THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Criminal Law Committee

RESPONSE TO QUESTION PAPERS

Sentencing: Question Papers 1–4

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New South Wales Law Reform Commission
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Introduction

The NSW Young Lawyers Criminal Law Committee ("the Committee") refers to Question Papers 1 to 4 produced by the New South Wales Law Reform Commission in response to the terms of reference referred by the Attorney-General on the review of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Sentencing Act") on 21 September 2011.

NSW Young Lawyers, a division of the Law Society of NSW, is made up of legal practitioners and law students, who are under the age of 36 or in their first five years of practice. Our membership is made up of some 13,000 members.

The Young Lawyers Criminal Law Committee provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies and submits on issues in need of law reform.

Question Paper 1

Section 3A and its application

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

Yes.

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

No.

The Committee considers it unnecessary for a sentencing court to explicitly take into account each and every purpose in s 3A. The Committee agrees with the judgment of McColl JA (Howie and Buddin JJ agreeing) in *Regina v King* (2004) 150 A Crim R 409 at [130], in that a sentencing court should impose a sentence that reflects the relative weight – taking into account the circumstances of the offending – given to each of the factors set out in s 3A. The subjective and objective factors of a particular matter will generally dictate which purposes of punishment are to be given precedence over others.

For example, although the common law recognises youth as a strong subjective circumstance that requires promotion of rehabilitation above other purposes, Dunford J in *Regina v MA* (2004) 145 A Crim R 434, at [28], was moved to state that "there comes a point at which the seriousness of the crime committed by a young offender…is so great that the special attention normally given to rehabilitation…must give way."[1]

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

No.

There are no general situations (for example, sentences for a particular offence) where a particular purpose should never be given consideration, even if that purpose may, after reflection, be considered to be irrelevant. As a corollary, the sentencing judge or magistrate may decide in any particular case that a factor is not relevant, but making that decision will require consideration of the factor nonetheless.

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?

Yes.

Sentencing ought to remain an exercise where all relevant factors recognised by the common law, legislatively enumerated or not, may be considered.

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

No.

1 Referring also to Lee AJ in *Regina v Nichols* (1991) 57 A Crim R 391 at 397: "… there is a point at which the seriousness of the crime committed by a man of 19, even though a young man, is of such a nature is so great, that the principle must, in the public interest, give way."

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

No.

The academic Mirko Bagaric disparagingly remarked that the Victorian Sentencing Committee, when considering legislation similar to s 3A in 1988, placed the problem of unranked and conflicting purposes of sentencing in the "too hard basket".[2] With respect to his argument – and in the absence of any consensus at all on what the principle purpose of sentencing is – that basket is where the problem belongs.

Except in a very vague sense, the different branches of our criminal law regime do not possess a uniform rationale for punishment. The reason a *Corporations Act* infringement is an offence is different to the reason assault is an offence, or a traffic violation, or an illegal use of a protected fishery. It would be futile and misleading to define one principle for such disparate offences.

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

Not applicable.

1.4.3 Should a hierarchy of sentencing purposes be established?

No (for the reasons given in response to Question 1.4.1).

1.4.4. If so:

a. what should that hierarchy be, and

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

Not applicable.

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

No.

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

No.

The Commission recognises that the list of purposes presented in s 3A has not been interpreted as creating a hierarchy. In the absence of evidence that it is being treated as such, there is no need for any amendment.

Specific purposes of sentencing

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

Yes, qualified by the subsequent response.

2 Mirko Bagaric, "Sentencing: The Road to Nowhere" (1999) 21 *Sydney Law Review* 597, n 46.

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

Yes.

The Committee endorses the formulation adopted in other jurisdictions, which is to ensure the offender is punished "to an extent or in a way that is just in all the circumstances".[3]

While the term "adequately" appears to focus more on the crime than on the offender, the preferred wording acknowledges that the sentence must not only accord with the general moral sense of the community,[4] and be proportionate to the gravity of the offence,[5] it must also be arrived at by taking into account all the circumstances of the case, such as the offender's moral culpability.[6]

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

Yes.

General deterrence is a valid aim of sentencing, but it has limits in principle and practice.

The Commission notes that an outstanding criticism of deterrence is that it involves, by necessity, punishment for hypothetical crimes committed by other people. This is not a merely hypothetical conflict with the principle of proportionality. In a practical sense, it now seems apparent that marginal increases in sentences (either through legislation or increasing sentencing severity) do not significantly deter people from committing crimes.[7]

Marginal general deterrence is discredited and should be treated as such. Yet absolute general deterrence does not appear to be entirely ineffective, and can be achieved by the imposition of sentence in the first place. If that distinction is observed, general deterrence remains a valid aim.

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

Yes.

In some cases absolute general deterrence is more important (eg. white-collar and environmental crimes) or less important (eg. offences stemming from drug dependency), which is another reason for the application of the purposes of sentencing to remain a matter for judicial discretion. The Committee sees no reason to change the law and supports the role of judicial discretion in choosing when to take the need for deterrence into account.

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

No, with a qualification.

It is important that offenders be discouraged from committing further crimes. But increasing a sentence in order to achieve that may be mistaken. Specific deterrence is only a valid purpose if the offender is actually deterred from committing a similar offence. Prison, for example, is not a place conductive to socialisation, a notion supported by substantial evidence confirming that

3 *Sentencing Act* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Sentencing Act 1991* (Vic) s 5(1)(a).
4 *R v Prindable* (1979) 23 ALR 665, 669.
5 *Veen v R (No 1)* (1979) 143 CLR 458, 467-468; *Veen v R (No 2)* (1988) 164 CLR 465, 472.
6 *Muldrock v The Queen* (2011) 244 CLR 120 at [58].
7 The Committee observes that the field is covered in both the Question Papers and the submission of the Law Society of New South Wales and has nothing to add.

sentences of imprisonment have no significant effect on specific deterrence[8] and are indeed often criminogenic.[9]

Some members of the Committee have suggested that, to the extent that s 3A(b) remains, the notion of deterrence be reconsidered. One means by which this could be carried out could be by breaking it into two sections, as follows:

(ba) to prevent crime by discouraging the offender from committing similar offences;

(bb) to prevent crime by deterring other persons from committing similar offences.

Accepting that not all members are in agreement on this point, it is acknowledged that "discouragement" is not a hugely different term to "deterrence", but it is not the same word, and leaves behind the definitional baggage of deterrence. In a practical sense, it may give the common law scope to rediscover a broader meaning of specific deterrence.

Discouragement could encourage alternative sentencing options that do not fall under the rubric of rehabilitation. These options include bonds, community service orders and pecuniary penalties. The aim of specific deterrence, which can only be the prevention of recidivism by the offender, is preserved. The amendment also has the effect of making a clear distinction between general and specific deterrence.

The underlying problem identified by the Committee is that deterrence, as reflected in the legislation and cases, is almost universally adopted, but not universally applicable (or effective). Traditionally, this problem has been dealt with by allowing a sentencer to give general or specific deterrence less weight depending on the circumstances, but this assumes (incorrectly, in the Committee's view) that there is an unambiguous body of knowledge that can be applied to the task of allocating weight, depending on the circumstances.

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

Yes (in the form proposed above).

Specific deterrence is always relevant, albeit the circumstances may call for it to be given little weight. For instance, it is unlikely to be an influential factor in situations involving offenders with a mental health or cognitive impairment, or where there is a low risk of re-offending.[10] Consideration of the circumstances will determine its relative weight.

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8 See eg : D Weatherburn, "The Effect of Prison on Adult Re-offending" (2010) *Crime and Justice Bulletin No 143*, NSW Bureau of Crime Statistics and Research, 1, 10; A McGrath, "Offenders'" Perceptions of the Sentencing Process: A Study of Deterrence and Stigmatisation in the New South Wales Children's Court,' (2009) 42(1) *Australian and New Zealand Journal of Criminology*, 24, 37; S Holland, K Pointon and S Ross, *Who Returns to Prison? Patterns of Recidivism among Prisoners Released from Custody in Victoria in 2002-03* (2007) Corrections Research Paper Series no. 1. Melbourne: Department of Justice, 1, 13-15; M Killias, M Aebi and D Ribeaud, 'Does Community Service Rehabilitate Better than Short-Term Imprisonment?: Result of a Controlled Experiment,' (2000) 39(1) *Howard Journal of Criminal Justice*, 4, 53; D P Green and D Winik, 'Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders,' (2010), 48(2) *Criminology*, 357, 381; D P Mears and W D Bales 'Supermax Incarceration and Recidivism,' (2009) 47(4) *Criminology*, 1131, 1154.

9 See eg: C Spohn and D Holleran 'The Effect of Imprisonment and Offenders Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders,' (2002) 40(2) *Criminology*, 329-357, 350; D S Nagin, F T Cullen and C L Jonson 'Imprisonment and Reoffending,' (2009) 38 *Crime and Justice*, 115, 186.

10 Mirko Bagaric, "Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?" (2000) 24 *Criminal Law Journal*, 21, 32-33.

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

Yes.

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

a. generally; or

b. only in serious cases?

No.

The expression "incapacitation" should not appear at all in the purposes of sentencing.

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

No.

The protection of the community is a purpose of sentencing to be given due weight depending on the circumstances of the case. It is unlikely that it would, in its broadest sense, be irrelevant in any case.

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

Yes.

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

No.

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

Yes, but for the reasons that follow, s 3A(e) should be deleted.

The Paper refers to the definitional confusion surrounding the term "accountable". The expression has been given the conflicting meanings of restoration and retribution.

A neutral view is that accountability means responsibility. Holding an individual accountable means that the offending behaviour is governed by "an interpersonal normative standard of conduct that creates expectations between members of a shared community".[11] To hold someone accountable is to address a fellow member of the moral community. But as an aim of sentencing, the Committee does not envisage a situation where the purpose will not be subsumed by "adequate" or "just" punishment. So accountability is relevant morally but not necessary practically. As the Paper observes, it creates confusion.

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

The latter involves the offender taking upon himself or herself some element of responsibility and understanding for their actions. The former does not

11 Lawrence Stern "Freedom, Blame, and the Moral Community" (1974) 71 *The Journal of Philosophy* 72; Michael McKenna, "The Limits of Evil and the Role of Moral Address: A Defense of Strawsonian Compatibilism" (1998) 2 *Journal of Ethics* 123.

necessarily involve recognition of responsibility. That said, the practical difference is nil.

The Committee also observes that "accountability" is limited to the extent that an offender is *willing* to take responsibility for and understand the impact of their actions. Insight can be encouraged, but it cannot be coerced by a sentence.

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

No.

Retribution may be taken into account sufficiently by s 3A(g) as it is, but as a purpose alone could be employed to impose disproportionate sentences for impermissible emotional reasons.

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

No.

The Committee submits that denunciation is not an appropriate purpose of sentencing insofar as its objective overlaps with general and specific deterrence. There is a causal connection between denunciation and deterrence.[12]

The Committee also recognises that the legislature's decision to criminalise certain conduct and impose maximum penalties accordingly reflects the community's attitude towards that conduct. So denunciation may be viewed as a consequence of the offender's contact with the criminal justice system and a result of the sentencing process, rather than a purpose of the exercise.

However, the Committee notes that this position should not preclude the court from incorporating denunciation of the offender's conduct into remarks on sentence. Denunciation provides an avenue through which the court may communicate society's condemnation.[13] The Committee recognises the benefit of the message it sends to the community, particularly in circumstances where circumstances make the offender an inappropriate vehicle for general or specific deterrence.

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

Not applicable.

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

Yes.

It is consistent with the community's legitimate expectation that a sentence will reflect the impact of an offence on both the individual victim and the broader community.

There has been some suggestion that the section may alter the status of the Supreme Court's decision in *Previtera*[14] regarding the use of victim impact statements in homicide cases.[15] But in the absence of express amendment to s 28 of the Sentencing Act regulating the use of such statements, the Committee does not believe that this was the intended effect of s 3A(g).

12 See *Regina v McKenna* (unreported, NSWCCA, 16 October 1992), [9] (Lee AJ).
13 *Ryan v The Queen* (2001) 206 CLR 267 at [118].
14 (1997) 94 A Crim R 76.
15 *R v Berg* [2004] NSWCCA 300, 42-45 (Spigelman CJ).

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

No.

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

No.

The list of purposes expressed in s 3A is not exhaustive. As such, purposes recognised at common law but not mentioned in the section may still be taken into consideration. The Committee submits that any addition to the statutory list will only serve to further complicate the sentencing process.

The Committee otherwise adopts the proposal by the Law Society of NSW to insert the term "include" to the *chapeau* of s 3A.

1.14.1 Should reparation and restoration be added to the list of purposes either as an addition to s 3A(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) or as a separate item in the list of purposes?

No.

Reparation and restoration are poorly defined and have been used to encompass a wide range of concepts, including all aspects of restorative justice. Consideration of the relative weight of a purpose in the circumstances in not a useful exercise where that purpose does not have a consensus meaning.

For example, the Paper does not contemplate a scenario where an offender damages or destroys insured property. The sentencing judge or magistrate would, of course, be entitled to use his or her discretion to evaluation the relative weight of restoration, given the circumstances. One view is that (under the given circumstances) it is nil. Another view might take into account the insurer's civil right of subrogation. These are uncharted waters and, given a reasonable expectation that the common law system would settle a definition in time, the legislature should not insert vague terms to the sentencing process.

The Committee is not so much opposed to the concept of reparation and restoration as it is objecting to its place in s 3A. It does not seem to be a purpose that can be achieved by a punishment – with the exception of except for community service.

1.14.2 How should the purpose of reparation and restoration be expressed?

Not applicable.

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

No.

The first area of the proposed purpose, in creating efficiency, is adequately met by the existing allowance for pleas, disclosure and assistance. The second purpose, maintaining public confidence in the judicial system, is best met by principled application of the purposes of sentencing, and not by adding an additional and overarching consideration.

The Committee must also observe that the range of government agencies involved in the criminal justice system means it is not appropriate to specify the effective operation of the criminal justice system as a purpose of sentencing. In particular, the agencies involved in the rehabilitative aspects of the criminal justice system influence its effectiveness in a direct way that the judiciary should not be expected to control when passing sentence.

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

Yes.

1.16.2 If so, which groups and what purposes?

It may be appropriate to consider specific purposes of sentencing should be identified that relate specifically to Aboriginal and Torres Straight Islander people.

It is clear that Indigenous people are overrepresented in gaol, and that circle sentencing is not a complete answer. Indigenous people suffer, perhaps not uniquely in all respects as individuals, but overwhelmingly as a community from significant historical and inter-generational disadvantage. *R v Fernando* (1992) 76 A Crim R 58 provides an authoritative list of principles to apply to Indigenous Australians on sentence in NSW[16]. These principles should remain.

However, it is worth noting that there is no unusual "purpose" to sentencing such a group – one does not sentence any person *in order* to recognise the fact that they belong to a particular group. Rather, one sentences them *bearing in mind* the fact of their particular circumstances.

People under the age of 18 are a vulnerable group, but the common law already recognises that rehabilitation for young people should take priority over other purposes, such as deterrence and retribution (see the Committee's response to Question 1.2.1). These principles are supplemented by legislation identifying purposes and factors to take into account when sentencing young offenders in criminal proceedings.[17]

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

Purposes that the Committee identifies as potentially (more) relevant to Indigenous persons include:

- rehabilitation;
- re-integrating the offender into the community; and
- recognising the historical and contemporary intergenerational disadvantage suffered by Aboriginal and Torres Strait people.

It would be an important matter for further research to draft the suggested purposes and identify the extent to which they overlap or supplement the existing law.

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

The proposed additional purposes should apply in addition to the general purposes.

16 See Janet Mannuel SC, 'The *Fernando* Principles: the sentencing of Indigenous Australians in NSW', *Discussion Paper prepared for the NSW Sentencing Council*, December 2009.
17 *Children (Criminal Proceedings) Act 1987* (NSW).

Question Paper 2

Imprisonment as a last resort

2.1 Should the legislative and common law principle that imprisonment is a sentencing option of last resort be retained or amended in any way? If it is amended, in what way should it be amended?

The principle should remain.

The Committee does not believe that there should be any change to the present practice, which is appropriate and sensible and appears to be performing the essential function of ensuring that individuals are not imprisoned when there are other appropriate and available penalties. Imprisonment should continue to be used carefully and sparingly.

Proportionality

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

The principle should remain at common law.

Proportionality is an appropriate basis for sentencing and should remain in its present form. It is a useful and instructive overarching principle that prevents generally excessive or inadequate sentences. Placing proportionality in legislation may reinforce the prominence of the principle for the sentencing judge or magistrate, but the Committee is not aware of any evidence that the principle is not working in the manner intended by the common law.

The only obvious benefit in codification is the visibility of having a principle accessible in legislative form – which, of itself, is not a sufficient basis for legislative reform unless it also achieves some meaningful simplification or reform.

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

No.

In the Committee's experience the common law principle is well understood.

Parity

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

The principle should remain at common law.

In the Committee's experience the common law principle is well understood.

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

See generally the comments at 2.2.1.

Totality

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 principle should remain at common law.

In the Committee's experience the common law principal is well understood.

2.4.2 Should sentencing courts have discretion to:

a. impose an overall sentence for all of the offences; and

b. articulate what sentences would have otherwise been imposed for the individual counts?

The Committee is unable to reach a consensus view on this question.

It is apparent that this proposal could have the benefit of increased flexibility in sentencing for a number of offences. But resolution of this question would require:

- analysis of the frequency and success of appeals against aggregate sentences imposed under s 53A (itself a relatively new provision);
- analysis of the purposes for which s 53A was introduced and the extent to which those purposes are being met; and
- weighing the convenience of aggregate sentences against the need for transparency and accurate sentencing statistics.

Sentencing the offender only for the offence proved

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 should remain at common law.

There is no discernable advantage to be gained by codifying this principle. The issue was firmly settled in *Regina v De Simoni* (1981) 147 CLR 383 and the so-called "*De Simoni* principle" is a part of the criminal law lexicon.

Reasons for sentencing

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

No.

The obligation to give reasons for sentence is a corollary of the judicial function to give reasons generally.

2.6.2 Should existing statutory requirements to give reasons for some aspects of sentencing (such as imposing a sentence of imprisonment of less than six months) be retained?

Yes.

Alternatives

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

No.

As the Commission notes, the principle of parsimony has been rejected in NSW as inconsistent with notions of sentencing ranges and judicial discretion – both fundamental factors that the Committee considers remain essential to the law of sentencing.

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

Without drawing a distinction between sentencing principles and practices, the Committee suggests that further changes to the sentencing law of New South Wales should only be made on the basis outlined elsewhere in the submission.

Instinctive synthesis

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

No.

As noted by the Commission at [2.31], instinctive synthesis is characterised by identifying relevant factors, discussing their significance and exercising discretion in determining the appropriate sentence. These are all essential considerations that the community reasonably expects of our justice system. To the degree that any proposed legislation mandates formula (or process) rather than principle, such legislation may be seen to make the judiciary less judicial.

Sentencing will always be an imperfect art, and any legislative attempt to amend the fundamental features of instinctive synthesis is more likely to undermine confidence in judgments than enhance it.

Question Paper 3

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

Section 21A has been widely criticised by judicial officers, practitioners and community stakeholders alike.[18] The Committee's majority view is that the legislative enumeration of considerations to be taken into account on sentence only complicates the sentencing process and leads to excessive delay both for offenders and victims.

Members of the Committee have expressed concern that the sentencing appeal statistics available on JIRS do not reflect the increased expenditure of time and effort by the profession in considering appeal on s 21A grounds, or in running those appeals. The Committee is of the view that the time expended is significant.

However, by way of contrast, a number of Committee members were of the view that the factors in s 21A are of assistance to practitioners. This is particularly the case at Local Court sentencing matters, where efficiency is gained by having a list to reference. This may indicate a general tension between various hierarchies of sentencing courts in articulating specific factors.

The following responses are not based on these views, but they are noted as valid expressions of disagreement.

3.1.2 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)?

No more so than under the common law. In this respect, the common law is supplemented by another legislative scheme – criminal appeal. Failure to consider a relevant ground of mitigation is a legitimate basis for an appeal.

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

Notwithstanding the Committee's majority view that s 21A ought not be retained, the Committee concedes that a layperson viewing an individual case (or indeed being sentenced) without the benefit of a list similar to that articulated in s 21A might find the sentencing process less transparent (or, perhaps, less accessible) than without that list.

Each sentence rests on a foundation of previous decisions and principles, and those resources are not measurably harder to access than the Sentencing Act. Additionally, all relevant factors will be considered by the sentencer in submissions, who will presumably articulate the relevance of the factors. But they are not necessarily as comprehensible to a layperson as a list.

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

If a form of s 21A is to be retained, it is recommended that:

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18 Preliminary submissions of Ian Temby QC, Crime and Justice Reform Committee, Justice Blanch, Chief Judge of the District Court, Law Society of NSW, Office of the Director of Public Prosecutions, Legal Aid, Probation and Parole Officers' Association of New South Wales and The Shopfront Youth Legal Centre to the Law Reform Commission Sentencing review.

- s 21A(2) continue to read that "[t]he court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence" to counteract the "checklist-approach"[19]; and
- s 21A(4) should remain to standardise considerations of common law.

3.3 Should s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) be amended by the addition and/or deletion of any factors?

If a form of s 21A is to be retained, it may be useful to consider a provision that accounts for an accused person's cultural background. This may be confined to Aboriginal and Torres Strait Islander people, other peoples who have suffered long-term disadvantage, or a "special disadvantage".

The Committee also makes an ancillary submission: an express provision that *excludes* consideration of an accused person's cultural background should not be adopted. Consideration of a person's cultural background may be relevant to an individual case and should not be excluded.

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?

If considerations to be taken into account on sentence are to be included in the legislation, the Committee advocates for a general list of neutrally framed considerations which would include those present in the 15 April 2002–1 February 2003 version of s 21A(2)(a)-(j).

3.4.2 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)?

Yes.

If a form of s 21A is to be retained, the Committee supports the consolidation of the articulated purposes of sentencing (subject to the comments on those purposes above), the provisions of the Act relating to pleas of guilty, assistance to authorities and disclosure and factors to be taken into account on sentence. Consolidation is often more effective at increasing transparency and efficiency than codification, as it relates to existing statutory provisions that have accrued over time into a cumbersome whole.

3.4.3 Should s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) be reframed as an unclassified, neutral and non-exhaustive list of sentencing factors?

Yes.

The current s 21A is composed of an ad hoc collection of detailed factors, which have been added to the legislation in a piecemeal fashion, sometimes in response to sensationalised, outlying cases. In its goal of meticulously enumerating factors to be taken into account, s 21A is incomplete.[20]

If s 21A were to be retained, a much more pragmatic and sensible approach would be to reframe the factors to be taken into account as a non-exhaustive and

19 *Regina v Johnson* [2005] NSWCCA 186, [22] (Hunt AJA).
20 For example, its failure to take into account extra-curial punishment, protective custody, delay, entrapment and other factors listed at [3.24] of the NSW Law Reform Commission's "Sentencing Question Paper 3: Factors to be taken into account on sentence".

neutral list of general categories of considerations similar to the 15 April 2002–1 February 2003 version of s 21A.

3.4.4 If so:

a. should the factors be expressed in broad terms, for example as general categories of considerations such as the nature and circumstances of the offence and the character, antecedents, age, means and physical or mental condition of the offender; or

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

If a form of s 21A is to be retained, the Committee prefers option (a).

Question Paper 4

Plea of guilty

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?

A discount should be allowed for a plea of guilty.

The sentencing judge or magistrate should retain full discretion under s 22 of the Sentencing Act to allow a discount for a plea of guilty in all circumstances.

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

Yes.

Reasons should be provided regardless of the outcome. Given that the discount for a plea of guilty is frequently the single largest factor reducing the sentence, a high level of transparency is required. Quantifying the discount, or articulating the reasons for not granting one, promotes consistency in sentencing by creating a judicial benchmark.

Well-known difficulties may arise in quantification between sentencing options: for example, when reducing a sentence from a community service order to a s 9 bond, a decision-maker may find it difficult to meaningfully quantify in percentage terms the discount a plea of guilty made. In those circumstances, it may be more appropriate for the decision-maker to be provided with an alternative expression to the traditional percentage formulation.

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

No.

The sentencing judge or magistrate should retain full discretion under s 22 of the Sentencing Act to allow the appropriate discount for a plea of guilty.

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

No.

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

The existence or lack of remorse adequately provided for by s 21A(3)(i) (if it is retained) and the common law (if it is not). The Committee does not believe reform is needed in this area.

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

The Committee has nothing to add.

Assistance to authorities

4.2.1 Should there be a discount for assistance to the authorities? Are there any circumstances in which a discount for assistance to authorities should not be allowed?

Yes.

The sentencing judge or magistrate should retain the discretion under ss 22A and 23 of the Sentencing Act to allow the appropriate discount for assistance, taking into account the prescribed factors.

The Committee is not aware of any particular circumstances in which assistance (that is, assistance actually provided, as distinct from assistance that is offered but of no practical use[21]) should not generally be available.

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

No.

The Committee agrees with the decision of Spigelman CJ in *SZ v Regina* (2007) 168 A Crim R 249 at [44] that "a single combined quantification will often be appropriate" for a guilty plea and assistance to authorities. In that case, the Court of Criminal Appeal held that generally, sentencers should give only a single, combined discount for both a plea of guilty and assistance, and that to do otherwise is liable to lead to error unless the court is aware of the overall discount.[22]

4.2.3 Should judicial officers be required to quantify the discount(s) applied, as is currently required by section 23(4) of the *Crimes (Sentencing Procedure) Act 1999* (NSW)?

Yes.

Reasons should be provided regardless of the outcome. Quantifying the discount promotes consistency in sentencing by creating a judicial benchmark. The matters to be considered in s 23(2) are not a formula or a "rigid mathematical exercise"[23] and it is to be reasonably expected that sentencing judges or magistrates will take this into account when considering comparable sentences.

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

Yes.

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

The Committee has already expressed its general view of codification above. In this case there is a measurable advantage. Codification might highlight the distinction between pre-trial discounts and assistance during a trial, bearing in mind the higher discount being given for the earlier assistance. This might in turn encourage offenders to assist at an earlier stage, thus cutting trial costs.

Codified or not, a sentencing judge or magistrate should retain a certain amount of discretion to modify listed discounts.

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21 See, eg, *De Campos v Regina* [2006] NSWCCA 51.
22 *SZ v R* [2007] NSWCCA 19 at [11].
23 *Regina v Gallagher* (1991) 23 NSWLR 220; (1991) 53 A Crim R 248, [19].

Pre-trial and trial assistance

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?

A discount should be allowed for pre-trial and/or trial assistance.

The sentencing judge or magistrate should retain the discretion under s 22A of the Sentencing Act to allow the appropriate discount for assistance in all circumstances.

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

Yes.

The distinction between the two species of assistance should be made clear to improve transparency and allow practitioners to properly advise on assistance.

The Committee also highlights the special case where a discount for future assistance is not fulfilled. In those circumstances, in order to re-sentence the offender, it is necessary for an appellate court to know the discount given.[24]

Section 23(4) was inserted into the Act in 2011 in contemplation of this scenario, and yet on its face it makes no distinction between the different species of assistance. In the event that the Committee's suggestion that all types of assistance be quantified, s 23(4) may require amendment to refer *specifically* to future assistance. But the Committee also considers that as this provision is a recent amendment, patience should prevail until its meaning is established.

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

Codification would not assist in this area.

There is a broad spectrum of assistance to authorities and a range of circumstances facing an informant in custody, which would either be difficult and cumbersome to codify, or would remove some or all of a sentencer's discretion to consider these factors. There is also a risk that codification could result in an overly lenient sentence in some circumstances.

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

Greater emphasis might increase efficiency if both sides (prosecution and defence) work together with the same goal in mind. The system would be unlikely to work if it were only implemented legislatively. Guilty pleas and assistance are best formulated with the cooperation of the defence and the Crown.

Excluded factors

4.4 Should the excluded factors relating to sexual offences in sections 21A and 24A of the Crimes (Sentencing Procedure)

24 See *Regina v Halls* (2002) 127 A Crim R 209; *Regina v Waqa (No 2)* (2005) 156 A Crim R 454, see also Second Reading Speech, *Crimes (Sentencing Procedure) Amendment Act 2010* (NSW), Legislative Council, 23 November 2010, (The Hon. Michael Veitch, Parliamentary Secretary).

Act 1999 (NSW) remain excluded from any consideration on sentence?

Yes in relation to s 21A(5A), but not in relation to s 24A.

The Committee believes that it may be appropriate to take into account on sentence the fact that a person will be placed on the Child Protection Register or will be banned from obtaining child-related employment.[25]

Placement on the Child Protection Register occurs as an automatic result of becoming a registrable person under the *Child Protection (Offenders Registration) Act 2000* (NSW) (the "Registration Act"). Unlike deportation, it is not a discretionary executive decision.

There are limited protections available in the Registration Act, but offenders who have committed less serious crimes or crimes that do not pose a risk to children can still be placed on the register. The sentencing judge or magistrate does not have discretion in the majority of cases. The minimum length of time on the register is eight years. It is fairly clear that, absent s 24A, registration is relevant to sentencing.[26]

The Committee's view is that the sentencing judge or magistrate ought to have a discretion in relation to s24A.

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

Yes.

The possibility of appropriate circumstances arising was acknowledged in *Regina v Kalache* (2000) 111 A Crim R 152 at [74-77], which adverted to the New Zealand Court of Appeal decision in *Regina v Brough* [1995] 1 NZLR 419. In that case, Cooke P, Casey and Tompkins JJ observed at 424 that:

- there may be exceptional circumstances where the confiscation has a disproportionate effect; and
- to the extent that confiscation and forfeiture orders are particularly harsh, the deterrence effect of the confiscation may lessen the need for deterrence in sentence.

The power to order forfeiture or compensation is extremely wide. The standard of proof is the balance of probabilities. Committee members have experience of cases where the value of the forfeited property is grossly out of proportion to both the "value" and objective criminality of the offending behaviour. In these circumstances, it is unjust for confiscation not to be taken into account on sentence.

The current s 24B was adopted on the recommendation of the NSW Sentencing Council's report.[27] The report does not give a great deal of consideration to the issue[28] and it does not consider any of the possibilities referred to above.

It is the opinion of the Committee that s 24B should be repealed and the previous common law position as stated in *Regina v Kalache* prevail, or that the section be amended to reflect the two-branched test.

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

The Committee cannot form a consensus on this question.

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25 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 24A.
26 See *TMTW v The Queen* [2008] NSWCCA 50 at 50-53 for the position prior to the introduction of s 24A.
27 NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009), Recommendation 10.
28 Ibid, [4.51].

On one hand, the Committee observes that it is difficult to maintain public confidence in the independent functioning of the judicial system if sentencing is to have regard to discretionary executive action to occur at some point in the future.

However, the Committee is not aware of the statistical likelihood of the deportation of a person for any given offence. It may the case that the "discretionary" nature of the executive exercise is only hypothetical. If deportation was the invariable, or almost invariable, outcome for certain offences, it may be appropriate to consider the effect of deportation, including the possibility that it may not happen.

The Committee thanks you for the opportunity to comment. If you have any questions in relation to the matters raised in this submission, please contact:

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[redacted]

OR

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Yours faithfully,

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NSW Young Lawyers | The Law Society of New South Wales