

NSW Law Reform Commission
Sentencing
Question Papers 1 - 4
Office of the Director of Public Prosecutions (ODPP)

As a general comment we note that the questions are structured in a way that suggests that sentencing is a step by step process, and can be approached in a checklist fashion. We would like to emphasise that in our view no one factor should be considered to dominate the sentencing process, to do so is contrary to instinctive synthesis.

We do not generally support codification of sentencing and in our view the common law is generally well settled and understood.

Where the questions ask for the advantages and disadvantages of making specific provision our answer can be taken to be that as there will inevitably be disadvantages in adding complexity, there will always be a risk of introducing unintended consequences and there is no real advantage in that the common law is settled and well understood.

Question Paper 1 - Purposes of sentencing

Section 3A and its application

Question 1.1

Should there be a legislative statement of the purposes of sentencing?

Yes, but the purposes should be treated as pivotal and not determinative.

Question 1.2

1. Should courts be required to take every purpose in the statutory list into account in determining an appropriate sentence?

No, the court needs to retain discretion and take into account matters relevant to the particular case, to make adherence to every purpose compulsory risks turning the purposes into a checklist.

2. Are there any circumstances where a particular purpose should not be taken into account?

Yes, there will be occasions where a particular purpose is not relevant e.g. mentally ill offenders.

Question 1.3

1. Should it be possible for the court to refer to purposes that are not included in the statutory list when determining an appropriate sentence?

Yes, the court needs to have discretion to respond to all types of offending including new or novel circumstances that might not have been previously contemplated

2. Should the list of purposes be exclusive of any other purposes of sentencing?

No, the court should be able to take into account other purposes if appropriate in the circumstances.

Question 1.4

1. Should a single overarching or primary purpose of sentencing be identified? If it should, what should it be?

No, the primary purpose will differ according to the particular facts and circumstances of the case.

2. What circumstances (such as the nature of the offence or the offender) might justify a different overarching or primary purpose?

There are no circumstances that we can think of.

3. Should a hierarchy of sentencing purposes be established?

No.

4. If so:

a. what should that hierarchy be, and

b. in what circumstances might it be appropriate to vary that hierarchy?

Not applicable.

5. Should guidance be provided as to the court's approach to applying the purposes of sentencing in particular circumstances?

No, the discretion of Court to apply purposes to the circumstances of case should not be fettered.

6. Should it be expressly stated that there is no hierarchy of sentencing purposes?

Yes.

Specific purposes of sentencing

Question 1.5

1. Is ensuring that the offender is adequately punished for the offence a valid purpose of sentencing?

Yes.

2. Does the purpose of punishment need to be qualified in any way, for example, by terms such as "adequately" or "justly"?

We do not support qualification of the word "punishment".

Question 1.6

1. Is preventing crime by deterring others from committing similar offences a valid purpose of sentencing?

Yes.

We note that there is research suggesting that general deterrence does not have this effect at all, but nevertheless it is a fundamental part of the common law and removing it from the sentencing equation would cause a change to the common law which would be undesirable because of the risk of its removal creating unintended consequences. This would be counter productive from the point of view of simplifying the sentencing process.

2. Should general deterrence be a relevant consideration in relation to all offences and all offenders? How could its application be limited?

No. In particular general deterrence is not a relevant consideration for young offenders.

Question 1.7

1. Is preventing crime by deterring offenders from committing similar offences a valid purpose of sentencing?

Yes. See above.

2. Should specific deterrence be a relevant consideration in all cases? How could its application be limited?

The court should have discretion to apply specific deterrence in appropriate cases.

Question 1.8

1. *Is protection of the community from the offender a valid purpose of sentencing?*

Yes.

2. *Should incapacitation be more clearly identified as a purpose of sentencing:*
a. *generally; or*
b. *only in serious cases?*

No, incapacitation should not be given greater prominence as a purpose of sentencing.

3. *Should protection of the community be identified as an overarching purpose of sentencing? Are there cases in which protection of the community is irrelevant?*

No, no single purpose should be an overarching purpose of sentencing.

Yes, protection of the community is not relevant to some matters for instance trivial matters, some "one off" offences or offenders with low risk of reoffending.

Question 1.9

1. *Is the promotion of the offender's rehabilitation an appropriate purpose of sentencing?*

Yes.

2. *Should the current expression of this purpose be altered in any way?*

No.

Question 1.10

1. *Is making the offender accountable for his or her actions an appropriate purpose of sentencing?*

We agree with the analysis in the discussion paper on this point. It should be removed as purpose of sentencing.

2. *How, if at all, does it differ from the purpose of ensuring that the offender is adequately punished for the offence?*

It does not differ.

3. *Should the purpose of retribution be more clearly identified in the statutory list? What are the implications for sentencing of doing so?*

No.

Question 1.11

1. Is denunciation of the offender's conduct an appropriate purpose of sentencing?

Yes.

2. Should the purpose, as currently expressed, be altered in any way?

No.

Question 1.12

1. Is recognition of the harm done to the victim of the crime and the community an appropriate purpose of sentencing?

Yes.

2. Should the current expression of the purpose be altered in any way?

No.

Question 1.13

Should any other purposes of sentencing be added to the legislative statement of purposes?

No. Generally we favour a minimalist approach to the purposes of sentencing, consistent with our earlier submissions that sentencing has become overly complex.

Question 1.14

1. Should reparation and restoration be added to the list of purposes either as an addition to s 3A(g) of the Crimes (Sentencing Procedure) Act 1999 (NSW) or as a separate item in the list of purposes?

No. Restorative justice as part of the sentencing process is only applicable under limited schemes for particular types of offences. One of the reasons for this limitation is that restoration will only be appropriate in certain types of offending and will nearly always be inappropriate for other types of offending.

2. How should the purpose of reparation and restoration be expressed?

Not applicable, but we note that court may take into account factors such as compensation paid to victim prior to sentence.

Question 1.15

Should the effective operation of the criminal justice system be identified as a

purpose of sentencing?

No.

Question 1.16

1. Should purposes of sentencing be identified that relate to particular groups of offenders?

Not generally, but we don't suggest any changes should be made to the approach in the Childrens (Criminal Proceedings) Act.

2. If so, which groups and what purposes?

See above.

3. Should purposes of sentencing be identified that relate only to Indigenous people?

No, the principles set out in *R v Fernando* [2002] NSWCCA 28 are clear and settled.

4. Should the purposes be in addition to the purposes of sentencing that apply generally or should they replace some or all of those purposes?

Not applicable.

Question Paper 2 – General sentencing principles ***Imprisonment as a last resort***

Question 2.1

Should the legislative and common law principle that imprisonment is a sentencing option of last resort be retained or amended in any way? If it is amended, in what way should it be amended?

It should be retained without amendment.

Proportionality

Question 2.2

1. Should the common law principle of proportionality continue in its current form or be amended in any way? What would be the advantages and disadvantages of codifying the principle of proportionality?

There is no change required.

2. Should there be codification of the principle that the jurisdictional limit in the

Local Court is not reserved for 'worst case' offences?

On one hand it is difficult to justify codification of the jurisdictional limit in the Local Court as the law is clear. But we do note that there have been difficulties in the interpretation particular in context of the Criminal Case Conferencing trial (see *Llavallo v R* [2012] NSWCCA 29).

Parity

Question 2.3

1. Should the common law principle of parity continue in its current form or be amended in any way?

There should be an amendment to provide that a sentence which would otherwise be appropriate cannot be reduced on the ground of disparity to a level which, had there been no disparity, would be regarded as erroneously lenient. cf: *Green v R*; *Quinn v R* [2011] HCA 49 at [36].

2. What would be the advantages and disadvantages of codifying the principle of parity?

An inadequate sentence given to a co-offender but not appealed by the Crown should not result in further inadequacy for a related offender.

Totality

Question 2.4

1. Should the common law principle of totality continue in its current form or be amended in any way? What would be the advantages and disadvantages of codifying the principle of totality?

There is no change required.

2. Should sentencing courts have discretion to:

a. impose an overall sentence for all of the offences; and

b. articulate what sentences would have otherwise been imposed for the individual counts?

a. Yes.

b. Yes.

Sentencing the offender only for the offence proved

Question 2.5

Should the principle that an offender is to be sentenced only for the offence proved (but still allowing the court to take into account aggravating circumstances

within that limitation) be codified? What would be the advantages and disadvantages of codifying this principle?

If s21A remains in its present form there may be some advantage in codifying this principle, otherwise we do not support codification.

Reasons for sentencing

Question 2.6

1. Should the common law requirement to give reasons for sentence be codified? If so, what should be required of courts?

No.

2. Should existing statutory requirements to give reasons for some aspects of sentencing (such as imposing a sentence of imprisonment of less than six months) be retained?

Imposing statutory requirements to give reasons for doing certain things invites error in the sentencing task. The difficulties with sentences of less than 6 months could be adequately addressed by judicial education.

Alternatives

Question 2.7

1. Should parsimony be part of the sentencing law of New South Wales?

No.

2. Are there any further principles which could be incorporated into the NSW sentencing law?

No.

Instinctive synthesis

Question 2.8

Should legislation mandate a different approach to sentencing distinct from the instinctive synthesis approach?

No, we strongly support the instinctive synthesis approach, and note that any legislative provisions that invite a "checklist" or step by step approach invite departure from instinctive synthesis and accordingly should be avoided.

Question Paper 3 – Factors to be taken into account on sentence

Question 3.1

1. What would be the advantages and disadvantages of abolishing s 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW)?

We agree with all the arguments in the discussion paper advanced in favour of abolishing section 21A, including:

- Reducing the possibility of appealable error,
- avoiding double counting and
- simplifying the process.

2. Are there dangers that relevant factors may not be taken into account in the absence of a provision similar to s 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW)?

No, the sentencer's mind will be focused on the facts of the cases and circumstances of the offender, this will ensure only relevant factors are taken into account.

3. Would sentencing be less transparent in the absence of a provision similar to s 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW)?

No, the reasons for sentence should set out the factors taken into account clearly and succinctly. Arguably sentencing will be more transparent, by omitting the reference to irrelevant factors, double counting and the like.

As we have previously submitted in our view comprehensive guidelines on sentence for particular types of offences is a preferable approach.

Question 3.2

Should s 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW) be retained in its current form?

No.

Question 3.3

Should s 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW) be amended by the addition and/or deletion of any factors?

No.

Question 3.4

1. Which considerations to be taken into account on sentence should be included in legislation and how should such legislative provisions be worded?

We do not support the considerations to be taken into account being included in legislation. If considerations are to be included then care must be taken to ensure that it is not a check list, that the drafting is very general and not overly prescriptive.

2. Should the purposes of sentencing contained in s 3A, the provisions of the Act relating to pleas of guilty, assistance to authorities and disclosure and s 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW) be consolidated into a provision similar to s 16A of the Crimes Act 1914 (Cth)?

We are cautious about adopting section 16A because the Commonwealth legislation is a Code, and accordingly different considerations apply. However we note that section 16A provides a good summary of relevant factors, but again we do not endorse any provision that invites a check list approach to sentencing.

3. Should s 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW) be reframed as an unclassified, neutral and non-exhaustive list of sentencing factors?

In our view this would be simply a checklist. If a check list is desirable then it should in guidelines or in a bench book.

4. If so:

a. should the factors be expressed in broad terms, for example as general categories of considerations such as the nature and circumstances of the offence and the character, antecedents, age, means and physical or mental condition of the offender; or

b. should the same level of detail as appears in the current s 21A be reproduced in a new provision, but without listing the relevant factors as 'aggravating' or 'mitigating'?

Not applicable.

Question Paper 4 – Other discounting factors ***Plea of guilty***

Question 4.1

1. Should there be a discount allowed for a plea of guilty? Are there any circumstances in which a discount for a plea of guilty should not be allowed?

Yes. Yes in worst case scenarios.

2. Should judicial officers be required to quantify the discount allowed for a plea of guilty?

Yes, for reasons of transparency and to demonstrate that they have turned their mind to it.

3. Should the determination of the level of discounts for pleas of guilty entered at various stages of proceedings be prescribed by legislation?

No, an overly prescriptive approach in the legislation is problematic. It is important for judicial discretion to be preserved in determining the discount. During the Criminal Case Conferencing trial, there was on occasion protracted argument on sentence about the time of the plea and what discount should be given if for example the agreed facts are negotiated late in proceedings. Such arguments complicate the sentencing process and distract the court from more important considerations.

4. Should the discount for a plea of guilty be limited only to the utilitarian value of the plea?

No.

5. What is the most appropriate way for remorse to be taken into account in the sentencing process?

Remorse is not an additional factor and the common law in this regard is appropriate and well understood.

6. How else could the determination of discounts for pleas of guilty be improved?

There is no need for change.

Assistance to authorities

Question 4.2

1. Should there be a discount for assistance to the authorities? Are there any circumstances in which a discount for assistance to authorities should not be allowed?

Yes. The factors provided for in s23(2) Crimes (Sentencing Procedure) Act adequately address the circumstances in which a discount should not be allowed.

2. Should legislation specifically exclude the common law approach to allowing a combined discount for a plea of guilty and assistance to the authorities?

No.

3. *Should judicial officers be required to quantify the discount(s) applied, as is currently required by section 23(4) of the Crimes (Sentencing Procedure) Act 1999 (NSW)?*

Yes.

4. *Is the current range of discount allowed for assistance to authorities appropriate?*

Yes.

5. *What would be the advantages and disadvantages of codifying amounts of discounts for assistance to authorities?*

See general comments.

Pre-trial and trial assistance

Question 4.3

1. *Should there be a discount for pre-trial or trial assistance? Are there any circumstances in which a discount for pre-trial or trial assistance should not be allowed?*

We have mixed views about pre-trial and trial assistance. On the one hand it is a matter that can be taken into account in all the circumstances of the case. We also support any provisions that might reduce the length of trials and the trauma and or ordeal associated with giving evidence for victims and witnesses.

On the other hand, some Accused may be disadvantaged by the instructions they give their lawyers, or if they choose to represent themselves, and by forensic decisions made by their legal representative.

2. *Should judicial officers be required to quantify the discount allowed for pre-trial and trial assistance?*

Yes it is necessary for reasons of transparency.

3. *What would be the advantages and disadvantages of codifying amounts of discounts for pre-trial and trial assistance?*

See general comments.

4. *Would a greater emphasis on discounts for pre-trial and trial assistance be likely to increase the efficiency of the criminal justice system?*

It may do so, but we are sceptical as, to date, provisions in the Criminal Procedure Act directed towards case management and defence disclosure are rarely invoked notwithstanding sections 21A(3) (l) and 22A.

Excluded factors

Question 4.4

Should the excluded factors relating to sexual offences in sections 21A and 24A of the Crimes (Sentencing Procedure) Act 1999 (NSW) remain excluded from any consideration on sentence?

Yes.

Question 4.5

Are there any circumstances in which confiscation and forfeiture orders should be appropriately taken into account on sentence?

No.

Question 4.6

Should possible deportation be relevant as a sentencing consideration? If so, why and how?

No.

**Office of the Director of Public Prosecutions
May 2012**