



**New South Wales
Law Reform Commission**

Sentencing Question Papers 1-4

Consolidated questions

April 2012
www.lawlink.nsw.gov.au/lrc

Make a submission

We seek your responses to the first four question papers in the Commission's reference on sentencing. To tell us your views you can send your submission by:

Post: GPO Box 5199, Sydney NSW 2001

DX: DX 1227 Sydney

Email: nsw_lrc@agd.nsw.gov.au

It would assist us if you could provide an electronic version of your submission.

If you have questions about the process please email or call (02) 8061 9270.

The closing date for submissions on Question Papers 1 to 4 is Monday, 4 June 2012.

We intend to release further question papers in **May 2012**.

Use of submissions and confidentiality

We generally publish submissions on our website and refer to them in our publications.

Please let us know if you do not want us to publish your submission, or if you want us to treat all or part of it as confidential.

We will endeavour to respect your request, but the law provides some cases where we are required or authorised to disclose information. In particular we may be required to disclose your information under the *Government Information (Public Access) Act 2009* (NSW).

In other words, we will do our best to keep your information confidential if you ask us to do so, but we cannot promise to do so, and sometimes the law or the public interest says we must disclose your information to someone else.

About the NSW Law Reform Commission

The Law Reform Commission is an independent statutory body that provides advice to the NSW Government on law reform in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

For more information about us, and our processes, see our website:
<http://www.lawlink.nsw.gov.au/lrc>

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This consolidated list of questions is extracted, for the convenience of stakeholders, from the NSW Law Reform Commission’s sentencing reference’s Question Papers 1-4.

Question Paper 1 - Purposes of sentencing

Section 3A and its application

Question 1.1

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

Question 1.2

1. Should courts be required to take every purpose in the statutory list into account in determining an appropriate sentence?
2. Are there any circumstances where a particular purpose should not be taken into account?

Question 1.3

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

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Question 1.4

1. Should a single overarching or primary purpose of sentencing be identified? If it should, what should it be?
2. What circumstances (such as the nature of the offence or the offender) might justify a different overarching or primary purpose?
3. Should a hierarchy of sentencing purposes be established?
4. If so:
 - a. what should that hierarchy be, and
 - b. in what circumstances might it be appropriate to vary that hierarchy?
5. Should guidance be provided as to the court's approach to applying the purposes of sentencing in particular circumstances?
6. Should it be expressly stated that there is no hierarchy of sentencing purposes?

Specific purposes of sentencing

Question 1.5

1. Is ensuring that the offender is adequately punished for the offence a valid purpose of sentencing?
2. Does the purpose of punishment need to be qualified in any way, for example, by terms such as "adequately" or "justly"?

Question 1.6

1. Is preventing crime by deterring others from committing similar offences a valid purpose of sentencing?
2. Should general deterrence be a relevant consideration in relation to all offences and all offenders? How could its application be limited?

Question 1.7

1. Is preventing crime by deterring offenders from committing similar offences a valid purpose of sentencing?
2. Should specific deterrence be a relevant consideration in all cases? How could its application be limited?

Question 1.8

1. Is protection of the community from the offender a valid purpose of sentencing?
2. Should incapacitation be more clearly identified as a purpose of sentencing:
 - a. generally; or
 - b. only in serious cases?
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?

Question 1.9

1. Is the promotion of the offender's rehabilitation an appropriate purpose of sentencing?
2. Should 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?
2. How, if at all, does it differ from the purpose of ensuring that the offender is adequately punished for the offence?
3. Should the purpose of retribution be more clearly identified in the statutory list? What are the implications for sentencing of doing so?

Question 1.11

1. Is denunciation of the offender's conduct an appropriate purpose of sentencing?
2. Should the purpose, as currently expressed, be altered in any way?

Question 1.12

1. Is recognition of the harm done to the victim of the crime and the community an appropriate purpose of sentencing?
2. Should the current expression of the purpose be altered in any way?

Question 1.13

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

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Question 1.14

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

Question 1.15

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

Question 1.16

1. Should purposes of sentencing be identified that relate to particular groups of offenders?
2. If so, which groups and what purposes?
3. Should purposes of sentencing be identified that relate only to Indigenous people?
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?

Question Paper 2 – General sentencing principles

Imprisonment as a last resort

Question 2.1

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

Proportionality

Question 2.2

1. Should the common law principle of proportionality continue in its current form or be amended in any way? What would be the advantages and disadvantages of codifying the principle of proportionality?
2. Should there be codification of the principle that the jurisdictional limit in the Local Court is not reserved for 'worst case' offences?

Parity

Question 2.3

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

Totality

Question 2.4

1. Should the common law principle of totality continue in its current form or be amended in any way? What would be the advantages and disadvantages of codifying the principle of totality?
2. Should sentencing courts have discretion to:
 - a. impose an overall sentence for all of the offences; and
 - b. articulate what sentences would have otherwise been imposed for the individual counts?

Sentencing the offender only for the offence proved

Question 2.5

Should the principle that an offender is to be sentenced only for the offence proved (but still allowing the court to take into account aggravating circumstances within that limitation) be codified? What would be the advantages and disadvantages of codifying this principle?

Reasons for sentencing

Question 2.6

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

Alternatives

Question 2.7

1. Should parsimony be part of the sentencing law of New South Wales?
2. Are there any further principles which could be incorporated into the NSW sentencing law?

Instinctive synthesis

Question 2.8

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

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

Question 3.1

1. What would be the advantages and disadvantages of abolishing s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW)?
2. Are there dangers that relevant factors may not be taken into account in the absence of a provision similar to s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW)?
3. Would sentencing be less transparent in the absence of a provision similar to s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW)?

Question 3.2

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

Question 3.3

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

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

3. Should s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) be reframed as an unclassified, neutral and non-exhaustive list of sentencing factors?
4. If so:
 - a. should the factors be expressed in broad terms, for example as general categories of considerations such as the nature and circumstances of the offence and the character, antecedents, age, means and physical or mental condition of the offender; or
 - b. should the same level of detail as appears in the current s 21A be reproduced in a new provision, but without listing the relevant factors as 'aggravating' or 'mitigating'?

Question Paper 4 – Other discounting factors

Plea of guilty

Question 4.1

1. Should there be a discount allowed for a plea of guilty? Are there any circumstances in which a discount for a plea of guilty should not be allowed?
2. Should judicial officers be required to quantify the discount allowed for a plea of guilty?
3. Should the determination of the level of discounts for pleas of guilty entered at various stages of proceedings be prescribed by legislation?
4. Should the discount for a plea of guilty be limited only to the utilitarian value of the plea?
5. What is the most appropriate way for remorse to be taken into account in the sentencing process?
6. How else could the determination of discounts for pleas of guilty be improved?

Assistance to authorities

Question 4.2

1. Should there be a discount for assistance to the authorities? Are there any circumstances in which a discount for assistance to authorities should not be allowed?
2. Should legislation specifically exclude the common law approach to allowing a combined discount for a plea of guilty and assistance to the authorities?

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3. Should judicial officers be required to quantify the discount(s) applied, as is currently required by section 23(4) of the *Crimes (Sentencing Procedure) Act 1999* (NSW)?
4. Is the current range of discount allowed for assistance to authorities appropriate?
5. What would be the advantages and disadvantages of codifying amounts of discounts for assistance to authorities?

Pre-trial and trial assistance

Question 4.3

1. Should there be a discount for pre-trial or trial assistance? Are there any circumstances in which a discount for pre-trial or trial assistance should not be allowed?
2. Should judicial officers be required to quantify the discount allowed for pre-trial and trial assistance?
3. What would be the advantages and disadvantages of codifying amounts of discounts for pre-trial and trial assistance?
4. Would a greater emphasis on discounts for pre-trial and trial assistance be likely to increase the efficiency of the criminal justice system?

Excluded factors

Question 4.4

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

Question 4.5

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

Question 4.6

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



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