



**New South Wales
Law Reform Commission**

Sentencing Question Paper 1

Purposes of sentencing

April 2012
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Question Paper 1 - Purposes of sentencing

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

Section 3A and its application

- 1.2 Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('the Act') provides:

3A Purposes of sentencing

The purposes for which a court may impose a sentence on an offender are as follows:

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent 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 recognise the harm done to the victim of the crime and the community.

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- 1.3 This provision includes the purposes of sentencing traditionally identified by the common law, namely “protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform”.¹ However, in some cases it may modify or go further than the traditional purposes.
- 1.4 The purposes of sentencing work within the context of, and are constrained by, the principles of sentencing and the other factors that a court should take into account that are expressed in both common law and statute.² These are discussed in Question Papers 2-4.
- 1.5 Section 3A was introduced as part of a number of amendments aimed at promoting “consistency and transparency in sentencing” and promoting “public understanding of the sentencing process”.³
- 1.6 The sentencing statutes in some other jurisdictions also contain lists of purposes of sentencing.⁴ Some jurisdictions, on the other hand, do not have a legislative statement of the purposes of sentencing.⁵

Question 1.1

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

Must the court address all of the purposes in s 3A?

- 1.7 The courts in NSW have followed the long-established approach to the traditional common law purposes and held that a court must address all of the purposes when framing a sentence.⁶ A court will, therefore, err if it takes no account of one or more particular purposes of sentencing.⁷
- 1.8 Some other jurisdictions have taken a different approach, for example, by:
- introducing the purposes of sentencing with a statement that a court “may impose a sentence on an offender for 1 or more of the following purposes”;⁸ or
 - allowing the courts to consider a combination of two or more of the listed purposes.⁹

1. *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476.

2. *R v MMK* [2006] NSWCCA 272; 164 A Crim R 481 [10]-[11].

3. *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*; NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (R J Debus, Attorney General).

4. *Sentencing Act* (NT) s 5; *Sentencing Act 1991* (Vic) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Crimes (Sentencing) Act 2005* (ACT) s 7.

5. But see the list of matters to be taken into account in sentencing in *Crimes Act 1914* (Cth) s 16A(2)(j), (k), (n); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j), (k), (m); and the list of purposes which the *Sentencing Act 1997* (Tas) aims to achieve: s 3.

6. *R v Stunden* [2011] NSWCCA 8 [112] (Garling J).

7. *R v Stunden* [2011] NSWCCA 8 [112] (Garling J); *R v Field* [2011] NSWCCA 13 [59] - [60] (Garling J).

8. *Crimes (Sentencing) Act 2005* (ACT) s 7(1).

- 1.9 There is a danger with such provisions that some judicial officers may give undue prominence to one or other 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?

May the court consider other purposes?

- 1.10 NSW does not expressly limit the purposes of sentencing that can be taken into account to those in the statutory list.
- 1.11 Some other jurisdictions, by contrast, identify the purposes listed as the “only purposes” for which sentences may be imposed.¹⁰
- 1.12 One benefit of expressly limiting the purposes of sentencing is to prevent the pursuit of illegitimate sentencing purposes.¹¹

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?

Prioritising the purposes

- 1.13 Section 3A, in setting out the various purposes of sentencing, does not identify a single overarching purpose, neither does it identify a primary purpose or establish any priority among the various purposes. This follows the common law position.
- 1.14 It is also consistent with the conclusions of various Australian law reform agencies which have noted that there is no agreement as to what the primary purpose of sentencing should be or the order in which the purposes should be ranked.¹²
- 1.15 Most jurisdictions do not expressly exclude a hierarchy among the purposes of sentencing. The ACT, by contrast, states that “nothing about the order in which the

9. *Sentencing Act* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Sentencing Act 1991* (Vic) s 5(1).

10. *Sentencing Act* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Sentencing Act 1991* (Vic) s 5(1).

11. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [4.37].

12. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [14.13]; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [4.48]; Tasmania Law Reform Institute, *Sentencing*, Final Report No 11 (2008) [7.1.36].

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purposes appear... implies that any purpose must be given greater weight than any other purpose".¹³

- 1.16 Ultimately the emphasis given to particular purposes of sentencing will depend on the circumstances of the case, including characteristics of the offender and characteristics of the offence.
- 1.17 For example, a court will generally not give prominence to general deterrence in the case of an offender with a mental health or cognitive impairment¹⁴ and, depending on the seriousness of the offence, rehabilitation will be given greater weight as a purpose in sentencing a young offender.¹⁵ The most important purposes for serious crimes such as murder and armed robbery are likely to be punishment and general deterrence, while, for less serious crimes, rehabilitation may be given greater prominence.
- 1.18 Some jurisdictions have taken the approach of identifying in legislation the types of offenders or the types of offences for which particular purposes should be given priority. For example, the ACT provides that in the case of a young offender "a court must consider the purpose of promoting the rehabilitation of the young offender and may give more weight to that purpose than it gives to any of the other purposes stated".¹⁶
- 1.19 It can be argued that all of the purposes of sentencing come under the single overarching purpose of the protection of society or the community from crime.¹⁷ Some jurisdictions have identified protection of the community or maintenance of public safety as a primary policy or objective of sentencing or the criminal law.¹⁸
- 1.20 It has been suggested that expressions such as "protection of the public" have been used "as an umbrella term to reflect the reductivist approach, in other words the aim of reducing the incidence of offending in society".¹⁹ All of the purposes of sentencing could be said to be aimed at the reduction of offending in one way or another, although the "forward-looking" objectives of deterrence, incapacitation and rehabilitation are more strongly associated with crime prevention than are the "backward-looking" objectives of retribution, denunciation and recognising harm to the victim which are concerned with the commission of the crime and punishment of it.

13. *Crimes (Sentencing) Act 2005* (ACT) s 7(2).

14. *R v Hemsley* [2004] NSWCCA 228 [33]; *R v Engert* (1995) 84 A Crim R 67, 71.

15. *R v DAR* (unreported, NSWCCA, 2 October 1997); *R v Mazzilli* [2001] NSWCA 117. See also *R v Nichols* (1991) 57 A Crim R 391, 395; *R v Pham* (1991) 55 A Crim R 128, 135 (Lee CJ at CL); *R v AEM Snr* [2002] NSWCCA 58 [97]-[98]; NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5816 (R J Debus, Attorney General).

16. *Crimes (Sentencing) Act 2005* (ACT) s 133C(1).

17. *R v Cuthbert* (1967) 86 WN (Pt 1) (NSW) 272, 274; *R v Channon* (1978) 20 ALR 1, 5.

18. See, eg, *Criminal Law (Sentencing) Act 1988* (SA) s 10(1b); *Sentencing Act 1997* (Tas) s 3(b); *Kentucky Revised Statutes* s 532.007(1); *Criminal Code*, RSC 1985, c C-46 s 718.

19. K Warner, *Sentencing in Tasmania* (2nd ed, Federation Press, 2002) [3.203].

- 1.21 Some jurisdictions have also highlighted particular purposes of sentencing for particular offences. For example, South Australia has singled out:
- home invasions (protection of the security of lawful occupants);
 - lighting bushfires (bringing home the extreme gravity of the offence and reparation); and
 - child sex offences (deterrence).²⁰
- 1.22 In Victoria, a court, when sentencing a recidivist serious arson, drug, sexual or violent offender for a relevant arson, drug, sexual or violent offence, "must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed".²¹ The Canadian Criminal Code requires a court to "give primary consideration to the objectives of denunciation and deterrence" in relation to offences involving the abuse of a person under the age of 18 years; assaults against police officers; the use of weapons; and other serious assaults.²²
- 1.23 It has been suggested that "an approach which clarifies by specifying overarching sentencing principles for different types or severity of offences is more in line with both community expectations and the needs of sentencers".²³
- 1.24 This view of "community expectations", in relation to different types or severity of offences, has some support in the Victorian Sentencing Advisory Council's report on community views of sentencing in Victoria. The report recorded the results of a community survey about a set of case studies relating to sentencing for burglary and serious violence. The survey generally found, on the one hand, a preference for rehabilitation for young offenders, first offenders and those guilty of burglary, and, on the other hand, a preference for punishment for adult offenders, repeat offenders and those guilty of serious violence. The report observed that the survey results "clearly demonstrate the importance of identifying specific offence and offender characteristics when asking for people's views about the purposes of sentencing".²⁴

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

20. *Criminal Law (Sentencing) Act 1988* (SA) s 10(1b)-(4).

21. *Sentencing Act 1991* (Vic) s 6D. See R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, Oxford UP, 1999) [3.416].

22. *Criminal Code*, RSC 1985, c C-46 s 718.01, s 718.02.

23. Probation and Parole Officers' Association of NSW, *Preliminary Submission PSE20*, 10. See NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [3.22].

24. K Gelb, *Purposes of Sentencing: Community Views in Victoria*, Sentencing Matters (Victoria, Sentencing Advisory Council, 2011) 19.

- 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

- 1.25 The following paragraphs will consider the particular purposes of sentencing as identified in s 3A, whether they are still valid objectives and whether they need to be abolished, or amended in some way, or new ones added to the list.

Adequate punishment for the offence

- 1.26 Paragraph 3A(a) of the Act states that one of the purposes for which a court may impose a sentence on an offender is:

to ensure that the offender is adequately punished for the offence.

- 1.27 The purpose of ensuring that the offender is adequately punished for the offence has been interpreted in a variety of ways, including as a reference to retribution²⁵ or the just deserts theory of punishment.²⁶ However, the NSW Court of Criminal Appeal ('CCA') has considered it to be the statutory expression of the "fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed".²⁷

- 1.28 It has been suggested 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".²⁸ Arguably, the term "adequately" suggests a base level at which a sentence becomes "adequate" for the purpose, whereas "justly" may allow a range of possible sentences that meet that description. The ACT, however, 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".²⁹

25. Australian Law Reform Commission, *Family Violence: A National Legal Response*, Report 114, (2010) [4.84].

26. Victorian Sentencing Committee, *Sentencing*, Report (1988) vol 1, 122.

27. *R v Scott* [2005] NSWCCA 152 [15]. It arises at common law: *R v Geddes* (1936) 36 SR (NSW) 554, 556 and *R v Dodd* (1991) 57 A Crim R 349, 354.

28. *Sentencing Act* (NT) s 5(1)(a); *Sentencing Act 1991* (Vic) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a).

29. *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a).

- 1.29 A question does arise as to whether the purpose of punishment needs to be qualified expressly at all. The limiting principle of proportionality, assuming that this is what is imported by the word “adequately”, currently exists at common law and continues to apply as a principle in relation to all sentencing decisions. The common law principles of sentencing and the question of their possible inclusion in a statutory list are raised in Question Paper 2.

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”?

Deterring the offender and others from committing similar offences

- 1.30 Paragraph 3A(b) of the Act states that one of the purposes for which a court may impose a sentence on an offender is:

to prevent crime by deterring the offender and other persons from committing similar offences.

- 1.31 This purpose identifies two forms of deterrence:

- “**Specific deterrence**” which aims to prevent crime by deterring the offender from re-offending.
- “**General deterrence**” which aims to prevent crime by deterring others from committing similar offences.

- 1.32 Most other jurisdictions also identify the deterrence of the offender or others from committing the same or similar offences as one of the purposes of sentencing.³⁰ The *Crimes Act 1914* (Cth) refers only to specific deterrence as one of the matters which the court must take into account.³¹ However, despite the omission of general deterrence, it has been held that general deterrence is still a purpose that must be taken into account in sentencing for Commonwealth offences.³²

- 1.33 Deterrence may be achieved by means other than sentencing. For example, there is said to be a general deterrent effect that results from the mere existence of a criminal justice system that prescribes punishments.³³

30. *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(b); *Sentencing Act* (NT) s 5(1)(c); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c); *Sentencing Act 1991* (Vic) s 5(1)(b). *Criminal Law (Sentencing) Act 1988* (SA) provides that one of the matters the court may take into account is “the deterrent effect any sentence under consideration may have on the defendant or other persons”: s 10(1)(j).

31. *Crimes Act 1914* (Cth) s 16A(2)(j).

32. *Putland v The Queen* [2004] HCA 8; 218 CLR 174 [12]; *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370, 377; *R v Paull* (1990) 20 NSWLR 427, 434.

33. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [4.6].

General deterrence

- 1.34 The theory of general deterrence suggests that appropriately severe sentences will discourage potential offenders.
- 1.35 General deterrence has long been identified as a purpose of sentencing at common law. Indeed, the courts have held that general deterrence is of particular importance to sentences in relation to some specific offences such as possession of child pornography, assault against police officers, sexual assault of a child by a family member, sexual assault of a prisoner by another prisoner, fraud committed by a financial officer of a public company where detection of the fraud is difficult, and serious offences arising from the use of a motor vehicle both generally and in relation to drink driving.³⁴ The current prevalence of a particular offence would also appear to be an important consideration in setting a deterrent sentence.³⁵
- 1.36 Despite judges sometimes expressing doubts about the general deterrent effect of a sentence in particular cases, the CCA has affirmed that deterrence is a “structural assumption” of the criminal justice system and that judges cannot simply dismiss general deterrence as a purpose of sentencing.³⁶
- 1.37 General deterrence has been criticised on the grounds that it effectively punishes one person for the future offences of others and thereby runs counter to the principle of proportionality.³⁷
- 1.38 There are two forms of general deterrence:
- **Marginal general deterrence** which suggests that increases in penalties imposed for an offence will result in a corresponding decrease in offending behaviour.
 - **Absolute general deterrence** which suggests that the existence of an appropriate level of punishment for an offence will have an impact on such offending behaviour.
- 1.39 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.³⁸ For example, a recent NSW Bureau of Crime Statistics and Research (‘BOCSAR’) study has highlighted that increasing the risk of arrest or the risk of imprisonment reduces crime while increasing the duration of prison

34. *R v Booth* [2009] NSWCCA 89, [40]–[44]; *R v Cook; Ex p DPP (Cth)* [2004] QCA 469, [21]; *R v Gent* (2005) 162 A Crim R 29, [36]; *R v Myers* (unreported, NSW CCA, 13 February 1990) 6-7 (Hunt J); *Attorney General’s Application Under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* [2002] NSWCCA 515; 137 A Crim R 196 [26]; *R v L* (unreported, NSW CCA, 3 July 1986); *R v Daley* [2010] NSWCCA 223 [61]; *R v Glenister* [1980] 2 NSWLR 597, 616; *R v Scott* [1999] NSWCCA 233 [17]; *Briant v Bessell* (1994) 74 A Crim R 204, 208.

35. See *R v Draper* (Unreported, NSW CCA, 9 December 1988) 8, 9 (Lee J).

36. See *R v Miria* [2009] NSWCCA 68 [11]; *R v Wong* (1999) 48 NSWLR 340, 363.

37. A von Hirsch and A Ashworth (ed), *Principled Sentencing: Readings on Theory and Policy* (3rd ed, 2009) 43.

38. M Bagaric and T Alexander, “(Marginal) Deterrence Doesn’t Work – and What it Means for Sentencing” (2011) 35 *Criminal Law Journal* 269, 273-277.

sentences “exerts no measurable effect at all”.³⁹ Accordingly, there have been calls for the abolition of marginal general deterrence as a purpose of sentencing.

1.40 Many reasons have been suggested for the failure of increasing prison terms to achieve marginal general deterrence (some of them also apply to absolute general deterrence):

- Many factors may influence a person's decision to engage in criminal activity (and diminish the impact of deterrent sentences), including psychological predispositions, socialisation, drug or alcohol dependency or abuse, mental health or cognitive impairments, and social and economic disadvantage.⁴⁰
- Offenders may be subject to various cognitive biases such as giving greater weight to the immediate benefit of the crime as opposed to the delayed negative consequences or a belief that they will not be detected or apprehended.
- Deterrence may be better achieved by an increase in the certainty of detection and apprehension than by the threat of an increased term of imprisonment.⁴¹
- Potential offenders may not learn of the appropriately harsh sentences that are meant to deter their criminal activities because they are not communicated.
- Sentences aimed at deterrence may also have no effect in communities where no stigma attaches to imprisonment.

1.41 It is possible that sentences aimed at general deterrence may be more effective in cases where some of the factors listed above do not come into play, for example, for white collar criminals, environmental offenders, corporate offenders and non-addicts who are engaged in the importation of drugs. One question concerning these categories is the extent to which perceptions about the risk of detection impact on decisions to offend rather than a (possibly harsh) penalty.

1.42 Much of the discussion concerning the failure of marginal general deterrence, which concentrates on increasing sentences of imprisonment, does not adequately take into account the possibility of increasing the severity of other sentencing options, for example, fines in relation to white collar or corporate offenders, or the escalation of penalties from more lenient options to more punitive options, in particular, an increase from non-custodial options to short prison sentences.

1.43 Another question that arises is what the effect of the abolition of general deterrence as a purpose of sentencing would be. Any reduction in the level of penalties as a result of the abolition, if brought to public attention, could possibly send the wrong message to potential offenders and lead to an increase in offending.

39. W Wan, S Moffatt, C Jones and D Weatherburn, *The Effect of Arrest and Imprisonment on Crime*, Crime and Justice Bulletin No 158 (NSW Bureau of Crime Statistics and Research, 2012) 15-16.

40. M Bagaric and T Alexander, “(Marginal) Deterrence Doesn't Work – and What it Means for Sentencing” (2011) 35 *Criminal Law Journal* 269, 277-278.

41. See R Homel and P Wilson, *Death and Injuries on the Road: Critical Issues for Legislative Action and Law Enforcement* (Australian Institute of Criminology, 1987) 25-27.

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?

Specific deterrence

1.44 Specific deterrence suggests that the imposition of a penalty will deter an offender from committing further offences in future. For example, 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 pornography.⁴²

1.45 A number of problems have been identified with the use of sentences of imprisonment to achieve specific deterrence:

- Studies have suggested that a sentence of imprisonment will either have no effect on an offender's criminal activities post release or will have a negative effect (as evidenced by the recidivism rate).⁴³ Some suggested reasons for what is often referred to as the criminogenic effect of imprisonment include that:
 - prison provides a learning environment for crime,
 - imprisonment effectively labels an offender as "criminal", and
 - prison is a poor response to the underlying problems that may have caused the person to offend in the first place.⁴⁴

Weatherburn has suggested that "it would be unwise to imprison offenders when the only reason for doing so is a belief in the specific deterrent effect of prisons".⁴⁵

- Systemic delays in the actual infliction of punishment may weaken the link between the offending behaviour and the punishment.⁴⁶
- Sentences aimed at specific deterrence may have a limited effect on overall offending rates in cases where only a minority of offenders are actually apprehended.⁴⁷

42. *Mouscas v R* [2008] NSWCCA 181 [28]. See also P Mizzi, T Gotsis, P Poletti, *Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences*, Judicial Commission of NSW, Monograph 34 (2010) 7.

43. D Weatherburn, *The effect of prison on adult re-offending*, Crime and Justice Bulletin No 143 (NSW Bureau of Crime Statistics and Research, 2010).

44. See D Brown, "The Limited Benefit of Prison in Controlling Crime" (2010) 22(1) *Current Issues in Criminal Justice* 137, 141.

45. D Weatherburn, *The effect of prison on adult re-offending*, Crime and Justice Bulletin No 143 (NSW Bureau of Crime Statistics and Research, 2010) 10.

46. See M Bagaric and T Alexander, "(Marginal) Deterrence Doesn't Work – and What it Means for Sentencing" (2011) 35 *Criminal Law Journal* 269, 278.

47. R Homel, *Death and Injuries on the Road: Critical Issues for Legislative Action and Law Enforcement* (Australian Institute of Criminology, 1987) 12.

- It is not an appropriate purpose of sentencing in cases where the offender has a mental health or cognitive impairment.
- 1.46 Many of these problems relate only to sentences of imprisonment. In appropriate cases other sentences which involve some incentive not to offend, for example, suspended sentences, compulsory drug treatment, and good behaviour bonds, may have some effect in deterring individuals from committing further offences.

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?

Protection of the community from the offender

- 1.47 Paragraph 3A(c) of the Act states that one of the purposes for which a court may impose a sentence on an offender is:
- to protect the community from the offender.
- 1.48 The purpose of protecting the community from the offender can be interpreted as:
- a reference to the purpose of sentencing more generally known as “incapacitation”, or
 - a broader, overarching purpose of sentencing that can be achieved not only by way of incapacitation but also by way of sentences aimed at an appropriate mix of such purposes as rehabilitation, deterrence or punishment.⁴⁸
- 1.49 The CCA⁴⁹ has noted that the introduction of the idea of protection “from the offender” may change the nature of the more general common law purpose of protection of the community.⁵⁰
- 1.50 A number of other jurisdictions have also identified the protection of the community from the offender as being a purpose of sentencing, without expressly referring to incapacitation.⁵¹ However, in Victoria, a special provision requires a court, when sentencing a recidivist serious arson, drug, sexual or violent offender for a relevant arson, drug, sexual or violent offence, to have regard to “the protection of the community from the offender as the principal purpose for which the sentence is imposed”. This provision also allows the court to “impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its

48. *R v Zamagias* [2002] NSWCCA 17 [32]. See also *Veen v The Queen (No 2)* (1988) 164 CLR 465, 473; *R v Valentini* (1980) 2 A Crim R 170, 174.

49. *Attorney General's Application Under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* [2002] NSWCCA 515; 137 A Crim R 196 [58].

50. See para 1.19-1.20, above.

51. *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(c); *Sentencing Act* (NT) s 5(1)(e); *Penalties and Sentences Act 1992* (Qld) s 9(1)(e); *Sentencing Act 1991* (Vic) s 5(1)(e)

objective circumstances” in order to protect the community from the offender.⁵² This clearly identifies the purpose of protection of the community from the offender as being about incapacitation.

- 1.51 It may be preferable for the purpose of incapacitation to be more clearly expressed.⁵³ In response to such a call, the Australian Law Reform Commission (‘ALRC’), in its 2006 report, recommended that one of the purposes of sentencing should be “to protect the community by limiting the capacity of the offender to reoffend”.⁵⁴ Such a purpose could conceivably be achieved not only by imprisonment but, for example, by sentencing options involving intensive supervision and home detention.
- 1.52 The Canadian Criminal Code, which includes the maintenance of a “safe society” as part of its fundamental purpose of sentencing, also includes the objective of “separat[ing] offenders from society, where necessary”.⁵⁵

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?

Promotion of the offender’s rehabilitation

- 1.53 Paragraph 3A(d) of the Act states that one of the purposes for which a court may impose a sentence on an offender is:
- to promote the rehabilitation of the offender.
- 1.54 Rehabilitation, as a purpose of sentencing, assumes that the imposition of an appropriate sentence can reduce or remove the factors that have influenced an offender’s criminal behaviour.⁵⁶ The aim is, ultimately, to prevent the offender from offending in future.

52. *Sentencing Act 1991* (Vic) s 6D. See R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, Oxford UP, 1999) [3.416].

53. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [4.35].

54. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) Recommendation 4-1(d).

55. *Criminal Code*, RSC 1985, c C-46 s 718(c).

56. See *R v Channon* (1978) 20 ALR 1, 5 (Brennan J); R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, Oxford UP, 1999) [3.410].

- 1.55 Rehabilitation can be achieved or attempted in a number of ways, for example, through rehabilitation programs that are available to incarcerated offenders, through non-custodial sentences themselves (such as good behaviour bonds with supervision), or through programs available as part of community-based sentences.
- 1.56 The purpose of rehabilitation can affect a sentence in a variety of ways. For example, a lenient sentence may be imposed where it has been demonstrated that rehabilitation is underway at the time of sentencing.⁵⁷ A non-custodial sentence may be justified in some cases where to impose a sentence of imprisonment would jeopardise rehabilitation that has already taken place.⁵⁸ However, the need for rehabilitation cannot reduce a sentence which is called for by the objective features of the crime and the need for deterrence.⁵⁹ As mentioned above, rehabilitation will generally be given greater weight in sentencing a young offender.⁶⁰
- 1.57 One of the mitigating factors identified in the Act is that “the offender has good prospects of rehabilitation, whether by reason of the offender’s age or otherwise”.⁶¹
- 1.58 Several other Australian jurisdictions have identified one of the purposes of sentencing as being to help, promote or facilitate the rehabilitation of the offender.⁶² Three of them expressly refer to providing “conditions” in the court’s order that will achieve the aim.⁶³
- 1.59 Rehabilitation has fallen from favour to a certain extent since the 1970s, driven in part by a lack of evidence of the effectiveness of many rehabilitation programs.⁶⁴ However, the studies that fuelled this view have been criticised as inadequate on many grounds⁶⁵ and more sophisticated research techniques have, more recently, demonstrated positive results with respect to at least some offenders. This has prompted the Tasmania Law Reform Institute to observe:

the pessimism of the last decades of the twentieth century has been replaced by a cautious optimism that some programmes are effective in reducing the criminal behaviour of at least some offenders.⁶⁶

Fox and Freiberg have suggested that such qualified support for rehabilitation as a purpose of sentencing explains “the cautious manner” in which rehabilitation is

57. *Duncan v The Queen* (1983) 9 A Crim R 354; *R v Rai* [2002] NSWCCA 506 [13].

58. *R v Fabian* (1992) 64 A Crim R 365.

59. *R v Gordon* (1994) 71 A Crim R 459, 468-469.

60. Para 1.17, above.

61. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(h).

62. *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(d); *Sentencing Act* (NT) s 5(1)(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(b); *Sentencing Act 1991* (Vic) s 5(1)(c); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(m).

63. *Sentencing Act* (NT) s 5(1)(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(b); *Sentencing Act 1991* (Vic) s 5(1)(c).

64. Tasmania Law Reform Institute, *Sentencing*, Final Report No 11 (2008) [2.1.40].

65. See, eg, Victorian Sentencing Committee, *Sentencing Report* (1988) vol 1, 82-84; Australian Law Reform Commission, *Sentencing*, Report 44 (1988) [50]; R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, Oxford UP, 1999) [3.412].

66. Tasmania Law Reform Institute, *Sentencing*, Final Report No 11 (2008) [2.1.40].

referred to in the *Sentencing Act 1991* (Vic),⁶⁷ that is, “to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated”.⁶⁸

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?

Making the offender accountable for his or her actions

1.60 Paragraph 3A(e) of the Act states that one of the purposes for which a court may impose a sentence on an offender is:

to make the offender accountable for his or her actions.

1.61 It is not entirely clear what is intended by this purpose of sentencing. It has been suggested that making the offender accountable may introduce “a new element into the sentencing task”.⁶⁹ For example, it has been argued that making the offender accountable amounts to a statutory recognition of restorative justice as a purpose of sentencing by comparison with provisions in New Zealand and Canada.⁷⁰

- “to hold the offender accountable for harm done to the victim and the community by the offending”;⁷¹
- “to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community”.⁷²

1.62 The ALRC did not include making the offender accountable among its recommended purposes of sentencing. However, it did include promotion of the “restoration of relations between the community, the offender and the victim”, noting that “restorative initiatives ... provide an effective way to ... accept responsibility for their actions”.⁷³ Diversionary conferencing schemes, such as circle sentencing, could be said to achieve the purpose of making offenders accountable for their actions.⁷⁴

67. R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, Oxford UP, 1999) [3.412].

68. *Sentencing Act 1991* (Vic) s 5(1)(c).

69. *Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* [2002] NSWCCA 515 [59]-[60].

70. P Johnson, “Reforms to New South Wales Sentencing Law: The Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002” (2003) 6 *The Judicial Review* 313, 320-325.

71. *Sentencing Act 2002* (NZ) s 7(1)(a).

72. *Criminal Code*, RSC 1985, c C-46, s 718(f).

73. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [4.28].

74. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [12.6].

- 1.63 However, the better view may be that this purpose does not necessarily reflect restorative principles but rather a “justice model” of offending which has “long advocated aiming to make young offenders in particular accountable and responsible for their offending long before restorative justice ideals became popular”.⁷⁵
- 1.64 The Judicial Commission of NSW’s Benchbook includes a discussion of retribution in its section on making the offender accountable.⁷⁶ Retribution is one of the purposes of sentencing traditionally identified at common law.⁷⁷ Justice Dunford described it as being “retaliation or revenge against the offender for committing a wrong and is concerned with the community’s expectation that offenders will be punished”.⁷⁸ Arguably, some form of “accountability” can be implied from meeting the community’s expectation of punishment. The question then arises, to what extent does this purpose add anything to that of ensuring that the offender is adequately (or justly) punished for the offence.

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?

Denunciation of the offender’s conduct

- 1.65 Paragraph 3A(f) of the Act states that one of the purposes for which a court may impose a sentence on an offender is:
- to denounce the conduct of the offender.
- 1.66 Denunciation of an offender can be achieved by the court imposing a sentence the severity of which makes a statement that society does not tolerate the offence either generally or in the specific instance. Such statements can be aimed at any combination of the offender, the community, victims or potential offenders.⁷⁹
- 1.67 To the extent that the court’s denunciation is aimed at discouraging the future commission of the offence by the offender or others, it can be said to have a very similar aim to the purpose of deterrence (both specific and general).⁸⁰
- 1.68 The CCA’s approach to denunciation has been to hold that a sentence that appears to have a strong element of leniency will not be sufficient to achieve the purpose of

75. K Warner, “Sentencing Review 2002-2003” (2003) 27 *Criminal Law Journal* 325, 332.

76. Sentencing Council of NSW, *Sentencing Bench Book* [2-270].

77. *Veen v The Queen* (No 2) 164 CLR 465, 476.

78. *R v De Souza* (unreported, NSW Supreme Court, Dunford J, 10 November 1995) 4.

79. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [3.9].

80. See, eg, *R v McKenna* (unreported, NSW CCA, 16 October 1992) (Lee AJ) 9.

denunciation. So, the CCA recently held that a suspended sentence for an offence of sexual intercourse with a child under 10 years of age fell “far short” of appropriately denouncing the crime.⁸¹

- 1.69 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”.⁸²

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?

Recognition of the harm done to the victim and the community

- 1.70 Paragraph 3A(g) of the Act states that one of the purposes for which a court may impose a sentence on an offender is:

to recognise the harm done to the victim of the crime and the community.

- 1.71 This purpose is seen as a recognition of the increasing importance of meeting the needs of victims in the criminal justice system. However, the recognition of the harm done to the victim may simply state the position at common law that the courts are entitled “to have regard to the harm done to the victim by the commission of the crime”.⁸³
- 1.72 This purpose has become particularly relevant to the question of concurrent sentences for offences against multiple victims or multiple offences against the same victim. For example, it has been noted that wholly concurrent sentences in the context of a series of offences of aggravated sexual intercourse without consent committed against a child over the course of one afternoon failed to “acknowledge the separate harm done to the child by the different criminal acts” of the offender.⁸⁴ In the case of offences involving multiple separate victims, it has been observed that a failure to accumulate the sentences for each offence, at least partially, “may well be seen as a failure to acknowledge the harm done to those individual victims”.⁸⁵
- 1.73 It has also been suggested that this purpose may amount to a statutory recognition of restorative justice processes as a purpose of sentencing.⁸⁶ However, as Warner has noted:

81. *R v King* [2009] NSWCCA 117 [1]. See also *R v MacDonald* (unreported, NSW CCA, 12 December 1995); *R v Nguyen* [2004] NSWCCA 332; 149 A Crim R 343 [43].

82. *Sentencing Act* (NT) s 5(1)(d); *Penalties and Sentences Act 1992* (Qld) s 9(1)(d).

83. *Siganto v The Queen* (1998) 194 CLR 656 [29]; *R v RKB* (unreported, NSWCCA, 30 June 1992), 5 (Badgery-Parker J).

84. *Carlton v R* [2008] NSWCCA 244; 189 A Crim R 332 [122] (Price J).

85. *R v Wilson* [2005] NSWCCA 219 [38]; *Baroudi v R* [2007] NSWCCA 48 [52].

86. *Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* [2002] NSWCCA 515 [59]-[60].

A recognition of harm done by an offender is relevant to utilitarian and retributive theories of punishment and could be said to be embraced in the practice of the courts in aiming to denounce or censure crime by the imposition of punishment.⁸⁷

- 1.74 The CCA has observed that the addition of the purpose of the recognition of the “harm” to “the community” in s 3A(g) may introduce a new element into the sentencing task (together with the introduction of making the offender “accountable” under s 3A(c)), however, in the absence of argument, did not express a view on this.⁸⁸

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?

Other purposes?

- 1.75 We have already noted that sentencing may take into account other purposes which stand outside of the traditional purposes of sentencing as expressed (or modified) by s 3A. In the following paragraphs we ask whether there are any other purposes of sentencing which could be added to the statutory list. We also consider the desirability of a number of additional purposes that have been suggested.

- 1.76 The statement of additional purposes, that the courts already take into account in sentencing, can be said to add to the transparency of the sentencing process. On the other hand, it can be argued that any addition to the list of purposes will only add to the complexity and confusion identified by submissions and other commentators.

Question 1.13

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

Reparation and restoration

- 1.77 Reparation can be said to encompass both restitution and compensation to victims and the community generally. It can include the restoration of an item of property to its lawful owner as well as the making good, by an offender, of the harm caused by the offence committed.⁸⁹ Restoration has also come to refer to aspects of “restorative” justice.

87. K Warner, “Sentencing Review 2002-2003” (2003) 27 *Criminal Law Journal* 325, 332.

88. *Attorney-General's Application under s 37 Crimes (Sentencing Procedure) Act 1999 (No 2 of 2002)* [2002] NSWCCA 515; 137 A Crim R 196.

89. See NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [10.24]-[10.30].

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- 1.78 Reparation and restoration provide a means of recognising the harm done to the victim and to the community,⁹⁰ but may go beyond that purpose as the courts have applied it.⁹¹
- 1.79 The ALRC, in recommending that one of the purposes of sentencing should be “to promote the restoration of relations between the community, the offender 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 recognise victims’ interests in the sentencing process and to encourage offenders to accept responsibility for their actions.⁹²
- 1.80 The Tasmanian Law Reform Institute has similarly recommended that one of the purposes of sentencing be “restoration or repairing the harm caused by the offence and restoring relations between the offender, the victim and the community”.⁹³
- 1.81 This purpose was seen as complementing the Institute’s recommendation that a compensation order be a sentencing option in its own right⁹⁴ and that community conferencing for young adults be piloted.⁹⁵
- 1.82 In Canada, in addition to the promotion of an “acknowledgment of the harm done to victims and to the community”,⁹⁶ the purposes of sentencing include providing “reparations for harm done to victims or to the community”.⁹⁷
- 1.83 In our 1996 review of sentencing, we did not regard reparation as one of the purposes of sentencing since it links punishment to “the victim’s need for restitution or compensation, rather than to the gravity of the offender’s conduct”.⁹⁸ Reparation was, therefore, seen as ancillary to the sentencing process.
- 1.84 A recent BOCSAR survey has shown that, while the effectiveness of restorative justice programs in reducing the likelihood of reoffending has been called into question, public opinion is largely in favour 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.⁹⁹

90. Australian Law Reform Commission, *Sentencing*, Report 44 (1988) [142].

91. Para 1.71-1.72, above.

92. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [4.28] and Recommendation 4-1(f).

93. Tasmania Law Reform Institute, *Sentencing*, Final Report No 11 (2008) [7.1.36].

94. Tasmania Law Reform Institute, *Sentencing*, Final Report No 11 (2008) [4.4.17].

95. Tasmania Law Reform Institute, *Sentencing*, Final Report No 11 (2008) [4.3.5]-[4.3.5].

96. *Criminal Code*, RSC 1985, c C-46 s 718(f).

97. *Criminal Code*, RSC 1985, c C-46 s 718(e).

98. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [3.21].

99. E Moore, *Restorative Justice Initiatives: Public Opinion and Support in NSW*, Bureau Brief No 77 (NSW Bureau of Crime Statistics and Research, 2012).

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?

The effective operation of the criminal justice system

- 1.85 The effective operation of the criminal justice system could be identified as an additional purpose of sentencing. There are two areas in which this purpose can be seen to operate.
- 1.86 First, it can be seen to operate when a sentence is imposed that has been mitigated with the aim of facilitating the operation of the criminal justice system either with respect to the case in hand or future cases. For example, sentencing discounts are considered necessary to encourage assistance to the authorities to ensure the continued efficient operation of the courts. The factors that attract a discount on sentence are identified in the Act as:
- (k) a plea of guilty by the offender (as provided by section 22),
 - (l) the degree of pre-trial disclosure by the defence (as provided by section 22A),
 - (m) assistance by the offender to law enforcement authorities (as provided by section 23).¹⁰⁰

Accordingly, s 22A of the Act currently requires the court to consider, in applying discounts for disclosures made pre-trial or during the trial or otherwise, the “degree to which the administration of justice has been facilitated by the defence”.¹⁰¹

- 1.87 The courts have long acknowledged that discounts for assistance to authorities are, in part, intended to act as an incentive for others to assist the police,¹⁰² thereby strengthening the administration of justice by making it more likely that offenders will inform on each other in future.
- 1.88 Secondly, it can be seen to operate when a sentence is imposed with the aim of maintaining public confidence in the criminal justice system, and support for its operation. For example, Sir Anthony Mason has observed:

Judges accept that the rule of law in our community depends upon the maintenance of public confidence in the administration of justice and that means maintenance of public confidence in the courts. Absence of public confidence in the administration of justice would bring unwanted and untold consequences in its train. It would result in non-compliance with the court orders and greater difficulty in enforcing them. It would lead us down a path away from the peaceful settlement of legal disputes into a world in which people would be inclined to

100. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3).

101. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22A(1).

102. *Perez-Vargas v The Queen* (1987) 8 NSWLR 559, 562-564.

take the law into their own hands. It would take us back to an earlier stage in the development of civilised society when disputes were resolved by brute force.¹⁰³

1.89 Likewise, the Chief Justice of NSW has recently said:

The intangible quality that gives the rule of law security in some nations, and none in others, has to do with community trust and expectations. The rule of law is one of six World Governance Indicators used to measure the quality of a country's governance. It is defined as "the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence". Therefore, public confidence in our courts and criminal justice system is not only necessary to the maintenance of the rule of law, but to the quality and perception of our governance structures.¹⁰⁴

1.90 Justice McHugh has also observed:

A judge's sentence and reasons are usually exposed to public scrutiny through publication or media reporting. Public responses to sentencing, although not entitled to influence any particular case, have a legitimate impact on the democratic legislative process. Judges are aware that, if they consistently impose sentences that are too lenient or too severe, they risk undermining public confidence in the administration of justice and invite legislative interference in the exercise of judicial discretion. For the sake of criminal justice generally, judges attempt to impose sentences that accord with legitimate community expectations.¹⁰⁵

1.91 In a recent CCA decision relating to the sentencing of two "white collar" offenders for tax fraud, Justice Simpson stated:

The community cannot afford for judges to be squeamish about discharging their duty, however personally painful it may sometimes be. To fail to sentence middle class offenders commensurately with social security offenders risks bringing the administration of justice into disrepute as perpetrating class bias.¹⁰⁶

1.92 One preliminary submission has suggested, in the context of sentencing Aboriginal people, that "the improvement of community confidence in the justice system" must be acknowledged as an objective.¹⁰⁷

1.93 Such concerns can be identified in the Canadian Criminal Code which introduces the objectives of sentencing with a statement that the "fundamental purpose of sentencing" is "to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives..."¹⁰⁸

1.94 To the extent that supporting the effective operation of the criminal justice system is achieved by, for example, the impartial enforcement of the law, this may be

103. A Mason, "The courts and public opinion" [2002] (Winter) *Bar News* 30, 30.

104. T Bathurst, "Community participation in criminal justice" Opening of Law Term Dinner 2012, Law Society of NSW (30 January 2012).

105. *Markarian v The Queen* (2006) 228 CLR 357 [82].

106. *R v Boughen* [2012] NSWCCA 17 [96].

107. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary submission PSE21*, 2.

108. *Criminal Code*, RSC 1985, c C-46 s 718.

something that is already taken into account as a higher order 'characteristic' of the justice system. As Chief Justice Gleeson has observed:

Administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.¹⁰⁹

- 1.95 However, even if public confidence is generally maintained by a justice system that displays such characteristics as impartiality and reasonable consistency, this does not provide a purpose to which the mitigating factors that facilitate the operation of the criminal justice system are aimed.

Question 1.15

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

Other purposes that apply to particular groups

- 1.96 It is possible that the criminal justice system can recognise different purposes of sentencing for members of particular groups with special characteristics. The most obvious group for which special provision is sometimes made in sentencing is young people under the age of 18 years.
- 1.97 The special provisions 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.¹¹⁰ Some of them can be taken as affecting the purposes of sentencing.¹¹¹
- 1.98 The *Children (Criminal Proceedings) Act 1987* (NSW) sets out the principles which those exercising functions under the Act should have regard to:
- (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,
 - (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
 - (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
 - (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,
 - (e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,

109. *Wong v The Queen* (2001) 207 CLR 584 [82].

110. *Children (Criminal Proceedings) Act 1987* (NSW) s 6; *Children, Youth and Families Act 2005* (Vic) s 362(1)

111. *R v Evans* [2003] VSCA 223 [44] (Vincent J).

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- (f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,
- (g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,
- (h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

1.99 Such an approach could be adapted for other groups of offenders. For example, the Jumbunna Indigenous House of Learning has proposed the addition of new purposes of sentencing to apply in the case of Indigenous people 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.¹¹²

1.100 The Aboriginal Legal Service has also submitted that:

Both the diversion, in appropriate cases, of Aboriginal people from sentences of full-time imprisonment and the improvement of community confidence in the justice system must be acknowledged as objectives.¹¹³

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?

112. Jumbunna Indigenous House of Learning, *Preliminary submission PSE15*, 3.

113. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary submission PSE21*, 2.



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