REVIEW OF *CRIMES (SENTENCING PROCEDURE) ACT* 1999 (NSW)

Response to Sentencing Question Papers 1- 4

Submission by Legal Aid NSW

to the

New South Wales Law Reform Commission

15 June 2012

About Legal Aid NSW

The Legal Aid Commission of New South Wales ("Legal Aid NSW") is an independent statutory body established under the *Legal Aid Commission Act* 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW criminal law practice provides legal assistance and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Courts and Children's Courts, committals, indictable sentences and trials, and appeals as well as the Drug Court. Our specialist criminal law services include the Children's Legal Service, Prisoners' Legal Service and the Drug Court.

Legal Aid NSW welcomes the opportunity to provide these comments. Should you require further information, please contact Samantha Lee, Senior Policy Officer, Legal & Policy Branch at [redacted] or by telephone on [redacted] or Annmarie Lumsden, Executive Director, Strategic Policy Planning and Management Reporting Division at [redacted] or by telephone on [redacted]

Introduction

Legal Aid NSW recognises that sentencing is a complex and difficult task, as illustrated by the then Chief Justice Spigelman at the 2008 Sentencing Conference, where he said:

> *At the core of the sentencing task - and the reason why debate in well informed circles, let alone in the tabloid media will know no rest - is the process of weighing incommensurable and often contradictory objectives: protection of the community, deterrence, retribution and rehabilitation. Such a process of balancing …is like asking "whether a particular line is longer than a particular rock is heavy."*[1]

Due to the current complexities encompassing the sentencing process, Legal Aid NSW supports reform to sentencing that will make the practice less onerous, yet more transparent and consistent. Unravelling the sentencing process will not only benefit practitioners and the judiciary, but it will also benefit those who come before the courts as defendants.

Legal Aid NSW is of the view that the task of weighing up the diverse circumstances of the offence and of the offender in order to reach the most appropriate sentence is best achieved by the exercise of judicial discretion.

[1] *Bendix Autolite Corp v Midwesco Enterprises Inc*, 486 US 888 (1988) at 897 as cited by then Spigelman CJ, *'Consistency and Sentencing'*, Keynote Address, Sentencing Conference 2008.

Section 3A and its application

Question 1.1

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

Legal Aid NSW is of the view that there should be a legislative statement of the purposes of sentencing but that the criteria or wording of the criteria should be reviewed.

Question 1.2

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

The court should not be required to take into account every purpose in the statutory list in determining an appropriate sentence. Rather, when framing a sentence the court should be able to take into account the purposes that are relevant to the circumstances of the particular case, including the characteristics of the offender and the characteristics of the offence.

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

A particular purpose should not be taken into account where it is not relevant to the circumstances of the particular case.

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?

To the extent that the common law allows, the court should have the discretion 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?

The list of purposes should not be exclusive of any other purposes of sentencing.

Question 1.4

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

Consistent with the common law position and the conclusions of various Australian law reform agencies, Legal Aid NSW is of the view that there should not be a single overarching or primary purpose of sentencing.

Ultimately, the emphasis given to particular purposes of sentencing should depend on the circumstances of the case, including characteristics of the offender and characteristics of the offence, as stated at paragraph 1.16 of Question Paper 1.

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

There are a wide range of circumstances (such as the nature of the offence or the offender) which might justify a different overarching or primary purpose, as indicated in the commentary at paragraph 1.17 of Question Paper 1.

3. Should a hierarchy of sentencing purposes be established?

A hierarchy of sentencing purposes should not be established. The emphasis given to particular purposes of sentencing should depend on the circumstances of the case, as stated at paragraph 1.16 of Question Paper 1.

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?

Legislation should not proscribe the court's approach to applying the purposes of sentencing in particular circumstances. The approach to applying the purposes of sentencing should be a matter of judicial discretion and depend on the circumstances of the particular case.

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

Legislation should expressly state that there is no hierarchy of sentencing purposes.

Specific purposes of sentencing

Question 1.5

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

Ensuring that the offender is adequately punished for the offence is 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"?

Noting the limiting principle of proportionality, Legal Aid NSW is of the view that the purpose of punishment does not need to be qualified in any way.

Question 1.6

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

Legal Aid NSW notes the ever increasing body of research which suggests that general deterrence does not work and, in particular, marginal general deterrence does not serve as a disincentive to crime.[2] However, Legal Aid NSW acknowledges that the Court of Criminal Appeal has recently affirmed that deterrence is a 'structural assumption' of the criminal justice system and that judges cannot simply dismiss general deterrence as a purpose of sentencing, as noted at paragraph 1.36 of Question Paper 1.

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 not be a relevant consideration in relation to all offences and all offenders, especially in cases where there are factors which influence a person's decision to engage in criminal activity which, at the same time, diminish the impact on deterrent sentences, including psychological dispositions, socialisation, drug or alcohol dependency or abuse, mental health or cognitive impairments, and social and economic disadvantage, as recognised at paragraph 1.40 of Question Paper 1.

Whether, and the extent to which general deterrence should be a relevant consideration in relation to offences and offenders, should be a matter of judicial discretion in the circumstances of a particular case, and with reference to current research.

Question 1.7

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

As indicated in paragraph 1.40 of Question Paper 1, there is an ever increasing body of research which suggests that specific deterrence does not work.[3]

[2] M Bagaric and T Alexander, *(Marginal) Deterrence Doesn't Work – and What it Means for Sentencing* (2011) 35 Crim LJ 269; *Sentencing Matters. Does Imprisonment Deter? A Review of the Evidence*, Sentencing Advisory Council (Victoria), April 2011, p23.

[3] See 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?

As discussed in response to question 1.6 and recognised at paragraph 1.40 of Question Paper 1, specific deterrence should not be a relevant consideration in all cases where factors which influence a person's decision to engage in criminal activity conversely diminish the impact on deterrent sentences.

In particular, specific deterrence should not be an appropriate purpose of sentencing in cases where the offender has a mental health or cognitive impairment.

Again, whether and to what extent specific deterrence should be a relevant consideration in relation to an offender should be a matter of judicial discretion in the circumstances of a particular case, and with reference to current research.

Question 1.8

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

Protection of the community from the offender is a valid purpose of sentencing where that purpose is interpreted 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 appropriate mix of such purposes as rehabilitation, deterrence or punishment", as opposed to "incapacitation" simpliciter, as distinguished at paragraph 1.48 of Question Paper 1.

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

Incapacitation should not be more clearly identified as a purpose of sentencing. This would give undue weight to incapacitation as a means to achieve the purpose of protection of the community from the offender and would be inconsistent with the broader interpretation of this purpose.

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?

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

As stated at paragraph 1.16 of Question Paper 1 and submitted above, ultimately the emphasis given to particular purposes of sentencing should depend on the circumstances of the case, including characteristics of the offender and characteristics of the offence.

However, Legal Aid NSW notes that where the purpose of protection of the community from the offender is interpreted as "a broader, overarching purpose of sentencing" as outlined above, there would be few cases in which protection of the community was irrelevant.

Question 1.9

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

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?

In the recent case of *Muldrock v The Queen*[4], the High court acknowledged the community interest in promoting the rehabilitation of the offender. Legal Aid NSW submits that it would be useful to alter the current expression to reflect this dicta.

Question 1.10

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

Legal Aid NSW agrees with the observations at paragraph 1.61 of Question Paper 1 that it is not entirely clear what is intended by the purpose of making an offender accountable for his or her actions.

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

In accordance with the discussion at paragraphs 1.63 and 1.64 of Question Paper 1, Legal Aid NSW is of the view that the purpose does not add anything to that 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 purpose of retribution should not be more clearly identified in the statutory list.

The purpose of retribution is included in the purpose of ensuring that the offender is adequately punished for the offence. More clearly identifying retribution as a purpose of sentencing would give undue weight to incapacitation as a means of achieving the purpose of ensuring that the offender is adequately punished for the offence and would be inconsistent with the broader interpretation of this purpose.

Question 1.11

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

As indicated at paragraphs 1.67 and 1.68 of Question Paper 1, Legal Aid NSW notes that the court's approach to denunciation of the offender's conduct is very similar to the purposes of general and specific deterrence. Given this, Legal Aid NSW is of the view that denunciation of the offender's conduct is not an appropriate purpose of sentencing.

[4] *Muldrock v The Queen* [2011] HCA 39; 281 ALR 652

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

The purpose of denouncing the conduct of the offender should be removed from the statutory list.

Question 1.12

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

Recognition of the harm done to the victim of the crime and the community is an appropriate purpose of sentencing.

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

The current expression of the purpose should not be altered.

Question 1.13

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

Legal Aid NSW is of the view that no other purposes of sentencing should be added to the legislative statement of purposes. The list should be an inclusive list and, when framing a sentence, the court should be able to take into account the purposes of sentencing recognised at common law that are relevant to the circumstances of the particular case, including the characteristics of the offender and the characteristics of the offence.

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?

Legal Aid NSW is of the view that reparation and restoration should not 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.

Legal Aid NSW shares the view taken by the NSW Law Reform Commission in its review of sentencing in 1996 that reparation should not be regarded as one of the purposes of sentencing because it links punishment to "the victim's need for restitution or compensation, rather than to the gravity of the offender's conduct", and is ancillary to the purpose of sentencing.[5]

Legal aid NSW notes that reparation is a factor to be taken into account under s 21A(3)(i) of the *Crimes (Sentencing Procedure) Act 1999 (see OH Hyunwook v R* [2010] NSWCCA 148).

[5] NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [3.21]

In addition, the *Victims Support and Rehabilitation Act* 1996 also provides for compensation to victims and restitution from offenders independently of the court sentencing process. The introduction of reparation as a purpose of the *Crimes (Sentencing Procedure) Act* 1999 may affect the already established mechanism of the Victims Compensation Tribunal and may lead to the offender being punished twice.

Currently, both Forum Sentencing and Circle Sentencing provide for restorative justice within the adult sentencing system and Youth Justice Conferencing provide for restorative justice within the children's sentencing system. Restorative justice has an effective part to play as a *diversion* from the court sentencing process and the inclusion of reparation as a sentencing purpose runs the risk of making restorative justice part of the court process, rather than a diversion from it.

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. The effective operation of the criminal justice system may be a relevant factor in sentencing, and there should be discounts for the utilitarian value of a guilty plea and for assistance to authorities, but it is not a *purpose* of sentencing.

Question 1.16

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

It has long been recognised in both case law and legislation that the sentencing of children and young people requires different considerations to the sentencing of adults. The United Nations Convention on the Rights of the Child, the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules) also endorse different sentencing purposes and schemes for children. It is the view of Legal Aid NSW that the purposes of sentencing should be identified that relate specifically to children and young people.

However, there is a danger in identifying other groups to whom special purposes apply as the inclusion of certain groups necessarily means the exclusion of others.

Certain groups of offenders may warrant different considerations. For example, general deterrence may not be an appropriate purpose in sentencing offenders with mentally illness and cognitive impairment (*R v Helmsley [2004] NSWCCA 228*) and indigenous offenders may attract the principles set out in *R v Fernando,*[6] as discussed in response to Question 3 below.

[6] *R v Fernando* (1992) 76 A Crim R 58

However, there can be a range of characteristics within a particular group of offenders. For example, there are many different forms of mentally illness and cognitive impairment can range from being mild to profound. In addition, the nexus between a characteristic of, for example, a particular mental illness, and the offence may vary. It may therefore be difficult to establish who falls within the group and who does not.

2. If so, which groups and what purposes?

As noted above, Legal Aid NSW is of the view that the purposes of sentencing should be identified that relate specifically to children and young people.

Legal Aid NSW notes that the NSW Department of Attorney General and Justice is currently undertaking a review of the *Young Offenders Act 1997* and the *Children (Criminal Proceedings Act) 1987*. The review includes consideration of the object and principles of legislation proscribing the approach to offending by children and young people. The purposes of sentencing children and young people should reflect the intent of those principles.

As a starting point, Legal Aid NSW notes that rehabilitation should be the paramount consideration in sentencing children and young people (*R v GDP*[7]*)*.

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

Legal Aid NSW is of the view that purposes of sentencing should not be identified that relate only to Indigenous people. To some extent, this question was dealt with in *R v Fernando (Fernando)*[8] and subsequent cases. In *Fernando,* Wood J said:

> "the same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group, but that does not mean that the sentencing courts should ignore those facts which exist only by reason of membership of such a group."[9]

For example, alcohol abuse that arises out of the socio economic circumstances in which a rural Aboriginal offender grows up can be taken into account as a mitigating factor. However, the fact that an offender is Aboriginal is not of itself a mitigating factor, without evidence that the offender has been affected by the social and economic problems of Aboriginal communities (see *Pitt v R* [2001] NSWCCA 156).

Other cases have restricted the *Fernando* principles to Aboriginals from rural communities (see *Ceissman* (2001) 119 A Crim R 535, but see *Kennedy v R* [2010] NSWCCA 260) or from alcohol related backgrounds (*Morgan v R* (2003) 57 NSWLR 533). These cases illustrate the difficulties of having special sentencing principles (and purposes) that apply to all Indigenous offenders.

[7] *R v GDP* (1991) 53 A Crim R 112
[8] *R v Fernando* (1992) 76 A Crim R 58
[9] ibid

4. Should the purposes be in addition to the purposes of sentencing that apply generally or should they replace some or all those purposes?

The purposes of sentencing children and young people as outlined in s 6(a)-(f) of the Children (Criminal Proceedings) Act 1987 should be separate to those that apply generally.

However, it would be helpful to have these purposes in s 3A of the *Crimes (Sentencing Procedure) Act* 1999 to reinforce the fact that they apply to all sentencing of children, whether under the children's sentencing regime or according to law.

In this regard Legal Aid NSW notes that many children are sentenced in the Local Court for traffic offences. Unless the Local Court applies the provisions of s 210 of the *Criminal Procedure Act* 1986 and sentences under Div 4 Pt 3 of the *Children (Criminal Proceedings) Act* 1987, the child is sentenced under the *Crimes (Sentencing Procedure) Act* 1999. Inclusion of the purposes of sentencing children and young people in s 3A of the *Crimes (Sentencing Procedure) Act* 1999 would ensure the Local Court is guided by these purposes when sentencing children.

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?

Legal Aid NSW is of the view that the legislative and common law principle that imprisonment is a sentencing option of last resort should be retained and does not require amendment.

Section 5(2) of the *Crimes (Sentencing Procedure) Act 1999* should also be retained to ensure that the Magistrate or Judge is required to give reasons why a sentence of imprisonment of 6 months or less was imposed, and specifically:

> *(a) its reasons for deciding that no penalty other than imprisonment is appropriate, and*
>
> *(b) its reasons for deciding not to make an order allowing the offender to participate in an intervention program or other program for treatment or rehabilitation (if the offender has not previously participated in such a program in respect of the offence for which the court is sentencing the offender).*

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 disadvantaged of codifying the principle of proportionality?

The common law principle of proportionality should continue in its current form. The common law has long recognised that the punishment must fit the crime. In *Veen v The Queen (No 2)*[10] Mason CJ, Brennan, Dawson and Toohey JJ said:

> *The principle of proportionality is now firmly established in this country. It was the unanimous view of the Court in Veen [No.1] that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender.*

Codifying a common law principle means that it is unable to evolve, and can add complexity in an area of law that is well settled.

[10] *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472

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

There is no need for codification of the principle that the jurisdictional limit in the Local Court is not reserved for 'worst case' offences (Grove J in *R v Doan*).[11]

The appropriate application of the principle of proportionality where there is a jurisdictional limit law is well understood, and simply stated in the Judicial Commission Benchbook as follows:

> *Magistrates must not regard the jurisdictional limit of their court as some form of maximum penalty or a penalty reserved for the worst category of an offence: R v El Masri [2005] NSWCCA 167 at [30].*

In addition, codification of the principle that the jurisdictional limit in the Local Court is not reserved for 'worst case' offences would create a statutory exception to the principle of proportionality and by inference excludes exceptions not otherwise listed. It is submitted that there would be no benefit in codifying this exception, which is currently recognised in the case law and well understood.

Parity

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. The parity principle explained in *Lowe v The Queen,*[12] is based on objectives of fairness and consistency in sentencing, as well as maintaining public confidence in the integrity of the justice system. Any difference between sentences imposed on co-offenders for the same offence should not be such as to give rise to a justifiable sense of grievance on the part of the offender with the heavier sentence.

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

There would be a number of significant disadvantages in codifying the principle of parity. There are multiple considerations involving the comparison of co-offender's roles and degrees of culpability as well as criminal history and subjective features. Application of the parity principle is a process which involves the exercise of discretion by the sentencing judge (see, for example, *R v Draper* (unreported), 12 December 1986 NSW CCA) and codification of the principle may fetter that discretion.

The application of the parity principle is tested in different ways in severity appeals and Crown appeals. It is different where co-offenders have differing roles and are not charges with identical offences, or where the Crown appeals the sentence of one co-offender but not another, or where co-offenders include both juveniles and adults. Relevant examples include:

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[11] *R v Doan* (2000) 50 NSWLR 115 [35]
[12] *Lowe v The Queen (1984) 154 CLR 606*

- **Severity appeals** - *Green v The Queen (2011) 86 ALJR 36* at [31]-[32];
- **Crown appeals** - *Green v The Queen (2011) 86 ALJR 36 at [34]-[40], R v Borkowski (2009) 195A Crim R 1 at [70];*
- **Co-offenders convicted of different charges but participating in the same criminal enterprise** - *Green v The Queen (2011) 86 ALJR 36 at [30]* and also *Jimmy v The Queen (2010)77NSWLR 540;*
- **Juvenile and Adult Co-offenders -** *R v Wong* [2003] NSWCCA 247 and Kirby at [35] and *R v Boney* [2001] NSWCCA 432.

In addition, the principles of proportionality and totality must also be considered alongside parity, see *R v Postiglione [1997] HCA 26; 189 CLR 295.*

Any attempt to codify the parity principle would require consideration of its application in apply in multiple differing scenarios. This would be a complex exercise in itself. In addition, codification may mean that the principle was unable to evolve and could fetter its future application to a variety of situations.

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?

The common law principle of totality should continue in its current form. There would be no advantage in codifying the principle.

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?

Legal Aid NSW is of the view that sentencing courts should have discretion to impose an overall sentence for all of the offences.

However, sentencing court should not be required to articulate what sentences would have otherwise been imposed for the individual counts. This would resolve the complexities of the common law.

Sentencing the offender only for the offence proved

Question 2.5

Should the principle that an offender is to be sentenced only for the offence proved (but still allowing the court to take into account aggravating circumstances within that limitation) be codified? What would be the advantages and disadvantages of codifying this principle?

The principle that an offender is to be sentenced only for the offence proved should not be codified.

The principle in *De Simoni v The Queen*[13] is well understood amongst the profession and the judiciary.

Sentencing courts have interpreted this general principle and its application to particular offences in many common law authorities. Codification would come at a risk that the principle is applied in a formulaic manner and the nuances of the common law are overlooked.

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?

Except for existing statutory requirements, the common law requirement to give reasons for sentence should not be codified. The existing principle that courts are required to provide reasons for the sentence is well understood and applied, and is a matter of procedural fairness. A failure to adequately provide reasons for a sentence is a reason for an appeal, if the basis for a sentence cannot be discerned from the reasons. Legal Aid NSW does not see any benefit from an additional 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?

The existing statutory requirements to give reasons for aspects of sentencing should be retained. The requirement for a court to give reasons when imposing a sentence of imprisonment of six months or less highlights that the legislature considers these sentences should be unusual and that specific justification ought to be given for them. This is a useful indication of the legislature's intent and serves to appropriately focus the judiciary on the reasons for imposing such a sentence.

[13] *De Simoni v The Queen* (1981) 147 CLR 389

Alternatives

Question 2.7

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

Legal Aid NSW is of the view that parsimony should be part of the sentencing law of NSW. As Adams J expressed in *Foster v R*:

> *to say that a sentence should not be heavier than the case calls for, may not be much more than saying that a sentence should be appropriate having regard to all the circumstances. But it is a way of casting that question that provides, to my mind, a helpful perspective.*[14]

Parsimony should operate in NSW to ensure that penalties beyond that required to satisfy the objectives of sentencing legislation are not imposed. This may be done by giving NSW an equivalent of s 5(3) of the *Sentencing Act* 1991 (Victoria), which states 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.*

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

Legal Aid NSW does not suggest any further principles which could be incorporated into the NSW sentencing law.

Instinctive synthesis

Question 2.8

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

Legislation should not mandate an approach to sentencing distinct from the instinctive synthesis approach. Instinctive synthesis has implicitly found support from the High Court in *Muldrock v The Queen.*[15] It is well accepted that sentencing law in NSW is excessively complex and part of that complexity derives from the artificial processes which 'multi stage sentencing' requires judicial officers to engage in.

In addition to the common law principles, there are certain matters which the legislature mandates should be taken into account on sentencing. Generally however, the judiciary should be permitted to reason using instinctive synthesis. However, the basis for such reasoning should still be provided in the remarks on sentence.

[14] *Foster v R* [2011] NSWCCA 285 [para 52]
[15] *Muldrock v The Queen* [2011] HCA 39; 281 ALR 652

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)?

Legal Aid NSW is aware that s 21A of the *Crimes (Sentencing Procedure) Act 1999* is erroneously treated by some legal practitioners and judicial officers as a checklist - an exhaustive list of factors to be taken into account on sentence. This can result in court time being wasted when factors are considered which are irrelevant to the particular sentence proceedings. Conversely, there may be factors which are relevant for the specific sentencing exercise but are overlooked because they are not contained in s 21A. This process is exacerbated by the binary approach to sentencing factors taken in s 21A.

Legal Aid NSW is of the view that abolishing s 21A will provide a less complex and more transparent sentencing process.

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)?

There is a risk 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). However, this already occurs as a result of the checklist approach taken by some legal practitioners and judicial officers.

The relevant factors under s 21A would be taken into account if legal practitioners and judicial officers identified and considered factors relevant to the particular case that were available under the common law before the introduction of the section.

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

Sentencing proceedings would be more transparent in the absence of a provision similar to s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Consideration of s 21A factors often creates a discourse about the case at hand, with reference to factors that may not be relevant or of most relevance to the particular sentence proceedings case. This can obscures the issues which are most relevant to the case.

The more complex and pro forma a sentencing exercise becomes, the less transparent it becomes.

Question 3.2

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

Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should not 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?

Section 21A of the *Crimes (Sentencing Procedure) Act* 1999 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?

Legal Aid NSW suggests sentencing legislation could include a similar provision to section 16A of the *Crimes Act* 1914 (Cth).

Section 16A of the *Crimes Act* 1914 (Cth) provide a useful list of broadly framed sentencing categories that a judicial officer can have regard to in applying the instinctive synthesis approach to sentencing.

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)?

Legal Aid NSW is of the view that the purposes of sentencing in s 3A should be contained in a provision which is separate from a provision which sets out the factors to be taken into account on sentence.

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?

Legal Aid NSW is of the view that s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be repealed.

Legal Aid NSW would support framing sentencing factors as a broad, unclassified, neutral and non-exhaustive list, and leaving the particulars of sentencing factors to the common law.

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'?

Legal Aid NSW is of the view that the factors should be expressed in broad terms without the detail of the current s 21A and without the division into aggravating and mitigating factors. Currently, a number of the factors in section 21A are very specific and have no application to the majority of matters that come before the court for sentencing.

Attempting to specifically apply the aggravating factors outlined in section 21A (2) can result in potential judicial errors. For example:

- s 21A(2)(b) can be misleading because violence is an element of the offence, and the court can only take into account the degree of violence as an aggravating feature, and not the fact that there was violence
- s 21A(2)(c) should refer to the nature of the weapon used, rather than the fact of the weapon, because the fact of the weapon will ordinarily result in a more serious charge
- s 21A(2)(cb) can be misleading, as causing the victim to take a drug etc. is often a specific offence or one which results in a more serious charge
- s 21A(2)(d) is misleading because previous convictions is a factor for sentencing but it cannot be taken into account as an aggravating feature
- s 21A(e) can be misleading, because the fact of being in company will often result in a more serious charge, and the aggravating feature will be the degree of in company

Plea of guilty

Question 4.1

1. Should there be a discount allowed for a plea of guilty? Are there any circumstances in which a discount for a plea of guilty should not be allowed?

Legal Aid NSW supports a discount for a plea of guilty. In a very small number of cases this could pose a difficulty in quantification, such as offences that justify life imprisonment. However, the principle of a discount for a plea of should apply as a general rule to all cases.

The protection of the public should not be a factor when considering a discount for a plea of guilty because the protection of the public is a relevant consideration elsewhere in the sentencing process.

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

Legal Aid NSW supports the practice of judicial officers quantifying the discount allowed for a plea of guilty in a particular case.

It is vital that the amount of discount imposed continues to be clearly reiterated and stated because a plea of guilty is one of the most significant factors considered by judicial officers. In addition, judicial quantification of the percentage discount has created a sense of certainty for accused who perceive they have in fact received a discount for their plea.

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

Legal Aid NSW does not support legislation prescribing the level of discounts for pleas of guilty entered at various stages of proceedings.

Judges should retain a wide sentencing discretion in relation to the value of a plea of guilty in any given case. Numerous factors should be synthesized by the judicial officer in determining the value of the plea, and prescribing essentially for discount by 'timetable' will not adequately take into account the numerous factors that should be considered. The timing of the plea should not be the only consideration.

Judicial officers are in a better position to consider the common law and make the appropriate adjustments for the percentage discount taking into account all the factors that are relevant to the timing of the plea.

As demonstrated in the *Criminal Case Conferencing Trial Act 2008* (now repealed) prescriptive legislation should not fetter the sentencing discretion of judicial officers.

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

The discount for a plea of guilty should not be limited to the utilitarian value of the plea.

There are many factors that a judge should consider that extend beyond the utilitarian value of the plea. In the guideline judgment of *R v Thomson; R v Houlton* [2000] NSWCCA 309, Spigelman CJ provided that the discount for a plea of guilty should encompass any or all of the matters to which the plea may be relevant, including contrition, witness vulnerability and utilitarian value. All of these matters should attract a discount.

The following factors may be considered when applying a broader discount for a plea of guilty. Some of these factors are presently considered relevant to the utilitarian value of the plea[16] and others are not. These factors include:

- timing of the plea
- strength of the prosecution case
- length and complexity of the trial
- evidence of remorse
- witness vulnerability and saving witnesses from giving evidence
- reasons for the delay in plea, particularly if it is as a result of negotiation resulting in a lesser charge or substantially less serious facts
- practical difficulties occasioned to an accused person who is overcharged, acknowledges their guilt, makes a genuine plea offer in consciousness of guilt to a more appropriate charge and suffers delay at the hands of the prosecution, only to find their discount suffers as a result. These factors were not considered in the case of *Sullivan v Skillin.*[17]
- whether an offer of a plea was made and rejected
- scope to consider when a charge is laid following immediate admissions by the accused in circumstances where there would otherwise be a weak Crown case, which goes to both the utilitarian value and any consideration of remorse
- significant discount retained for the *Ellis* principle.[18]
- broader considerations, falling within the judicial discretion that would give rise to exceptional circumstances arising from the individual case that would justify an increase or decrease in the value of the plea of guilty.

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

Remorse and contrition should attract a discount for a guilty plea that is separate to the discount for the utilitarian value of the plea. A factor relevant to a discount for remorse is immediate admission.

[16] In *R v Robert Borkowski* [2009] NSWCCA 102, Howie J discussed numerous factors that relate to the utilitarian value of the plea.
[17] *Sullivan v Skillin* [2009] NSWCCA 296
[18] *R v Ellis* (1986) 6 NSWLR 603 at 604

While in *R v MAK*[19] the CCA indicated that quantifying a discount for remorse should be avoided as *"it is likely to result in a sentence that is unduly lenient by reason of double counting"*, judicial officers should be able to exercise their discretion and quantifying the discount where appropriate.

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

Discounts for the utilitarian value of the plea and remorse and contrition should be taken into account as part of the instinctive synthesis approach to sentencing and in accordance with the common law.

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?

There should be a discount for assistance to authorities.

As indicated at paragraph 4.27 of Question Paper 4, there are good policy reasons for allowing a discount for assistance to authorities as a general principle.

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

Legal Aid NSW does not support legislation which specifically excludes the common law approach to allowing a combined discount for a plea of guilty and assistance to the authorities.

The sentencing process is complex and Legal Aid NSW solicitors often have the task of explaining the sentencing process and results to accused persons who may suffer from mental health and cognitive impairments issues, or for whom English is a second language. The approach to allowing a combined discount simplifies this aspect of the sentencing process.

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 not be required to quantify the discount(s) as required by section 23(4) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

The common law approach of allowing a combined discount for a plea of guilty and assistance to the authorities is consistent with the instinctive synthesis approach, which allows a discount to be tailored to the circumstances of the particular case.

[19] *R v MAK* (2006) 167 A Crime R 159

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

Legal Aid NSW is of the view that the current range of discounts is generally appropriate, so long as the ability to exceed 40% in exceptional circumstances is retained.

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

Legal Aid NSW is of the view that the disadvantages of codifying amounts of discounts for assistance to authorities outweigh the advantages.

The disadvantages include the diversity of forms of assistance, which require the widest possible judicial discretion.

Pre-trial and trial assistance

Question 4.3

1. Should there be a discount for a pre-trial or trial assistance? Are there any circumstances in which a discount for pre-trial or trial assistance should not be allowed?

Legal Aid NSW supports a discount for a pre-trial or trial assistance. Just as a plea of guilty can save significant costs to the community, the cost of a trial and the stress and inconvenience to witnesses of shortening a trial can lead to similar cost benefits. For example, agreements under s 191 of the *Evidence Act 1995 No. 25* (NSW) can mean that witnesses do not have to be called, or facts proved.]

All pre-trial assistance should attract some measure of discount. The amount of discount should be determined by the sentencing judge.

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

Judicial officers should not be required to quantify discounts 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?

The disadvantages of codifying discounts for pre-trial and trial assistance would far outweigh the advantages. The disadvantages include the fetter of judicial discretion to tailor a discount which is appropriate to the particular case.

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

Legal Aid NSW agrees that a greater emphasis on discounts for pre-trial and trial assistance would likely increase the efficiency of the criminal justice system.

However, Legal aid NSW would be concerned if this resulted in more onerous requirements for pre-trial disclosure by the defence.

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?

Legal Aid NSW does not support retention of excluded factors relating to sexual offences in sections 21A and 24A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Judicial officers should have the discretion to take such factors into account where appropriate.

Question 4.5

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

Legal Aid NSW is of the view that there are circumstances in which confiscation and forfeiture orders should be taken into account on sentence.

Legal Aid NSW notes the decision of the New Zealand Court of Appeal In *R v Bough*[20] referred to at paragraph 4.47 of Question Paper 4.

Question 4.6

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

Deportation should be a relevant sentencing consideration, and the extent to which it might discount a sentence should be within the discretion of the sentencing judge.

For example, deportation may be a relevant sentencing consideration where an accused person runs the risk of personal physical or psychological danger upon returning to their country of origin. It may also be relevant in cases where a person is returned to a country where they have not lived since they were a child, in circumstances where they may have no support from family and no formal supervision by NSW State Parole Authority (NSW SPA).

In addition, deportation should be a relevant sentencing consideration because it generally means that an offender will not be given parole when first eligible. Deportation is a relevant parole consideration and the NSW SPA rarely grant parole to an offender who will be deported because the offender will be out of the jurisdiction and will not receive supervision from SPA.

[20] *R v Bough [1995] 1 NZLR 419*