NSW LAW REFORM COMMISSION SENTENCING REVIEW

QUESTION PAPER 1 – PURPOSES OF SENTENCING

NSW POLICE FORCE SUBMISSION

Question 1.1

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

The NSW Police Force supports a legislative statement of the purposes of sentencing, which promotes a clear understanding of the core principles that underpin sentencing for the broader community, as well as legal practitioners and judicial officers.

The NSW Police Force refers the NSW Law Reform Commission to its submission on standard non-parole periods, in which we support the current purposes and propose that "retribution" also be included as a purpose of sentencing.

Question 1.2

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

Yes, to the extent that each purpose is relevant to the circumstances of a particular case. Further, the NSW Police Force considers that a sentence should not be invalidated by error simply because the court fails to specifically articulate each purpose and its relevance to the facts.

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

As the NSW Police Force observed in its preliminary submission to the NSW Law Reform Commission's sentencing review, sentencing may only be effective where all relevant principles are taken into account by the court when sentencing an offender.

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?

As noted in response to Question 1.1 above, the NSW Police Force supports the current list of sentencing purposes and refers to its previous submission on standard non-parole periods. The NSW Police Force makes no comment about whether the court may take other factors into account in sentencing an offender.

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

The NSW Police Force makes no comment on this issue.

Question 1.4

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

The NSW Police Force makes no comment on this issue.

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

Although the NSW Police Force does not propose to comment on whether there ought to be a single overarching or primary purpose of sentencing, we consider that a number of matters should be taken into account.

The objects within s 9 of the *Crimes (Domestic and Family Violence) Act 2007* and those espoused in *R v Hamid* [2006] NSWCCA 302 at [65]-[88] under the heading of "Sentencing for Domestic Violence Offences" should be the primary considerations in sentencing offenders in domestic violence matters.

For the following types of offences, promoting rehabilitation should yield to the other sentencing purposes within s 3A and that of providing retribution for victims, their family and the community:

- the offence is of a sexual nature;
- the victim of the offence is particularly vulnerable, eg children and victims of family and domestic violence;
- the offence is a drug offence involving not less than the large commercial quantity of drugs;
- the offence relates to a prohibited firearm or pistol or the unauthorised sale of firearms;
- the offence involves to actual use (as opposed to simple possession) of a firearm;
- the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work; and
- offences involving significant risk to public safety (by action, as opposed to by simple possession or omission).

3. Should a hierarchy of sentencing purposes be established?

In announcing the amendments to the *Crimes (Sentencing Procedure) Act*, which included s 3A and the standard non-parole period provisions, former Premier Carr indicated that the purpose of those amendments was to ensure "tougher, more consistent sentences".[1] The NSW Police Force considers that this principle should continue to underpin sentencing in NSW.

4. If so:

a. what should that hierarchy be, and b. in what circumstances might it be appropriate to vary that hierarchy?

The NSW Police Force makes no comment.

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

Yes, see response to Q.1.4.2.

[1] "Premier Carr Releases Plan for Tougher and More Consistent Sentences", News release, 4 September 2002

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

The NSW Police Force makes no comment.

Question 1.5

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

Yes.

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

The NSW Police Force supports the current expression, "adequately punished".

Question 1.6

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

Yes.

2. Should general deterrence be a relevant consideration in relation to all offences and all offenders?

Yes.

How could its application be limited?

Its application should not be limited.

Question 1.7

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

Yes. It is noted that BOCSAR has concluded that increasing the risk of imprisonment reduces crime.

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

The NSW Police Force makes no comment.

Question 1.8

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

Yes.

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

a. generally;

b. only in serious cases?

For recidivist offenders and serious cases, yes.

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?

The NSW Police Force makes no comment.

Question 1.9

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

Yes.

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

No.

Question 1.10

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

Yes.

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

The NSW Police Force makes no comment.

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

Yes, see response to Q1.4.2.

Question 1.11

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

Yes.

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

The NSW Police Force makes no comment.

Question 1.12

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

Yes.

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

The NSW Police Force makes no comment.

Question 1.13

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

Yes. On retribution see response to Q1.4.2.

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?

The NSW Police Force makes no comment.

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

The NSW Police Force makes no comment.

Question 1.15

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

The NSW Police Force makes no comment.

Question 1.16

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

Yes, recidivist offenders, regardless of age or indigenous status.

Sentencing purposes regarding children are already set out in the *Children's (Criminal Proceedings Act) 1987.* The NSW Police Force therefore considers that there is no need for duplication in the sentencing legislation.

2. If so, which groups and what purposes?

The NSW Police Force makes no comment.

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

The NSW Police Force does not support distinct sentencing purposes that relate only to Indigenous people.

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

The NSW Police Force makes no comment.

NSW LAW REFORM COMMISSION SENTENCING REVIEW

QUESTION PAPER 2 – GENERAL SENTENCING PRINCIPLES

NSW POLICE FORCE SUBMISSION

Question 2.1

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

The NSW Police Force makes no comment about whether the principle of sentencing as the option of last resort should be retained. However, we support consistent sentencing that leads to reduced levels of crime.

Question 2.2

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

The NSW Police Force considers that the common law principle of proportionality has been appropriately amended within the standard non-parole period (SNPP) legislation: Part 4 Div 1A of the *Crimes (Sentencing Procedure) Act 1999*. We rely on our previous submissions in answer to the questions within the NSW Law Reform Commission's *Confidential Staff Paper Sentencing - Standard Minimum Non-Parole Periods options for reform*.

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

The NSW Police Force notes the observation of the Sentencing Council:

> There is some support for concern that this principle is not always observed, and that if overlooked, it can result in an unjustifiably lenient sentence.[1]

Codification of the principle is supported in order to address non-compliance by Local Court magistrates with the principle set out in *R v Doan* [2000] NSWCCA 317.

There also seems to be reluctance to apply s 45 of the *Crimes (Sentencing Procedure) Act*. Anecdotal evidence suggests only a few magistrates have been prepared to apply the decision in *Doan* in declining to set a non-parole period less than the jurisdictional limit.

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[1] "An Examination of the Sentencing Powers of the Local Court in NSW", Sentencing Council, December 2010, p 7

The following scenario illustrates the considerations when a magistrate comes to sentence an offender in the Local Court:

- the offence carries a maximum penalty of 5 years;
- the seriousness of the offence is "worst case";
- while the offender has a criminal record and has received sentences of imprisonment in the past, the offender does not fall within the category of "worst offender";
- there is recognition of the offender's efforts to rehabilitate himself from drug addiction and a demonstrated need for continued assistance if those efforts are to be maintained;
- having considered the maximum sentence, the magistrate is of the view that the appropriate penalty reflecting the objective seriousness of the offence, but tempered by the subjective circumstances of the offender, is still beyond the jurisdictional limit.

In this circumstance is the appropriate penalty a sentence of 2 years' imprisonment with or without setting a non-parole period? If a non-parole period is to be set, is it appropriate to find special circumstances and decrease the non-parole period to less than 18 months? Against the jurisdictional limit, setting a non-parole period would be inappropriate, as it would lead to an inappropriately lenient sentence. However, faced with recognition of the offender's efforts to rehabilitate himself from drug addiction and a demonstrated need for continued assistance if those efforts are to be maintained, most magistrates would at least set a non-parole period and many would set it less than 18 months. Such sentences are not ordinarily subject to appellate review and therefore the extent to which unjustifiably lenient sentences are handed down in the Local Court is not quantifiable.

The NSW Police Force would therefore support codification of the principle that the jurisdictional limit in the Local Court is not reserved for "worst case" offences. Further, it would also be useful to codify that, where the magistrate finds that the appropriate penalty reflecting the objective seriousness of the offence, but tempered by the subjective circumstances of the offender, is beyond the jurisdictional limit, the court must decline to set a non-parole period less than would be appropriate if there were no jurisdictional limit, even where special circumstances that would justify a reduction of the non-parole period exist. For example, if save for the jurisdictional limit the appropriate sentence is 3 years' imprisonment with a non-parole period of 23 months, the appropriate sentence in the Local Court would be 2 years' imprisonment with a non-parole period of 23 months.

It should also be noted that this approach also supports magistrates' discretion to refer cases to the District Court for sentencing, following a plea of guilty or conviction after a hearing, where they are satisfied that any sentence they could impose would not be commensurate with the seriousness of the offence.

Question 2.3

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

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

The position should be confirmed by codification to provide for parity between the test applied to offenders and Crown appeals. This is the main advantage.

Concerning appeals by a co-offender said to be suffering a grievance resulting from the disparity between her/his sentence and the co-offender's the relevant cases are *Lowe v The Queen* (1984) 154 CLR 606 and *R v Diamond* (unreported, NSW CCA, 18 February 1993). In *Lowe,* Brennan J advocated that two wrongs don't make a right when he stated at 617:

> To say that an appellate court is bound to take the lesser sentence as the norm even though it is inappropriately lenient is tantamount to saying that "where you have one wrong sentence and one right sentence (the) Court should produce two wrong sentences" – a proposition that cannot be accepted: per Roskill LJ in *Stroud* (1977) 65 Cr App R150, at p152.

Dawson J (with whose reasons Wilson J agreed) said at 624:

> The difference between the sentences must be manifestly excessive and call for the intervention of an appellate court in the interests of justice …

It was stated in *Doan*, at 120, that in *Diamond,* recognising the decision to make a reduction is discretionary, Hunt CJ at CL (James J agreeing, Smart J dissenting) said:

> The issue is whether the particular sense of grievance (or injustice) is a legitimate one. There is in my view, a stage at which the inadequacy of the sentence imposed upon the co-offender is so grave that the sense of grievance engendered can no longer be regarded as a legitimate one.

The NSW Police Force prefers Dawson J's "manifestly excessive difference" test, as it is straightforward and militates against two wrong sentences. Consideration of any subjective grievance of the offender is not supported.

On Crown appeals, the relevant decision is *Green v The Queen* [2011] HCA 49. French CJ, Crennan and Kiefel JJ state at [37]:

> … a powerful consideration against allowing a Crown appeal would be the resultant creation of unjustifiable disparity between any new sentence and an unchallenged sentence previously imposed upon a co-offender.

We prefer a probable "manifestly excessive difference" test on Crown appeals where parity is an issue. It appears simpler, militates against two wrong sentences and will provide for consistency in approach.

The ultimate question should always be, "What is the appropriate sentence?"

Question 2.4

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

2. Should courts have discretion to:

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

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

The NSW Police Force does not support a discretion to articulate what sentences would otherwise have been imposed for the individual counts. For reasons of transparency and opportunity for focused appellate review, this should remain mandatory.

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 in *R v De Simoni* (1981) 147 CLR 383 is well known. There is no need to codify it.

Question 2.6

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

There is no need to codify this requirement.

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?

We support the current legislative requirement to give reasons for departing from the standard non-parole period, including where a non-custodial sentence is imposed.

Question 2.7

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

No.

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

The NSW Police Force makes no comment.

Question 2.8

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

The NSW Police Force makes no comment.

NSW LAW REFORM COMMISSION SENTENCING REVIEW

QUESTION PAPER 3 – FACTORS TO BE TAKEN INTO ACCOUNT ON SENTENCE

NSW POLICE FORCE SUBMISSION

Question 3.1

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

The NSW Police Force considers that s 21A of the *Crimes (Sentencing Procedure) Act 1999*, which sets out aggravating and mitigating factors to be taken into account in sentencing, provides appropriate guidance to courts. This is especially important in the Local Court, which deals with very high volumes of criminal matters.

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)?*

Yes, particularly in the Local Court, where time and volume of matters are particular considerations.

3. *Would sentencing be less transparent in the absence of a provision similar to s21A of the Crimes (Sentencing Procedure) Act 1999 (NSW)?*

Yes.

Question 3.2

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

No. The NSW Police Force refers the NSW Law Reform Commission to our submission on Standard Non-Parole Periods (SNPPs) and the effect of the decision of *Muldrock v R* [2011] HCA 39. We submitted that the interpretation in *Way v The Queen* (2004) 60 NSWLR 168 be legislated into effect and we noted that:

> The opportunity now exists to make sentencing law less technical whereby the interplay between the common law and statute is less ambiguous. A significant portion of *Muldrock* dealt with the current interplay [14-21]:
>
> > *17. ...Fixing the appropriate non-parole period is not to be treated as if it were the necessary starting point or the only important end-point in framing a sentence to which Div 1A applies.*
> >
> > *18. ... In R v Way, the Court of Criminal Appeal held that s 21A(1) preserves the entire body of judicially developed sentencing principles, which constitute*

"law" for the purposes of both s 21A(1) and s 21A(4)

The said principles in [18] obviously should be preserved, however, SNPP legislation and its operation as a two-tiered sentencing regime should take precedence. Our answer to this question supports legislation that, for SNPP offences, provides for the SNPP to be the starting point. Factors such as *segregation or that imprisonment will be particularly burdensome because of the offender's physical condition* should be included as mitigating factors that provide for adjustment to the sentence.

Question 3.3

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

The NSW Police Force supports the removal of pleas of guilty, pre-trial disclosure and assistance to authorities from the mitigating factors under s 21A because they are already referred to in the Act.

Question 3.4

1. *Which considerations to be taken into account on sentence should be included in legislation and how should such legislative provisions be worded?*

The NSW Police Force makes no comment.

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)?*

The NSW Police Force does not support consolidating these provisions.

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.*

No.

4. *If so:*

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

No.

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'?*

No.

NSW LAW REFORM COMMISSION SENTENCING REVIEW

QUESTION PAPER 4 – OTHER DISCOUNTING FACTORS

NSW POLICE FORCE SUBMISSION

Question 4.1

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

Yes. The underlying principle for giving credit for offender's guilty plea, even if he or she is not contrite or remorseful, is that victims of crime, the criminal justice system and the community benefit from early identification of a defendant's intention to plead guilty to an offence. The practical benefits of the plea justify a reduction in sentence, although the court should have the discretion to decide whether a reduction in sentence is warranted in any given case.

It may not always be proper for a sentence discount to be awarded for an early guilty plea. For example, if the offence is of the greatest seriousness.[1] In other words, the maximum penalty for an offence would be applicable notwithstanding that there has been a plea of guilty to an offence in the worst possible category.

Further, the reduction in penalty should decrease by virtue of the more factors in play at the time of the plea. For example, the following factors should cumulatively decrease the reduction where:

1. the State has gone to the expense of preparing a brief of evidence;
2. the State has caused State employed witnesses to attend court;
3. the plea is entered after a witness for the prosecution gives evidence;
4. the plea is entered after witnesses for the prosecution give evidence;
5. the plea is entered at the close of the Crown case; and
6. the plea is entered after the judicial officer finds a prima facie case against the accused.

There is at least the perception that the Chief Magistrate's Local Court Practice Note Crim 1[2] and its previous derivatives have been used by legal representatives to enter pleas of not guilty, not because their client has instructed them in this regard, but rather to strategically obtain the

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[1] *R v Thompson* (2000) 49 NSWLR 388[153]-[156]

[2] http://www.localcourt.lawlink.nsw.gov.au/agdbasev7wr/_assets/localcourts/m401551i422003/pn_crim_1.doc

brief of evidence to determine the case against their client. When satisfied that the case is as it appears in the Facts Sheet already provided, the plea of guilty in line with instructions is entered. Further, especially in domestic violence matters, the perception is available that pleas of not guilty are being maintained and defended hearing dates confirmed, for the purposes of seeing if prosecution witnesses turn up to court. If the witnesses do turn up, a plea of guilty is entered. If this be the case, the utilitarian value of the plea is significantly reduced and should be reflected in a decrease in the reduction of penalty.

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

The NSW Police Force favours disclosure at sentencing of the effects of the guilty plea on the sentence imposed. This enhances the transparency and accountability of the sentencing process. It encourages greater consistency and public confidence.

In the event that the effect of the guilty plea is not quantified, it is difficult to determine if the proper sentencing principles have been applied. Without an account of the weight given to the guilty plea at sentence, it is difficult to establish the degree to which the courts have given proper regard to the obligation under the *Crimes (Sentencing Procedure) Act 1999* (NSW). Without employing this approach, it may not be possible for prosecutors to compare the sentence imposed with others for like offences or to consider issues of parity. As per Howie J in *R v Sutton* [2004] NSWCCA 225 at [16]:

> While there is no obligation on a sentencer to nominate the utilitarian value for the plea, I cannot personally understand why certain judges seek to avoid doing so in simple cases, such as the present. But if judges are not prepared to make the discount clear by quantifying it or indicating the starting point of the sentence before the application of the discount, then with respect, they should carefully and correctly enunciate the factors taken into account and the principles being applied in determining the discount which they are applying.

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

Yes. See the response to Q.4.1.1. The strength of the prosecution case should also be taken into account.

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

No. The strength of the Crown case has no impact on the utilitarian value of the plea of guilty but, rather, is a factor that might be taken into account when assessing contrition or remorse.[3] In *R v Carter,* Howie J was critical of:

> ... the view held by some judges that in determining the quantum of such a discount a relevant consideration is the strength of the Crown case. It is not. That is a factor that is relevant to a consideration of whether the plea of guilty shows contrition and whether any discount over and above that for the utilitarian benefit of the plea should be allowed.

Accused persons who enter a plea of guilty early, in the face of a weak prosecution case or only on the Facts Sheet produced, should be given greater dispensation than those who wait to see

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[3] *Sutton v The Queen* [2004] NSWCCA 12 at [13]

what their prospects of success are rather than entering a contrite and remorseful plea. At times, legal representatives ask the judicial officer not to decrease the reduction in penalty they otherwise would have given as the original plea of not guilty was entered on advice concerning a technical point that the legal representative had run and lost. The question of what plea to enter is one for the accused person upon receiving such advice. No discount should be given where a plea of guilty is entered following an unsuccessful technical argument. The utilitarian value is lost and any degree of contrition or remorse is lost in the decision to accept and act on the legal advice provided.

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

If the presence of remorse does not lead to a finding of good prospects of rehabilitation or the likelihood of reform or does not indicate personal deterrence is not required, then it has no particular relevance and does not justify a discrete discount of the sentence. Other considerations that are also relevant are the offender's conduct after the commission of the offence and his or her conduct during the criminal proceedings.

Referring to s 21A(3)(i) of the Act, often the plea of guilty itself is seen as evidence of remorse but it should be noted that remorse alone is not necessarily a mitigating factor.

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

It is the role of the prosecutor to assist the court with sentencing principles and authorities relevant to the matter before it. Notwithstanding that a court is not bound by a prosecutor's submission on this issue, even if the submission accords with that of the defence,[4] the determination could be improved by the inclusion of provisions that ensure the prosecutor's submission are given appropriate weight.

Question 4.2

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

Yes. It is thought to be "clearly in the public interest" to encourage the supply of information to the authorities that will assist in bringing other offenders to justice, and to give evidence against those other offenders.[5] This kind of assistance can result in a saving of costs in the investigation and prosecution of criminal offences and can help in improving the clear up rate for crimes thereby vindicating the public process of punishing and deterring crimes.[6]

It is often the case that the only source of information about crime (actual or in contemplation) comes from accused persons or suspects. It is in the public interest to encourage offenders to provide such information to police and to give evidence against other offenders. Hence, the disclosure of information to the authorities is to be encouraged and an appropriate discount

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[4] *Ahmad v The Queen* [2006] NSWCCA 177, [21]–[26]

[5] *R v Cartwright* (1989) 17 NSWLR 243, 252

[6] Per Kirby J in *R v Ryan* (2001) 206 CLR 267 at [92]

should be established. Regardless of motive, whether such assistance is motivated by real remorse or simply self-interest, a discount for assistance should be provided for.

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

No.

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

Yes. The legislation emphasises the importance of quantifying that element of the discount which relates to future assistance. This is essential in aiding the prosecution to understand exactly the position, and for an appellate court to respond to any review of the sentencing court's decision in the event that such an undertaking was not complied with.

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

Yes. However, the court should recognise that on occasions the objective criminality of the offence may be such as to place the offence in the worst category. In these circumstances, the court should significantly reduce or eliminate the discount for assistance. This recognises that "there are crimes that so offend the public interest that the maximum sentence, without any discount for any purpose, is appropriate."[7]

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

In most instances the provision of assistance will be accompanied by a plea of guilty, as well as positive indications of remorse and rehabilitation. As a result, more than one factor will need to be taken into account in fixing a sentence which, after consideration of the discounting elements, is proportionate to the gravity of the nature and circumstance of the offence. This being said, a codification of discounts for assistance to authorities would assist.

Question 4.3

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

Yes. However, it is perhaps uncertain whether an accused should be provided with a lesser penalty in a case of this kind, where pre-trial disclosure is mandated by order of the court, and where non-compliance with that order may attract the sanctions that are available under the *Criminal Procedure Act 1986* (NSW), including possible exclusion of the evidence. However, we accept that the potential availability of a discount is acceptable having regard to the fact that the pre-trial disclosure regime leaves the defence with an opportunity to provide varying degrees of cooperation in narrowing issues and in shortening the trial.

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

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[7] *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [157]–[158]. See also *R v El-Andouri* [2004] NSWCCA 178

Yes. It is acknowledged that the quantification of a discount for a sentencing factor, such as a plea of guilty or assistance, that may have relevance for other subjective and mitigating factors for example discount allowed for pre-trial and trial assistance, can lead to the error of double counting. However, refer to our response to Q4.1.2.

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

Refer to Q4.1.2 for advantages.

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

No. For those reasons outlined in Q4.3.1, it is open to question whether an accused should be provided with a lesser penalty in a case of this kind, where pre-trial disclosure is mandated by order of the court, and where non-compliance with that order may attract the sanctions available under the *Criminal Procedure Act 1986* (NSW). The incentive to comply with a court order should not be a discount on penalty.

Question 4.4

Should the excluded factors relating to sexual offences in section 21A and 24A of the Crimes (Sentencing Procedure) Act 1999 (NSW) remain excluded from any consideration on sentence?

Yes. The exclusion of "good character" among the mitigating factors, in cases of sexual offences against children, should remain. The incidence of such offending by persons of "good character" and the seriousness of the consequences to the victims militates in favour of the exclusion.

In relation to s 24A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), we support the exclusion provisions. Allowing the registration requirements, orders and prohibitions applicable to sex offenders to be categorised as a mitigating factor conflicts with the current legislative policy of enacting heavier penalties for sexual offences to reflect the increased community view of the seriousness of this form of offending. See, for example, second reading speech for the *Crimes (Serious Sex Offenders) Amendment Bill 2010*, 24 November 2010 by the Hon John Hatzistergos MLC.

Question 4.5

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

No. The purpose of confiscation and forfeiture orders is to bring the offender back to the position they would have been but for their criminal behaviour. While the process of forfeiture and confiscation is a means of providing an additional deterrent to those minded to commit offences, any sentence for the actual crime committed should be considered separately.

Question 4.6

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

The NSW Police Force makes no comment.