NSW GOVERNMENT

New South Wales
Law Reform Commission

Sentencing
Question Paper 4

Other discounting factors

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Question Paper 4 – Other discounting factors

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4.1 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).

Overview

4.2 Under the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('the Act') there are a number of factors which must be taken into account when a court comes to consider discounts on sentence.

Plea of guilty

4.3 Section 22 of the Act provides that a court is required to take into account the fact of a plea of guilty as well as the timing and circumstances in which the plea was entered and in doing so may impose a lesser penalty than would have otherwise been imposed.[1] In applying a discount for a plea of guilty, a court may reduce the severity of the punishment, not just the term of the sentence.[2]

4.4 Section 21A(3)(k) of the Act lists a plea of guilty as a mitigating factor, to be taken into account as provided under s 22.

4.5 Unsurprisingly, there has been strong support for allowing discounts for pleas of guilty in previous reviews of the criminal law in NSW and elsewhere in Australia.[3]

4.6 Section 22 of the Act provides that a reduced sentence must not be unreasonably disproportionate to the nature and circumstances of the offence.[4]

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1); *R v Thomson* (2000) 49 NSWLR 383.
2. NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 4 April 1990, 18-19 (J Dowd, Attorney General).
3. NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009) [8.2].

4.7 Case law provides a guideline for judicial officers taking into account a plea of guilty on sentence and includes a range of appropriate levels, generally between 10 and 25%, for the discount for the 'utilitarian value' of the offender's plea to recognise the saving of time and resources that would have been used in preparation for the trial and during the trial itself.[5] While there is no requirement to quantify the discount, courts are encouraged to do so.

4.8 The case law provides that the determination of where, within the range, the discount lies is a matter for the sentencing judge but generally the timing of the plea and the complexity of the trial that would be required to prove the offence are relevant.[6]

4.9 While a discount is applied in most instances, there may be offences that are so serious that no discount should be allowed.[7] Where no discount is allowed, a court must provide reasons.[8]

4.10 The utilitarian discount does not take account of any other consideration in relation to the plea. The fact that witnesses are spared from giving evidence is relevant only to remorse,[9] which is not a component of the discount for the utilitarian value of the plea.[10]

4.11 The strength of the prosecution case is also not taken into account in considering the utilitarian value of the plea and is relevant only to an evaluation of remorse and the weight to be accorded to that factor in the sentence.[11]

4.12 It should be noted that remorse may be present even when an offender pleads not guilty and is convicted after trial and may be relevant to prospects of rehabilitation. Section 21A(3)(i) of the Act provides that remorse is a mitigating factor to be considered on sentence and case law has stated that an approach quantifying a discount for remorse, generally or as related to a plea of guilty, should be avoided as "it is likely to result in a sentence that is unduly lenient by reason of double counting".[12]

4.13 Section 22 does not specify that the discount for a guilty plea is to be applied solely for the utilitarian value of the plea. The NSW Sentencing Council noted that there was some merit in amending s 22 to require that the discount be allowed solely for the utilitarian value of the guilty plea. This would remove the risk of appealable error in judicial consideration of the plea.[13]

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4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1A).
5. *R v Thomson* (2000) 49 NSWLR 383 [160]; *R v Borkowski* [2009] NSWCCA 102; 195 A Crim R 1 [32].
6. *R v Thomson* (2000) 49 NSWLR 383 [153]-[154].
7. *R v Thomson* (2000) 49 NSWLR 383 [158]; *R v Kalache* [2000] NSWCCA 2.
8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(2).
9. *R v Thomson* (2000) 49 NSWLR 383 [119]-[123].
10. *R v Borkowski* [2009] NSWCCA 102; 195 A Crim R 1, referring to *R v MAK* [2006] NSWCCA 381; *Kite v The Queen* [2009] NSWCCA 12.
11. *Sutton v The Queen* [2004] NSWCCA 225 [12].
12. *R v MAK* [2006] NSWCCA 381 [44].
13. NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009) [8.17].

4.14 The Sentencing Council also noted the merit in legislating for a requirement for courts to quantify expressly the amount of discount applied.[14]

An attempt at codification

4.15 NSW trialled codification of discounts for guilty pleas between 2008 and 2011 in the *Criminal Case Conferencing Trial Act 2008* (NSW), which applied only to indictable matters in which committal proceedings were listed in the Downing Centre or Central Local Courts. Sections 16 and 17 prescribed levels of discounts for guilty pleas entered at different stages of the proceedings.

4.16 In contrast to the case law discussed above, the legislation stated that the discount for the plea of guilty included a discount for:

> (a) the saving in resources and time that would otherwise be expended in a trial for the offence but for the guilty plea, and
>
> (b) the avoidance of the additional trauma to the victim that might be caused by a trial for the offence, and
>
> (c) the contrition that the sentencing court considers that the offender demonstrates by pleading guilty, and
>
> (d) any other benefit associated with or demonstrated by the guilty plea.[15]

4.17 The *Criminal Case Conferencing Trial Act 2008* (NSW) (now repealed) provided that a court must allow a discount of 25% where an offender pleaded guilty before being committed for sentence (that is, in the Local Court)[16] and was allowed to grant a discount of up to 12.5% where an offender pleaded guilty at any time after being committed for trial.[17] A court was allowed to grant a greater discount than 12.5% if there were "substantial grounds", as set out in s 17(5).

4.18 Under s 17(5), substantial grounds existed if:

- the prosecution refused an offer to plead guilty before committal to an alternative offence (that was recorded in a compulsory conference certificate), and the offender was found guilty of that offence or the prosecutor accepted a plea of guilty to that offence after committal for trial; or
- "the offer to plead guilty to an alternative offence [was] made for the first time, and accepted, after committal for trial and the offender had no reasonable opportunity to offer to plead guilty to such an offence before the committal"; or
- "the offender was found unfit to be tried for the offence concerned after being committed for trial and pleaded guilty to the offence when he or she was subsequently found fit to be tried".

14. NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009) [8.17].
15. *Criminal Case Conferencing Trial Act 2008* (NSW) s 16(2).
16. *Criminal Case Conferencing Trial Act 2008* (NSW) s 17(1).
17. *Criminal Case Conferencing Trial Act 2008* (NSW) s 17(2).

4.19 The legislation resulted in a number of appeals to the NSW Court of Criminal Appeal (CCA) where the sentencing judge failed to apply the mandatory provisions of the Act and consequently allowed an insufficient discount for the guilty plea.[18]

Arguments for and against codification

4.20 Arguments in favour of codification of discounts for guilty pleas include a greater degree of consistency in the level of discounts and more certainty for accused people when considering how much of a discount they are likely to receive if they plead guilty. While safeguards against any inappropriate pressure being placed on accused people to plead guilty should be maintained, it must be recognised that there are considerable benefits to the administration of the criminal justice system of early pleas of guilty. This is particularly so where guilty pleas are entered in the Local Court and matters can be finalised without committal proceedings.

4.21 Apart from creating possible appeal points, arguments against legislative prescription of the discount might include the issue of whether the fettering of judicial discretion can cause unjust outcomes if courts are confined in the matters they can take into account in relation to the plea of guilty, for example, if they are precluded from taking into account the circumstances that may have prevented the offender from entering an early plea.[19]

4.22 *Passaris v The Queen*[20] also highlighted the practical difficulties of interpreting the complicated legislation in the context of protracted plea negotiations and disputed facts on sentence. In that case, ultimately there were agreed facts, but they were drafted on a different basis to the initial offer made by the offender.

4.23 The codification of levels of discount for pleas entered at various stages of proceedings may also be problematic where a plea may be described as being entered "at the earliest opportunity" despite the late stage in proceedings. For example, a plea entered to a fresh indictment on the first day a trial is due to commence may nonetheless be an early plea where the fresh charge is brought for the first time in full satisfaction of the remaining charge or charges. This may occur due to plea negotiations (for example, where the indictment is overloaded) or where a plea offer is made by the offender early in proceedings, but not accepted until a later date.[21] Other examples include situations in which a prosecution brief is delayed or the offender does not have adequate representation at an early stage.[22]

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?

18. See, for example, *Tran v The Queen* [2010] NSWCCA 183; *Do v The Queen* [2010] NSWCCA 182; *Williams v The Queen* [2011] NSWCCA 244; *Greer v The Queen* [2011] NSWCCA 40; *Chompeay v The Queen* [2011] NSWCCA 96.
19. NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009) [8.20].
20. *Passaris v The Queen* [2011] NSWCCA 216.
21. NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009) [8.6].
22. NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009) [8.6].

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

4.24 Under s 23 of the Act, a court may impose a lesser penalty than would have otherwise been imposed on an offender who has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of any offence, or in proceedings relating to any offence.[23]

4.25 Section 21A(3)(m) of the Act lists assistance to law enforcement authorities as a mitigating factor, to be taken into account as provided under s 23.

4.26 Such a reduction must not result in a penalty that is unreasonably disproportionate to the nature and circumstances of the offence.[24]

4.27 The CCA has held that the discount is given partly as an incentive to others to assist the police.[25] There is a broader policy objective that is pursued by the criminal law – namely, that there should not be 'honour among thieves'. Arguably, the policy interests pursued by the courts go beyond the individual offender's case and are also aimed at strengthening the administration of justice by making it more likely that offenders will inform on each other in the future. There is a similarity to the common law approach to general deterrence – the courts proceed on the basis that the sentencing outcome for one offender will be relevant to other people's future behaviour.

4.28 The arguments that could be made against allowing discounts for offenders for assistance include the potential for corruption, the eliciting of unreliable disclosures, lack of transparency or accountability, and concerns in allowing serious offenders to escape full punishment for their crimes.[26]

4.29 The range of discount allowable is not prescribed by legislation but is the subject of detailed case law. The discounts allowed for assistance and a plea of guilty should

23. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(1).
24. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(3).
25. *Perez-Vargas v The Queen* (1987) 8 NSWLR 559, 562-564 (Street CJ), citing *inter alia* the English authority of *R v Lowe* (1977) 66 Cr App R 122, 125 in which a member of a gang gave assistance in relation to the investigation of dozens of 'persons of interest'.
26. NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009) [8.35].

generally be expressed in a combined quantification of the discount allowed.[27] While there is no "fixed tariff" for the amount of discount allowable, combined discounts for a plea of guilty and assistance to authorities generally have ranged between 20% and 50%, the discount of 50% generally being reserved for "assistance of a very high order".[28]

4.30 Section 23(4) was inserted into the Act in 2011[29] to require a court that allows a discount for assistance to authorities to make a record that the lesser penalty is imposed for that reason and to state what the penalty would be in the absence of the discount. Where an offender is given a discount for past and future assistance, the court must quantify the discount applied for each of these categories.[30] The subsection does not address how courts should express a combined discount for a plea of guilty and assistance to the authorities.

4.31 Traditionally a discount was given for assistance to recognise the hardship likely to be suffered by the offender in custody, for example, by reason of the conditions associated with strict protective custody. However, the courts have noted more recently that it should not be assumed that offenders who had provided assistance would be disadvantaged while serving a custodial sentence and evidence would be required for an offender to assert otherwise.[31] The range of 20% to 50% previously expressed by the courts had been based on the assumption that the offender would face difficulties in custody resulting from the assistance provided. In the absence of evidence of the disadvantage to be suffered by the offender in custody, a combined discount (for plea and assistance) exceeding 40% will only be allowed in exceptional circumstances.[32]

4.32 Where an offender fails to comply wholly or partly with an undertaking to give evidence, the prosecution may appeal to the CCA against the discount that was allowed.[33] Where an offender fails to give evidence due to threats received, the CCA will take this into account.[34] If an offender is placed at risk because of the actions of authorities, such as inappropriate custodial arrangements, this will also be taken into account and the court may dismiss such a prosecution appeal.[35]

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?

27. *SZ v The Queen* [2007] NSWCCA 19 [44]; *El Hani v The Queen* [2004] NSWCCA 162 [69]; *R v Thomson* (2000) 49 NSWLR 383 [160] (ii); *Gallagher v The Queen* (1991) 23 NSWLR 220, 228.
28. *R v Sukkar* (2006) 172 A Crim R 151 [54] (Latham J).
29. *Crimes (Sentencing Procedure) Amendment Act 2010* (NSW) Sch 1.2 [6].
30. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(4).
31. *R v Sukkar* (2006) 172 A Crim R 151 [5] (Howie J).
32. *R v Sukkar* (2006) 172 A Crim R 151 [3]-[5], referring to *Cartwright v The Queen* (1989) 17 NSWLR 243, 250.
33. *Criminal Appeal Act 1912* (NSW) s 5DA.
34. *R v Vincent* (unreported, NSWCCA, 27 July 1995).
35. *R v Bagnall* (unreported, NSWCCA, 10 June 1994).

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

4.33 Section 22A of the Act provides that, where an offender was tried on indictment, a court may impose a lesser penalty than would have otherwise been imposed having regard to the extent to which "the administration of justice has been facilitated by the defence". This can be achieved through disclosures made before or during the trial, or otherwise.[36]

4.34 For example, under s 191 of the *Evidence Act 1995* (NSW), an accused person also may formally agree on a fact with the prosecution, thereby facilitating the administration of justice by relieving the Crown of the requirement to call evidence to prove that fact.

4.35 There are a number of legislated disclosure requirements under the *Criminal Procedure Act 1986* (NSW). For example, defendants in criminal trials on indictment are required to give notice of particulars of any alibi evidence that is to be called.[37] In murder trials, defendants are required to give notice of any intention to adduce evidence of substantial impairment by abnormality of mind.[38] Other disclosure requirements for Supreme Court and District Court trials mandate that the defendant is to give the prosecution the name of the legal practitioner proposed to represent the defendant at trial and notice of any consent to waive certain rules of evidence in relation to witness statements or evidence summaries.[39] Other legislated disclosure is only applicable where the court makes an order for compliance in the interests of the administration of justice.[40] However, an accused person may give assistance beyond these bare requirements.

4.36 Section 21A(3)(l) of the Act lists the degree of pre-trial disclosure as a mitigating factor, to be taken into account as provided under s 22A.

36. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22A(1).
37. *Criminal Procedure Act 1986* (NSW) s 138, 150.
38. *Criminal Procedure Act 1986* (NSW) s 138, 151.
39. *Criminal Procedure Act 1986* (NSW) s 138.
40. *Criminal Procedure Act 1986* (NSW) s 141-144.

4.37 Any discount allowed under s 22A must not be unreasonably disproportionate to the nature and circumstances of the offence.[41]

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

4.38 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.

Prior good character – child sexual offenders

4.39 Section 21A(5A) of the Act excludes the offender's good character or lack of previous convictions as a mitigating factor where the factor has assisted in the commission of a child sexual offence, for example, by allowing the offender to gain unsupervised access to children.

Sex offenders registration/supervision

4.40 Section 24A of the Act provides that a court may not take into account, as a mitigating factor, the fact that sex offenders may become subject to various legal and administrative obligations and restrictions. Prior to the introduction of s 24A, the case law left open the possibility that the registration requirements, orders and prohibitions applicable to sex offenders could constitute mitigating circumstances in certain situations.[42] However, the enactment of s 24A has prevented such factors from being judicially considered on sentence.

4.41 The section was introduced on 1 January 2009 to implement a NSW Sentencing Council recommendation[43] and provides that a court cannot take into account the fact that an offender has or may become a registrable person under the *Child*

41. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22A(2).
42. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales* (2008) [6.55]-[6.56], [6.60] referring to *R v KNL* (2005) 154 A Crim R 268 [50]; *TMTW v The Queen* [2008] NSWCCA 50; *Ghanem v The Queen* (2008) 180 A Crim R 440.
43. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales* (2008) Recommendation 42.

Protection (Offenders Registration) Act 2000 (NSW) as a consequence of the offence, or has or may become the subject of an order under the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) or the *Crimes (Serious Sex Offenders) Act 2006* (NSW).

4.42 Registrable persons under the *Child Protection (Offenders Registration) Act 2000* may be subject to obligations and restrictions including reporting personal information to police and any intention to travel interstate for more than 14 days or to travel overseas.[44]

4.43 Offenders subject to orders under the *Child Protection (Offenders Prohibition Orders) Act 2004* may be prohibited from engaging in specified conduct where there may be a risk to the lives or sexual safety of children and the order will reduce that risk.[45]

4.44 Orders under the *Crimes (Serious Sex Offenders) Act 2004* include extended supervision orders[46] or continuing detention orders[47] where there is "a high degree of probability that the offender poses an unacceptable risk of committing a serious sex offence".[48]

4.45 Section 24A was amended in 2010 to preclude a court from taking into account, as a mitigating factor, the fact that an offender is prohibited from applying for or attempting to obtain child-related employment or from undertaking or remaining in child-related employment as a result of the offence, under the *Commission for Children and Young People Act 1998* (NSW).[49] This amendment followed a separate NSW Sentencing Council recommendation.[50]

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?

Confiscation of assets or forfeiture of proceeds of crime

4.46 Section 24B precludes a court from taking into account, as a mitigating factor, the consequences of any court order made under confiscation or forfeiture legislation due to the offence. It was inserted in the Act in 2011 also in response to a recommendation by the NSW Sentencing Council.[51]

44. *Child Protection (Offenders Registration) Act 2000* (NSW) s 10-11F.
45. *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 5.
46. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 6, s 9.
47. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 14, s 17.
48. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 9(2A), s 17(2).
49. *Commission for Children and Young People Act 1998* (NSW) s 33B, s 33C.
50. NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009) Recommendation 9, [4.51], [8.77-8.80].
51. NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009).

4.47 Prior to the introduction of s 24B, case law provided that confiscation and forfeiture were not to be taken into account in sentencing unless there were exceptional or unusual circumstances.[52] The court in *R v Kalache* noted that, generally, confiscation and forfeiture legislation and imprisonment should be regarded as "complementary sanctions intended to strengthen each other, rather than as alternative sanctions which a resourceful offender can juggle in a way that effectively causes the one to weaken, rather than to strengthen, the other".[53] However, the court adopted the approach of the New Zealand Court of Appeal in *R v Brough*:

> [T]here may be exceptional or unusual circumstances where orders made, particularly orders to forfeit valuable property used in the commission of an offence, may have a disproportionate or exceptional effect on the offender, sufficient for some regard to be had to it when imposing sentence. Secondly, recognising that one of the purposes of the sentence to be imposed is to deter others who may be minded to commit like offences, if forfeiture orders of property used in the commission of offences are particularly severe, some adjustment to the sentence may be appropriate because the deterrent effect of the forfeiture orders may lessen the need for the deterrent element in the sentence.[54]

4.48 Nonetheless, the NSW Sentencing Council recommended that it was advisable to introduce such a legislative prohibition because it took the view that the loss of unjustifiably obtained proceeds of crime cannot amount to extra-curial punishment that justifies a sentence discount.[55]

Question 4.5

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

Deportation

4.49 Current case law provides that possible deportation of an offender as a consequence of an offence is irrelevant as a sentencing consideration as such matters are the exclusive province of the Executive. The courts have traditionally considered that action, or inaction, by the Executive cannot be predicted and therefore it is impermissible to proceed upon the basis that an offender will be dealt with in a particular way.[56] This means that possible deportation cannot be taken into account as extra-curial punishment or in the determination of the length of a non-parole period and parole period. The High Court has held that a foreign national should receive the benefit of being eligible for release on parole, despite any possible deportation.[57]

52. *R v Van Can Ha* [2008] NSWCCA 141 [47] referring to *R v Kalache* [2000] NSWCCA 2 [74]-[77].
53. *R v Kalache* [2000] NSWCCA 2 [77] (Sully J).
54. *R v Brough* [1995] 1 NZLR 419.
55. NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009) [8.81]-[8.82].
56. *Jap v The Queen* (unreported, NSWCCA, 20 July 1998); *Latumetan v The Queen* [2003] NSWCCA 70.
57. *Shrestha v The Queen* (1991) 173 CLR 48 [71].

4.50 It would appear that specific legislative provisions would be required for courts to take deportation 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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