

**CORRECTIVE SERVICES NSW
SUBMISSION TO THE NSW LAW REFORM COMMISSION
REVIEW OF THE *CRIMES (SENTENCING PROCEDURE) ACT 1999*
QUESTION PAPERS 1-4**

QUESTION PAPER 1 – PURPOSES OF SENTENCING

Section 3A and its application

Question 1.1

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

Yes. A legislative statement of the purposes of sentencing is helpful for transparency, both at the time of sentencing and for organisations such as Corrective Services NSW (**CSNSW**) that take sentencing considerations into account when assessing offenders post-sentence.

Question 1.2

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

Courts should be given discretion.

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

Courts should be given discretion.

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?

Yes, to the extent allowed by the common law.

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

No. Courts should be given discretion.

Question 1.4

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

No.

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

Not applicable.

3. Should a hierarchy of sentencing purposes be established?

No. Courts should be given discretion.

4. If so:

(a) what should that hierarchy be, and

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

Not applicable.

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

No. Courts should be given discretion.

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

Yes.

Specific purposes of sentencing

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"?

Yes. CSNSW agrees that the concept of 'justly punished' is a better expression of the principle of proportionality than 'adequately punished'. If paragraph 3A(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**the SP Act**) is not qualified, the concern is that the punishment 'may not fit the crime'; that is, the punishment may be too lenient or too harsh.

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? How could its application be limited?

Yes. General deterrence is of particular importance in relation to some offences such as possession of child pornography, sexual assault, fraud and motor vehicle offences. Marginal general deterrence has been shown to be ineffective. Bagaric

and Alexander: '(Marginal) Deterrence doesn't work and what it means for sentencing'. General deterrence does not, however, work very well as many factors may influence a person's decision to engage in criminal activity.

If, however, it is accepted that general deterrence actually deters people from offending, it follows that general deterrence may also reduce the potential inmate population. Reducing the inmate population is consistent with the NSW Government's corrections policy.

Question 1.7

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

Yes.

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

Yes, for the same reasons set out in the above response to Question 1.6.2.

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; or

(b) only in serious cases?

Only in serious cases; for example, where the offending behaviour is compulsive or resistant to treatment and the community is at serious risk if the person is at large.

3. Should protection of the community be identified as an overarching purpose of sentencing?

No. The emphasis to be given to a purpose of sentencing will always depend on the circumstances of the case, including the characteristics of the offender and the offence. However, the protection of the community remains an important purpose of sentencing. In particular, when managing offenders in the community, CSNSW takes community protection into account when developing strategies to address and monitor offending behaviour.

Are there cases in which protection of the community is irrelevant?

No.

Question 1.9

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

Yes, because failure to address factors underpinning the offending behaviour through treatment programs and other interventions may result in ongoing re-offending.

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

CSNSW suggests altering the current expression of this purpose as follows: 'to promote the rehabilitation of the offender' and then add 'and his or her safe reintegration into the community, where applicable'. (This suggestion may be superseded if reparation and restoration are added as a separate item in the list of purposes, as in Question 1.14 below).

Question 1.10

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

The principle of holding offenders accountable for their actions should be retained. When managing offenders in the community, CSNSW works with offenders to hold them accountable and responsible for their actions and behaviour.

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

Punishment and accountability are different. Punishment is a response to a community expectation of retribution, while accountability relates to an individual being held personally responsible for their actions.

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

CSNSW does not consider that the purpose of retribution needs to be more clearly identified in the statutory list. Retribution may be viewed as an emotional need emanating from the community in general, rather than contributing to the reduction of re-offending, the safety of the community or the level of responsibility taken by the offender. CSNSW considers that the concept of retribution is met by the terms 'to punish' and 'to denounce', contained in the purposes of sentencing in paragraphs 3A(a) and (f).

Question 1.11

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

No response provided.

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

No response provided.

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?

CSNSW suggests altering the current expression of this purpose as follows: 'to recognise and attempt to mitigate the harm done to the victim of the crime and the community'. (This suggestion may be superseded if reparation and restoration are added as a separate item in the list of purposes, as in Question 1.14 below.)

Question 1.13

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

CSNSW makes no comment other than noting that any purposes expressed in legislation should be non-exhaustive.

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?

See the above responses to Questions 1.9 and 1.12. If reparation and restoration are added to the list of purposes as an addition or amendment to paragraph 3A(g), CSNSW suggests the following expression: 'to recognise and attempt to mitigate the harm done to the victim of the crime and the community'. If reparation and restoration are added as a separate item in the list of purposes, see Question 1.14.2 below.

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

If reparation and restoration are added as a separate item in the list of purposes, CSNSW suggests that the expression be similar to the Tasmanian Law Reform Institute's recommended wording for this purpose of sentencing: 'restoration or repairing the harm caused by the offence and restoring relations between the offender, the victim and the community' (paragraph 1.80, page 18, Sentencing Question Paper 1).

Question 1.15

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

No response provided.

Question 1.16

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

There appears to be some merit in creating different purposes of sentencing that relate to particular groups of offenders, if it can reduce the inmate population or lead to a reduction in re-offending. It may, however, be difficult to establish who should fall within the groups of offenders, having regard to the individual characteristics of the offender and the offence.

CSNSW notes that the NSW Law Reform Commission has conducted separate reviews into Diversion for offenders with mental illness and cognitive impairment and the *Bail Act 1978*. The Commission supported the inclusion of separate provisions in the *Bail Act 1978* for children and young people. It may therefore be appropriate to make further provision for groups of offenders such as children and young people, offenders with mental illness and cognitive impairment, and indigenous people.

Regarding indigenous offenders, CSNSW notes the Jumbunna Indigenous House of Learning (*Preliminary submission PSE15, 3*) proposal as to the following purposes of sentencing for indigenous offenders:

- maintaining/encouraging respect for and the authority of culture;
- ensuring the offender is answerable to the community;
- reintegrating the offender into the community;
- ensuring the social cohesion of the community;
- recognising the historical and contemporary disadvantage suffered by Aboriginal and Torres Strait people; and
- healing; rehabilitation; accountability; and self-determination.

2. If so, which groups and what purposes?

See Question 1.16.1 above.

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

No.

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?

CSNSW believes that any new purposes of sentencing should be in addition to the existing statutory purposes.

QUESTION PAPER 2 – GENERAL SENTENCING PRINCIPLES

Imprisonment as a last resort

Question 2.1

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

The legislative and common law principle that imprisonment is a sentencing option of last resort should be retained as it is. It cannot be proved whether this principle does in fact divert offenders from full-time custody. What can be said, however, is that inclusion of the principle in legislation would not increase the number of offenders given custodial sentences.

Proportionality

Question 2.2

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

No response provided.

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

No response provided.

Parity

Question 2.3

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

No response provided.

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

No response provided.

Totality

Question 2.4

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

No response provided.

2. Should sentencing courts have discretion to:
(a) impose an overall sentence for all of the offences; and
(b) articulate what sentences would have otherwise been imposed for the individual counts?

CSNSW believes that a court should impose a sentence for each offence.

Sentencing the offender only for the offence proved

Question 2.5

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

No response provided.

Reasons for sentencing

Question 2.6

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

No.

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

Yes. The requirement to provide reasons assists in understanding why a non-custodial sentence was not considered appropriate. Please see the **attached** document which shows the numbers of inmates who served sentences of six months or less.

Alternatives

Question 2.7

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

No response provided.

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

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

Instinctive synthesis

Question 2.8

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

No response provided.

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

Question 3.1

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

See Question 3.1.3 below.

2. Are there dangers that relevant factors may not be taken into account in the absence of a provision similar to s 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW)?

No response provided.

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

Sentencing would be less transparent in the absence of a provision similar to section 21A of the SP Act. As an organisation that is responsible for the administration of sentences, CSNSW uses Judges' Sentencing Remarks (JSRs) while assessing offenders post sentence, in order to develop case management strategies to address the factors linked to the offending behaviour. Section 21A requirements make the JSRs more intelligible and consistent for CSNSW, as staff seek to understand the judgment and the documented background to the offence.

Question 3.2

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

No response provided.

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?

CSNSW suggests that the mitigating factor in paragraph 21A(3)(g) of the SP Act - 'the offender is unlikely to re-offend' – could bear further scrutiny. The benefit of predictive statements of this nature can be unclear in Judges' Sentencing Remarks (JSRs), as with hindsight (for example, when reading JSRs prepared ten years earlier) it is often that these statements are not borne out. Such a statement may be of limited usefulness unless the Judge is able to elucidate the basis upon

which the conclusion is formed. The Judge may or may not have had indirect access to the CSNSW Level of Service Inventory – Revised (LSI-R), if a pre-sentence report was prepared, or had access to other scales or actuarial instruments for assessing the risk of re-offending, via reports from other parties. There appears to be a practice at times of making such predictive statements with minimal or no qualifying comments.

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?

No response provided.

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)?

No response provided.

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 response provided.

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’?

No response provided.

QUESTION PAPER 4 – OTHER DISCOUNTING FACTORS

Plea of guilty

Question 4.1

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

No response provided.

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

No response provided.

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

No response provided.

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

No response provided.

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

No response provided.

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

No response provided.

Assistance to authorities

Question 4.2

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

No response provided.

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 response provided.

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)?

No response provided.

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

No response provided.

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

No response provided.

Pre-trial and trial assistance

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?

No response provided.

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

No response provided.

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

No response provided.

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 response provided.

Excluded factors

Question 4.4

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

There may be a circumstance, already commented on in a consultative paper on family violence published in 2010¹, where a teenager can be sentenced as a child sex offender after having consensual sex with another teenager under the age of 16. The report states that 'NSW stakeholders highlighted similar concerns about the operation of NSW legislation on the basis that:

all sexual contact with a child under 16, even consensual contact, is an offence, even where both parties are under 16. Secondly, an offence involving two juveniles is automatically 'aggravated' because it is designated as a 'child sex offence' which places

¹ *Family Violence - A National Legal Response*, Australian Law Reform Commission (ALRC Final Report 114), NSW Law Reform Commission (NSWLRC Final Report 128), Commonwealth of Australia, October 2010. See: <http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114>.

the offence in a more serious category, attracting higher penalties. In addition, child sex offences attract the provisions of the Child Protection Register set up under the *Child Protection (Offenders Registration) Act 2000* (NSW), even where the offender and the victim are both children.²

The NSW Law Reform Commission may wish to consider whether, in this kind of case, the excluded factors from any consideration on sentence could be waived, as it could be argued to be unnecessarily onerous.

Question 4.5

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

No response provided.

Question 4.6

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

No response provided.

² Ibid at paragraph 25.44, page 1140, referring to Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

CORRECTIVE SERVICES NSW

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Table 1: Inmates discharged on completion of a sentence having only served sentence(s) of 6 months or less by time on remand

Time on remand	Number	Percent
No remand	148	40.2
Less than 7 days	110	29.9
8 days to < 1 month	33	9.0
1 to < 2 months	44	12.0
2 to < 3 months	24	6.5
3 to < 6 months	9	2.4
	368	100.0

Exclusions

Offenders where no legal status or offence data was recorded have been excluded (N=28).

Offenders whose episode of imprisonment included a sentence in relation to Breach of parole have also been excluded (N=51).

Table 2: Inmates discharged on completion of a sentence having only served sentence(s) of 6 months or less by time on remand, gender and Indigenous status

Time on remand	Non-Indigenous		Indigenous		Total
	Indigenous males	Non-Indigenous males	Indigenous females	Non-Indigenous females	
No remand	18	105	12	13	148
Less than 7 days	24	69	8	9	110
8 days to < 1 month	11	18	1	3	33
1 to < 2 months	12	28	1	3	44
2 to < 3 months	7	16	1	1	25
3 to < 6 months	3	5	0	0	8
	75	241	23	29	368

Table 3: Inmates discharged on completion of a sentence having only served sentence(s) of 6 months or less by time on remand and offence (MOST SERIOUS OFFENCE ONLY)

Time on remand	No remand	Less than 7 days	8 days to < 1 month	1 to < 2 months	2 to < 3 months	3 to < 6 months	Total
Homicide and related	-	-	-	-	-	-	-
Acts intended to cause injury	28	24	10	12	8	3	85
Sexual assault and related	1	-	1	1	1	-	4
Dangerous or negligent acts endang. persons	5	3	-	2	-	-	10
Abduction, harassment etc.	3	1	1	-	1	-	6
Robbery, extortion etc.	1	-	-	-	1	-	2
Unlawful entry with intent/burglary, B&E	2	4	1	-	-	-	7
Theft and related	17	18	5	10	2	2	54
Fraud, deception and related	9	5	-	-	3	1	18
Illicit drug offences	10	7	-	5	3	-	25
Weapons and explosives	3	2	1	-	-	-	6
Property damage and environmental pollutior	4	5	1	3	2	1	16
Public order offences	2	5	2	1	-	-	10
Traffic and vehicle regulatory offences	30	18	5	5	2	-	60
Offences against justice procedures etc.	33	18	6	5	1	2	65
Miscellaneous offences	-	-	-	-	-	-	-
Total	148	110	33	44	24	9	368

Explanatory notes

Data in Table 1 includes offenders discharged from full-time custody on completion of a sentence during the 2011-12 financial year. This includes only those offenders released for reasons of "Sentence expired" or "Parole" and excludes offenders serving a sentence who were released for other reasons, e.g. granted bail on appeal, being acquitted etc. The table excludes offenders serving a sentence other than by way of full-time imprisonment (e.g. periodic detention or any community-based order e.g. home detention).

The table also excludes all offenders who were serving a sentence imposed in relation to breach of parole, regardless of whether they were serving any other sentence of full-time imprisonment. This is because it is difficult to determine whether the offender would have received a sentence of full-time imprisonment had there been no breach of parole, and what impact this had in terms of the period of time spent in custody, as it is difficult to determine when any breach of parole sentence has expired. It is also noted that offenders serving a sentence for breach of parole are usually received as "sentenced" offenders, as the sentence imposed for that breach is usually imposed prior to the offender being taken into custody and is taken to commence on the date of reception.

In order to determine the period spent on remand, a record of the date on which the offenders imprisonment status changed from "unsentenced" to "sentenced" is also required. A small number of offenders (n = 28) where no imprisonment status date was recorded during their episode of imprisonment have been excluded. Time on remand has been calculated as the period between reception and date of first subsequent update of the offenders imprisonment status to "Sentenced". Offenders received as sentenced offenders are recorded as "No remand". Some offenders may be sentenced for one offence and remain on remand for another (perhaps more serious) offence. Generally, the imprisonment status will be updated to "sentenced" on the imposition of the first sentence, regardless of further outstanding charges for which they may be held under a remand order.

The table also excludes any offender who was determined to have been serving any sentence of more than six (6) months during the episode relating to the discharge. The calculation of this period is based on the total sentence i.e. the difference between the sentence start and sentence expiry date (as distinct from any non-parole expiry date imposed). Therefore, offenders serving a sentence of one (1) year with a 3 month non-parole period have been excluded. Offenders serving more than one sentence of 6 months or less that were served consecutively have been included.

The determination of the most serious offence is based on CSNSW standard methodology for determining most serious offence. This method first determines the sentence with the greatest sentence term (sentence expiry date - sentence start date). Where more than one sentence shares this greatest sentence term (i.e. two 6 month sentences), the most serious offence is determined by selecting the offence with the lowest (most serious) National Offence Index (NOI) as determined by the Australian Standard Offence Classification (ASOC) national offence classification system developed by the Australian Bureau of Statistics (ASOC 2008).