



Children's Court of New South Wales

31 May 2012

Mr Joseph Waugh,
Senior Law Reform Officer,
NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001
AUSTRALIA

Dear Mr Waugh

RE: Law Reform Commission Review of the *Crimes (Sentencing Procedure) Act 1999*

Thank you for the opportunity to comment on the Law Reform Commission's review of the *Crimes (Sentencing Procedure) Act 1999* (CSPA). I will respond to questions which are applicable to juveniles, whether they are being dealt with in the Children's Court or at law.

Question Paper 1 - Purposes of sentencing

Section 3A and its application

Section 3A of the CSPA does not apply to juveniles who are sentenced in the Children's Court, pursuant to the definition of "court" in s 3 of the CSPA. Juveniles who are dealt with "at law" in the District Court or the Supreme Court are subject to the *Purposes of sentencing* as articulated in s 3A.

Juveniles who are dealt with "at law" however, are also subject to Part 2 of the *Children (Criminal Proceeding) Act 1987* (CCPA). The Children's Court proposes that the CSPA should provide clarification of the principles relevant to juveniles ("the principles"), by expressly stating that when dealt with under the CSPA, juveniles are subject to the overarching principles enunciated in s 6 of the CCPA, and also that rehabilitation and the reduction of recidivism are primary considerations when dealing with juveniles (These two additional considerations are proposed to be included in the current review of the CCPA being undertaken by the Department of Attorney General and Justice).

Question 1.1

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

Yes. The Children's Court is of the view that a statement of the purposes of sentencing advances the public confidence in the criminal justice system by providing transparency and a clear statement of its process. The Children's Court is supportive of such a legislative statement, subject to "the principles" outlined above.

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Question 1.2

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

Yes. All purposes should be taken into account but it is for the judicial officer to decide what weight he or she attaches to each particular purpose.

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

No. See answer to question 1.2.1 above.

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. The purposes of sentencing should be clearly codified and be exhaustive.

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

Yes. The Children's Court is of the view that an exclusive list promotes public confidence, consistency and transparency in the sentencing process.

Question 1.4

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

No. A consideration of each of the purposes of sentencing, in light of the individual facts and circumstances, assists the judicial officer in imposing an appropriate sentence in each individual case. In the case of juveniles, this is guided by "the principles" articulated earlier. Codifying a primary purpose constrains the sentencing process unnecessarily and may lead to injustice in individual cases.

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

See answer to question 1.4.1 above.

3. Should a hierarchy of sentencing purposes be established?

No. Upon hearing the individual facts and circumstances the judicial officer is best placed to attach the relevant weight to each purpose and prioritise them accordingly.

4. If so:

a. what should that hierarchy be, and

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

Not applicable.

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

No. There is adequate guidance in the existing legislation and case law and codification would unnecessarily constrain and complicate the process.

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

No. The Children's Court is of the view that this is unnecessary.

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, but subject to the qualification in 1.5.2 below.

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

The word "adequately" does imply a minimum punishment and its retention is supported.

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?*

General deterrence should be a consideration but the judicial officer may decide that little or no weight should be attached to it in a particular case. This decision should be left to the judicial officer who is privy to hearing all of the evidence and is therefore in a position to consider all relevant factors in the sentencing exercise.

Considerations of general deterrence are, in most cases, of less significance when sentencing juveniles than they would be when sentencing an adult for the same offence: *KT v R* (2008) 182 A Crim R 571 at [22].

Question 1.7

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

Yes, but with respect to juveniles see answer to question 1.6 above.

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

Specific deterrence is a relevant consideration for juveniles but in some cases, for example, where juveniles have an intellectual disability or mental illness, little weight may be attached to specific deterrence. As well "the principles" outlined earlier would inform a consideration of specific deterrence.

Question 1.8

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

Yes, but the nature of that protection for juveniles is again informed by the overarching consideration in the "the principles". As articulated in *R v Webster*:

*"The protection of the community does not involve simply the infliction of punishment ... The community does have a real interest in rehabilitation. The interest to no small extent relates to its own protection... The community interest in respect to its own protection clearly is the greater where the offender is young and the chances of rehabilitation for almost all of the offender's adult life, unless he is crushed by the severity in sentence, are high."*¹

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

No.

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?*

No. If, after a consideration of all of the relevant circumstances of the case, the judicial officer decides that protection of the community is the primary purpose of sentencing in the particular case, an appropriate sentence can then be arrived at.

Question 1.9

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

Yes. "The principles" outlined earlier amply address the significance of this for juveniles.

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

As long as "the principles" outlined earlier apply the current wording in s 3A is adequate.

Question 1.10

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

The meaning of the term "accountable" should be clarified. The Macquarie Dictionary (4th Edition) defines "accountable" as: *"the state of being liable; to be called to account; responsible (to a person for an act) to take responsibility or that can be explained."* As a purpose of sentencing we understand "accountable" to mean that by the imposition of a sentence a person is required to take responsibility for their conduct.

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

¹ (unrep. Court of Criminal Appeal, NSW, NO 6582 of 1990, 15 July 1991) at pages 11 and 12.

The term is closely aligned to denunciation and adequacy of punishment. It is therefore important that each purpose is clearly articulated to avoid confusion.

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

No. The Children's Court is of the view that retribution is closely linked to adequacy of punishment, denunciation and accountability, and as such is already encapsulated in s 3A.

Question 1.11

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

Yes.

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.

Question 1.13

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

See answer to question 1.14 below.

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?

Yes. The Children's Court is of the view that the inclusion of these purposes would augment the current provisions. It would be appropriate to include them in s 3A(g).

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

The purpose should be expressed in terms of restorative justice principles.

Question 1.15

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

No. Provisions which assist in the efficiency of the court processes are adequately encapsulated in the legislation and may be taken into account by way of mitigation. Efficiency within the criminal justice system is not a relevant "purpose" of sentencing.

Question 1.16

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

No. These are relevant factors in imposing an appropriate sentence, but they are not relevant to "purposes" of sentencing.

2. *If so, which groups and what purposes?*

Not applicable.

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

Not applicable.

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?*

Not applicable.

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 legislative and common law principles should be retained and in the case of juveniles it should be expanded to incorporate Article 19 of the Beijing Rules:

"The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period."

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?

The Children's Court is of the opinion that the principle should not be codified and that it should continue in its current form in the common law. Attempting to codify it would constrain and complicate the sentencing process unnecessarily.

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

Yes. The principle should also be stated to apply to the Children's Court.

Parity

Question 2.3

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

As above at 2.2.1.

2. What would be the advantages and disadvantages of codifying the principle of parity?

As above at 2.2.1.

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?

As above at 2.2.1

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?

Yes, as contained in s 53A of the CSPA.

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?

It is the opinion of the Children's Court that the principle is adequately expressed in the common law and in the CSPA and further codification is not necessary.

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?

This is a fundamental principle of justice and it is the view of the Children's Court that it is not necessary to codify it.

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?

Yes, with respect to imposing a sentence of imprisonment of less than 6 months.

Alternatives

Question 2.7

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

The Children's Court is of the view that parsimony should be part of sentencing law in the consideration of penalties imposed on juveniles.

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?

No.

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

Question 3.1

1. What would be the advantages and disadvantages of abolishing s 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW)?

2. Are there dangers that relevant factors may not be taken into account in the absence of a provision similar to s 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW)?

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

The advantage of abolishing s 21A is that sentencing would be less complex and it is likely that there would be fewer appeals. The disadvantage is that it provides a useful and comprehensive list of common aggravating and mitigating factors to ensure that no relevant factor is overlooked.

Question 3.2

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

No. See answers to questions 3.4.3 and 3.4.4 below.

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?

No.

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?

Not applicable.

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.

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?

Yes

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 some 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'?

The Children's Court is of the view that a detailed list should be retained but there is no need to identify them as "aggravating" or "mitigating" factors.

Question Paper 4 – Other discounting factors

Plea of guilty

The Children's Court is satisfied that the current provisions are appropriate.

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?

The Children's Court is satisfied that the current provisions are appropriate. No discount should apply where the plea has no utilitarian value.

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

Yes.

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

No.

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

Yes.

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

A plea of guilty is relevant to remorse as are other factors.

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

Not applicable.

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?

The Children's Court supports the retention of s 23 of the CSPA.

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

No.

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)?

Yes.

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

Yes.

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

Not applicable.

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?

Yes. A discount should apply and it should be extended to cover all summary matters.

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

Yes.

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

The advantage is that the sentencing process would be more transparent. The Court can see no disadvantages.

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 the view of the Children's Court that these excluded factors should not apply to juveniles. The intention of the legislation in relation to sexual offences is primarily intended to protect children from adults where a significant discrepancy in power exists. In matters involving juveniles this element is often not a primary concern and the judicial officer should be in a position to consider the facts on a case by case basis.

Question 4.5

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

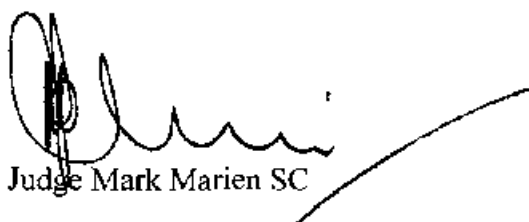
Not usually applicable to the Children's Court.

Question 4.6

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

Not usually applicable to the Children's Court.

Yours sincerely,



Judge Mark Marien SC

PRESIDENT