The Public Defenders

29 May 2012

The Chairman,
New South Wales Law Reform Commission,
DX 1227
Sydney

Dear Sir,

Re: Sentencing Question Papers

Thank you for your invitation to respond to your question papers.

The Senior Public Defender, Mark Ierace SC, is on leave, and he has asked me to respond on his behalf. I reply as follows.

Question 1.1
Should there be a legislative statement of the purposes of sentencing?

Yes.

Question 1.2
1. Should courts be required to take every purpose in the statutory list into account in determining an appropriate sentence?

Yes.

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

No.

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?

No.

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

Yes.

Question 1.4
1. Should a single overarching or primary purpose of sentencing be identified? If it should, what should it be?

In my submission, it would not be possible to reduce the purposes of sentencing to a single overarching purpose. For example, in nearly every case, it will be necessary to at least take

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into account the need to ensure that the offender is adequately punished, to deter the offender and others, and to promote the rehabilitation of the offender.

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

As suggested above, there should be no overarching purpose of sentencing.

3. Should a hierarchy of sentencing purposes be established?

In my submission, it would be very difficult to set out a hierarchy of purposes. For example, at common law, principles of general deterrence have less weight when the offender has a mental disability: see for example DPP v De La Rosa [2010] NSWCCA 194. Where the offender is a young person, rehabilitation will assume greater importance than general deterrence: Regina v GDP (1991) 53 A Crim R 112.

4. If so:
a. what should that hierarchy be, and
b. in what circumstances might it be appropriate to vary that hierarchy?

It has been submitted above that there should not be a hierarchy.

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

In my submission this should be left to the common law.

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

In my submission this is unnecessary and should be left to the common law.

Specific purposes of sentencing
Question 1.5
1. Is ensuring that the offender is adequately punished for the offence a valid purpose of sentencing?

Yes.

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

In my submission it is desirable that the purpose of punishment be qualified. I do not believe it would make much difference whether the qualifier was 'justly' rather than 'adequately', but 'justly' would be a preferable qualifier.

Question 1.6
1. Is preventing crime by deterring others from committing similar offences a valid purpose of sentencing?

Yes.

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

As discussed above, general deterrence may have greater or lesser relevance depending on the nature of the offence, and the subjective circumstances of the offender. It is submitted that it is preferable to leave it to the courts to determine how much weight should be given to each purpose of sentencing in a particular case.

Question 1.7
1. Is preventing crime by deterring offenders from committing similar offences a valid purpose of sentencing?

Yes.

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

Specific deterrence should be a relevant consideration in all cases, but, in accordance with the authorities, have greater or lesser weight depending on the nature of the offence and the subjective circumstances. It is submitted that the question of how much weight it should be given in any particular case should be determined according to common law principles.

Question 1.8
1. Is protection of the community from the offender a valid purpose of sentencing?

Yes.

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

It is submitted that it would make sense to limit incapacitation of the offender to 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?

It is submitted that protection of the community should not be identified as an overarching purpose of sentencing. It should remain as one of a number of purposes, which will have varying weight depending on the particular objective and subjective circumstances of the case.

Question 1.9
1. Is the promotion of the offender's rehabilitation an appropriate purpose of sentencing?

It is submitted that rehabilitation of the offender should definitely remain a purpose of sentencing.

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

No.

Question 1.10
1. Is making the offender accountable for his or her actions an appropriate purpose of sentencing?

Yes.

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

It probably does not greatly differ from ensuring that the offender is adequately punished.

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

It is unnecessary to further identify the purpose of retribution.

Question 1.11
1. Is denunciation of the offender's conduct an appropriate purpose of sentencing?

Yes.

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

It is unnecessary to alter this purpose of sentencing.

Question 1.12
1. Is recognition of the harm done to the victim of the crime and the community an appropriate purpose of sentencing?

Yes.

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

It is unnecessary to alter this purpose of sentencing.

Question 1.13
Should any other purposes of sentencing be added to the legislative statement of purposes?

No.

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?

It is submitted that reparation and restoration should not be added to the list of purposes of sentencing, as it would overlap with the recognition of harm to the victim of crime.

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

It should not be.

Question 1.15
Should the effective operation of the criminal justice system be identified as a purpose of sentencing?

I submit that adding 'the effective operation of the criminal justice system' to the list of purposes of sentencing would add nothing to the purposes of sentencing but add to their complexity. Assistance to the authorities is already dealt with by ss. 22, 22A, and 23 of the Crimes (Sentencing Procedure) Act.

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?

These questions can be considered together. It is submitted that it is preferable to allow judge-made principles of law deal with the weight to be given to particular sentencing purposes for particular groups of offenders, such as Aboriginal offenders.

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?

The principle that imprisonment is the sentencing option of last resort should definitely be retained. It does not require amendment.

Proportionality
Question 2.2
1. Should the common law principle of proportionality continue in its current form or be amended in any way? What would be the advantages and disadvantages of codifying the principle of proportionality?

It is submitted that it is unnecessary to codify the common law 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?

The codification of this principle is unnecessary and might simply encourage magistrates to impose the maximum sentence more frequently.

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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?

These questions can be considered together. It is submitted that principles of parity are well-defined at common law and there is no need to codify them.

If there was any codification, it might be helpful to make it clear that the principles of parity apply to all offenders in the same criminal enterprise, even if they have been charged with different offences.

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?

It is submitted that the principles of totality are well settled at common law and it is unnecessary to codify them.

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?

The discretion given under s. 53A of the Crimes (Sentencing Procedure) Act is a useful one because it may reduce the number of technical Crown appeals based on Pearce v The Queen (1998) 194 CLR 610.

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?

The common law principle of not sentencing the offender on the basis of facts which would have warranted a conviction for a more serious offence is well settled (see particularly The Queen v De Simoni (1981) 147 CLR 383) and does not require codification or amendment.

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?

It is submitted that it is unnecessary to codify the requirement that judges give reasons as this is a common law requirement and it is well understood.

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?

It is submitted that the requirement of giving reasons for sentences under 6 months be retained to discourage magistrate's from giving short sentences in cases where a non-custodial sentencing option would be more appropriate.

Alternatives
Question 2.7
1. Should parsimony be part of the sentencing law of New South Wales?

The introduction of a 'parsimony' principle to the Crimes (Sentencing Procedure) Act in similar terms to s. 5(3) of the Victorian Sentencing Act is supported.

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

No.

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

It is submitted that the High Court's approach to sentencing, which has been described as the 'instinctive synthesis' approach, is preferable and should not be altered by statute.

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)?

I respectfully agree with Justice Blanch that s. 21A of the Crimes (Sentencing Procedure) Act has added greatly to the complexity of sentencing for little benefit. It should be deleted from the Act.

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)?

I do not believe that the deletion of s. 21A would lead to relevant factors being overlooked as for the most part they all apply at common law.

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

I do not believe the deletion of s. 21A would make sentencing less transparent as the sentencing judicial officer would still be required to give reasons.

Question 3.2
Should s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) be retained in its current form?

It should not be retained at all.

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?

As indicated above, in my opinion s. 21A should not be retained at all.

Question 3.4
1. Which considerations to be taken into account on sentence should be included in legislation and how should such legislative provisions be worded?

As indicated above, in my opinion s. 21A should not be retained at all.

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)?

No. As indicated above, in my opinion s. 21A should not be retained at all.

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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?

As indicated above, in my opinion s. 21A should not be retained at all.

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'?

As indicated above, in my opinion s. 21A should not be retained at all.

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?

In my opinion there should always be a discount for a plea of guilty, except in 'worst case' murder cases.

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

I believe that it is important for judicial officers to quantify the discount for pleading guilty so that offenders realise that they are receiving a tangible benefit for pleading guilty.

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

I think it is preferable for this to be determined by common law principles. It would be difficult to codify the appropriate discount in a way which is both simple, and which covers all situations which might arise. For example, what discount is appropriate when an offender charged with murder offers to plead to manslaughter, the Crown rejects that offer, but the jury returns a verdict of not guilty of murder but guilty of manslaughter? What happens where an accused's legal representatives delay the entering of a plea by an accused because they have concerns about the accused's mental state, or because they need to investigate complex forensic evidence? It is submitted that it is preferable if the question of the extent of the discount is dealt with along common law principles.

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

No, but it should only be necessary for the judge to express the amount of the discount related 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?

It is submitted that s. 21A be deleted from the Crimes (Sentencing Procedure) Act.

In particular, it is submitted that s. 21A (3) (i) be repealed. This provision states that remorse can only be taken into account if the offender has provided evidence that he or she has accepted responsibility for his or her actions, and has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss, or damage, or both. This provision is frequently used by prosecutors to argue that an offender who does not give evidence in sentencing proceedings cannot have any discount for remorse, despite what the Court of Criminal Appeal said in Butters v Regina [2010] NSWCCA 1. It is difficult to see why evidence of the offender's remorse which does not meet the qualifications set out in s. 21A (3) (i) should not be taken into account.

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

My suggestions for improving the determination of the discount for pleas of guilty are set out above.

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?

It is submitted that it is in the public interest in giving a discount to offenders who provide assistance to the authorities, as otherwise they would have little incentive to do so.

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

The current common law approach to the discount for assistance appears to be working well and does not need to be amended by statute.

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)?

I believe that the discount should be quantified for the sake of transparency and because if the future assistance is not forthcoming it makes an increase in the sentence following a Crown appeal very straight forward.

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

The current range of discount for assistance is appropriate.

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

I believe the common law position about the range of discount for assistance is well settled and it is unnecessary to codify it.

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?

There should be a discount for pre-trial assistance to give the accused an incentive to restrict trials to the matters which are really at issue.

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

It is submitted that that judicial officers should not have to quantify the discount as this will simply add to the complexity of the sentencing process.

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

I believe that there would be no advantage in codifying the discount for pre-trial and trial assistance. I believe that codifying that discount would simply complicate sentencing.

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

Yes.

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?

It is submitted that prior good character should be relevant for all offences.

Question 4.5
Are there any circumstances in which confiscation and forfeiture orders should be appropriately taken into account on sentence?

It is submitted that it is appropriate that confiscation of assets be taken into account in sentencing, where the assets seized are not the proceeds of crime but are items used in the commission of the crime.

Question 4.6
Should possible deportation be relevant as a sentencing consideration? If so, why and how?

Possible deportation should not be used as a reason to decline to impose a non-parole period, as the High Court held in Shrestha v The Queen (1991) 173 CLR 48. Otherwise it is submitted that the fact of likely deportation as a result of the commission of the offence should be taken into account in the same was that extra-curial punishment is taken into account: Allpass (1993) 72 A Crim R 561.

Yours faithfully,

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