

The Shopfront

YOUTH LEGAL CENTRE

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

7 September 2012

By email

Dear Sir/Madam

Sentencing: Question Paper 12: Procedural and jurisdictional aspects

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to this reference.

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront's main area of practice is criminal law. Two of our solicitors are accredited specialists in criminal law; one is also an accredited specialist in children's law. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's, District and occasionally Supreme Courts.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to nearly all of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

Scope of this submission

Although the Shopfront is a youth legal service, and has expertise in children's matters, the majority of our clients are in fact young adults aged 18 to 25. We therefore have an extensive working knowledge of adult sentencing law and practice. In accordance with the terms of reference, our submission is confined to adult sentencing issues.

Time does not permit us to make a more comprehensive submission. However, we would welcome the opportunity to make further comments or to attend consultations if you consider this would be helpful. In this regard, please do not hesitate to contact me, preferably by email at jane.sanders@freehills.com

Yours faithfully

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The Shopfront Youth Legal Centre is a service provided by Freehills in association with Mission Australia and The Salvation Army



Mission Australia

Freehills

Sentencing: Question Paper 12: Procedural and jurisdictional aspects

Question 12.1: Accessibility of sentencing law - websites

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

In principle we do not oppose the use of technology and social media in the ways suggested in the Question Paper. However, there is still a risk that only the most “interesting” cases will be broadcast or reported, or that only that snippets of information are communicated (especially when using media such as Twitter). The public would still be left without a sophisticated understanding of the sentencing process.

Question 12.2: Accessibility of sentencing law – publicity orders and searchable databases

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

We support the improved provision of information via databases. The excellent JIRS service provided by the Judicial Commission could potentially be extended to provide information to the general public. However, to a large extent such a resource would be “preaching to the converted”, and is likely to be accessed mainly by people who already have a reasonable understanding of the criminal justice system.

Question 12.3: Procedural reforms – making traditional courts more efficient

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

We are concerned that procedural measures aimed at increasing efficiency may be of marginal effectiveness, or may achieve efficiency at the expense of justice.

Although we acknowledge that delays can cause stress for both victims and offenders (not to mention frustration for lawyers and other criminal justice personnel) it is vital in the interests of justice that sentencing should be thorough and carefully considered, especially in the superior courts where sentences are potentially very severe.

In our view, the increasing delay in sentence proceedings in the superior courts is due to the increasing complexity of sentencing law and the perceived need for sentencing judges to provide detailed “appeal-proof” reasons. These factors will be discussed in our response to the next question.

There are some sensible measures that could be adopted to smooth the sentencing process, such as the suggestion in the Question Paper about exchange of legal representatives’ contact details. We also support better resourcing of court registries and probation and parole officers, so that requests for pre-sentence reports do not go astray (as they sometimes do) and matters are not adjourned due to PSRs being unavailable.

We also agree that searching the court listing database with a view to having all of an accused person’s matters joined up is a good idea in principle. However, this is something that should usually be done by a defendant’s legal representative in any event.

The other procedural reforms suggested in paragraph 12.40 of the Question Paper are, in our view, unworkable. Many of these suggestions would create unnecessary paperwork and would impose unreasonable demands on busy and under-resourced lawyers, especially in Legal Aid or Aboriginal Legal Service matters. Given the disadvantaged nature of many accused persons, especially those in custody, it is unrealistic to expect that a legal representative will be able to provide details of the evidence proposed to be called in court from their client and other witnesses in advance of the sentence date.

Question 12.4: Procedural reforms – streamlining the assessment process

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

Apart from ensuring that requests for pre-sentence reports are transmitted from courts in a timely manner (see our response to the previous question), and better resourcing of the Probation and Parole Service, we cannot offer any suggestions for making the process of obtaining pre-sentence reports more efficient.

Indeed, we would caution against too much “efficiency”, as it may preclude the Probation and Parole Service from performing a thorough assessment on the offender.

We have appeared in numerous Local Courts where “duty” PSRs are commonly ordered. This involves the matter being stood down until later in the day, or adjourned for a week or two, and the offender spending about half an hour with the duty probation officer at the courthouse. Sometimes these duty reports are useful, but they are of necessity superficial.

In contrast, a full PSR usually requires a six-week adjournment and ideally involves two or three meetings with the offender as well as conversations with other significant people such as employers, family members, health professionals and social workers.

Question 12.5: Procedural reforms – legislative support for oral sentencing remarks

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

We agree that sentencing law has become unnecessarily complex and it appears to have resulted in an increase in “technical” appeals.

Over the years, in the District Court, we have certainly observed a trend away from ex tempore oral sentencing remarks in favour of detailed reserved judgments.

However, we are not convinced that it is appropriate to legislate to encourage the provision of oral sentencing remarks. In our view, legislative amendments would be better directed at reducing unnecessary complexity by simplifying section 21A and abolishing standard non-parole periods.

Question 12.6: Procedural reforms – determining appeals ‘on the papers’

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 oppose any changes to the test for appellate intervention in sentence appeals from the Local Court to the District Court.

Firstly, the current appeal provisions are an important protection against sentences imposed by magistrates in circumstances which are not always ideal. It must be remembered that Local Court sentencing is generally done quickly, often on busy list days with significant time pressures on magistrates, legal representatives and prosecutors. Additionally, defendants in the Local Court are often unrepresented.

Secondly, we have not seen any evidence that the District Court is clogged with unmeritorious appeals from the Local Court.

We do not offer any comments on appeals to the CCA.

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?

As we understand it, section 43 is very narrow in its application. It allows the correction of a clear sentencing error, e.g. where the magistrate has imposed a section 9 bond for a fine-only offence, or a fine in excess of the maximum penalty. However, as we understand it, section 43 does not

permit sentences to be adjusted on the basis that they are “manifestly excessive” or (to quote from your Question Paper) “unreasonable or plainly unjust”.

If a District Court appeal has been lodged, and it is clear that the Local Court has made a sentencing error that is capable of being corrected by section 43, we support the matter being remitted to the Local Court for correction of the error.

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

In principle we have no objection to appeals being determined on the papers if the parties agree. However, in many cases, we would expect that one or both parties would wish to make oral as well as written submissions, and should be afforded the opportunity to do so.

Question 12.7: procedural reforms - bottlenecks

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

In our experience, the main “bottleneck” at committal stage is the delay in the preparation and service of briefs of evidence, particularly where this includes scientific evidence such as fingerprint, DNA or drug analysis. Better resourcing of the DAL laboratories would be of some assistance. However, investigation of serious allegations takes time and it is understandable that there may be delays with the service of briefs.

Based on our experience of the Criminal Case Conferencing Trial, this did not alter the situation significantly because it merely formalised what defence lawyers and DPP prosecutors were already doing informally, i.e. entering into charge negotiations and resolving matters at Local Court stage where possible.

We agree with the Law Society’s position that better funding should be provided so that senior DPP lawyers and Crown Prosecutors can be involved at an early stage. The same goes for Legal Aid and Aboriginal Legal Service funding, so the defence can have access to counsel where necessary. Currently, some prosecutors and defence lawyers are understandably uncomfortable about negotiating plea agreements in serious and complex matters without the benefit of more experienced counsel.

There is also a reluctance by some defendants to plead guilty to charges until they are convinced that conviction is absolutely inevitable; sometimes this is not until the first day of the trial. In our view this is just human nature and, apart from offering generous discounts for early pleas of guilty, there is little that can or should be done about this.

Question 12.8: Jurisdictional reforms – specialist judges or a specialist criminal jurisdiction

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;**
- 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;**
- d. amending the selection criteria for the appointment of judicial officers;**
- e. in any other way?**

Criminal law is a specialised and increasingly complex field. We do see some attraction in the idea of appointing specialist criminal law judicial officers and/or establishing specialist criminal divisions within existing courts.

However, we are not sure whether specialisation will necessarily bring about greater efficiency, as suggested in paragraph 12.73 of the Question Paper. In our experience, most of the District Court judges who deal with sentence matters are very experienced in criminal law, and are not constantly

rostered in and out of the civil jurisdiction, yet it is still commonplace for delays to occur and for judgments to be reserved.

In the Local and Children's Courts, most (but not all) magistrates come to the bench with a good grasp of criminal law.

In our view, lack of judicial experience in criminal law is more likely to have an impact on the conduct of trials and hearings than sentencing.

Question 12.9: Jurisdictional reforms – guideline judgment systems involving the community

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

We are not familiar with this system and cannot meaningfully comment on it. At this stage we are not convinced that such a system would be of benefit.

2 Should the current guideline judgement 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 judgements, and if so, how should they be involved?

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?

We do not necessarily favour the expansion of the current guideline judgement system. However, if it is to be expanded or enhanced, we see some benefit in allowing input from bodies such as the NSW Sentencing Council or BOCSAR. The availability of sound criminological research, and evidence as to "what works" in terms of criminal justice interventions, may produce better quality guidelines that are not so heavily focused on general deterrence.

In principle we believe that the DPP or Senior Public Defender should be able to apply for a guideline.

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

We believe this idea merits further consideration but do not express a view at this stage.

Question 12.10: Jurisdictional reforms – the Goodyear model in England and Wales

1 Should a sentence indication scheme be reintroduced in NSW?

Our experience of the sentence indication pilot that operated in the 1990s was generally positive. It took away a significant amount of speculation and anxiety for our clients. Having said that, we acknowledge that such a scheme may not necessarily be beneficial for the administration of the criminal justice system as a whole.

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

If such a scheme were reintroduced it should probably only apply in the superior courts, where the stakes are inevitably higher.

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

We are unable to comment on whether a guideline judgement would be of benefit.

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?

We are not in a position to offer any practical solutions to these concerns.

Question 12.11: The role of victims in sentencing proceedings

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?

This is a very sensitive issue which has been the subject of much debate over the years. We do not believe we have anything helpful to add to the arguments that have already been advanced.

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

We do not offer any comment on this.

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

As discussed in our response to Question Paper 9, we support the greater use of restorative justice programs. When appropriately run, these can provide victims with meaningful input into the sentencing process, without giving them an inappropriate level of influence over the final result.

Question 12.12: Other options

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

We do see the need for some reforms to the classification of offences (Table 1, Table 2 and Strictly Indictable) and the re-adjustment of maximum penalties for certain offences.

We also suggest that the parole system is in need of review.

However, these issues are complex and time does not permit us to give them adequate consideration in this submission.

**The Shopfront Youth Legal Centre
September 2012**