QUESTION PAPER 1 - PURPOSES OF SENTENCING

Question 1.1

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

Yes, however the statutory list of purposes requires amendment.

Question 1.2

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

No. The court should take into account the purposes that are relevant to the circumstances of the case.

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

Yes. Where a particular purpose is not relevant to the factual matrix then it should not be taken into account.

Question 1.3

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

Courts should have the discretion to refer to purposes that are not included in the statutory list.

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

The list of purposes should not be exclusive.

Question 1.4

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

No. A single overarching or primary purpose of sentencing should not be identified. This follows the common law position and is consistent with the conclusions of various Australian law reform agencies. The Committee agrees with the commentary at paragraph 1.16 of the paper that 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.

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

Not applicable.

3. Should a hierarchy of sentencing purposes be established?

No. 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.

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. 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.

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

Yes.

Question 1.5

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

Yes, however the Committee is of the view that the purpose should be phrased as follows: "to ensure that the offender is *justly* punished for the offence".

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

The Committee is of the view that "justly punished" is a better expression of the principle of proportionality than "adequately punished". The Committee agrees with the commentary at paragraph 1.28 of the paper that 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.

Question 1.6

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

The Committee acknowledges the political reality that general deterrence has long been identified as a purpose of sentencing. However, there is a large body of research that questions whether general deterrence is effective at reducing offending.

The Committee is concerned about the legal fiction that imprisonment creates general deterrence. The concept of general deterrence is a "virtually unchallenged orthodoxy in Australian courts,"[1] and Bargaric and Alexander argue that:

> "[t]he reality is that general deterrence, as universally applied, does not work. The overwhelming trends evident in empirical research suggest that higher penalties do not serve as disincentives to crime. The current practice of increasing penalties to give effect to general deterrence has no social utility".[2]

There is substantial research which suggests that general deterrence does not work, and that higher penalties do not serve as a disincentive to crime. Recent research conducted by the Victorian Sentencing Advisory Council found that:

> "The evidence from empirical studies suggests that the threat of imprisonment generates a small general deterrent effect. However, the research also indicates that increases in the severity of penalties, such as increasing the length of imprisonment, do not produce a corresponding increase in the general deterrent effect.
>
> ...
>
> The research shows that imprisonment has, at best, no effect on the rate of reoffending and is often criminogenic, resulting in a greater rate of recidivism by imprisoned offenders compared with offenders who received a different sentencing outcome".[3]

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

The application of general deterrence should be limited to appropriate circumstances on a case by case basis. The court should consider whether general deterrence is a relevant consideration in each individual case based on the offence and the circumstances of the offender.

There is a valid argument that for certain offences general deterrence is of particular importance, e.g. for offences such as perjury where detection is difficult. However, for potential offenders who are economically or socially disadvantaged, have a cognitive or mental health impairment, or have a drug or alcohol dependency, general deterrence has little if any effect.

Question 1.7

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

If it is accepted that deterring offenders from committing similar offences does prevent crime then it is a valid purpose of sentencing. However, research by the NSW Bureau of Crime Statistics and Research suggests that a sentence of imprisonment either does nothing to deter offenders or increases the risk of re-offending.[4]

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[1] *'(Marginal) general deterrence doesn't work – and what it means for Sentencing'*, Mirko Bagaric and Theo Alexander, (2011) 35 Crim LJ 269.
[2] Ibid.
[3] Sentencing Matters, *Does Imprisonment Deter? A Review of the Evidence*, Sentencing Advisory Council (Victoria), April 2011, p23.
[4] D Weatherburn, *The effect of prison on adult re-offending*, Crime and Justice Bulletin No 143, NSW Bureau of Crime Statistics and Research, 2010, p10.

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

The application of specific deterrence should be limited to appropriate circumstances on a case by case basis. The court should consider whether specific deterrence is a relevant consideration in each individual case based on the offence and the circumstances of the offender.

Question 1.8

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

Yes. The Committee supports the interpretation of protection of the community from the offender as 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.

2. Should incapacitation be more clearly identified as a purpose of sentencing:

a. generally; or

b. only in serious cases?

No, incapacitation should not be given greater prominence as a purpose of sentencing.

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. Protection of the community should not be identified as an overarching purpose of sentencing. 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.

It is unlikely that there would be cases in which protection of the community is irrelevant under the broad definition outlined in 1.8(1) above.

Question 1.9

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

Yes, the promotion of the offender's rehabilitation is an appropriate purpose of sentencing.

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

The current expression could be amended to read as follows: "To promote the rehabilitation of the offender and to promote the community interest in the rehabilitation of the offender".

Question 1.10

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

The Committee agrees with the authors of the paper that it is not entirely clear what is intended by the purpose of making an offender accountable for his or her actions. The Committee submits that paragraph 3A(e) should be deleted.

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

Making the offender accountable for his or her actions does not differ from the purpose of ensuring that the offender is adequately (or justly) punished.

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

No.

Question 1.11

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

The Committee is of the view that denunciation of the offender's conduct is superfluous and has a similar aim to the purposes of deterrence. The whole sentencing process is a denunciation of the offender's conduct; it is not an appropriate purpose of sentencing.

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

The Committee submits that paragraph 3A(f) should be deleted.

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?

No.

Question 1.13

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

No. The legislative statement of purposes expressed in section 3A is not exclusive. The court may take into account other purposes without the need to add to the statutory list. Section 3A should be amended to read: "the purposes for which a court may impose a sentence on an offender *include* the following:".

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?

No. Reparation and restoration are ancillary to the sentencing process. Reparation may be relevant to sentencing submissions; however, it should not be included as a purpose of sentencing.

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

Not applicable.

Question 1.15

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

The effective operation of the criminal justice system should not be identified as a purpose of sentencing. Matters relating to the effective operation of the criminal justice system are covered under sections 22, 22A and 23.

Question 1.16

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

The Committee strongly supports special provisions that apply to young people under the age of 18 years contained in section 6 of the *Children (Criminal Proceedings) Act 1987* as follows:

> A person or body that has functions under this Act is to exercise those functions having regard to the following principles:
>
> (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,
> (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.

2. If so, which groups and what purposes?

See 1.16(1) above.

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

The judiciary should have sufficient discretion to adequately deal with particular groups with special characteristics.

The Committee recommends that the Law Reform Commission give consideration to incorporating a cultural recognition provision somewhere in the Act. The provision should specify that courts should take into account an Indigenous offender's cultural background and community ties.

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

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 principle that imprisonment is a sentencing option of last resort should be retained and does not require amendment.

The Committee notes the substantial cost implications for the State of incarcerating an offender. It costs approximately $73,000 per year to keep an offender in a NSW prison, compared with the national average in 2009/10 of $6,661 per year to manage an offender in the community.[5]

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 common law principle of proportionality is well established and should continue in its current form. The principle of proportionality should not be codified. The disadvantages of codification are unintended consequences.

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

The law is clear; there is no need to codify it.

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[5] Australian Institute of Criminology, *Australian Crime: Facts and Figures 2011* (2012), p140.

Question 2.3

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

The common law principle of parity should continue in its current form.

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

The principle of parity is well established; there is no need to codify it. The disadvantages of codification are unintended consequences.

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?

The common law principle of totality should continue in its current form. There is no need to codify the principle. The disadvantages are unintended consequences.

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. Courts should have the discretion to impose an overall sentence for all of the offences and articulate what sentences would have otherwise been imposed for the individual counts.

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?

No. The Committee sees no advantage in codifying this principle.

Question 2.6

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

The common law is well established. There is no need for codification.

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. The existing statutory requirements to give reasons for some aspects of sentencing should be retained as it promotes transparency.

Question 2.7

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

The principle of parsimony has been criticised as inconsistent with the notion of a "range of sentences" and the discretions properly open to sentencing judges (see Simpson J in *Blundell v R* [2008] NSWCCA 63 at [47]).

If a discretionary range of appropriate sentences applies to a particular case, the mandated imposition of the minimum sentence in that range renders the discretionary range nugatory. For that reason, and the Committee's support for enhancing judicial discretion, the Committee does not support parsimony becoming part of the sentencing law in NSW.

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

No.

Question 2.8

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

No. The Committee strongly supports the instinctive synthesis approach to sentencing.

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)?

The Committee supports the repeal of section 21A. Compliance with section 21A has been described as time-consuming, complex and carrying a real risk of error.[6]

Justice Howie commented in *Elyard v R* [2006] NSWCCA 43 at [39] that the drafters of section 21A:

> "... have made the task of sentencing courts more difficult, or at least more prone to error (either real or apparent), by what was in my opinion a needless attempt to define relevant factors into categories of aggravation or mitigation and yet apparently without the intention of altering the common law as it was applied to sentencing before the advent of the section."

All of the factors in section 21A are to be read in conjunction with the common law. The section 21A factors were routinely taken into account by application of the common law principles prior to the enactment of section 21A. This renders section 21A superfluous and creates unnecessary complexity. The repeal of section 21A would simplify the sentencing process.

The use of section 21A as a checklist can result in courts attempting to apply factors where they are not relevant to the particular case. The checklist approach can result in the aggravating and mitigating factors assuming a disproportionate importance

[6] NSW Bar Association, *Criminal Justice Policy*, 2007, *p6*.

above the overall sentencing exercise which should involve an instinctive synthesis approach.

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)?

Only if the judge fails to take into account a relevant factor in the sentencing process.

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

No. The removal of the section would not abrogate a judicial officer's obligation to set out the reasons for the decision. The factors under section 21A would continue to be taken into account by application of the common law principles that were applicable prior to the enactment of section 21A.

Question 3.2

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

The Committee is of the view that section 21A should be repealed.

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?

The Committee is of the view that section 21A should be repealed.

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?

The Committee is of the view that section 21A should be repealed.

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. The Committee is of the view that section 21A should be repealed and section 3A should remain a separate provision.

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?

The Committee's position is that section 21A should be repealed. However, if section 21A is retained it should be reframed as an unclassified, neutral and non-exhaustive list of sentencing factors.

4. If so:

a. should the factors be expressed in broad terms, for example as general categories of considerations such as the nature and circumstances of the

offence and the character, antecedents, age, means and physical or mental condition of the offender; or

b. should the same level of detail as appears in the current s 21A be reproduced in a new provision, but without listing the relevant factors as 'aggravating' or 'mitigating'?

If section 21A is retained the factors should be expressed in broad terms as detailed in paragraph (a) above.

QUESTION PAPER 4 – OTHER DISCOUNTING FACTORS

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?

Yes, there should be a discount allowed for a plea of guilty. There may be circumstances where a discount for a plea of guilty should not be allowed.

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

Yes. Judicial officers should be required to quantify the discount allowed for a plea of guilty for reasons of transparency and to demonstrate that they have turned their mind to the discount.

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

The Committee does not support the level of discounts for pleas of guilty being prescribed by legislation.

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

No.

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

Remorse is one of the factors to be taken into account as part of the instinctive synthesis approach to sentencing. It permeates throughout the entire sentencing process and can be taken into account on a case by case basis.

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

Judges should retain discretion to determine discounts for pleas of guilty in accordance with the common law.

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?

Yes, there should be a discount for assistance to the authorities. There are circumstances in which a discount for assistance to authorities should not be allowed.

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

No. Legislation should not specifically exclude the common law approach to allow 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)?

Judicial officers should be required to quantify the discount(s) applied to promote transparency.

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

The current range of discounts allowed for assistance to authorities is appropriate, so long as the ability to exceed the current range of discounts in exceptional circumstances is retained.

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

The disadvantages of codification are unintended consequences.

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, there should be a discount for pre-trial or trial assistance. However, this should not result in more onerous requirements for pre-trial disclosure from the defence. There are 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?

Yes, to promote transparency.

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

The Committee does not support codification. The disadvantages of codification are unintended consequences.

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

The Committee is concerned that a greater emphasis on discounts for pre-trial and trial assistance may result in more onerous requirements in pre-trial disclosure from the defence.

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?

Courts should have the discretion to take into account certain factors that may mitigate the sentence.

Question 4.5

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

There are circumstances in which confiscation and forfeiture orders should be appropriately taken into account on sentence. This is part of the discretion that should be afforded to judicial officers to enable them to take factors into account where appropriate.

Question 4.6

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

Possible deportation should be able to be taken into account on sentence in appropriate circumstances.