NSW SENTENCING COUNCIL

HOW BEST TO PROMOTE CONSISTENCY IN SENTENCING IN THE LOCAL COURT

"Beginning as the humble Sydney bench of Magistrates, the Local court of NSW is now the largest and busiest court in the Commonwealth of Australia"

-Local Court NSW Annual Review 2003

A REPORT OF THE NEW SOUTH WALES SENTENCING COUNCIL

Pursuant to s100J(1)(a), (d) of the *Crimes (Sentencing Procedure) Act 1999*

The members of the NSW Sentencing Council are:

Hon Alan R Abadee RFD QC, Chairperson
Hon J P Slattery AO QC, Deputy Chairperson
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Mr Peter Zahra SC, Senior Public Defender.

The views expressed in this report do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations. A decision of the majority is a decision of the Council.[1]

JUNE 2004

[1] See Schedule 1A, clause 12 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)

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1. INTRODUCTION

1.1 NSW Sentencing Council's Terms of Reference

In a letter dated 18 June 2003, the Attorney General referred to the NSW Sentencing Council the issue of "how best to promote consistency in sentencing in the Local Court".

A further letter from the Attorney General formally requested that the Sentencing Council prepare a report on this issue. The following were identified as particular issues that the Council might wish to consider in the context of that report:

1. Current measures to promote consistency;
2. Whether consistency might be affected by the non availability of sentencing options such as Periodic Detention or from the non availability of supervision services;
3. The role of prosecutorial practice in ensuring consistency; or
4. Suggestions for ways to improve consistency.

1.2 Methodology and Submissions

The Council invited submissions from the following:

- Commissioner R Woodham, NSW Department of Corrective Services;
- Mr N Cowdery AM QC, Director of Public Prosecutions;
- The Honourable Justice R O Blanch, Chief Judge of the District Court of NSW;
- Law Society of NSW;
- Mr Paul Grant, CEO of the Legal Aid Commission of NSW;
- His Honour Judge D Price, Chief Magistrate of the Local Court of NSW;
- NSW Bar Association;
- NSW Council for Intellectual Disability;
- NSW Ministry for Police;
- Commissioner K E Moroney APM, MA NSW Police;
- Mr Peter Zahra SC, Senior Public Defender, NSW Public Defender's Office; and
- A Delegation from the Western Division Councils Association

A request for a further submission on specific issues was also sent to NSW Ministry for Police and the Commissioner of NSW Police. Copies of the letters sent by the Council requesting submissions can be found in **Appendices 1 and 2**.

Submissions were received from the following:

1. Commissioner R Woodham, NSW Department of Corrective Services;
2. Mr N Cowdery AM QC, Director of Public Prosecutions;
3. A Judge of the District Court;
4. Law Society of NSW;
5. Legal Aid Commission of NSW;
6. NSW Bar Association;
7. A Local Court Magistrate (sitting at three Metropolitan Local Courts);
8. A Local Court Magistrate (sitting at a Local Court in the Southern Highlands);
9. A Local Court Magistrate (sitting at a Local Court on the South Coast);

10. A Local Court Magistrate (sitting at a Metropolitan Local Court and with experience at a Local Court in North West NSW);
11. Commissioner K E Moroney APM, MA of NSW Police and NSW Ministry for Police (joint submission). A second joint submission was also received in response to a request from the Council;
12. A Delegation from the Western Division Councils Association; and
13. NSW Public Defender's Office.

1.3 Summary of Conclusions and Recommendations

Having undertaken a comprehensive review of the operation of Local Courts in regards to sentencing, the Sentencing Council has identified a number of recommendations that would assist in promoting consistency of sentencing. The main issues which have been identified, and which are addressed by the recommendations, are:

1. The lack of availability state-wide of sentencing options, and related resourcing issues;
2. The limitations of the system of appeal against sentence from the Local Court to the District Court; and
3. The practices of prosecutors in regards to addressing the Local Court on sentence and the internal procedures regarding appeals.

A full list of recommendations contained in the report is as follows:

Recommendation 1

Police prosecutors in the field should have direct access to relevant sentencing resources produced by the Judicial Commission and be given training in their interpretation and use.

Recommendation 2

That funding be made available to ensure that transport of the offender does not act as a barrier to the preparation of assessment (or "pre-sentence") reports.

Recommendation 3

Appeals to the District Court against sentence imposed in the Local Court should be retained, but be by way of rehearing on the record of proceedings in the Local Court, including reasons of the sentencing magistrate, and not be by way of hearing de novo.

In addition:

- **The reasons of the District Court, or if unavailable, the transcript should be provided to the sentencing magistrate where an appeal against sentence is successful; and**
- **Selected decisions of the District Court on sentencing should be regularly published.**

Recommendation 4

That primary sentencing options such as Periodic Detention, Home Detention, community service and probation supervision should be made available at every court in NSW.

Recommendation 5

That the Department of Corrective Services develops and actively pursues a strategy for identifying new suitable work agencies for the purpose of increasing the availability of Community Service Orders.

Recommendation 6

That access to programs such as MERIT and traffic offenders programs should be extended to all Local Courts.

Recommendation 7

That where initiatives relating to sentencing are trialled, a timely decision must be made about their effectiveness, and where successful, they should be properly funded and implemented expediently across the state.

Recommendation 8

That funding for transport be made available to ensure that the ability to travel does not prevent offenders from accessing sentencing options such as Periodic Detention where appropriate.

Recommendation 9

That the general election protocol should contain an overarching principle or test to be applied namely whether viewing the case at its worst (taking into account objective seriousness of the offence and subjective circumstances of the defendant, to the extent which such are known), and having regard to the public interest, a sentence could possibly be imposed which is not within the Local Court's jurisdiction.

Recommendation 10

That additional election protocols, specific to certain types of offences, be developed between the DPP and NSW Police, as has been done in relation to firearms offences and bushfire offences.

Recommendation 11

The level of ongoing education and training provided to police prosecutors should be enhanced, in particular to ensure adequate knowledge and awareness of recent reforms to sentencing law in NSW.

Recommendation 12

In relation to police prosecutors, measures should be taken to promote the proper implementation of the relevant provisions of the ODPP Prosecution Guidelines regarding the circumstances in which to address on sentence. This could involve:

a) developing protocols to further guide, and provide greater clarity, on the circumstances in which a magistrate can be regarded as falling into appealable error, for the purpose of determining when there is a duty to address on sentence;

b) the provision of ongoing education and training on the circumstances in which to address on sentence; and/or

c) **the Chief Magistrate issuing a Practice Note on the circumstances in which prosecutors should be called upon to address on sentence, and how such an address should be made.**

Recommendation 13

That a clear written protocol should be developed on when an appeal should be requested by a police prosecutor and implementing procedures to ensure that the question of whether an appeal against the leniency of sentence is appropriate be addressed by prosecutors in a systematic way at the initial stage.

Recommendation 14

That statistical resources be reviewed to ensure that they incorporate variations on appeal from sentences imposed in the Local Court, in order that they provide sentencers with accurate information.

Statistics relating to variations on appeal from sentences imposed by the Local Court should be made readily available.

The Sentencing Council has concluded that, having regard to the terms of reference and information available, the report is not an appropriate opportunity for the making of recommendations regarding possible changes to the institution of police prosecutions generally, and has confined its recommendations to how specific practices might be improved. The Council does however propose a list of alternatives to consider in relation to the broader issue, as follows:

A. **Maintenance of the status quo;**

B. **ODPP lawyers should be responsible for prosecuting all matters in the Local Court, including summary matters, all indictable matters and prosecutions on behalf of other bodies and authorities;**

C. **ODPP lawyers should be responsible for prosecuting all indictable offences dealt with summarily;**

D. **ODPP lawyers should be responsible for prosecuting all indictable offences dealt with summarily that are covered by the standard non-parole sentencing scheme;**

E. **ODPP lawyers should be responsible for prosecuting all indictable matters dealt with summarily in respect of which a guideline judgment has been promulgated.**

Having regard to the terms of reference and the issues raised, the Sentencing Council (by majority) considers it appropriate to express a favoured view qualified by it being specifically advanced only upon the sole and specific ground (and not otherwise) of being a way to improve or promote consistency in sentencing in the Local Court. The Council (by majority) favours the alternative “B” above.

Note that if option “B” above was implemented, certain recommendations in this Report proposing less radical changes to police prosecutions would only need to be implemented in the interim, as temporary measures.

1.4 Summary and Overview

The Sentencing Council has been asked to consider how consistency in sentencing in the Local Court would be promoted. It is important to note that the Council does not interpret the Attorney General's reference as implying that there is necessarily a problem of inconsistency in sentencing in the Local Court, or as requiring the Council to reach a firm conclusion on the current level of consistency. Rather, the reference directs the Council to consider the ways in which structural and other improvements could be made to better promote consistency in sentencing.

The Council does not view the Terms of Reference as embracing consistency in the Children's Court where different considerations arise in comparison with the sentencing of adults in the Local Court.

The NSW Local Court is the largest and busiest Court in the Commonwealth of Australia. The Court in its criminal jurisdiction is ranked first in Australia for timeliness. As of 31 December 2003, 96.98% of all criminal matters were disposed of within six months of initiation, and 99.55% of all criminal cases were disposed of within 12 months.[2]

Sentencing generally in the Local Court is an exceptionally important issue given the substantial number of criminal matters resolved in the Local Courts and the increasing proportion of indictable offences being dealt with summarily. Consistency of sentencing is vital component of justice and the appearance of justice, and is necessary for maintaining the integrity of the judicial process and public trust and confidence.

A number of important legislative changes have been made in recent years, most of which directly impact upon sentencing in the Local Court, the exception being the standard non-parole scheme. Sentencing in the Local Court is now a more complex exercise, having ramifications not only for magistrates but also the role and duties of prosecutors who appear in the Local Courts. Police prosecutors appear in most matters within the Court's criminal jurisdiction and thus are of particular importance in this respect.

The most prominent themes raised in the submissions received by the Sentencing Council were:

1. The lack of uniform availability of sentencing options across the state;
2. Problems with the process of appeal from the Local Court to the District Court, and the way that it fails to provide an appropriate level of guidance on sentencing to the Local Court; and
3. The way in which practices of prosecutors (particularly police prosecutors) could be improved.

To a lesser extent, questions were also raised as to the proficiency of Local Court Magistrates in regards to sentencing.

Considering these submissions, and based on its own research, the Council is of the view that the three issues identified above are the most significant impediments to consistency in sentencing in the Local Court at present, and to which reform efforts must be directed.

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[2] Local Court NSW Annual Review 2003 at p6.

2. CONSISTENCY IN SENTENCING

2.1 The Meaning of "Consistency": Consistency in Approach versus Consistency in Outcome

In determining what is meant by consistency, a distinction must be drawn between consistency in approach and consistency in outcome. What is generally meant by consistency is *consistency in approach*, which involves ensuring that account is taken of the same factors and that similar weight is given to those factors. Consistency in "outcome", or of the actual result, is not generally the aim.

It is however important to keep in mind that significant variations in outcome, in truly "like" cases, may indicate an error in consistency of approach. In the context of the requirements of the rule of law, the Honourable Chief Justice J J Spigelman has defined consistency as requiring that "similar cases lead to similar results".[3] Indeed it can be said that public confidence in the justice system demands this type of consistency, at least to some extent, and that it is linked to the need for predictability in the administration of the law. However, in the particular context of sentencing in the criminal law, the priority to be given to predictability is a difficult issue, due to the particular need to do justice in the individual case and the specific facts, and no two cases are completely alike for this purpose. In *Rogers v Nationwide News*, Hayne J stated, in the context of civil defamation proceedings rather than criminal law, that:[4]

> "It is inevitable and right that appellate courts seek to guide and direct the work that is done at trial level. Consistency in and predictability of the outcome of litigation is fundamental to the proper administration of justice. But consistency and predictability are to be achieved within the confines of applicable legal principle. They are not to be achieved by treating different cases alike any more than they are to be achieved by treating like cases differently."

Even in the civil law context, it is difficult in reality to achieve consistency in outcomes.[5]

It may be that in criminal sentencing, due to the nature of the applicable legal principles, it is much more difficult to properly compare the outcomes of cases and that the degree of predictability to be expected would be lower than in other areas of law. Moreover, comparison between the sentencing outcomes in individual cases should only be compared with great caution.

The concept and meaning of consistency has been discussed in a number of cases. Lord Lane, in the English guideline judgment of *Bibi*[6], stated the following in relation to "consistency": [7]

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[3] Chief Justice Jim Spigelman, 'Reasons for Judgment and the Rule of Law', paper delivered at the National Judicial College, Beijing 10 November 2003, and The Judge's Training Institute, Shanghai, 17 November 2003 <www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman_031110> at 1.

[4] See *Rogers v Nationwide News P/L* (2003) 77 ALJR 1739 at paragraph 82 per Hayne J.

[5] See for example, *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118, where it was said when discussing general personal injury damages decisions of the court, that "It may be granted that a judge who is making such an assessment will be aware of and give weight to current general ideas of fairness and moderation. But this general awareness is quite a different thing from what we were invited by Planet's counsel to act upon in this case. The awareness must be a product of general experience and not formed ad hoc by a process of considering particular cases and endeavouring, necessarily unsuccessfully, to allow for differences between the circumstances of those cases and the circumstances of the case in hand." A decision referred to by Kirby J in *Johnson v. The Queen* [2004] HCA 15 at [43]

[6] (1980) 2 Cr App R (Sentencing) 177 at 179.

[7] Ibid at 179.

> "We are not aiming for uniformity of sentence. That would be impossible. We are aiming for uniformity of approach".

Earlier, as was said by Street CJ in *R v Rushby*:[8]

> "The judicial discretion underlying the formulation of a sentence must be exercised with due regard to principles of law deductible from authoritative decisions… Although the discretion left to the judge is wide, the doctrine and principles established by the Common Law [and now also by statute] in regard to sentencing provide the chart that both relieves the judge from too close personal involvement with the case in hand, and promotes **consistency of approach** on the part of individual judges".(Emphasis added).

In the recent case of *Johnson v the Queen*[9] the High Court considered the meaning of "consistency" and favoured consistency of approach. Gummow, Hayne and Callinan JJ observed:

> "Judges of first instance should be allowed as much flexibility in sentencing as is consonant with **consistency of approach** and as accords with the statutory regime under which the sentencing is effected." (Emphasis added).

As a matter of practicality, the range of circumstances which are relevant to the objective gravity of an offence, and the subjective circumstances of the offender, are very broad. For this reason, there is likely to be variation on at least some of the relevant considerations, and it would be almost impossible to find two identical matters, even though in many cases, the basic circumstances of the offence and of the offender will be comparable. As noted by the NSW Law Reform Commission, "this means that, generally, it is artificial to aim for consistency of outcome."[10]

In *Veen*[11], the High Court noted that the sentencing task often involves balancing overlapping, contradictory and incommensurable objectives. This has also been emphasised extra judicially by Spigelman CJ[12] The guideposts to the appropriate sentence often point in completely different directions. This is a further argument for the view that consistency in outcome would be near impossible, and that consistency in approach is the proper aim.

It was held in *Griffiths v R*[13] that the task of the Court of Criminal Appeal was to minimise disparities of sentence while recognising that perfect uniformity cannot be achieved. Thus, a fair margin of sentencing discretion must be left to the sentencing judge.

In *Lowe v R*[14], Mason J considered what is meant by "an appropriate sentence":[15]

> "The reference to an appropriate sentence is apt to be misunderstood. Generally speaking, a sentence within a limited range of years is appropriate to the circumstances in which the

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[8] (1977) 1 NSWLR 594 at 597
[9] [2004] HCA 15 at [26]
[10] NSWLRC (1996) *Discussion Paper 33: Sentencing* at paragraph 3.40
[11] (1988) 164 CLR 465, 77 ALR 385 at 393
[12] Chief Justice Jim Spigelman, "Sentencing Guideline Judgments" (1999) 73 *Australian Law Journal* 876 at 877
[13] (1977) 137 CLR 293 at 296
[14] (1984) 154 CLR 606 at 610
[15] Ibid at 612

> offence was committed and to the character, antecedents and conditions of the offender. As the ascertainment and imposition of an appropriate sentence involve the exercise of judicial discretion based on an assessment of various factors it is not possible to say that a sentence of a particular duration is the only correct or appropriate penalty to the exclusion of any other penalty."

Thus what must be looked at is whether the sentence in question is within the *range* appropriate to the objective gravity of the particular offence and to the subjective circumstances of the particular offender. The question is not whether the sentence is more severe or more lenient than some other sentence also falling within that range.[16]

As Street CJ stated in *R v Viscont*[17], while a factual assessment of one case should not be seen as legal authority to govern the decision in another, weight must be given to the general pattern of sentencing showing the collective wisdom of sentencing judges.[18]

In *Wong*[19] the majority of the High Court stated that:[20]

> "To focus on the *result* of the sentencing task, to the exclusion of the reasons which support the result, is to depart from fundamental principles of equal justice. Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect." (Emphasis in original)

The NSW Law Reform Commission considered the meaning of the term "consistency" in their 'Discussion Paper 33 – Sentencing'. The Commission noted that where offenders other than co-offenders are concerned, the test is whether the sentence is outside the appropriate range, bearing in mind the objective and subjective features of the offender and offence.[21] The Commission noted that, considering that variation in at least some of the relevant considerations was inevitable, to aim for consistency in outcome would be artificial.

One of the first substantial items to be dealt with by the Commission in their 'Report 79 – Sentencing'[22] is the Commission's approach to reform of sentencing law, and the necessity for judicial discretion in sentencing.[23] The Commission discusses both the issue of actual or perceived "disparity" and expressed the following views:

> "The importance which the Commission attaches to doing justice in the individual case does not mean that we are unmindful of the desirability of obtaining consistency in sentencing. While consistency is of particular importance in imposing sentences of co-offenders, the principle is more generally applicable. The significance of a consistent approach to sentencing is undeniable whether the concern is with justice, equity, efficiency, effectiveness or cost benefit. The corollary of this is that like cases (that is similar circumstances offenders charged with similar offences) should not be subjected to punishment which reflects unwarranted disparity."

The Commission continues with discussion of the notion of disparity, emphasising that it is not simply disparity that is the concern, but rather *unjustifiable* disparity.

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[16] See *R v Warfield* (1994) 34 NSWLR 200 at 207.
[17] (1982) 2 NSWLR 104 at 151.
[18] See also *R v Ellis* (1993) 68 A Crim 449.
[19] *Wong v The Queen; Leung v the Queen* [2001] HCA 64.
[20] Ibid at [65].
[21] See *R v Ellis* (1993) 68 A Crim R 449.
[22] NSW Law Reform Commission (December 1996) "Report – Sentencing".
[23] Ibid at 1.7 – 1.15.

It is therefore clear that the Commission preferred a definition of "consistency" based on consistency of approach, rather than consistency in outcome. This point is emphasised further:

> "We remain convinced that what is important is that courts should adopt a common approach to sentencing having regard to its purposes and to relevant applicable principles of common law and statute. In fixing the quantum of sentence befitting the circumstances of the particular case, courts should have regard to previous cases which are similar in terms of the gravity of the offence and the circumstances of the particular offender in order to provide an indication of the appropriate sentencing range. The quest is not one for identical sentences for like cases. The key concerns, in our view, are consistency of approach and outcomes which are not beyond the acceptable range."

Morgan and Murray identify some of the many ideas encapsulated by the term "consistency":[24]

> "It might mean:
> - Consistency of "purpose" or philosophy" (agreement on the basic aims of sentencing);
> - Consistency in "approach" (taking account of the same factors and giving similar weight to those factors);
> - Consistency in "outcome" or "result" (imposing the same type and quantum of sentence);
> - A variant or combination of these meanings."

An issue relating to consistency in outcome is the decision whether or not to make an election to have a particular matter dealt with on indictment (where that decision can be made). Such a decision would affect the outcome in cases even where the same approach was taken in respect of the same offence (see *further Part 7, Prosecutorial Practice and Promoting Consistency in Sentencing - Importance of election regarding indictable offences*).

Morgan and Murray examine the NSWCCA judgment in *R v Jurisic*[25], noting that the judgments in that case do not explore the meaning of the term to any significant degree. Wood CJ at CL speaks of consistency in terms of avoiding dramatic departures from the sentence to be expected and which is "an indicator of justice".[26]

In 2002, the Judicial Commission of NSW published a monograph paper on the impact of the *R v Jurisic* guideline on sentencing practice.[27] In discussing the methodology of the study, the paper considers the meaning of "consistency". The paper noted that the absence of a definition in *R v Jurisic*, and stresses that a definition was necessary at the outset. The four definitions suggested by Morgan and Murray were considered, but the definition of consistency in outcomes was adopted by the Judicial Commission for the purposes of that particular study. However, the Commission acknowledged that consistency in approach is what is sought to be achieved by judicial officers.[28]

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[24] Morgan N & Murray B, "What's in a Name? Guideline Judgments in Australia" (1999) 23 *Crim LJ* 90 at 95
[25] *Regina v Jurisic* [1998] NSWSC 592
[26] *Jurisic* at 223
[27] Gallagher, Poletti and Potas (2002) Monograph No 21 – *Sentencing Dangerous Drivers in NSW: The Impact of the Jurisic Guidelines on Sentencing Practice*, Sydney, Judicial Commission of NSW
[28] See for example paragraphs 24-26

The conclusion drawn from the Judicial Commission's study is that the guidelines have resulted in consistent results or outcomes in the sentencing of offenders convicted of dangerous driving offences under s 52A of the *Crimes Act* 1900.

Other monograph papers by the Judicial Commission, including "Sentencing Disparity and the Gender of Juvenile Offenders"[29] and "Sentencing Disparity and the Ethnicity of Juvenile Offenders" have also considered the meaning of "sentencing disparity".[30]

Potas states in the preface to the Sentencing Manual NSW, published by the Judicial Commission of NSW, that the manual has three aims, the first of which is to "promote *consistency of approach* in the sentencing of offenders"[31] (emphasis added). Potas notes that the concept of "consistency" reflects the notion of equal justice, and is essential to public confidence in the integrity of the administration of justice.[32]

The fact that "consistency of approach" is stated as the first aim in the Sentencing Manual NSW is significant for a number of reasons. First, it reflects the view of the Judicial Commission of NSW, which is an important statutory body having functions which include monitoring sentences imposed by courts and disseminating information and reports on sentences imposed by courts "for the purpose of assisting the Courts to achieve consistency".[33] Secondly, the Sentencing Manual NSW is widely used by judicial officers in NSW. As noted by the Chief Justice of NSW, the Hon JJ Spigelman AC in the foreword to the manual, the manual serves one of the principal functions of the Commission, which is the promotion of consistency in sentencing. The manual replaces the sentencing volume of the Bench Book, and is primarily designed to assist judicial officers on a daily basis, although it is now also available to the general public.

In *R v Whyte*[34], in considering the meaning of "consistency", Spigelman CJ states the following view:

> "By inconsistency I do not mean only that individual judges have different penal philosophies. This is not a bad thing in a field which, as Sir Frederick Jordan once put it, "the only golden rule is that there is no golden rule". In this regard, judges reflect the wide range of different views on this very matter that exists in the general community. However, there are limits to the permissible range of variation."

In England, the meaning of "consistency in sentencing" was recently considered in the Halliday Report.[35] The view expressed in the Report is that consistency should be a continuing goal, and should be measured by consistency of *approach* rather than uniformity of outcomes. This recognises that disparity in outcomes is often justifiable and necessary. In aiming for consistency in approach to sentencing, the Halliday Report suggests that the

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[29] Gallagher, Poletti and Mackinnel (1997), *Monograph Series No 16 – Sentencing Disparity and the Gender of Juvenile Offenders*, Sydney, Judicial Commission of NSW
[30] Gallagher and Poletti (1998) *Monograph Series No 17 – Sentencing Disparity and the Ethnicity of Juvenile Offenders*, Sydney, Judicial Commission of NSW
[31] Potas I (2001) *Sentencing Manual NSW*, Sydney, Judicial Commission of NSW and Law Book Co
[32] Potas I (2001) *Sentencing Manual NSW*, Sydney, Judicial Commission of NSW and Law Book Co
[33] Section 8 of the *Judicial Officers Act* 1986
[34] [2002] NSWCCA 343.
[35] Halliday, John (July 2001) *Making punishment work – Report of a Review of the Sentencing Framework for England and Wales*, London: The Home Office

transparency of the framework, and understanding about how it is supposed to work should be improved. Recommendation 10 of the Report reads as follows:

> "The proposed new guidelines should look for consistency of approach, rather than uniform outcomes, and recognise justifiable disparity, for example in case where the offender has young dependent children."

Although the Halliday Report defines the form of consistency sought to be achieved in terms of consistency of approach, the Report further recognises that large disparities can point to inconsistencies in approach. The Report reads:[36]

> "Consistency can be recognised through like cases resulting in like outcomes. The variety of circumstances in criminal cases, however, makes this an incomplete definition, and one which can result in undesirable priority being given to apparently uniform outcomes, regardless of circumstances. A better approach is to seek consistent application of explicit principles and standards, recognising that these may result in justifiably disparate outcomes. The goal is consistency of approach not uniformity of outcomes. This makes consistency difficult to monitor, but not impossible."

Overall, the case law, reports and extra judicial comments cited above all seem to support the definition of "consistency" as centring on consistency of "approach". In its submission, the Law Society of NSW also stressed that, "Consistency in sentencing is not to be equated with uniformity in sentencing."

2.2 The Meaning of Consistency in Approach

In essence, the court's approach to sentencing, or the court's sentencing methodology, refers to the way in which all the various objective and subjective factors are taken into account to arrive at a final sentence. In this context, how is consistency in approach to be achieved? Two major approaches to sentencing have been identified: the 'two-tiered' approach and the instinctive (or intuitive) approach.[37] It is not entirely clear what either approach entails or how precisely they differ. In general however, the two-tiered approach involves an initial stage whereby a "notional" sentence is derived at (usually based on "objective" factors), and that sentence is then refined by one or more stages into a final sentence (usually by then taking into account "subjective" factors). The instinctive synthesis, by comparison, involves only one stage of reasoning, which all the various factors are assimilated to arrive at a final sentence. The two-tiered approach has been criticised as being too artificial and mathematical, and the instinctive synthesis approach has been criticised as lacking transparency and as such poses difficulties for an appellate court in locating and correcting error.

Considerable jurisprudence has arisen in regards to the two approaches and which approach is correct or preferable. In general, the instinctive synthesis approach seems to have been embraced in Victoria[38], whereas in NSW the two-tiered approach has often been used.[39] The

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[36] Halliday, John (July 2001) *Making punishment work – Report of a Review of the Sentencing Framework for England and Wales*, London: The Home Office, at 16

[37] For an excellent analysis of the law in this area, see Sally Traynor and Ivan Potas, 'Sentencing Methodology: Two-tiered or Instinctive Synthesis' (2002) 25 *Sentencing Trends and Issues* 1

[38] *R v Williscroft* [1975] VR 292 at 300 per Adam and Crockett JJ. See also *R v Thomson* (2000) 49 NSWLR 383

High Court has, on several occasions, considered the issue, but a majority of the Court supporting the order disposing of matter has never conclusively determined which approach is required by law.[40] The issue was first addressed by McHugh J in *AB v The Queen*[41], where his Honour was highly critical of the two-tiered approach, stating that it was likely to produce an overly heavy sentence, since the initial sentence was unrepresentative of the actual crime and involved generalising the facts of the case. In *Wong*[42], the two-tiered approach was again criticised, and the instinctive synthesis approach was endorsed:[43]

> "[T]he task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an "instinctive synthesis". This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features."

In December 2003, the High Court granted special leave to appeal in the matter of *Markarian v The Queen*[44], and it appears that this case may be used as a vehicle for the Court to address the issue of which approach to sentencing is the correct or preferable one and how it is to be carried out.

2.3 The Importance of Consistency in Sentencing

As Chief Justice Spigelman has stated, the rule of law requires that laws are administered *consistently*, and consistency is fundamental to the administration of justice.[45]

The importance of consistency in approach in particular has also been discussed in a number of cases. In *Griffiths v R*[46], Jacobs J considered the importance of consistency in the following terms:

> "…Where equal treatment (i.e. consistency in sentencing) is not the rule a potential offender is encouraged to play the odds, believing that he will be amongst those who escape serious sanction. Certainty of punishment is more important than increasingly heavy punishment."

In *Bugmy*[47], Dawson, Toohey and Gaudron JJ reviewed the minimum terms that had been handed down in Victoria, and noted:

> "Uniformity of sentencing is a matter of importance. It cannot be pressed too far but what does emerge is that the minimum term fixed for the applicant is higher than any other in the statistics furnished to the Court of Criminal Appeal. That of itself is a matter calling for some scrutiny of the minimum term on the part of the appellate court."

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[39] See for example *R v Cuthbert* [1967] 2 NSWR 329; *R v Gallagher* (1991) 23 NSWLR 230; *R v Winchester* (1992) 58A Crim R 345
[40] This point is made by Kirby J in *Johnson v The Queen* (2004) HCA 15 at paragraph 40
[41] (1999) 198 CLR 111
[42] *Wong v the Queen; Leung v The Queen* (2002) 76 ALJR 79
[43] Ibid at [75]
[44] *Markarian v The Queen* [2003] HCATrans 505
[45] Chief Justice Jim Spigelman, 'Reasons for Judgment and the Rule of Law', paper delivered at the National Judicial College, Beijing 10 November 2003, and The Judge's Training Institute, Shanghai, 17 November 2003 <www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman_031110> at 1.
[46] (1977) 137 CLR 293 at 327.
[47] (1990) 169 CLR 525.

In *Lowe v R*[48], consistency is discussed in the context of the need for an appellate court to intervene where a justifiable sense of grievance had been engendered on the part of the accused where his co-accused has received a lighter sentence than he did, even though the sentence imposed upon the aggrieved accused was itself an otherwise appropriate sentence. However, Mason J referred to the concept of "consistency in punishment"[49] which may be interpreted as being applicable to sentencing generally, and not just in relation to the sentencing of co-offenders. In that case, Mason J stated that:

> "Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and the community."

2.4 Consistency and Judicial Discretion

When considering how best to promote consistency in approach to sentencing, the essential issue concerns balancing consistency with judicial discretion.

The High Court has recently emphasised the need for judicial discretion and flexibility to ensure that the sentence meets the particular circumstances of each case. It has often been said that an amount of flexibility and discretion is needed in order that the sentencing judge may consider all the various factors that are assimilated to arrive at a final sentence. In *Weininger v The Queen* the majority considered the issue as follows:[50]

> "[I]t is important to avoid introducing "excessive subtlety and refinement" to the task of sentencing. That object is advanced if sentencing and appellate courts pay close attention to identifying those matters that the sentencing judge takes into account in a way that is adverse to the interests of the accused, and those matters that the sentencing judge takes into account in favour of the accused…It must be recognised that not every matter urged on the judge who is to pass sentence has to be, or can be, fitted into one or other category. The judge may be unpersuaded of matters urged in mitigation or in aggravation. The absence of persuasion about a fact in mitigation is not the equivalent of persuasion of the opposite fact in aggravation. So to conclude would ignore the different standards of proof that are to be applied. Further, it would be wrong because it would assume that sentencing is a syllogistic process. It is not. It is a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment usually expressed in time or money."

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[48] (1984) 154 CLR 606 at 610

[49] Ibid at 610-611

[50] *Weininger v The Queen* [2003] HCA 14 at [26] per Gleeson CJ, McHugh, Gummow and Hayne JJ. As noted above, it seems that the High Court may use the matter of *R v Markarian* [2003] HCATrans 505 (2 December 2003) to address and consider the issue of approaches to sentencing. See also *Johnson v. The Queen* [2004] HCA 15 per Kirby J at [40]-[44] describing as *obiter*, views on instinctive synthesis and transparency in sentencing.

After the promulgation of the guideline in *R v Jurisic*, Spigelman CJ[51] noted that the guideline judgments system emerged in a context in which there was significant public debate concerning the introduction of various forms of legislative prescription to confine the sentencing discretion of judges. Such legislative schemes include grid sentencing (see further *Part 4, Current Measures to Promote Consistency – Guideline Judgments*). Spigelman CJ noted the importance of the continued existence of sentencing discretion as vital for a fair and individualised system of criminal justice, and expressed the view that guideline judgments strike the correct balance between structuring discretion without restricting it, and therefore guideline judgments are to be preferred over restrictive schemes such as grid sentencing.

After the judgment in *R v Jurisic*, the NSW Parliament introduced legislation providing for the promulgation of guideline judgments.[52] The provisions were introduced in recognition that the system of guideline judgments would balance the need for consistency with the need for judicial discretion:[53]

> "[S]entencing guidelines promote greater consistency in sentencing, without inappropriately fettering judicial discretion. That is important. Public confidence in the administration of criminal justice requires both consistency in sentencing decisions and flexibility to ensure that the sentence meets the particular circumstances of each case."

2.5 Consistency in sentencing for a particular offence and "elections"

In relation to consistency in sentencing for particular offences, it is inevitable that practical inconsistencies will arise in situations where there is a choice of jurisdiction. For example, some indictable offences may be charged summarily and be subject to a lesser penalty. If charged on indictment a penalty up to the maximum may be imposed, with appeals to the Court of Criminal Appeal (governed by the provisions of the *Criminal Appeal Act 1912*). If charged summarily in the Local Court, there is a jurisdictional limit of 2 years,[54] with sentence appeals to the District Court on the evidence. The reasons are not included,[55] and it is a different type of appeal, by way of rehearing. The issues of "elections" and a comparison of the appeal provisions from Local Court to District Court, and District Court to the Court of Criminal Appeal are considered in detail at a later stage.[56]

2.6 Disparity between Co-offenders

In *Ellis*, the majority of the Court of Criminal Appeal held that *other* than in the sentencing of co-offenders, the test for disparity is whether the sentence under review was outside the *range* of sentences appropriate to the objective gravity of the offence and the subjective circumstances of the offender.[57] However, in relation to the sentencing of co-offenders,

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[51] Chief Justice Jim Spigelman, "Sentencing Guideline Judgments" (1999) 73 Australian Law Journal 876 at 876-7

[52] See *Part 4Current Measures to Promote Consistency – Guideline Judgments*

[53] The Hon Ms Harrison, Minister for Sport and Recreation, on behalf of Mr Whelan, Hansard, Legislative Assembly, 28 October 1998 p9190-9191

[54] The jurisdictional limit of the Local Court was recently considered in *R v Doan* (2000) 50 NSWLR 115; (2000) 115 A Crim R 497; [2000] NSWCCA 317

[55] Even the reasons for imprisonment for 6 months or less are not included. Such reasons must be recorded by way of section 6(2) of the *Sentencing Procedure Act 1999* no 92.

[56] As to elections, see 7.1 The Election Process. On the appeal provisions, see Part 5, Appeals Against Sentence and their Limitations.

[57] *R v Ellis* (1993) 68 A Crim R 449, per Hunt CJ at CL at 461. Kirby P in dissent at 456-59

disparate sentences tend to give the impression of inequality of treatment in apparently like cases. The major principle is that although equal justice requires that like be treated alike, if there are relevant differences, due allowance should be made, even in the sentencing of co-offenders.

In *Postiglione*[58], the High Court considered an appeal against sentence by a person where his co-offenders received a markedly different sentence. The High Court held, with McHugh and Gummow JJ in dissent, that the sentence imposed on the offender, in comparison with the sentence imposed on his co-offender, gave rise to a justifiable sense of grievance. The Court recognised that disparity, even as between co-offenders, is not simply the imposition of different sentences for the same offence. As stated by Gaudron and Gummow JJ:

> "Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated… Discrepancy or disparity is not simply a question of the imposition of different sentences for the same offence. Rather, it is a question of due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality. The different circumstances involved in this case, namely, the fact that Savvas was the principal organiser in both conspiracies and that Postiglione rendered significant assistance to police and prosecuting authorities, clearly require that Postiglione receive a markedly lesser sentence than that imposed on Savvas."

In the matter of *Houvardas*[59], the NSW Court of Criminal Appeal considered a sentence appeal where the appellant's co-offender received a substantially longer sentence than the principal co-offender. The Court of Criminal Appeal drew together the authority considering the principle of parity. The Applicant argued that it was contrary to sound sentencing principle for him to be sentenced more harshly than his wife, who was the principal. Again, the Court held that the disparity in the sentences imposed is only an issue if it is unjustifiable disparity. Heydon JA held, with Mason P and Smart AJ agreeing:

> "Sentencing an accessory more severely than a principal offender does not necessarily create a justifiable sense of grievance. Whether it does will depend on the circumstances of the particular case. The circumstances of this case could not fairly create that sense of grievance because of the role of the applicant as instigator."

2.7 Consistency: an actual or perceived problem?

As the Attorney-General recently stated:[60]

> "One aspect of the justice system which creates great frustration in the community is the perception of inconsistency in sentencing."

The importance of public confidence in the sentencing process is of utmost importance, and is discussed in numerous places.[61] A public perception of a lack of consistency in sentencing can lead to a sense of frustration and lack of confidence in the criminal justice system.

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[58] (1997) 189 CLR 295, 94 A Crim R 397.
[59] [2000] NSWCCA 203.
[60] The Hon Bob Debus MP, NSW Attorney General (2003) "The NSW Sentencing Council – Its role and functions" 15(6) *Judicial Officers Bulletin* 45 at 46.

The issue of public confidence is linked to whether inconsistency in sentencing is actual or perceived. Note also that the recent report by the Hon Gordon Samuels AC CVO QC, "Review to Consider the Merits of Establishing a Specialist Gun Court in New South Wales", concludes that, in relation to firearm offences, there is no evidence of inconsistency in sentencing in the Local Court or District Court.[62]

This issue has also been explored in other jurisdictions, although the issue considered is usually the perception of adequacy of punishment in terms of severity rather than consistency as such. In England, the Halliday Report explored this issue, discussing numerous surveys that show levels of public confidence in the adequacy of punishment are low, however, they also suggest that awareness amongst the public as to the levels of punishment actually imposed are also low. The survey suggests that:

- "the public is badly under-informed about sentencing severity, and believes it to be more lenient than it is; and
- when faced with sentencing options, the public seem ready to pass sentences broadly in line with existing practice."

The Report continues that what is needed is:

- "Better and more accessible information for the public about how sentencing is supposed to work, in this respect, and how it is working in practice;
- Better information for sentencers about what the public think, and on what information the various opinions are based; and
- Better information about the cost of the punitive element of sentences if, and when, they can be disaggregated from the crime reduction elements."

To similar effect, Lord Justice Auld has considered the role of public confidence in the criminal justice system.[63] His Honour states:

> "Public confidence is thus, and is likely to remain, an imprecise tool for determining how well a criminal justice system is performing and what needs to be done to improve it. Public confidence is not so much an aim of a good criminal justice system; but a consequence of it."

The NSW Bureau of Crime Statistics and Research has also considered the lack of public understanding about the sentencing process. This can cause concern about leniency where there seems to be large disparities in the outcomes and penalties for superficially similar crimes. The bureau states, "this lack of understanding can easily be manipulated by the media to create the impression that the courts are very haphazard in the way they deal with offenders."[64]

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[61] See for example, Mason J in *Lowe*, paragraph 8; Potas, paragraph 26; introduction of legislative basis for guideline judgments, paragraph 60; Gleeson CJ in *Wong*, paragraph 66; Spigelman CJ in *Jurisic*, paragraph 84; Spigelman CJ in *Whyte*, paragraph 67; and McHugh J in *Everett*, paragraph 83

[62] Report by the Hon Gordon Samuels AC CVO QC, *Review to Consider the Merits of Establishing a Specialist Gun Court in New South Wales,* March 2004, paragraphs 6.2 and 12.1

[63] Lord Justice Auld, (September, 2001) *Review of the Criminal Courts of England and Wales*, London: the Stationary Office at paragraph 31-32

[64] Baker, J (1998) "*Crime and Justice Bulletin no 40: Are the Courts Becoming more Lenient? Recent Trends in Convictions and Penalties in NSW Higher and Local Courts*" Sydney: BOCSAR

The recognition of concerns in relation to the role of public confidence and lack of public understanding about the sentencing process should not merely be acknowledged, but underlies the need for action including public education.[65]

In an English guideline judgment of *Keating and McInerney,* Lord Wolf further considers the use of “surveys” of members of the public and the need for caution in using them, particularly in the context of guideline judgments.

To what extent do the above conclusions apply in the NSW context? In the 1980’s and early 1990’s a number of studies on public attitudes towards sentencing were conducted in Australia but it appears that no more recent studies exist. The Australian Institute of Criminology undertook an important 1987 study entitled “How the public sees sentencing: an Australian Survey”, which found:[66]

- That the average response broadly agreed with typical court decisions;
- A diversity of opinion across socio-demographic groups; and
- An unexpected sophistication in public attitudes about crime and punishment.

A similar survey undertaken in 2004, in the context of the Local Court, could provide interesting comparisons, and better inform the NSW Sentencing Council on public perceptions of sentencing, in particular the inconsistency of sentencing, and the basis for these views.[67]

It has been said that media reporting of criminal cases plays a significant role in creating inaccurate public views regarding sentencing. This issue was raised in the submissions of the NSW Law Society and a Local Court Magistrate, and was also considered in the report of Mr Samuels in relation to the merits of establishing a Gun Court.[68] Generally, the view is that the media overemphasise the occasional inadequate sentence and tend to portray as inadequate sentences which, if the circumstances were fully appreciated and reported, may not seem inadequate. Although a public perception of leniency in sentencing does not necessarily involve a perception of inconsistent sentencing, the two are least related. In this sense, it is probably fair to say that there is some perception of inconsistency in sentencing and that perception is at least partly based on or encouraged by media reporting.

Whether or not there is inconsistency in sentence in actuality is another issue. Objectively measuring the actual extent of inconsistency in approach to sentencing would be an extremely difficult task. It could be gathered in a number of ways. Canvassing the opinion of Judges of the District Court who have experience in dealing with appeals from sentences imposed in the Local Court is one means of assessing the extent of inconsistency in approach to sentencing. Interestingly, the submission from a Judge of the District Court stated:

> “In general, the sentences I see are, with some notable exceptions, reasonable and consistent.”

[65] This is perhaps a matter in which the Council could play a significant role if given statutory power to do so.
[66] Australian Institute of Criminology, *How the Public Sees Sentencing: An Australian Survey*, No 4,Trends and Issues in Criminal Justice, April 1987.
[67] However, the Council considers that at the present time there is insufficient basis for such a use of time and resources.
[68] Report by the Hon Gordon Samuels AC CVO QC, *Review to Consider the Merits of Establishing a Specialist Gun Court in New South Wales,* March 2004, paragraph 6.1

The “notable comparisons” referred to involved the sentencing practices of certain magistrates, including some more senior magistrates, who appeared to be “unaware of some basic principles of sentencing.” Another method for assessing the extent of inconsistency in approach to sentencing is provided by the recent report of the Bureau of Crime Statistics and Research into sentencing of PCA offences. (For discussion of a case study of sentencing inconsistency relating to PCA offences, see *Part 3, NSW Local Courts – Sentencing*). This offers a scientific approach according to which state-wide data about sentencing outcomes for a particular offence is controlled against variables such as the relevant facts of the crime and availability of sentencing options. However, the Council considers that the main issue is how sentencing consistency could be better promoted, and as such it is not necessary to determine the extent to which sentencing is actually inconsistent, but only to identify impediments to consistency which currently exist and how consistency could be better promoted.

In conclusion, “discrepancy” or “disparity” in sentencing is not simply a question of imposition of different sentences for the same category of offence.

3. NSW LOCAL COURTS

The Local Courts sit in 158 locations across NSW[69], covering the Sydney Metropolitan area as well as regional and rural areas of the State.

Criminal matters represent the majority of the caseload of NSW Local Court. In 2003, 266,179 criminal prosecutions were commenced and 266,307 cases were finalised in the Local Courts' criminal jurisdiction.[70] Nearly 98% of criminal prosecutions in NSW are heard by Local Court Magistrates, and the proportion continues to rise.[71]

Despite the high volume of criminal matters finalised, the NSW Local Court has achieved excellent outcomes in terms of the time taken to finalise matters:[72]

> "The Report on Government Services 2004 (published on 30 January 2004) outlined the result of the 2002/2003 Courts Administration Working Group (COAG) report.
>
> The results reported indicated:
> The Court in its criminal jurisdiction ranked first in Australia for timeliness…As of 31 December 2003, 96.98% of all criminal matters were disposed of within six months of initiation. 99.55% of all criminal cases were disposed of within 12 months."

Outside the hearing of criminal offences, the most significant area of work is the adjunct criminal jurisdiction of domestic and personal violence.[73] In 2003, a total of 45, 517 applications for domestic and personal violence orders were made, a slight increase from 2002.[74]

The issue of court waiting times and court delay, particularly as concerns the Local Courts, has been a particular focus in recent years. In 2001-2002, the Public Accounts Committee considered the issue of court waiting times[75], and it is understood that Cabinet is currently finalising the Government's response. The report does not address the issue of consistency in sentencing.

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[69] Local Court NSW, *Annual Review*, 2003, p6
[70] Local Court NSW, *Annual Review*, 2003, p6. The Court achieved a "clearance ratio" of above 100%.
[71] Local Court NSW, *Annual Review*, 2003, p6. In the second joint submission from the NSW Police and the Ministry for Police, received by the Sentencing Council in April 2004, it is asserted at page 7 that "police prosecutors undertake 98% of all prosecutions in NSW. The Council has difficulty in reconciling this figure as it suggests that police prosecutors prosecute *all* matters in the Local Court.
[72] Local Court NSW, *Annual Review*, 2003, p6
[73] Local Court NSW, *Annual Review*, 2002, p7. This jurisdiction was conferred by the inception of Part XVA of the *Crimes Act 1900*.
[74] Local Court NSW, *Annual Review*, 2003, p8
[75] NSW Public Accounts Committee (NSW Legislative Assembly Statutory Committee), *Inquiry into Court Waiting Times*, No 133, 2001
<http://www.parliament.nsw.gov.au/prod/web/phweb.nsf/frames/committees?open&tab=committees>
This inquiry occurred pursued to reports of the NSW Auditor General in 1999 and 2001: NSW Auditor-General, *Management of Court Waiting Times*, 1999 <http://www.audit.nsw.gov.au/perfaud-rep/Year-1999-2000/courtswait99/contents.html>; NSW Auditor-General, *Follow-up Performance Audit Report – Management of Court Waiting Times*, 2001 < http://www.audit.nsw.gov.au/perfaud-rep/followup-sept01/followup2-contents.html>

3.1 Local Court Magistrates

Of a total of 134 Magistrates appointed in NSW, there are 111 Local Court Magistrates.[76] There are also several Acting Magistrates at any one time.[77]

3.2 Criminal Jurisdiction

NSW Local Courts have jurisdiction to hear and determine charges that relate to offences permitted or required to be dealt with summarily.[78] These include the following types of offences:

1. Offences under an Act that is required to be dealt with summarily;
2. Offences described as a summary offence;
3. Offences that are not required to be dealt with on indictment and for which the maximum penalty that may be imposed does not include imprisonment for more than 2 years; and
4. Offences that may be dealt with summarily or on indictment, where no election is made that it be dealt with on indictment.

In relation to point 4 above, a distinction is made in the legislation between Table 1 and Table 2 offences.[79] Offences listed in either Table are to be dealt with summarily unless an election is made. In the case of Table 1 offences, the election to have the matter dealt with on indictment can be made by either the prosecutor or the person charged with the offence. For Table 2 offences, the election can only be made by the prosecutor.[80] The maximum penalties that can be imposed where Table 1 and 2 offences are dealt with summarily are provided in sections 267 and 268 respectively, of *the Criminal Procedure Act 1999*.[81]

The Local Court's Annual Review for 2002 notes that it has become increasingly common for the DPP to proceed summarily with indictable offences where an election could have been made to deal with the matter on indictment.[82] It was stated that "the experience of the Local Court is that the DPP uses the Local Court jurisdiction wherever possible as an alternative to committal to the District Court" and that "use of the Local Court has considerable cost benefit advantages and allows the District Court to focus on complex and serious criminal trials."[83]

The importance of the election process is considered in further detail in *Part 7, Role of Prosecutorial Practice in Ensuring Consistency, Importance of election regarding indictable offences and the standard non-parole sentencing scheme*.

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[76] Local Court NSW, *Annual Review*, 2003 at p19-22. "Local Court Magistrates" excludes Magistrates of Children's Courts, NSW Administrative Decisions Tribunal, Drug Court, Coroner's Court, Commonwealth Court, and Licensing Court, as well as the State Coroner, Chief Industrial Magistrate and Chief Mining Warden.
[77] Magistrates are appointed by the Governor, and qualification depends on eligibility to be admitted as a barrister or solicitor of the Supreme Court of NSW, or of any Court of any other Australian State or Territory, or of the High Court: section 12 of the *Local Court Act 1983*. The Governor also appoints a Chief Magistrate, who has the power to require specified functions to be exercised by specified Magistrates or a specified class of Magistrates: section 14 of the *Local Court Act 1983*. Deputy Chief Magistrates may also be appointed by the Governor: section 15 of the *Local Court Act 1983*.
[78] See section 6 of the *Criminal Procedure Act 1986*.
[79] Tables 1 and 2 are located in Schedule 1 to the *Criminal Procedure Act 1986*.
[80] See section 260 of the *Criminal Procedure Act 1986*.
[81] See sections 267-268 of the *Criminal Procedure Act 1986*.
[82] Local Court NSW, *Annual Review*, 2002, p6.
[83] Local Court NSW, *Annual Review*, 2002, p6.

The criminal jurisdiction of the Local Court also covers committal hearings for strictly indictable offences and also those which are permitted to be dealt with summarily but where no such election has been made. About 60% of all cases before the higher Courts (i.e. the District and Supreme Courts) appear following a committal hearing in the Local Court.[84] Committal hearings involve a preliminary hearing by the magistrate of the evidence against the accused. Where a guilty plea is entered, or the accused reserves his or her right to a defence, the question for the Court is whether the evidence is "capable of satisfying a jury, properly instructed, beyond reasonable doubt, that the accused person is guilty of an indictable offence.[85] If so satisfied, the accused is committed for trial before a higher court, usually the District Court. Where a guilty plea is entered, the accused is committed for sentence before a higher court. In 2002, 2,237 cases were committed for trial and 1,458 cases were committed for sentence, to the District Court.[86]

The maximum sentence of imprisonment that the Local Court can impose is two years,[87] and a consecutive sentence cannot be imposed such that the total period of imprisonment is more than 3 years.[88] Since 14 February 2004, when Schedule 2 of the *Crimes Legislation Further Amendment Act 2003* (NSW) came into effect, Local Courts have the power to impose consecutive sentences with total duration of up to 5 years.

Table 1 below shows the 20 offences most commonly sentenced in NSW Local Courts in 2002. Low, mid and high-range Prescribed Concentration of Alcohol (PCA) offences all featured in the ten most common offences (at sixth, first and fifth respectively). Together these three PCA offences counted for approximately 20% of the total sentences imposed. Other common offences sentenced were common assault (second), larceny (third) and drive while disqualified (fourth).

Table 1: The 20 Most Common Offences Sentenced in NSW Local Courts in 2002[89]

Number	Name of Offence	Percentage of total sentences	Legislation
1	Mid-range Prescribed Concentration of Alcohol (PCA)	11.2%	*Road Transport (Safety and Traffic Management) Act 1999*, s 9(3)
2	Common assault	7.7%	*Crimes Act 1900*, s 61
3	Larceny	6.6%	*Crimes Act 1900*, s 117
4	Drive while disqualified	4.8%	*Road Transport (Driver Licensing) Act 1998*, s 25A (1)
5	High-range PCA	4.7%	*Road Transport (Safety and Traffic Management) Act 1999*, s 9(4)

[84] NSW Bureau of Crime Statistics and Research, Statistics Services Unit, NSW Criminal Courts Statistics 2002, 2003, at p11.
[85] Section 62(1) of the *Criminal Procedure Act 1986*.
[86] NSW Bureau of Crime Statistics and Research, Statistics Services Unit, NSW Criminal Courts Statistics 2002, 2003, at p11.
[87] Section 27(2) of the *Criminal Procedure Act 1986*.
[88] section 58 of the *Sentencing Procedure Act 1999*.
[89] Keane J and Poletti P, Judicial Commission of NSW, 'Common Offences in the Local Court', *Sentencing Trends and Issues*, No 28, Sept 2003.

6	Low-range PCA	4.7%	*Road Transport (Safety and Traffic Management) Act 1999*, s 9(2)
7	Possess prohibited drug	4.0%	*Drug Misuse and Trafficking Act 1985*, s 10(1)
8	Malicious destruction/damage	3.8%	*Crimes Act 1900*, s 195(a)
9	Knowingly contravene AVO	3.1%	*Crimes Act 1900*, s 562I
10	Drive while suspended	3.1%	*Road Transport (Driver Licensing) Act 1998*, s 25A(2)
11	Assault occasioning bodily harm	3.0%	*Crimes Act 1900*, s 59(1)
12	Drive without being licensed	2.7%	*Road Transport (Driver Licensing) Act 1998*, s 25(1)
13	Negligent driving (not occasioning death or grievous bodily harm)	2.2%	*Road Transport (Safety and Traffic Management)* Act *1999*, s 42(1)(c)
14	Drive unregistered vehicle	2.1%	*Road Transport (Vehicle Registration) Act 1997*, s 18(1)
15	Drive while licence refused/cancelled	2.0%	*Road Transport (Driver Licensing) Act 1998*, s 25A(3)
16	Assault with intent on certain officers	2.0%	*Crimes Act 1900*, s 58
17	Goods in custody	1.9%	*Crimes Act 1900*, s 527C(1)
18	Offensive language	1.8%	*Summary Offences Act 1988*, s 4A
19	Offensive conduct	1.3%	*Summary Offences Act 1988*, s 4
20	Break, enter and steal	1.3%	*Crimes Act 1900*, s 112(1)

3.3 Legal representation

One characteristic of the Local Court is the relatively high proportion of unrepresented persons. According to BOCSAR statistics, persons were represented in 55.2% of matters finalised in 2002, a slight increase from 53.7% in 2001.[90] In both 2001 and 2002, represented persons were more likely than unrepresented persons to be found guilty.[91] Another issue to consider is that unrepresented persons are less likely to appeal.[92]

3.4 Prosecution of Criminal Offences in the Local Court

Both police prosecutors and officers from the Office of the Director of Public Prosecutions (ODPP) appear in the Local Court in respect of criminal prosecutions. Most of the

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[90] NSW Bureau of Crime Statistics and Research, Statistics Services Unit, NSW Criminal Courts Statistics 2002, 2003, at p3. Further, as can be seen from BOCSAR's "*Summary Statistics for the NSW Local Court, 1998 to 2002*", representations in the Local Court has remained relatively stable over the past 5 years. See http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/lc_stats9802, as at 12 May 2004.

[91] For example, in 2002, 90.6% of persons unrepresented were found guilty, whereas only 83.7% of represented persons were found guilty: NSW Bureau of Crime Statistics and Research, Statistics Services Unit, NSW Criminal Courts Statistics 2002, 2003, at p3.

[92] This view would seem to accord with common sense and was expressed in the submission of a magistrate of 15 years standing.

prosecutions in NSW are conducted by police prosecutors.[93] Prosecutors from the ODPP are legal practitioners, whereas police prosecutors are by their nature police officers with specialist training in prosecutorial duties In the second joint submission to the Council from the NSW Police and the Ministry for Police, it was estimated that around 10% of police prosecutors are legally qualified, and that a further 25% are undertaking studies at a number of universities.[94]

The general practice is that police prosecutors have carriage of all summary offences and indictable offences dealt with summarily, although under s 9 of the Director of Public Prosecutions Act 1986, the ODPP has the ultimate power according to which it may take over a matter "instituted by a person other than the Director".

A protocol or written arrangement exists between the ODPP and the Police Prosecution Service concerning the taking over of certain types of matters.[95] First, since 1986, responsibility for the prosecution of child sexual assault cases has passed to a special unit of the Attorney general's Department, and there is an agreement in place that ODPP lawyers will prosecute all child sexual assault matters dealt with summarily before the Children's and Local Courts. Second, prosecutions against serving and, with limitations, former police officers, as well as immediate family members of a Senior Executive Police Officer (serving or former) are conducted by ODPP lawyers. It is notable that no such agreement is in place for the ODPP to take over prosecutions where a police officer is the victim, such as with the offence of assault police officer.

3.5 Sentencing in the Local Court

In 2002, approximately 113,000 people either pleaded guilty or were found guilty by the Local Court, representing 86.5% of finalised appearances.[96]

The sentencing options generally available to Local Court Magistrates within NSW are:

1. Fine
2. Rising of the Court
3. Dismissal without conviction (either with or without a Good Behaviour Bond
4. Good behaviour bond
5. Community service order
6. Suspended sentence

[93] A figure of 90% from the Ministry of Police, is cited by the Hon John Watkins, Hansard, Legislative Assembly, 19 June 2003 at 1753. In the second joint submission from the NSW Police and the Ministry for Police, received by the Sentencing Council in April 2004, it is asserted at page 7 that "police prosecutors undertake 98% of all prosecutions in NSW. The Council has difficulty in reconciling this figure with the fact that 98% of all criminal matters in NSW are finalised by the Local Court, as it suggests that police prosecutors prosecute *all* matters in the Local Court, whereas this is not the case.

[94] See p12 of the second joint submission of the NSW Police and the Ministry for Police, received by the Sentencing Council in April 2004. In 1996, it was noted by the Police Royal Commission that the proportion of police prosecutions who were legally qualified was about 20%,[94] although the figure was elsewhere estimated at 10% at that time.

[95] This information was provided by letter from the ODPP to the NSW Sentencing Council, dated 22 October 2003.

[96] NSW Bureau of Crime Statistics and Research, Statistical Services Unit, *NSW Criminal Court Statistics 2002*, 2003, p3.

7. Periodic Detention
8. Home Detention
9. Full-time imprisonment

Other orders the Local Court can make include non-association orders and place restriction orders, under section 17A of the *Crimes (Sentencing Procedure) Act 1999 (*'the *Sentencing Procedure Act').*

Another order available to the Court in sentencing is an order deferring the sentencing for a particular purpose where a person is found guilty of an offence.[97] Such an order may be made for any purpose that the court considers appropriate, although typically it is made to allow the offender's prospects for rehabilitation to be assessed or so that the offender can participate in an intervention program. The basic premise is that the court will be in a position to impose a sentence more favourable to the defendant than otherwise if sentencing is deferred for such a purpose.

Table 2 shows the distribution of sentence types for offenders sentenced in NSW Local Courts in 2002. Overwhelmingly, the most common sentence is a fine, with a median amount of $400. Just over half of offenders sentenced receive a fine. The second most common sentence, at 17.8%, is dismissal without conviction. Where a dismissal without conviction is recorded, it was more commonly ordered in conjunction with a good behaviour bond, than outright. Full-time imprisonment was ordered for 6.9% of offenders that were sentenced. Periodic Detention and Home Detention orders were two of the least common sentences imposed, at 1.2% and 0.3% respectively.

Table 2: Distribution of Sentence Types for Offenders Sentenced in NSW Local Courts 2002[98]

Sentence type	Percentage of Sentences
Fine	50.2%* *median $400
Good behaviour bonds	14.5%
Dismissal without conviction	17.8%* *7.4% outright; 10.4% with good behaviour bonds
Community Service Orders	4.5%* *Median 100 hours
Suspended sentence	4%
Full-time imprisonment	6.9%* *median 6 months
Periodic Detention	1.2%
Home Detention	0.3%
Rising of the court	0.5%

Due to the jurisdictional limitations of the Local Court, and the types of offences most commonly sentenced, the most frequently imposed penalties differ markedly to those imposed by the Higher Courts. The most common penalties in the higher Courts are

[97] Formerly known as a "Griffith Remand", it is now contained in section 11 of the *Crimes (Sentencing and Procedure) Act 1999.*

[98] Keane J and Poletti P, Judicial Commission of NSW, 'Common Offences in the Local Court', Sentencing Trends and Issues Bulletin, No 28, Sept 2003.

imprisonment (68.5%), suspended sentences (11.9%) and bonds (8.2%).[99] The average duration of imprisonment imposed is 28.3 months for Higher Courts,[100] compared to 6 months for the Local Court.

The issue of appeals from the Local Court to the District Court is discussed at *Part 5, Appeals Against Sentence and their Limitations*. In summary, the appeals process in relation to sentences imposed in the Local Courts does not, in the Council's view, promote consistency in sentencing in the Local Court.

3.6 Case study: PCA offences

In February 2004, the NSW Bureau of Crime Statistics and Research (BOCSAR) published the findings of a study into sentencing for PCA offences, which, as noted earlier, are some of the most common offences sentenced in the Local Court and together account for over 20% of the total number of sentences imposed.[101] The study is significant for the reason that it tends to suggest that inconsistency in approach to sentencing is evident in relation to PCA offences in NSW. It also offers a relatively reliable means for assessing the extent of inconsistency in approach to sentencing in practice.

The study arose in a context where there has been rapid growth in the frequency of which PCA offences have been dismissed or conditionally discharged. Under the *Road Transport (Safety and Traffic Management) Act 1999*, conviction for PCA offences carries an automatic period of licence disqualification. However, compulsory licence disqualification does not apply where the Court finds a defendant guilty but directs that the charge be dismissed or the offender conditionally discharged under section 10 of the *Sentencing Procedure Act*.

Part of the report focused on variation between courts in outcomes in 2002, and these findings provide significant evidence of inconsistency in sentencing across NSW in relation to those offences. One of the findings was that the court which deals with an offender sometimes has a much larger effect on the odds of a dismissal or discharge being given than the charge (low, medium or high range PCA offence) on which a person is convicted. The findings in relation to mid range PCA offences are also interesting. It will be remembered that this is the type of offence most commonly sentenced in the Local Court. In 2002, around 11,500 persons were found guilty of a middle range PCA offence. Overall, 27% of those received a dismissal or conditional discharge. If the variation around the average value had been determined by chance alone, it would be expected that more than 55 of the 59 courts in the sample would have a rate between 19% and 34%. In fact, less than 20 of the courts were within those bounds.[102] The chances of a dismissal or conditional discharge in Raymond Terrace Local Court were more than 11 times higher than in Nowra Local Court. These findings show clearly that the variation is not accounted for by chance alone, however, the influence of other relevant sentencing factors was also considered. The study found clear evidence that the Court where the offender was sentenced influenced the outcome (a "court effect") even when

[99] NSW Bureau of Crime Statistics and Research, Statistics Services Unit, *NSW Criminal Courts Statistics 2002*, 2003, p12.
[100] NSW Bureau of Crime Statistics and Research, Statistics Services Unit, *NSW Criminal Courts Statistics 2002*, 2003, p12.
[101] Moffat S, Weatherburn D and Fitzgerald J (2004) "Sentencing Drink-Drivers: The use of Dismissals and Conditional Discharges" 81 *Crime and Justice Bulletin* 1.
[102] Moffat S, Weatherburn D and Fitzgerald J (2004) "Sentencing Drink-Drivers: The use of Dismissals and Conditional Discharges" 81 *Crime and Justice Bulletin* 1 at 4.

allowing for age, gender, offence seriousness and prior PCA record. The variation was also found to exist amongst courts which did not have access to the Traffic Offenders Program (TOP), showing that the availability of TOP in some Courts but not others could not explain the disparity. The study concluded that:

> "[A] likely explanation for the variation between courts in the use of section 10 [dismissals] is that magistrates differ greatly in their assessment of the seriousness of PCA offences and/or in their views about the fairness of mandatory disqualification in certain circumstances."

Overall therefore, it seems that the inconsistencies in sentencing outcome are more likely to be attributed to idiosyncratic views and personal philosophies of individual magistrates. In the face of the evidence, it is difficult to believe there is consistency of approach to sentencing in this area.

In light of the findings of the BOCSAR study, and particularly given the prevalence of PCA offences in the Local Court, it may be desirable for further consideration to be given to specific measures for promoting consistency in sentencing in the Local Court in relation to PCA offences. One option identified by BOSCAR was to provide greater guidance on the use of dismissals and conditional discharges through specific judicial education programs. It was also suggested that a guideline judgment on PCA offences would promote consistency in this area. (see Part 4, C*urrent Measures to Improve Consistency and Guide Judicial Discretion – Guideline Judgments*).

An application for a guideline judgment in respect of high range PCA offences was in fact heard by the Court of Criminal Appeal on 5 May 2004,[103] and the matter of consistency in sentencing is likely to arise as a consideration. That said, the case may illustrate that the problem may rather be one of "systematic leniency" (particularly in the Hunter region and compare with the Wollongong area where there is greater severity) and a general reluctance to treat the offence as a serious one or a failure to give effect to the views of Parliament in this regard. Further, there is the issue of protocols or criteria for determining when appeals should be initiated as raised in relation to protocols as to when appeals should be lodged. The Council's attention has been brought to the number of appeals lodged by police prosecutors for offences of high range PCA since December 2003: see **Appendix 3** – High Range PCA Appeals 1999-2004. Of a total of 13 appeals made, 4 were declined by the Appeals and International Law Unit, 5 of the remainder were declined by the ODPP, and 3 appeals were lodged by the ODPP. Whilst there are few Crown appeals on sentence (1.5 per 1000), the success rate was 36%. Although the success rate of Crown appeals is not an invitation to appeal more matters, it is an argument for the utility of a guideline judgment in this area.

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[103] Application by the Attorney General under section 37 of the *Sentencing Procedure Act 1999* for a guideline judgment concerning the offence of high range prescribed concentration of alcohol under section 9(4) of the *Road Transport (Safety and Traffic Management) Act 1999.*

4. CURRENT MEASURES TO PROMOTE CONSISTENCY AND GUIDE JUDICIAL DISCRETION

Numerous measures are currently in place which promote consistency in sentencing or otherwise guide the exercise of judicial discretion, either by design or as a practical matter.

4.1 Changes to the *Crimes (Sentencing Procedure) Act 1999*

A number of important changes have been made to the *Sentencing Procedure Act*, aimed at promoting consistency in sentencing. Broadly, these changes cover:

1. The purposes of sentencing;
2. Aggravating, mitigating and other factors in sentencing;
3. The standard non-parole sentencing scheme; and
4. Creation of the NSW Sentencing Council.

Some of these changes are directed towards all courts, whereas other changes will have a greater impact on the higher courts.

The Attorney General has referred to the purpose of the above reforms, collectively, in the following terms:[104]

> "These reforms are primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process."

4.1.1 *Purposes of Sentencing*

Section 3A was inserted by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*, and sets out the purposes for which a Court may impose sentence.

4.1.2 Aggravating, Mitigating and Other Factors

Section 21A was initially introduced by the *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Act 2002* (Act no 5 of 2002), and a new section 21A was substituted by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*. Generally, the provisions identify specific aggravating and mitigating factors that a court is required to take into account when determining the appropriate sentence for offences. As made clear in the Second Reading Speech, the list of aggravating and mitigating factors in subsections (2) and (3) are a restatement of factors which in any event applied at common law. These include, as aggravating factors, that the offender has any record of criminal convictions, and that the offence was committed in company,[105] and as mitigating factors, that the offender was acting under duress, and that the offender was a person of good character.[106] The Court is also to take into account any other objective or subjective factors that affect the relative seriousness of the offence.[107] A number of other

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[104] The Hon Bob Debus, Attorney General, Hansard, Legislative Assembly, 23 October 2002.
[105] Section 21A(2)(d) and (e) of the *Sentencing Procedure Act 1999.*
[106] Section 21A(3)(d) and (f) of the *Sentencing Procedure Act 1999.*
[107] Section21A(1) of the *Sentencing Procedure Act 1999.*

factors are also specified which the Court must take into account in sentencing a defendant, such as the degree to which the offender has shown contrition for the offence.[108]

Subsection 21A(1) provides that the aggravating or mitigating factors specified are to be taken into account in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law. This makes it clear that the statement of aggravating and mitigating factors in the Act are not an exclusive statement of the factors which may be taken into account.

The Court must take into account particular matters that are "relevant and known to the court."[109] The meaning of the phrase "relevant and known to the court" was recently considered by the High Court in *Weininger v The Queen,*[110] where it was held that the phrase should not be construed as imposing a universal requirement that matters urged in sentencing hearings be either formally proved or admitted.

The Court is only required to consider the matters specified in the Act where they are known to the Court, there is no obligation on the Court to conduct its own investigation to determine such matters.[111] Law Notes 02/17 issued by the Legal Services of the NSW Police Service instructs the Officer in Charge of the case that it is her or her responsibility to ensure that these matters are brought to the Court's notice, either by recording all pertinent matters on the Facts Sheet (which is tendered in cases if the defendant pleads guilty) or by informing the police prosecutor. (See further *Part 7, Prosecutorial Practice and Ensuring Consistency in Sentencing*.)

4.1.3 Standard Non-Parole Sentencing Scheme

The third recent reform to sentencing law in NSW is the standard non-parole sentencing scheme, introduced by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*, inserting Division 1A of Part 4 into the *Sentencing Procedure Act*. A non-parole period is the period of a sentence of imprisonment during which the offender must be detained and cannot be released on parole. The purpose of the scheme is to introduce:[112]

> "a further important reference point, being a point in the middle of the range of objective seriousness for the particular offence. The identification of a further reference point within the sentencing spectrum will provide further guidance and structure to the exercise of the sentencing discretion."

Recently, the Court of Criminal Appeal in discussing the scheme held that when interpreted in a purposive way, it is intended to provide *guidance and structure* to judicial discretion, and to promote *consistency and transparency* in sentencing. The Court of Criminal Appeal did however also note that the scheme may result in sentences increasing for some offences: *"…it may be that for some offences the sentencing pattern will move upwards, while for others it will not.*"[113] The scheme of standard minimum sentencing is established in respect of a

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[108] See section 21A(2) of the *Sentencing Procedure Act 1999*
[109] Section 21A(2) of the *Sentencing Procedure Act 1999*
[110] [2003] HCA 14 at [21].
[111] This is recognised in *Law Notes 02/17 – Sentencing Offencers: Ensuring Appropriate Sentences Are Given*, NSW Police Service, Legal Services, Criminal Law Division.
[112] The Hon Bob Debus, Attorney General, Hansard, Legislative Assembly, 23 October 2002.
[113] *R v. Way* [2004] NSWCCA 131 at [142]

number of serious offences. The provisions only apply where no penalty other than imprisonment is appropriate.

Under section 54D of the *Sentencing Procedure Act*, the standard non-parole sentencing scheme does not apply to offences dealt with summarily. Thus although the scheme is designed to further promote consistency in sentencing, it is in effect directed at sentencing in the higher courts. From the offences contained, and the standard non-parole periods prescribed in the table of standard non-parole periods, the scheme would appear to have a limited effect on consistency in the Local Court. The shortest standard non-parole period is three years, whereas the Local Court has a two-year jurisdictional limit on imposing a sentence of imprisonment.[114] (See *Part3, NSW Local Courts – Criminal Jurisdiction*).

However, Peter Johnson SC suggested, shortly after the commencement of the scheme, that although the *Sentencing Procedure Act* does not apply to the Local Court, the figure nominated as the non-parole period for *an offence in the middle of the range of objective seriousness for offences* is "relevant to a sentencing determination, in the same way as the maximum penalty is pertinent to that decision".[115] It is not clear at this stage whether or not the scheme is having such an effect in practice.

4.1.4 NSW Sentencing Council

The fourth recent reform is the creation of the NSW Sentencing Council, by Part 8B of the *Sentencing Procedure Act*, which was introduced by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*. The Functions of the Council are set out in Part 8B of the Act (sections 100I to 100L). Broadly speaking, the functions of the Council involve advising and consulting with the Attorney General in relation to sentencing issues in accordance with its statutory functions.[116]

4.2 Sentences of Imprisonment of 6 Months or Less

As noted earlier, the median term of imprisonment imposed in the Local Court was 6 months, in 2002.

Under section 5(2) of the *Sentencing Procedure Act*:

> "A court that sentences an offender to imprisonment for 6 months or less must indicate to the offender, and make a record of, its reasons for doing so, including:
>
> (a) its reasons for deciding that no penalty other than imprisonment is appropriate, and
>
> (b) its reasons for deciding not to make an order allowing the offender to participate in an intervention program or other program for treatment or rehabilitation (if the offender has not previously participated in such a program in respect of the offence for which the court is sentencing the offender)."

The provision was clearly introduced to discourage judicial officers from imposing sentences of imprisonment of short duration and to consider the alternatives to full-time imprisonment.

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[114] Section 27(2) of the *Criminal Procedure Act 1986.*
[115] Peter Johnson SC, 'Reforms to New South Wales Sentencing Law' (2003) 6 *the Judicial Review* 313 at 344.
[116] See sections 100J(1)(a) – (d) of the *Crimes (Sentencing Procedure) Act 1999*

In his submission, a Judge of the District Court stated that:

> "[M]agistrates are simply not imposing sentences of 6 months, or, if they do… are not recording their reasons for doing so in ways that those reasons are available to a judge on appeal. The result may have been an unintended measure of consistency – magistrates are imposing a great many sentences of 6-month fixed terms, even where, on close examination, a shorter sentence may be warranted… [T]here is a singular consistency where magistrates are not imposing sentences of less than 6 months at all, often at the expense of the requirement of justice in the individual case."

His Honour also notes that extremely short sentences of imprisonment, such as 7 to 14 days, for a first offender can be an effective sentence to deter further offences, and that it is unfortunate that the provision has also discouraged the use of such sentences.

Overall, it may be the case that section 5 is promoting an undesirable form of consistency in the Local Court. The issue of short-term sentences of imprisonment is the subject of a separate report by the Sentencing Council.

Despite the requirement to give reasons under s 5(2), there is no requirement for the District Court to have regard to those reasons on appeal against sentence. (See *Part 5, Appeals Against Sentence and their Limitations, Limitations of Appeals against Sentence from the Local Court*).

4.3 Sentencing Appeals

Appeals against sentence imposed by the Local Court are ordinarily dealt with by the District Court, and in theory, this appeal process should be a major method of promoting consistency of sentencing in the Local Court. As the Attorney General has previously stated, the appeal process may be able to "cure" some inconsistencies in relation to sentencing.[117] The Council does not consider that the appeal provisions limited to a rehearing on the evidence is an effective way of dealing with inconsistencies in the Local Court. On the other hand, the appeal provisions of the *Criminal Appeal Act* in relation to sentencing for offences on indictment in the District Court and Supreme Court by their terms assist in promoting consistency of sentencing for such offences where dealt with in such courts. For a number of reasons, the efficacy of the appeal process as regards appeals from the Local Court, is currently seriously restricted (See *Part 5, Appeals against Sentence and their Limitatio*ns).

4.4 Guideline Judgments

The Court of Criminal Appeal has the power to give a guideline judgment when determining an appeal in relation to sentence by the Crown or the offender. It may also give a guideline judgment on the application of the Attorney General.[118] In passing it may be noted that the Sentencing Council has statutory functions in relation to guideline judgments.[119]

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[117] The Hon Bob Debus MP, The NSW Sentencing Council – Its role and functions (2003) 15(6) *Judicial Officers Bulletin* 1.

[118] See sections 37 and 37A of the *Crimes (Sentencing Procedure) Act 1999*

[119] See section 100J(1)(b) of the *Crimes (Sentencing Procedure) Act 1999*, recently amended by *Crimes Legislation Amendment Act 2004* (no 11) Schedule 3

There are practical difficulties and restrictions in obtaining a guideline judgment for matters commonly dealt with in the Local Court. These matters are discussed in *Attorney General's Application No. 2.*[120] It remains to be seen whether the Court's judgment in response to the Attorney General's application for a guideline judgment in relation to high range PCA offences will impact upon this reasoning.[121]

One of the main purposes of promulgating guideline judgments is to promote consistency and adequacy in sentencing whilst maintaining judicial discretion.

Additional background information on guideline judgments can be found in **Appendix 4**.

The NSW Court of Criminal Appeal has so far issued guideline judgments in respect of the following offences:

- Dangerous driving (*Crimes Act*, section 52A);[122]
- Drug importation (*Customs Act* 1901, section 233B);[123]
- Break, enter and steal (*Crimes Act* 1900, section 112(1));[124] and
- Armed robbery (*Crimes Act*, section 97).[125]

A guideline judgment has also been made in relation to guilty pleas which applies to all offences (*Sentencing Procedure Act*, section 22).[126]

Guideline judgements, once promulgated, can result in a lower number of appeals, due to the increased guidance available to the sentencing magistrate or judge. Further, guideline judgments have certain advantages over the system of precedent generally when it comes to sentencing. Spigelman CJ has highlighted the ability of guideline judgments to correct patterns of leniency.[127] In delivering the guideline judgment in *R v Jurisic*, the Court referred to a long list of successful Crown appeals for the offence of dangerous driving causing death or grievous bodily harm:[128]

> "It appeared to the Court that the parliamentary intention reflected in significantly increased maximum penalties, which the Court of Criminal Appeal had said a number of times should lead to a "sharp upward" movement in sentence, had simply not been implemented."

Similarly, prior to the guideline judgment in *Henry* in relation to the offence of armed robbery, statistics indicated that non-custodial sentences were common, contrasted with a "long line of appellate authority" stating that such non-custodial sentences for armed robbery should be rare. Thus, in some contexts, guideline judgments can be far more effective than

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[120] [2002] NSWCCA 515 at [53].
[121] See *Application by the Attorney General under section 37 of the Sentencing Procedure Act 1999 for a guideline judgment concerning the offence of high range prescribed concentration of alcohol under section 9(4) of the Road Transport (Safety and Traffic Management) Act 199.9*
[122] *Jurisic* NSWCCA (12 Aug 1998), reformulated in *R v Whyte* [2002] NSWCCA 343.
[123] *Wong & Leung* [1999] NSWCCA 420 (16 Dec 1999), now overruled see: *Wong v The Queen; Leung v The Queen* [2001] HCA 64.
[124] *Attorney General's Application (No 1), R v Ponfield & Ors* [1999] NSWCCA 435 (16 Dec 1999).
[125] *Henry, Barber, Tran, Silver, Tsoukatos, Kyroglou, Jenkins* [1999] NSWCCA 111 (revised 18 May 1999).
[126] *Thomson & Houlton* [2000] NSWCCA 309 (17 Aug 2001).
[127] Chief Justice Jim Spigelman, "Sentencing Guideline Judgments" (1999) 73 *Australian Law Journal* 876 at 878. See also *Griffiths v R* (1977) 137 CLR 293 at 310; Allpass (1993) 72 *A Crim R* 561 at 562-3.
[128] Chief Justice Jim Spigelman, "Sentencing Guideline Judgments" (1999) 73 *Australian Law Journal* 876 at 878.

ordinary system of precedent in influencing sentencing practice in the lower courts. Wood CJ at CL, has described the effects of promulgating guideline judgments as follows:[129]

> "… it is becoming apparent that sentencing judgments are merely paying lip-service to pronouncements by the Court of Criminal Appeal as to sentencing policy in a particular area of criminality , and are possibly relying on: the reluctance of the Crown to appeal against sentence; or upon the discretion traditionally exercised by the Court of Criminal Appeal in declining to interfere in much matters; or upon the double jeopardy principle, in those cases where it does intervene; or to produce a less severe sentence than properly called for."

4.4.1 Limitations of Guideline Judgments regarding Sentencing in the Local Court

As the system of guideline judgments currently stands in NSW, it is not well placed to promote consistency in the Local Court. The guideline judgments that have been promulgated tend to relate to offences usually dealt with by the higher courts, rather the Local Court. Of the guideline judgments that have been made, those of greatest significance to the Local Court are those relating to the offence of break, enter and steal and guilty pleas. Break, enter and steal offences accounted for 1.3% of the total offences sentenced in the Local Court, and were the 20th most common offence sentenced, in 2002 (see *Table 1).* The other offences for which a guideline judgment has been promulgated do not represent a significant portion of the Local Court's sentencing workload.

There are a number of reasons why the system of guideline judgments itself might be of limited use in relation to sentencing in the Local Courts, compared to higher Courts. The first is the difficulties of having a guideline judgment issued in relation to the most common offences sentenced in the Local Court, such as PCA offences and common assault. These difficulties were illustrated by the unsuccessful application by the NSW Attorney General to have a guideline judgment made in respect of the offence of assault police (section 60(1) of the *Crimes Act 1900*),[130] which is dealt with by the Local Court in the vast majority of cases. In that case, statistics from the Judicial Commission show that in the overwhelming majority of cases the offence was finalised in the Local Court: more than 500, compared with only 7 in the District Court.[131] The Court refused the application, declining to make a guideline judgment pursuant to its discretion under section 40 of the *Sentencing Procedure Act.* In its reasons for declining to make a guideline judgment, the Court referred to the lack of direct experience it had of sentencing the offence, and the low rate of Crown appeals against sentence.

The Chief Justice stated that:[132]

> "Before this Court decided that guidance is appropriate it should first be satisfied that the pattern of inadequacy extends beyond particular instances. The absence of appeals from magistrates suggests that inadequacy has not been regarded as systematic by the police prosecutors who are closest to day-to-day decision making by magistrates.

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[129] Wood CJ at CL, "Sentencing Review" (1999) 11 (June) *Judicial Officers Bulletin* 33. Cited in Chief Justice Jim Spigelman, "Sentencing Guideline Judgments" (1999) 73 *Australian Law Journal* 876 at 879.

[130] *Attorney General's Application under section 37 of the Sentencing Procedure Act 1999 No 2 of 2002* [2002] NSWCCA 515 (20 Dec 2002).

[131] See [2003] HCA 14 at [12].

[132] *Attorney General's Application under section 37 of the Sentencing Procedure Act 1999 No 2 of 2002* [2002] NSWCCA 515 at [52]-[53].

> We are here concerned with an offence about which this Court has no direct experience on which to draw. The assessment of existing sentencing patterns cannot be made with the same level of assurance as it can be made with respect to offences that frequently come before this Court. The Court should be slow to make such an assessment where the usual course of Crown appeals has not occurred."

The notion that the particular court's lack of direct experience with respect to a particular offence is seen as an argument against promulgating a guideline judgment has been questioned by Morgan and Murray, in the context of the refusal of the WA Court of Criminal Appeal to promulgate a guideline judgment in *GP*.[133] Those authors have suggested that lack of experience should in fact be seen as an argument *for* guideline judgments, and that:[134]

> "… given its pivotal role with respect to sentencing practices in the State, the Supreme Court should regard itself as having an obligation to attempt guidelines in areas where legislation is unclear and where courts at all levels in the hierarchy will be called upon to consider the issue."

There is a notable practice on the part of the Court to not make guideline judgments for offences commonly sentenced by the Local Court. In Western Australia, where this also seems to have occurred, there was even a clear intention on the part of the government to promote sentencing guidelines for offences sentenced in the Local Court. In 1991, the Attorney General and Minister for Corrective Services in WA, the Hon. Mr Joe Berinson, published the 'Report of the Official Visit to Europe to Examine Criminal Justice Policies'.[135] Recommendation 6 states that:[136]

> "In appropriate cases, judgments by the Court of Criminal Appeal should set out guidelines to be followed by Courts when sentencing a convicted person and declare the judgment to be a guideline judgment. Guideline judgments should include the type of offences which are most commonly considered by the Courts of Petty Sessions."

In NSW, guideline judgments seem to depend heavily upon cases appealed to the Court of Criminal Appeal (i.e. sentence appeals from the District Court and Supreme Court). In the context of sentences imposed by the Local Court, these same restrictions do not apply. However, a history of Crown appeals against sentence is an important factor. In *Attorney General's Application No 2 of 2002*, Spigelman CJ stated that:

> "This Court should be slow to come to a conclusion that there can be detected any systematic pattern of leniency in sentences by magistrates in a context where the Crown has not exercised its right to lodge appeals against the leniency of sentences at all. The position may well be different if there appeared to be a systematic failure by the District Court to correct a pattern of lenient sentencing by magistrates."

If it is considered desirable that the Court of Criminal Appeal issue guideline judgments for offences commonly sentenced in the Local Court it may be necessary to amend the legislation to encourage the Court to do so. However, much will depend upon whether the approach to

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[133] *GP* at 376; Morgan N and Murray B, "What's in a Name? Guideline Judgments in Australia" (1999) 23 *CrimLJ* 90 at 102.
[134] Morgan and Murray, "What's in a Name? Guideline Judgments in Australia" (1999) 23 *Crim LJ* 90 at 102.
[135] The Hon. Joe Berrinson (November 1991) "Report of the Official Visit to Europe on Criminal Justice Policies".
[136] The Hon. Joe Berrinson (November 1991) "Report of the Official Visit to Europe on Criminal Justice Policies" at 54.

be adopted and the views of the Court of Criminal Appeal in the guideline judgment for high range PCA offences. One also notes that guideline judgments may be guidelines that apply to particular courts or even relate inter alia to particular offences, as per the definition of guideline judgments in section 36 of the *Sentencing Procedure Act*.

Two different methods by which this could be done involve amending the current section 40 of the *Sentencing Procedure Act*. That section provides:

> "**Discretion of Court preserved**
>
> Nothing in this Division:
>
> a) limits any power or jurisdiction of the Court to give a guideline judgment that the Court has apart from this Division, or
>
> b) requires the Court to give any guideline judgment under this Division if it considers it inappropriate to do so."

Issues to be considered if appropriate might be:

1. Whether section 40(b) might be amended; or[137]
2. Whether the Court should be required to give a guideline judgment on application by the Attorney General.

4.5 Functions of the Judicial Commission of NSW

The Judicial Commission of NSW is constituted by the *Judicial Officers Act 1986*. Part 4 of the *Judicial Officers Act 1986* sets out the functions of the Commission, which include:

1. Monitoring and disseminating information on sentencing; and
2. Organising and supervising schemes for judicial education.

Both these functions have a role to play in promoting consistency, and indeed, in relation to monitoring and disseminating information, section 8 states that this is "for the purpose of assisting courts to achieve consistency in imposing sentences."

The objective of consistency in sentencing is also clear from the Second Reading Speech of the Bill:[138]

> "The ultimate objective of the Commission's sentencing functions, and of the justice information system, is a better informed judiciary which is more consistent in sentencing. These initiatives are designed to assist judges and magistrates by providing them with information and opportunities for discussion, which they currently lack. The crucial elements of judicial discretion will not be curtailed. Therefore, the ability of judicial officers to render justice in particular cases will be unaffected. The government is convinced that this is the most acceptable

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[137] It is noted that the Court also has a power, by section 37B of the *Sentencing Procedure Act 1999* to "*review, vary or revoke*" a guideline judgment. The Court's approach to an application for a guideline judgment brought by the Attorney General may be further clarified in *Application by the Attorney General under section 37 of the Sentencing Procedure Act 1999 for a guideline judgment concerning the offence of high range prescribed concentration of alcohol under section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999.*

[138] The Hon Mr Dowd, Attorney General, Hansard, Legislative Assembly, 24 September 1986 at 3871.

> way of addressing the problem of inconsistency in sentencing – whether there is inconsistency in fact or merely in public perception."

4.5.1 Judicial Education and Training

The Judicial Commission's education program involves conferences, seminars and training as well as publications.

The conference and seminar program is offered to judicial officers in each court, including the Local Court, and ranges from induction courses for new appointees to specialist conferences. Computer training courses are provided to enable judicial officers to use computers and on-line legal databases effectively in the context of the court system.

In 2001-2002, a number of education topics were directly or indirectly related to sentencing, including:[139]

- Appeal court review;
- Circle sentencing;
- Classification of prisoners;
- Commonwealth matters including sentencing;
- *Crimes (Sentencing Procedure) Act 1999*;
- Diversionary schemes and crime prevention programmes in indigenous communities;
- Mental health and alternatives to imprisonment;
- Recurring themes (Court of Appeal);
- Sentencing;
- Sentencing panel;
- Sentencing workshops and report; and
- The MERIT Program.[140]

4.5.2 Publications and the Sentencing Statistics System (SIS)

The Judicial Commission regularly publishes a variety of materials, including:

- The Judicial Officers' Bulletin;
- Sentencing Trends and Issues, which are short empirical studies of sentencing practice;
- Monograph Series Papers;
- Sentencing Manual NSW; and
- Various "Bench Books" for Judges, including the Criminal Trial Courts bench Book.

Publications are generally provided to all judicial officers in hard copy and on-line via Judicial Information Research System (JIRS). JIRS also contains the Sentencing Information System (SIS), which consists of:

- Full text judgments from the Court of Criminal Appeal in NSW from 1 January 1990;

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[139] Judicial Commission on NSW (2002) *Judicial Commission of NSW Annual Review 2001-2002*, Appendix 4.
[140] The NSW MERIT Program is the Magistrate's Early Referral into Treatment Program – a Local Court based diversion program that targets adult defendants with illicit drug use problems who are motivated to undertake drug treatment.

- database of case summaries providing efficient means of finding cases of similar facts and their sentencing outcomes;
- a principles database consisting of an electronic textbook on sentencing;
- a statistical database which allows a judge to analyse aggregate sentencing outcomes for defendants displaying a wide range of characteristics;
- a facilities database containing information about the availability of various services for adult and juvenile offenders, cross-referenced by geographic location and type of service; and
- a help desk.

It is notable that the ODPP lawyers also have access to JIRS, which would also make a contribution to overall consistency in sentencing in the matters the ODPP conducts in the Local Court.[141]

Police prosecutors generally *do not* have access to the statistics and information produced by the Judicial Commission. However, these resources could be obtained by police prosecutors through their executive section. Presumably, access would involve a request to the executive section for the particular information, but it also relies on prosecutors being aware of this means of access, as well as when such information should be requested and what use to make of it in an instant case.

Recommendation 1
Police prosecutors in the field should have direct access to relevant sentencing resources produced by the Judicial Commission and be provided with training in their proper interpretation and use.

In 1996, the Law Reform Commission stated that SIS was available to 95% of magistrates. It is understood that all magistrates now have access to SIS.

As Spigelman CJ has noted extra judicially, the collection of sentencing statistics by the Judicial Commission is an essential element of the Court's ability to promulgate guideline judgments.[142] The statistics are vital to assessing sentencing practice for the purpose of determining whether a guideline judgment is desirable.

The SIS has been praised from a number of sources. In 1996, the Law Reform Commission recognised that SIS is maintained by the Judicial Commission of NSW as a tool to enhance consistency.[143] Lord Justice Auld, in the "Review of the Criminal Courts of England and Wales" praised the Judicial Commission's sentencing database, referring to it as "sophisticated yet unobstrusive" and "probably the world leader in this field."[144] The report considered the way information is provided to judges and magistrates in order to inform their decisions, and noted that sentencing information systems have been established in a number of jurisdictions. It was said that such systems could assist sentencers in four separate but complementary areas:

1. Promoting consistency;

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[141] Submission by the ODPP to the NSW Sentencing Council (dated 3 September 2003).
[142] Chief Justice Jim Spigelman, *Sentencing Guideline Judgments* (1999) 73 Australian Law Journal 876 at 879.
[143] NSW Law Reform Commission (December 1996), *Report – Sentencing,* at 1.1.15.
[144] Lord Justice Auld, (September, 2001) *Review of the Criminal Courts of England and Wales*, London: the Stationary Office.

2. Assisting with the exercise of discretion;
3. Providing information on the availability of sentencing facilities; and
4. Promoting public understanding.

Such extensive sentencing statistics as those which the Judicial Commission provides are not available in other Australian states. Morgan and Murray have criticised the lack of collection and dissemination of statistical data on sentence length in Western Australia as "rather crude", and contrasts this with the availability of sentencing statistics to assist the Court in NSW.[145] Morgan and Murray note the difficulty in determining sentencing ranges for the purpose of guideline judgments without adequate statistics, and note that in *R v Jurisic*, the NSW Court of Criminal Appeal was able to use data on sentence length which had been provided by the Judicial Commission of NSW.

4.6 Pre-Sentence Reports

Generally speaking, the decision as to whether there should be an adjournment to obtain a pre-sentence report is a matter for the sentencing judge.[146] However, a pre-sentence report may or must be ordered in some circumstances, for example, prior to imposing a Home Detention order.[147] There are problems in obtaining timely pre-sentence reports, particularly in remote areas.[148] Note that this matter is also considered at some length in the Discussion Paper dealing with the matter of abolition of prison sentences of 6 months or less compiled by the Committee set up by the Sentencing Council to assist the Council in its reporting on that issue.

The *Crimes (Sentencing Administration)* Act *1999* provides specific legislative basis for the ordering and making of assessment reports - or "pre-sentence reports" as they are more commonly known - by the Probation and Parole Service. Before sentencing an offender, a court may refer the offender for assessment as to the suitability of Periodic Detention,[149] Home Detention (where the court has decided not to make a Periodic Detention order)[150] or a community service order.[151] The Probation and Parole Service is then to investigate and report on certain matters, and the court must have regard to the assessment report when deciding whether or not to make a Periodic Detention order,[152] Home Detention order[153] or community service order.[154] A court does not have to abide by the recommendation as to

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[145] Morgan N and Murray B, "What's in a Name? Guideline Judgments in Australia" (1999) 23 *Crim LJ* 90.
[146] An adjournment to obtain a pre-sentence report should be granted only where it will lead to a clear and legitimate advantage to the prisoner: *R v. Majors* (1991) 54 A Crim R 334 at 337 per Carruthers J. Further, there is a mandatory obligation on the court to obtain a "background report" in relation to a person who was a child when the offence was committed, and was under 21 when the matter was before the court, prior to ordering a sentence of imprisonment or a term of detention: section 25 of the *Children (Criminal Proceedings) Act 1987*.
[147] By section 88 of the *Sentencing Procedure Act 1999* a report may be obtained before imposing a Community service order; by section 68 a report may be obtained prior to imposing a Periodic Detention order; and by section 80, a report must be made before imposing a Home Detention order.
[148] This issue is discussed in the Sentencing Council's Committee's discussion paper "*The issue of abolishing prison sentences of 6 months or less.*" at part 14.
[149] Sections 68 and 69 of the *Sentencing Procedure Act 1999.*
[150] Section 80 of the *Sentencing Procedure Act 1999*.
[151] Section 88 of the *Sentencing Procedure Act 1999.*
[152] Section 66(2) of the of the *Sentencing Procedure Act 1999.*
[153] Section 78(2) of the of the *Sentencing Procedure Act 1999.*
[154] Section 86(2) of the of the *Sentencing Procedure Act 1999.*

suitability contained in an assessment report, although it must indicate to the offender if it makes a decision contrary to the assessment report.[155]

In 2002-2003, 27,649 assessment reports were prepared.[156]

The Probation and Parole Service uses a pre-sentence report template, and all new staff receive training in how to prepare the report. The legislation also identifies certain factors to be considered in relation to suitability,[157] and these are reflected in the templates completed by Probation and Parole officers.

Assessment reports can promote consistency in sentencing by ensuring that sentencing magistrates have certain information available before deciding whether or not to impose three of the major sentencing alternatives. By requiring assessment reports to inquire into certain matters, the legislature in effect mandates that these factors are relevant to determining the suitability of imposing a particular sentencing option, thus providing guidance on sentencing.

Agreements have been reached between the Attorney General's Department and the Department of Corrective Services on the ordering and provision of assessment reports. The Local Court Strategic Plan, published in 2001, identified agreement on such matters as time standards and delivery of reports. Time standards were identified for each of the six different types of reports that could be requested. A Memorandum of Agreement was also entered into between the Attorney General's Department and the Department of Corrective Services, effective from 1 December 1998.

The Commissioner of Corrective Services has supplied the Council with information regarding the availability of assessment reports across the State.[158] It was stated that in some remote areas, preparation could be problematic due to lack of transport.

Recommendation 2
That funding be made available to ensure that transport of the offender does not act as a barrier to the preparation of assessment (or "pre-sentence") reports.

It was stated that assessment reports are no longer offered in some locations due to "poor utilisation by magistrates". However, this does not seem to reflect the experience reported by magistrates, where rather unmet demand has been identified as an issue.

Generally, the evidence of practitioners in the field appears to be that assessment reports are requested as a matter of course in appropriate matters.

The Commissioner's letter also stated that requests for full reports for minor offences have increased, and that a system to meet requests with a shorter form of report has been introduced in some areas to meet demand. However, this is also difficult to reconcile with the

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[155] Section 66(3) and (4) (Periodic Detention), Section 78(3) and (4) (Home Detention), Section 86(3) and (4) (community service order) of the of the *Sentencing Procedure Act 1999.*
[156] Submission from the NSW Department of Corrective Services.
[157] See Periodic Detention: section 66(1) of the *Sentencing Procedure Act 1999*, cl 15 *Crimes (Sentencing Procedure) Regulation 2000*; Home Detention: section 78(1) of the *Sentencing Procedure Act 1999*, section 21 of the *Crimes (Sentencing Procedure) Regulation 2000*; Community Service Order: section 86(1) of the *Sentencing Procedure Act 1999.*
[158] In his letter to the Chair dated 21 February 2004.

experience of magistrates. The 2001 Local Court Strategic Plan recognised the need for shorter forms of sentence reports in certain cases, and the Chief Magistrate’s view is that this is utilised for minor offences. There may be a need to review the agreements contained in the Local Court Strategic Plan and the Memorandum of Understanding, to ensure that the agreed standards are still appropriate and are being implemented, by both the Local Court and the Department of Corrective Services, in the best possible way. The main areas for improvement appear to relate to content and form. There may be a need to develop additional policies and procedures to bolster the agreement and ensure greater consistency.

5. APPEALS AGAINST SENTENCE AND THEIR LIMITATIONS

In principle, appeals against sentence have an important role in both promoting consistency and encouraging public confidence in the justice system. In *Everett v The Queen,*[159] McHugh J stated that:

> "Uniformity of sentencing is a matter of great importance in maintaining confidence in the administration of justice in any jurisdiction. Sentences that are higher than usual create justifiable grievances in those who receive them. But inadequate sentences also give rise to a sense of injustice, not only in those who are the victims of the crimes in question but also in the general public. Inadequate sentences are also likely to undermine public confidence in the ability of the courts to play their part in deterring the commission of crimes. *To permit the Crown, as well as convicted persons, to appeal against sentences assists in maintaining confidence in the administration of justice*." (emphasis added)

The process of appeal against sentence from the Local Court to the District Court has significant potential to, and should, promote consistency in sentencing in the Local Court. However, it was clear from the submissions, particularly those of magistrates, that the current appeal framework from the Local Court to the District Court is seen as having a number of serious flaws. The structure of the current appeal mechanism was widely thought to impede consistency in sentencing, and even to promote *in*consistency. The submissions, from Magistrates in particular, created a strong sense that the current system for appeals against sentence was one of the single most important areas where change was needed in order to promote greater consistency in sentencing. It was generally perceived that whereas the appeal process from the District Court to the Supreme Court in respect of matters dealt with on indictment facilitates consistency, the same could not be said in relation to appeals from the Local Court to the District Court because different appeal provisions apply.[160]

5.1 Appeal Process

Whilst it is true that the provisions of section 5 of the *Criminal Appeal Act 1912* assist in promoting consistency in sentencing, the appeals process in relation to sentences imposed in the Local Courts do not, in the Council's view, promote consistency in sentencing. Whilst it is "*inevitable and right*" that appellate Courts seek to "*guide and direct the work that is done at trial level*"[161] it is not considered that the District Court, in its appellate jurisdiction, provides such guidance and assistance to the Local Court.

Both as a matter of history and as a matter of relationship between the various courts, there are significant differences between appeals from the Local Court to the District Court on the one hand, and appeals from the District Court and the Supreme Court to the Court of Criminal Appeal on the other. [162] A sentence appeal from the Local Court to the District Court is not like a sentence appeal from a criminal trial court to the Court of Criminal Appeal, [163] and

[159] (1994) 181 CLR 295.
[160] This point is raised in the study of the NSW Judicial Commission into Crown appeals which is focusing on the interpretation of section 5D of the *Criminal Appeal Act 1912* (NSW). That section has no application to appeals from the Local Court to the District Court.
[161] See *Rogers v Nationwide News P/L* (2003) 77 ALJR 1739 at paragraph 82 per Hayne J.
[162] See *R v. Longshaw* (1990) 20 NSWLR 554 at 562.
[163] *Budget Nursery Pty Ltd v. FCT* (1989) 43 A Crim R 81.

further, a sentence from the Local Court cannot be appealed to the Court of Criminal Appeal.[164]

It remains to be seen how the problem of the Court of Criminal Appeal's lack of experience in dealing with matters in the Local Court concerning high range PCA offences (as well as to the few Crown appeals) will impact upon or influence its approach in the Attorney General's application for a guideline judgment for high range PCA offences (heard on 5 May 2004).

An appeal by way of rehearing is not necessarily a hearing de novo, and the nature of appeals conferred by particular statutes is a matter that has been confronted by the courts in a number of cases. As noted by Callinan J in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*[165] the legislature does not usually provide detail as to the "precise functions, roles, procedures and powers" of an appellate body. There is an issue about whether it is desirable for the legislature to address these factors, to reduce uncertainty, or whether it should be left as a matter of statutory construction or to the court's discretion in regulating its own procedures.

5.1.1 Appeals from the Local Court to the District Court

The *Crimes (Local Court Appeal and Review) Act 2001* deals with appeals from the Local Court. Appeals against conviction or sentence arising from Local Court cases are generally made to the District Court and require leave only in certain instances.[166]

There is also a right to appeal to the Supreme Court against a conviction or sentence imposed by the Local Court, but on questions of law alone.[167] On a question of fact or a question of fact and law, the Supreme Court may give leave to appeal against a conviction or sentence imposed by the Local Court and there is no right of appeal in such cases.[168] The provisions regarding such appeals to the Supreme Court were formerly contained in Part 5 of the *Justices Act 1902.*[169] It appears that such appeals to the Supreme Court were very rarely pursued under the former provisions, and that this continues to be the case under the new provisions.[170] The review mechanism most frequently used continues to be that of appeal to the District Court.

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[164] This is because to appeal to the Court of Criminal Appeal, the conviction must be on indictment: section 2 of the *Criminal Appeal Act 1912.* There is no right to seek leave to appeal against a sentence imposed by the District Court to the Court of Criminal Appeal from an appeal from a magistrate: *R v. Francis* (1943) 61 WN (NSW) 46.
[165] [2000] HCA 47.
[166] See Pt 3 of the *Crimes (Local Courts Appeal and Review) Act 2001.* As to the appeals which require leave, see section 12 of that Act.
[167] Other than for an environmental offence. See section 52 of the *Crimes (Local Courts Appeal and Review) Act 2001.* See also section 56 (appeals as of right by prosecutors to the Supreme Court). Part 51B of the *Supreme Court Rules 1970* concerns such appeals, which are assigned to the Common Law list (rule 1). A copy of the transcript and reasons must be filed with the Court (rule 9). There may be appeals to the Supreme Court against both conviction and sentence in certain other circumstances. Section 52 is a former provision of the *Justices Act 1902* and has rarely been utilised in practice.
[168] Other than for an environmental offence. See section 53 of the *Crimes (Local Courts Appeal and Review) Act 2001.* See also section 57 (appeals by prosecutions from the Local Court to the Supreme Court requiring leave).
[169] Part 5 of the *Justices Act* 1902 was substantially re-enacted in Part 5 of the *Crimes (Local Courts Appeal and Review) Act* 2001. Prior to 1998, the *Justices Act* 1902 contained three means of review/appeal to the Supreme Court but these were replaced by a single means of appeal by amendments to that Act brought about by the *Justices Legislation Amendment (Appeals) Act* 1998.
[170] An example of a case under the new provisions is *DPP v Wunderwald* [2004] NSWSC 182 (16 March 2004). In that case Sully J held that the Magistrate in question had improperly taken over the prosecution case in effect and had peremptorily closed off the calling of certain evidence by the prosecution.

Appeals against conviction

It is convenient to first outline the provisions relating to appeals against conviction to the District Court. Prior to 2001, the provisions relating to appeals from the Local Court were contained in Part 5A of the *Justices Act* 1902. When that Act was repealed by the *Justices Legislation Repeal and Amendment Act* 2001, Part 5A was substantially re-enacted in Part 3 of the *Crimes (Local Courts Appeal and Review) Act* 2001.

Important changes to the provisions relating to appeals against conviction (but not sentence appeals) were, however, made in 1998. These changes followed the review of the *Justices Act,* completed in 1992, and the circulation of the *Justices Review Discussion Paper*[171]. Under the 1998 changes, appeals against conviction continued to be dealt with by way of rehearing on the depositions of the Local Court, but under the new s 133, restrictions were placed on when witnesses could be recalled and certain criteria had to be met. In the case of an alleged victim of an offence involving violence, the party needed to establish special reasons why, in the interests of justice, the witness should be called again, and in other cases, the party needed to show "substantial reasons" why a witness should be recalled.[172] A party wishing to produce new evidence had to establish that it was in the interests of justice that such evidence be adduced.[173] Restrictions were also made on the circumstances in which appeals could be brought to the District Court.[174]

The new provisions were in large part designed to meet concerns about the amount of time allocated to hearing appeals from the Local Court in the District Court, the delay with all-grounds appeals and issues associated with having witnesses reappear to give evidence in the District Court.[175] The Government's preferred reform option was to more drastically reduce the ability to recall witnesses and adduce fresh evidence. This failed to attract the support of the legal community and thus a "compromise" solution was reached.

The current provisions relating to appeals against conviction are contained in the *Crimes (Local Courts Appeal and Review) Act* 2001 and largely reflect the 1998 reforms.[176] Where a defendant was convicted after a plea of guilty, or convicted in their absence, leave to appeal must be obtained from the District Court. A person who is entitled to make an application for annulment to the Local Court under section 4 and has not done so (or has made an application

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[171] Brought about by the *Justices Legislation Amendment (Appeals) Act* 1998. See the Hon J W Shaw, Hansard, 17 September 1998 at Art No 43.
[172] Under s 131(1)(b) of the now repealed *Justices Act* 1902.
[173] S 132(2) of the now repealed *Justices Act* 1902.
[174] A person was required to obtain leave to appeal to the District Court when the appellant had not exhausted all avenues of review available in the Local Court. Where the matter was dealt with in the Local Court in the absence of the defendant, the defendant was required to first have the earlier decision reviewed by the Local Court before appealing to the District Court or to seek leave of the District Court being permitted to appeal to the District Court.
[175] See The Hon J W Shaw, Hansard, 17 September 1998 at Art No 43.
[176] The *Crimes (Local Courts Appeal and Review) Act* 2001 was itself part of a package of three Acts aimed at reforming the Justices Act 1902 and streamlining legislative provisions relating to the Local Court. The two associated Acts are the *Justices Legislation Repeal and Amendment Act* 2001 and the *Criminal Procedure Amendment (Justices and Local Courts) Act* 2001. The former repealed the *Justices Act* and placed matters relating to the structure of the Local Courts and the rights and duties of parties in the *Local Courts Act* 1982. The latter relates to procedure for dealing with criminal matters in the Local Court.

but it has not been disposed of) cannot make an application for leave to appeal (section 12(2)).[177]

Appeals against conviction are by way of rehearing on the basis of certified transcripts of evidence given in he Local Court proceedings, except where the District Court is satisfied that there are special reasons (in the case of a victim of an offence involving violence) or substantial reasons (in the case of any other witness) in the interests of justice why that person should attend to give evidence. Fresh evidence can be given by leave, but only where the Court is satisfied that it is in the interests of justice that such evidence be adduced.[178] The District Court may set aside the conviction or dismiss the appeal.[179]

In the majority of appeals against conviction the matter is dealt with "on the papers": the prosecutor tenders the notice of appeal, the court attendance notice/s, the transcript of the evidence given by witnesses in the Local Court and the documentary and physical exhibits tendered in the Local Court.[180] Each party then makes submissions and the judicial officer determines the matter. The magistrate's reasons and remarks on sentence are not tendered, (unless by consent of the parties) having regard to the provisions of section 18.

Applications by the prosecution to call fresh evidence are rare. To permit the appellant to raise an issue which was not raised in the Local Court (where the appellant may have been unrepresented), the calling of the appellant is not uncommon and other witnesses are sometimes called on behalf of the appellant. In matters in which leave to adduce oral evidence has been given, the relevant party calls the witness.

The Office of the Director of Public Prosecutions has previously suggested to the Criminal Law Review Division that the legislation should be amended to permit the District Court judge to have regard to the Magistrate's reasons for decision, and, if the judge decides to re-sentence, to have regard to the Magistrate's remarks on sentence. The rationale for this proposal is that the magistrate has the advantage of observing the witnesses give their evidence at first hand and is thus best placed to make assessments as to credit. Where the magistrate makes a finding based on such an assessment, this information should be available to the District Court and, in the absence of fresh evidence, such finding arguably should bind the District Court. This proposal has been ventilated and has been opposed by the professional associations which represent those appearing for appellants.

Appeals against sentence

As noted, the 1998 amendments to the provisions of the *Justices Act* relating to appeals to the District Court did not encompass appeals against sentence to the District Court. No substantive changes were made to the provisions when they were transferred to the *Crimes (Local Courts Appeal and Review) Act* 2001.

As to appeals against sentence by defendants, section 17 of the *Crimes (Local Courts Appeal and Review) Act 2001* provides that:

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[177] S 11(1A). As to appeals requiring leave, see s 12.
[178] S 18(2).
[179] S 20(1).
[180] The Sentencing Council gratefully acknowledges the DPP in providing assistance with the understanding of the way in which appeals from the Local Court to the District Court operate in practice.

> "An appeal against sentence is to be by way of a **rehearing of the evidence** given in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings." (emphasis added)

It may be observed that no reference is made to "*certified transcripts of evidence*" in section 17, unlike section 18.

The District Court may set aside or vary the sentence or dismiss the appeal.[181] For appeals by defendants, there is no requirement for leave in order to give fresh evidence in the appeal proceedings.[182] For appeals by prosecutors, fresh evidence may only be given by leave of the District Court, and leave may only be given in exceptional circumstances.[183]

Where an appeal against severity of sentence is brought, the District Court exercises a fresh sentencing discretion, based upon the evidence admitted in the appeal proceedings, and it can therefore be characterised as a hearing de novo.[184]

The District Court's powers include the ability to impose a more severe sentence, but special principles apply where an increased sentence is contemplated.[185]

In a typical appeal against sentence, the prosecutor tenders only the Notice of Appeal, court attendance notice and the material which was tendered by the parties in the Local Court; for example the police facts, antecedents, the pre-sentence report and references and reports relied upon by the defendant. No transcript of the Local Court proceedings is available to the parties or the District Court (the majority of matters having proceeded by plea of guilty in the Local Court) and no transcript of the magistrate's reasons is available to the parties or the Court. The prosecutor does tender a fresh criminal history. After the tender of this material, the appellant routinely gives evidence in his case (explaining the circumstances of the offence) and occasionally other witnesses also give evidence for the appellant. Further documents are often tendered on the appellant's behalf.

As the prosecutor is unaware of the previous version of events given by the appellant or of the submissions made on his behalf from the bar table in the Local Court, it is very difficult to effectively cross examine such an appellant. The prosecutor has a limited capacity to assist the court because of the limited nature of the material available. The District Court engages in a fresh exercise of sentencing discretion. Due to the unavailability of the Magistrate's reasons, the District Court is denied data potentially influential upon the primary decision maker. Absent the reasons of the Local Court, the District Court is denied the advantage had by the primary decision maker in assessing the credibility of any important evidence, of findings, if any based on credibility and if relevant, in cases involving section 5(2) of the *Crimes (Sentencing Procedure) Act 1999*, the reasons for deciding that no penalty other than imprisonment is appropriate; for example the magistrate may have stated at the commencement of his reasons that the offence was prevalent in that particular area.

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[181] S 20(2) (appeals by defendants); s 27 (appeals by prosecution).
[182] See s 17.
[183] S 27.
The provisions regarding the circumstances in which fresh evidence can be adduced were identical to those contained in the *Justices Act*, under ss 131A; s 133H.
[184] See *Coal and Allied Operations Pty Ltd v. AIRC* (2000) 203 CLR 194 per Gleeson CJ Gaudron and Hayne JJ at [13]
[185] See *Parker v DPP* (1992) 28 NSWLR 282.

Thus a fertile area for debate is whether the District Court ought to have regard to a transcript of the magistrate's reasons in respect of a severity appeal. This would be particularly significant where the severity appeal is lodged after a contested summary hearing.

5.1.2 Appeals from the District Court to the Court of Criminal Appeal

There is no right to seek leave to appeal against a sentence imposed by the District Court to the Court of Criminal Appeal from an appeal against a sentence imposed by the Local Court.[186] However, a question of law may be stated by the District Court to the Court of Criminal Appeal before any final determination of the appeal from the magistrate to the District Court. Further, in *R v Sirocic*,[187] it was held that the Court of Criminal Appeal can answer questions submitted to it by the District Court and then make any such order as it thinks fit even though the appeal proceedings during which the question arose have been disposed of.

When a matter is dealt with on *indictment* to the District Court and the defendant is convicted, rights to appeal are governed by the *Criminal Appeal Act 1912.*[188] The Court of Criminal Appeal hears appeals of convicted persons (in respect of both conviction and sentence) and Crown appeals against sentence, in relation to matters dealt with on indictment. Under section 5(1) of the *Criminal Appeal Act 1912*, a convicted person may, with leave of the court, appeal against the sentence imposed following the person's conviction (that is, appeal against the severity of sentence). Section 6(3) of the *Criminal Appeal Act* states, in the context of against sentence by the person convicted, that:[189]

> "the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."[190]

In relation to the matter of Crown appeals to the Court of Criminal Appeal, the Crown may appeal under s 5D against sentence, and error must be found before the appellate Court can interfere on sentence. Although the same principles apply generally in relation to a Crown appeal as they do when an offender appeals under section 5(1) and 6 of the *Criminal Appeal Act 1912* additional principles apply before the Court will interfere.

In respect of appeals against sentence, the Court of Criminal Appeal will not interfere with a sentence imposed by a trial judge unless it finds some *error* has occurred in the exercise of the sentencing discretion or unless it determines that the sentence imposed is *manifestly* excessive or inadequate. It is not enough that the Court of Criminal Appeal considers that if it had been in the position of the primary judge it would have taken a different sentencing course. The Court does not substitute its own discretionary conclusion for that which has been expressed by the sentencing judge. In determining the appeal the Court has regard not only to the evidence before the sentencing judge but also his/her reasons. Indeed the Court generally is only concerned with whether the facts found by the sentencing Judge were open on the evidence in the sense that the Court does not deal with the findings of fact as on a

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[186] *R v Francis* (1943) 61 WN (NSW) 46.
[187] [2000] NSWCCA 447.
[188] Sections 5, 5A, 5B, 5C, 5D, 5DA, 5DB, 5F and 6 of the *Criminal Appeal Act 1912*.
[189] Section 6(3) of the *Criminal Appeal Act 1912.*
[190] See also section 7(1A) of the *Criminal Appeal Act 1912* regarding the power of the Court to quash or vary sentence in special cases.

"rehearing".[191] The appellate provisions of the *Criminal Appeal Act* including on appeal under section 5(1) against a sentence have been held not to provide for a rehearing. An appeal which is not by way of rehearing is no more than a right to have a superior Court interpose to redress the error of the Court below.[192]

It is instructive to compare the procedure for appeal for persons convicted on indictment in the District Court with that for appeals from the Local Court to the District Court (*see further Pt 5 Appeals against Sentence and their Limitations*). In general, there are greater restrictions in the latter case. The bases upon which the Court of Criminal Appeal may intervene are quite narrow, and mere disagreement with the exercise of the discretion of a sentencing judge is not sufficient reason to intervene.[193] In *House v The King,*[194] the High Court said of an appeal against the exercise of the sentencing discretion:

> "[i]t is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion."

The sentence must be so "manifestly inadequate" as to be indicative of error or departure from principle.[195] The court has stated on several occasions that sentencing judges are in a better position to assess a proper sentence than a court of appeal, error or breach of principle notwithstanding.[196]

In comparison with appeals to the District Court, appeals to the Court of Criminal Appeal are *not* by way of rehearing;[197] they are appeals *stricto sensu*.[198] The question on appeal is whether the District Court's decision was in error, at the time it was given and on the material which the lower court had before it. Ordinarily, no fresh evidence can be received, save by leave to prevent a miscarriage of justice.[199] The appellate court's powers are limited to setting aside the decision under appeal or substituting the decision that should have been made.[200]

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[191] *R v Kelly* (1993) 30 NSWLR 64.
[192] *R v Khouzanne* [2000] NSWCCA 505.
[193] See *R v Allpass* (1993) 72 A Crim R 561 at 562 per the court. See also *R v Macdonell* (unrep, 8/12/95, NSW CCA) per Hunt CJ at CL.
[194] (1936) 55 CLR 499 at 504.
[195] *Griffiths v The Queen* (1977) 137 CLR 293 per Barwick CJ at 310.
[196] *Griffiths v The Queen* (1977) 137 CLR 293 per Barwick CJ at 310; *Whittaker v* King (1928) 41 CLR 230 per Isaacs J at 249; *R v Majors* (1991) 54 A Crim R 334 at 338, adopting the view of Lee CJ at CL in *R v Salameh* (1991) 55 A Crim R 384 at 394. Hunt J expressly agreed with Carruthers J at 339.
[197] There are different meanings also to be attached to the word "rehearing" and between an appeal by way of rehearing and a hearing de novo. Which of the meaning is that borne by the term "appeal" or whether there is some other meaning in the absence of an express statement in the particular provision is a matter of construction in each case. As to the nature of a "rehearing: in particular statutes such has been described in various cases: See for example, *Fox v. Percy* (2003) 197 ALR 201 at 207.
[198] The main distinction appears to be between appeals by *stricto sensu* and appeals by way of rehearing noting that even the expression "appeals by way of rehearing" does not have a single well-established meaning. The nature of appeals conferred by various statutes is one that has troubled the Courts. As to the different types of meanings, see for example: *Eastman v. R* (2000) 172 ALR per McHugh J at 65; *Builders Licensing Board v. Sperway Constructions (Sydney) Pty Ltd* (1976) 135 CLR 616 per Mason J at 621-22; *Coal and Allied Operations v. AIRC* (2000) 203 CLR 194; 174 ALR 585 at 590-591.
[199] *Gallagher v R* (1986) 160 CLR 392.
[200] *Coal and Allied Operations Pty Ltd v Australian industrial Relations Commission* at 590 per Gleeson CJ, Gaudron and Hayne JJ.

However, there are of course problems with the appellate process to the Court of Criminal Appeal, perhaps even natural limitations that apply in the case of any appellate Court proceeding to a rehearing wholly on the evidence (or even substantially on the "record"). Such include the disadvantage that an appellate Court has when compared with the trial judge in respect of evaluation of witnesses credibility, and of the "feeling" of the case from a mere reading of the transcript. Further the appellate court may not be taken to have read all of the evidence at the trial and may be deprived of the advantages of the trial judge in various respects. In contrast, an appellate "rehearing" in a civil appeal to the Court of Appeal[201] not only is not and cannot be a rehearing de novo but is a rehearing on the record "that omits data potentially influential upon a primary decision maker."[202]

5.1.3 Appeal Figures

In 2002, there were 1409 all grounds appeals and 4249 sentence appeals made to the District Court.[203] Both all grounds appeals and sentence appeals increased in number from the year before, by 9% and 10% respectively.[204] However, compared to 2000, there was a decrease in the level of both all grounds appeals and sentence appeals. Only a very small proportion of these appeals made to the District Court were Crown Appeals on an issue of law or on inadequacy of sentence.

As shown in Table 3, a relatively high proportion of appeals against sentence to the District Court were successful (for some or all matters) in 2002, at nearly 68%. This figure is particularly high in comparison with the success rate for appeals against conviction.

Table 3: Appeals from the Local Court to the District Court, 2002 [205]

	Number of appeals finalised	Percentage of appeals where appeal was successful for all or some matters
Appeals against conviction	1134	37%
Appeals against sentence (by defendants)	3969	67.8%

The 2002 Annual Review of the NSW District Court identifies time standards from lodgement to finalisation for sentencing appeals as follows:

- 90% within 2 months;
- 100% within 6 months.

Actual performance did not conform to these standards in 2002. 60% were finalised within 4 months and 95% within 6 months. Only 5% took more than 6 months to be finalised.[206]

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[201] See section 75A of the *Supreme Court Act 1970*

[202] *Suvaal v. Cessnock* [2003] HCA 41; (2003) 200 ALR 1 per McHugh and Kirby JJ at 18-20, particularly where discussing appellate review and credibility assessments. See also *Pledge v. Roads and Traffic Authority; Ryan v. Pledge* [2004] HCA 13; (2004) 205 ALR 56.

[203] Local Court NSW, *Annual Review*, 2002, at p 112-113.

[204] District Court of NSW, *2002 Annual Review*, 2003 at 43. In stark contrast, the second joint submission of the NSW Police and the Ministry for Police details the number of *Crown* appeals lodged for 2002 and 2003. The submission states that for 2002, there were 75 applications received and 46 appeals lodged by the ODPP, and for 2003, there were 120 applications received and 68 appeals lodged by the ODPP.

[205] NSW Bureau of Crime Statistics and Research, Statistics Services Unit, *NSW Criminal Courts Statistics 2002*, 2003, Table 3.14 at p 113.

Approximately 11% of the total number of first instance cases heard in the District Court of NSW were appealed (on sentence, conviction, or by the Crown) between 1990 and 1996.[207] The average rate of success for sentence appeals (by offenders) was 11% for that period. Crown appeals (i.e. on sentence) had a success rate of 66% in the same period.[208] Comparing the success rate of sentence appeals to the District Court with those to the Court of Criminal Appeal, it can be seen that a much higher proportion of sentence appeals are upheld in the District Court (67.8% compared to 11%).

5.2 Limitations of Appeals against Sentence from the Local Court

An offender has a right to appeal against sentence from the Local Court to the District Court.[209] Unlike an appeal to the Court of Criminal Appeal, an appeal to the District Court is a hearing de novo on the sentence imposed.[210] The Crown also has a right to appeal against sentence from the Local Court to the District Court.[211] Again, when considering the appeal, the District Court does not sit as a court of review but exercises its own discretion in determining the sentence.[212] New evidence by the Crown may be received in “exceptional circumstances.”[213]

As a number of the submissions emphasised, the level of guidance provided by appeals to the District Court from the Local Court should ideally be closer to that provided by the Court of Criminal Appeal. However, there are a number of reasons that this does not currently occur and that the guidance provided by the District Court can be regarded as relatively poor. Overall, there is a sense in which - as the submission of one magistrate described it – the District Court has been elevated into an appeals court without the constraints that should be attached in order to realise the aims of transparency and encouraging consistency.

First, the District Court does not have to consider the sentencing Magistrate’s reasons for imposing a sentence. As noted in the submission of a Magistrate, magistrates often take considerable time and effort in writing a sentence, referring to sentencing statistics and cases, yet these reasons are irrelevant to the District Court’s decision on appeal. As Chief Justice Spigelman has noted, two of the important roles of providing reasons for judicial decision-making is that it facilitates the appellate process and the accountability of individual judges.[214] Although the provision of reasons by magistrates also furthers other important goals, such as open justice and the appearance of fairness, it is still of concern that the other functions that reasons can and should play are not being fully utilised at present.

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[206] District Court of NSW, *2002 Annual Review*, 2003 at 44.
[207] Hickey J (1998) “Sentencing trends: an analysis of NSW sentencing statistics”, March, No 16, *Sentencing Trends and Issues*, Judicial Commission of NSW.
[208] Hickey J (1998) “Sentencing trends: an analysis of NSW sentencing statistics”, March, No 16, *Sentencing Trends and Issues*, Judicial Commission of NSW.
[209] Section 11, *Crimes (Local Courts Appeal and Review) Act 2001.*
[210] In considering an appeal to the District Court under section 11, the District Court engages in a fresh exercise of sentencing discretion upon the evidence admitted on the hearing of the appeal by section 17. Compare appeals to the Court of Criminal Appeal: section 5(1) of the *Criminal Appeal Act 1912*.
[211] Section 23, *Crimes (Local Courts Appeal and Review) Act 2001*
[212] This is in contrast to Crown appeals to the Court of Criminal Appeal.
[213] Section 26, *Crimes (Local Courts Appeal and Review) Act 2001*
[214] Chief Justice Jim Spigelman, ‘Reasons for Judgment and the Rule of Law’, paper delivered at the National Judicial College, Beijing 10 November 2003, and The Judge’s Training Institute, Shanghai, 17 November 2003 <www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman_031110> at 2.

There are two situations where the lack of consideration given to magistrate's reasons for sentence raises a particular problem.

The first is where factors relating to general deterrence and a local crime wave of a particular crime were taken into account by the magistrate. The magistrate's reasons may be particularly important in substantiating the sentencing decision in such cases, and are not considered by the District Court on appeal. Nor is it likely that any such reasons would ever be published. The principle that prevalence of an offence in a particular locality may be a valid consideration in sentencing has been recognised.[215] That said, there may be potential for conflict with the principle of consistency in the state framework with a need to balance the "locality view". As noted by Lord Justice Auld,

> "…there is the question of courts, in their application of the law to the facts, responding to local needs or other circumstances, for example, when there are local surges of particular types of offence or where there is endemic deprivation. However, such locality should be balanced against a national framework for clarity and consistency in the application of the law."

The second situation is where the Magistrate imposes a sentence of imprisonment of 6 months of less, a particular anomaly is raised by the District Court not having to have regard to the sentencer's reasons for imposing the sentence. This is due to the fact that magistrates are specifically required to provide reasons in this situation, under section 5(2) of the *Sentencing Procedure Act*. The notion that providing reasons is mandated by statute in these circumstances is at odds with the lack of any need for the District Court to consider those reasons in the event of appeal. At the very least therefore, the District Court Judge should be required to have regard to the reasons provided by the magistrate in cases where section 5(2) applies. Issue arising from the requirement to provide reasons under s 5(2) is also discussed in the Discussion Paper on 'The Issue of Abolishing Prison Sentences of 6 Months of Less' of the Committee set up by the Council to assist with this project.

The fact that the District Court does not need to consider the reasons of the magistrate on appeal, combined with the right of appeal and to a de novo hearing, seems to discourage the provision of reasons by magistrates. As stated in the submission of a Magistrate:

> "If magistrates' judgments or the reasoning process behind those judgments are of no significance in the District Court appeal process of what value are they? One may choose to be cynical and argue that as a Magistrate's reasoning process (or lack of it) is of no significance, why give a judgment at all. A defendant will either like or dislike the sentence without any concern as to how the magistrate reached it."

A second reason that District Court appeal decisions are of limited guidance to the Local Court are that the sentencing Magistrate does not receive any reasons for decisions from the District Court where the appeal against sentence is upheld. The sentencing Magistrate only receives the result (ie the orders), and it can be difficult or impossible to obtain reasons. There are obvious reasons why this practice fails to encourage consistency in sentencing – the sentencing Magistrate is not aware of why a sentence has been varied on appeal, and is not provided with any guidance on how to correct his or her approach to sentencing in future

[215] See for example *R v. Broxham*, Unrep, CCA 3/4/1986. See also NSW LRC (1996) *Discussion Paper 33* at 5.13 to 5.15. The principle has been recently recognised by Lord Justice Auld: Lord Justice Auld, (September, 2001) *Review of the Criminal Courts of England and Wales*, London: the Stationary Office at paragraph 27: "Local Justice".

cases. Although the degree of detail and length of judgments from the District Court need not be the same as for say judgments of the Court of Criminal Appeal, there is still a need to make published judgments readily available. Chief Justice Spigelman has usefully referred to the role of published reasons as follows:[216]

> "The objectives of predictability and consistency are significantly enhanced by the availability of reasons for the decision to lawyers and other judges who subsequently become involved in or have to consider and decide similar cases. It is only if a lawyer is able to identify the facts of a previous case that he or she will be able to decide whether that case is truly similar to the case that he or she has to decide."

Of course published reasons for judgement also serve a number of other important purposes, such as enhancing public confidence in the justice system.

Overall, the lack of regard for reasons of the sentencing magistrate, and the fact that the magistrate does not receive the District Court's reasons, has created an impression, according to the submission by one magistrate, that District Court Judges are not aware of the principles applied by magistrates, and magistrates are not aware of principles applied by District Court Judges. The result, as described by that magistrate, is "an impression that the District Court merely substitutes one decision for another, one discretion for another, one result for another, without disclosing the basis of it". This is clearly an unsatisfactory situation from the point of view of promoting consistency.

A further limitation, relevant to the role of precedent more generally, is that the reasons for sentence imposed by the Local and District Courts are not published or reported as a matter of course. Publications of judgments in the District Court in relation to sentence appeals from the Local Court would have a role in promoting consistency in sentencing in the Local Court.

Other problems with the system were also identified in the submissions. The submission of one Magistrate stated that there appears to be wide variations in approach of individual District Court judges, giving rise to the impression that the judicial personnel involved is the best predictor of outcome. The view was expressed in two submissions that some District Court judges appear to adopt the approach that all appellants ought to 'leave with some benefit' for having gone to the trouble of appealing, even if one a minor decrease in sentence is made. If this is the case, it is clearly unsatisfactory. However, even if this impression is not accurate, the belief by some that Judges vary sentences at whim is a reflection on the lack of transparency in reasoning from the perspective of the Magistrate, and supports the need for the reasons of Judges to be readily available to magistrates.

Another reason for the limited role of sentence appeals in the promotion of consistency is simply that the process of appeal itself can take a substantial period of time in an instant case. Precedent set by the Supreme Court can play an important role in this respect. However, the Supreme Court rarely deals with the offences commonly dealt with in the Local Court, and further, trials or appeals from the District Court relate to offences dealt with on indictment rather than summarily, such that the judgments may be of little guidance to the Local Court. The limitations of appeals again raise the question as to whether it would be desirable to encourage the Court of Criminal Appeal to issue guideline judgments in respect of offences

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[216] Chief Justice Jim Spigelman, 'Reasons for Judgment and the Rule of Law', paper delivered at the National Judicial College, Beijing 10 November 2003, and The Judge's Training Institute, Shanghai, 17 November 2003 <www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman_031110> at 8.

commonly sentenced in the Local Court. (See *Pt 3 Current Measures to Promote Consistency and Guide Judicial Discretion – Guideline Judgments*).

The role of the prosector is also relevant in relation to the making of “appeals” against the leniency of sentence (see *Pt 7 Role of Prosecutorial Practice in Promoting Consistency*).

5.3 Options for Reform

Essentially three types of reforms could be suggested in response to the limitations discussed above:

1. Changes within the current structure to improve transparency in reasoning;
2. Changes to the grounds of appeal from a sentence imposed by the Local Court; and
3. Changes to the court which hears and determines appeals from the Local Court, possibly in addition to changes to the grounds of appeal.

Generally, any of these changes would be preferable to the current situation.

In relation to reform options 2 and 3 above, it is interesting to note certain recommendations made in Lord Justice Auld’s Review of the Criminal Courts in England and Wales. The report recommended that there should be the *same tests* for appeal against conviction and sentence respectively at all levels, and that the test should be that which is applicable to appeals to the Court of Appeal.[217] Further, the report also recommended that appeals from Magistrates Courts be made to the Court of Appeal in all criminal matters, and that appeals from Magistrates Courts to the Crown Court (or the equivalent of the District Court) by way of rehearing be abolished.

Each of the three reform options identified above will now be considered in more detail.

The first type of reform relates to the fact that the District Court does not have to consider the reasons of the sentencing magistrate, that the magistrate does not receive reasons, and that District Court decisions are not published. The following ‘solutions’ can be posed to these problems:

a) Requiring District Court judges to have regard to the Magistrate’s reasons for imposing sentence;
b) Where an appeal against sentence is successful, the Magistrate should be provided with the Judge’s reasons, or, at the least, a transcript of the hearing; and
c) Routinely publishing or otherwise making available all or selected District Court judgments relating to sentencing.

It is considered that, under the current appeal system, to provide the sentencing Magistrate with the Judge’s reasons would often be unhelpful, due to the re-hearing and fresh evidence involved. However, if the District Court was to have regard to the reasons of the Magistrate and/or if the test for appeals was changed, providing reasons to the sentencing Magistrate could indeed be useful in many cases in assisting to promote consistency.

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[217] Lord Justice Auld, *Criminal Courts’ Review*, 2000, at 29-30 <www.criminal-courts-review.org.uk>.

The second type of change was that the right of appeal from the Local Court to the District Court be brought in line with the restrictions which apply to appeals from the District Court to the Court of Criminal Appeal and that there be no right to a de novo hearing. This could be implemented by amending the *Crimes (Local Court Appeal and Review) Act 2001* to contain appeal provisions similar to those in section 5 of the *Criminal Appeal Act 1912*.[218] This would make an appeal from the Local Court to the District Court an appeal *stricto sensu*. The submission of a Magistrate, where this suggestion was made, identified the following advantages with this approach:

- A body of law would arise, from the District Court, which would be applicable to cases heard in the Local Court, and provide a sound basis for sentencing;
- Prosecutors and legal representatives would be encouraged to better prepare submissions on sentence; and
- Magistrates would be encouraged to give full reasons for sentence.

Such a change could be made on a more limited basis, making an appeal from the Local Court to the District Court an appeal *stricto sensu* (as above) but only in relation to indictable matters dealt with summarily.

The third reform option is that appeals from the Local Court could be made directly to the Court of Criminal Appeal for all indictable matters dealt with summarily. Appeals to the Court of Criminal Appeal would be covered by the same tests for appeal as those relating to appeals for matters dealt with on indictment in the District Court. An issue raised by having appeals directly to the Court of Criminal Appeal is the higher level of technicality and lower accessibility of that Court compared to the District Court, which is a particular concern where many defendants appearing in the Local Court are unrepresented. If appeals lay to the Court of Criminal Appeal, it may discourage the making of appeals for reasons unrelated to the merits of any such appeal and/or impede the ability of unrepresented persons to conduct an appeal without legal representation.

Whilst historically the former appeal from magistrates courts to quarter sessions pursuant to the *Justices Act 1902* was frequently described as a rehearing and most aptly described as a hearing de novo,[219] nevertheless such appeal was from frequently legally unqualified stipendiary magistrates and were initially prior to the "election" provisions which have conferred expanded jurisdiction on magistrates to hear inter alia indictable offences charged summarily.

The arguments in favour of a re-hearing appeal to the District Court (particularly one de novo) is weakened by the expanded jurisdiction, particularly in consequence of the election provisions and cases being heard by legally qualified magistrates, who are "judicial officers" under the *Judicial Officers Act 1986*. A "two hearing" system involving appeals to the District Court may be subject to question in contemporary times, particularly if such involves re-hearings in the nature of being de novo re-hearings.

The Council is of the view that if appeals from the Local Court lay to the Court of Criminal Appeal, and the test for appeal was changed, that no concern is raised about the quality of

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[218] Such provision would have to be duly modified, for example, perhaps removal of the "leave" provisions in section 5 would be needed.
[219] See *Builders Licensing Board v Sperway Constructions (Syd) P/L* (1976) 135 CLR 616.

magistrate's decisions in terms of facilitating this process. It is thought that the quality of Magistrate's reasons is already adequate for this purpose, and in any case, having a different appeal system in place would encourage the recording of more detailed and comprehensive reasons by Magistrate.

In any event, the Sentencing Council does not recommend that appeals from the Local Court be made directly to the Court of Criminal Appeal. Instead, it is recommended that changes be made to the current structure of appeals from the Local Court to the District Court in order to improve transparency in reasoning. The Sentencing Council recommends that appeals to the District Court against sentence imposed in the Local Court should be retained, but should be by way of rehearing on the record of proceedings in the Local Court, including the reasons of the sentencing magistrate, and should not be by way of hearing de novo, together with the additions set forth in recommendation 3. Incidentally, provision could also be made for adducing fresh evidence in qualified circumstances.

Recommendation 3
Appeals to the District Court against sentence imposed in the Local Court should be retained, but be by way of rehearing on the record of proceedings in the Local Court, including reasons of the sentencing magistrate, and not be by way of hearing de novo.

In addition:

a) The reasons of the District Court, or if unavailable, the transcript, should be provided to the sentencing magistrate where an appeal against sentence is successful; and

b) Selected decisions of the District Court on sentencing should be regularly published.

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6. AVAILABILITY OF SENTENCING OPTIONS ACROSS THE STATE

6.1 Introduction

In NSW, magistrates in a number of courts are prevented from using particular sentencing options due to geographic limitations on the availability of some of the options and insufficient funding of the Probation and Parole Service, which limit the availability of viable programs and necessary supervision. Notably, the sentencing options which are unavailable or subject to limitations in a number of areas in NSW are:

1. Periodic Detention;
2. Home Detention; and
3. Community Service Orders.

The first two of these three sentencing options are alternatives to a sentence of full-time imprisonment, in that they cannot be used until a decision has first been made that the offender should be sentenced to a term of imprisonment.

Where one or more sentencing options are not available due to exigencies or other circumstances, the sentencing process does not simply become one of substituting an alternative or lesser sentencing option. In *R v Atkins,*[220] a pre-sentence report assessed the respondent as suitable for Periodic Detention or a community service order, but she could not serve the sentence by way of Periodic Detention due to geographic factors. On appeal, the Court concluded that it would be erroneous to assume on the basis that Periodic Detention and Home Detention were not available that a community service order could be considered. This is because the alternatives to a sentence of full time imprisonment[221] can only be considered if the determination has first been made that no sentence other than imprisonment is appropriate.

A number of factors influence the availability of the above sentencing alternatives in any given location, including:

- the presence of Probation and Parole Service in the area;
- the resources and staff available to the Probation and Parole Service in the area, where it is present;
- the availability of services in the area, such as drug and alcohol services and counselling;
- the availability of public transport;
- access to private means of transport; and
- the sex of the offender.

On 16 July 2003, the Chief Magistrate acknowledged the unavailability of uniform sentencing options throughout NSW in an address to the NSW Sentencing Council. His Honour circulated a document titled 'A Partial Overview of the Availability of Sentencing Alternatives', which clearly demonstrated that alternatives to sentences of full-time imprisonment are not equally distributed across the State.

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[220] NSW CCA, 3 November 1998. Abadee J held that it was erroneous to consider a community service order in circumstances where Home Detention was not available due to geographic factors.
[221] Namely, Home Detention, Periodic Detention or a suspended prison sentence.

As noted in the submission by the Law Society of NSW, a range of other services and programs relevant to sentencing are also unavailable or limited in certain areas. These include drug and alcohol treatment and rehabilitation resources, accommodation supports for people with intellectual disabilities and treatment for people with mental illnesses. The court held that even if Periodic Detention had been available, it would not have been appropriate in the present case. Ultimately, the court held that despite the sentence being manifestly inadequate, it would not intervene and allow the appeal, amongst other things, because of the fact that Atkins had been sentenced to a community service order, which at the time of the appeal had been wholly served.

6.2 Extent of the Problem

The Department of Corrective Services has provided the Council with information on the availability of certain sentencing options throughout NSW.[222]

Table 4 is based on information provided by the Department, and contains a summary of the availability of sentencing alternatives to Local Court Magistrates across NSW, as per the 12 court regions in NSW (based on the Australian Standard Geographical Classification).

Table 4: Availability of Sentencing Alternatives Across NSW as at February 2004

Sentencing option	Availability
Supervision (eg for Community Service Orders, Good Behaviour Bonds an Suspended Sentences)	Available in all locations, but in some remote areas places are limited for Community Service Orders
Periodic Detention	Not available in 2 court locations, namely Mid-North Coast and South Eastern.
Supervision of Home Detention	• May not be available in some fringe areas of Lower Northern Sydney and Central Northern Sydney • Not available in Richmond-Tweed or Northern. • Not available on the Mid-North Coast, but there is a pilot project for that area in 2004-2005.

The Department of Corrective Services stated in its submission that, subject to the availability of funding, the Department anticipates expanding Home Detention to "the remaining major population areas of the State."

At the July 2003 meeting, Chief Magistrate His Honour Judge D Price provided the Council with information regarding the availability of sentencing options to magistrates across the State. This including the following information in relation to certain sentencing options for the 13 circuits outside the Sydney area:

Home Detention

- Available only in one of the 13 circuits outside the Sydney Metropolitan area, namely, the Wentworth circuit.

Period Detention

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[222] The accompanying letter was dated 2 February 2004 and signed by Commissioner R Woodham.

- There are only three circuits where Periodic Detention is available for both men and women, and without any major difficulties associated with distance and transport.
- Not available at all in three circuits.
- There are seven circuits where it is available but subject to limitations: it is not available to females in three circuits, and is only available subject to the offender's access to transport in four other circuits.

Community Service

- Available generally in five circuits.[223]
- Limitations on availability, either shortages of places or restricted due to the need to travel, in four circuits.
- It is available only for males in one circuit (Tamworth).

Anecdotal evidence of the lack of availability of sentencing options across the State is also notable. It has been observed, for example, that a lack of available work is frequently reported in assessment reports as a factor limiting the suitability of a Community Service Order.

Probation supervision is also not available in regards to every Local Court across NSW.

A Magistrate, in his submission, provided a stark example of the situation faced in some remote areas. That Magistrate had sat in Condoblin, a community with a high aboriginal population and levels of high unemployment. The sentencing choice for extended periods was limited to unsupervised bonds, fines or prison. Pre-sentence reports were often not forthcoming, and there was no access to alternative sentencing options such as those requiring supervision, or to Periodic Detention or Home Detention. There was also no access to other programs such as sex offender programs or anger management courses.

Overall, the limitations in availability of sentencing options raise major issues of equity and fairness both in relation to geography and sex.

6.3 Sentencing Pilots and Specialist Programs

The unavailability of sentencing alternatives in certain areas, and the differential impact on certain groups and types of offenders, has led to various innovative programs, such as the adult and juvenile drug court, juvenile conferencing, circle sentencing, and MERIT drug program. Again however these initiatives are not universally available across the State.

Although these initiatives are not universally available across the State, the Sentencing Council does acknowledge that some of these programs have been recently expanded. In particular, the Local Court NSW Annual Review 2003 outlines the recent expansion and achievements of MERIT:[224]

> "During 2003 MERIT expanded to cover Central Sydney, Hunter Valley, Mid West, Greater Murray, Central Coast, South Western Sydney, South East Sydney, North Sydney and Northern Rivers Regions. MERIT is currently available in 50 Local Courts…

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[223] Including as 'not having any significant limitations' is the Wentworth circuit, although Community Service is only available where the offender resides in NSW at the time of the assessment.

[224] Local Court NSW Annual Review 2003 at p7

> An evaluation of the pilot programme at Lismore established, inter alia, that those who completed the programme are significantly less likely to re-offend and take longer to re-offend than those who do not complete the programme."

In relation to Circle Sentencing, the Local Court NSW Annual Review 2003 reports that following the success of the trial at Nowra, the Circle Court commenced at Dubbo Local Court in June 2003.

Various other specialist programs have also been introduced in NSW, such as the traffic offenders program. For example, circle sentencing is only available in Nowra and Dubbo, although the Council notes that the Attorney General's Department has announced plans to extend the program to Brewarrina, Walgett and Bourke. As the Legal Aid Commission expressed in its submission:

> "The concern is that many of these initiatives are run as pilots and so are not widely available. The LAC applauds the initiatives which are being trialled and submits that where successful, they be properly funded and implemented across the State to ensure access to all citizens."

In its submission, the ODPP drew attention to the fact that the community-court psychiatric service is generally not available in regional areas. The role of the service is to identify offenders suffering from mental illness at an early stage and enables judicial officers to divert such offenders to appropriate treatment. It was stated that the wider availability of this service would undoubtedly increase consistency in sentencing in the Local Court.

6.4 Aboriginal and Torres Strait Islander Persons

Another important issue to consider is that the geographic unavailability of certain sentencing options has a particular impact of Aboriginal people, since particular areas affected by lack of availability of sentencing options are remote parts of NSW which is also where a significant number of Aboriginal persons reside. Ensuring that the full range of sentencing options are available to courts in such areas may have the effect of promoting consistency in sentencing outcomes between Aboriginal and Torres Strait Islanders offenders and other offenders.

This issue of sentencing and Aboriginal and Torres Strait Islanders offenders is considered in detail in the Council's project on 'Abolishing Prison Sentences of Six Months or Less', where it is also noted that about one quarter of persons serving short prison sentences are Aboriginal. There are of course a number of other important reasons factors influencing the sentences imposed on Aboriginal and Torres Strait Islander offenders, and in particular the large proportion of Aboriginal and Torres Strait Islander persons amongst the prison population. Relevant issues are the impact of policing on generating lengthy prior records (particularly for public order offences) and the quality of information handed to sentencing magistrates regarding criminal history. As will be discussed in the Council's report on short prison sentences,[225] other appropriate sentencing options to consider are allowing Aboriginal communities to become more actively involved in managing community based sentencing options such as Home Detention and supervision of community service orders.

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[225] See also Sentencing Council's Committee's discussion paper "*The issue of abolishing prison sentences of 6 months or less.*"

6.5 Implications for Sentencing

The limitations on the availability of alternative sentencing options obviously increase disparity in sentencing outcomes between different geographic areas throughout the State.

Two major concerns are raised by this situation:

1. The ability to achieve the purposes of sentencing in respect of a given case is adversely affected, which raises equity and fairness issues for the particular offender as well as holding longer term implications for the public at large; and
2. The desirability of consistency in approach is undermined because not all magistrates are able to consider the full range of sentencing options.

One of the situations of greatest concern is where a person is sentenced to full-time imprisonment not because he or she was not suitable for alternatives to a full-time custodial sentence but because other more suitable options were not available in the area. The upshot is that residents of these areas may receive more severe sentences than residents of Sydney metropolitan areas.[226] This situation has particular implications for:

1. Offenders from all backgrounds who live in relatively isolated parts of NSW, whose offending behaviour is often said to result from the lack of other services and which are also the product of isolation;[227]
2. Aboriginal persons, of whom there are a disproportionately large number in full-time custody serving relatively short sentences of imprisonment. This may well be the result, at least partly, of the lack of available alternatives;[228] and
3. Young offenders, since alternatives to full-time imprisonment can help "to prevent offenders from entering a lifetime of crime."[229]

It is important that longer term effects be taken into account in any "cost/benefit analysis" of whether the full range of sentencing options should be made available across NSW. The fact some offenders in NSW cannot receive the most appropriate sentencing option affects the ability to realise the goals of sentencing, and has long-term implications for both the individual and the public at large.

Another major issue is the notion that availability of sentencing options can determine a sentencing outcome as much as the approach to sentencing. To a large extent, the goal of consistency in approach to sentencing is thwarted where sentencing magistrates across the State are unable to consider the same range of sentencing options. The Legal Aid Commission stated in its submission that:

> "The lack of uniform availability of sentencing options, particularly in rural New South Wales, has a major impact on the consistency of sentencing… Consistency of sentencing will only be possible when all judicial officers are able to effectively consider every applicable sentencing option."

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[226] This is noted in the submission by a Judge of the District Court.
[227] This is noted in the submission by the Legal Aid Commission.
[228] As noted in the submission by the Legal Aid Commission.
[229] The Hon Bob Debus MP, "The NSW Sentencing Council - Its role and functions" (2003) 15(6) *Judicial Officers Bulletin* 4 at 4.

A similar view was provided in the submission from the Law Society of NSW:

> "[C]onsistency in sentencing is impossible where the full range of viable sentencing options is not available to the court."

Two proposals could be made to address the above concerns. The first is that funding be provided to ensure that an adequate number of places are available in relation to the full range of sentencing options, in all circuits across NSW, to both men and women, regardless of where the Local Court sits and the area of residence of the offender.

It is also worth noting, in relation to Periodic Detention, that intensive resourcing may be necessary to maintain its credibility as a sentencing option. In the submission from the Law Society of NSW, the view was expressed that "the level of support and supervision afforded to periodic detainees should be similar to that afforded to offenders subject to Home Detention orders." It also suggested that there might be a need to install more effective measures of accountability or oversight to the court in relation to Periodic Detention orders. These are further factors to be considered in terms of providing adequate resources to ensure the full range of sentencing options are available across the State.

In its submission, the NSW Department of Corrective Service stated that it would not be economically feasible to provide Periodic Detention or Home Detention across NSW.

A second option, for areas where certain sentencing alternatives are available subject to the offender's ability to travel, is for the Department of Corrective Services to provide appropriate transportation. This solution has already been implemented in the Bateman's Bay Circuit to enable offenders to travel to Wollongong for Periodic Detention. This would overcome the situation where offenders who would otherwise be suitable for a particular sentencing option are unable to take advantage of it due to lack of access to transport.

Recommendation 4
That primary sentencing options such as Periodic Detention, Home Detention, community service and probation supervision should be made available at every court in NSW.

Recommendation 5
That the Department of Corrective Services develops and actively pursues a strategy for identifying new suitable work agencies for the purpose of increasing the availability of Community Service Orders.

Recommendation 6
That access to programs such as MERIT and traffic offenders programs should be extended to all courts.

Recommendation 7
That where initiatives relating to sentencing are trialled, a timely decision must be made about their effectiveness, and where successful, they should be properly funded and implemented expediently across the State.

Recommendation 8

That funding for transport be made available to ensure that the ability to travel does not prevent offenders from accessing sentencing options such as Periodic Detention where appropriate.

7. PROSECUTORIAL PRACTICE AND PROMOTING CONSISTENCY IN SENTENCING

7.1 The Election Process

It is clear that the election process has significant implications for the sentencing of a particular offender and the sentencing outcomes for particular offences. There is therefore a need to ensure that election decisions are made according to consistent and appropriate criteria.

Prior to the introduction of the election process and Table 1 and Table 2 offences in 1995, magistrates had a far more significant role in determining whether or not to exercise jurisdiction with regards to an indictable offence.[230] However, the role of magistrates in this process was seriously criticised, and replaced with the election process for a number of valid reasons, including fairness to the accused as well as resourcing issues.[231] Although magistrates retain some residual discretion in this respect, the prosecution has the central role in determining whether an indictable matter is dealt with summarily. However, the Council considers that, overall, the appropriate test in determining whether or not an election should be made is that which was considered by Lord Justice Auld in his report.[232] These remarks arose in the context of his Lordship's recommendation that the Crown Courts and Magistrates' Courts be replaced by a unified Criminal Court, consisting of three divisions.[233] It was there stated that the decision to allocate a case to a particular division of the proposed Court should be determined according to the objective seriousness of the alleged offence and the subjective circumstances of the defendant, looking at the possible outcome of the case at its worst and bearing in mind jurisdictional issues. The Council considers that these criteria would also be appropriate in terms of the guiding principle for determining whether an election should be made.

Whether an offender charged with an indictable offence is prosecuted summarily or on indictment determines the mode of trial and whether a trial by jury is available, as well as the applicable appeal procedure and the court to which an appeal is made.

Other important implications of the decision regarding election are:

1. The court's jurisdictional limits as regards sentence, and in particular, the jurisdiction limit for sentences of imprisonment (i.e. the Local Court cannot impose a sentence of imprisonment of more than 2 years, for a single offence, or more than 5 years in the case of consecutive sentences); and

2. Whether or not the standard non-parole scheme will apply (since it does not apply in the Local Court).

These factors mean that some disparity is inevitably created between sentences imposed for a particular offence in the District Court and the Local Court. Essentially, this is an issue about

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[230] The new scheme sought to remove the discretion of the magistrate in deciding upon jurisdiction. The offences within section 476 of the *Crimes Act 1900* were among those listed in Table 1, although section 476 was not repealed.
[231] See The Hon. J. Shaw, Attorney General, *Hansard*, Legislative Council, 24 May 1995, p 119.
[232] Ibid at paragraphs 302-305.
[233] Ibid at paragraph 19.

the inconsistency in sentencing *outcomes* between the Local Court and District Court, and so the election process does not necessarily undermine consistency in *approach* taken to sentencing in the Local Court. However, the inherent inconsistency in sentencing outcomes which arises from whether or not an election is made requires that the election process be subject to some scrutiny.

However, it does determine the important question of whether a particular matter involving an indictable offence is heard in the Local Court, and it is therefore important to sentencing in the Local Court as well as the public perception of consistency. Moreover, if elections are made in a consistent way, and by giving due regard to sentencing principles, the integrity of the election process and the disparity in sentencing outcomes need not raise concern.

There are three election protocols currently in place relating to the referral of Table 1 and Table 2 offences (indictable offences dealt with summarily unless an election is made).

The first general election protocol, agreed to between the ODPP and NSW Police in 1995, offers guidance to the Officer in Charge of a matter in recommending to the police prosecutor whether the case should be dealt with as an indictable matter in the District Court. Six features are identified in a non-exhaustive list, one of those features being the available sentencing options under the relevant Act in the Local and District Courts.

Two additional protocols were approved in 2002-2003 in regard to offences under the *Firearms Act 1996* and arson offences under the *Crimes Act 1990* and the *Rural Fires Act 1997*. These protocols identify additional features to be considered in making a recommendation. The police prosecutor then assesses the matter and if appropriate makes a recommendation to the ODPP. A protocol is also in place regarding election for offences to be dealt with on indictment where the offence is included in the table of standard non-parole period offences pursuant to section 54D of the *Sentencing Procedure Act*. There is also a practice direction[234] in place regarding the offence of "Assault Police in the Execution of their Duties."[235] A Police Prosecutor must consider all the relevant facts including those relating to the physical degree, severity and level of violence. That practice direction emphasises that the prosecutor must reach "an independent and impartial decision" regarding election.

The ultimate decision of whether to proceed with the matter on indictment rests with the ODPP, and if an election is made, the ODPP takes over the prosecution. However, the initial decision as to whether an election should be made relies upon the OIC or police prosecutor, and the process hinges on that initial decision. Although a general protocol exists, and two further specific protocols have been developed, there is an issue about whether additional specific protocols are needed. There would not necessarily be a need to develop a protocol in relation to each offence, but could be grouped into broader categories, following the model that exists in relation to firearm, arson and rural fire offences. Although a number of serious offences would already be covered by the protocol relating to indictable offences included in the standard non-parole scheme, there are many that would not and where guidance would be from the general election protocol only. The general election protocol lists six general factors, which are non-exhaustive, and appears to be of limited guidance regarding election. For example, one of the identified factors is "the objective seriousness of the offence". More specific protocols, such as those which exist in relation to firearm, arson and rural fire

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[234] Director, Legal Services, *Practice Direction: Referral of matters to the DPP for prosecution*, 15 January 2003.
[235] Section 58 of the *Crimes Act*.

offences, could provide a further guidance and promote greater consistency, ensuring that the ODPP is given the opportunity to approve an election in all appropriate instances.

Further consultation, such as with the ODPP and magistrates, would be needed to determine which offences should be made a priority in terms of developing protocols. It may be that the most serious offences, appropriately defined, would be the most important focus of additional protocols. Although there is already a protocol in place regarding election for offences listed in the standard non-parole scheme, only a small number of such offences exist (i.e. most are strictly indictable). Alternatively, it may be argued that the indictable offences most commonly heard in the Local Court should be given priority in regards to developing protocols.

In the Council's report on firearms offences, the recommendation was made that the relevant offences with a statutory maximum penalty of ten years or more should be dealt with on indictment, which could be achieved through removing these offences from Table 1 and Table 2. That recommendation was explicitly confined to the issue of certain firearms offences, where the Sentencing Council considers that there is a strong need for general deterrence and consistency in sentencing. It is now appropriate to raise the issue of whether all offences with a maximum penalty of ten years or more should be dealt with on indictment. In considering the issue of making more offences strictly indictable, the powerful reasons for the introduction of the scheme of elections via "Table 1" and "Table 2" should be borne in mind. These include that there are considerable benefits where indictable offences are dealt with summarily in appropriate cases. In particular, there are savings in the administration of justice, matters are resolved at the earliest opportunity, and resources of the District Court are freed to deal with the more serious matters. As stated in the second reading speech to the Bill:

> "A decision to commit the defendant for trial or sentence to the District Court has far-reaching consequences in terms of resources. For that reason alone, it is important to ensure that the resources of the District Court are being used effectively. In April 1992 a Bureau of Crime Statistics and Research study titled "Aspects of Demand for District Court Time" found that 78 per cent of all penalties imposed in 1991 in the District Court were less than two years' imprisonment. This finding suggests that significant savings in District Court time would be achieved by increased use of summary jurisdiction for those offences which would not attract penalties of more than two years, regardless of the jurisdiction in which they are tried."[236]

The Bill received wide support from outside the Government as providing a means for disposing of a wider range of appropriate offences in the Local Court, thereby using District Court resources more efficiently.[237]

A more moderate version of this proposal, compared with making such offences strictly indictable, would be to include guidance on this point in the general election protocol. For example, a requirement could be included that in deciding whether to make an election, regard should be had to the statutory maximum penalty and specifically whether it exceeds ten years imprisonment, and that in such cases, an election should be made except in exceptional circumstances.

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[236] The Hon. J. Shaw, Attorney General, *Hansard*, Legislative Council, 24 May 1995, p 119.

[237] The Hon. J. P. Hannaford, Leader of the Opposition, *Hansard*, Legislative Council, 31 May 1995. The leader of the opposition noted that the reforms would "*go some way to easing the pressure on victims*" with witnesses having to appear in only one court.

Recommendation 9
That the general election protocol should contain an overarching principle or test to be applied, namely whether a sentence could possibly be imposed which is not within the Local Court's jurisdiction, viewing the case at its worst (taking into account objective seriousness of the offence and subjective circumstances of the defendant to the extent known), and taking into account the public interest.

Recommendation 10
That additional election protocols, specific to certain types of offences, be developed between the ODPP and NSW Police, as has been done in relation to firearms offences and bushfire offences.

7.2 Role of the Prosecutor in the Sentencing Process

The quality of prosecutions in our adversarial system has important consequences. The common law judicial system in our jurisdiction has often been described as an adversarial system.[238] The adversarial procedure is bound up with notions of judicial independence and impartiality. In criminal matters, the case is presented by the prosecutor and the defence to the judicial officer: an impartial and disinterested third party with the power to impose an authoritative determination. As such the quality of the representations to the judicial officer are most important. In particular, the role of the police prosecutor is crucial in ensuring consistency in the Local Court, bearing in mind that it is police prosecutors who prosecute the vast majority of criminal matters in the Local Court.

In *Regina v Paris*[239], the Court stated that:

> "In matters of sentencing, the Crown does have an obligation to draw to the attention of the judge all relevant sentencing options and to ensure the appropriate options are not overlooked… the Crown's role is not to secure a conviction at any cost, nor is the Crown's role to secure the heaviest available penalty."

As noted by Tony Krone, Senior Lawyer of Commonwealth Director of Public Prosecutions:[240]

> "The work of the prosecutor in this [adversarial] system, is not to find the guilty party, but to present to the court in an objective manner, the evidence gathered by the investigator".

In its submission, the ODPP also noted that:

> "The prosecutor does have an important role to play in the sentencing process. While the prosecutor cannot ensure that the sentencer does not fall into appealable error, the prosecutor has a responsibility to provide the sentencer with accurate information as to the facts and the applicable law."

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[238] See for example, *Crampton v. R* [2000] HCA 60; (2000) 206 CLR 161.
[239] [2001] NSWCCA 83 at 33.
[240] Tony Krone, Senior Lawyer, Policy, Commonwealth Director of Public Prosecutions, "Police and Prosecutions", Paper presented at the 3rd National Outlook Symposium on Crime in Australia, *Mapping the Boundaries of Australia's Criminal Justice System*, convened by the Australian Institute of Criminology and held in Canberra, 22-23 March 1999, at 2.

In the Local Court context, the role of the prosecutor is also shaped by the high level of unrepresented persons who are typically poorly equipped to make appropriate submissions or address on sentencing on their own behalf. The submission of a Magistrate also pointed out that duty solicitors may sometimes lack experience, particularly in country towns, and thus the fact that an accused is represented does not necessary lessen the practical significance of the prosecutor's role in sentencing.

As noted earlier, the Court is only required to consider those matters specified in section 21A (aggravating, mitigating and other factors) of the *Sentencing Procedure Act* where the matters are known to it. In cases where the defendant is found guilty, it is essential that the prosecutor is aware of all pertinent features of the case and that these are put to the Court on sentence to ensure an appropriate sentence is given. Further, whether the prosecution provided the Court with adequate information on sentence is an important factor for the ODPP in determining whether to pursue an appeal against sentence requested by NSW Police. An appeal against sentence is unlikely to be successful where an inadequate sentence was imposed because the Court was not provided with sufficient information in the first instance. Officers in charge of the case and police prosecutors are alerted to the importance of the above by a Legal Services Division publication titled *Law Notes 02/17 - Sentencing Offenders: Ensuring Appropriate Sentences Are Given.*[241]

Due to the important role of the prosecutor in sentencing, it is clear that adequate measures must be in place in terms of information, education and training and internal procedures. In terms of ODPP lawyers, the ODPP has produced Prosecution Guidelines, an internal Sentencing Manual and Sentencing Schedules. Training is also provided to ODPP officers by in-house and external experts. ODPP officers also have access to JIRS.[242]

7.3 Police Prosecutors in NSW

Police prosecutors are part of the Legal Services of NSW Police. The Director of Legal Services is an unsworn member of NSW Police, and is legally qualified and a member of the NSW Police Senior Executive Service. The Criminal Law Division of Legal Services is headed by a Deputy Director who is also legally qualified. Police prosecutors at each court are supervised by a senior prosecutor known as the Head of Court, and also by Area Prosecutor Coordinators (APCs) who are at the rank of senior sergeant.

As at June 2003, there were about 180 police prosecutors in NSW, and there are around 50 in training at any one time.[243] From 7 July 2003, police prosecutors no longer had to seek leave to appear in Local Courts and now have the right of appearance.[244]

Police prosecutors also appear in criminal matters for numerous other government departments, statutory authorities and agencies, include the Roads and Traffic Authority, the RSPCA and local councils, under negotiated agreement. Police prosecutors also appear in other forums, such as the Coroner's Court, the Children's Court and the NSW Administrative Decisions Tribunal. The focus here however is limited the Local (criminal) Court and prosecution on behalf of NSW Police.

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[241] *Law Notes 02/17 - Sentencing Offenders: Ensuring Appropriate Sentences Are Given*, NSW Police, Legal Services, Criminal Law Division.
[242] Submission from the ODPP (3 September 2003).
[243] The Hon John Watkins MP, Hansard, Legislative Assembly at 19 June 2003, p1753.
[244] See section 36(2) of the *Criminal Procedure Act 1986.*

7.3.1 Background: Previous Studies and Recommendations on Police Prosecutions

The Police Prosecution Service in NSW has been challenged on a number of occasions, and the major studies in this respect are considered here by way of background only and with a view to addressing the issue as it relates specifically to consistency in sentencing. The second submission of Mr Les Tree, Director General of the Ministry of Police, which was a response to a request of the Council for responses to a number of specific issues, stated that the repeated questioning of the role of police prosecutors has had a negative impact on the moral of police prosecutors and has the effect of discouraging police officers from pursuing a career as prosecutors. There appeared to be a concern that the issue had already been adequately addressed in other forums and that it was unnecessary for the Council to reconsider it. However, the Council considers that the issue has not elsewhere been comprehensively dealt with specific regard to the context of sentencing, and the proposal of having prosecutions for all indictable matters dealt with summarily, rather than all prosecutions, handled by the ODPP has not previously been canvassed.[245] There have also been a number of important changes in recent years which impact on sentencing in the Local Court, including the increased (accumulated) jurisdiction and the need to implement guideline judgments, which make it appropriate to reconsider the issue in a new light. The issue also arises directly from the Council's terms of reference and was subsequently identified as an important issue in a number of submissions.

One of the recommendations of the Humphrey's Royal Commission in 1983 was that police prosecutors be abolished.[246] Subsequently, an assessment by the NSW Public Service of the transfer of police prosecutions to the Attorney General identified an increased cost of $5.9m in the first year and $4.4m in each subsequent year.[247] In 1994, a recommendation arising from an ICAC inquiry was that a trial be conducted for the conduct of summary prosecutions by the ODPP.[248] The Wood Royal Commission, in 1997, also recommended that the function of the prosecution of summary cases be progressively transferred to the ODPP.[249] Specifically, the following was proposed:[250]

> "assigning all prosecutions to the Office of the Director of Public Prosecutions, as a specialist prosecution agency, being a body separated from the investigative process, and whose members are legally qualified."

The major pressures to abolish or reduce the role of police prosecutors have arisen from concerns over the levels of independence and efficacy of police prosecutors. Although it is the practical concerns which are most relevant here, these cannot be divorced from the

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[245] For example, Justice Wood has recommended that all prosecutions be transferred to the ODPP, but did not consider limiting this recommendation to indictable matters dealt with summarily. See Justice Wood, *Royal Commission into New South Wales Police Service*, Final Report, Volume 2, [3.318] at 318.
[246] Street, Sir Laurence, Royal Commission of Inquiry into Certain Committal Proceedings against K E Humphreys, *Report*, Sydney, 1983.
[247] New South Wales Office of Public Management, Transfer of certain prosecution functions from the police to the Director of Public Prosecutions, *Report*, November 1989, p1.
[248] Independent Commission Against Corruption (ICAC), *Investigation into the relationship between Police and Criminals*, Second Report, ICAC, Sydney, April 1994 (recommended a trial be conducted for the conduct of summary prosecutions by the ODPP).
[249] Justice Wood, *Royal Commission into New South Wales Police Service*, Final Report, Volume 2 [3.318] at 318.
[250] Interim Report of the Royal Commission into the New South Wales Police Service, February 1996.

ideological issues raised by the phenomenon of police prosecutions. From an ideological perspective, the central issue, as Krone has noted, is that "If police act as prosecutors, there is effectively no boundary between police and prosecutions."[251]

In 1996, a pilot project was carried out at Campbelltown and Dubbo Local Courts, involving ODPP lawyers replacing police prosecutors at those courts for approximately 6 months. An evaluation report based on the pilot was released by the Premier's Department in May 1997, and entitled '*Prosecuting Summary Offences: Options and Implications'* ('The Waller Report').[252] It is noted that no specific mention was made of sentencing (or of consistency in sentencing) in the Waller Report.

The Waller Report identified and assessed four options:

1. The Status quo/No change option;
2. Upgraded Status Quo Option (whereby the legal services branch of the Police Service is administratively separated from operational police, and significant upgrades are made to its management and operations);
3. DPP Legal Services Option (DPP staff responsible for all prosecutions in the Local Court); and
4. DPP Legal Client Option (DPP responsible for al prosecutions but contracts out the delivery of services to the private sector).

In essence the Waller Report concluded that the status quo option was the least favourable "in terms of legal integrity, efficiency, provision of support to victims and capacity for liaison with other justice participants, and costs", and that:

> "A Summary Prosecutions system under the aegis of the Director of Public prosecutions will have high legal integrity, is likely to be more efficient, will provide a higher standard of support to victims and better liaison with other justice agencies, and will be more cost effective than the Police prosecutor Option".

This is one of the several matters in the Waller Report that is challenged by the Police in their submissions.

As Waller accepted,[253] it is important to bear in mind that the findings were based on a limited pilot. A similar observation is made by Dr Don Weatherburn, Director of the NSW Bureau of Crime Statistics and Research.[254] The submission received, in conjunction with the Waller Report, of Dr Don Weatherburn also contained an evaluation of the pilot and found that:

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[251] Tony Krone, Senior Lawyer, Policy, Commonwealth Director of Public Prosecutions, "Police and Prosecutions", Paper presented at the 3rd National Outlook Symposium on Crime in Australia, *Mapping the Boundaries of Australia's Criminal Justice System*, convened by the Australian Institute of Criminology and held in Canberra, 22-23 March 1999, at 2.
[252] Waller, K and Munro, D (May 1997) "*Prosecuting Summary Offences: Options and Implications. Second Progress Report on the Evaluation of the DPP Summary Prosecution Pilot*" Sydney: NSW Premier's Department.
253 Ibid, p5
[254] Ibid, Appendix 3, at p 2 of the submission.

> "there was no evidence of any changes in: the rate at which guilty pleas were entered; the conviction rate for persons pleading not guilty; and the time taken to dispose of defended cases."[255]

In the second submission received from the Police, it was stated in relation to the Waller Report that "the Government determined that, for a number of very valid reasons, the role of police prosecutors would be retained." The submissions also states that although proposals have been made to transfer prosecutions to the ODPP on various occasions, a "detailed business case with accurate costings including additional funding and staffing required by the ODPP" has never been formulated. It argued that the estimated costing of the ODPP option was erroneous, being based on a number of inaccurate assumptions (such as the ability of the ODPP to realise faster work practices) and the design of the pilot (such as the ODPP deploying more senior advocates and twice the number of police prosecutors).

The Public Accounts Committee *Inquiry into Court Waiting Times* states that the Police made a number of changes in response to the Premier's Department Report, including:[256]

1. Introducing a code of ethics for police prosecutors, which covers the ODPP Guidelines, the NSW Barristers' Rules and the Solicitors' Rules;
2. Establishing a Professional Standards Section within the Court and Legal Services Division to promote ethical standards and further study;
3. Establishing benchmarks to measure the quality of evidence presented to the Local Court; and
4. Introducing quality control and integrity audits to monitor ethical and professional performance.

These reforms would appear very positive steps towards promoting high standards of ethical conduct amongst police prosecutors.

Another change which has occurred, and which indicates that some of the findings in the Waller Report may now be out of date, is the strengthening of practices and procedures concerning victim support by police prosecutors. The Waller Report found that the DPP had superior victim support capacity, and noted that the Police Services' "Commitment to Service" does not contain an explicit requirement relating to victim support nor did any Standard Operating Procedures cover the matter. Since the release of the Waller Report, the NSW Police Service has launched a Victims Support Policy, and there is also a statutory obligation on Police Service employees to implement the provisions of the Charter of Victims Rights (under the *Victims Rights Act* 1996). Police are also represented on the NSW Victims Advisory Board and Victims Interagency meetings.

In 2002, the Public Accounts Committee (a Legislative Assembly Statutory Committee) released the report of its *Inquiry into Court Waiting Times.* Recommendations 3 of that report states that, in conjunction with a then current review of Court and Legal Services Division by the NSW Police, "NSW Police should consider the transfer of the prosecution function from NSW Police to the DPP."

Elsewhere in Australia, two other major developments have been the Memorandum of Understanding for the takeover of summary prosecutions entered into by the Northern

[255] Public Accounts Committee, *Inquiry into Court Waiting Times*, No 133, 2002, at 18.
[256] Public Accounts Committee, *Inquiry into Court Waiting Times*, No 133, 2002, at 19.

Territory Commissioner of Police in February 1998, and the findings of Project Pathfinder in Victoria.[257] The ACT, Commonwealth and Northern Territory are the only jurisdictions where the ODPP has control over summary prosecutions rather than the police and routinely exercises the responsibility to conduct summary prosecutions.[258]

It appears that the NSW Government currently does not support the recommendation to phase out police prosecutions. In June 2003, arguments against the Royal Commission's recommendation were canvassed by the Minister for Police, the Hon. John Watkins.[259] Mr Watkins referred to:

1. The benefits the NSW Police Service derives from having a prosecution service;
2. That the reasons behind the recommendation could be addressed in a different way, namely, by enhancing the independence of police prosecutors;
3. Police prosecutors in fact have a high level of independence and are subject to stringent oversight; and
4. Police prosecutors are specially trained and have a high level of skill.

The need to abolish police prosecutions or reduce the role of police prosecutors was raised in a number of submissions. One Magistrate identified two practical concerns: that police prosecutors do not understand the role of the Crown in sentencing, and that they do not comply with the Solicitors' Rules or Barristers' Rules. This concern is challenged by the Police. The submission of another Magistrate identified the following practical reasons in favour of the change:

- The ODPP must determine any appeals on grounds of inadequacy anyway;
- The ODPP are bound to follow the ODPP guidelines on sentencing as officers of the Court, and these guidelines cover the making of submissions where the prosecutor is of the view that the Magistrate is falling into appealable error;
- ODPP lawyers have direct access and experience with using JIRS;
- ODPP lawyers are familiar with current sentencing decisions by higher courts; and
- In country areas, the same ODPP lawyers handle appeals from the Local Court and are therefore in touch with 'tariffs' applicable in that Court.

7.3.2 Education and Training

It could be argued that education and training of police prosecutors is more important at present than it has ever been, as sentencing in the Local Court has become more complex. More indictable matters are being dealt with summarily, and recent developments in the law such as guideline judgments affect sentencing in the Local Court.

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[257] Tony Krone, Senior Lawyer, Policy, Commonwealth Director of Public Prosecutions, "Police and Prosecutions", Paper presented at the 3rd National Outlook Symposium on Crime in Australia, *Mapping the Boundaries of Australia's Criminal Justice System*, convened by the Australian Institute of Criminology and held in Canberra, 22-23 March 1999, at 2, 12.

[258] See Tony Krone, Senior Lawyer, Policy, Commonwealth Director of Public Prosecutions, "Police and Prosecutions", Paper presented at the 3rd National Outlook Symposium on Crime in Australia, *Mapping the Boundaries of Australia's Criminal Justice System*, convened by the Australian Institute of Criminology and held in Canberra, 22-23 March 1999, at 10.

[259] The Hon John Watkins MP, Hansard, Legislative Assembly at 19 June 2003, p1753.

In order to become a police prosecutor, it is mandatory to undertake and successfully complete the Prosecutors Education Program (PEP) conducted by the Prosecutor Training Unit. The Program involves seven months face-to-face education, and an officer must undergo two years practical training before he or she can act without supervision.

One module (two lecture periods) of the PEP is devoted to sentencing in the Local Court, and this area is examinable. The module covers:

- The purposes and principles of sentencing;
- The role of the prosecutor in sentencing;
- The sentencing options available to judicial officers in NSW;
- The meaning of “plea of guilty”;
- Appealing;
- Guideline judgments from the NSW Court of Appeal;
- The application of Barristers’ Rule 71 to police prosecutors;
- ODPP policy and guidelines relating to sentencing;
- The circumstances when an accused will be permitted to withdraw a guilty plea and when a court may reject a guilty plea; and
- NSW Police Service Policy regarding “letters of support” for defendants in the sentencing process and section 23 of the *Crimes (Sentencing Procedure) Act 1999*.

At present Police prosecutors do not have access to JIRS (see Recommendation 1).[260] NSW Police, Legal Services, subscribes to a number of legal texts regarding sentencing and these are available to police prosecutors in hard copy, CD ROM and/or via the police intranet. The NSW Police Law Library also purchases sentencing publications, such as the Sentencing Manual by Ivan Potas. Under agreement with the ODPP, Legal Services also subscribes to the ODPP Advance Notes, which contain comprehensive guidance on sentencing principles.

Although details of the PEP and the information and resources made available to prosecutors was provided by the joint submissions of the Ministry of Police and the Commissioner of Police, no details of any *ongoing* training and education was provided.

Recommendation 11
The level of ongoing education and training provided to police prosecutors should be enhanced, in particular to ensure adequate knowledge and awareness of recent reforms to sentencing law in NSW.

7.3.3 Conduct and Ethical Duties

Although it is not disputed that police prosecutors are bound to comply with relevant standards of conduct and ethics, the critical issue is that police prosecutors (who have a statutory right of appearance) are not officers of the court and do not have obligation to the court, unlike officers of the ODPP and advocates. There is also a real question about how the compliance of police prosecutors with the professional ethics of lawyers could be tested, and how they could be held accountable to these standards when they are not admitted.

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[260] Commander Laycock has provided information to the Sentencing Council indicating that Legal Services of the NSW Police will install JIRS with a full set of guidelines early in the 2004-2005 financial year.

However, in respect of their conduct, Police Prosecutors are inter alia subject to supervision by the Police Integrity Commission, Ombudsman, Police Executive, Police Professional Standards and SCIA, Police Audit Branch, Legal Services internal audit system, Local Court stakeholders, the Government through its various Parliamentary Committees including the Cost to Local Government and Public Accounts, Appellant Courts and the Magistrates.[261]

The conduct and ethical duties of police prosecutors are governed by a range of sources. Guidance on ethical responsibilities is available to police prosecutors on the Legal Services Intranet site, including a document entitled '*Ethics for Legal Services'*. This document specifies that "members of Legal Services" must apply:

- The NSW Police Service Code of Conduct, Statement of Values and Corruption Prevention Plan;
- The ethical principles contained in the *Ethics for Legal Services* policy (*see below*);
- Professional Standards of the NSW Law Society and the Bar Association;
- In criminal prosecutions, the Director of Public Prosecutions Policy and Guidelines.

The ethical principles contained in the *Ethics for Legal Services* document cover duties and responsibilities relating to:

1. Legal process (model litigant duties, privilege, choice of Counsel, opinion shopping, discovery, use/abuse of legal process and indemnities);
2. Key relationships;
3. Clients;
4. External law firms;
5. External relationships; and
6. Community.

Standard Operating Procedures incorporate the ODPP Prosecution Guidelines. Guideline 28 of the ODPP Prosecution Guidelines relates to Barristers' Rule 71 and Solicitors' Rule A71, both of which relate to the role of the prosecutor in the sentencing process. A document entitled "DPP Resources" is available on the Legal Services Intranet site. This contains hyperlinks to the DPP Prosecution Guidelines and their Advance Notes. Police prosecutors also receive training in relation to ODPP Guidelines and Policy as part of the PEP.

Clearly, there is a need to ensure that the obligations which in principle police prosecutors must comply with are given effect in practice. This raises issues relating to:

1. The level of education and training provided to ensure that police prosecutors are aware of and able to carry out their ethical obligations;
2. Enforcement and monitoring of compliance; and
3. The consequences or penalties that exist for breaching the obligations.

The education and training relating to ethical obligations centres on the component of the PEP and the information contained on the Legal Services Intranet. The joint submission by Police did not contain any information relating to points two and three above. As noted earlier, the Public Accounts Committee Report stated that NSW Police had put in place certain measures with regards to ethical duties of police prosecutors, including establishing

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[261] See information provided to Sentencing Council by Commander John Laycock on 15 June 2004.

benchmarks, quality control and integrity audits. However, the Council did not receive any information from Police relating to such policies or programs. This raises issues relating to:

- The level of training and education provided to ensure that police prosecutors are aware of and able to carry out their ethical obligations;
- Compliance enforcement and monitoring; and
- The consequences or penalties that exist for breaching the obligations.

Different views have been expressed as to the extent to which police prosecutors actually comply with the above conduct and ethical guidelines in practice, as well as their ability to comply, in terms of awareness and training. It has been noted, elsewhere, by Krone, that[262]:

> "Many police services now claim to operate in accordance with the prosecution policy established by the DPP in each State. The difficulty is that whilst the police may claim to give effect to DPP prosecution policy internally, there is no way in which we can be confident that that is so".

In its submission, the DPP proposed that police prosecutors should receive training in relation to applying the ODPP Prosecution Guidelines, including the need to refer matters to the ODPP on the question of an appeal against sentence thought unduly lenient.

In its submission, the Law Society of NSW stated that police prosecutors who are not trained as lawyers and not admitted to legal practice are not bound to comply with the Prosecutor's Duties as set out in the Advocacy Rules of the *Professional Conduct and Practice Rules* 1995 ('The Rules'), made by the Council of the NSW Law Society under the *Legal Profession Act* 1987 in the same way that are persons who have been admitted. The Advocacy Rules are Rules A.15 to A.72 of the Rules, and apply to all legal practitioners when acting as advocates. These Rules cover, among other matters:

- the efficient administration of justice (A.15 to A.15B);
- independence – avoidance of personal bias (A.18 to A.20);
- frankness in court (A.21 to A. 31A);
- responsible use of court process and privilege (A.35 to A.40);
- integrity of evidence (A.43 to A.50);
- duty to opponent (A. 51 to A. 58); and
- prosecutor's duties (A.62 to A.72).

The view of the Law Society of NSW is that a mechanism should be put in place whereby lay prosecutors are required to adhere to the relevant portions of the Advocacy Rules, and that prosecutors will be most effective in assisting consistency in the court by observing those Rules. It appears that police prosecutors are indirectly subject to those Rules through SOPs (which give effect to ODPP Prosecution Guidelines, and which in turn incorporates various provisions of the Rules). However the issue remains whether police prosecutors should be subject to the relevant provisions of the Rules in a more direct way and in a manner equivalent to prosecutors who are admitted. Overall, it would seem to be consistent with the

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[262]Tony Krone, Senior Lawyer, Policy, Commonwealth Director of Public Prosecutions, "Police and Prosecutions", Paper presented at the 3rd National Outlook Symposium on Crime in Australia, *Mapping the Boundaries of Australia's Criminal Justice System*, convened by the Australian Institute of Criminology and held in Canberra, 22-23 March 1999, at 4.

notion that police prosecutors have appropriate expertise and are competent advocates that they should be held to the same standards as legally qualified advocates and be regarded for these purposes as officers of the court. Since police prosecutors now have the right of appearance, and their status has been elevated to that of legal practitioners for that purpose, it would seem a logical progression that police prosecutors be held to the same standards as legal practitioners also.

Since an increasing proportion of police prosecutors are in fact legally qualified and subject to the regime of the *Legal Profession Act*, it would also be more consistent public policy to ensure that all police prosecutors are subject to the same advocacy standards.

7.3.4 Submissions on Sentence

The Council received a response from the Ministry of Police and the Commissioner of Police addressing the specific issue of "the circumstances in which police prosecutors should address on sentence" ("the second joint submission"). Commander Laycock of NSW Police, who is a member of the Council, also provided the Council with findings from his preliminary consultations with Prosecuting Area Coordinators in relation to the current practice of police prosecutors regarding addressing on sentence.

As provided in the second joint submission, the circumstances in which police prosecutors should address on sentence are contained in the ODPP Prosecution Guidelines, in particular Guideline 28 (which refers to Barristers' rule 71 and Solicitors' rule A71). This area is also covered in the PEP. The joint submission also stated that relevant case law, s 43 of the *Sentencing Procedure Act* and s 38 of the *Criminal Procedure Act* guide the circumstances in which police prosecutors should address on sentence. Reference was also made to the legal resources to which NSW Police Legal Services subscribes, the implication being that police prosecutors have access to the relevant case law, legislation and commentary.

The second joint submission received from the Police also stated that the accepted practice is to address on sentence when the court is contemplating a bond under s 10 or an adjournment under s 11 (that is, a deferral of sentence for some purpose such as taking part in rehabilitation), and that there is a duty to address on sentence when a prosecutor considers that the court may give an inappropriate or manifestly inadequate sentence or may otherwise fall into appealable error.

Information regarding the results of Commander Laycock's consultations was tabled at the Council's meeting in March 2004. Three major points arose from the consultations. First, police prosecutors do not normally address on sentence. However, prosecutors always address when a dismissal or conditional discharge under s 10 of the *Sentencing Procedure Act* is being contemplated by the Magistrate; when the sentence contemplated is manifestly inadequate; or when the Magistrate is about to fall into a sentencing error. Second, police prosecutors are not generally precluded from addressing due to time constraints in busy courts. However, in very busy courts it can be extremely difficult to address on sentence due to lack of time. Thirdly, sometimes police prosecutors may be directed that there is no need to address on sentence, but this depends on the Magistrate. Generally, Magistrates do not give such a direction. However, if such direction is given, prosecutors still address when a "section 10" bond is being contemplated, when the sentence is manifestly inadequate or there may be a sentencing error.

Due to the role of the prosecutor in the Local Court, it is important that in all appropriate cases, prosecutors address on sentence, that the decision whether or not to address on sentence is made in a consistent way and that submissions are of a high quality. It could reasonably be concluded that addressing on sentencing in appropriate cases enhances the quality of decision-making in sentencing (since the sentencing magistrate's knowledge of the facts is limited by the information before the Court) as well as consistency in sentencing.

A number of submissions raised an issue that police prosecutors rarely make submissions on sentencing, or otherwise do not provide sufficient information, to the sentencing magistrate. The submission of a Magistrate who had acted as such for four years stated that in his experience, the DPP often make excellent submissions and refer to appropriate cases and legislation and that the submissions are typically fair and do not push for a particular outcome. In comparison, that magistrate had "never been handed a case, or even referred to a case of legislation on sentencing by a police prosecutor".

Clearly there are a number of practical issues to consider in terms of when and how prosecutors should make submissions on sentence. In practice, the ability of prosecutors to participate in the sentencing process is influenced by a number of factors and this was noted in a number of submissions. The Legal Aid Commission stated that "the workload of the Local Court is such that prosecutors are seldom called on to address on penalty". The DPP's submission also made a similar point, stating that:

> "Ideally, the prosecutor will assist the court to avoid error (and increase consistency) by providing relevant sentencing statistics and cases. However, the volume of work that must be dealt with in the Local Court within very limited timeframes, and the consequent heavy workloads of all concerned, does not in practice generally allow time for the production or detailed consideration of such material".

Thus any observed tendency for police prosecutors not to provide submissions on sentence should be seen in the context of these pressures on the Court, rather than being seen in isolation as a practice of police prosecutors. In addition to the court's workload, other relevant factors were noted. In the joint submission of the Ministry of Police and Commissioner of Police, the experience of the particular magistrate and whether he or she has a known tendency of unduly lenient sentencing were identified as further factors which affect the degree of involvement of prosecutors in the sentencing process. The joint submission stated that although police prosecutors are frequently called upon to address on sentence in the Children's Court, only rarely does this occur in the Local Court.

Putting aside the fact that time pressures may not allow for lengthy submissions in every case, it is desirable for all prosecutors to have the capacity to address on sentence and for prosecutors to address on sentence in appropriate cases, determined as such according to consistent criteria. The joint submission of Police pointed out that there is at present no practice note (which could be issued by the Chief Magistrate) on the issue of prosecutors addressing on sentence, and prosecutors are unaware whether magistrates in general want prosecutors to take a more active role. It may be desirable for the Chief magistrate to issue a Practice Note as regards addresses on sentence by prosecutors, or that some other form of guidance is developed to provide greater certainty on when and how prosecutors should address on sentence. It may also be desirable for more specific guidance to police prosecutors on where a magistrate can be regarded as being about to fall into appealable error.

Clearly the notion of police prosecutors taking a more active role in the sentencing process raises the issue of court efficiency and waiting times. This was noted in the joint submission of Police, where it was stated that court lists and allocations may need to provide additional time to facilitate the greater involvement, and that this may be counter to the high priority placed on reducing court waiting times. However, there is an at least equal importance to be placed on quality judicial decision-making in the sentencing process. If it is accepted that a more active role of prosecutors in sentencing would increase quality and consistency of sentencing, then surely expediency can be to some extent offset by this gain. Further, efficiency of court process has both a time element and a quality element, and allowing greater time in order to facilitate address on sentence does not necessarily run counter to efficiency. Increasing the number of magistrates would seem to be the proper solution to reducing court waiting times, rather than limiting the ability to address on sentence. Further, the overall effect of higher quality and consistent sentencing in the Local Court may even be an overall *reduction in* court time: if the errors in sentencing can be reduced then this may translate into a lower number of appeals.

Recommendation 12
In relation to police prosecutors, measures should be taken to promote the proper implementation of the relevant provisions of the ODPP Prosecution Guidelines regarding the circumstances in which to address on sentence. This could involve:

1. **Developing protocols which further guidance and greater clarity on the circumstances in which a magistrate can be regarded as falling into appealable error, for the purpose of determining when there is a duty to address on sentence;**

2. **The provision of ongoing education and training on the circumstances in which to address on sentence; and/or**

3. **The Chief Magistrate issuing a Practice Note on the circumstances in which prosecutors should be called upon to address on sentence, and how such an address should be made.**

7.3.5 Police Prosecutions and Appeals

Police prosecutors have the key role in lodging appeals in relation to offences dealt with in the Local Court of which a police prosecutor has carriage, and the appropriate process is outlined in police guidelines and Standard Operating Procedures (SOPs).[263] The main issue is ensuring that theory is matched with practice. It is correct to say that there is ample guidance to police prosecutors on *how* to appeal, but there is much less guidance on the question of *when* to appeal.

There are essentially three stages to the appeal process for an appeal against sentence:

1. The prosecutor submits a request to Appeals and International Law Unit (AILU) of the Criminal Law Division of Legal Services, NSW Police;

[263] The Legal Services Division of NSW Police provided the Council with information on procedures regarding sentencing “appeals” to the District Court, where a police prosecutor has carriage of the matter in the Local Court. Appeal procedures are outlined in Standard Operating Procedures (titled “Appeals against Sentences”) as well as two “Law Notes” produced by the Legal Services Division (Law Note 32/2002 and Law Note 17/2002).

2. The AILU then considers the appeal application and determines whether to make a request to appeal to the ODPP and, if it is considered that there is a real prospect that an appeal will be initiated, the AILU submits a request for appeal to the ODPP; and
3. The ODPP considers the request and has ultimate responsibility for the decision as to whether to initiate an appeal.

The joint submission of the Ministry of Police and the Commissioner of Police provided data on such appeals. Between December 2002 and December 2003, 187 applications for appeal on law or inadequacy of sentence were processed by the AILU (nearly all of which are made by police prosecutors). The ODPP received 75 appeals in 2002, and 120 in 2003, and 46 and 68 of those were 'approved' and lodged by the ODPP in 2002 and 2003 respectively. Approximately half of the number of appeals lodged by the ODPP were upheld in the District Court.

The prosecutor can make a request in relation to any case and there are no specific criteria that must be met before a request can be lodged with the AILU. There is no protocol or written instructions given by the ODPP to NSW Police in terms of sentencing "appeals" where the Police Prosecution Service has carriage of the matter.[264]

In its letter to the Council dated 30 October 2003, the Legal Services Division of NSW Police identified the following factors as those which in practice would be considered by the prosecutor when deciding whether to request an appeal:

- The type of offence;
- Criminal record of the offender;
- Prevalence of the offence;
- Seriousness of the offence, including any injuries occasioned to victims;
- Penalty imposed by the court; and
- The need for deterrence, general or otherwise.

However, these factors do not appear anywhere in the form of a protocol or written guideline to police prosecutors.

In terms of procedural requirements, the prosecutor's request is to include:

- A comprehensive report detailing submissions by both prosecution and defence;
- Copies of all paperwork, including charge sheets, facts sheets and assessment reports;
- Any comments made by the sentencing magistrate;
- Reasons in support of the view that the sentence was manifestly inadequate.

It is also possible, although less common, for the informant police officer to request an appeal. Normally this request would also be lodged with the Appeals and International Law Unit.

The AILU, in deciding whether to make a request to the ODPP, considers a range of factors and is not a checklist as such. The AILU's determination is based on whether or not there is a real prospect that the ODPP would initiate an appeal.

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[264] Letter from the DPP to the NSW Sentencing Council, dated 22 October 2003.

From the above, it can be said at the initial stage, the decision whether or not an appeal should be made rests on the virtually unaided discretion of the individual police prosecutor. Although there are procedures in place regarding the making of an application for an appeal by the police prosecutor, there is inadequate guidance in place to ensure that applications are made in *all appropriate cases* and in a *consistent* manner. The Council considers that additional protocols should be developed in regards to *when* and in *what circumstances* a prosecutor should exercise his or her discretion to request an appeal.

Recommendation 13
That a clear written protocol should be developed on when an appeal should be requested by a police prosecutor and implementing procedures to ensure that the question of whether an appeal against the leniency of sentence is appropriate be addressed by prosecutors in a systematic way at the initial stage.

7.3.6 Options for Reform

A significant option for reform could involve replacing police prosecutors with DPP lawyers in all Local Court matters which could assist in promoting consistency in sentencing the Local Court. Such could occur through a phased transition, as was recommended in the 1997 Royal Commission. Having one body conducting prosecutors would assist with consistency, however, the material and evidence does not enable the Council to conclude one way or the other whether police prosecutors who perform a difficult and commendable service should be changed. Such is a powerful argument in support of the status quo.

This is such a complex area that it would merit examination in its own right by a body with appropriate power rather than collaterally to the issue of how best to promote consistency in the Local Court.

Nevertheless having regard to its terms of reference and the issues raised, the Sentencing Council (by majority) considers it appropriate to express a favoured view qualified by it being specifically advanced only upon the sole and specific ground (and not otherwise) of being a way to improve or promote consistency in sentencing in the Local Court. The Sentencing Council (by majority) favours the alternative "B" below.

Although the issue has previously been considered on numerous occasions, a number of recent changes to sentencing have taken place that properly require the issue to be revisited, and which provide compelling justification for change. In general, a number of important legislative changes have occurred, making sentencing principles and practice far more technical and complicated. It could well be concluded that only a qualified legal practitioner is appropriately placed to carry out prosecutorial functions in such an environment. In particular, the introduction of the standard non-parole sentencing scheme (often described as a new code) and the system of guideline judgments has made for a far more complex sentencing environment. Further, another important trend to consider is that an increasing proportion of table offences are being dealt with summarily, by election. The Local Court is increasingly dealing with serious offences and has extensive powers in relation to them. The high proportion of unrepresented defendants in the Local Court, which has remained relatively stable over time, is another factor in favour of ensuring that prosecutors are suitably qualified and that prosecution is of the highest quality.

In its submission, the DPP stated that implementing this recommendation would enhance the professionalism of the Local Court and improve the consistency in sentencing. It notes the following three advantages of the DPP taking over all prosecutions:

1. Providing greater support to the magistracy in the sentencing process, through provision of relevant material and oral submissions (as now occurs in sentencing proceedings before the higher courts);
2. identifying matters that should not be dealt with summarily (ie matters where an election should be made to have the prosecution dealt with on indictment);
3. identifying sentence decisions that should be appealed.

It is acknowledged that other issues impact on the feasibility of this option. However, there are worthwhile alternatives to completely abolishing police prosecutions, which would also improve the current situation. Options to consider involve the DPP being responsible for certain types of matters, such as:

a) all indictable offences where an election is made that the matter be dealt with summarily;
b) all offences covered by the standard non-parole sentencing scheme; and/or
c) all offences in respect of which a guideline judgment has been promulgated.

The following are listed as alternatives to consider:

A. Maintenance of the status quo (at least pending receipt of the Government's response to the Public Accounts Committee Report);

B. ODPP lawyers should be responsible for prosecuting all matters in the Local Court, including summary matters, all indictable matters and prosecutions on behalf of other bodies and authorities;

C. ODPP lawyers should be responsible for prosecuting all indictable offences dealt with summarily;

D. ODPP lawyers should be responsible for prosecuting all indictable offences dealt with summarily that are covered by the standard non-parole sentencing scheme;

E. ODPP lawyers should be responsible for prosecuting all indictable matters dealt with summarily in respect of which a guideline judgment has been promulgated.

Note that if option "B" above was implemented, certain recommendations in this Report proposing less radical changes to police prosecutions would only need to be implemented in the interim, as temporary measures.

8. OTHER WAYS TO IMPROVE CONSISTENCY

8.1 Judicial Information

A number of submissions stressed the need to ensure that the availability and content of information available to sentencing magistrates are at an optimal level. In its submission, the Legal Aid Commission stated that:

> "[E]ffective systems should be introduced for all magistrates to be provided with case law and sentencing statistics in the context of the Local Court jurisdiction. The Local Court has limited time available during the sentencing process due to the sheer volume of the caseload. As a consequence innovative measures are required to support magistrates to achieve consistency in sentencing through improved access to statistics data and case law principles".

In its submission, the DPP also stressed the need to promote measures which enable judicial officers to readily identify the relevant range and penalty type from the large volume of case law and statistics now available.

Some specific issues were raised in relation to the content of statistical information available. The DPP stated that data for Local Court sentences which were overturned on appeal to the District Court need to be included in sentencing statistics. This issue raised in the submission of a magistrate, who stated that because Local Court sentencing patterns do not reflect appeal results, and statistics on variations of Local Court sentences by the District Court are not readily available, the present system has significant potential to cause errors in the Judicial Commission's sentencing statistics. It was stated that, to be regarded as reliable, sentencing statistics need to take into account the variations on appeal.

The Law Society of NSW also emphasised the need for magistrates to have access to current information about locally available support, treatment and rehabilitation services and programs.

Recommendation 14
That statistical resources be reviewed to ensure that they incorporate variations on appeal from sentences imposed in the Local Court, in order that they provide sentencers will accurate information.

Statistics relating to variations on appeal from sentences imposed by the Local Court should be made readily available.

8.2 Judicial Education

In a submission to the Sentencing Council, a District Court Judge stated that some magistrates "seem to be unaware of some basic principles of sentencing" and provides three examples of practices by certain sentencing magistrates in support of this view. His Honour's view is that disciplinary action is often needed to ensure certain magistrates cease such practices, and that compulsory judicial education in basic sentencing principles should be improved.

Although some anomalies may exist, it is generally thought that the level of knowledge of sentencing principles amongst magistrates is at an appropriate level and that this is not a major factor behind any inconsistency in sentencing that currently exists.

8.3 Guidance issued by the Chief Magistrate

In its submission, the NSW Department of Corrective Services suggested that the Chief Magistrate be given the power to issue “binding directives” to magistrates to assist in achieving greater consistency in sentencing in the Local Court. Although such a meaning was probably not intended, the term “directive” would seem to entail guidance on sentencing particular offenders. Clearly, such “directives” could not properly relate to a specific offender, as this would affront the principle of judicial independence between members of the court, would impose unwarranted interference with judicial discretion and is certainly beyond existing power. However, it may well be appropriate to have some form of guidance issued by the Chief Magistrate and such guidance could simply take the form of a practice direction within power. However, it is thought generally that the matter of guidance, either in relation to particular offences or sentencing options, is for the Court of Criminal Appeal.

8.4 Sentencing Guidelines Councils

Another option would be to confer powers on a statutory body to issue a form of direct and binding sentencing guidance for the Local Court. An interesting model to consider exists in England, where a “Sentencing Guidelines Council”, rather than the court, issues guidelines judgments. The new Sentencing Guidelines Council (the Council) met for the first time in March 2004, and its current chair is Lord Chief Justice Woolf.

The Council is established under the *Criminal Justice Act* 2003 and is to consist of 12 members, which are to include the Lord Chief Justice (as chair), seven judicial members[265] and four non-judicial members. Non-judicial members must include one person with experience in each of the following areas:[266]

1. Policing;
2. Criminal prosecution;
3. Criminal defence; and
4. The promotion of welfare of victims of crime.

Its legislative function is to create a comprehensive set of sentencing guidelines for all offenders.[267] Currently, guidelines are issued by the Court of Appeal for serious offences with assistance from the Sentencing Advisory Panel, with the Magistrates Association issuing guidelines for less serious offences.

The Council has the power to issue “sentencing guidelines” and “allocation guidelines”. Sentencing guidelines relate to the sentencing of offenders and may be general in nature or limited to a particular category of offence or offender[268]. Allocation guidelines are guidelines

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[265] The judicial members must include a Circuit judge, a District Judge (Magistrate’s Courts) and a lay justice, and may include a Lord Justice of Appeal of a judge of the High Court: subss 167(2) and (3) of the *Criminal Justice Act* 2003.

[266] Subss 167(4) and (5) of the *Criminal Justice Act* 2003.

[267] Sections 167-173 of the Act relate to “sentencing and allocation guidelines”.

[268] S 170(1) of the *Criminal Justice Act* 2003 (UK).

relating to decisions by a magistrates' court as to whether an offence should be dealt with summarily or by trial on indictment.[269]

The Council may consider whether to frame sentencing guidelines on its own motion, and must consider whether to do so where the Sentencing Advisory Panel or the Secretary of State makes a proposal that it do so. The Council must have regard to certain factors when deciding whether to frame a sentencing guideline, including "the need to promote consistency in sentencing".[270] "The need to promote consistency in decisions" is also a factor that must be considered in regards to whether to issue an allocation guideline.[271]

When the Council has prepared sentencing guidelines or allocation guidelines, it must publish them as draft guidelines and then, after consult with certain persons and bodies, it may issue the guidelines as definitive guidelines.[272] Importantly, *every* court *must* have regard to any relevant guidelines in sentencing an offender or exercising any other function relating to the sentencing of offenders[273]. Also, any court imposing a sentence must state the court's reasons for deciding on a sentence of a different kind or outside the range where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate for the offence in question.[274]

It may be worth considering to whether a similar body should be established in NSW.

8.5 Grid Sentencing

"Grid sentencing" is used most widely in the United States, and is a system whereby a grid is provided by statute for determining sentences in individual cases. The NSW Law Reform Commission has previously considered the various types of grid sentencing systems that exist.[275] It noted that the systems that have been introduced contain important differences, including that some are voluntary whereas others are mandatory. Other differences relate, for example, to objectives and philosophies and the types of offences covered. Overall, it should be noted that the various grid systems that have been introduced differ in terms of how far judicial discretion is confined.

The accepted view in Australia appears to be that grid sentencing fails to strike the right balance between consistency and judicial discretion. The Australian Law Reform Commission and the Victorian Sentencing Committee has described one widely known version of grid sentencing (the Minnesota system) as being overly rigid.[276] The NSW Law Reform Commission concluded that:[277]

> "Consistency [in terms of certainty in outcome] may be increased at the expense of dispassionate consideration of a range of other factors [other tan the offenders criminal record] which might be relevant when deciding upon the appropriate punishment".

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[269] S 170(1) of the *Criminal Justice Act* 2003 (UK).
[270] S 170(5)(a) of the *Criminal Justice Act* 2003 (UK).
[271] S 170(6)(a) of the *Criminal Justice Act* 2003 (UK).
[272] S 170(8) of the *Criminal Justice Act* 2003 (UK).
[273] S 172 of the *Criminal Justice Act* 2003 (UK).
[274] S 174(2)(a) of the *Criminal Justice Act* 2003 (UK).
[275] NSWLRC, *Sentencing* (Discussion Paper 33, 1996) at [6.51] to [6.66].
[276] Noted in NSWLRC, *Sentencing* (Discussion Paper 33, 1996) at [6.51] to [6.66].
[277] NSWLRC, *Sentencing* (Discussion Paper 33, 1996) at [6.58].

Five fronts have been identified on which grid sentencing can be criticised:[278]

1. Policy (limiting judicial discretion and shifting discretion to prosecutors);
2. Process (causing judges and prosecutors to avoid them);
3. Technocratic (too complex and difficult to apply);
4. Fairness (requiring that very different defendants receive the same sentence); and
5. Normative (leading to too many prison sentences; too harsh).

The Legal Aid Commission, in its submission, stated that it did not support grid sentencing, and asked that if the Sentencing Council proposes to recommend such a system be introduced in NSW that it be the subject of a separate request for submissions. The Legal Aid Commission emphasised in this context that "the drive for consistency in sentencing must not be at the cost of judicial discretion", and that it is imperative that the sentencer always appropriately address "the subjective circumstances of the particular offender".[279]

Consistent with the above, the Council does not support the introduction of grid sentencing to improve consistency in sentencing in the Local Court.

8.6 Standard Non-Parole Scheme

As discussed earlier, the standard non-parole sentencing scheme does not apply to the Local Court. One option would be to have a similar scheme applying to the offences covered by the standard non-parole scheme when they are dealt with in the Local Court. It could be argued that this would encourage consistency in relation to sentencing of those offences wherever dealt with. However, the Council's view is that this would involve unwarranted interference with judicial discretion since non-custodial sentencing options will be appropriate in many cases and should not be discouraged. The fact that an election has not been made to deal with the charge on indictment indicates that a non-custodial sentencing option may well be appropriate. However, this of course presumes that the decision not to make an election was appropriate (*see further Pt 7 Prosecutorial Practice and Promoting Consistency in Sentencing*).

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[278] Cited in NSWLRC, *Sentencing* (Discussion Paper 33, 1996) at [6.64].
[279] Hunt CJ at CL, *R v Wakefield* (1994) 34 NSWLR 200 at 207.

Appendix 1 - Letter from Council Requesting Submissions

2003

«Adressee»
«Position»
«Organisation»
«Address_1»
«Address_2»

Dear

The NSW Attorney General has asked the NSW Sentencing Council to prepare a report on how best to promote consistency in sentencing in the Local Court.

In particular, the NSW Sentencing Council will be considering the following issues:

1. Current measures to promote consistency;
2. Whether consistency might be affected by the non-availability of sentencing options such as Periodic Detention or from the non-availability of supervision services;
3. The role of prosecutorial practice in ensuring consistency; and
4. Suggestions for ways to improve consistency.

In order to assist the Council in its task, I invite the «Organisation» to make a written submission addressing one or more of the issues set out above.

Submissions should be sent to:

The Executive Officer
NSW Sentencing Council,
GPO Box 6,
Sydney NSW 2001

The closing date for submissions is September 2003.

I look forward to receiving the submission of the «Organisation».

Yours faithfully

The Hon A. R. Abadee RFD QC
Chairperson

Appendix 2 - Letter to Ministry of Police and the Commissioner of NSW Police requesting further submission

24 March 2004

Dear ,

Re: The NSW Sentencing Council's reports on "how best to promote consistency in sentencing in the Local Court".

As you will recall, the NSW Sentencing Council ('the Council') is currently working on a report on how best to promote consistency in sentencing in the Local Court. In referring this issue to the Council, the Attorney General identified 'the role of prosecutorial practice in ensuring consistency' as being an issue that the Council might like to consider.

The preparation of this report is now well advanced with finalisation expected in the not too distant future. A number of issues have emerged which will need to be carefully considered. Some of these issues are directly relevant to the Police. At its last meeting, the Council considered that these issues should be further explored by the Police before the Council finalises its report.

As you will recall, a joint submission by the Commissioner for Police and the Ministry of Police was made in relation to this report. The Council now wishes to seek your further submissions in relation to the following specific issues:

1. The role of police prosecutors in sentencing generally;
2. The circumstances in which police prosecutor should address on sentence;
3. The role of police prosecutors in appeals and in raising matters with the DPP (including processes and protocols generally and specifically in initiating appeals);
4. The merits of having prosecutors from the Office of the Director of Public Prosecutions take carriage of all indictable matters in the Local Court, or alternatively, a subset of those matters such as those identified under the standard non-parole sentencing scheme;
5. The system for appeals between the Local Court and District Court (including the lack of reasons for sentence exchanges between the two);
6. The issues of ethics and conduct (including compliance with the DPP's prosecution guidelines at the local court level, the Bar Association's rules and solicitors' rules); and
7. Eligibility and desirable qualifications for police prosecutors.

You may wish to note that, at the Council's March meeting, Commander John Laycock (who is a member of the Council) provided the Council will some information relating to addresses on sentence by police prosecutors. This information was based on discussions with Prosecuting Area Coordinators in NSW.

I would appreciate if you would kindly provide submissions on the issues outlined above by Wednesday 7 April 2004.

Yours sincerely,

The Hon. Alan R. Abadee, RFD QC
Chairperson

Appendix 3 - High Range PCA Appeals 1999-2004

The following information is based on data received from Nick Cowdery at the Council's May 2004 meeting and was current as at May 2004.

Year Sentence Imposed by Local Court	Number of Crown Appeals	Sentence imposed by the Local Court	Results on Appeal to the District Court
1999	13	▪ Order of imprisonment (1) ▪ Bond (8) ▪ Fine plus disqualification (2) ▪ Dismissal (1) ▪ Recognizance (1)	7 dismissed
2000	3	▪ Bond (2) ▪ Bond with disqualification (1)	2 dismissed
2001	6	▪ Bond (4) ▪ s10 dismissal (1)	4 dismissed
2002	5	▪ Bond (4) ▪ Bond with CSO and disqualification (1)	3 dismissed; no result for 1 (defendant could not be located)
2003	3	▪ Bond (1) ▪ Imprisonment (1) ▪ Disqualification (1)	1 dismissed
2004	1 (also charged with aggravated dangerous driving occ. GBH)	For dangerous driving offence: order of imprisonment. For HRPCA: CSO and period of disqualification	No result as yet

Appendix 4 – Additional Background on Guideline Judgments

In England, Lord Woolf, the new head of the recently appointed Sentencing Guidelines Council (charged with the task of creating a comprehensive set of guidelines for all offences) said:[280]

> "I hope the guidelines will assist the judiciary to impose the sentence which is appropriate to punish the offender while at the same time tackling the reason for offending. It should also ensure that in appropriate cases more use is made of community sentences, while at the same time reserving custodial sentence for those cases where it is necessary."

The NSW Court of Criminal Appeal promulgated its first "guideline judgment" in *R v Jurisic*. Spigelman CJ stated in that case that guideline judgments:[281]

> "have a useful role to play in ensuring that an appropriate balance exists between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed, and in the judiciary as a whole, on the other."

The guideline took the form of a prescription of clear "starting points" for classes of offenders.[282] In that case, the guideline judgment was made without a specific legislative basis. The Court noted that the practice of issuing guideline judgments was a "logical development of what the Court has long done."[283]

R v Jurisic also signalled a move upwards in the sentencing of offenders for dangerous driving causing death or grievous bodily harm. Spigelman CJ pointed to the increased statutory maximum penalty for the offence, and noted that statistics of sentencing patterns did not seem to reflect this changed maximum penalty. Spigelman CJ cited two English guideline judgments where increased sentence ranges were promulgated in response to increased statutory maximum penalties.[284] Morgan and Murray view this upward move as illustrative of another crucial feature of guideline judgments:[285]

> "They allow an evaluation on not just a description of current practices. In the light of that evaluation, new levels of sentence can be suggested. In that sense they are overtly prescriptive."

Morgan and Murray also note that, although unlikely, in principle, guideline judgments may be used to review sentencing trends downward.[286]

After *R v Jurisic*, the lack of specific legislative basis for promulgating guideline judgments was changed with the passage of the *Criminal Procedure Amendment (Sentencing Guidelines) Act 1998*, assented on 14 December 1998, which amended the *Criminal*

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[280] Home Office, 'New Body to Improve Sentencing Practice', 5 March 2004 <http://www.homeoffice.gov.uk/n_story.asp?item_id=849>.
[281] *R v Jurisic* (1998) 45 NSWLR 209 at 220.
[282] See Morgan N and Murray B, "What's in a Name? Guideline Judgments in Australia" (1999) 23 *Crim LJ* 90 at 93.
[283] *R v Jurisic* (1998) 45 NSWLR 209 at 220 at 217.
[284] *R v Jurisic* (1998) 45 NSWLR 209 at 220 at 223-226, per Spigelman CJ.
[285] Morgan and Murray, "What's in a Name? Guideline Judgments in Australia" (1999) 23 *CrimLJ* 90 at 93.
[286] See for example *Bibi* (1980) 2 Cr App R (Sentencing) 177.

Procedure Act 1986. Section 36 describes a guideline judgment as containing a guideline that applies either generally or "to particular courts or classes of courts, to particular offences or classes of offences, to particular penalties or classes of penalties or to particular classes of offenders (but not to particular offenders)."[287] The guideline issued by the Court takes the form of a specified range.

The guidelines are to be taken into account by courts when sentencing offenders in addition to the other matters which must be taken into account under Division 1 of Part 3 of the *Sentencing Procedure A,t*[288] and create a "check" or "sounding board" or "guide", not a "rule" or "presumption."[289]

In the Second Reading Speech to the Bill, it was stated that:[290]

> "…sentencing guidelines promote greater consistency in sentencing, without unduly fettering judicial discretion. That is important. Public confidence in the administration of criminal justice requires both consistency in sentencing decisions and flexibility to ensure that the sentence meets the particular circumstances of each case. Whilst the Court of Criminal Appeal in *Regina v Jurisic* has indicated a willingness to provide further sentencing guidelines, there are limits on its ability to do so effectively. Under the existing appeal structure, the Court of Criminal Appeal is only able to issue a sentencing guideline as a result of a particular matter when that matter is brought before the Court."

Spigelman CJ has noted, extra judicially, that the provisions envisage that the Court of Criminal Appeal would continue to formulate guideline judgments without any formal application from the Attorney General.

In 2001, the *Criminal Legislation Amendment Act* (Act no 117 of 2001) made further amendments to the provisions relating to sentencing guidelines contained in Division 4 of Part 3 of the *Sentencing Procedure Act.* The amendments provide clearly that the Court of Criminal Appeal can issue guideline judgments of its own motion. The Second Reading Speech to the Bill again emphasised that one of the main purposes for guideline judgments is to promote consistency in sentencing, and it is also acknowledged that guideline judgments tend to encourage an upward trend in sentencing practices:[291]

> "Sentencing guidelines work. They are the most effective way of making sentencing consistent. Recent figures show that in some cases guidelines produce longer sentences – more appropriate sentences. This is what the public wants: sentences that reflect the serious nature of the crime."

After the legislative changes to the Court of Criminal Appeal's power to promulgate a guideline of its own motion, the Court of Criminal Appeal made a guideline judgment in *R v Whyte*[292]. Spigelman CJ noted in that case the positive impact that the Court's guideline in *R v Jurisic* had had on sentencing consistency and adequacy, whilst maintaining the discretion

[287] Section 36 of the *Sentencing Procedure Act 1999*. Div 4 of Pt 3 contains the provisions relating to guideline judgments.
[288] Section 42A of the *Sentencing Procedure Act 1999*.
[289] *R v Whyte* [2002] NSWCCA 343 at 343 per Spigelman CJ, Mason P, Barr, Bell and McClellan JJ agreeing.
[290] The Hon Ms Harrison, Minister for Sport and Recreation, on behalf of Mr Whelan, Hansard, legislative Assembly, 28 October 1998, p9190-9191.
[291] The Hon Bob Debus, Attorney General, Hansard, Legislative Assembly, 30 November 2001at 9298.
[292] *R v Whyte* [2002] NSWCCA 343 at [58].

which is essential for individual justice. Spigelman CJ discusses the principle of "consistency"[293] and the importance of public confidence in the sentencing process.[294]

In England, the Halliday Report has recently considered that guidelines are needed to assist sentencers at different levels to match the severity of sentence with the seriousness of the offence, and to indicate the ranges within which sentence severity may vary. Recommendation 9 of the Report states:

> "New sentencing guidelines should set out "entry points" for considering severity of sentence, alongside graded definitions of seriousness of offences, and indicate the range of effects that previous convictions have on severity."

In *R v Jurisic*, Wood CJ at CL further noted that giving certain judgments the status of a "guideline judgment" reduces the possibility of oversight:[295]

"The Court has, in many instances identified and in several other areas, over the years endeavoured to lay down sentencing principles for particular classes of case where sentences reflecting a significant element of general deterrence are required, or where non-custodial options are inappropriate. It appears that sometimes these principles are lost or that their significance is overlooked, in the volume of appellate decisions handed down and in the pressures imposed on trial courts to dispose of increasingly busy criminal lists."

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[293] (1998) 45 NSWLR 209at 278.
[294](1998) 45 NSWLR 209 at282.
[295] (1998) 45 NSWLR 209 at 233.