The New South Wales Bar Association

12/101

7 June 2012

The Hon J Wood AO QC
Chairperson
New South Wales Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

Dear Judge Wood

Review of Crimes (Sentencing Procedure) Act 1999 (NSW): Sentencing - Question Papers 1-4

The New South Wales Bar Association is grateful for the opportunity to comment on the first four question papers released by the New South Wales Law Reform Commission.

Question Paper 1 – Purposes of Sentencing

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

The Bar Association supports retention of a legislative statement of the purposes of sentencing.

Question 1.2
1. Should courts be required to take every purpose in the statutory list into account in determining an appropriate sentence?
2. Are there any circumstances where a particular purpose should not be taken into account?

The Bar Association supports retention of the requirement that courts are required to take every relevant purpose in the statutory list "into account" in determining an appropriate sentence. Of course, as under the current approach to s 3A, it need only do so " ... at least to an extent that is fairly related to the facts of the given case": *AS* [2006] NSWCCA 309 at [25]; *Stunden* [2011] NSWCCA 8 at [111]-[112].

Question 1.3
1. Should it be possible for the court to refer to purposes that are not included in the statutory list when determining an appropriate sentence?
2. Should the list of purposes be exclusive of any other purposes of sentencing?

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Section 3A does not expressly limit the purposes of sentencing that can be taken into account to those in the statutory list. That is desirable. The courts should be permitted to develop the applicable principles rather than be circumscribed by a statutory definition. The statutory list of purposes should not be exclusive. The courts, in developing general sentencing principles, will avoid taking into account "illegitimate" sentencing objectives.

Question 1.4
1. Should a single overarching or primary purpose of sentencing be identified? If it should, what should it be?
2. What circumstances (such as the nature of the offence or the offender) might justify a different overarching or primary purpose?
3. Should a hierarchy of sentencing purposes be established?
4. If so:
a. what should that hierarchy be, and
b. in what circumstances might it be appropriate to vary that hierarchy?
5. Should guidance be provided as to the court's approach to applying the purposes of sentencing in particular circumstances?
6. Should it be expressly stated that there is no hierarchy of sentencing purposes?

The Bar Association opposes any statutory identification of a single overarching or primary purpose of sentencing . It also opposes a hierarchy of sentencing purposes or statutory "guidance" to the application of those purposes.

There is an on-going debate about the underlying justification for punishment. This debate has generated a prodigious amount of academic literature and has been largely dominated by two different theories of punishment. The utilitarian theory of punishment states that punishment is justified because its beneficial effects outweigh its detrimental effects. Proponents of this theory consider that punishment has the potential to reduce crime and that sentences should be fashioned in the light of utilitarian analysis. On the other hand, the retributive (or "just deserts") theory of punishment states that punishment is an appropriate moral response to the voluntary commission of an offence and should be imposed regardless of its effects. The prevailing view is that both justifications for punishment should be taken into account in the exercise of the sentencing discretion. It is left to the sentencing court to reconcile those justifications, and the sometimes conflicting purposes of sentencing, in seeking to fashion a just sentence. That approach should be maintained.

Question 1.5
1. Is ensuring that the offender is adequately punished for the offence a valid purpose of sentencing?
2. Does the purpose of punishment need to be qualified in any way, for example, by terms such as "adequately" or "justly"?

The Bar Association doubts that s 3A(a) "to ensure that the offender is adequately punished for the offence" provides much assistance to a sentencing court since retribution is a well-understood purpose of sentencing under general principles: *Veen v The Queen [No 2]* [1988] HCA 14, 164 CLR 465 at 476. Nevertheless, there is no need to remove or modify it.

Question 1.6

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

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

In its 1988 report on sentencing (ALRC 44), the ALRC objected to general deterrence on the ground that it was unfair to punish one person by reference to a hypothetical crime of another. However, the position of the ALRC had changed in 2006. In *Same Crime, Same Time: Sentencing of Federal Offenders* it is stated:

> [T]he ALRC agrees that general deterrence is an established and legitimate purpose in sentencing law. However, general deterrence may be applied too readily when sentencing federal offenders and it is important that judicial officers do not assume general deterrence is always an effective purpose of sentencing.[1]

This comment raises a more serious concern about reliance on general deterrence as a goal of sentencing that supports more severe sentences – that it does not work. There is clear evidence that absolute general deterrence (that conduct, if detected and prosecuted will be the subject of punishment) works, at least to some extent. There can be little doubt that many potential offenders choose not to commit offences because of the prospect of subsequent punishment through the criminal justice system. There is also a causal link between lower crime rates and an increased perception of being caught. However, there is no empirical evidence to support marginal general deterrence (that the greater the potential punishment, the stronger the desire to avoid being subjected to it).[2] The Victorian Sentencing Advisory Council concluded that the evidence from a number of empirical studies indicates that the threat of imprisonment generates a small general deterrent effect but 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.[3] A recent NSW Bureau of Crime Statistics and Research study found that "increasing the length of stay in prison beyond current levels does not appear to impact on the crime rate after accounting for increases in arrest and imprisonment likelihood" and concluded that policy makers should focus more attention on strategies that increase the risk of arrest and less on strategies that increase the severity of punishment.[4]

There are likely to be a number of (overlapping) explanations for the ineffectiveness of marginal general deterrence. One explanation is that "the risks of hardship and pain occasioned by criminal offending are not adequately transmitted to potential offenders. … In other words, there is a failure of 'threat communication' as it affects risk perception and negatively impacts crime rates".[5] Statements by judicial officers that sentences are being increased by some unidentified quantum for the purposes of general deterrence, unlikely to

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[1] ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC Report 103) para 4.29.

[2] Bagaric M and Alexander T, "(Marginal) general deterrence doesn't work – and what it means for sentencing" (2011) 35 Crim LJ 269.

[3] Hoel A and Gelb K, "Sentencing Matters: Mandatory Sentencing" (Victorian Sentencing Advisory Council, 2008) at 14.

[4] Wan W-Y et al, "The effect of arrest and imprisonment on crime" Crime and Justice Bulletin 158 (2012).

[5] Bagaric M and Alexander T, "(Marginal) general deterrence doesn't work – and what it means for sentencing" (2011) 35 Crim LJ 269 at 277.

be reported at all and, if subsequently published, likely to be read by a miniscule portion of the public, are not an efficient means of communication to potential offenders. Another reason is that the evidence shows that to the extent that potential offenders make a cost/benefit decision about committing crimes, they generally only weigh up the risk of being caught, not what will happen when they are apprehended. Of course, it is likely that many offenders do not engage in a rational cost/benefit calculation at all and, of those who do, they tend to minimise the risk of detection and prosecution, with the consequence that the risk of punishment is negated as a significant consideration. Yet another potential explanation is that heavier sentences do nothing to address the underlying causes of criminal behaviour. Thus, "[t]he deterrence argument is based on the economic rationalist theory of choice; it assumes that offenders rationally 'choose' to offend in a type of criminological cost/benefit calculation. Of course, sociologists argue that this theory fails to account for the myriad reasons that predispose some individuals, and some groups, to crime …ranging from biological predispositions, psychological personality traits, social learning, cognitive thinking, geographical location and the ecology of place, relative deprivation and the strain of capitalist society, political conflict and social and sub-cultural meaning".[6]

However, this analysis is not accepted by a number of senior members of the judiciary. Spigelman CJ stated in *Wong*:

> There are significant differences of opinion as to the deterrent effect of sentences, particularly, the deterrent effect of marginal changes in sentence. Nevertheless, the fact that penalties operate as a deterrent is a structural assumption of our criminal justice system. Legislation would be required to change the traditional approach of the courts to this matter.[7]

Similarly, in *Henry*, Spigelman CJ stated:

> General deterrence always operates at the margin. Some people will continue to engage in criminal conduct notwithstanding the level of, or increases in the level of, the penalties they suffer. However, some people will be deterred. … It may very well be the fact that increased possibility of detection has greater effect by way of deterrence than increased punishment. There is no warrant, however, for the Courts abandoning reliance on the latter. In any event the two propositions are related. It is only because detection, when it occurs, leads to a level of punishment, that increases in detection have their deterrent effect. … The deterrent effect of a sharp reduction in the proportion of non-custodial sentences which, as a result of this judgment, become custodial sentences, may well be much more significant than the deterrent effect from an increase in the level of custodial sentences.[8]

Wood CJ at CL stated:

> It may be recognised that while there are different views about this, some studies have been interpreted as showing that the perceived severity of a sentence, as distinct from the certainty of detection and arrest, does not of itself provide a deterrent effect: … I

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[6] Bagaric M and Alexander T, "(Marginal) general deterrence doesn't work – and what it means for sentencing" (2011) 35 Crim LJ 269 at 277-8.
[7] (1999) 48 NSWLR 340 at 363.
[8] [1999] NSWCCA 111, 46 NSWLR 346, 106 A Crim R 149 at [205]-[211].

> am not prepared to advocate any departure from the long accepted wisdom that imprisonment does have a personal and general deterrent effect. It is a notion deeply entrenched in the criminal law, and it has the imprimatur of the legislature which has prescribed significant maximum penalties for the offence under consideration, as well as for other offences involving serious criminality. … Moreover, it cannot necessarily be assumed from the fact that increases in sentences have not been accompanied by any noticeable drop in crime rates, that they lack deterrent effect. In the absence of any control, it cannot be known whether that crime rates would have been higher had sentences not been increased.[9]

Simpson J stated:

> Far from diminishing the importance of general deterrence, the fact that the population in which deterrence is necessary is unlikely to be deterred other than by firm action on the part of the courts speaks for greater rather than lesser emphasis on that principle.[10]

On the other hand, the words of Gaudron, Gummow and Hayne JJ in *Wong* should be noted. It was said by Spigelman CJ in the Court of Criminal Appeal that "the clear promulgation of likely actual sentences" for federal drug importation offences by means of a guideline judgment "will assist the objective of general deterrence".[11] Gaudron, Gummow and Hayne JJ commented as follows:

> If, as was accepted in the Court of Criminal Appeal in these cases, the publication of maximum sentences does not perform a substantial deterrent function, there is no reason to think that publishing the fact that other, *lesser*, sentences are likely to be imposed in certain circumstances will have some *greater* deterrent effect.[12]

It might be argued that there is a large element of wishful thinking apparent in those who contend that marginal general deterrence works and an unwillingness to challenge assumptions which have not been supported by empirical research. However, that research is not determinative. The research has not conclusively demonstrated that marginal general deterrence never works. Generally speaking, the data is not offence specific. It may be the case that certain forms of crimes are more amenable to deterrence by harsh penalties than others. For example, it may well be that potential white-collar offenders would engage in a careful cost-benefit analysis (including consideration of the level of likely penalty) before engaging in criminal behaviour.

The ALRC has stated that:

> if a series of heavy sentences have been imposed in relation to a particular type of federal offence and there is, for example, empirical evidence that since the imposition of those sentences there has been a decline in the incidence of that offence, that

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[9] [1999] NSWCCA 111, 46 NSWLR 346, 106 A Crim R 149 at [260]-[266].
[10] [1999] NSWCCA 111, 46 NSWLR 346, 106 A Crim R 149 at [350].
[11] [1999] NSWCCA 420, 48 NSWLR 340 at [125].
[12] [2001] HCA 64, 207 CLR 584 at [44].

should be considered by a judicial officer in assessing the prospect of deterring others from committing that offence.[13]

Absent such empirical support, it may be doubted whether general deterrence (sought to be achieved by greater severity of punishment) should have any weight in the exercise of the sentencing discretion. It is unlikely that this would lead to a large reduction in sentences imposed nor does it appear plausible that "any reduction in the level of penalties as a result of the abolition, if brought to public attention, could possibly send the wrong message to potential offenders and lead to an increase in offending" (at [1.43]). The absence of empirical support for marginal general deterrence arising from increased sentences demonstrates that there would be no significant impact if it were given little or no weight in the exercise of the sentencing discretion.

Nevertheless, given the fact that marginal general deterrence may operate in respect of some potential offenders, the Bar Association does not support deleting the reference to general deterrence in s 3A(b). The Bar Association considers that the weight to be given that purpose should be left to the courts to determine on a case-by-case basis. On the other hand, it is proposed below that the principle of parsimony in s 5(3) of the *Sentencing Act 1991* (Vic), which provides that a court "must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed", should be adopted in NSW. This would appropriately focus the attention of sentencing courts on the question whether a more severe sentence was "necessary" to advance the purpose of general deterrence.

Question 1.7
1. Is preventing crime by deterring offenders from committing similar offences a valid purpose of sentencing?
2. Should specific deterrence be a relevant consideration in all cases? How could its application be limited?

Specific deterrence is a utilitarian goal of sentencing which aims to reduce crime by punishing an offender and, thereby, persuading the offender that crime does not pay. It attempts to dissuade an offender from re-offending by inflicting an unpleasant experience (usually imprisonment) as punishment for the offence, which the offender will seek to avoid in the future by not re-offending. When a sentencing court takes into account specific deterrence as a sentencing purpose, it proceeds on the assumption that a more severe sentence will tend to have a greater deterrent effect on the offender that a less severe sentence. If that assumption is wrong, the exercise of the sentencing discretion will necessarily be flawed.

Available research tends to indicate that specific deterrence does not work. While there are difficulties in determining the effectiveness of specific deterrence given the numerous factors that contribute to the likelihood of offending, numerous studies have concluded that recidivism rates are unaffected by the types of penalty imposed and that, in fact, lengthy or

[13] ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC Report 103) para 6.131.

repeated imprisonment tends to increase recidivism. [14] In April 2011, the Victorian Sentencing Advisory Council advised that the available research on specific deterrence indicates that imprisonment has either no effect upon re-offending or a criminogenic effect.[15]

There may be a number of reasons for this. It has been suggested that prison culture normalises and fosters criminal orientations; may label and stigmatise offenders and reduce their opportunities to re-integrate into the normal community; and fails to address the underlying causes of offending. In any event, it is not self-evident that the actual experience of punishment will be more effective at deterring offending than the general threat of punishment applicable to all potential offenders. Whatever the reason, if specific deterrence sought to be achieved by greater severity of punishment is generally ineffective, it should have little or no weight in the exercise of the sentencing discretion.

Given the fact that specific deterrence may operate in respect of some potential offenders, the Bar Association does not support deleting the reference to specific deterrence in s 3A(b). The Bar Association considers that the weight to be given that purpose should be left to the courts to determine on a case-by-case basis. On the other hand, it is proposed below that the principle of parsimony in s 5(3) of the *Sentencing Act 1991* (Vic), which provides that a court "must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed", should be adopted in NSW. This would appropriately focus the attention of sentencing courts on the question whether a more severe sentence was "necessary" to deter the particular offender.

Question 1.8

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

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

a. generally; or

b. only in serious cases?

3. Should protection of the community be identified as an overarching purpose of sentencing? Are there cases in which protection of the community is irrelevant?

In one sense, the only utilitarian purpose of sentencing is "protection of the community" from crime. It can encompass all the other articulated utilitarian purposes. Sometimes, however, it is equated with particular goals, like deterrence or incapacitation (by keeping the offender away from the community – by imprisoning the offender). In *Ryan,* McHugh J stated:

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[14] For example, in a 2010 NSW study (see Weatherburn D, "The effect of prison on adult re-offending" Crime and Justice Bulletin No 143, August 2010), the effect of prison on re-offending was examined by comparing time to re-conviction among 96 matched pairs of convicted burglars and 406 matched pairs of offenders convicted of non-aggravated assault. One member of each pair received a prison sentence, while the other received some form of non-custodial sanction. The result of the study was that offenders who received a prison sentence were slightly more likely to re-offend than those who received a non- custodial penalty. The conclusion reached was: "There is no evidence that prison deters offenders convicted of burglary or non-aggravated assault. There is some evidence that prison increases the risk of offending amongst offenders convicted of non-aggravated assault but further research with larger samples is needed to confirm the results". The same conclusions have been reached in relation to juvenile offenders: Weatherburn D et al, "The specific deterrent effect of custodial penalties on juvenile reoffending" (Crime and Justice Bulletin No 132, 2009).

[15] Sentencing Advisory Council (Victoria), Sentencing Matters – Does Imprisonment Deter, a Review of the Evidence (April 2011).

> Sentencing principles in this country have emphasised the need to protect the community by imposing sanctions that reduce crime by removing the offender from contact with the general population and by deterring the offender and others from committing offences - the so-called "reductive" justification for prison sentences. The need to protect the community is also particularly important in cases of paedophilia. Even if long sentences do not deter offenders or others with similar inclinations, such sentences at least have the effect of putting paedophiles in a place where they cannot harm children for the time being.[16]

However, protection of the community may also be served by rehabilitation of offenders. In *Zamagias*, Howie J stated:

> It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation.[17]

The Bar Association does not support articulation of "incapacitation" as a sentencing purpose because of the risk that it will be seen to over-ride the operation of the proportionality principle. The Bar Association does not oppose retention of s 3A(c) in its current form. It should not be classified as "an overarching purpose of sentencing" because, as has already been noted, the retributive (or "just deserts") theory of punishment should be retained along with utilitarian considerations.

Question 1.9
1. Is the promotion of the offender's rehabilitation an appropriate purpose of sentencing?
2. Should the current expression of this purpose be altered in any way?

The Bar Association supports retention of s 3A(d).

Question 1.10
1. Is making the offender accountable for his or her actions an appropriate purpose of sentencing?
2. How, if at all, does it differ from the purpose of ensuring that the offender is adequately punished for the offence?
3. Should the purpose of retribution be more clearly identified in the statutory list? What are the implications for sentencing of doing so?

The Bar Association doubts that s 3A(e) "to make the offender accountable for his or her actions" provides much assistance to a sentencing court. It is not clear whether it raises the purpose of retribution or some concept of restorative justice. Nevertheless, there is no apparent need to remove or modify it.

Question 1.11
1. Is denunciation of the offender's conduct an appropriate purpose of sentencing?
2. Should the purpose, as currently expressed, be altered in any way?

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[16] [2001] HCA 21, 206 CLR 267 at [47].
[17] [2002] NSWCCA 17 at [32]. See also *Azzopardi* [2011] VSCA 372 at [35].

The Bar Association supports retention of s 3A(f).

Question 1.12
1. Is recognition of the harm done to the victim of the crime and the community an appropriate purpose of sentencing?
2. Should the current expression of the purpose be altered in any way?

The Bar Association sees no need to remove or modify s 3A(g).

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

Question 1.14
1. Should reparation and restoration be added to the list of purposes either as an addition to s3A(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) or as a separate item in the list of purposes?
2. How should the purpose of reparation and restoration be expressed?

The Bar Association believes that the goal of restorative justice should be given recognition in sentencing and expressly specified within s 3A. There is no universally accepted definition of restorative justice, but it can be described as an approach to sentencing that focuses on repairing the harm caused by criminal activity and addressing the underlying causes of criminal behaviour.[18] Thus, restoration includes elements of rehabilitation. Restorative initiatives use inclusive decision-making processes that involve bringing together the offender, the victim, and sometimes members of the wider community, in order to determine collectively the appropriate sentence. The rationale is that those involved in, and affected by, criminal activity should be given a real opportunity to participate in the process by which the response to the crime is decided.

It is argued by those in favour of restorative justice initiatives that they have the potential to increase the satisfaction of participants in the criminal justice system, encourage offenders to accept responsibility for their conduct, and reduce recidivism by addressing the causes of offending. However, as a rehabilitative tool in respect of individual offenders, restoration has not proved particularly successful. Participants in restorative justice initiatives generally report high levels of satisfaction with the process but studies of the effect of restorative justice initiatives on recidivism rates have produced mixed results.[19] Further, restoration may be regarded as an inappropriate and undesirable sentencing purpose in many cases. Above all, the general principle should remain that determination of sentence should remain a matter for judicial discretion. However, where appropriate, restorative initiatives have demonstrated their potential to complement and enhance the operation of the criminal justice system.[20] They provide an effective way to recognize victims' interests in the sentencing process and to encourage offenders to accept responsibility for their actions. A sentencing court should

[18] See King M et al, *Non-adversarial Justice* (Federation Press, Sydney, 2009) at 48-49; Preston B, "The use of restorative justice for environmental crime" (2011) 35 Crim LJ 136 at 136-7.
[19] Weatherburn D, Law and Order in Australia: Rhetoric and Reality (2004), 137–138; People J and Trimboli L, "An evaluation of the NSW community conferencing for young adults pilot program" (NSW Bureau of Crime Statistics and Research, 2007).
[20] See Preston B, "The use of restorative justice for environmental crime" (2011) 35 Crim LJ 136.

have the option to apply principles of restorative justice and the goal of restorative justice should be given recognition in s 3A (subject, again, to the proposition that such a goals is to be taken into account "to an extent that is fairly related to the facts of the given case").

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

No. While two particular examples of a circumstance where the effective operation of the criminal justice system bears on the determination of sentence are according sentence discounts for the "utilitarian benefit" of pleas of guilty and assistance provided to the authorities, these are already recognised in the Act and there is no need to refer to such considerations in s 3A.

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?

As a general proposition, the Bar Association does not support purposes of sentencing being identified that relate to particular groups of offenders. The Bar Association's views in respect of the sentencing of aboriginal persons are contained in the NSW Bar Association *Criminal Justice Reform Submission* 2010 (attached).

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 Bar Association supports retention of s 5. However, there is a related issue that needs to be addressed. A sentencing court is precluded from giving consideration to such sentencing options as home detention, intensive corrections orders or suspended sentence until the court has sentenced the offender to "imprisonment". It is even more curious that the term of the sentence of imprisonment has to be determined before it is decided how it is to be served. In *Amato*, Basten J discussed this incongruity:

> "There is, of course, a perfectly sound abstract logic to the proposition that a person may be sentenced to imprisonment, without ever having to go to prison. On the other hand, what mental exercise is the Court required to undertake in deciding that imprisonment is the only available option? If, at the first step ... the Court decides that imprisonment is appropriate, that, in a practical sense, would involve the conclusion that the offender should spend a period in custody. Step two in this process involves the specification of the relevant period of imprisonment including, it must at

> that point be assumed, the specification of a non-parole period, being the minimum term for which the offender must be kept in detention. … If, after earnestly making the determinations required at steps one and two, the Court, as step three, then suspends the execution of the sentence, so the person is under no immediate liability to serve the specified period in custody, the result appears incongruous. Even such an appearance tends to undermine the purposes of sentencing set out in s 3A of the *Sentencing Procedure Act*. The incongruity, however, is not merely an appearance, but a reality. Furthermore, it is unrealistic to suppose that the Court actually reaches its conclusion by proceeding mechanically from step one to step three".[21]

There is much force in these observations. While it is said that the conventional approach is required as a matter of statutory interpretation on the basis that alternatives available in respect of a sentence of imprisonment can only be considered once the sentence has been "imposed", it is not self-evident that a sentencing court is prohibited as a matter of statutory construction from such consideration prior to imposition.[22] One purpose of the prevailing approach is perhaps to discourage sentencing courts from adopting these sentencing options instead of such non-custodial options as community service orders (that is, to prevent "net widening"), and another purpose may be to limit the period of time for which such alternative sentencing options may be imposed. It is difficult to see how the first purpose justifies the incongruity[23] of requiring a finding that a sentence of imprisonment is required but then permitting imposition of a sentence that does not involve actual imprisonment. The second purpose, if it were regarded as persuasive, would be served by statutory provisions which provide that these alternatives are available only for specified limited periods of time. It could be provided that the term of the alternative sentencing option actually imposed should be no longer than the term of any period of actual imprisonment that would have been imposed if the alternative option were not available.[24]

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

The Question Paper states at para 2.6:

> It is a fundamental principle at common law that the sentence imposed by the court must be proportional to the offence committed by the offender. For example, it is not appropriate for a court to sentence an offender simply for the purpose of preventative

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[21] [2011] NSWCCA 197 at [5].
[22] It is well-established, for example, that s 44(1) of the NSW Act, which provides that when sentencing an offender to imprisonment, "the court is first required to set a non-parole period", does not preclude prior consideration by the court of the appropriate term of imprisonment (indeed, such prior consideration is essential: *Koloamatangi* [2011] NSWCCA 288 at 12-13; *Tobar* [2004] NSWCCA 391, 150 A Crim R 104 at [31]–[39]; *Dolman* [2010] NSWCCA 137). For an example of a statutory provision which makes it clear that consideration should be given to the option of a suspended sentence of imprisonment before considering the option of immediate imprisonment, see s 39(2), (3) *Sentencing Act 1995* (WA).
[23] See *Amado* [2011] NSWCCA 197, Basten JA at [5], [15].
[24] See *Stevens v Giersch* (1976) 14 SASR 81 at 82.

> detention because he or she is considered to be a danger to the community. The sentence imposed must be proportionate (or appropriate) to the offence which she or he has committed.

The Bar Association considers that considerable confusion has developed with respect to the "principle of proportionality". As stated by the High Court in *Veen [No 2]* it is a principle which imposes an upper limit on a sentence. The sentence to be imposed may not exceed the sentence that would have been imposed based on the objective seriousness of the offence. This principle reflects a rejection by the High Court of preventative detention. The High Court did not hold that the principle imposed some kind of downward limit on sentences, although there are a number of judgments in the NSW Court of Criminal Appeal that have adopted the proposition that there must be a "reasonable proportionality" between the sentence passed and the objective circumstances of the offence. Some judgments of the NSW Court of Criminal Appeal have even gone so far as to hold that the objective seriousness of the offence "will principally determine which of the available sentencing alternatives the court should adopt". In the view of the Bar Association, such statements do not reflect a proper understanding of the proportionality principle. Mason CJ, Brennan, Dawson and Toohey JJ acknowledged in their joint judgment in *Veen [No 2]* that " the purposes of criminal punishment ... overlap and none of them can be considered in isolation from the others ... [t]hey are guideposts to the appropriate sentence but sometimes they point in different directions".[25] They should all be taken into account in the exercise of the sentencing discretion. Each purpose should not be considered in isolation, with a provisional sentence modified as each is taken into account, but at the same time as the other purposes. Thus, "two-stage sentencing" should be avoided. There is no suggestion that, as a general proposition, they are ranked in order of priority or one purpose is accorded greater importance than another. Similarly, in respect of s 3A, French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ stated in *Muldrock*:

> The purposes there stated are the familiar, overlapping and, at times, conflicting, purposes of criminal punishment under the common law. There is no attempt to rank them in order of priority and nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in *Veen v The Queen [No 2]* in applying them.[26]

The Bar Association would not oppose statutory confirmation of the proportionality principle as developed by the High Court but considers that the preferable outcome would be to leave the development of such principles to the common law.

As regards the jurisdictional limit of the Local Court, the current position is satisfactory and the preferable outcome would be to leave such matters to the common law.

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?

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[25] *Veen [No 2]* [1988] HCA 14, 164 CLR 465 at 476.
[26] [2011] HCA 39 at [20].

The High Court has recently provided guidance on the operation of the parity principle. The Bar Association considers that the development of such principles should be left to the common law.

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?
2. Should 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 Bar Association considers that the development of the totality principle should be left to the common law. Any practical difficulties resulting from the judgment of the High Court in *Pearce* have been satisfactorily addressed by the statutory option of an aggregate sentence. The requirement that the sentencing court should indicate what sentences would have otherwise been imposed for individual counts is desirable to make transparent the application of the totality principle.

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 *De Simoni* principle is a fundamental principle of sentencing. It recognises that an offender may not be punished for an offence of which he or she had not been convicted. In particular, a sentencing court cannot take into account, for the purposes of increasing the sentence for an offence, conduct that is a circumstance of the offence that would have warranted a conviction for a more serious offence than the one for which the offender is to be sentenced or a discrete aggravated form of the offence. That principle must be maintained. The Bar Association would oppose any statutory qualification or modification of that principle. The Bar Association considers that the development of such principles should be left to the common law.

Question 2.6
1.Should the common law requirement to give reasons for sentence be codified? If so, what should be required of courts?
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?

The Bar Association does not support any attempt to legislate the general duty of a sentencing court to give reasons for the sentence. However, the Bar Association does not oppose retention of the current specific statutory obligations to give reasons.

Question 2.7
1. Should parsimony be part of the sentencing law of New South Wales?
2. Are there any further principles which could be incorporated into the NSW

sentencing law?

The Bar Association supports the adoption of the "parsimony" principle, as set out in s. 5 (3) of the *Sentencing Act 1991* (Vic), which provides that a court:

> *"must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed."*

The principle of "parsimony" already exists to an extent in the current law, (and in the common law) which provides that a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate. [s. 5 (1) *Crimes (Sentencing Procedure) Act 1991* NSW]

The Bar Association considers it to be desirable, as a general principle, that no person should be subjected to a punishment which is more severe than necessary in the circumstances.

The Victorian legislation has the significant additional effect of explicitly directing the mind of the sentencing judicial officer to the *purposes* for which the particular sentence in question is being imposed.

A comparison between sentences imposed in NSW and sentences imposed in Victoria shows that NSW sentences are significantly more severe than those imposed in Victoria. This has nothing to do with the severity of offending, and all to do with the basis (including the sentencing statutes) upon which courts are required to sentence offenders.

If NSW were to extend the already-established principle of "parsimony", so as to apply it to all sentences, (including the severity of sentences) and not just to the choice between imprisonment and non-imprisonment, this would go some way to addressing the differences in sentencing patterns between Victoria and NSW. This is, in itself, given that the two states are in the same nation, a desirable result.

The established case law is already to the effect that a sentencing court, while taking into account the various purposes of sentencing, "should lean towards mercy".

In *Kelly* [2007] NSWCCA 357 at [30]; the NSW Court of Criminal Appeal endorsed[27] the following observation of Napier CJ of the South Australian Supreme Court:

> Our first concern is the protection of the public, but, subject to that, the court should lean towards mercy. We ought not to award the maximum which the offence will warrant, but rather the minimum which is consistent with a due regard for the public interest.[28]

There is no contradiction between the protection of the public, on the one hand and the principle of "parsimony" (as set out in the Victorian legislation) on the other – the purposes of sentencing encompass the protection of the public.

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[27] *Kelly* [2007] NSWCCA 357 at [30]; *Blundell* [2008] NSWCCA 63, 70 NSWLR 660, 183 A Crim R 120 at [48].

[28] *Webb v O'Sullivan* [1952] SASR 65 at 66. See also *Cobiac v Liddy* (1969) 119 CLR 257 at 269, cited in *Baffsky* [2001] NSWCCA 332, 122 A Crim R 568 at [75]; *Miceli* (1997) 94 A Crim R 327.

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

No. The Bar Association repeats the submission made in respect of standard non-parole periods. The judgment of the High Court in *Muldrock* clearly prohibits using the results of a comparison of the objective seriousness of the instant offence with a hypothetical offence in the middle of the range of objective seriousness (eg the instant offence is slightly less objectively serious than a hypothetical offence in the middle of the range of objective seriousness) in some "proportionate" way (in the example, concluding that the non-parole period to be imposed should be slightly less than the standard non-parole period before consideration of subjective matters that might lead to some further reduction) – that is "two-stage sentencing". What is required is using the standard non-parole period in precisely the same way as the maximum penalty, as a guidepost to be kept in mind when engaging in intuitive synthesis. The Bar Association considers this approach to standard non-parole periods is most desirable in principle. "Objective seriousness" should not be given presumptively greater importance in the sentencing process than other considerations (eg culpability, prospects of rehabilitation) and should not be allowed to distort the balancing of relevant factors under *Veen [No 2]* where no presumptive priority is given to any particular sentencing purpose or relevant factor. It must be recognised that each of the purposes of sentencing, pursued unchecked, could lead to the imposition of unjust sentences.[29] Taking into account these purposes must be a discretionary exercise conducted in the light of general sentencing principles in pursuit of individualised justice in the particular circumstances of the case.

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)?

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

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?

[29] As the ALRC stated in *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC Report 103) para 4.31: "For example, grossly disproportionate sentences could be imposed in order to achieve general deterrence; indeterminate sentences could be imposed in order to rehabilitate or incapacitate an offender; and unnecessarily severe punishments could be imposed in the pursuit of retribution".

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?

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)?

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?

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'?

The Bar Association supports the approach that the factors in s 21A should simply be listed as factors that a sentencing court is required to take into account. The formulation in s16A(2) of the *Commonwealth Crimes Act 1914* could be adopted: "In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court: …"

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?

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?

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?

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?

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?

The Bar Association considers that the questions raised are complex. They have been answered satisfactorily by the courts (in the light of such statutory provisions as s22A) and it would not be desirable to attempt to legislate such matters. The Bar Association considers that the development of applicable principles should be left to the common law.

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?

A sentencing court should retain the discretion to take into account the circumstances of the offender that are relevant to the sentence, including those matters set out in s24A(1)(a)-(c). The legislation referred to in s24A is both protective and punitive in nature, the distinction between these characteristics in the context of the child protection legislation being *"elusive"*[30]. The provisions in question operate in the nature of effective disqualification from certain types of employment. This can have a punitive impact, particularly on young people, who may be affected for a period of 7 to 15 years from the orders that flow on a finding of guilt for a prescribed offence. To this extent s24A may be in direct conflict with the express purposes of the *Children (Criminal Proceedings) Act* 1987 (see s6(c)). The legislation could also have the extra-curial impact of persons being effectively prohibited from their trained profession which may be relevant to the sentence being imposed. The sentencing court should retain a discretion to take the matters in s24A(1)(a)-(c) into account.

Section 24A should either be repealed or should be amended as follows:
- delete the words in the heading: "to be disregarded in sentencing";
- delete the words in subsection(1) "must not", inserting instead "may;
- delete the words in subsection (1) "as a mitigating factor in sentencing".

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

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[30] *Rich v ASIC* (2004) 220 CLR 129 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at [32]

Confiscation and forfeiture orders may pertain to two quite different situations: where the property that is the subject of the order is itself the proceeds of crime; or where the property that is the subject of the order was used in the commission of the offence. Confiscation of property derived from the commission of an offence should not be treated as a mitigating factor. However, a sentencing court should retain the discretion to treat confiscation of property used in the commission of an offence as a mitigating factor. The Australian Law Reform Commission has recommended that sentencing legislation should provide that only a confiscation of property order or other court order that "merely neutralises a benefit that has been obtained" by the commission of the offence for which the offender is being sentenced should not mitigate the sentence.[31] The Bar Association supports that approach.

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

The approach taken appears to be consistent with the view of the High Court that, as a general principle, the possibility of executive action during or after the period of a sentence to be imposed on the offender is not to be taken into account. The Bar Association does not propose any change.

The Association looks forward to the release of further question papers relating to the review of the *Crimes (Sentencing Procedure) Act 1999*.

Yours sincerely

Bernard Coles QC
President

[31] ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC Report 103) recommendation 6-6.