentally ill person" (as defined under section 14 of the *Mental Health Act 2007* (NSW)) but may be:

- developmentally disabled;
- suffering from a mental illness; or
- suffering from a mental condition for which treatment is available in a mental health facility.

The individuals who are eligible for their matters to be heard under section 32 are identified by the Justice Health Court Liaison Service which operates in many Local Courts. A treatment plan is prepared to address the mental health problems and the individual may be diverted from further criminal justice proceedings. The legislation provides for matters to be returned to the court for failure to comply with treatment.

Section 32 requires a Magistrate to decide whether the defendant is eligible to be dealt with under section 32 and whether it is more appropriate to deal with the defendant by way of section 32 than otherwise in accordance with the law.

The Justice Health Court Liaison Service has been evaluated and found to be effective in reducing re-offending (Bradford & Smith, 2009). Given this positive evaluation, it seems likely that the Justice Health Court Liaison Service and/or the Magistrates are using sound judgement to identify defendants whose mental illness or mental condition is directly related to their offending behaviour.

There is a considerable over-representation of individuals with mental impairment in the custodial population. However, there is a common misconception that for individuals in the criminal justice system who have a mental illness or mental condition, their offending is directly related to their mental illness or mental condition. Both offending and mental impairment have similar social and structural determinants and so high levels of mental impairment in the criminal justice population should be anticipated. However, this does not mean that treating the mental impairment will necessarily reduce the risk of further offending. Recent research (for example, Constantine, Robst, Andel, & Teague, 2012) has identified that in a sample of offenders with serious mental health issues, the offending was directly related to the mental health symptoms in only a small sub-group. Constantine et al (2012) found that the relationship between the offending behaviour and the mental health issue to be completely independent (64.6%), mostly independent (17.2%), mostly direct (10.7%) or completely direct (7.5%). These findings are consistent with other research which has suggested that for individuals with mental health diagnoses, approximately 10% of the offending can be directly attributed to their mental health impairment and in 90% of cases the relationship is not direct.

According to Bradley (2009) citing the Forensic Faculty, Royal College of Psychiatrists, UK, (2008), the relationship between mental dysfunction and offending is extremely complex. The Royal College of Psychiatrists has identified the impact of mental health interventions on five groups of offenders with mental disorders. Table 1 illustrates the complexity of the relationship between mental dysfunction and offending.

Table 1: The relationship between mental health and offending (Bradley 2009)

No.	Relationship	Impact of mental health interventions
1	The anti-social behaviour is directly related to or driven by aspects of mental disorder	In this case, effective treatment of the mental disorder would be likely to reduce the risk of re-offending
2	The anti-social behaviour is indirectly related to mental disorder	Treatment of the mental disorder would be likely to make a contribution to a reduction in offending but would not be sufficient in itself to tackle offending behaviour
3	The anti-social behaviour and the mental disorder are related by some common antecedent, for example	Treatment of the mental disorder in itself would not be sufficient to tackle re-offending

	childhood abuse	
4	The anti-social behaviour and the mental disorder are coincidental	Treatment of the mental health disorder will not impact on the offending
5	The mental health issue is at least partly secondary to the anti-social behaviour	Treatment of the mental health issue will have minimal impact on the offending

(Extract from the submission to the review by the Forensic Faculty, Royal College of Psychiatrists, UK, March 2008, cited by Bradley, 2009)

Despite this complexity, it is important for community safety that any diversion program seeks to clarify if individuals who are targeted for diversion on the basis of mental impairment would benefit from additional interventions to address their offending behaviour and, if so, which community programs and services are available for this purpose.

The Justice Health Court Liaison Service and the courts appear to be targeting diversion appropriately since there has been a reduction in re-offending for individuals who participate in the scheme. It seems likely that individuals with mental illness, where the mental illness is directly or mainly directly linked to the offending, are currently being diverted under this scheme. However, extending the criteria further may not be successful since for some 90% of offenders the relationship between serious mental health issues and offending is less direct.

CSNSW notes that the diversion of individuals from the criminal justice system to appropriate community programs and services may not be occurring for defendants with developmental disability. CSNSW recommends that opportunities be investigated with Ageing, Disability and Home Care (**ADHC**) for diversion under section 32 for individuals with developmental delay and cognitive impairment/intellectual disability.

ADHC appears to currently take a ‘back end’ approach via the Community Justice Program which targets offenders with an intellectual disability exiting custody. If defendants with intellectual disability are to be diverted from the criminal justice system, a ‘front end’ program is also required.

However, the international criteria for intellectual disability are strictly applied and few offenders with cognitive impairment or borderline intellectual disability who exit custody are eligible and/or admitted to the Community Justice Program. Similar issues would also apply if a ‘front end’ diversion program was developed.

There are least two major groups with cognitive impairment/intellectual disability who may be targeted for ‘front end’ diversion. The first is people with repeated contact with the criminal justice system for relatively minor offences. The second is people with cognitive impairment/intellectual disability who come into contact with the criminal justice system for the first or second time and includes young offenders.

The Community Justice Program is presently not a diversionary program, but provides support for higher risk or repeat offenders who meet ADHC’s eligibility criteria. Consideration may be given to expanding the Community Justice

Program to promote diversion, although for many offenders with cognitive impairment/intellectual disability who meet the eligibility criteria, the anti-social behaviour rather than the intellectual disability is the primary concern. Accordingly, when considering the diversion of people with cognitive impairment/intellectual disability, it is important that both disability support and programs and services for addressing offending behaviour are available.

CREDIT

CREDIT (Court Referral of Eligible Defendants into Treatment) is a diversion program that targets defendants in Local Courts and refers them to mainstream, community-based services and/or programs to meet their psychosocial needs. CSNSW recommends that there should be clarification as to what the CREDIT program is diverting defendants from (that is, whether CREDIT is diverting defendants from the criminal justice system or custody) and how offence-related needs, particularly anti-social cognitions/attitudes and beliefs, will be addressed.

MERIT

MERIT (Magistrates Early Referral into Treatment) is a program that targets defendants with drug and alcohol problems and directs them to community-based services and programs to address their drug and alcohol problems. Again it is unclear if MERIT is diverting defendants from the criminal justice system or from custody and how their offence-related needs other than drug and alcohol issues are addressed. For example, there is a strong link between alcohol abuse and domestic/family violence. Addressing the alcohol abuse may not resolve the violence and the safety of victims may be compromised as a result of delays in progressing the perpetrators to CSNSW's programs which have been demonstrated to be highly successful in treating domestic abuse, such as CSNSW's Domestic Abuse Program. This is particularly true for Aboriginal offenders with issues of family violence and alcohol abuse because CSNSW's Domestic Abuse Program also significantly reduces Aboriginal family violence. In addition, the wellbeing of the victim and secondary victims of the abuse may not be sufficiently monitored by the MERIT program.

A further issue is offenders with drink driving offences. It is not illegal to use, abuse or be dependent on alcohol. The offence is driving while intoxicated with alcohol. Accordingly, addressing the alcohol issues alone may not be effective in targeting the anti-social thinking that underpins drink driving. CSNSW, in partnership with Roads and Maritime Services (**RMS**) and other traffic authorities, developed the Sober Driver program which has been externally evaluated and found to be highly effective in reducing re-offending.

Two evaluations of the Sober Driver Program have been conducted to determine its effectiveness in the reduction of re-offending. The first evaluation (Mills, Hodge, Johansson & Conigrave, 2008) included a comparison of re-offending rates over two years for 2,491 Sober Driver Program participants and a community control group of convicted drink drivers matched by the Bureau of Crime Statistics and Research (**BOCSAR**) who received legal sanctions alone. The Sober Driver

Program participants were **43% less likely to re-offend** over two years compared with the community controls.

A later evaluation by ARTD Consultants (ARTD, 2010) re-analysed re-offending by the 2006 evaluation treatment group, thereby extending the follow-up period from two to 5.5 years. The 2010 evaluation also explored re-offending among a new group of Sober Driver Program participants. The 2010 evaluation of the original Sober Driver Program participant group found the impact of the program to be lasting as the group who did not offend continued to be deterred. The newer group participants showed a similar pattern of reduced re-offending to the initial group.

After three years of follow up, individuals who had attended the Sober Driver Program were **44% less likely to re-offend** compared with the BOCSAR matched controls. The Sober Driver Program is a key example of the success of CSNSW in reducing re-offending.

Section 11 Deferral of sentencing for rehabilitation, participation in an intervention program or other purposes

CSNSW recommends increasing the use of section 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**CSP Act**) for specific groups, particularly those for whom the court is considering a custodial term, including Aboriginal offenders and offenders with mental health issues or intellectual disability. The use of section 11 provides considerable motivation for an offender to begin to address their offending behaviour by way of a sentencing adjournment. That the court is provided with a report detailing the offender's rehabilitation progress and has the opportunity to interact with the offender when the matter is returned to court for sentencing is a valuable motivational tool for the management of community offenders by CSNSW. Section 11 provides an opportunity for a therapeutic jurisprudence approach to be available to all courts.

The increased use of supervised section 11 orders may be particularly advantageous to Aboriginal offenders, including Aboriginal women. Such an option would allow for early intervention by way of effective programs and services. Anecdotally, lengthy unsupervised bail is frequently breached by Aboriginal people because, as a group, they are at greater risk of further offending than non-Aboriginal people.

Despite the potential value of the use of section 11 in facilitating the rehabilitation of offenders, there have been long term problems in the administration of this legislation. In 2006, CSNSW noted internally (Bowery, 2008) that there appear to be some difficulties in the recording of bail supervision orders under the *Bail Act 1978* (NSW) and a Section 11 Good Behaviour Bond. This confusion was a result of courts only using one form/template for both a Good Behaviour Bond and for a Bail undertaking. Unfortunately, there is no way for CSNSW to reliably distinguish which type of order has been issued that would enable staff to be confident that they are identifying the correct order.

According to Bowery (2008), enquiries with Courts Administration in 2006 found that the court uses the same template (previous Form A under the bail regulations) for both types of orders because "when a court makes an order under Section 11, the defendant will also be subject to the provisions of the *Bail Act 1978* during the period of remand. The preparation of a separate bond in these circumstances would result in duplication of information contained in the bail undertaking. As a consequence no separate form of bond has been created".

Since that time, work has been undertaken by both CSNSW and Courts Administration in an attempt to resolve this issue but with no resolution to date. The recording of supervised Section 11 Good Behaviour Bonds and data collection in relation to outcomes from supervised section 11 orders would be the necessary starting point in evaluating any increase in the use of this legislation. Accordingly, CSNSW recommends that action be taken to restore the supervised Section 11 Good Behaviour Bond template for the use of courts.

Summary

CSNSW recommends that:

- All diversion programs should be explicit about what individuals are being diverted from, and where they are to be diverted to.
- Diversion programs should be required to be explicit in the relationship between the characteristics of the individual that suggest diversion is appropriate and the offending behaviour. If the characteristics are not directly related to the offending behaviour, a diversion program should be required to demonstrate how the offence-related needs will be met.
- Section 11 of the CSP Act should be used for programs such as Balund-a in northern NSW (see Question 9.5 below for more details on Balund-a). Long-term administrative issues in the distinction between matters being adjourned under section 11, and bail supervision under the *Bail Act 1978*, should be resolved. Changes to the use of section 11 should be evaluated and so the recommended legislative distinction will facilitate such evaluation.

Program-based diversion

Question 9.2
Is the Court Referral of Eligible Defendants into Treatment program operating effectively? Should any changes be made?

It is unknown if the CREDIT (Court Referral of Eligible Defendants into Treatment) program is operating effectively because an outcome evaluation has yet to be undertaken. CSNSW is aware of the evaluation undertaken in February 2012 by the BOCSAR (Trimboli, 2012). In this study, 95.8 per cent of participants indicated that their life had "changed for the better" by being on the CREDIT program and stakeholders' opinions of the program were positive. On this basis, it was recommended by Trimboli (2012) that the CREDIT program should be expanded from the two pilot courts at Burwood and Tamworth.

However, caution is warranted because positive personal reports of a program's effectiveness may not be supported by empirical evidence. For example, McCord

(1992, 1991, 1978) reports on an early but sophisticated randomised control trial of high-risk for delinquency boys recruited for the Cambridge-Somerville intervention of delinquency prevention. The Cambridge-Somerville Youth Study was a carefully designed, adequately funded, well-executed intervention framed by a scientifically credible research design. Social workers/counsellors regularly visited 253 matched pair boys and befriended the boys and their families from when the boys were a little over ten years of age. The social workers/counsellors provided on call friendly guidance to the boys and their parents and assisted the families in a variety of ways. The boys were tutored, taken to a variety of sports events and encouraged to participate in workshops and summer camps. The boys were encouraged to join community groups and assisted to gain employment. The program ended in 1945 after some five years of treatment and during that time more than half of the treatment boys had been tutored in academic subjects, and more than one hundred had received medical or psychiatric attention.

Between 1975 and 1981, when the boys were reaching middle age, 98% of the 253 matched pairs who had remained in the program were traced. Two thirds of the treatment participants indicated that the program had “helped them” and had “improved their lives”. Claims included that the program had helped the men to “become law-abiding citizen”, it had helped them to “stay off the streets” and that the social worker/counsellors had assisted them to develop pro-social values and keep them on “the right track”.

There was a major disparity between the results of interviews with the individuals in the treatment group and the empirical evidence. For the majority of pairs (n = 150), treatment had no measured effect. For 103 pairs, those who had been in the treatment group were **more likely** to have been convicted of crimes classified as serious street crimes, had died an average of **five years younger**, and were **more likely** to have received a diagnosis of alcohol dependence, schizophrenia, or bi-polar disorder.

This study clearly demonstrates that qualitative evaluations can be very misleading. McCord (1978, 1991, 1992) further demonstrated that despite good intentions and glowing reports from the participants, this intervention caused serious harm to those in the treatment group.

CSNSW recommends that the CREDIT program should be explicit in:

1. Whether the program operates as a diversion from the criminal justice system or from custody and the success of the program in achieving this aim.
2. Whether participants in the CREDIT program display reduced levels of offending following graduation.
3. What services are available in the community for CREDIT participants to address their offending behaviour, including drink driving, domestic and other violence and drug and alcohol interventions delivered at the appropriate level of intensity to match the risk/need level of the individual.
4. Whether CREDIT participation results in a delay in sentencing and, if so, does this further disadvantage Aboriginal people because their access to effective programs by way of supervision by CSNSW is delayed.
5. Identifying suitable referral agencies for individuals with mental health issues, cognitive impairments and personality disorders.

CSNSW recommends that the principles of international correctional evidence-based practice should be applied to the practices of the CREDIT program in relation to risk, need, and responsivity.

According to Trimboli (2012), CREDIT participants have their court matters adjourned for the period of their involvement with CREDIT which is between two and six months. For domestic violence offenders and others charged with violent and property offences, this delay in court matters, particularly sentencing, may cause anguish for victims and compromise the safety of the community. This concern may be particularly relevant for Aboriginal people who are, as a group, at higher risk of further offending than non-Aboriginal people (Day, 2003) and are therefore more likely to re-offend during any adjournment period.

A further concern is that to be eligible for the CREDIT program the defendant must admit to offending. This may prevent appropriate legal representation and pressure may be placed on a defendant to plead guilty to be offered psychosocial services such as housing.

In addition, a person may offend in order to be offered housing because housing opportunities are extremely limited and, according to Trimboli (2012), 75% of CREDIT housing referrals were accepted by the service provider.

Question 9.3
Is the Magistrates Early Referral into Treatment program operating effectively? What changes, if any, should be made?

The MERIT (Magistrates Early Referral into Treatment) program has been evaluated and found to be effective in reducing re-offending (Lulham, 2009) but it is unclear how many MERIT participants progress to supervision by CSNSW at sentencing and how many of the treatment group were subsequently incarcerated during the minimum two year follow up period of the study. If a large proportion of MERIT participants are supervised by CSNSW at sentencing, the reduction in re-offending identified as a result of participation in MERIT is confounded.

CSNSW recommends that MERIT should adopt the risk/need/responsivity principles of evidence-based correctional practices. The lack of MERIT program intensity has particular implications for Aboriginal offenders who, as a group, are at a higher risk of further offending than non-Aboriginal offenders (Day, 2003). Accordingly, Aboriginal offenders tend to require intensive services to address their offending and this is not possible during the 3 month period of MERIT (Lulham, 2009).

CSNSW understands that the scope of MERIT has been extended to include alcohol abuse/dependence and the extension to alcohol has yet to be evaluated. Alcohol use/abuse/dependence is not illegal. However, the offending that is linked to alcohol abuse/dependence needs to be addressed to reduce re-offending. Many Aboriginal offenders have issues of alcohol abuse/dependence and family violence. Such offenders require intensive interventions to address both issues.

Intensive interventions to address alcohol related violence are not available by way of MERIT.

It is unclear whether the MERIT program aims to divert offenders from the criminal justice system or from custody. This question and the achievement of this aim should be responded to in any further evaluations of the MERIT program.

Question 9.4
1. Is the Drug Court operating effectively? Should any changes be made?

CSNSW notes the success of the Drug Court which is administered by an inter-agency partnership between CSNSW, NSW Health and the Attorney General's Division of the Department of Attorney General and Justice.

Currently, the Drug Court program has a "one size fits all" approach to the management of participants. Outcomes from the Drug Court program could be improved by the adoption of evidence-based correctional principles of targeting intensive resources to those at higher risk of further offending, addressing all factors related to offending, and providing interventions which are responsive to the thinking and learning styles of offenders.

In addition, there appears to be considerable variation in the intervention across NSW Health regions.

Interventions provided to lower risk offenders should be kept to a minimum. Providing intensive treatment to lower risk offenders is not only an inefficient use of resources but it may also increase their chances of re-offending. If treatment is provided to lower risk offenders, steps should be taken to ensure that the lower risk offenders are separated as much as possible from higher risk offenders. Mixing lower risk offenders with higher risk offenders in a treatment program has the risk of exposing lower risk offenders to the influence of higher risk offenders (Andrews & Bonta, 2006).

Lower risk offenders have more personal strengths and fewer treatment needs compared to high risk offenders. Often, the treatment needs of lower risk offenders are only weakly associated with their criminal behaviour. These needs are non offence-related needs (for example, anxiety, depression and general feelings of distress) (Andrews & Bonta, 2006).

Research based practice dictates that a higher level of intervention should be available to higher risk offenders. However, this increased demand for resources for higher risk offenders would be offset by lower levels of interventions for those at lower risk of further offending. The current practice of combining higher risk and lower risk offenders for group-based intervention may be significantly increasing the risk of further offending by the lower risk group (Andrews & Bonta, 2006).

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

CSNSW notes that this question relates only to the Drug Court and **not** to the Compulsory Drug Treatment Correctional Centre program.

CSNSW suggests that the maximum number of participants should have access to the Drug Court program, particularly if correctional 'best practice' research driven policy is adopted in line with the above recommendation. Generally, higher risk offenders have a greater tendency to violence, but such offenders are currently excluded from the Drug Court program. However, in accordance with evidence-based correctional practice, higher risk offenders have more to gain from programs and services and the community has the most to gain from successful interventions applied to offenders who pose the greatest risk of harm. Accordingly, CSNSW recommends changing the exclusion criteria from excluding those who have been charged with an offence involving "violent conduct" to providing the Drug Court with more discretion to include offenders who have a violent offence but who may benefit from the program. This would capture offenders who would benefit most from intervention and for whom violence has been instrumental in gaining access to drugs and alcohol.

CSNSW notes that the court would be required to consider the treatment needs of the offender and the safety of the community when deciding which offenders are eligible for the Drug Court program.

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?

See earlier comments on section 11 in the above response to Question 9.1.

As noted above, CSNSW strongly supports increasing the use of section 11 of the CSP Act by courts for individuals who are likely to receive a custodial term. This would allow a final opportunity for such offenders to demonstrate their commitment to their rehabilitation.

However, to promote the greater use of section 11, CSNSW established two programs which were designed specifically for the use of section 11. Balund-a operates in northern NSW and is a rural residential facility targeting Aboriginal male and female offenders, with a focus on the Bundjalung people of northern NSW. Balund-a offers a range of programs to meet both offending and non-offending needs during a section 11 bond period. However, the use of this option by courts has been limited and this has required the eligibility of Balund-a to be expanded to include Aboriginal offenders from other areas of NSW.

CSNSW also has two residential programs for women - Biyani in Parramatta and Miruma in Cessnock. Both Biyani and Miruma provide 24/7 supervision of women and acts as a referral point and preparation for long-term residential

rehabilitation/therapeutic communities, or other intensive programs. Biyani and Miruma initially targeted women held on remand and were able to offer courts an option for using section 11 where women were experiencing co-existing mental health and substance abuse issues. However, again, the use of this option by courts has been limited, which required the eligibility criteria for these programs to be extended to post-sentence participants, including those leaving custody.

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?

Specific intervention programs are:

- Circle Sentencing
- Forum Sentencing
- Traffic Offender Program

Circle Sentencing and Forum Sentencing have been evaluated and found to be ineffective in reducing re-offending. This is not surprising because these programs are not framed by evidence-based correctional practice and the principles of behaviour change. Accordingly, these programs should not be considered as offender interventions, rather they are of benefit to victims and/or Aboriginal communities.

The Traffic Offender Program is unable to maintain integrity and has not been evaluated. However, this program is also likely to be ineffective because it is not framed by evidence-based correctional practice and the principles of behaviour change.

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

See above comments.

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

No. The programs currently prescribed have been demonstrated to be ineffective in reducing re-offending and therefore should not be described as offender intervention programs. They are not based on the principles known to change offending behaviour. As such, CSNSW recommends changing the aims of these programs from the reduction of re-offending to meeting the needs of victims and communities only.

A key concern is the delays in sentencing offenders which may result from their participation in Circle Sentencing, Forum Sentencing or the Traffic Offender Program.

It is also unclear if these programs have the effect of increasing motivation to change. For example, it may be that offenders who are subject to these intervention programs respond more favourably to the intensive programs provided to higher risk offenders by CSNSW. This possibility should be included in any further evaluations of these programs. However, pending the resolution of this question, CSNSW does not recommend that further programs should be prescribed as intervention programs under the legislation.

Approaches to criminal offending

Question 9.7
1. Should restorative justice programs be more widely used?
2. Are there any particular restorative justice programs in other jurisdictions that we should be considering?

The Restorative Justice Unit of CSNSW facilitates victim/offender conferences and indirect mediations at the post-sentence stage of the criminal justice process. The aim of the Restorative Justice Unit is to address the needs of victims of crime and encourage offenders to accept responsibility for their offending behaviour.

The focus of CSNSW's application of restorative justice is not to reduce re-offending. Rather, CSNSW aims to address the conflict caused by the criminal act and focuses on the personal needs of individual members of the community.

CSNSW's Restorative Justice Program is currently the subject of a three year qualitative research project, funded by the Australian Research Council and conducted in partnership with the University of New South Wales. The project aims to examine the prospects and issues relating to the use of restorative justice at the post-sentencing stage to resolve conflict between victims and offenders following serious criminal offending and the immediate and long-term impact of this process on participants. It is anticipated that the results of the restorative justice program will be published in 2014.

CSNSW's Restorative Justice Program could be extended to more inmates and victims in NSW with additional resources.

Question 9.8
1. Should problem-solving approaches to justice be expanded?
2. Should any of the models in other jurisdictions, or any other model, be adopted?

CSNSW is committed to evidence-based practice and provides case management and intervention programs based on international evidence of 'what works'. Referring an offender to a program is unlikely to be of benefit without careful assessment and preparation and the motivational benefits of supervision by CSNSW. In addition, case management by CSNSW includes active referral to a range of CSNSW and mainstream community programs and government and non-government agency services to address all offence-related needs.

The assessment of risk and diversion from the criminal justice system of lower risk offenders is a good option. However, unless a risk/need assessment is undertaken, problem solving courts may result in high levels of resources being used by individuals who pose a lower risk of harm to the community. This would be an inefficient use of resources.

If problem solving courts are established, they should work in close partnership with criminal justice programs so that courts are aware of the treatment needs of participants and can direct services to individuals who are at highest risk of further offending. An example of such a successful partnership is the Drug Court and the Compulsory Drug Treatment Correctional Centre (**CDTCC**). In this partnership, the CDTCC staff provide recommendations to the court and work as part of the Drug Court team, alongside Legal Aid NSW, the NSW Director of Public Prosecutions and the Justice Health and Forensic Mental Health Network. The judge of the Drug Court has a direct relationship with each participant by overseeing their progress and case management and decides on the progress of the participant through the CDTCC based on the recommendations of the partners.

Any other approaches?

Question 9.9
Are there any other diversion, intervention or deferral options that should be considered in this review?

Multi-Agency Intensive Correctional Order

In CSNSW's previous response to Sentencing Question Paper 6, CSNSW recommended a 'multi-agency intensive correctional order' for offenders with mental/cognitive impairment where such impairments are directly related to the offending behaviour.

Where an offender may be defined as having complex needs or as being 'vulnerable' (using, it is suggested, the definition of 'vulnerable' already used for Work and Development Orders) and the court is considering a custodial sentence of six months or less, the court could consider making a separate order in the nature of a 'multi-agency intensive correctional order'. This would involve a model similar to the Child Protection Watch Teams, including joint case management by agencies such as CSNSW, NSW Health (mental health and drugs and alcohol), ADHC and non-government agencies, Housing NSW and social housing providers, or any agency identified by the court as relevant to the needs of the individual offender.

This order would combine the expertise of the relevant disciplines at a local level, formalising what may already be occurring informally in certain locations, and reducing the likelihood of the individual 'slipping between the cracks' or becoming overwhelmed by numerous interventions by several unconnected agencies.

Such a penalty option would have resource implications for all involved, as the case management of this kind of offender is necessarily resource-intensive and

complex. CSNSW envisages that it would administer the order as the primary case manager, in partnership with other agencies, and that, as the order would properly be an alternative to custody, breach issues would be dealt with by the State Parole Authority.

The proposed 'multi-agency intensive correctional order' would differ from an Intensive Correction Order by having multi-agency input and by being targeted at 'vulnerable' offenders. Consideration would need to be given to its placing within the sentencing hierarchy and to mechanisms through which agencies other than CSNSW would be obliged to participate. The involvement of other agencies may require legislation. Some of the proven inter-agency processes used by the Compulsory Drug Treatment Order, Drug Court Order and the Child Protection Watch Teams may be useful as initial templates.

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?

No comment.

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?

In the past, many CSNSW staff raised concerns about the number of Aboriginal people incarcerated for driving licence offences. However, this situation now appears to be changing. According to CSNSW's data, as at 20 September 2012, 11 Aboriginal females and 128 Aboriginal males were serving a custodial sentence for driving licence offences. However, driving licence offences may not be their most serious matter. Of the Aboriginal offenders in custody for driving licence offences, three females and 23 males have driving licence offences as their most serious offence (based on the National Offence Index). In addition, some may be held on remand for additional matters pending conviction.

By comparison, overall there are 37 females and 489 males with driving licence offences in custody, with seven and 121 respectively having it as their most serious offence respectively.

In light of this data, CSNSW does not recommend any changes to the provisions governing driver licence disqualification.

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

CSNSW believes that extending driver licence disqualification to offences that do not arise under road transport legislation would disadvantage offenders in rural and remote areas because public transport is not available in many of those locations.

Any extension of driver licence disqualification may lead to further offences and greater levels of incarceration for Drive Whilst Disqualified and Drive While Licence Suspended offences. In addition, this may further disadvantage Aboriginal offenders.

Non-association and place restriction orders

Question 10.3
1. Should non-association and place restriction orders be retained?

No comment.

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

No comment.

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?

Lengthy periods of unsupervised bail may disadvantage Aboriginal offenders. Anecdotally, Probation and Parole Officers report that Aboriginal offenders often fail to comply with the requirements of unsupervised bail because, as a group, they are at a higher risk of offending than non-Aboriginal offenders (Day, 2003). Consequently, Aboriginal offenders re-offend during the bail period more frequently than non-Aboriginal offenders. Therefore, lengthy bail periods should be limited.

To achieve this aim, the greater use of supervised orders under section 11 of the CSP Act for Aboriginal offenders would:

1. Promote increased offender motivation given the need to report to the court and a further court appearance at the end of the term of the section 11 order.
2. Increase the exposure of more Aboriginal offenders to effective programs and services provided by CSNSW during the bail period of section 11 orders, including participation in CSNSW's Balund-a residential program in northern NSW. Effective programs for Aboriginal offenders require sufficient intensity to

address their higher risk of further offending (Day, 2003). For example, under section 11, Aboriginal men could undertake CSNSW's Domestic Abuse Program (see Question 11.1.2 below) either at the Balund-a residential program or during community supervision.

CSNSW understands that the greater use of section 11 orders for Aboriginal people may delay sentencing which may compromise the outcomes of the *NSW 2021* priority to efficiently sentence offenders. However, this may be offset by the possibility of reducing the incarceration rate of Aboriginal people.

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

In response to significant concerns among the Canadian Aboriginal community that mainstream prison programs fail to meet the needs of Aboriginal offenders, and the over-representation of Aboriginal offenders in Canadian prisons, the Correctional Service of Canada introduced a new correctional concept for Aboriginal offenders. "Healing Lodges" offer services and programs that reflect Aboriginal culture in a space that incorporates Aboriginal peoples' tradition and beliefs. In the "Healing Lodges", the needs of Aboriginal offenders serving federal sentences are addressed through Aboriginal teachings and ceremonies, contact with Elders and children, and interaction with nature. A holistic philosophy governs the approach, where individualised programming is delivered in a context of community interaction, with a focus on preparing for release. The "Healing Lodges" place an emphasis on spiritual leadership and the value of the life experiences of staff members who act as role models.

Prompted by similar concerns regarding Australian Aboriginals, many commentators have suggested the need for Aboriginal specific programs. For example, Spivakovsky (2007-8) calls for a criminal justice response to Indigenous offending that involves more meaningful interactions with Aboriginal communities rather than merely addressing the cognitive behavioural characteristics alone.

Queensland's criminal justice policy on Aboriginal offenders proposes that Aboriginal offending is a result of past experiences of government policies that removed Aboriginal people from their traditional land, families and culture, and that this history makes the rehabilitation needs of Aboriginal offenders distinct from non-Aboriginal offenders (Queensland Corrective Services, 2010).

CSNSW suggests that Aboriginal interventions need to be holistic and address not only offence-related needs but also the multi-layered issues faced by this offender group such as that provided by the Canadian "Healing Lodge" program which reconnects Aboriginal offenders with their culture, history and heritage.

Aboriginal offenders, as a group, have higher levels of social disadvantage than non-Aboriginal offenders. Accordingly, as a group, Aboriginal offenders are at a higher risk of further offending. The criminal careers of Aboriginal offenders start earlier and extend longer than non-Aboriginal offenders (Day, 2003; Snowball and Weatherburn, 2006). However, the suggestions from overseas and other Australian jurisdictions of the need for a different approach to the resolution of

Aboriginal offending is **not** supported by efficacy evaluations of programs offered by CSNSW.

CSNSW's Domestic Abuse Program (**DAP**) is a 20 session rehabilitative group-based intervention program for offenders with domestic and family violence related offences. State-wide rollout and evaluation of the DAP commenced in August 2007. At 30 June 2011, 2,555 offenders had commenced the DAP from 32 Probation and Parole District Offices and 14 correctional centres in NSW. The program has a relatively low attrition rate with close to 80 per cent of participants completing the DAP treatment program.

Preliminary results of a study (in preparation for journal publication) evaluating the effectiveness of the DAP demonstrate significant reductions in re-offending rates in the DAP treatment group for both 'any' re-offending as well as violent and violent breach of Apprehended Violence Order re-offending. In addition, the DAP treatment group took longer to re-offend (any type of re-offence) compared with an untreated matched control group of men who did not attend the DAP.

Importantly, Aboriginal men averaged 25% of all DAP participants. The evaluation found the DAP was also effective for Aboriginal men and their reduced patterns of re-offending were the same as non-Aboriginal men, showing the program was equally as effective for Aboriginal men. Aboriginal men also had significantly reduced re-offending compared with the untreated men in the matched Aboriginal control group.

Evaluations of other programs for domestic and family abuse perpetrators have generally lacked methodological rigour and failed to detect appreciable reductions in re-offending at follow up. This includes programs which promote a 'holistic' or 'healing' approach to Aboriginal violence. The DAP study results (to be published) provide solid and defensible evidence of the effectiveness of cognitive behavioural program techniques for both Aboriginal and non-Aboriginal people.

The DAP is a standardised cognitive behavioural program which is delivered to mixed groups of Aboriginal and non-Aboriginal offenders by well trained and supervised program facilitators. Assessment for program attendance is based on the 'what works' literature by targeting higher risk offenders and addressing offence-related needs. There is no cultural content in the DAP program materials, although facilitators may make slight adjustments to the program to meet the needs of individual groups.

Similar results have been achieved by drug and alcohol interventions provided by CSNSW both in custody and the community. When compared with non-Aboriginal participants, Aboriginality was not predictive of treatment failure (program attrition) or re-offending. However, contrary to these findings, CSNSW's preliminary findings of the outcomes of the SMART (Self Management and Recovery Training) program for custody-based offenders indicate that Aboriginality is predictive of re-offending at two years (to be published). However, the SMART program is a low-to-moderate intensity program and, as such, may not be suitable for Aboriginal offenders who generally fall into the higher risk categories. Parole periods or community-based sentences provide an opportunity for Aboriginal

offenders to attend drug and alcohol interventions at the level of intensity that matches their risk of further offending.

Accordingly, CSNSW suggests that separate and specialised groups for Aboriginal offenders are **not** necessary to reduce re-offending and to address the over-representation of Aboriginal people in custody. However, this does not preclude the potential benefits of referral of Aboriginal offenders to mainstream cultural community programs and services that provide support for offenders during their period of supervision in the community and after their supervision ends.

Based on the successful results discussed above, CSNSW suggests that any options that increase the opportunity for Aboriginal offenders to undertake rehabilitation programs while under the supervision of CSNSW in the community would be beneficial. Therefore, continuing the hierarchy of community sentencing options seems to best support this objective.

CSNSW also proposes that Aboriginal offenders should be provided with rehabilitation programs at the earliest point of contact with the criminal justice system, which is likely to be at contact with Juvenile Justice. Juvenile Justice also argues for the 'what works' principles of risk, needs and responsivity to be applied to Aboriginal young people and supports the availability of a wider range of structured intensive community-based interventions that promote rehabilitation.

Summary

- As a group, Aboriginal offenders are at a higher risk of further offending than non-Aboriginal offenders. This is a result of the higher level of social disadvantage of Aboriginal people.
- As a group, Aboriginal offenders start their offending careers earlier and their offending trajectory is longer. Providing intensive rehabilitation options at the earliest age is likely to have the most benefit to both the offender and the community.
- Separate groups for Aboriginal rehabilitation are not required and the evidence suggests that the ‘what works’ principles apply equally to Aboriginal people. This includes providing intensive programs and services commensurate with the level of risk posed by the offender.
- Current correctional programs to address both family violence and substance abuse are equally effective for both Aboriginal and non-Aboriginal offenders, provided that they are of sufficient intensity.
- Sentencing that maximises rehabilitation opportunities in a community setting will benefit both Aboriginal and non-Aboriginal offenders and their communities.

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

No comment.

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?

Yes. Special circumstances should include the relationship between the offending behaviour and the mental health issue, including the likely impact of treating the mental health issue on reducing the risk of re-offending. Further, the court may consider what services and support are available to individuals with mental and cognitive impairments and whether such services are suitable and accessible for offenders. This is consistent with section 95A of the CSP Act which provides that a good behaviour bond may contain a condition that requires the offender to participate in an intervention program.

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

CSNSW recommends that the courts should order a Pre-Sentence Report when considering a custodial term for an offender with cognitive and mental health impairments. Since the NSW Government is committed to the diversion of such offenders from custody, a Pre-Sentence Report could potentially identify alternative sentencing options for the court to consider.

Further, if the proposal by CSNSW for a new multi-agency legal order for individuals with mental and cognitive impairment is adopted, a Pre-Sentence Report would include the potential roles and responsibilities of each agency, and the contribution that such services would make to reducing the risk of further offending. This may benefit the court when considering a custodial term.

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?

CSNSW strongly supports such an increase in the powers of the court to detain offenders with special needs in a facility other than a correctional centre. However, consultation would be required in relation to how such a power should be framed, and the court would need to reconcile whether the cognitive and/or mental illness/condition is related to the offending behaviour. There would need to be guidance as to what degree of cognitive and/or mental illness/condition warrants detention in a correctional centre versus another facility.

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

From CSNSW's perspective, a key issue is the availability, accessibility and suitability of mainstream community services for supervised offenders with cognitive and mental impairments. Generally, CSNSW has found that some agencies are reluctant to deal with offenders as they believe they pose risks to staff. Alternatively, some agencies believe that offenders are not their target group and that treatment services should be provided by CSNSW. However, the majority of offenders are on community-based orders and this stance effectively excludes even community-based offenders from mainstream services and programs.

See above comments on a new multi-agency order in response to Question 9.9.

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?

Yes. See the above comments on a new multi-agency order in response to Question 9.9.

Women

Question 11.3
1. Are existing sentencing and diversionary options appropriate for female offenders?

All responses in relation to sentencing also apply to female offenders.

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

All responses in relation to sentencing also apply to female offenders.

3. What additional options should be developed?

All responses in relation to sentencing also apply to female offenders.

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?

No comment.

Any other categories

Question 11.5
Are there any other categories of offenders that should be considered as part of this review?

1. An interesting change to the offender population is the number of offenders who are elderly. Often elderly offenders have dementia, including both alcohol-related and age-related dementia. CSNSW believes that custody is inappropriate for older offenders with dementia and the early diversion from the criminal justice system to appropriate facilities (for example, nursing homes) should be available.

2. CSNSW believes that offenders with cognitive impairment/borderline intellectual disability, including brain injury, are a group with special needs. Currently, there are limited programs and services in the community that can meet the offending needs of this group which would provide diversion from custody to appropriate community resources either while under the supervision of CSNSW or under section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

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?

CSNSW notes that significant initiatives have been taken by the Judicial Commission of NSW to develop the Judicial Information and Research System to provide access to sentencing data, sentencing trends, and information and statistics on the basis of sentencing decisions. This initiative, which is subject to continuous improvement, is having a significant impact on the visibility of sentencing law and ultimately the consistency of sentencing decisions.

The creation of the Department of Attorney General and Justice, as a Principal and Cluster Department, and the resulting coordination of justice sector activities, particularly the Joined Up Justice project, has significantly increased the role of information technology in supporting the integrity and credibility of the justice system.

Question 12.2
Could publicity orders and databases be a useful tool in corporate or other sentencing cases?

Yes. As noted in the above response to Question 12.1, the improved visibility of court decisions, and the availability of technological devices to readily access information about such decisions, indicates the role of technology as a useful tool in sentencing cases.

Procedural reforms

Question 12.3
What procedural changes should be made to make sentencing more efficient?

The use of technology, both within and outside courts, to access court information through smart phones, tablets and broader aspects of technology mobility, also provides a significant catalyst to harness the role of technology in improving the efficiency of courts administration.

Question 12.4
How can the process of obtaining pre-sentence reports covering all sentencing options be made more efficient?

CSNSW is currently in the process of reviewing assessments for sentencing options and external stakeholders will be consulted as part of this review, including the courts. Advice could be made available at a later stage on this issue when the review process is complete.

Question 12.5
Should oral sentencing remarks be encouraged by legislation with appropriate legislative protections to limit the scope of appeals?

CSNSW recommends that if this proposal is adopted there needs to be a requirement for oral sentencing remarks to be recorded and a hard or soft copy generated for CSNSW in the case of offenders who will be subject to supervision. Judges' sentencing remarks are particularly pivotal to case planning and making recommendations to the State Parole Authority for release on parole. They can guide the program intervention provided to offenders in custody and also the conditions that may be placed on a parole order by the State Parole Authority.

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)?

No comment.

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?

No comment.

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

No comment.

Question 12.7
What bottlenecks exist that prevent committal for sentence proceeding as swiftly as possible and how can they be addressed?

No comment.

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;

No comment.

(b) establishing a Criminal Division of the District Court;

No comment.

(c) establishing a single specialist Criminal Court incorporating both the District Court and Supreme Court's criminal jurisdictions, modelled on the Crown Court;

No comment.

(d) amending the selection criteria for the appointment of judicial officers;

No comment.

(e) in any other way?

No comment.

Question 12.9
1. Should the comprehensive guideline judgment system in England and Wales be adopted in NSW?

No comment.

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?

No comment.

(b) allowing parties other than the Attorney General to make an application for a guideline judgment, and if so, which parties, and on what basis should they be able to apply for a guideline judgment?

No comment.

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

No comment.

Question 12.10
1. Should a sentence indication scheme be reintroduced in NSW?

No comment.

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

No comment.

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

No comment.

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?

No comment.

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?

No comment.

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

No comment.

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

No comment.

Other options

Question 12.12
Should any other options be considered for the possible reform of the sentencing system?

No comment.

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