



public interest
ADVOCACY CENTRE LTD

**NSW Law Reform Commission –
Sentencing Question Papers 1-4**

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Trade and Investment, Regional Infrastructure and Services NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work in the criminal justice system

PIAC has significant experience in relation to sentencing through its work with the Homeless Persons' Legal Service (HPLS), a joint initiative between PIAC and the Public Interest Law Clearing House (PILCH) NSW. The HPLS Solicitor Advocate provides representation for people who are homeless and charged with minor criminal offences. The role was established in 2008 to overcome some of the barriers homeless people face accessing legal services, including: a lack of knowledge of how to navigate the legal system; the need for longer appointment times to obtain instructions; and, the need for greater capacity to address multiple and complex interrelated legal and non-legal problems.

Since commencing in 2008, the HPLS Solicitor Advocate provided court representation to 314 individual clients.

NSW Law Reform Commission Sentencing Question Papers 1-4

PIAC welcomes the opportunity to comment on the NSW Law Reform Commissions' *Question Papers 1-4* (the Question Papers) relating to the review of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the Act).

In October 2011, PIAC through its program, HPLS, provided comment to the NSW Law Reform Commission's sentencing outline paper. HPLS's submission focused on the close relationship between offending, re-offending, incarceration and homelessness. HPLS's submission called on the NSW Law Reform Commission to recommend:

- additional intermediate sentencing orders for people who are homeless, have a mental illness or a drug/alcohol dependency;
- that suspended sentences as a sentencing option be maintained;
- the expansion of diversionary programs and sentencing options in respect of breaches of suspended sentences.

PIAC's submission to the NSW Law Reform Commission's Question Papers again focuses on the need to ensure the diversion of people who are homeless and those with a mental illness or chronic disability out of the criminal justice system. This submission calls on the NSW Law Reform Commission to highlight the importance of such diversion prior to conviction and sentencing. Where such diversion has not occurred, PIAC believes that sentencing options should be focused on addressing the underlying causes of criminal activity. As such PIAC's submission calls on the NSW Law Reform Commission to recommend the continued operation of 'imprisonment as a last resort' and 'rehabilitation' as valid sentencing purposes under the Act. The submission also recommends the removal of 'deterrence' as a relevant sentencing consideration in relation to crimes committed by people from disadvantaged backgrounds such as people experiencing homelessness.

Sentencing and vulnerable communities

PIAC believes it is essential that the Question Papers address the need to divert people from disadvantaged backgrounds out of the criminal justice system prior to sentencing. There are a number of mechanisms in place in NSW that seek to divert vulnerable groups out of the criminal justice system and into appropriate treatment and support programs.¹ Most significant in terms of people with a mental illness or cognitive impairment are the powers available to the Local Court under ss32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) (MHFPA).²

However, many of these diversionary options are not currently being utilised by the NSW Police and Local Courts. In particular, as found by the NSW Law Reform Commission as part of its

¹ There are a number of procedures in NSW that should operate to divert people with a mental illness away from the criminal justice system prior to being brought before court including section 107 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) section 8 of the *Criminal Procedure Act 1986* (NSW) and section 22 of the *Mental Health Act 2007* (NSW) (the MHA).

² Under s 32 of the MHFPA the magistrate has the power to discharge the defendant into the care of a responsible person, unconditionally or subject to conditions; discharge the defendant on the condition that the defendant attend to a person or at a place specified by the magistrate for assessment of the defendants mental condition or treatment or discharge the defendant unconditionally.

review into *People with cognitive and mental health impairments in the criminal justice system*, only a small percentage of matters before the Local Court are dealt with under ss 32 and 33 of the MHFPA. In 2007, 341,896 charges were finalised in the Local Court, with only 3,941 being dealt with under these powers.³ The failure of these agencies to exercise these diversionary procedures can also be seen in the disproportionate number of people with a mental illness or cognitive impairment in the criminal justice system. A 2011 report found that 87 per cent of young people in custody in NSW had a psychological disorder, with over 20 per cent of Indigenous young people and 7 per cent of non-Indigenous young people in custody being assessed as having a possible intellectual disability.⁴ Further, in 2008, following a study of 2700 people in the Australian prison system, it was found that 28 per cent of the prisoners experienced a mental health disorder in the preceding 12 months, 34 per cent had a cognitive impairment and 38 per cent had a borderline cognitive impairment.⁵

These figures are supported by the casework of the HPLS Solicitor Advocate. Using a recent sample group, from January 2010 to December 2011, the HPLS Solicitor Advocate provided court representation to 179 individual clients facing criminal charges. Of these:

- 45 per cent disclosed that they had a mental illness;
- 60 per cent disclosed that they had drug or alcohol dependency;
- 35 per cent disclosed that they had both a mental illness and drug/alcohol dependency;
- 69 per cent had either a mental illness or drug/alcohol dependency;
- 45 per cent disclosed that they have previously been in prison.

As noted above, the NSW Law Reform Commission is in the process of conducting a review into diversionary options available for people with a mental illness or cognitive impairment in the NSW criminal justice system. PIAC believes that future versions of the Question Papers should contain information from this review as well as other pre-sentence diversionary options available for offenders from disadvantaged backgrounds. The Question Papers should highlight the importance of such options and encourage their use to ensure vulnerable people are diverted away from the criminal justice system prior to conviction and sentencing.

Recommendation One

That the NSW Law Reform Commission's Question Papers highlight the need to divert vulnerable communities away from the criminal justice system prior to sentencing.

Question Paper 1

While providing no comment on whether or not a single primary purpose of sentencing should be adopted in NSW, this submission provides the following comments in relation to how the current sentencing objectives under s 3A of the Act should be applied to disadvantaged groups.

³ NSW Department of Attorney General and Justice, *NSW Criminal Court Statistics 2007*, Bureau of Crime Statistics and Research, (10 January 2012)

<http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_crime_stat> at 28 May 2012.

⁴ Indig, Devon, Vecchiato Claudia, Haysom Leigh, *2009 NSW Young People in Custody Health Survey: Full report*, Justice Health and Juvenile Justice, (2011).

⁵ Baldry, Eileen, *A critical perspective on Mental Health Disorders and Cognitive Disability in the Criminal Justice System*, (2008).

Question 1.6: Deterrence as a consideration in sentencing

PIAC believes the sentencing principle of 'deterrence' under paragraph 3A(b) of the Act should not be applied in relation to offences committed by people experiencing homelessness.

As detailed in Question Paper 1, there are two forms of deterrence relevant to paragraph 3A(b) of the Act: *general* and *specific deterrence*. General deterrence aims to discourage people in general from offending, specific deterrence aims to prevent re-offending by the specific person who was convicted of an offence. There is little evidence to demonstrate the effectiveness of either general or specific deterrence in preventing future offences from being committed. A 2012 study conducted by the NSW Bureau of Crime Statistics and Research found the concept of marginal general deterrence "exerts no measurable effect" in decreasing offending behaviour.⁶ General deterrence has also been criticised on the basis of being in conflict with another sentencing principle contained within the Act: proportionality.⁷

Nor is there evidence to suggest that conviction and sentencing are effective in achieving specific deterrence among offenders. A recent study from the NSW Bureau of Crime Statistics and Research, *Re-offending in NSW*, revealed that almost 60 per cent of adults convicted in NSW Courts were reconvicted within 15 years, with 21 per cent of re-offending occurring within one year of the reference offence.⁸ Juvenile offenders in NSW have a significantly higher rate of re-offending, with almost 80 per cent being reconvicted within 15 years.⁹

PIAC believes it is unlikely that deterrence will be removed as a valid principle behind sentencing. However, regardless of whether the concept of deterrence remains a valid consideration for sentencing under the Act, PIAC recommends the principle should not apply to people from vulnerable communities who are convicted of crime. As the case study from the work of the HPLS Solicitor Advocate below details, the concept of specific deterrence has no relevance in relation to people experiencing homelessness who often commit crime out of 'need' rather than 'greed'.

Case Study 1

TD is a homeless man who was convicted of possessing goods in custody under section 527C of the *Crimes Act 1900* (NSW). TD was walking in the park he usually slept in when he found a credit card. Before being arrested by the Police, TD had used the credit card in order to obtain food and accommodation.

PIAC notes that NSW Courts do not apply the principle of general or specific deterrence in the sentencing of offenders with a mental illness or cognitive impairment.¹⁰ In detailing why the application of deterrence was not relevant in offences committed by people with a mental illness or cognitive impairment, Hunt CJ in *R v Wright* claimed "such an offender is not an appropriate

⁶ Weatherburn Don, Wan Wai-Yin, Moffatt Steve, Jones Craig, 'The Effect of Arrest and Imprisonment on Crime', Crime and Justice Bulletin No 158 (NSW Bureau of Crime Statistics and Research, 2012) 15-16.

⁷ For more discussion on this point please see Richie, Donald, *Does Imprisonment Deter? A Review of the Evidence*, (April 2011) Sentencing Advisory Council <<http://www.sentencingcouncil.vic.gov.au/content/publications/does-imprisonment-deter-review-evidence>> at 28 May 2012.

⁸ Holmes, Jessie, 'Re-offending in NSW', Crime and Justice Bureau Brief 56 (NSW Bureau of Crime Statistics and Research, 2012).

⁹ Ibid.

¹⁰ R v Hemsley [2004] NSWCCA 228 [33]. For further discussion please see Freckelton Ian, 'Sentencing Offenders with Impaired Mental Functioning' (2007)14 *Psychiatry, Psychology and Law* 187.

medium for making an example to others”.¹¹ PIAC believes such a principle also applies in relation to offenders who are homeless. In addition, as with people with a mental illness or cognitive impairment, sentencing (and specifically incarceration) will have limited impact upon deterring homeless peoples behaviour as their offences are often committed without consideration or concern for the prospect of conviction and sentencing.

Recommendation Two

That the NSW Law Reform Commission recommend that the principle of deterrence in the Crimes (Sentencing Procedure) Act 1999 (NSW) not be applied as a relevant consideration in the sentencing of people from vulnerable communities such as those experiencing homelessness.

Question 1.9: Promotion of an offenders rehabilitation

PIAC supports the continued adoption of sentencing procedures that seek to address the underlying reasons behind offending behaviour and that promote rehabilitation. As detailed above, PIAC believes people from vulnerable groups should be diverted out of the criminal justice system prior to sentencing. However, should this not occur, PIAC believes the most appropriate sentencing principle in relation to such offenders is that of rehabilitation.

Case Study 2

JK was homeless. He was initially found guilty of criminal offences, especially offensive language, offensive conduct and goods in custody. His consumption of alcohol and methylated spirits increased. He was charged with wielding a knife in a public place, the ninth such charge on his record since 2001. On many occasions he had received a short gaol sentence and then was back on the street. In recent times, his matters had been diverted from the correctional system through the use of ss32 and 33 of the *Mental Health (Criminal Procedure) Act*. However, none of his underlying issues had been addressed.

The Solicitor Advocate worked with a treatment provider to ensure that a treatment plan for JK was put together that would have an impact on his long-term situation, not just his short-term legal problem. This meant that when JK received a good behaviour bond, he was released, not back to the streets, but straight into long-term accommodation with 24-hour support and medical care.

PIAC notes the discussion in Question Paper 1 about whether ‘rehabilitation’ remains the most appropriate term under paragraph 3A(d) of the Act to describe the need for sentencing options to address the underlying reasons for criminal conduct. PIAC believes more important than the terminology adopted within this section of the Act, is the need to ensure rehabilitation programs receive appropriate levels of funding. PIAC recommends that the future issues of the NSW Law Reform Commission’s Question Papers provide details of the current rehabilitation options available during sentencing, their current levels of funding and what funding is required in order to ensure the principles of rehabilitation are achieved in practice.

Recommendation Three

That the NSW Law Reform Commission recommend that the principle of rehabilitation be retained as a relevant consideration in sentencing under the Crimes (Sentencing Procedure) Act 1999 (NSW) and that programs that promote such rehabilitation be adequately funded.

¹¹ *R v Wright* (1997) 93 A Crim R 48, 50-51.

Question Paper 2

Question 2.1: Imprisonment as a last resort

PIAC believes the NSW Law Reform Commission should recommend the continuation of the common law and legislative principle that imprisonment is a sentencing option of last resort. As identified in Question Paper 2, the imposition of imprisonment is a 'grave step', and one that places considerable financial cost on the community. A study conducted by the NSW Bureau of Crime Statistics and Research, *The Effect of Prison on Adult Re-offending*, also highlights how custodial sentences are ineffective in reducing high rates of re-offending. Rather than acting as a specific deterrent to adult re-offending in NSW, the report revealed that recidivism risks for offenders convicted of burglary or non-aggravated assault who are sent to prison are significantly higher than among those who are given a non-custodian sentence.¹²

PIAC also notes the role that imprisonment can play in causing homelessness, with a study conducted by the Australian Housing and Urban Research Institute detailing the high rates of homelessness experienced by prisoners upon release.¹³ HPLS is currently conducting a study to record the experiences of people who are experiencing homelessness who have been released from prison. Upon its completion, a copy of this report will be provided to the NSW Law Reform Commission.

Recommendation Four

That the NSW Law Reform Commission recommend that the common law and statutory principle that imprisonment is sentencing option of last resort be retained.

Question Paper 3

This submission makes no comment on whether s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the Crimes Act) should be retained in its current format. However, PIAC recommends the consideration of mitigating factors in sentencing that reflect the experiences of people from disadvantaged backgrounds.

Question 3.3: Additional mitigating factors

PIAC recommends the adoption of homelessness as a factor to mitigate the severity of a sentence. While s 21A (3) of the Crimes Act enables the court to consider the mental health of an offender as a mitigating factor in sentencing, no equivalent provision exists in terms of homelessness. As was detailed above, the offences of people experiencing homelessness are often committed as a consequence of their homeless status. PIAC believes in cases such as illustrated in Case Study 1, courts should consider during sentencing the impact of homelessness as a factor influencing the individuals 'choice' to partake in the offending behaviour.

Recommendation Five

That the NSW Law Reform Commission recommend the adoption of homelessness as a mitigating factor under the Crimes (Sentencing Procedure) Act 1999 (NSW).

¹² Weatherburn Don, 'The effect of prison on adult re-offending', Crime and Justice Bulletin No 143 (NSW Bureau of Crime Statistics and Research, 2010) 10.

¹³ Baldry Eileen, McDonnell Desmond, Maplestone Peter and Peeters Manu, *Ex-prisoners and accommodation: what bearing do different forms of housing have on social re-integration* (August 2003), Australian Housing and Urban Research Institute, <<http://www.ahuri.edu.au/publications/p70068/>> at 28 May 2012.

Question Paper 4

Question 4.6: Deportation as a sentencing consideration

As noted in Question Paper 4, current case law provides that possible deportation of an offender as a consequence of an offence is irrelevant as a sentencing consideration. In PIAC's experience, the failure of courts to consider the impact of deportation as an extra-curial punishment often results in offenders being doubly punished for their crimes.

Case Study 3

KK is a homeless man who was born overseas and arrived in Australia at the age of 9. He has never returned to his country of birth and was not in contact with any relatives from there. At age 40, he was convicted under s 112(3) of the *Crimes Act 1900* (NSW) with aggravated break and enter. KK is currently being sentenced and was recently threatened by the Australian Government with deportation to the country of his birth.

PIAC notes the potential difficulties faced by courts in determining whether or not the Australian Government will take action to deport someone convicted of an offence. However, PIAC believes that it would be appropriate for the consequence of deportation to be considered in sentencing where the court believes there is a reasonable prospect of the Australian Government seeking deportation of an offender.

Recommendation Six

That the impact of deportation be adopted as a relevant consideration in sentencing under the Crimes (Sentencing Procedure) Act 1999 (NSW).