Police Association of NSW

Sentencing: Law Reform Commission Question Papers 1-4 (2012)

Police Association of New South Wales Submission

May 2012

Version Control

Purpose
The purpose of this document is to provide to the LRC the Police Association's response to the first four question papers regarding the review of the Crimes (Sentencing Procedure) Act 1999 (NSW).

Document Control

Version Number	V 0.1
Release Date	May 2012
Copies	Public
Confidentiality	Non-confidential
Release Restrictions	Nil
File Name	Sentencing: Law Reform Commission Question Papers 1-4 (2012)
File Location	TRIM Police Services-Criminal Procedures-Sentencing
File Reference Number	
Author	Vicki Sokias, Research and Resource Centre
Status (Draft/Out of Draft)	Out of Draft

Sentencing

The Law Reform Commission has released for public comment the first four question papers relating to the review of the Crime (Sentencing Procedure) Act 1999 (NSW) ('the Act'). These question papers outline and discuss some of the most fundamental aspects of sentencing law and ask questions designed to encourage a critical review of the assumptions underpinning this vital area of the law. The question papers address the issues that arise most commonly in sentencing practice, both in the Local Court and the higher courts, whether or not imprisonment is imposed.

In general, the Association is of the view that the Crime (Sentencing Procedure) Act 1999 (NSW) is well-drafted and works well in practice. The Association's has some concerns and these will be detailed in its responses to the following questions as posed from the Law Reform Commission.

The Association conducted some research in sentencing and its effect on crime rates some time ago and it found that there exists a tendency for political leaders, usually responding to public concerns about crime to push for increased prison sentences when crime statistics start to rise. The idea that tougher sentencing will reduce crime seems like a reasonable idea, but the issue itself is somewhat more complex than it appears.

Criminal justice systems have historically used imprisonment to deal with offenders in the hope that crime rates may be lowered through a combination of deterrence and incapacitation. Existing literature, however, indicates that sentences appear to have very little influence on crime rates. A large number of studies have found no clear correlation between sanction severity and levels of offending. Indeed, the very idea that tougher sentences will reduce crime by acting as a deterrent implies that the average would-be offender will contemplate the length of a potential sentence before committing a crime. Crime, however, is often impulsive and lacks such prudent foresight (Hoel & Gelb 2008).

Sentencing law as a whole needs to be clear and easy for sentencing judges to apply and be understood by the affected parties and the public at large. The provision of clearly-expressed reasons made available to the public in appropriate cases would help as would public education about criminal justice and sentencing. However, sentencing is a complex process involving balancing a number of competing factors. A general pursuit towards 'consistency' is desirable in so far as like offenders are treated in a like manner, but the legislature and the judiciary must exercise caution against espousing principles that would encourage or even permit unlike offenders to be treated alike. Appeal processes and a provision of resources to assist judicial officers in reaching decisions would help in maintaining a level of consistency eg JIRS statistics and widely available judgments and case summaries.[1]

In relation to the issues raised in the four Question papers, we provide the following comments:

Sentencing Question Paper 1
Purposes of sentencing

This question paper discusses the purposes of sentencing which a court must take into account when determining what sentence to impose for an offence. In determining a sentence the court must also take into account the overarching sentencing principles (discussed in Question Paper 2) as well as any relevant factors relating to the offender or the

[1] Janes Sanders, Sentencing, The Shopfront Youth Legal Centre, October 2011

offence (discussed in Question Paper 3) and any other discounting factors (discussed in Question Paper 4).

Question 1.1

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

Yes the inclusion of an express statement of the purposes for which a court may impose a sentence is recommended. The purposes for which a court may sentence an offender include:

a. To ensure that the offender is adequately punished for the offence,
b. To prevent the crime by deterring the offender and other persons from committing similar offences,
c. To protect the community from the offender,
d. To promote the rehabilitation of the offender,
e. To make the offender accountable for his or her actions,
f. To denounce the conduct of the offender,
g. To recognize the harm done to the victim of the crime and the community.

These purposes of sentencing have their origins in long-established common law tradition and must not be discarded lightly. Old assumptions, for example that harsh sentences are necessary and effective in achieving general deterrence, must be questioned. A need to develop more empirical studies similar to the research conducted by the Australian Research Council and the Criminology Research Council regarding *Sentencing the Multiple Offender*, in developing more detailed and comprehensive sets of sentencing principles and associated numerical frameworks for guidance. Such research will add significantly to criminal justice policies in Australia. To date there has been no satisfactory system of statistical guidance available to judges for the sentencing of multiple offenders for instance.

The unique facts of a case will shape a sentence, but certain principles must be followed in every sentence hearing. All sentencing legislation in Australia outlines the purposes that may be considered when imposing a sentence. The main purposes: punishment, rehabilitation, specific deterrence, general deterrence, denunciation, community protection and restorative justice are all such purposes and need to be stated, so to speak. Often the purposes of sentencing overlap, and it is very rare for a sentence to be imposed for only one purpose. The purposes of sentencing may differ for different crimes, different offenders, and different purposes all which are dependent on their seriousness.

Question 1.2

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

Justice in sentencing requires fair, coherent and openly stated policies, and their consistent application in sentencing judgments. In considering the objectives or purposes of sentencing, deterrence, retribution, denunciation, rehabilitation, incapacitation and the recognition of harm to victims and the community – the sentencing objectives conventionally applied to offenders – are all relevant in sentencing.

More reliable knowledge of what effects a sentence will actually have on an offender would be invaluable in deciding what sentence to impose and legislation that incorporates the behavioural sciences in the sentencing process would be as well aid in the sentencing process.

2. **Are there any circumstances where a particular purpose should be taken into account?**

When determining a sentence, a judicial officer must take into account a number of factors, such as: the facts of the offence; the circumstances of the offence; subjective factors about the offender; and relevant sentencing law. The judicial officer may also consider the general pattern of sentencing by criminal courts for the offence in question.

The Association requests that the review on sentencing pay particular attention to the following highly vulnerable and (some) over represented groups;

For young offenders, rehabilitation is the principle consideration in sentencing. Section 362 (1) of the Children, Youth and Families Act 2005 outlines the considerations that must be taken into account when sentencing a young offender.

The growing female prison population, indigenous women are particularly overrepresented in the prison population. This is particularly problematic given the cycles of violence, trauma, substance use and disadvantage that characterize the pathways of many women into and then back into the criminal justice system and prison.

Indigenous people across Australia are 14 times more likely to be in prison than non-Indigenous Australians. The position is acute in New South Wales, which goals more Indigenous people than any other state in Australia, and in particular amongst Indigenous youths, who are 28 times more likely to be incarcerated than non-Indigenous youth.

People with intellectual disabilities are over represented at all stages of the criminal justice system. Many people with intellectual disability who are incarcerated are only assessed as having an intellectual disability once they are in prison. There should be specific sentencing principles with regards to these offenders to adequately have regard to their vulnerability to offending and re-offending.

Question 1.4

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

At a normative level, some people think the primary purpose of sentencing is to impose deserved punishments proportioned to offenders' culpability, some that sentences should aim optimally to prevent crime, and most, probably, that sentencing should try to do both, to take account of crime-prevention goals while to a significant extent apportioning punishment to blameworthiness (Tonry 2005).
The community's need for protection should be paramount. So consideration needs to be given to victims and the community to be the first predominant concerns of the justice system, followed by compensation and restitution, with punishment as a lesser consideration. The overarching principle to should be similar to, by whatever means provided under the act, preventing the further commission of offences by the offender, and the type of offence by any offender.

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

Circumstances (as proposed in its LRC report) that might justify a different overarching or primary purpose could include; An offender with a mental health or cognitive impairment and depending on the

seriousness of the offence, rehabilitation will be given greater weight as a purpose in sentencing a young offender; Serious crimes such as murder and armed robbery their purposes are likely to be punishment and general deterrence, while for less serious crimes, rehabilitation may be given greater prominence.

3. Should a hierarchy of sentencing purposes be established?

If crimes are fundamentally defined by their harm done to a victim or to the community, then repairing the harm done to victims and the community is foremost, with prevention of further offending a very near companion. The current order of purposes then appears to be the opposite of what it should be. Re-stating the purposes of sentencing in a revised priority order would have profound effects on both pre sentence and sentence processes.[2]

4. If so;

a. What should the hierarchy be, and

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

Re-stating the purposes of sentencing in a revised priority order would have profound effects on both pre sentence and sentence processes. The perspective of the purpose of sentencing needs to broaden in a number of areas:

a. The interests of victims, such as restitution, compensation and possible restoration;
b. The likely social and economic impacts of the penalty upon victims and their families, offenders and their families, and the broader community;
c. The likely prospect of reducing the offender's risk of recidivism.

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

The present focus of the law and legal advocate on aggravating and mitigating factors focuses both attention and resources away from victims to the questions of penalty, so maybe guidance ought to be provided to courts when applying the purposes of sentencing in some circumstances. One report referred to the aggravating and mitigating factors of present day cases as generating a substantial micro-economy.

> *A guideline is to be taken into account only as a 'check' or 'sounding board' or 'guide' but not as a 'rule' or 'presumption'.* (from Judicial Commission of New South Wales)

Guideline judgments are a mechanism for structuring discretion, not for restricting discretion. The continued existence of sentencing discretion is an essential component of the fairness of the criminal justice system.

> *The ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice - do not generally point in the same direction. Specifically, the requirements of justice, in the sense of just deserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy. Centuries of practical experience establish that the multiplicity of factors involved in the sentencing task require the exercise of a broad discretion, which is best conferred on trial judges. That is why the promulgation of guidelines must not be inconsistent with the existence of a sentencing discretion. We must strive for both consistency and individualised justice.* (from The Honourable JJ Spigelman, Chief Justice of New South Wales, 24 June 1999)

[2] Probation and Parole Officers' Association of NSW, Preliminary submission to the New South Wales Law Reform Commission on Sentencing, January 2012.

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

The goals of sentencing vary and the law needs to be able to cope with this by emphasizing different principles at different times. NSW legislation currently, does not prioritise the purposes of sentencing and while it is acknowledged that this would not be possible across the whole range of criminal activity, it is considered that some guidance for offences at different levels of seriousness would be valuable in removing the confusion as to the basis for a sentence in a given case and would also accord with community attitudes toward offenders.[3]

Question 1.5

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

Ensuring the offender is adequately punished for the offence is a valid purpose of sentencing. Prisons must serve the dual purposes of punishing offenders for the crimes which they have perpetrated, and rehabilitating them to enable them to live crime free lives on release. International research with victims of crime clearly demonstrates that victims want punishment which prevents reoffending.[4]

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

In its report, the LRC, suggests that "justly punished" may be a better expression of the principle of proportionality than "adequately punished" and several jurisdictions have apparently taken this approach by having a purpose of sentencing that involves the punishment of the offender in a way or manner that is "just in all the circumstances". This is worth considering as the term "adequately" suggests a base level at which a sentence becomes "adequate" for the purpose, whereas (as the LRC puts it) "justly" may allow a range of possible sentences that meet that description. The ACT, on the other hand, has combined the two options, so that one of the purposes of sentencing is "to ensure that the offender is adequately punished for the offence in a way that is just and appropriate". This concept too is worth looking at as well.

Question 1.6

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

General deterrence refers to the idea that potential offenders in the community will be discouraged from committing a particular crime when they see the penalty imposed for that kind of offence. However, there has been research conducted by Bargaric and Alexander in 2011 which demonstrates that as a principal of sentencing general deterrence does not work. Higher sentences do not deter offenders. The research brings into question the appropriateness of general deterrence being taken into account in the sentencing process. The Victorian Sentencing Advisory Council found that:

> *The evidence from empirical studies suggests that the threat of imprisonment generates a small general deterrent effect. However, the research also indicates that increases in the severity of penalties, such as increasing the length of imprisonment, do not produce a corresponding increase in the general deterrent effect.*

[3] Probation and Parole Officers' Association of NSW, Preliminary submission to the New South Wales Law Reform Commission on Sentencing, January 2012

[4] Victim Support, Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders, A response by Victim Support, March 2011.

The research show that imprisonment has, at best, no effect on the rate of reoffending and is often criminogenic, resulting in a greater rate of recidivism by imprisoned offenders compared with offenders who received a different sentencing outcome".

Therefore the Association considers the application of general deterrence in sentencing requires further review of the purposes of sentencing by relevant stakeholder parties.

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

As the LRC report states, there is some evidence that absolute general deterrence has some validity as a purpose of sentencing. However, it seems that, in many cases, marginal general deterrence is not effective.

Question 1.7

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

From a policing perspective, police reduce crime via deterrence and incapacitation. More police have a deterrent effect if risk perceptions and behavior of offenders change as a result of a perceived increase in the likelihood of being caught (Becker 1968). In the case of incapacitation, higher police levels contribute to the conviction of a greater percentage of recidivist offender through arrests. While a criminal is imprisoned, he/she is unable to engage in criminal actions that otherwise would have been taken.

And in a similar vein, The Honourable JJ Spigelman, Chief Justice of New South Wales, 24 June 1999 makes the suggestion via Guideline Judgements;

The public at large and potential offenders in particular, should know in advance that offences of a particular kind are likely to lead to a particular level of sentence. This is often said to be an advantage of a minimum sentence regime or of grid sentencing. It is apparent that the publication of maximum sentences does not perform a substantial deterrent function, as the relationship between maximum sentences and actual sentences is not sufficiently clear. There is a considerable debate about the deterrent effect of sentences and, particularly, of marginal increases in sentences. That penalties operate as a deterrent is a structural phenomenon of our criminal justice system. The courts must continue to act on the basis that punishment deters and that, within limits of tolerance, increased punishment has a corresponding effect by way of deterrence. This is a structural feature of the common law, in its application to criminal justice. Legislation would be required to change the traditional approach to this matter. However, deterrence only works to the extent to which knowledge is transmitted to potential offenders about actual sentencing practice. Guideline judgments are a mechanism of increasing the efficiency of the transmission of such knowledge.

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

Specific deterrence basically refers to the discouraging of the particular offender from committing more crimes. Critics of specific deterrence argue that offenders do not pause to consider the possible punishment for a crime they are about to commit, especially in the heat of the moment, and when drugs or alcohol are involved. Some suggest that potential offenders are more likely to be deterred by the

threat of being caught rather than the threat of punishment, citing an example of the crime rate falling dramatically in areas where closed-circuit television surveillance systems were introduced. On the other hand, courts have held that specific deterrence is an important purpose of sentencing in cases where a real prospect of re-offending can be identified, such as possession of child porn. Suspended sentences, compulsory drug treatment, and good behavior bonds may be more successful in deterring individual from committing further offences.

That being said, our members are all aware of offenders who do not participate in a crime when the opportunity presents itself due to the fear of being punished again, having been through the sentencing procedure, particularly incarceration. Whilst imprisonment does not seem to be a significant deterrence to recidivism, there is evidence that it may be a deterrence to some offenders.

Question 1.8

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

Yes. The community's need for protection should be paramount.

2. **Should incapacitation be more clearly identified as a purpose of sentencing:**

a. Generally; or b. Only in serious cases?

Incapacitation is a philosophy of incarceration that argues that some offenders might have to be incarcerated not for what they have done but to prevent future harm to the community. The philosophy of incapacitation depends on the community's ability to identify those that might re-offend. Some also argue that it is unfair to punish people for what they might do, rather than for what they have done.

As the Australian Law Reform Commission recommends in its 2006 report, one of the purposes of sentencing should be "to protect the community by limiting the capacity of the offender to reoffend". Such a purpose is valid and is often a reflection of an accumulation of similar offences, particularly committed in isolation from one another.

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?**

Yes. The community's need for protection should be paramount and should be identified as an overarching purpose of sentencing (as mentioned already).

Question 1.9

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

According to sentencing law, the term rehabilitation means imposing a sentence that will help to change the offender's behavior into that of a responsible citizen. One only has to look at prison overcrowding and the recidivism rate to deduce that tough sentences do not reduce crime. The promotion of the offender's rehabilitation in some cases can be an appropriate purpose of the sentencing laws.

One way that Australian correctional authorities can safeguard the community is by incapacitating offenders and keeping them away from potential victims. The community can also be protected in the longer term by minimising the likelihood of ex-prisoners reoffending after they are released. One strategy for reducing the risk of recidivism is the provision of treatment, services and support to prisoners during their incarceration and after their release. This approach is gaining prominence in Australia and

internationally. It recognises that prisoners are confronted by a range of social, economic and personal challenges that can be barriers to a crime-free lifestyle. Research conducted by the Australian Institute of Criminology examines various issues linked to the provision of post-release services to prisoners, drawing on both international literature and a roundtable discussion held at the Australian Institute of Criminology in October 2002.

Another report that provides a descriptive picture of the nature of offender rehabilitation programs in Australia prepared by the University of South Australia in May 2004 suggests programs can too be effective in reducing rates of re-offending. The report states that offender rehabilitation programs in Australia are clearly established, with each jurisdiction offering a range of offence-focused programs. Each jurisdiction has a well-developed system of program delivery, highly motivated program staff and a general organisational acceptance of the importance of offender rehabilitation. The legislative context for rehabilitation programs in Australia is varied and diverse. The similarities between jurisdictions are great. Most, if not all, have programs dedicated towards the reduction of re-offending risk in sexual and violent offenders, along with other programs, such as cognitive skills, which have been designed to address some of the more general causes of offending. The lack of development of programs for Indigenous offenders and female offenders is noticeable. The most intensive programs are offered to violent and sexual offenders, and there is a trend in most jurisdictions to offer programs that are targeted to offenders of differing levels of risk of recidivism.

The AIC's recent work on adult male offenders has found that the most serious and persistent adult offenders had been detained as a juvenile (see Trends & issues no 267). In terms of crime reduction, interventions that focus on reducing the likelihood of juveniles escalating to adult offenders will have significant benefits for the whole of the Australian community. Research conducted in juvenile justice settings around the world consistently shows that young people who come to the attention of criminal justice agencies have multiple problems and experience high levels of need across all areas of functioning. In meeting these needs, correctional agencies have been increasingly influenced by the model of rehabilitation known as the 'what works' approach.

There is extensive literature into how offender rehabilitation can be achieved and it is extremely relevant for program development, and practitioners and policymakers to consider these findings.

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

As in the words of the LRC's report when referring to the Sentencing Act 1991 (Vic), that is, "to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated", is worth considering in how the current expression of this purpose be altered in any way.

Question 1.10

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

Victim Support's own research with victims of crime clearly demonstrates that victims want punishment which prevents reoffending. A Victim Support research study, which involved 90 victims and witnesses of crime in the South-East, found that 'there was a common view that the desired outcome was that the offender not commit the crime again'. Victim Support would therefore support any measures, including increasing the amount of work done by prisoners, which would help to rehabilitate offenders. Victim Support's believe that effective rehabilitation must be at the heart of the prison system. In line with this

thinking is Restorative Justice - an approach to justice that focuses on the needs of the victims and the offenders, as well as the involved community. Victims take an active role in the process, while offenders are encouraged to take responsibility for their actions, "to repair the harm they've done. Restorative justice involves both victim and offender and focuses on their personal needs. In addition, it provides help for the offender in order to avoid future offences. It is based on a theory of justice that considers crime and wrongdoing to be an offence against an individual or community, rather than the state. The approach fosters dialogue between victim and offender shows the highest rates of victim satisfaction and offender accountability. However a recent study reviewing the effectiveness of Youth Conferencing in NSW has found that it has no effectiveness in reducing recidivism in young offenders. Whilst the aims and methods of the option appear valid and based on rational evidence, it has lost effectiveness in the implementation. Young offenders see Conferencing as a soft option with no accountability. Despite facing their victims and having to engage with them, there is insufficient retribution and compensation is rarely ordered in any young offender matter due to restrictions on capacity to pay. Our members are constantly dealing with young offenders who see conferencing as nothing more than an inconvenience.

The justice system considers intent when evaluating criminality. It deals with people as if they are free-willed agents, capable of making their own decisions unless overwhelming evidence exists to the contrary. It is also significant that it punishes based on these distinctions, affirming that a person's mind and actions matter and have consequences for which they are accountable. Each and everyone has a responsibility for their own actions. Not forgetting too that juvenile minds are different from adults and to better understand the mind of juveniles, holding them accountable for their actions in a way that is mindful of their capabilities, particularly their ability to be rational and not simply impulsive. This will produce the most effective results and be the most moral way to deter youth from criminal activity. Additionally, because of their relative inexperience with the world, adolescents are much more susceptible to outside influences than adults. Rehabilitative philosophies appreciate the evolving character of the adolescent mind. This approach seeks to mend the victim and the aggressor, the juvenile and the community. It encourages youths to take responsibility for their delinquent acts by apologizing to and directly recompensing the victim. It also encourages community service as a form of punishment to make the juvenile aware of the outside world that his/her actions affect.

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

Making an offender accountable for their actions and ensuring that they be adequately punished for their offence are 2 different principles in sentencing speak. Both are required, particularly when it comes to juvenile crime (see above). Take Restorative Justice for instance which recognizes the conflict or harm, repairs the damage (physical and relational) as much as possible and creates future accountability plans and/or agreements that will prevent the same thing from happening again. These principles guide people's actions in response to wrongdoing, misbehavior and conflict and in a response to them; thus all such principles play a crucial part in reform of an offenders actions.

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

There are a number of reasons why a society punishes offenders. Many surveys have explored public opinion on the purposes of sentencing, but reviews of the research show that there is little consistency in the findings (Roberts 1992; Roberts & Stalans 1997). Some of this inconsistency can be attributed to methodological diversity, with some surveys asking respondents to consider the purposes of sentences

generally and others linking questions to a specific offence or type of offender. Research that allows for a variety of responses, depending on the type of offence or offender, shows that members of the public want to achieve mixed aims with sentencing. Studies of the Canadian and Australian public showed that individual deterrence was the most popular aim for offenders convicted of relatively minor crimes and incapacitation was seen as more appropriate for offenders convicted of serious crimes (Roberts & Doob 1989; Indermaur 1990). In a survey of the American public, retribution was clearly seen as the most appropriate aim for adult offenders, whereas rehabilitation was the option most frequently chosen for juvenile offenders (Gerber & Engelhardt-Greer 1996).

In 2003, a New Zealand study, Attitudes to Crime and Punishment, asked members of the public what they believed were the aims of sentencing in relation to six specific crimes, ranging from possession of cannabis through to smuggling heroin. 'Providing punishment that reflects the seriousness of the offence' (retribution) was consistently mentioned as an aim across the scenarios, with the exception of possession of cannabis. Survey respondents wanted to achieve a mix of aims when sentencing offenders. Among the most popular aims were individual rehabilitation, deterrence and retribution.

Consideration should be given to the purpose of retribution to be more clearly identified in the statutory list. The retributive idea is that punishment should be determined chiefly (possibly even only) by the seriousness of the crime itself, and not by consequential factors, such as whether the punishment is enough to scare (i.e. deter) the rest of society. The term 'retribution' is therefore unfortunate because its everyday meaning connotes 'revenge'; it is better described as 'desert', 'just deserts' or 'proportionality' theory.

Whether the purpose of retribution be more clearly identified in the statutory requires further analysis and debate by relevant stakeholders in the sentencing process.

Question 1.11

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

As the LRC report states, some jurisdictions have elaborated the expression of this purpose by adding that the denunciation or disapproval is that of "the community, acting through the court". This expression is worth considering. Denunciation in the context of sentencing philosophy refers to the disapproval of an act by society that is expressed by the imposition of a sentence. This can be considered as one of the purposes of sentencing, as well as being a possible justification for the imposition of a sentence. It is said that denunciation arguments can be used to justify more serious sentences than are required by the principles of retribution and deterrence. Denunciation arguments can also be used to justify the existence of laws which are never in practice enforced; they stand as statements of a society's values rather than working parts of a criminal justice system.

The Victorian Sentencing Committee noted the following justifications for having denunciation as an aim of sentencing:

1. To prevent crime by making a public statement that certain offences will not be tolerated.
2. To achieve social coherence through the making of symbolic statements that certain crimes will not be tolerated by the community.
3. To appease victims of crimes.
4. To make a symbolic statement to the offender him or herself that society will not tolerate the commission of the crime for which he or she has been convicted

However, the Committee also made reference to the fact that effective denunciation is reliant upon sufficient publicity and to the possibility that denunciation may not affect the public's perception of the seriousness of an offence even if such an effect could be measured.

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

As mentioned above, if the purpose was to be altered in any way, it should look to other jurisdictions that have elaborated the expression of this purpose by adding that the denunciation or disapproval is that of "the community, acting through the court".

Question 1.12

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

There has been a move in recent years to accommodate the legitimate concerns of victims in the criminal justice system. For example, in New South Wales there are now provisions relating to victims' rights, victims' compensation and victim impact statements. Hence, the purposes of sentencing contained in the Crimes (Sentencing Procedure) Act 1999 (NSW) include the recognition of the harm done to the victim of the crime and the community, and rightly so.

An important goal of sentencing is to promote a sense of responsibility in the offender; to have the offender realize they are accountable for their criminal actions and to recognize the harm they have caused. Responsibility is related to both the rehabilitation and reparation purposes. If offenders feel a sense of responsibility, it is believed that their ability to be rehabilitated will increase and they will be more agreeable to making restitution.

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

If the current expression is to be altered in any way, the CCA's observation (via the LRC report) of the addition of the purpose of the recognition of the "harm" to "the community" in s3A(g) could introduce a new element into the sentencing task. Recognition as a purpose of sentencing is appropriate - there must be recognition that crime is a violation of one person by another and that recognition that crime is harmful to personal relationships and to communities.

Question 1.13

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

It is of course desirable that sentencing law be clear and easy for sentencing judges to apply. It should be readily understood by the parties (the accused) and other affected people (victims) and the public at large. However, sentencing can be a complex process involving a balance of a number of often competing factors, therefore, over-simplifying sentencing laws needs to be considered with caution. The Crimes (Sentencing Procedure) Act is, in general, a well drafted and easily understood piece of legislation and apart from a few concerns (already mentioned) in report above, there are no other purposes of sentencing that could be added to the legislative statement of purposes. These purposes have their origins in long-established common law tradition, and should not be discarded lightly.

There is concern about the over-representation of indigenous people in custody. Consideration needs to given maybe to the addition of new 'purposes' of sentencing such as 'maintaining/encouraging respect for and the authority of culture', 'ensuring the offender is answerable to the community', 'reintegrating the

offender into the community', 'ensuring the social cohesion of the community', 'recognising the historical and contemporary disadvantage suffered by Aboriginal and Torres Strait people', 'healing', 'rehabilitation', 'accountability' and 'self-determination'. These and other concerns are as quoted in the University of Technology's report to the LRC review from Jumbunna Indigenous House of Learning, November 2011.

It is probably relevant to say that there is a need for more empirical evidence in support of the usefulness of the sentencing principles.

Question 1.14

1. **Should reparation and restoration be added to the list of purposes either as an addition to s3A(g) of the Crimes (Sentencing Procedure) Act 1999 (NSW) or as a separate item in the list of purposes?**

In the LRC's 1996 review of sentencing, reparation orders fell into two categories: orders for restitution; and orders for compensation. The Commission expressed the view that, while such orders could be said to be consistent with the traditional aims of sentencing and could also take into account some of the interests of victims of crime, reparation was not, of itself, an aim of sentencing and reparation orders were merely ancillary to the sentencing process.

The ALRC, in recommending that one of the purposes of sentencing should be 'to promote the restoration of relations between the community, the offenders and the victim', noted that:

> *Restoration may not always be an appropriate purpose of sentencing. However, where appropriate, restorative initiatives have demonstrated their potential to complement and enhance the operation of the criminal justice system. They provide an effective way to recognize victims' interests in the sentencing process and to encourages offenders to accept responsibility for their actions.*

In a research project conducted by the University of Victoria in Canada, titled, The Role of Apology in Restorative Justice, by Marilyn R. McNamara and Mandeep K. Dhami it was found that victims rates reparation low in comparison to other motivations to attend the RJ process, such as the desire to express their feelings about how the crime affected them or finding whether they were targeted (Goodes 1995 cited in Braithwaite 1999). The voluntary offer of reparation restores offenders' self-esteem, dignity, and nurtures a commitment to not re-offend (Weinberg 1995). When offenders neither offer reparation nor express responsibility, victims want to blame and punish the offender (Scher and Darley 1997).

A 2012 BOCSAR survey has shown that, public opinion is largely in favor of restorative justice principles, such as giving victims the opportunity to inform offenders of the harm and distress caused, giving victims a say in how offenders can make amends and making offenders undertake unpaid work in the community and those surveyed considered these principles more effective than the option of a prison sentence.

On the question of whether reparation and restoration be added to the list of purposes or be placed as a separate item in the list of purposes requires further evaluation of relevant stakeholders. Currently in all Australian jurisdictions, except Western Australia, there is power to order—as a sentencing option—that an offender pay compensation for loss, injury or damage as a consequence of an offence. In Western Australia, the power to order compensation is restricted to property

damage or property offences. The 'fundamental purpose' of such powers is to give victims 'easy access to civil justice'.

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

Currently in all Australian jurisdictions, except Western Australia, there is power to order—as a sentencing option—that an offender pay compensation for loss, injury or damage as a consequence of an offence. In Western Australia, the power to order compensation is restricted to property damage or property offences. The 'fundamental purpose' of such powers is to give victims 'easy access to civil justice'. As Bell J has explained:

> *When an offender has been dealt with by the courts, the judge can be in a good position to consider the issue of compensating the victim. The factual circumstances relevant to compensation may have been fully or at least sufficiently established by the evidence led or the admissions made by the offender. It can be clear that the offender's crime has caused loss or damage to the victim. Once the court receives evidence of the extent and value of such loss or damage, it can then expeditiously determine whether and what compensation to order. This saves the victim the time, expense, inconvenience and possible additional trauma of having to institute a civil proceeding. Not doing so may deprive the victim of ready access to just compensation, leaving them with an understandable* sense of grievance.

The making of restitution orders shares some philosophical underpinnings with the sentencing aim of restoration. As mentioned already, further analysis from relevant stakeholders is required in answering this question suitably.

Question 1.15

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

The inclusion of the effective operation of the criminal justice system to be identified as a purpose of sentencing does require consideration. The importance of maintaining and promoting public confidence in the criminal justice system cannot be overstated (Butler and Mcfarlane 2009). The criminal justice system is centrally concerned with securing public order by the exercise of power, however, a system that does not command public trust will fail to establish the requisite legitimacy and authority to fulfill this role. Its effective operation relies on public confidence in a way that is distinctively different from other services such as health and education. While public confidence is undoubtedly an aspiration of such systems, it is not critical in ensuring the public's participation in, or the fundamental legitimacy of, these services. The same cannot be said for the criminal justice system. Victims must have sufficient trust and confidence in the system to report crimes to the police and to participate in the prosecution process. Similarly, confidence in the process, outcomes and accountability of the administration of justice is crucial to ensure the co-operation and participation of jurors and witnesses in court proceedings. Accordingly, it is essential that the issue of public confidence be an ongoing priority for all criminal justice agencies.

Question 1.16

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

Sentencing involves complex decision-making based on a court's consideration of a wide array of factors and circumstances weighed against legislated and common law sentencing principles and purposes. The question, should purposes of sentencing be identified that relate to particular groups

of offenders has already been mentioned previously in this submission. These particular groups of offenders include persons under 18 years and indigenous people.

2. If so, which groups and what purposes?

As the LRC report states, it is possible that the criminal justice system can recognize different purposes of sentencing for members of particular groups with special characteristics, such as young people under the age of 18 years and indigenous people. The AIC's recent work on adult male offenders has found that the most serious and persistent adult offenders had been detained as a juvenile. In terms of crime reduction, interventions that focus on reducing the likelihood of juveniles escalating to adult offenders will have significant benefits for the whole of the Australian community. Research conducted in juvenile justice settings around the world consistently shows that young people who come to the attention of criminal justice agencies have multiple problems and experience high levels of need across all areas of functioning.

The significant over-representation of Indigenous Australians in the criminal justice system is a major concern. While Indigenous people constitute less than 2% of the total Australian population, they make up 20% of the prison population (ABS, 1999), with the number of Indigenous prisoners increasing at approximately 1.7 times the rate of non-Indigenous prisoners (Carach, Grant & Conroy, 1999).

As the LRC report states, the special provision in NSW and Victoria each provide a list of factors that a court should take into account when sentencing a young person. Some can be classified as principles, some as factors to be taken into account and some can be taken as affecting the purposes of sentencing.

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

As mentioned already in this submission, the Jumbunna Indigenous House of Learning has proposed the addition of new purposes of sentencing to apply in the case of indigenous people that requires serious consideration in trying to stem the over-representation on indigenous people in NSW prisons.

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?

Relevant consideration must be given to these additional purposes of sentencing that would apply generally or replace some or all purposes via (as a suggestion) consultations with Aboriginal communities in NSW in which the sentencing regime is open for discussion. The explicit purpose of this consultation (and any consequent legislative scheme) should be to strengthen the authority of indigenous communities to determine the relevant considerations in sentencing indigenous offenders and the suitable sentence for such an offender. This suggestion is quoted in the Jumbunna Indigenous House of Learning's submission. All this must be coupled with improved police training as well as deploying suitable number of experienced officers in remote communities as well as Aboriginal Police Liaison officers and broadening their roles.

Sentencing Question Paper 2
General sentencing principles

This question paper discusses some of the sentencing principles at common law, which interact with the purposes of sentencing discussed in Question Paper 1. In determining a

sentence the court must also take into account any relevant factors relating to the offender or the offence (discussed in Question Paper 3) and any other discounting factors (discussed in Question Paper 4).

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?

The legislative and common law principle that imprisonment as a sentencing option of last resort be retained or amended with the support of evidence to give the objective of deterrence (deterrence being an important consideration) some weight to the argument that prison is an effective general deterrent for some crimes or for some offenders. The statement is quite clear and precise and would be applicable to some crimes and offenders. It should be remembered that the goals of sentencing do vary and the law needs to be able to cope with this by emphasizing different principles at different times. This is also noted in the publication designed to explain sentencing to the general public, "Judge for Yourself: A Guide to Sentencing In Australia", the Judicial Conference of Australia, being the national representative body for judicial officers, with over 600 members, offer the following explanation under the sub heading 'Balancing the reasons for a sentence':

> *The purposes of sentencing may differ for different crimes, depending on their seriousness. For crimes like murder or armed robbery, the major purposes are likely to be punishment and general deterrence. For less serious crimes such as graffiti or malicious damage, the judicial officers might view rehabilitation as the major consideration when imposing the sentence."*

The answer is not to forego efforts to incapacitate offenders, but to do so intelligently. This means developing strategies targeting particular kinds of serious offenders whose future behavior one will be able to reasonably confidently predict and who's averted crimes save substantial suffering.

According to Victorian sentencing law, imprisonment is the most severe sentencing order available in Victoria. An offender's freedom is restricted by confining them in prison. Imprisonment occurs when the sentencing orders of the court commit a person into custody at a prison for a specified period of time. This may include a sentence order where part of the conditions must be met in the community after time served in prison. This incorporates Combined Custody and Treatment Order where drug treatment may begin in custody and is mandatory on release, or a Partially Suspended Sentence where a prisoner must serve jail time, and then not commit any offence whilst living in the community.

Similarly in NSW sentencing comes at the end of a long and complex criminal justice process. Imprisonment is the most severe sentence available to the courts in Australia, as capital punishment has long been abolished. Prisons are classified as high, medium or low security, but a judge cannot direct the prison authorities where to hold a person sentenced to imprisonment. Most longer sentences of imprisonment will include a period of parole. Conditions of release on parole include supervision. Offenders can be returned to prison if they breach the conditions of their release.

According to research conducted by the Tasmanian Law Reform Institute there are strong arguments in favour of a low imprisonment rate. Imprisonment is the most expensive sentencing option. It may incapacitate offenders while they are in prison, but it achieves little else in terms of crime reduction.

A reconviction study in Tasmania shows that 62 per cent of offenders given unsuspended sentences of imprisonment re-offended within a two year period. Ways of encouraging restraint in the use of imprisonment should be considered. The Tasmania findings state punishment is one of a number of considerations when determining the appropriate sentence for a crime. At one end of the spectrum, there are some crimes which demand severe prison sentences and the removal of the offender from the general community. The sentence of imprisonment serves as a punishment and a deterrent, and to ensure the safety of the community by depriving the offender of his liberty. However, there are circumstances where it is appropriate to expand the range of sentencing options beyond imprisonment and to replace imprisonment as a primary option.

Victim Support (a national charity for people affected by crime) believes that prisons must serve the dual purposes of punishing offenders for the crimes which they have perpetrated, and rehabilitating them to enable them to live crime free lives on release.

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?**

Proportionality should continue in its current form – it is a central principle in the sentencing of offenders at common law. As developed in Australian jurisprudence, proportionality operates to restrain excessive, arbitrary and capricious punishment by requiring that punishment must not exceed the gravity of the offence. Proportionality is also relevant in ensuring that a minimum level of punishment is imposed upon the offender, in that a sentence which fails to give sufficient weight to the objective seriousness of the offence (and is therefore manifestly inadequate) will be quashed.

The issue of whether the common law principle of proportionality ought to be codified requires further case analysis from relevant legal stakeholders. Currently the courts already recognize this principle. The Supreme Court of Canada passed a reform of the Code of Civil Procedure in 2002, whereby it enshrined the principle of proportionality in Article 4.2 of the Code. By entrenching it in Article 4.2 of the Code, the legislator sent a clear message to parties and judges that proceedings must be proportionate to the ultimate purpose of the action or application and to the complexity of the dispute. Codifying this principle should have prompted a change in the way the legal profession handled litigation files. Despite its importance, the principle of proportionality has not had the expected effect and is only slowly begun to being increasingly used. This trend is also evident in Ontario, British Columbia and Alberta, all of which adopted the principle of proportionality in 2010.[5]

2. **Should there be codification of the principle that the jurisdictional limit in the Local Court is not reserved for 'worst case' offences?**

As the LRC reports, as a general rule, a jurisdictional limit of two years of imprisonment applies to sentences imposed in the NSW Local Court, while accumulation of sentences generally may not exceed five years. In imposing sentences of imprisonment in the Local Court, Magistrates should ensure that sentences reflect the objective seriousness of the offence, "taking care only not to exceed the maximum jurisdictional limit". There is an argument for codification of this principle, so that it is clear that a sentence comprising the jurisdictional limit is not reserved for 'worst case'

[5] Jean-Francois Michaud, The Principle of Proportionality and its Impact on Disputes, April 28 2011.

offences. This argument requires further case analysis by relevant stakeholders to support its argument for codification of this principle.

Question 2.4

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

The principle of parity requires that when two or more co-offenders are to be sentenced, any significant disparity in their sentences should be capable of a rational explanation. In the absence of such an explanation a more lenient sentence imposed on one of them will be likely to engender a justifiable sense of grievance in the other or others. It is inappropriate ever to say that the principle of parity should not apply as between co-offenders. The concept is always to be borne steadily in mind when co-offenders are to be sentenced, whether together or separately, or by one judge or more than one.

According to a Law Article by Geoff Harrison, published in October 2010, the principle of parity in its application raises more difficult questions where the accused are part of a common criminal enterprise and are charged with different offences. 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

In 1998 in a NSW Parliamentary Briefing paper, it was reported that there had been troubling questions in New South Wales and elsewhere as to whether there are unjustified disparities in sentencing - that is, cases where an offender receives a sentence that is significantly more lenient or harsher than an offender in those or similar circumstances would normally receive. Some evidence and arguments relating to disparities in New South Wales were dealt with in the earlier Parliamentary Library Sentencing Guidelines Briefing Paper 33. In particular, that briefing paper discussed the findings of a 1994 report by the NSW Bureau of Crime Statistics and Research that there were real concerns about marked differences between individual District Court Criminal judges in their readiness to imprison convicted offenders. The New South Wales Law Reform Commission addressed the question of sentencing disparity in its 1996 sentencing report. Ultimately, the Commission concluded that there was some evidence of disparities, but it could not be inferred that widespread unjustifiable evidence of disparities exists.

However, the Commission was prepared to assume that there was some degree of unjustifiable disparity, and that it was appropriate to seek to minimize if not eliminate it. Since the Law Reform Commission's 1996 report, concerns about disparity have continued to emerge. Some empirical evidence of disparity is found in a 1998 report by the Judicial Commission of New South Wales, which found that there were some differences in the sentences received by juvenile offenders from different ethnic groups. The study's findings included that there were statistically significant differences in penalties received by the sample group of Aboriginal and Torres Strait Islander juveniles and Anglo-Australian juveniles, with the former group receiving harsher penalties. On the other hand, a 1997 study of gender in juvenile sentencing conducted by the Judicial Commission found no statistically significant disparity between sentencing outcomes for male and female juvenile offenders.
The issue then, whether the common law principle of parity continue in its current form or be amended obviously requires further intensive case analysis as illustrated from the above material.

2. What would be the advantages and disadvantages of codifying the principle of parity?
The principle of parity is already recognized in the NSW courts. There is no general rule that the same sentence must be passed on co-accused. But the court must take into account the sentence imposed on a co-offender so that there is no justifiable sense of grievance arising from sentence disparity. Where matters such as age, background and previous criminal history (and all other subjective characteristics of the offender) differ significantly between co-offenders, a court is not required to equate the sentences, though it should articulate the reasons for any disparity in the sentences passed. Further case analysis is required by legal stakeholders on the question of whether codifying the parity principle is at all required.

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?
The totality principle requires that where an offender is being sentenced to multiple terms, or is otherwise to serve multiple sentences, then the sentencer should ensure that the total sentence remains 'just and appropriate' for the whole of the offending.

The LRC report states that in many cases, a series of events which lead to an offender's conviction will provide evidence of more than one offence and lead to multiple convictions of that offender. The courts have dealt with this by stating that the total sentence imposed upon an offender must reflect the totality of the offending, so that the aggregate sentence is just and appropriate to the totality of the criminal behaviour. This may be achieved by making the sentences wholly or partly concurrent, or by lowering individual sentences. The court is not restrained by any statutory maximum penalty applicable to individual offence and should be careful to avoid an overly lenient sentence by too close attention to the principle of totality. The principle of totality is the foundation for the law relating to concurrent and cumulative sentences.

Much more is needed in terms of case analysis in answering the question whether the totality common law principle be amended and or codified.

2. Should 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?
In the LRC findings, the High Court has held that a court, when sentencing for multiple offences, should determine the appropriate sentence for each offence, and then determine the structure of the overall sentence in terms of concurrence, accumulation, or partial accumulation to arrive at the appropriate total sentence that reflects the criminality of the offences. It was found that this approach, while encouraging transparency, increased the difficulty in applying the principle of totality by making the process more technical. Section 53A of the Act, aims to reduce this technical difficulty. The requirement that a court articulate the individual sentences has been criticized as it is said does not solve the complexities of the common law but may be desirable for transparency and for the purposes of the sentencing statistics. Again, further case analysis is required in answer to this question.

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?

In answering this question the requirement of further considered case analysis and comment is needed regarding same with the underlying intention that the sentencing law as a whole can be made more coherent, transparent and consistent as it's desirable aim. Sentencing can be a complex process involving balancing a number of often competing factors so care is required in any attempt to over-simplify sentencing laws. There have been examples in NSW of appeals to the CCA where the sentencing judge has breached the principle by taking in to account a statutory aggravating factor in s21A that could have been charged, but was not charged, in relation to the matter for which the offender is being sentenced.

Question 2.6

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

According to Traynor and Potas (2002) open justice is a fundamental principle enshrined in our legal system and nowhere is it more important than when a court seeks to exercise the punitive powers of the State. As part of the process of judicial accountability, judicial officers are required to give reasons for the sentences they impose. In turn, sentencing decisions are often closely scrutinised by the media, interested members of the public, academics, legal practitioners and, of course, other judicial officers. In many ways the sentence that is handed down, together with the reasons for sentence, provide one of the few means by which the community, the victim and the offender are able to gauge whether justice has been done in accordance with the principles of consistency and fairness. The requirement should be codified requiring the sentencing judicial officer enunciate the principles applied as relevant and the factors considered in applying those principles. This would ensure the officer turned their mind to those principles and factors, and increase the transparency and satisfaction for all parties involved in the process.

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?

According to the LRC's 1996 report, the common law principle is that imprisonment is a sanction of last resort. Section 80AB of the Justices Act 1902 (NSW) gives some statutory recognition to this principle by preventing a magistrate from imposing an order involving full-time imprisonment "unless satisfied, having considered all possible alternatives, that no other course is appropriate". The principle has also been recognised more generally by statute in other Australian jurisdictions.

In DP 33 the Commission argued that greater substance could be given to the principle that imprisonment is the sanction of last resort if offenders who would normally be subject to short terms of imprisonment were diverted from custodial sentences. Accordingly LRC proposed that courts should provide reasons for any decision to impose a sentence of imprisonment of six months duration or less in the hope that the provision, in conjunction with the common law principle, might encourage courts to use imprisonment more appropriately. Several submissions (to LRC) either doubted the effectiveness of the principle that imprisonment is a punishment of last resort or questioned whether that effectiveness could ever be measured or known. Most, nevertheless, supported the Commission's proposal, at least in principle. Some, while supporting the proposal, expressed concern

that it may ultimately have little or no effect on the practical outcome of the process. The Department of Corrective Services supported the proposal principally because it might reduce the number of offenders sentenced to periods in custody, but drew attention to a number of problems which might arise in its application. One was a possible conflict with the aims of the home detention scheme, which is available only when the court has imposed a sentence of imprisonment of 18 months or less. Another was the possibility of a greater demand for pre-sentence reports to aid the courts in assessing the suitability of offenders for various sentencing options. Other submissions did not support the Commission's proposal because:

- it might have the effect of increasing custodial sentences beyond six months, because a court might inflate sentences to avoid application of the principle;
- the basis for the proposal was suspect and not capable of demonstration; and
- to impose such requirements would slow down the disposal of cases.

The Commission was of the view that only the first of these objections has real substance. Appellate control will, however, ensure that sentences which are inflated simply to evade this requirement will be overturned. The Commission had carefully considered the argument that the proposal put forward in DP 33 would be practically ineffective and secure only token compliance. In the Commission's view this argument is met by requiring that courts not only provide reasons for any decision to impose a sentence of six months or less but also expressly state why a non-custodial sentence is not appropriate. This approach will have the effect of directing the mind of the sentencing court not only to the suitability of imprisonment, but also to the suitability of other sentencing options.

Question 2.7

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

As the LRC states, attempts to introduce parsimony in NSW have in the past rejected. In NSW, courts have the discretion to weigh up the various aims of punishment as they apply in any one case and, as the former Chief Justice explained, this "necessarily means that, within reasonable bands, different judges can permissibly reach different conclusions".

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

On a more general note, many of the LRC questions posed have been answered with a need for more considered case analysis, empirical evidence and comment if changes or amendments are to be made to any of the common law principles of sentencing. Examples of this include Austin Lovegrove's (of the AIC) study comprising of an empirical examination of judicial practice and policy analysis of legal principle that had been carried out with a view to understanding current practice and to further develop existing policy. It examines the approach of Victorian judges to the determination of sentencing for an offender convicted of multiple offences, where these offences are considered jointly for the purposes of sentencing. Of particular interest in this study is the case comprising multiple offences where each offence is properly regarded in its own right as a separate transaction warranting a term of imprisonment. Justice in sentencing requires fair, coherent and openly stated policies, and their consistent application in sentencing judgments. What is offered here is description and guidance. Understanding how judges apply general sentencing principles is important, since it is a prerequisite to the evaluation of the soundness and fairness of sentencing practice. This is a complex and technical subject and the report reflects this in its detail. The executive summary provides a useful overview of the specific legal principles and judicial practices involved in sentencing

the multiple offender, for those who will primarily be interested in the outcomes of the research. These outcomes highlight the need for policy debate over how to approach the sentencing of the multiple offender. Given that a substantial percentage of criminal cases involve a multiple offender and that criminological research has shown that the majority of offences are accounted for by a smaller group of repeat offenders, the sentencing of such offenders is a matter of significant public policy interest. The empirical work undertaken in this study, and funded by the Australian Research Council and the Criminology Research Council, indicates that there is a need to develop a more detailed and comprehensive set of sentencing principles and an associated numerical framework for guidance. This research will add significantly to criminal justice policy in Australia. To date there has been no satisfactory system of statistical guidance available to judges for the sentencing of multiple offenders.[6]

Many of the principles and factors suggested or discussed require judicial officers to consider the interests and expectations of victims, the community and others who are not regularly involved in the criminal justice system. Their beliefs and expectations are varying and change over time. It is possible for judicial officers, particularly those in the criminal courts, to become desensitized or disconnected from community expectations and societal and generational changes. There must be a way for contemporary expectations and standards to feature in those aspects of sentencing that require such an assessment. This should not be considered as popularism featuring in sentencing, but if community and victim factors are to feature, they must be based on current expectations, beliefs and standards.

Question 2.8
Should legislation mandate a different approach to sentencing distinct from the instinctive synthesis approach?

Traynor and Potas (2002), in their paper titled, *Sentencing Methodology: Two-tiered or Instinctive Synthesis*, traces the development of case law in Victoria and NSW, with some consideration also given to other jurisdictions, and critically explores the arguments for and against decision-making by way of instinctive (sometimes also referred to as "intuitive") synthesis. As the concept of instinctive synthesis is often presented as diametrically opposed to two-tiered (or two-stage) sentencing, the latter is also discussed. They conclude by expressing some of their own views on this topic. They suggest that two-tiered or sequential reasoning has the advantage of breaking down an often complex set of facts and principle into manageable components. This does not turn the decision-making process into a strictly mathematical exercise, but simply assists in organising thoughts and explaining how decisions are reached. In this way appeal courts are better able to assess whether the sentencer has given too little or too much weight to a particular factor. It enables decisions to be analysed, contrasted and compared in terms of their objective and subjective components. Thus, consistency of approach in sentencing is promoted and judicial accountability enhanced.
Although the writers concede that sentencing does involve some instinct or intuition they nevertheless prefer to see it expressed in ways that reflect the more conventional and palatable notion that sentencing is a human process, that it involves a discretionary exercise applied within the constraints of the judicial process and that the process requires the balancing of many, often conflicting, considerations or factors that cannot always be assigned individual weight. What matters

[6] Lovegrove, Austin, Sentencing the multiple offender: Judicial practice and legal principle, Australian Institute of Criminology 2004.

is that all relevant considerations are taken into account, that proper reasons are provided for the sentence and that the sentence imposed is neither unduly lenient nor excessively severe. Accordingly, they see no harm in retaining a two-tiered sentencing methodology wherein the sentencing judge or magistrate determines the upper, and sometimes lower, limits of an appropriate sentence based on the notion of offence seriousness or objectivity (the outer range of proportional punishment) and then proceeds to fine-tune the sentence by reference to other considerations. These considerations should be identified if they tend to increase or reduce the sentence to be imposed. At times, but certainly not always, this may include specifying a discount for one or more variables. The writers prefer this to simply expressing the process in terms of instinctive or intuitive synthesis. The first approach is more consistent with notions of transparency, the giving of reasons and accountability; the second is more mysterious, idiosyncratic and less open to analysis.
Some cases may be more amenable to a sequential form of reasoning than others. Similarly, some judicial officers may find two-tiered sentencing a useful method for determining sentence while others may not. While the writers favour consistency of approach they also agree that sentencing methodology should not be excessively rigid or artificial. It is important that the appropriate considerations are taken into account, that the correct law and proper principles are applied, and that the sentence imposed can be justified. Just as there is no single correct penalty, so too, they suggest, there is no single correct methodology. If this were otherwise, we would undermine or excessively restrict the important discretionary element of the sentencing process.
Meanwhile, until such time as the High Court clarifies the situation, judicial officers will be left to undertake the task of sentencing, uncertain as to the validity of their approach. Until then, courts may best adopt the practice of reaching their decisions on the basis of instinctive synthesis in addition to any other method they may seek to employ.

Stratton (2005) observed in a number of High Court cases two different models of the sentencing process have been championed. The first model, particularly advocated by McHugh J, is the 'instinctive synthesis' model, in which the sentencing judge produces the final figure after taking into account all the relevant factors. The second model is the 'two step' sentencing approach, praised by Kirby J, in which the sentencing judge first determines a sentence by reference to the objective gravity of the offence, and then makes adjustments to this provisional sentence to take into account other factors, in particular a plea. The 'two step' approach was criticised by McHugh and Hayne JJ, who both gave dissenting judgments in AB v The Queen (1999) 198 CLR 111. Subsequently in Wong and Leung v The Queen (2001) 207 CLR 584 Gaudron Gummow and Hayne JJ said (at 611):

> *Secondly, and no less importantly, the reasons of the Court of Criminal Appeal suggest a mathematical approach to sentencing in which there are to be 'increment[s]' to, or decrements from, a predetermined range of sentences. That kind of approach, usually referred to as a 'two-stage approach' to sentencing, not only is apt to give rise to error, it is an approach that departs from principle. It should not be adopted.*

However the Court of Criminal Appeal held in Sharma (2002) 54 NSWLR 300 that in New South Wales sentencing judges should continue to indicate the discount given for a plea of guilty in accordance with the guideline judgment of Thomson and Houlton (2000) 49 NSWLR 383. In Markarian v The Queen [2005] HCA 25 the High Court again had the opportunity to determine the debate between the competing models. Not surprisingly, McHugh J's judgment denounced two-step sentencing, while Kirby J argued for it. The approach taken by the majority (Gleeson CJ, Gummow, Hayne and Callinan JJ) on the face of it supported the 'instinctive synthesis model', but seemed to

accommodate the approach taken in Sharma that the discount for a plea of guilty could be made transparent. It was submitted that 'two step' sentencing still has some life left in it.

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

This question paper discusses the factors relating to the offender or the offence which a court must take into account when determining what sentence to impose for an offence. In determining a sentence the court must also take into account the purposes of sentencing (discussed in Question Paper 1), the overarching sentencing principles (discussed in Question Paper 2) and any other discounting factors (discussed in Question Paper 4).

Question 3.1

1. What would be the advantages and disadvantages of abolishing s21A of the Crimes (Sentencing Procedure) Act 1999 (NSW)?

Sentencing decisions typically include the weighing up of aggravating and mitigating factors, insofar as they exist, in order to individualise the sentence with respect to the offender and the circumstances of the offence(s). Aggravating factors are those which may increase the sentence, while mitigating factors may have the opposite effect. The courts have generally been left a broad discretion as to how to deal with aggravating and mitigating factors. The debate as to which aggravating and mitigating factors should be taken into account is largely centered on whether factors not directly related to the offence itself or to the offender's conduct in relation to that offence should be considered.

As the LRC reveals despite appeals (involving s21A) declining the application of the provision appears to still be causing concern as a result of double counting relevant factors. The provision has as it seems added to the complexity of the sentencing process. The repeal of s21A will also have implications for the SNPP regime, which states that the only reasons for which a court may depart from the SNPP are those in s21A. If the provision was to be abolished, consideration must be given to how the goals of the Act may be diminished in the absence of the provision. On the other hand, if the provision was to be retained, the section is being used as a checklist and has provided that courts remain aware of the dangers associated with this method is an advantage.

Some Legal organisations such as the Probation and Parole Officers' Association of NSW have advocated for a repeal of s21A in favour of victim interests, restoration, reparation, compensation and steps taken to reduce risk of recidivism instead.

The Office of the Director of Public Prosecutions, has too advocated for the repeal of s 21A claiming it adds nothing to the common law; it invites a circular process of reasoning, it actively sets traps for the unaware; it's time-consuming, complex and holds a real risk of error and it distorts and confuses the sentencing process. There have been constant ad hoc amendments to the list of aggravating factors contained in s21A.

2. Are there danger that relevant factors may not be taken into account in the absence of a provision similar to s21A of the Crimes (Sentencing Procedure) Act 1999 (NSW)?

As Justice Howie commented in Elyard v R [2006] NSWCCA 43 at [39] that s21A:

"… have made the task of sentencing courts more difficult, or at least more prone to error (either real or apparent), by what was in my opinion a needless attempt to define relevant factors into categories of aggravation or mitigation and yet apparently without the intention of altering the common law as it was applied to sentencing before the advent of the section. One has only to look back over sentence appeals determined by this court over the last two years to see that the impact that this section has had upon the work of this court. And yet, as I pointed out in R v Tadrosse [2005] NSWCCA 145, if sentencing judges simply take into account the relevant sentencing factors that were taken into account before the introduction of the section, they will inevitably comply with the section's demands".

3. Would sentencing be less transparent in the absence of a provision similar to s21A of the Crimes (Sentencing Procedure) Act 1999 (NSW)?

Some have suggested the repeal of s21A could only simplify the sentencing process. The factors set out in s21A are factors that have always been taken into account in sentencing but by setting out a table of factors to be considered, the Act has led to countless arguments before appellate courts as to whether or not the judge has considered some one or more of the factors mentioned. It has also led to arguments about whether there has been double counting. Often judges feel obliged to go through the various factors mentioned as a checklist. The section contemplates there are other matters that may be required or permitted by common law to be taken into account and in fact the section adds nothing to common law.

According to research conducted in New Zealand, an important question is the extent to which these factors should be linked, or even limited, to the rationale(s) selected as the basis for sentencing. For example, if the primary aim of sentencing were just deserts, then factors such as remorse and contrition on the part of the offender may be viewed as relevant considerations if they are seen to reduce culpability because they indicate the offender was acting 'out of character' or 'made a mistake'. They would also be relevant if rehabilitation were the aim. It is argued that making the aggravating and mitigating factors consistent with the declared rationale(s) of sentencing will enhance consistency of approach (See for instance, Council of Europe 1993, p381). On the other hand, Ashworth comments that to link aggravating and mitigating factors solely to the primary rationale(s) would be "too astringent ... particularly in the context of a branch of the law so closely entwined with social policy and so politically sensitive as sentencing." His view is that while "the core of aggravating and mitigating factors ... [should be] linked to the primary rationale, there is no reason why additional factors should not be recognised" (Ashworth 1992, p123). Different rationales will occasion different considerations of factors. If a variety of rationales are available, then the sentencing judge is able to choose between a wide range of aggravating and mitigating factors. It is of note that New Zealand judges have often linked aggravating factors to the need to impose a deterrent or incapacitative sentence, while mitigating circumstances are often linked with the possibility and opportunity for rehabilitation, or attempts to achieve equal impact in sentencing

Question 3.2

Should s21A of the Crimes (Sentencing Procedure) Act 1999 (NSW) be retained in its current form?

As the LRC states in its report, it may be that appeals (as mentioned in 3.1.1) in relation to s21A have reached a manageable level as the CCA has adequately addressed the major conceptual

difficulties in relation to s21A. More considered case analysis and comment is required to verify this assumption though.

Question 3.3

Should s21A of the Crimes (Sentencing Procedure) Act 1999 (NSW) be amended by the addition and/or deletion of any factors?

There are more calls for the repeal of s21A than calls in trying to amend or add any factors to the provision. Since its inception there have been constant ad hoc amendments to the list of aggravating factors contained in s21A. However, an argument in favour of retaining s21A (according to the LRCs findings) is the fact that it may have achieved the aim of providing guidance and structure to judicial discretion, particularly in the Local Court. In the Local Court's experience, the impact of the introduction of s21A of the Act has been largely positive in providing a useful guide, both for judicial officers and practitioners, as to matters that may be relevant considerations in the sentencing exercise. Accordingly, the section does not itself invite confusion, as it largely (though not exhaustively) replicates the circumstances of aggravation and mitigation recognized in the common law. While in some instances the Court may receive submissions on sentence addressing the s21A factors that invite an erroneous approach, from a practical standpoint the section also has utility in providing practitioners with a structure that can lend greater coherence to their submissions on sentence.

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?

As the LRCs findings state, s16A of the Crimes Act 1914 (Cth) has been said to provide the most useful list of matters to which a court is to have regard (reproduced to the LRC report as Annexure 3). It provides that a court must impose a sentence or make an order that is of a severity appropriate in all circumstances of the offence, and for that purpose the court must take into account a non-exhaustive list of broadly framed relevant sentencing factors that are not divided into categories of 'aggravating' or 'mitigating' as these are already reproduced in common law. The above all aim must be to simplify sentencing laws while maintaining transparency and reasonable consistency, and enabling the entire process to be hastened.

2. Should the purposes of sentencing contained in s3A, the provisions of the Act relating to pleas of guilty, assistance to authorize and disclosure and s21A of the Crimes (Sentencing Procedure) Act 1999 (NSW) be consolidated into a provision similar to s16A of the Crimes Act 1914 (Cth)?

This is worth considering if the sentencing laws are to be at all more simplified and aim to maintain a transparency and consistency that is much needed at the moment.

3. Should s21A of the Crimes (Sentencing Procedure) Act 1999 (NSW) be reframed as an unclassified, neutral and non-exhaustive list of sentencing factors?

Again, this is worth considering if the sentencing laws are to be at all more simplified and aim to maintain a transparency and consistency that is much needed at the moment.

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 conditions of the offender; or
b. should the same level of detail as appears in the current s21A be reproduced in a new provision, but without listing the relevant factors as 'aggravating' or 'mitigating'?
The factors ought to 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 conditions of the offender. As the LRCs findings purports, this approach resists the binary categorization of sentencing factors, which has been the subject of criticism. These categories can include then a wide range of circumstances. This allows the common law to continue to develop without the need to consider adding further particularized circumstances to a list such as s21A.

Sentencing Question Paper 4
Other discounting factors

This question paper discusses the discounting factors that may affect a sentence. In determining a sentence the court must also take into account the purposes of sentencing (discussed in Question Paper 1), the overarching sentencing principles (discussed in Question Paper 2) and the factors relating to the offender or the offence (Question Paper 3).

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?
There has been strong support for allowing discounts for please of guilty in previous reviews of the criminal law in NSW and elsewhere in Australia.

In a NSW Parliamentary briefing paper, plea bargaining or charge bargaining is the process by which the prosecution agrees to reduce the charge(s) laid against an offender, in exchange for a plea of guilty. This may entail the prosecutor substituting the original charge selected by the police with a less serious charge or, when a defendant is accused of multiple offences, negotiating to withdraw some of the charges. Either side may initiate a plea bargain. A mutually agreed statement of facts, omitting references to conduct that would support more serious charges, is presented to the court at sentence. Any other material before the court that contains information exceeding the agreed facts must be disregarded by the sentencing judge. The most commonly cited benefits of plea bargaining are:

- that it spares victims and witnesses the trauma of having to testify and be cross examined at a trial, particularly for children and sexual assault complainants;
- the State will be saved the expense of a trial;
- court backlogs and delays are alleviated if more defendants plead guilty;
- the Crown case may not be sufficiently strong to obtain a conviction if the matter proceeds to trial on the 'higher' charge. By allowing the offender to plead guilty to a lesser charge, at least the offender is penalised to some extent for their actions.

There is general agreement among those 'with responsibility for the operation of the criminal justice system that charge bargaining, as the primary means of facilitating the disposal of indictable offences by a plea of guilty rather than by trial, [is] essential to the administration of justice. Without it, the system could not cope.' For example, between January 1998 and 30 September 2001, of the 1890

cases committed to be tried in the District Court, 591 were negotiated as pleas of guilty by charge bargaining at the arraignment stage. However, according to critics of plea bargaining, some of its disadvantages are:

- it can be regarded as effectively rewarding guilty people, or as punishing those who earnestly plead not guilty but are subsequently convicted and receive no discount;
- negotiations take place in private, contrary to expectations that justice should be conducted in public whenever possible. To non-lawyers, the process may seem like a deal done between the prosecution and defence lawyers to save them time, effort or resources;
- plea bargaining detracts from traditional sentencing principles like deterrence. Offenders are dealt with more leniently and therefore may not be sufficiently deterred from re-offending;
- victims often feel that their suffering has been trivialised when fact summaries and witness statements are edited as part of a plea bargain;
- the right to silence is undermined if police refer to incentives such as sentencing discounts to encourage a confession;
- the prospect of a discount may induce some defendants to plead guilty if the case against them looks strong, even though they did not commit the crime or a conviction is not appropriate[7]

Where an offender is convicted of a reduced charge and a plea bargain, they have already received the benefit of being exposed to a lesser range of sentences. A plea to those lesser charges should attract a discount, however it should not be in the order of pleading to the original charges. Similar to the argument to double counting aggravating factors in previous papers, this is akin to double counting discounts – one through the reduced charge and one through the plea of guilty.

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

In his paper, Justice Rod Howie of NSW Supreme Court (2008) states that a sentencing discount refers to a specific reduction, usually quantifiable, relating to a discrete factor and which is applied after all other sentencing considerations have been taken into account. It has also been plain since Thomson and Houlton that different judges have very different views about what the extent of the discount for the utilitarian plea of guilty should be and the rationale for the discount. This is perhaps as a result of a view by some that a discount of 25 per cent solely based upon the utilitarian value of a plea of guilty is overly generous. The problem is that although the amount of discount is a matter of discretion, the basis upon which the discretion is exercised is very limited: in the vast majority of cases it is merely the timing of the plea. Whenever the judge departs from the guideline or does not state the value of the discount this is almost inevitably a ground of appeal and the Court of Criminal Appeal is faced with the difficult task of determining either what the discount might have been or the discretionary reasons that may have existed for departing from the guideline. In the absence of reasons, which is normally the case, the offender will find it difficult to understand why a discount in accordance with the guideline was not given in his or her particular case. It can hardly be said that the decision has added to transparency in sentencing in New South Wales when a judge is not required to nominate the discount and judges frequently do not do so. Nor does it seem to have

[7] Johns, Rowena, NSW Parliamentary Library Research Service, Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services, Briefing Paper No 10/01, 2002

much assisted consistency when the discount is discretionary despite the very limited factors upon which it is based and there are variations discernable in the discounts given even when the discounts are disclosed. There are cases where the sentence imposed appears to be inconsistent with the stated discount notwithstanding that there will be a degree of rounding out of the numbers.

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

It is probably relevant to take into consideration research (Dawes, Harvey, McIntosh, Nunney and Phillips 2011) conducted on attitudes to guilty plea sentence reductions when considering a response to this question. In its findings, the public assume that the key motivation for the guilty plea sentence reduction is to reduce resources (time and money), but they prefer the idea of it as something which helps prevent victims having to give evidence and experiencing emotional trauma whilst doing this. There is a strong sense that the drive for cost savings should not impact on a system effectively delivering justice.

There is more support for sentence reductions if the guilty plea is entered at an early point. The benefits – both economic and emotional – are more tangible at this point, and both the public and victims and witnesses are less likely to feel that the offender can 'play the system'. On the other hand offenders say they are less likely to enter an early plea, but prefer to weigh up the evidence against them first.

There is generally little support for a reduction for a guilty plea made at the court door or once the trial has started amongst the public and many victims and witnesses, although the small number of victims of more serious offences included in this study often felt that reductions at this stage could be acceptable. There was an indication that the prospect and reality of attending court proved more traumatic for this group, and they therefore may be more open to late reductions.

For the general public, there was weak support for higher levels of reductions beyond the current guideline range of up to 33% and a fifth (20%) felt that there should be no reduction at all. Supporting this, when survey respondents were asked whether the reduction should be increased from a third if an offender pleads guilty at the earliest opportunity, 58% disagreed and only 22% agreed. A small number of victims of more serious offences were, however, more supportive if it spared them having to testify in court.

The public (and some victims and witnesses) do not like the idea of a universal approach to reductions – in fact, the public in the survey were less likely to say that an offender pleading guilty to an offence should be given a more lenient sentence in most/all cases (21%) and more likely to say it never should result in a more lenient sentence (29%). They instead think that this should depend on certain factors/circumstances relating to the offender or offence type. For instance, views were often much more punitive towards violent crimes as opposed to those against businesses, and likewise towards repeat offenders versus first time offenders.

The language and discourse of the reductions did not sit well with people. They were very resistant to the idea of an offender being 'rewarded' for admitting they were guilty of an offence; rather they spontaneously suggested that defendants should be further penalised for not admitting guilt if they are subsequently found guilty.

Offenders in this study were often unsure what their sentence was likely to be when weighing up how to plead, and felt that decisions on sentence lengths were inconsistent. This made it difficult for them to calculate exactly what the impact of a set reduction to their sentence would be. Offenders also questioned the extent to which reductions for early guilty pleas were actually being applied, with a number feeling that it was very difficult to understand exactly how their final sentence had been determined. However, when probed on the level of reductions, offenders in this study were broadly content with the current discount of a third for an early guilty plea, and felt that without the reduction there was little incentive to admit guilt.

The main factor determining whether or not offenders plead guilty was the likelihood of being found guilty at trial. The key 'tipping point' here was when offenders realised that the chances of them being found guilty were greater than being found not guilty. Weight of evidence and advice from solicitors/barristers were pivotal in offenders' assessments of whether they were likely to be found guilty and therefore crucial in determining when a guilty plea was entered. There was little evidence from the research that increasing the reduction further would encourage more offenders to plead guilty at an earlier stage, given the reduction only becomes a driver of entering a guilty plea at such a point that an offender considers a conviction to be the likely outcome.

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

As mentioned already, it has also been plain since Thomson and Houlton that different judges have very different views about what the extent of the discount for the utilitarian plea of guilty should be and the rationale for the discount. This is perhaps as a result of a view by some that a discount of 25 per cent solely based upon the utilitarian value of a plea of guilty is overly generous. In any case the Court of Criminal Appeal has faced the situation of a discount of as low as 15 per cent being given for a plea of guilty at the Local Court notwithstanding the guideline judgment that would suggest.

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

Other Australian jurisdictions have not generally followed the NSW approach by distinguishing one part of the effect of the plea of guilty and treating it as a separate matter of mitigation. In Western Australia the Court maintains an instinctive synthesis approach to sentencing so that "attempts to specify the extent of the discount for a plea of guilty should be addressed with care"40. But it is accepted that the court must take into account the plea even where there is an absence of remorse. In a simple case it is not an error to state the discount given for the plea of guilty but nor is it an error not to specify the discount. It has been held that the public interest would benefit from the judge identifying the amount of the discount and the reasons for it. If a discount is given, that fact must be stated. The discount for a fast-track plea of guilty will be between 20 and 35 per cent but the discount takes into account all aspects of the plea including remorse and an acceptance of responsibility.

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

In Tasmania the principles were set out in Pavlic v R46. Green CJ at 16 stated:

> *"The appellant's remorse, the fact that he pleaded guilty and the fact that he volunteered information which would not otherwise have been known to the police were mitigating factors.*

However I do not accept the submissions made by counsel for the applicant that this Court should endorse a formalised approach whereby considerations of this kind should be reflected by applying a nominated percentage "discount" to the "head sentence".

Considerations of this kind are no different in kind from and should be treated in the same way as all the other considerations which are relevant to the exercise of the sentencing discretion. It is not regarded as appropriate to reflect the other aggravating and mitigating circumstances relevant to sentence in a list of premiums or discounts each expressed as a percentage and I can see no reason why mitigating circumstances arising out of remorse, a plea of guilty or assistance given to the police should be treated differently." This has remained the approach and it was not an error for a judge merely to indicate that "some credit" was given for a plea of guilty. However, where the plea of guilty is a cogent factor, there is no error in identifying it as a component in the sentencing synthesis and analysing its weight.

In South Australia a five-judge bench considered the discount for the plea of guilty in R v Place. The Court saw no difficulty in continuing the practice that had existed in that State by indicating a discount for the plea of guilty. However, the discount includes all aspects of the plea including remorse and contrition and active assistance to the police. There is a statutory requirement that the court take into account the plea of guilty but it does not indicate the manner in which it is to do so. The Court held that the discount for the plea of guilty should be identified but it was not an error if it were not. The plea of guilty is only mitigatory if it results from genuine remorse or if it results from a willingness to co-operate with the administration of justice or some other public interest.

In the Northern Territory the discount for the plea of guilty encompasses all aspects of the plea but no tariff has been determined. Where there was a plea of guilty at the earliest opportunity accompanied by true remorse a discount of 15 per cent was inadequate. A discount of 10 per cent was held to be appropriate for a late plea after the complainant gave evidence in chief. The court is to have regard to an offer made to plead guilty including any terms attached to the offer. An offer to plead guilty to manslaughter was given little weight where it was "self-interested maneuvering".

In Queensland there is a statutory requirement that a plea of guilty be taken into account and if a sentence is not reduced the court must state its reasons. There should be a reduction in the sentence even though there is no remorse. It has been held that a court should indicate how it is reducing the sentence if it is doing so because of the plea. A reduction may be achieved by making a recommendation for early parole. An unaccepted offer to plead guilty is a relevant fact in determining sentence for that offence.

The courts in Victoria take into account the plea of guilty in all its aspects including remorse but are reluctant to specify the discount. Credit is given for the plea as part of the general synthesis of factors relevant to the sentence64. The plea of guilty is a mitigating factor even if it is a result of self-interest in receiving a lesser sentence, although the value would be limited. A plea of guilty to murder will not necessarily avoid a life sentence.

In the Australian Capital Territory the effect of the plea of guilty is set out in s 35 of the Crimes (Sentencing) Act 2005 which requires the court to take into account various factors including whether the plea of guilty was related to negations between the offender and the prosecutor

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. It is recognised throughout Australian jurisdictions that assistance given by an offender to investigating or prosecuting agencies is mitigatory and is to be taken into account when determining the sentence to be imposed. In NSW and other jurisdictions there are provisions relating to assistance to authorities. Assistance may be taken into account whether it relates to the particular offence for which the offender is to be sentenced or otherwise. It is a matter of public policy that offenders should be encouraged to assist the police in relation to co-offenders or criminal activity generally. This policy has been emphasised in drug importation offences. There is also a need to compensate the informer from any harshness of the custodial regime arising from protection offered to the offender because of the assistance given.

The assistance given can range from general intelligence information, participation in the investigatory process, such as the wearing of a listening device, or an undertaking to give evidence for the prosecution. Although there was initially a view that the effectiveness of the assistance was not a relevant factor, legislation in NSW requires the court to take this factor into account. It has been held to be relevant in sentencing for Commonwealth offences.

Assistance can also arise from the voluntary admission of unknown criminality committed by the offender, but in NSW this does not result in a particular discount and is often seen as part of the effect of the plea of guilty.

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

According to Howie (2002) there was a persisting argument that sometimes found favour that the discount for assistance was additional to that for the plea of guilty and in an appropriate case the discount could be as high as 75 per cent. This argument was ultimately rejected in R v SZ91 where it was held that the discounts should be combined and should not normally exceed 50 per cent. It was stressed that there was a limit to the degree that a sentence could be reduced by discounts before it became inadequate either as a breach of s 23(3) of the Crimes (Sentencing Procedure) Act 1999 or under the common law. When the discount for the guilty plea is as high as 25 per cent, there is correspondingly less scope to reduce the sentence for any other factor including assistance. With the concurrence of Simpson J, I wrote:

> *There is in my opinion nothing unfair about this result nor is the public policy in encouraging assistance necessarily reduced. There is still on offer, even after an early plea, a discount of somewhere in the vicinity of 25 per cent, or more in an exceptional case. The simple fact is that it is more important to the administration of justice to encourage and reward early pleas of guilty. If the pursuit of that policy diminishes the ability to encourage and reward assistance, so be it. There is a greater public policy at stake and that is public confidence in the courts to impose sentences that are just and reasonable to all concerned.*

Of course there will be cases where, because of the particular circumstances of the assistance given and the offender's circumstances, the sentence might on its face appear to be inadequate, for example where the offender's life might be at risk in custody.

3. Should judicial officer be required to quantify the discount(s) applied, as is currently required by section 23(4) of the Crimes (Sentencing Procedure) Act 1999 (NSW)?
In NSW it has been considered that the discount for assistance would fall generally within the range of 20 to 50 per cent. But that range was established before Thomson and Houlton determined that the discount for the utilitarian value of the plea might be as high as 25 per cent. Notwithstanding that the guideline judgment appreciated that it might not be appropriate to give separate discounts for the plea and assistance, the practice quickly arose of giving two discounts, notwithstanding reservations expressed in the Court of Criminal Appeal. Where two discounts were given, the question arose as how the discounts should be combined and the Court of Criminal Appeal endorsed discounts as high as 60 per cent. The situation reached the stage that a judge gave discounts totally over 80 per cent without a Crown appeal. However, there were attempts to restrict the discount to a combined total of 50 per cent. To a significant degree, particularly in the District Court of NSW, the discount for assistance took on a life of its own with little apparent regard in many cases to the rationale for the discount or the statutory limitation that the discount not result in a sentence that was unreasonably disproportionate to the object seriousness of the offence. To some degree this occurred because of joint submissions by the defence and Crown. Some of the matters to be taken into account in determining the discount as set out in the particular section have never, been acknowledged in sentencing remarks. Other matters were often ignored, for example discounts in the range of 50 per cent were given even though the offender was not being held in protective custody or was not, by reason of having given assistance, experiencing harsher custodial conditions. In R v Sukkar90 it was held that a combined discount for assistance and plea should not normally exceed 40 per cent unless there was evidence that the offender would serve the sentence in harsher conditions. It is for the offender to indicate the actual nature of the conditions in which the sentence is to be served.

4. Is the current range of discount allowed for assistance to authorities appropriate?
According to Howie (2002) there will be cases where, because of the particular circumstances of the assistance given and the offender's circumstances, the sentence might on its face appear to be inadequate, for example where the offender's life might be at risk in custody.

In South Australia the relevance of assistance was recently considered in Director of Public Prosecutions (Cth) v AB94. It was emphasised that the nature of the assistance and the relevant factors can vary so that it would be wrong to be exhaustive about the matters that can be taken into account. The view was expressed that it was preferable to give a combined discount for the plea and assistance because of the risk of double counting by combining the two discounts96. There it was held that a discount totaling 65 per cent was manifestly excessive and a 40 per cent discount was substituted notwithstanding threats made to the offender and his family.

In R v Webber97 The Queensland Court of Appeal commented upon the difficulty of striking a balance between encouraging assistance to authorities and yet imposing a sentence that reflected the seriousness of the offence. Under the legislation of that State the court is required to indicate in closed court the sentence it would have given but for the future assistance offered and a failure to do so will vitiate the sentence.

In Victoria a discount of up to 50 per cent may be appropriate in cases such as drug matters where the assistance is of particular significance and comes at very great risk to the offender. Otherwise

there is a wide discretion in the discount to be given. The fact that the offender is in protective custody as a result of information is a matter to be taken into account. An offender who has given assistance before the commission of the offence does not receive the discount although the fact that he or she is in protection because of that assistance is relevant. As is the situation now in NSW, the offender is to lead evidence as to the hardship suffered101. Generally the court considers the effectiveness of the assistance as irrelevant.

In Western Australia a discount for assistance of up to 50 per cent can be given. Where the offender delayed in giving information and the police considered it to be of little value, the reduction of a sentence of 14 years by 2 years for the assistance, plea and other subjective matters was not inadequate. The court will take into account conditions of imprisonment but the court should have information as to the nature of the conditions

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

In NSW after Thomson and Houlton discounts for assistance resulted in a large number of appeals and on one view gave rise to a further complication of the sentencing practice in that State by the consideration of the utilitarian value of the plea separately from the assistance otherwise provided by the offender. There was to a degree inconsistency in the approach adopted to the matter in the Court of Criminal Appeal, with some courts considering independent discounts and how they were to be combined and other courts advocating a single discount for both forms of assistance. The issue now seems to have been settled by the decision in SZ, but whether there will now follow a simpler and more consistent approach remains to be seen. SZ has been applied both at the sentencing level, and by the Court of Criminal Appeal to limit the discount given to the offender.

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?

The debate about pre-trial disclosure generally, and the compulsory defence disclosure in particular, has a long history in NSW, stretching at least as far back as the mid-1980s. It has been shown to be an effective mechanism in other jurisdictions, to focus the court's time on the issues that are in dispute, remove extraneous matters, and provide some incentive on the part of the accused to co-operate in that process.

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

Consistency is a major goal of sentencing, and whilst there has been widespread acceptance of the need for discounts, there is a need for greater consideration of the theoretical and policy basis on which they are used in practice, and their effect on consistency and fairness in the sentencing system more generally. More considered case analysis and empirical evidence and research is required on an international and national standard.

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

According to LRC's Report 95 2000 (The Right to Silence), one cogent objection to compulsory prosecution pre-trial disclosure is that that it is open to misuse by the defence. It is arguable that

early disclosure of the substance of the prosecution case gives the defence an opportunity to tailor its case to meet the disclosed prosecution case, by fabricating evidence, procuring perjured testimony, and intimidating prosecution witnesses. It is also argued that compulsory prosecution pre-trial disclosure rules can be, or are, misused by the defence to force the prosecution to comb through large amounts of material as a tactic to delay trials, or simply in order to conduct a fishing expedition for potential defence evidence or lines of argument.

It is also argued that disclosure of certain sensitive prosecution material which reveals the identity of undercover police officers or informants, may endanger their safety or jeopardise the effectiveness of police investigations. In particular cases, the defence may insist on full prosecution disclosure in the hope that the prosecution will be induced to withdraw the charges rather than have to disclose particular material. Various measures can be taken to minimise these risks. The Barristers' and Solicitors' Rules and DPP Prosecution Guidelines provide that prosecutors can decline or limit disclosure which is not in the interests of justice in a particular case. For example, the names of police officers or informants can be withheld while the substance of their evidence can be disclosed. The defendant and his or her legal advisers can be required to treat prosecution material confidentially. In particular circumstances, access to sensitive material may be restricted to the defendant's legal representatives, although the Commission acknowledges that this would hinder the ability of defendants to properly instruct their legal representatives.

Prosecutors can be required to notify the defence of the non-disclosure of particular material, and the court can be given jurisdiction to hear challenges by the defence to non-disclosure. The Commission notes that the misuse of prosecution disclosure by fabricating evidence, procuring perjured testimony and interfering with prosecution witnesses are already criminal offences in themselves. However, there is always a risk that this type of material may be misused, even where protective .measures are in place

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

Mackenzie (2002) refers to a study by Henham of sentencing discounts in the Crown Court in the UK that has suggested the need for reform in the way in which guilty pleas are taken into account. The findings of that study suggested a need for greater transparency in the way in which sentencing discounts are taken into account, and that greater guidance should be provided to sentencers. With little prescription of exactly how the discount should be taken into account in Australia being provided, the findings of the study would apply equally here. Henham notes that well known sentencing scholar Andrew Ashworth argues convincingly that fundamental reform of the UK system of sentencing discounts is necessary on the basis of contravention of fundamental rights in the European Convention of Human Rights, namely the presumption of innocence, the privilege against self-incrimination, the right to equality of treatment and the right to a fair and public hearing. Henham also notes Ashworth's support of the reappraisal of the guilty plea discount, which suggests either abolition or that major changes should occur.

An Australian study by Mack and Anleu involving over 50 interviews with judges, police prosecutors, DPP staff and defence lawyers concluded that the sentencing discount for guilty pleas was wrong in principle and should no longer be supported. According to Mack and Anleu, the sentencing discount is a plea bargain in its crudest form. They go on to say,

It puts an inappropriate burden on the accused's choice to plead guilty, undermines proper sentencing principles, risks inducing a guilty plea from the innocent, undermines judicial neutrality and independence, and does not directly address the problems of time and delay which motivated its introduction by the courts. One suggestion to improve efficiency and transparency is the use of sentence indications by judges at the pre-trial stage. This call has been recently taken up by the Australian Law Reform Commission, who has recommended the use of sentence indication hearings in relation to the sentencing of Commonwealth offenders. In a press release dated 22 June, the ALRC called for overhaul of the Federal sentencing system to provide greater consistency, fairness and clarity. The review of the way in which sentencing discounts are provided is an important part of this.

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?

Under NSW legislation and at common law, a court cannot take into account certain factors which could, on their own, otherwise arguably be capable of mitigating the sentence. It is important that if changes are made the above all aim is transparency in sentencing. transparency is absolutely crucial so the community can understand why a particular sentenced is imposed.

Question 4.5

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

24B relates to the confiscation of assets and forfeiture of proceeds of crime being disregarded in sentencing. This is a very important point. During its consideration of the Bill, (Hansard Transcript Legislative Assembly, 2 December 2010), speakers stated quite clearly, *that there is no way that the loss of ill-gotten gains could be considered hardship for the defendant. There is no way that a court should consider that somehow a defendant deserves sympathy because of the loss of goods that, for example, have been stolen. That should not be a relevant consideration in imposing a sentence. In that regard, it is good to ensure that only relevant matters are taken into account by sentencing judges and to ensure that they do not have regard to completely irrelevant matters that could be insulting to a victim*.

Question 4.6

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

According to the commentary provided in the Commonwealth Sentencing Database*, It falls to the sentencing court to determine sentence by reference strictly to those matters which are relevant, and any prospect of deportation consequent upon the imposition of an otherwise appropriate penalty is simply irrelevant to that process. That is a matter of concern only to the Executive.*

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