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New South Wales
Law Reform Commission

Sentencing
Question Paper 2

General sentencing principles

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Question Paper 2 – General sentencing principles

2.1 This question paper discusses some of the sentencing principles at common law, which interact with the purposes of sentencing discussed in Question Paper 1. In determining a sentence the court must also take into account any relevant factors relating to the offender or the offence (discussed in Question Paper 3) and any other discounting factors (discussed in Question Paper 4).

Imprisonment as a last resort

2.2 Imprisonment is recognised at common law as a sentencing option of 'last resort'. This seems to be generally supported in other Australian jurisdictions.[1] It now has statutory expression in s 5 of the *Crimes (Sentencing Procedure) Act 1999* ('the Act'), to the effect that a court must *not* impose a term of imprisonment unless it is satisfied, having considered all other possible alternatives, that no penalty other than imprisonment is appropriate.[2]

2.3 The NSW Court of Criminal Appeal ('CCA') has observed that "the imposition of a sentence of imprisonment is a grave step for a court to take whether or not the offender's liberty is immediately removed or curtailed".[3]

2.4 Similarly, we have described full-time imprisonment as "the gravest sanction" open to courts[4] and the High Court recently described full-time custody as "punitive".[5]

1. *Crimes (Sentencing) Act 2005* (ACT) s 10(2); *Penalties and Sentences Act 2002* (Qld) s 9(2)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 11; *Sentencing Act 1991* (Vic) s 5(4); *Sentencing Act 1995* (WA) s 6(4); *Crimes Act 1914* (Cth) s 17A(1).
2. The CCA in *Way v The Queen* (2004) 60 NSWLR 168 [115] said that the statement in s 5 "reflects the accepted principle that imprisonment is a sentence of last resort". Previously, *Justices Act 1902* (NSW) s 80AB(1) provided that full-time imprisonment could not be imposed unless the court was "satisfied, having considered all possible alternatives, that no other course is appropriate".
3. *R v Zamagias* [2002] NSWCCA 17 [31].
4. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [3.26].
5. *Muldrock v The Queen* [2011] HCA 39 [57].

2.5 Custodial sentences involve heavy costs to the community. The total net operating expenditure and capital cost of NSW prisons was $1.048 billion in 2009/10.[6] The cost per prisoner per day in 2009/10 was just under $200. This equated to about $73,000 per year per prisoner in prison, compared with the national average cost in 2009/10 of $6,661 per year per prisoner who was managed in the community.[7]

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?

Proportionality

2.6 It is a fundamental principle at common law that the sentence imposed by the court must be proportional to the offence committed by the offender. For example, it is not appropriate for a court to sentence an offender simply for the purpose of preventative detention because he or she is considered to be a danger to the community.[8] The sentence imposed must be proportionate (or appropriate) to the offence which she or he has committed.[9]

2.7 The High Court has held that a court, when sentencing for multiple offences, is obliged to impose an appropriate sentence for each count and then to consider the degree of accumulation (if any) of the sentences as a separate issue in light of the totality of offending.[10] It is not appropriate to extend the sentence for one of the offences and then impose inappropriately shorter, concurrent sentences for the other offences.

Maximum penalty

2.8 It is also helpful to keep in mind that a court is always bound and guided by the maximum penalty stated for the offence.[11] The maximum penalty reflects the seriousness of the criminal conduct as it is perceived by the public, and expressed through Parliament.[12] The High Court has held that the imposition of the maximum

6. Australian Government Productivity Commission, *Report on Government Services 2011* (2012) Table 8A.25. The cost of prisoner transport and escort was an additional $51m in 2009/10.
7. Australian Institute of Criminology, *Australian Crime: Facts and Figures 2011* (2012) 140.
8. Compare with *Sentencing Act 1991* (Vic) s 6D which directs the court to regard the protection of the community as the principal purpose for sentencing recidivists who have committed serious sexual, violent, drug or arson offences if it considers that imprisonment is justified in the circumstances. Nonetheless, the court is not required to ignore proportionality and reasons must be given if a disproportionate sentence is passed: *Taylor v The Queen* (2004) 8 VR 213 [24] (Winneke P). The Victorian courts have held that a proportionate sentence is sufficient in any event to protect the community: see R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd ed, 1999) [3.416], [3.504].
9. *Veen v The Queen [No 1]* (1979) 143 CLR 458; *Veen v The Queen [No 2]* (1988) 164 CLR 465.
10. *Pearce v The Queen* (1998) 194 CLR 610 [45].
11. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 49(1)(a). If there is a standard non-parole period, then the court must also take that into account in the correct manner.
12. *R v Oliver* (1980) 7 A Crim R 174, 177; *R v H* (1980) 3 A Crim R 53, 65; *Moon v The Queen* (2000) 117 A Crim R 497 [67].

penalty for an offence is reserved for the 'worst category' of cases for which the penalty is prescribed (usually described simply as the 'worst case').[13] At the other end of the spectrum, an offender may be discharged unconditionally.[14] For the vast majority of cases in between, there is a legitimate range of sentencing outcomes, which are properly informed by the principle of proportionality.

Local Court

2.9 As a general rule, a jurisdictional limit of two years imprisonment applies to sentences imposed in the NSW Local Court, while accumulation of sentences generally may not exceed five years.[15] In imposing sentences of imprisonment in the Local Court, Magistrates should ensure that sentences reflect the objective seriousness of the offence, "taking care only not to exceed the maximum jurisdictional limit".[16] There is an argument for codification of this principle, so that it is clear that a sentence comprising the jurisdictional limit is not reserved for 'worst case' offences.[17]

Question 2.2

1. Should the common law principle of proportionality continue in its current form or be amended in any way? What would be the advantages and disadvantages of codifying the principle of proportionality?
2. Should there be codification of the principle that the jurisdictional limit in the Local Court is not reserved for 'worst case' offences?

Parity

2.10 The parity principle states the proposition that there should be parity (or relativity or due proportionality) between co-offenders' sentences, such that like should be treated as like and due allowance made for differences between the co-offenders.[18] It is an aspect of equal justice.[19]

2.11 It is also important to note that there need not be any error in the sentence which is challenged. It can be reduced on the basis of parity with a co-offender's sentence, even if it would otherwise withstand any challenge on appeal.[20]

13. *Ibbs v The Queen* (1987) 163 CLR 447.
14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(a).
15. *Criminal Procedure Act 1986* (NSW) s 267-268; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 58; NSW Sentencing Council, *An Examination of Sentencing Powers in the Local Court* (2010) [1.9]-[1.11].
16. *R v Doan* (2000) 50 NSWLR 115 [35].
17. His Honour Judge Henson, Chief Magistrate, Local Court of NSW, *Preliminary Submission PSE5*, 4.
18. *Lowe v The Queen* (1984) 154 CLR 606.
19. *Postiglione v The Queen* (1997) 189 CLR 295, 301 (Dawson and Gaudron JJ).
20. See the discussion of parity reasoning in S Thomson, "Unifying Sentencing Law: A Principled Approach to Sentencing Justice" (2011) 85 *Australian Law Journal* 798, 798-799.

2.12 Issues have arisen in cases where the co-offenders or parties to the same criminal enterprise have not been charged with identical offences.[21]

2.13 There is also a limitation in comparing the sentence to that of a 'co-offender' who received an unjustifiably low sentence. The CCA authorities state in this regard that a court is not bound to reduce a sentence on the basis of parity in this situation.[22]

2.14 Parity also may be relevant in a Crown appeal against inadequacy of sentence if allowing the appeal would create unjustifiable disparity between the sentences for offenders in the same criminal enterprise.[23]

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?

Totality

2.15 The court must ensure that the sentence imposed reflects the total criminality of the offences, particularly where a court imposes sentences of imprisonment for multiple offences, or where an offender is already serving or has been serving separate sentences.[24] The court must have regard to the effect of the total period for all offences.

2.16 The principle extends to sentences that are part of a course of criminal conduct or closely related to the offences before the court and is not restricted to offences that are part of the same activity.[25] Where multiple offences have overlapping elements, the court should not punish the offender twice in relation to these elements.[26]

2.17 The High Court has held that a court, when sentencing for multiple offences, should determine the appropriate sentence for each offence, and then determine the structure of the overall sentence in terms of concurrence, accumulation, or partial accumulation to arrive at the appropriate total sentence that reflects the criminality of the offences.[27]

2.18 This approach, while encouraging transparency, increased the difficulty in applying the principle of totality by making the process more technical.[28] Section 53A of the

21. *Jimmy v The Queen* (2010) 77 NSWLR 540 [203].
22. *Jimmy v The Queen* (2010) 77 NSWLR 540 [187]-[188].
23. *Green v The Queen* (2011) 86 ALJR 36 [37].
24. R N Howie and P A Johnson, *Criminal Practice and Procedure NSW* (LexisNexis) [5-150].
25. R N Howie and P A Johnson, *Criminal Practice and Procedure NSW* (LexisNexis) [5-150].
26. *Pearce v The Queen* (1998) 194 CLR 610.
27. *Pearce v The Queen* (1998) 194 CLR 610, 624. This approach is to be preferred to the practice of determining the overall sentence first and then setting terms of imprisonment to fit within that total sentence.
28. G Brignell and H Donnelly, *Crown Appeals Against Sentence,* Monograph 27 (Judicial Commission of NSW, 2005) 35.

Act, introduced in 2011, creates an exception and aims to reduce the technical difficulty associated with the application of the principle of totality. It allows a court to impose an aggregate sentence of imprisonment for multiple offences instead of imposing a separate sentence of imprisonment for each offence.[29] The section also requires a court that employs this method to articulate the individual sentences that would have otherwise applied.[30] This has been criticised as it does not completely solve the complexities of the common law.[31] However, it may be that the articulation of the individual sentences is desirable for transparency and for the purposes of the Judicial Commission of NSW's sentencing statistics.

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?

Sentencing the offender only for the offence proved

2.19 This principle provides that a court must not take into account a circumstance of aggravation on sentence that "would have warranted a conviction for a more serious offence".[32] The principle is preserved by the words in s 21A(4) of the Act which prohibit a court from taking into account circumstances of aggravation or mitigation if it would be contrary to any Act or rule of law to do so.

2.20 In WA, the *Sentencing Act 1995* (WA) has been amended to allow courts to take into account an aggravating factor, but not so as to expose the offender to a higher maximum penalty unless he or she is convicted of an offence carrying the higher penalty.[33]

2.21 There have been examples in NSW of appeals to the CCA where the sentencing judge has breached the principle by taking into account a statutory aggravating factor in s 21A that could have been charged, but was not charged, in relation to the matter for which the offender is being sentenced.[34]

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

29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53A(1).
30. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53A(2).
31. R Blanch, *Preliminary submission PSE3, 2.*
32. *R v De Simoni* (1981) 147 CLR 383 [389] (Gibbs CJ).
33. *Sentencing Act 1995* (WA) s 7(3); *Zimmerman v WA* [2009] WASCA 211 (McLure P).
34. Judicial Commission of NSW, *Sentencing Bench Book* [11-050].

aggravating circumstances within that limitation) be codified? What would be the advantages and disadvantages of codifying this principle?

Reasons for sentencing

2.22 It is an accepted principle that it is important for the offender, the community, and an appeal court to know the basis upon which a sentence was imposed.[35]

2.23 Justice Basten has noted recently that passing sentence is a "judicial act" and the commonly used term "remarks on sentence" should not detract from the importance of a judicial officer giving detailed reasons for the sentence. His Honour considered that the term "remarks on sentence" should be abandoned.[36]

2.24 Courts are required to give full sentencing reasons when imposing a sentence, including the findings of fact in relation to the offences, findings in relation to the aggravating or mitigating matters taken into account and the reasoning process leading to the sentence imposed.[37]

2.25 Legislative requirements for courts to give reasons also exist in different circumstances. For example, a court must make a record of its reasons for deciding that no other sentence but imprisonment is appropriate where it imposes a sentence of six months or less.[38] For standard non-parole period offences, the court is required to give reasons for departing from the standard non-parole period including where a non-custodial sentence is imposed.[39] The High Court stressed recently in *Muldrock v The Queen* that this obligation encompassed a requirement to "identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed".[40]

Question 2.6

1. Should the common law requirement to give reasons for sentence be codified? If so, what should be required of courts?
2. Should existing statutory requirements to give reasons for some aspects of sentencing (such as imposing a sentence of imprisonment of less than six months) be retained?

Alternatives

2.26 Consideration might be given to alternative approaches to the fundamental principles of sentencing. Without limiting the alternative options, one consideration is the principle of 'parsimony' in Victoria.

35. R N Howie and P A Johnson, *Criminal Practice and Procedure NSW* (LexisNexis) [5-070].
36. *Hendricks v The Queen* [2011] NSWCCA 203 [9]; see also *Turner v The Queen* [2011] NSWCCA 189 [1].
37. R N Howie and P A Johnson, *Criminal Practice and Procedure NSW* (LexisNexis) [5-070].
38. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(2).
39. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(4), s 54C.
40. *Muldrock v The Queen* [2011] HCA 39; 281 ALR 652 [29].

Parsimony

2.27 Victoria has recognised a principle of parsimony in s 5(3) of the *Sentencing Act 1991* (Vic), which provides that a court "must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed".

2.28 Attempts to introduce parsimony in NSW have been rejected.[41] In NSW, courts have the discretion to weigh up the various aims of punishment as they apply in any one case and, as the former Chief Justice explained, this "necessarily means that, within reasonable bands, different judges can permissibly reach different conclusions".[42]

Question 2.7

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

Instinctive synthesis

2.29 Instinctive synthesis is the process by which a court considers all of the circumstances and factors relating to a particular case and instinctively determines a sentence based on the combination of these considerations in one step.

2.30 Instinctive synthesis informs the approaches to these sentencing principles, the purposes of sentencing discussed in Question Paper 1 and the assessment of the objective circumstances of an offence and the subjective features of the offender.

2.31 The instinctive synthesis approach was summarised by Justice McHugh in *Markarian v The Queen* as involving:

- an identification of all the factors that are relevant to the sentence;
- a discussion of their significance;
- a value judgment as to what is the appropriate sentence given all the factors of the case.[43]

2.32 The High Court in *Muldrock v The Queen* referred to *Markarian* and clearly endorsed the instinctive synthesis approach, although it was not named as such.[44]

41. *Blundell v The Queen* [2008] NSWCCA 63 [38]-[48] (Simpson J, Grove J agreeing). See also the discussion of the case law in *Kelly v The Queen* [2007] NSWCCA 357 [28]-[31] (Basten JA) and *Foster v The Queen* [2011] NSWCCA 285 [4] (McClellan CJ at CL).
42. J Spigelman, "Consistency and Sentencing" (200) 82 *Australian Law Journal* 450, 450.
43. *Markarian v The Queen* (2005) 228 CLR 357 [51].
44. *Muldrock v The Queen* [2011] HCA 39; 281 ALR 652 [26].

2.33 In terms of transparency of sentencing, some commentators have suggested that the instinctive synthesis approach renders the reasoning process less open to scrutiny and is more likely to produce inconsistency. It is also suggested that it does not sit comfortably with quantification of discounts such as for a plea of guilty or assistance to authorities.[45]

2.34 However, it appears instinctive synthesis can be employed while also incorporating references to quantified discounts.[46] It might be argued that inconsistency does not necessarily follow as instinctive synthesis envisages sentences will fall within a legitimate range.[47]

Question 2.8

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

45. D Brown and others (ed), *Criminal Laws: Material and Commentary on Criminal Law and Process of New South Wales*, (Federation Press, 4th ed, 2006) [12.4.1].
46. *Markarian v The Queen* (2005) 228 CLR 357 [39].
47. *Markarian v The Queen* (2005) 228 CLR 357 [76]. See also J Spigelman, "Consistency and Sentencing" (200) 82 *Australian Law Journal* 450.

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