



**New South Wales  
Law Reform Commission**

## **Sentencing Question Paper 3**

**Factors to be taken into  
account on sentence**

April 2012  
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# Question Paper 3 – Factors to be taken into account on sentence

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- 3.1 This question paper discusses the factors relating to the offender or the offence which a court must take into account when determining what sentence to impose for an offence. In determining a sentence the court must also take into account the purposes of sentencing (discussed in Question Paper 1), the overarching sentencing principles (discussed in Question Paper 2) and any other discounting factors (discussed in Question Paper 4).

## Introduction

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- 3.2 In NSW the relevant factors to be taken into account on sentence are looked at largely through the prism of s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (‘the Act’). Section 21A applies to all sentencing exercises, irrespective of whether a custodial or non-custodial sentence is imposed.
- 3.3 Section 21A currently requires a court to take into account relevant factors known to the court that are listed under the headings of aggravating or mitigating factors as well as “any other objective or subjective factor that affects the relative seriousness of the offence”.<sup>1</sup>

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1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1).

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- 3.4 The court is not required to increase or reduce a sentence because the court is aware of relevant aggravating or mitigating factors.<sup>2</sup> The weight that is attached to particular factors is a matter to be determined by the court in each case.<sup>3</sup>
- 3.5 The articulation of specific sentencing factors under the headings of aggravating and mitigating factors was introduced in s 21A by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW), which also introduced standard non-parole periods ('SNPP'). The amendments applied from 1 February 2003.
- 3.6 Prior to this time, s 21A was in a different form, introduced on 15 April 2002, that did not specifically articulate sentencing factors or divide these into aggravating or mitigating factors. Rather it referred to general categories of sentencing considerations such as the nature and circumstances of the offence, the circumstances of the victim and the character, antecedents, age, means and physical or mental condition of the offender. This framing of the considerations on sentence was similar to s 16A of the *Crimes Act 1914* (Cth), which is reproduced in Annexure 3.
- 3.7 Prior to the introduction of specific aggravating and mitigating factors into s 21A, such factors were contained in the common law (and generally referenced in s 21A in 2002-2003) and were routinely considered by courts as factors relevant to the sentencing exercise.
- 3.8 The articulation of specific circumstances in s 21A is not intended to alter or add to the established common law principles<sup>4</sup> and is "not intended to operate as an exhaustive or exclusive code" of factors that a court may take into account.<sup>5</sup> There remain factors that are capable of either aggravating or mitigating a sentence that exist only in the common law. Section 21A(1) allows for these additional common law factors to be taken into account by providing that the factors listed in the provision are "in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law".<sup>6</sup>
- 3.9 It may be that the articulation of specific factors and the division of these factors into aggravating and mitigating factors under s 21A was largely related to the operation of the SNPP regime, as the SNPP regime stipulates that the factors in s 21A are the only reasons for which a court may set a non-parole period that is longer or shorter than the specified SNPP.<sup>7</sup>
- 3.10 The current framing of s 21A has drawn criticism and resulted in some problems, which are discussed below.

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2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5).

3. R N Howie and P A Johnson, *Criminal Practice and Procedure NSW* (LexisNexis) [5-s 21A.1].

4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1); *Way v The Queen* (2004) 60 NSWLR 168 [56]-[57]; *Wickham v The Queen* [2004] NSWCCA 193 [23].

5. *Way v The Queen* (2004) 60 NSWLR 168 [104].

6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1).

7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(3).

- 3.11 Section 21A as originally drafted appears as Annexure 2 to this paper, together with the current version of s 21A (Annexure 1) and s 16A of the *Crimes Act 1914* (Cth) (Annexure 3). Annexure 5 is a table that compares the provisions of the three sections.
- 3.12 Apart from s 16A of the *Crimes Act 1914* (Cth), there are further examples of provisions dealing with the factors to be taken into account on sentence in other Australian jurisdictions which contain varying levels of detail in relation to the factors. Most of these provisions do not divide the factors into two categories of aggravating and mitigating factors, instead expressing the factors under unclassified, neutral headings.<sup>8</sup> However, s 7 and 8 of the *Sentencing Act 1995* (WA) relate to aggravating and mitigating factors, respectively. The WA Act provides that aggravating and mitigating factors are to be taken into account in determining the seriousness of the offence,<sup>9</sup> however such factors are not listed, but rather referred to as factors which, in the court's opinion, increase or decrease the culpability of the offender or, in the case of mitigating factors, decrease the extent to which the offender should be punished.<sup>10</sup> In Victoria, s 5(2)(g) of the *Sentencing Act 1991* (Vic) provides that the court must have regard to "the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances." However, the Victorian Act does not list specific aggravating or mitigating factors. In the Northern Territory, s 6A of the *Sentencing Act* (NT) lists aggravating factors under one heading, while other factors are listed in unclassified, neutral terms.

## Aspects of the operation of s 21A

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### Overview

- 3.13 A number of issues have arisen since the introduction of s 21A concerning its operation. Some of these issues appear to have been resolved, while others remain. This section of the paper will address these issues.
- 3.14 It has been suggested that s 21A has introduced unnecessary complexity<sup>11</sup> and has caused an excessive number of appeals.<sup>12</sup> Particular issues arising from the

8. *Crimes (Sentencing) Act 2005* (ACT) s 33; *Sentencing Act* (NT) s 5, s 6, s 6A (s 6A lists aggravating factors under one heading, however other factors are listed in neutral terms); *Penalties and Sentences Act 2002* (Qld) s 9 (includes "the presence of any aggravating or mitigating factor concerning the offender" in a detailed list of factors that the court is to have regard to in sentencing); *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1991* (Vic) s 5(2).

9. *Sentencing Act 1995* (WA) s 6(2).

10. *Sentencing Act 1995* (WA) s 7(1), s 8(1).

11. NSW Bar Association, *Preliminary Submission PSE4*, 1; NSW Young Lawyers, Criminal Law Committee, *Preliminary Submission PSE11*, 5; Law Society of NSW, *Preliminary Submission PSE8*, 3; Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 4; The Shopfront Youth Legal Centre, *Preliminary Submission PSE13*, 3; Crime and Justice Reform Committee, *Preliminary Submission PSE12*, 2; D Shoebriidge, *Preliminary Submission PSE16*, 1; Legal Aid NSW, *Preliminary Submission PSE18*, 1.

12. NSW Young Lawyers, Criminal Law Committee, *Preliminary Submission PSE11*, 2; District Court of NSW, *Preliminary Submission PSE3*, 1; Legal Aid NSW, *Preliminary Submission PSE18*, 1, referencing Judicial Commission of NSW, *Sentencing Bench Book* [11-020].



operation of the section have included failing to take into account relevant s 21A factors and difficulties associated with the interaction of s 21A with established common law. The latter is illustrated by the interpretation of some aggravating factors in light of the common law, such as the offender's record of previous convictions.<sup>13</sup> There has also been criticism of the framing of s 21A in binary terms<sup>14</sup> and the use of the provision as a checklist.<sup>15</sup> A further source of error has been the double counting of s 21A factors with the elements of the offence.<sup>16</sup>

### Source of appeals

- 3.15 Despite the suggestion that s 21A has contributed to an increase in appeals, it is interesting to note that, in broad terms, the number of appeals to the NSW Court of Criminal Appeal ('CCA') has steadily declined since 2001.
- 3.16 Statistics collated by the Office of the Director of Public Prosecutions ('ODPP') and published in the ODPP annual reports show that the total number of CCA sentence appeals by offenders (inclusive of conviction only appeals and sentence and conviction appeals) increased slightly in 2004/05, corresponding with the introduction of aggravating and mitigating factors in s 21A and the SNPP regime. However, the number of CCA appeals by offenders decreased in 2005/06 and has generally decreased since that time. The number of Crown appeals against sentence peaked in 2003/04, but has generally declined since then. These statistics are illustrated in a series of charts, which appear in Annexure 4.
- 3.17 Given that it has now been more than eight years since the introduction of s 21A, it may be that the CCA has adequately addressed the major conceptual issues in relation to s 21A and appeals in relation to s 21A have reached a manageable level, as is expected after an initial period of intensive appellate review following the introduction of a new legislative scheme.<sup>17</sup>
- 3.18 An examination of the matters heard by the CCA in 2011 shows that only 16 out of more than 200 sentence appeals involved appeal grounds related to s 21A factors.<sup>18</sup> Of these cases, many of the grounds were unsuccessful, as the CCA found that the sentencing judge had correctly applied the law or the findings of the sentencing judge were open. It would appear therefore that misapplications of s 21A do not account for the bulk of appellate points in sentence appeals.
- 3.19 It has been submitted to us that s 21A has had a positive impact in sentencing in the NSW Local Court, where it is regarded as a useful guide to relevant

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13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d); *McNaughton v The Queen* (2006) 66 NSWLR 566. See para 3.22, below.

14. Judicial Commission of NSW, *Sentencing Bench Book* [9-720].

15. *Kelly v The Queen* [2005] NSWCCA 280 [40].

16. *Cramp v The Queen* [2004] NSWCCA 264; *Williams v The Queen* [2005] NSWCCA 99; *Ibrahimi v The Queen* [2005] NSWCCA 153.

17. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 23 October 2007, 3042 (J Hatzistergos, Attorney General).

18. The cases were found by searching for "s 21A" in the JIRS database maintained by the Judicial Commission of NSW and carefully analysing each decision.

considerations on sentence.<sup>19</sup> However, the Chief Judge of the District Court has submitted that s 21A has been a source of appellate argument, adds nothing to the common law and, as such, the repeal of the provision “could only simplify the process”.<sup>20</sup> These differences in approach to s 21A may reflect the appellate concerns of the courts, as judicial error must be demonstrated for an appeal against the severity of sentence imposed in the District Court, while no error need be demonstrated in appeals from the Local Court.<sup>21</sup> The practical effect of this is that reasons for decisions of the Local Court are not subjected to the same high level of scrutiny as decisions of the District Court, and s 21A issues do not arise as appeal points on appeals from the Local Court. It may be that similar errors are being made in the Local Court in relation to s 21A, however they are not detected due to the different appellate processes.

### Failing to take into account s 21A factors

- 3.20 Section 21A mandates that a court is to take into account relevant aggravating and mitigating factors under that section that are known to the court.
- 3.21 At common law it is an error of sentencing discretion to fail to take into account a relevant consideration<sup>22</sup> and appeals may be brought in relation to failures to take into account relevant ‘aggravating’ or ‘mitigating’ circumstances under s 21A. It may be that the list of factors in s 21A has a positive effect in terms of transparency in sentencing, but it arguably provides an appeal point where it is not clear whether a court has taken into account a relevant factor.

### Interaction of s 21A with established common law

- 3.22 Section 21A lacks detail of how the particular circumstances listed are to be taken into account and problems have arisen as to how to interpret provisions in light of the common law.<sup>23</sup>
- 3.23 While s 21A may render sentencing more transparent, all of the factors listed in s 21A are to be read in conjunction with the common law. It could be argued that this renders the provision superfluous, time consuming, potentially confusing and incomplete.
- 3.24 The list of aggravating and mitigating circumstances contained in s 21A is comprehensive, though not exhaustive. There are a number of common law factors that may be relevant to sentencing that could be, but are not, included in the section. Without attempting an exhaustive list, these factors include extra-curial

19. G Henson, *Preliminary Submission PSE5*, 4.

20. R Blanch, *Preliminary Submission PSE3*, 1.

21. It is noted here that the differing appeal process of the Local and District Courts do not constitute part of the current NSW Law Reform Commission reference.

22. *House v The King* (1936) 55 CLR 499, 505.

23. For example, in relation to prior convictions as an aggravating factor under s 21A(2)(d) (*Veen v The Queen [No 2]* (1988) 164 CLR 465; *McNaughton v The Queen* (2006) 66 NSWLR 566) and the aggravating factor of abuse of trust under s 21A(2)(k) (R Howie, “Sentencing Update” (2010) 22(1), *Judicial Officers’ Bulletin*, 1, 2; *Suleman v The Queen* [2009] NSWCCA 70 [26].)

punishment,<sup>24</sup> loss of reputation, harm or hardship to third parties,<sup>25</sup> protective custody,<sup>26</sup> age,<sup>27</sup> illness,<sup>28</sup> loss of employment or future superannuation benefits, past sexual assault of the offender (where it has a causal link to the offence),<sup>29</sup> involuntary drug addiction,<sup>30</sup> intoxication,<sup>31</sup> “onerous” bail conditions,<sup>32</sup> double jeopardy, delay<sup>33</sup> and entrapment.<sup>34</sup>

### Binary approach of s 21A to sentencing factors

3.25 The division of factors under s 21A into aggravating or mitigating circumstances has been criticised as an oversimplification of these factors as they relate to sentencing.

3.26 The Judicial Commission of NSW’s Sentencing Bench Book describes the characterisation of a sentencing factor as either aggravating or mitigating as being “too simplistic and sometimes unhelpful”<sup>35</sup> and refers to the court in *Weininger v The Queen*<sup>36</sup> as stating:

The matters that must be taken into account in sentencing an offender include many matters of and concerning human behaviour. It is, therefore, to invite error to present every question for a sentencer who is assessing a matter which is to be taken into account as a choice between extremes, one classified as aggravating and the opposite extreme classified as mitigating. Neither human behaviour, nor fixing of sentences is so simple.

3.27 One of the problems associated with the binary approach said to be illustrated by the designation of ‘planning’ under s 21A(2)(n) as an aggravating factor and the absence of planning under s 21A(3)(b) as a mitigating factor, and similarly the characterisation of substantial injury, emotional harm, loss or damage caused by the offence as an aggravating factor under s 21A(2)(g) but, if not substantial, as a mitigating factor under s 21A(3)(a).<sup>37</sup>

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24. *Hannigan v The Queen* (2009) 193 A Crim R 399 [25]; *Clinton v The Queen* [2009] NSWCCA 276 [31]; *Sharpe v The Queen* [2006] NSWCCA 255 [61] - [67]; *Alameddine v The Queen* [2006] NSWCCA 317; *Lancaster v The Queen* (1991) 58 A Crim R 290.
25. See for example *T v The Queen* (Unreported, NSWCCA 15 March 1990); *R v Edwards* (1996) 60 A Crim R 510.
26. *Totten v The Queen* [2003] NSWCCA 207, [43]; *Scott v The Queen* [2003] NSWCCA 28 [34]; *Mostyn v The Queen* (2004) 145 A Crim R 304 [179].
27. *Kidd v The Queen* [2009] NSWCCA 229 [49] (Grove J); *R v DCM* (unreported, NSWCCA, 26 October 1993) (Badgery-Parker J), cited in *Holyoak v The Queen* [1995] 82 A Crim R 502, 507.
28. *R v Achurch* [2011] NSWCCA 186.
29. *Cunningham v The Queen* [2006] NSWCCA 176 [67]; *Dousha v The Queen* [2008] NSWCCA 263 [47].
30. Such as from pain or injury, from prescribed medication or from a very early age.
31. Judicial Commission of NSW, *Sentencing Bench Book* [50-150].
32. *Webb v The Queen* [2004] NSWCCA 330 [18].
33. *R v Borkowski* (2009) 195 A Crim R 1 [32].
34. *Taouk v The Queen* (1992) 65 A Crim R 387; *R v Lipton* [2011] NSWCCA 247 [68].
35. Judicial Commission of NSW, *Sentencing Bench Book* [9-720].
36. (2003) 212 CLR 629 [22].
37. *Einfeld v The Queen* (2010) 200 A Crim R 1 [74]. See also Judicial Commission of NSW, *Sentencing Bench Book* [10-040].



- 3.28 The framing of these positive or negative provisions under s 21A has been criticised as both a source of confusion and as creating unnecessary complications.<sup>38</sup> In relation to planning, Justice Howie has noted that the parliamentary intention surely would have been to confine the application of the mitigating factor to circumstances in which “the offence was an instantaneous reaction to a situation or lacked any premeditation”, however the provision does not provide this detail,<sup>39</sup> and as such it may be applied too broadly.
- 3.29 The binary approach of s 21A to aggravating and mitigating factors also means that some factors are difficult to include in the provision due to the varying circumstances in which they may apply as either aggravating or mitigating factors. For example, intoxication may aggravate or mitigate an offence in different circumstances.<sup>40</sup>

### The ‘checklist’ approach

- 3.30 There are indications that s 21A is being regarded as a ‘checklist’ which practitioners and judicial officers use to review the aggravating and mitigating circumstances under s 21A and include any factors that appear to apply in the circumstances of a particular case.<sup>41</sup>
- 3.31 The use of s 21A as a checklist or guide may also result in the elevation of the listed aggravating and mitigating factors above the overall sentencing exercise, which the High Court has held should involve an instinctive synthesis in considering the elements and objective gravity of the offence, the maximum penalty and all of the relevant subjective features of the offender.<sup>42</sup>
- 3.32 Justice Howie has pointed out that the perils associated with the checklist approach include the risk of double counting aggravating factors that are elements of the offence or taking into account matters that have no real application to the particular case before the court.<sup>43</sup>
- 3.33 There is also a danger that the principle expounded in *R v De Simoni* may be breached. The principle prevents a judicial officer from taking into account a circumstance of aggravation on sentence that “would have warranted a conviction for a more serious offence”.<sup>44</sup>

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38. *Saddler v The Queen* [2009] NSWCCA 83 [4].

39. R Howie, “Sentencing Update” (2010) 22(1) *Judicial Officers’ Bulletin* 1, 2.

40. Judicial Commission of NSW, *Sentencing Bench Book* [50-150].

41. *Kelly v The Queen* [2005] NSWCCA 280 [40]; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 4; R Blanch, *Preliminary Submission PSE3*, 1; Legal Aid NSW *Preliminary Submission PSE18*, 1.

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

43. R Howie, “Section 21A and the Sentencing Exercise” (2005) 17(6) *Judicial Officers’ Bulletin* 43.

44. *R v De Simoni* (1981) 147 CLR 383 [389] (Gibbs CJ); see NSW Law Reform Commission, *General Sentencing Principles*, Sentencing Question Paper 2 (2012).

### Double counting s 21A factors

- 3.34 It is an appealable error for a sentencing judge to have additional regard to an aggravating factor under s 21A if it is an element of the offence<sup>45</sup> or if it is an inherent characteristic of the offence or the particular class of offence.<sup>46</sup>
- 3.35 This type of double counting has been found to be a source of error in a number of appeals to the CCA.
- 3.36 Where the court refers to a factor that is an element of an offence in a way that may indicate in relation to s 21A(2) that it is viewed as elevating the seriousness of the offence, the failure to provide an explanation of how the factor was used may be an error.<sup>47</sup> The same may be said to apply where the factor is an inherent characteristic of the offence. This may provide a wider avenue of appeal, which includes the possibility or appearance that the factor was double counted. However, it has been noted that, where the court refers to a factor as being aggravating in circumstances in which the factor is an element of the offence, this does not necessarily mean that double counting has occurred where there is nothing else to support that conclusion.<sup>48</sup>
- 3.37 By contrast, an element of the offence may legitimately be taken into account in an assessment of the objective seriousness of the offence, rather than as a circumstance of aggravation.<sup>49</sup> For example, for a charge of sexual assault in company, the fact that the offender was in company cannot be considered as an aggravating factor, however, the presence of a large number of powerful companions may increase the objective seriousness of the offence.<sup>50</sup> In this example, there is no need to have regard to the aggravating factor of “in company” under s 21A as the offence itself and the maximum penalty account for this aspect of the seriousness of the offence.
- 3.38 The principle of avoiding double counting that is contained in s 21A(2) may not need any codification at all. In *Johnson v The Queen* it was remarked that it is a “fundamental principle of sentencing which needs no statute to support its existence that a matter may not be taken into account in aggravation of sentence if it is already an element of the crime”. His Honour considered the principle was included in s 21A(2) to remind judges who may use the section as a checklist that a factor must not be double counted.<sup>51</sup>
- 3.39 The risk of double counting is increased in cases in which a guideline judgment is applicable. This is because guideline judgments may have taken into account a number of factors that are listed in s 21A. Where a guideline is applicable in a

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45. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2); *Cramp v The Queen* [2004] NSWCCA 264; *Williams v The Queen* [2005] NSWCCA 99; *Ibrahimi v The Queen* [2005] NSWCCA 153.

46. *Elyard v The Queen* [2006] NSWCCA 43.

47. *Dougan v The Queen* [2006] NSWCCA 34 [34]; *Andrews v The Queen* (2006) 160 A Crim R 505 [18].

48. *Lee v The Queen* [2011] NSWCCA 169 [27] (Basten JA, Hulme and Hidden JJ agreeing).

49. *Way v The Queen* (2004) 60 NSWLR 168.

50. *Way v The Queen* (2004) 60 NSWLR 168 [107].

51. *Johnson v The Queen* [2005] NSWCCA 186 [22] (Hunt AJA, Hulme and Johnson JJ agreeing).

sentence, a judge must not double count the same factors under s 21A that have already been taken into account by the guideline judgment.<sup>52</sup>

## Options for reform

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### Overview

- 3.40 There are various options for the possible reform of s 21A, including retaining or abolishing the section, amending the list of factors, or reframing the list of factors in unclassified, neutral terms.

### Abolish s 21A

- 3.41 There continue to be appeals to the CCA involving s 21A<sup>53</sup> despite indications that such appeals may be declining. The application of the provision appears to still be causing some concern at an appellate level, particularly as a result of double counting relevant factors.
- 3.42 Even if s 21A can no longer be described as a major source of appeals, primary sentencing courts are required to apply the large body of case law surrounding the provision. This adds to the complexity of the sentencing process. Justice Blanch, Chief Judge of the NSW District Court, has observed that the complexity of sentencing has “led to judges taking more time to impose sentences than is desirable”.<sup>54</sup>
- 3.43 It has been repeated on a number of occasions that s 21A factors were routinely taken into account by application of common law principles prior to the enactment of s 21A.<sup>55</sup> Therefore, it may not be necessary to list sentencing factors in legislation at all. The common law requires the court to take into account all relevant objective and subjective factors on sentence and there appeared to be no significant problems with this approach prior to the introduction of s 21A, apart from a possible lack of transparency where factors that were considered were not specified in the reasons for sentence.
- 3.44 If s 21A was repealed, the factors under s 21A would be accounted for if judicial officers took into account the relevant factors under common law applicable prior to the introduction of the section<sup>56</sup> and appealable error could be avoided.
- 3.45 It has been pointed out that the inclusion of a plea of guilty as a mitigating factor under s 21A(3)(k) is superfluous, as:

52. *Street v The Queen* [2005] NSWCCA 139 [35]-[36].

53. *Mapp v The Queen* [2010] NSWCCA 269 [6] (Simpson J): “Section 21A ... identifies ‘aggravating’ and ‘mitigating’ factors that a judge is obliged to take into account, where relevant. Item by item, these are the basis of repeated, and often arid argument in this court. It can sometimes be seen that technical error, such as the present, is made, but with no perceptible impact on the outcome.”

54. R Blanch, *Preliminary Submission PSE3*, 1.

55. *Kelly v The Queen* [2005] NSWCCA 280 [40].

56. *Elyard v The Queen* [2006] NSWCCA 43 [39]; *Tadrosse v The Queen* [2005] NSWCCA 145.

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[O]nce a discount has been given for the utilitarian value of the plea of guilty, there is little reason or purpose in noting that the plea of guilty was a mitigating factor under s 21A(3)(k), which itself makes reference to s 22, which mandates that a plea of guilty is to be taken into account.<sup>57</sup>

- 3.46 The same criticism may apply equally to the inclusion as mitigating factors of pre-trial disclosure under s 21A(3)(l) and assistance to authorities under s 21A(3)(m) coupled with the provisions under s 22A and 23 which allow judicial discretion to impose a lesser penalty having regard to the degree of pre-trial disclosure or assistance to authorities.
- 3.47 The repeal of s 21A will have implications for the SNPP regime, which states that the only reasons for which a court may depart from the SNPP are those in s 21A.<sup>58</sup> Obviously, this aspect of the SNPP regime would need to be amended if s 21A was abolished.
- 3.48 Any consideration of the repeal of s 21A must also consider how the goals of the Act may be diminished in the absence of the provision. The Attorney General referred to the goals of the amendments introducing SNPP and s 21A in the second reading speech as “promoting consistency, transparency and public understanding in relation to sentencing as well as providing further guidance and structure to judicial discretion”.<sup>59</sup>

### Question 3.1

1. What would be the advantages and disadvantages of abolishing s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW)?
2. Are there dangers that relevant factors may not be taken into account in the absence of a provision similar to s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW)?
3. Would sentencing be less transparent in the absence of a provision similar to s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW)?

## Retain s 21A

- 3.49 As discussed above, it may be that appeals in relation to s 21A have reached a manageable level as the CCA has adequately addressed the major conceptual difficulties in relation to s 21A.
- 3.50 The provision may allow for increased transparency, as judicial officers often state on the record the factors that have been taken into account under s 21A. The public are also able to access some of the factors relevant to sentencing in legislation rather than in case law. However, this may be misleading, as the provision is not a complete account of the sentencing process and does not explain the complex way in which some of the factors are to be taken into account. Moreover, merely listing

57. R Howie, “Section 21A and the Sentencing Exercise” (2005) 17(6) *Judicial Officers’ Bulletin* 43.

58. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(3).

59. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 23 October 2002, 5813-5819 (R Debus, Attorney General).

factors in legislation does not necessarily make the law more accessible for members of the public than it would be at common law if the existence of the legislative list is not well known.

- 3.51 A major argument in favour of retaining s 21A is the fact that it may have achieved the aim of providing guidance and structure to judicial discretion,<sup>60</sup> particularly in the Local Court.<sup>61</sup> The common law principles are located in a number of different cases, and inexperienced practitioners or unrepresented offenders may benefit from the codification of at least part of the common law in this area. Even if the section is being used as a checklist, it is arguable that there is merit in such an approach provided that courts remain aware of the dangers associated with this method.

### Question 3.2

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

### Amend the list of factors under s 21A

- 3.52 Since the transformation of s 21A from an unclassified, neutral list of relevant factors to a list of aggravating and mitigating factors, Parliament has added further factors over time. There are arguments for and against continuing this incremental process.
- 3.53 One difficulty is that many of the additional common law factors that could be included may be too complex in their application, resist the binary categorisation as either aggravating or mitigating or are very specific and would only apply to a very small percentage of cases. These considerations may count against including such circumstances in the list under s 21A. One preliminary submission is critical of the codification of factors on the basis of “individual case examples”.<sup>62</sup> Rather than achieve simplification, attempts to codify these factors may render legislation and sentencing more complex.
- 3.54 Stakeholders have identified some specific mitigating factors that are not included in s 21A, such as hardship to children in foster care as a result of a guardian’s custodial sentence<sup>63</sup> and hardship to an offender in protective custody.<sup>64</sup> These factors are currently the subject of case law, however, if it was thought appropriate to add to s 21A then these factors could be included in the legislation, together with at least some of the factors in the list at paragraph 3.24, above.
- 3.55 However, an unintended consequence of the inclusion of further factors in s 21A may be that courts will attempt to apply such factors where they are not relevant, as this can occur when s 21A is used as a checklist.

60. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 23 October 2002, 5813-5819 (R Debus, Attorney General).

61. G Henson, *Preliminary Submission PSE5*, 4.

62. NSW Young Lawyers, Criminal Law Committee, *Preliminary Submission PSE11*, 3.

63. Mental Health Coordinating Council, *Preliminary Submission PSE9*, 3.

64. Mental Health Coordinating Council, *Preliminary Submission PSE9*.



- 3.56 As discussed above, the inclusion of pleas of guilty,<sup>65</sup> pre-trial disclosure and assistance to authorities as mitigating factors under s 21A may be regarded as unnecessary, as these factors are specifically referred to in s 22, 22A and 23. An option for reform may be to delete these factors from s 21A.

### 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?

## Reframe s 21A

- 3.57 It has been suggested that s 21A could be varied or replaced to provide a less complex account of the relevant sentencing factors.<sup>66</sup>
- 3.58 Section 16A of the *Crimes Act 1914* (Cth) has been said to provide the most useful list of matters to which a court is to have regard.<sup>67</sup> The provision is reproduced in Annexure 3 to this paper and provides that a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence,<sup>68</sup> and for that purpose the court must take into account a non-exhaustive list of broadly framed relevant sentencing factors that are not divided into categories of 'aggravating' or 'mitigating'.
- 3.59 An examination of s 16A shows that the provision includes some of the purposes of sentencing that are currently found in s 3A of the Act, as well as broadly framed sentencing factors and discounting factors such as pleas of guilty, assistance to authorities and disclosure. It could be argued that such a provision reduces the complexity of sentencing and contributes to transparency.
- 3.60 One option for reform of NSW sentencing law may be to replace s 21A as well as s 3A (and arguably the provisions relating to pleas of guilty, assistance to authorities and disclosure) with a single provision similar to s 16A of the *Crimes Act 1914* (Cth). However, if such a provision were preferred, it is noted that s 3A contains further purposes of punishment that are not contained in the Commonwealth provision, being general deterrence, protection of the community, promoting the rehabilitation of the offender, making the offender accountable for his or her actions, denouncing the conduct of the offender and recognising the harm done to the victim and the community. Further, there is a greater amount of detail in the NSW provisions relating to pleas of guilty, assistance to authorities and disclosure, and it may not be desirable to dilute these provisions.
- 3.61 Neither s 16A nor the original s 21A articulated specific factors or divided factors into aggravating and mitigating but rather referred to 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

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65. R Howie, "Section 21A and the Sentencing Exercise" (2005) 17(6) *Judicial Officers' Bulletin* 43.

66. D Shoebridge, *Preliminary Submission PSE 16*, 1.

67. J Goldring, "Facts and Statistics in the Sentencing Process" [2009] *Australian Bar Review* 32.

68. *Crimes Act 1914* (Cth) s 16A(1).

offender. This approach resists the binary categorisation of sentencing factors, which has been the subject of criticism. An alternate option for reform may be to frame sentencing factors in such broad, unclassified, and neutral terms and leave the particulars of sentencing factors to the common law, while leaving s 3A and the provisions relating to pleas of guilty, assistance to authorities and disclosure intact.

- 3.62 A clear advantage of broadly framed categories of sentencing factors is that these categories can include a wide range of circumstances. This allows the common law to continue to develop without the need to consider adding further particularised circumstances to a list such as the current s 21A.
- 3.63 However, if a greater degree of particularisation of sentencing factors is desirable, another option for reform may be to retain the more detailed expression of factors contained in the current s 21A but combine the aggravating and mitigating factors into a single, unclassified, neutral list of relevant sentencing factors.

#### Question 3.4

1. Which considerations to be taken into account on sentence should be included in legislation and how should such legislative provisions be worded?
2. Should the purposes of sentencing contained in s 3A, the provisions of the Act relating to pleas of guilty, assistance to authorities and disclosure and s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) be consolidated into a provision similar to s 16A of the *Crimes Act 1914* (Cth)?
3. Should s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) be reframed as an unclassified, neutral and non-exhaustive list of sentencing factors?
4. If so:
  - a. should the factors be expressed in broad terms, for example as general categories of considerations such as the nature and circumstances of the offence and the character, antecedents, age, means and physical or mental condition of the offender; or
  - b. should the same level of detail as appears in the current s 21A be reproduced in a new provision, but without listing the relevant factors as 'aggravating' or 'mitigating'?

## Annexure 1: Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A (current version)

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### 21A Aggravating, mitigating and other factors in sentencing

#### (1) General

In determining the appropriate sentence for an offence, the court is to take into account the following matters:

- (a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,
- (b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,
- (c) any other objective or subjective factor that affects the relative seriousness of the offence.

The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.

#### (2) Aggravating factors

The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

- (a) 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,
- (b) the offence involved the actual or threatened use of violence,
- (c) the offence involved the actual or threatened use of a weapon,
- (ca) the offence involved the actual or threatened use of explosives or a chemical or biological agent,
- (cb) the offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance,
- (d) the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences),
- (e) the offence was committed in company,
- (ea) the offence was committed in the presence of a child under 18 years of age,
- (eb) the offence was committed in the home of the victim or any other person,

- (f) the offence involved gratuitous cruelty,
- (g) the injury, emotional harm, loss or damage caused by the offence was substantial,
- (h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),
- (i) the offence was committed without regard for public safety,
- (ia) the actions of the offender were a risk to national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* of the Commonwealth),
- (ib) the offence involved a grave risk of death to another person or persons,
- (j) the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence,
- (k) the offender abused a position of trust or authority in relation to the victim,
- (l) the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant),
- (m) the offence involved multiple victims or a series of criminal acts,
- (n) the offence was part of a planned or organised criminal activity,
- (o) the offence was committed for financial gain,
- (p) without limiting paragraph (ea), the offence was a prescribed traffic offence and was committed while a child under 16 years of age was a passenger in the offender's vehicle.

The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.

**(3) Mitigating factors**

The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

- (a) the injury, emotional harm, loss or damage caused by the offence was not substantial,
- (b) the offence was not part of a planned or organised criminal activity,
- (c) the offender was provoked by the victim,
- (d) the offender was acting under duress,
- (e) the offender does not have any record (or any significant record) of previous convictions,
- (f) the offender was a person of good character,

## Sentencing question papers

- (g) the offender is unlikely to re-offend,
  - (h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise,
  - (i) the remorse shown by the offender for the offence, but only if:
    - (i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and
    - (ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both),
  - (j) the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability,
  - (k) a plea of guilty by the offender (as provided by section 22),
  - (l) the degree of pre-trial disclosure by the defence (as provided by section 22A),
  - (m) assistance by the offender to law enforcement authorities (as provided by section 23).
- (4) The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so.
- (5) The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.

### (5A) Special rules for child sexual offences

In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

(5B) Subsection (5A) has effect despite any Act or rule of law to the contrary.

(5C) For the purpose of subsection (2) (p), an offence under section 13 (2), 15 (4), 18B (2), 18D (2), 22 (2), 24D (1) or 29 (2) of the *Road Transport (Safety and Traffic Management) Act 1999* is taken to have been committed while a child under 16 years of age was a passenger in the offender's vehicle if the offence was part of a series of events that involved the driving of the vehicle while the child was a passenger in the vehicle.

(6) In this section:

**child sexual offence** means:

- (a) an offence against section 61I, 61J, 61JA, 61K, 61M, 61N, 61O or 66F of the *Crimes Act 1900* where the person against whom the offence was committed was then under the age of 16 years, or
- (b) an offence against section 66A, 66B, 66C, 66D, 66EA, 66EB, 91D, 91E, 91F, 91G or 91H of the *Crimes Act 1900*, or



- (c) an offence against section 80D or 80E of the *Crimes Act 1900* where the person against whom the offence was committed was then under the age of 16 years, or
- (d) an offence against section 91J, 91K or 91L of the *Crimes Act 1900* where the person who was being observed or filmed as referred to in those sections was then under the age of 16 years, or
- (e) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in any of the above paragraphs.

**prescribed traffic offence** means an offence under any of the following provisions:

- (a) sections 9, 11B (1) and (3), 12 (1), 13 (2), 15 (4), 18B (2), 18D (2), 22 (2), 24D (1) and 29 (2) of the *Road Transport (Safety and Traffic Management) Act 1999*,
- (b) sections 51B (1) and 52A (1) (a) and (3) (a) of the *Crimes Act 1900*,
- (c) section 52A (2) and (4) of the *Crimes Act 1900* in the circumstances of aggravation referred to in section 52A (7) (a), (c) or (d) of that Act.

**serious personal violence offence** means a personal violence offence (within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007*) that is punishable by imprisonment for life or for a term of 5 years or more.

## Annexure 2:

### ***Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A*** **(15 April 2002 - 1 February 2003)**

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#### **21A General sentencing principles**

- (1) In determining the sentence to be imposed on an offender, a court must impose a sentence of a severity that is appropriate in all the circumstances of the case.
- (2) For that purpose, the court must take into account such of the following matters as are relevant and known to the court:
  - (a) the nature and circumstances of the case,
  - (b) if the offence forms part of a course of conduct consisting of a series of criminal acts—that course of conduct,
  - (c) the personal circumstances of any victim of the offence, including:
    - (i) the age of the victim (particularly if the victim is very old or very young), and
    - (ii) any physical or mental disability of the victim, and
    - (iii) any vulnerability of the victim arising because of the nature of the victim's occupation,
  - (d) any injury, loss or damage resulting from the offence,
  - (e) the degree to which the offender has shown contrition for the offence:
    - (i) by taking action to make reparation for any injury, loss or damage resulting from the offence, or
    - (ii) in any other manner,
  - (f) the need to deter the offender or other persons from committing an offence of the same or a similar character,
  - (g) the need to protect the community from the offender,
  - (h) the need to ensure that the offender is adequately punished for the offence,
  - (i) the character, antecedents, cultural background, age, means and physical or mental condition of the offender,
  - (j) the prospect of rehabilitation of the offender.
- (3) In addition, in determining whether a sentence under Division 2 or 3 of Part 2 is appropriate, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender under that sentence.

- (4) The matters to be taken into account by a court under this section are in addition to any other matters that are required or permitted to be taken into account by the court under this Act or any other law.
- (5) This section does not apply to the determination of a sentence if proceedings (other than committal proceedings) for the offence were commenced in a court before the commencement of this section.

## Annexure 3: *Crimes Act 1914 (Cth) s 16A*

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### **16A Matters to which court to have regard when passing sentence etc.**

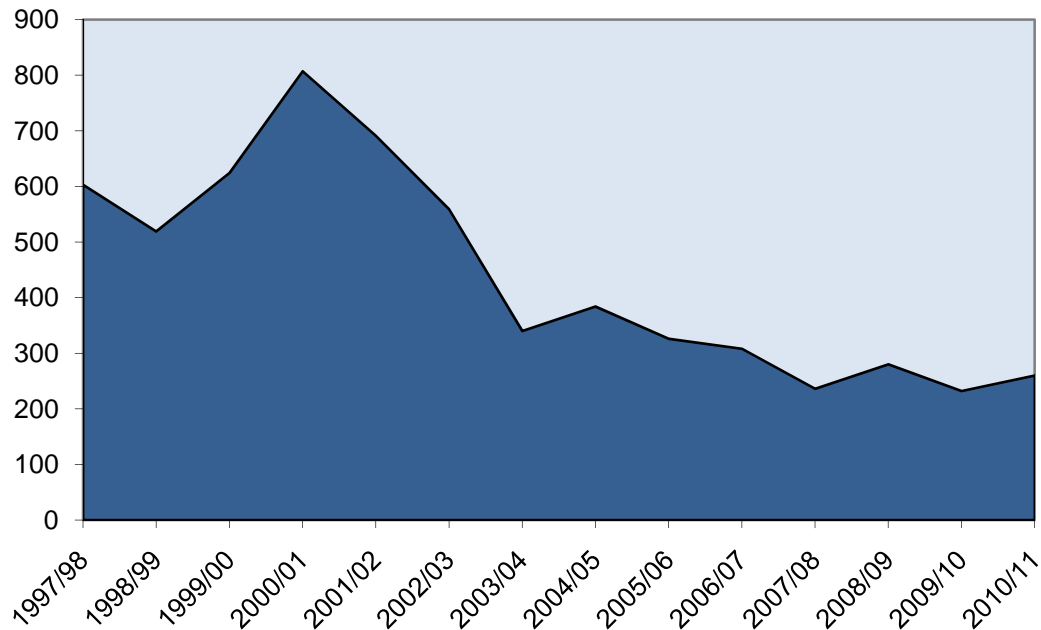
- (1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.
- (2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:
  - (a) the nature and circumstances of the offence;
  - (b) other offences (if any) that are required or permitted to be taken into account;
  - (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—that course of conduct;
  - (d) the personal circumstances of any victim of the offence;
  - (e) any injury, loss or damage resulting from the offence;
  - (f) the degree to which the person has shown contrition for the offence:
    - (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
    - (ii) in any other manner;
  - (fa) the extent to which the person has failed to comply with:
    - (i) any order under subsection 23CD(1) of the *Federal Court of Australia Act 1976*; or
    - (ii) any obligation under a law of the Commonwealth; or
    - (iii) any obligation under a law of the State or Territory applying under subsection 68(1) of the *Judiciary Act 1903*;  
about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence;
  - (g) if the person has pleaded guilty to the charge in respect of the offence—that fact;
  - (h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;
  - (j) the deterrent effect that any sentence or order under consideration may have on the person;
  - (k) the need to ensure that the person is adequately punished for the offence;

- (m) the character, antecedents, age, means and physical or mental condition of the person;
  - (n) the prospect of rehabilitation of the person;
  - (p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.
- (2A) However, the court must not take into account under subsection (1) or (2) any form of customary law or cultural practice as a reason for:
- (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
  - (b) aggravating the seriousness of the criminal behaviour to which the offence relates.
- (2B) In subsection (2A):
- criminal behaviour*** includes:
- (a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and
  - (b) any fault element relating to such a physical element.
- (3) Without limiting the generality of subsections (1) and (2), in determining whether a sentence or order under subsection 19B(1), 20(1) or 20AB(1) is the appropriate sentence or order to be passed or made in respect of a federal offence, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender, under that sentence or order.
- (4) For the purposes of a reference in this section to a family, the members of a person's family are taken to include the following (without limitation):
- (a) a de facto partner of the person;
  - (b) someone who is the child of the person, or of whom the person is the child, because of the definition of child in section 3;
  - (c) anyone else who would be a member of the person's family if someone mentioned in paragraph (a) or (b) is taken to be a member of the person's family.



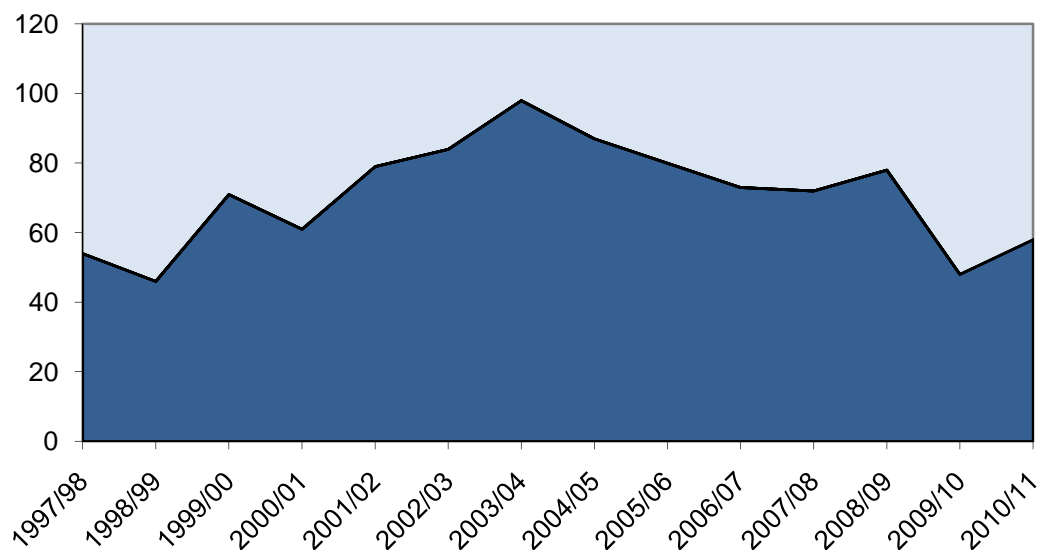
## Annexure 4: Appeals in the NSW CCA

Chart 1 – The number of appeals by offenders finalised by the NSW CCA, 1997/98 - 2010/11



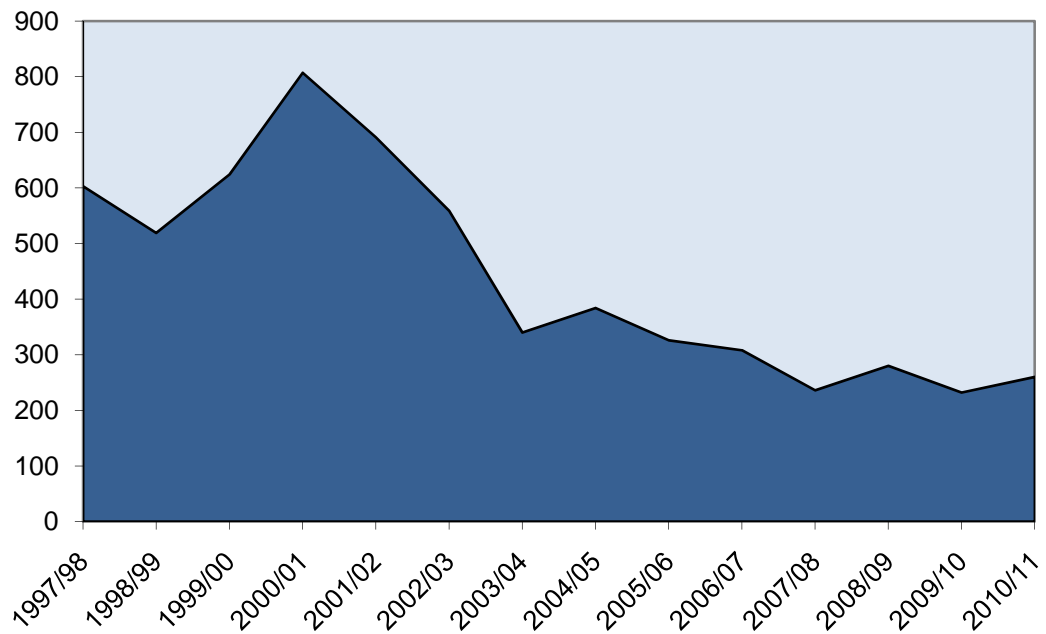
Source: NSW Office of the Director of Public Prosecutions' Annual Reports (see Appendix 13 for reports up to 2005/06 and Appendix 1 for the report for 2010/11).

Chart 2 – The number of Crown sentencing appeals finalised by the NSW CCA, 1997/98 - 2010/11



Source: NSW Office of the Director of Public Prosecutions' Annual Reports (see Appendix 13 for reports up to 2005/06 and Appendix 1 for the report for 2010/11).

Chart 3 – Combined totals of appeals by offenders and Crown sentencing appeals finalised by the NSW CCA, 1997/98 - 2010/11



Source: NSW Office of the Director of Public Prosecutions' Annual Reports (see Appendix 13 for reports up to 2005/06 and Appendix 1 for the report for 2010/11).

## Annexure 5: Comparative table of provisions

	Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A (current)	Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A (in force 15 April 2002 – 1 February 2003)	Crimes Act 1914 (Cth) s 16A
<b>Victim</b>	<p>Occupation/voluntary work-public/community function (2)(a) (<i>aggravating</i>)</p> <p>Causing victim to take drug/alcohol/intoxicating/substance (2)(cb) (<i>aggravating</i>)</p> <p>In home of victim or any other person (2)(eb) (<i>aggravating</i>)</p> <p>Injury, emotional harm, loss or damage was substantial / not substantial (2)(g) (<i>aggravating</i>) / (3)(a) (<i>mitigating</i>)</p> <p>Abuse of position of trust/authority to victim (2)(k) (<i>aggravating</i>)</p> <p>Vulnerable victim, for example, due to age/disability/occupation (2)(l) (<i>aggravating</i>)</p> <p>Multiple victims (2)(m) (<i>aggravating</i>)</p> <p>Offender provoked by victim (3)(c) (<i>mitigating</i>)</p>	<p>Personal circumstances of victim, including age, physical or mental disability or vulnerability arising from occupation (2)(c)</p> <p>Injury, loss or damage (2)(d)</p>	<p>Personal circumstances of victim (2)(d)</p> <p>Injury, loss or damage (2)(e)</p>
<b>Other offences/conditional liberty</b>	<p>Previous convictions (particularly serious violence offences if sentence relates to such offence) or not (2)(d) (<i>aggravating</i>) / (3)(e) (<i>mitigating</i>)</p> <p>Committed while on conditional liberty (2)(j) (<i>aggravating</i>)</p>	N/A	Other offences (if any) that are required or permitted to be taken into account (2)(b)
<b>Nature of offence</b>	<p>Actual or threatened violence or weapon (2)(b)-(c) (<i>aggravating</i>)</p> <p>Actual or threatened use of explosives or chemical/biological agent (2)(ca) (<i>aggravating</i>)</p> <p>In company (2)(e) (<i>aggravating</i>)</p> <p>In presence of child (2)(ea) (<i>aggravating</i>)</p> <p>Gratuitous cruelty (2)(f) (<i>aggravating</i>)</p> <p>Hate crime (2)(h) (<i>aggravating</i>)</p> <p>Without regard for public safety (2)(i) (<i>aggravating</i>)</p> <p>Risk to national security (2)(ia) (<i>aggravating</i>)</p> <p>Grave risk of death (2)(ib) (<i>aggravating</i>)</p> <p>Series of criminal acts (2)(m) (<i>aggravating</i>)</p> <p>Part of planned or organised criminal activity or not (2)(n) (<i>aggravating</i>) / (3)(b) (<i>mitigating</i>)</p>	<p>The nature and circumstances of the case (2)(a)</p> <p>If the offence forms part of a course of conduct consisting of a series of criminal acts – that course of conduct (2)(b)</p>	<p>Nature and circumstances of the offence (2)(a)</p> <p>If the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character— that course of conduct (2)(c)</p>

## Factors to be taken into account on sentence QP 3

	Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A (current)	Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A (in force 15 April 2002 – 1 February 2003)	Crimes Act 1914 (Cth) s 16A
	For financial gain (2)(o) ( <i>aggravating</i> ) Prescribed traffic offence with passenger under 16 (2)(p) ( <i>aggravating</i> )		
<b>Subjective characteristics of offender</b>	Under duress (3)(d) ( <i>mitigating</i> ) Good character (3)(f) ( <i>mitigating</i> ) – except where it was of assistance to the offender in the commission of a child sexual offence (5A) Unlikely to re-offend (3)(g) ( <i>mitigating</i> ) Good prospects of rehabilitation, by reason of age or otherwise (3)(h) ( <i>mitigating</i> ) Remorse, if evidence of acceptance of responsibility and offender has acknowledged injury, loss or damage or made reparation for such (or both) (3)(i) ( <i>mitigating</i> ) Not aware of consequences because age/disability (3)(j) ( <i>mitigating</i> )	Contrition, by reparation for injury, loss or damage or in any other manner (2)(e) Character, antecedents, cultural background, age, means and physical or mental condition of the offender (2)(i) Prospect of rehabilitation (2)(j)	Contrition, by reparation for injury, loss or damage or in any other manner (2)(f) Character, antecedents, age, means and physical or mental condition (2)(m) Prospect of rehabilitation (2)(n) Probable effect of sentence/order on offender's family or dependants (2)(p)
<b>Discounting factors</b>	Guilty plea (3)(k) ( <i>mitigating</i> ) (as provided by s 22) Pre-trial disclosure (3)(l) ( <i>mitigating</i> ) (as provided by s 22A) Assistance to law enforcement (3)(m) ( <i>mitigating</i> ) (as provided by s 23)	<i>Other sections of the Act referred to discounts for a plea of guilty (s 22), pre-trial disclosure (s 22A) and assistance to authorities (s 23)</i>	Guilty plea (2)(g) Failure to comply with disclosure order/obligations relating to the offence (2)(fa) Assistance to law enforcement (2)(h)
<b>Purposes of sentencing</b>	<i>Purposes of sentencing, including general and specific deterrence, protection of the community and adequate punishment are expressed in s 3A of the Act (together with the promotion of the rehabilitation of the offender, making the offender accountable for his or her actions, denouncing the conduct of the offender and recognising the harm done to the victim of the crime and the community)</i>	Specific and general deterrence (2)(f) Protection of the community (2)(g) Adequate punishment for the offence (2)(h)	Specific deterrence (2)(j) Adequate punishment (2)(k)
<b>Other</b>	The court is to take into account the aggravating and mitigating factors that are relevant and known to the court and any other objective or subjective factor that affects the relative seriousness of the offence (1) Section 21A matters are in addition to any other matters required or permitted to be taken into account by the court under any Act or rule of law (1) The court is not to have regard to any aggravating or mitigating factor if it is an element of the offence or if it would be contrary to any Act or rule of law to do so (2), (4) Aggravating or mitigating factors do not require the court to increase or reduce the	A court must impose a sentence of a severity that is appropriate in all the circumstances of the case (1) Section 21A matters are in addition to any other matters that are required or permitted to be taken into account by the court under this Act or any other law (4) The court must have regard to the nature and severity of the conditions of sentences involving alternatives to full-time detention and non-custodial alternatives (3)	The court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence (1) Section 16A matters are in addition to any other matters (2) The court must have regard to the nature and severity of the conditions of sentences involving discharge of offenders with no conviction, conditional release of offenders after conviction, community service orders, work orders, periodic detention, attendance centre orders, weekend

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	Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A (current)	Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A (in force 15 April 2002 – 1 February 2003)	Crimes Act 1914 (Cth) s 16A
	sentence for the offence (5)		detention or attendance orders.\ (3)  The court must not take into account any form of customary law or cultural practice as a reason for excusing, justifying, authorising, requiring or lessening or aggravating the seriousness of the criminal behaviour (2A)







**Law Reform Commission**  
Attorney General & Justice

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