

Economics and Business Educators

2007

Trial Higher School Certificate Examination

LEGAL STUDIES
MARKING GUIDELINES

SECTION 1. LAW & SOCIETY PART A. LAW & JUSTICE.

Multiple Choice Answers

1 – c

2 – c

3 – c

4 – a

5 – c

6 – b

7 – b

8 – d

9 – c

10 – d

11 – b

12 – d

13 – d

14 – a

15 – b

SECTION I LAW & SOCIETY PART B HUMAN RIGHTS

QUESTION 16 (10 MARKS)

(a) What is sovereignty? (2 Marks)

Answer

Supreme and independent power exercised by a nation state; the exclusive power of a state to control its own territory and subjects.

Flowing from this concept is the notion that a state, being the highest legal entity with no international parliament and having complete power to govern the affairs of its citizens unimpaird by other states, has a duty not to interfere in the affairs of another sovereign state. A state's sovereignty is to a large extent inviolable.

Marking Criteria	Marks
Correctly defines or explains the term in a manner that demonstrates a thorough understanding of its meaning.	2
Attempts to define or explain the term in a manner that demonstrates some understanding of its meaning.	1

(b) Using a specific domestic or international example, explain how state sovereignty impacts on human rights. (3 Marks)

Answer

Because a state's sovereignty is to a large extent inviolable this restricts the actions of neighbour states from meddling in the internal affairs of other states; as a result, human rights abuses are allowed to go unpunished within the boundaries of a state.

Conversely, it is this very inviolable right, allowing a state to govern the affairs of people entering its borders that allows political asylum to be granted to refugees irrespective of whether such immigration is contrary to the laws of the refugee's home state.

(i) Domestic

- Australia's immigration policy of mandatory detention for illegal immigrants is an example of how sovereign power has been used to control people in a manner that is alleged to be in breach of internationally recognized standards of human rights law. Whilst such policy, enshrined in the Migration Act, has attracted international criticism and negative commentary from international rights activists and UN delegations, it nonetheless remains intact and continues to be followed by the current government without any direct invasive interference from other sovereign states. As such, any instances of human rights violations remain unpunished and look likely to continue.

The following is a submission made to the National Inquiry into Children in Immigration undertaken by HREOC which is chairing an inquiry into human rights violations and policies concerning the mandatory detention of children of refugees. The submission gives a detailed account of how the policy breaches numerous human rights obligations enshrined in international conventions/covenants and what needs to be done to rectify the problem.

Submission to National Inquiry into Children in Immigration Detention from The International Commission of Jurists, Australian Section

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The International Commission of Jurists is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. Its aim is to promote human rights through the rule of law by ensuring that developments in international law adhere to human rights principles and that international standards are implemented at the national level. The Commission was founded in Berlin in 1952 and its members are jurists representing different legal systems of the world. It is based in Geneva, and has a network of autonomous national sections and affiliated organisations located in all continents.

The Australian Section of the ICJ was established in 1952, and has branches in most of the Australian States and Territories. The Section pursues the mandate of the ICJ by monitoring and reporting on human rights in Australia and in this region, to ensure compliance with the rule of law.

This submission draws on the knowledge and experience of several members of the Australian section of the ICJ who are familiar with the laws and policies applicable to asylum seekers and to the conditions of detention. Its focus is on legal issues rather than case studies.

Summary of proposals basic position of ICJ

The position of the ICJ is that there is no place in Australian law or practice for the non-appealable detention of children solely on the basis of their arrival status. Such detention is in clear violation of many international treaties to which Australia is a party.

To justify this detention on the basis that, as parents who have arrived without authorisation must be detained, the children should remain with them, rather than being separated, is a travesty, since adult detention is also incompatible with Australia's international obligations.

In addition to being contrary to accepted international standards, the detention of children for lengthy periods exposes them to conditions and experiences which are harmful to their health and well-being and may result in long term psychological damage. It deprives them of their right to education, to health services and to cultural activities, all of which are internationally protected rights of children.

In summation, the policies of the Australian government in placing children in detention for long periods are in total disregard of international obligations, and of the commitment which Australia has made to make the best interests of the child a primary consideration and to ensure that every child enjoys, without any discrimination, the right to such measures of protection as are required by his status as a minor.

general obligations

The principle that the best interests of the child shall be a primary consideration should be incorporated into the relevant legislation, regulations and administrative directives concerning the treatment of child asylum seekers; the provisions of article 22 (1) of the Convention on the Rights of the Child should be a legal obligations of the relevant authorities. Steps should be taken to ensure that children are able to put forward their own views and to have those views considered before any decision is taken as to the status, custody or care of that child by the State or its agencies, including the managers of detention facilities.

detention and release

After a reasonable period for necessary screening (identity, health, etc), accompanied children should be released into the community with their parent or parents. Where appropriate, such release may place the family in the care of a responsible individual or organisation, or be subject to reporting obligations. After a reasonable period for screening, unaccompanied children should be released into the care of a responsible individual or organisation. The processing of claims of children under 18 and their accompanying families should be given priority.

claims for refugee status

The importance of maintaining family unity as a measure of protection for children should be adopted as a policy to guide decisions about detention and recognition of refugee claims by children and their parents. The role and responsibility of parents in the upbringing and development of their children should be recognised in policy and in practice.

The claims of spouses and dependent children of recognised refugees for refugee status should be granted, whether or not they have travelled together to Australia, in order to ensure protection of the family, and the rights of children not to be separated from their parents. Persons whose refugee status has been recognised should be entitled to seek family reunion and the applications of their parents or dependent children to enter Australia for that purpose should be considered positively.

entitlements while in detention

An independent Special Visitor should be appointed to monitor the treatment of children in detention, with unrestricted access to facilities, staff and detainees. The responsibilities of the Minister as guardian of children in detention should be clearly defined and their implementation subject to scrutiny. The welfare of children in detention should be subject to the supervision of State and Territory Welfare Departments.

Detention centres should be located close to centres of habitation, and in an environment comparable with that available to the Australian community.

The Department of Immigration and ACM should provide safe and secure accommodation for unaccompanied children, and ensure that they are not exposed to other detainees who may be a danger to themselves or others. Day release should be available to children and their parents on a reasonable basis, eg for medical or dental attention, for educational or vocations purposes, or to participate in community activities, organised excursions.

English language teaching should be provided as a priority to children in detention. Children in detention should also have access to vocational training. Teachers who educate children in detention centres should be provided with adequate curriculum support, and with appropriate resources and equipment to ensure that children have equal and non-discriminatory access to educational opportunities.

Children who are in detention (for more than 4 weeks) should be entitled to day release to attend schools in the community where arrangements can be made for that purpose. Children in detention should have access to play, games, sports and leisure facilities appropriate to age, and with appropriate supervision on a daily basis. Equipment and toys should be provided to put these children on an equal footing with others in the community.

Other issues

The Alternative Detention Model proposed by the Refugee Council of Australia should be adopted and implemented. The alternative detention program should be extended and should permit husbands and fathers to join their families. Relocating detention facilities nearer to population centres would enable greater use of this option.

Background to inquiry

terms of reference

Under the terms of reference, the Human Rights Commissioner will inquire into the adequacy and appropriateness of Australia's treatment of child asylum seekers and other children who are, or have been, held in immigration detention. It will consider Australia's international human rights obligations regarding child asylum seekers; mandatory detention of child asylum seekers and alternatives to their detention; and the impact of laws, policies and practice in regard to children in immigration detention or child asylum seekers and refugees residing in the community after a period of detention

defining child asylum seekers

Under the Convention on the Rights of the Child, *children* are, for most purposes,^[1] those who are under 18.

Child asylum seekers and refugees include unaccompanied minors as well as those who are with a parent. They include babies born in detention in Australia.

Under the Convention Relating to the Status of Refugees, 1951 (the Refugee Convention) and the 1967 Protocol (Relating to the Status of Refugees) a refugee is a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. [art 1]

These provisions apply to children in the same way as to adults. A child who has a "well-founded fear of being persecuted" for one of the stated reasons is a "refugee". Children who hold refugee status cannot be forced to return to the country of origin (non-refoulement). Children who are part of a family group on arrival are considered as part of the family of the member who can establish refugee status. If the child does not arrive with the relevant family member who is recognized as a refugee, the claims of that child may be rejected.

Right to seek asylum

The right to seek asylum is recognized by article 14 of the Universal Declaration of Human Rights: 14 (1). Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2.) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations

General human rights obligations towards children child's best interests must be a primary consideration

In accordance with its obligations under article 3 of the Convention on the Rights of the Child, Australia must make **the best interests of the child** a primary consideration in all actions and decisions concerning that child:

1. **In all actions concerning children**, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

The UNHCR advocates the observance of CRC standards by all States, international agencies and non-governmental organizations. The UNHCR Policy on Refugee Children draws upon the Convention on the Rights of the Child by stating, in its guiding principles, that, "In all actions taken concerning refugee children, the human rights of the child, in particular his or her best interests, are to be given primary consideration" (para. 26 (a)).

the Teoh principle applies in Australia

In the ***Teoh case***, 1995, the High Court decided that when Australia ratified the Convention on the Rights of the Child, this gave rise to a legitimate expectation on the part of people in this country that government decision-makers would exercise their discretion in matters affecting children in conformity with that Convention, even in the absence of legislation to give effect to it. [2] In that case, as there was no indication that the best interests of the children were treated as a primary consideration. there was a want of procedural fairness.

Legislation was introduced almost at once to overrule the High Court and to make it clear that no one should expect the government to honour treaty obligations in making administrative decisions. The Bill lapsed, but is still pending. The effect of Teoh may be short lived, and is in any event limited, as a procedural guarantee.

Nevertheless, until overruled, it should guide individual decisions as well as the development of laws and policies. Regrettably there is little evidence that the Convention on the Rights of the Child and the Teoh principle are considered in setting policies in regard to asylum seekers.

Covenant obligations

Under the International Covenant on Civil and Political Rights, article 24 (1), a child is entitled to such measures of protection as 'are required by his status as a minor, on the part of his family, society and the State. [3] Measures of protection required of the State are not defined, but would certainly extend to ensuring that the best interests of the child guide decision making regarding that child.

obligations towards child asylum seekers

The Convention on the Rights of the Child provides that States have particular obligations towards children who are seeking refugee status. Under article 22 (1), States Parties are required to take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee shall receive appropriate protection and humanitarian assistance in the enjoyment of rights.

The HCR guidelines on child refugees point out the special needs of children in this situation:

"Refugee children face far greater dangers to their safety and well being than the average child. The sudden and violent onset of emergencies, the disruption of families and community structures as well as the acute shortage of resources with which most refugees are confronted, deeply affect the physical and psychological well being of refugee children. It is a sad fact that infants and young children are often the earliest and most frequent victims of violence, disease and malnutrition which accompany population displacement and refugee outflows. In the aftermath of emergencies and in the search for solutions, the separation of families and familiar structures continue to affect adversely refugee children of all ages. Thus, helping refugee children to meet their physical and social needs often means providing support to their families and communities.

proposals

The Commission should recommend that the principles of the Convention on the Rights of the Child referred to should be incorporated into the relevant legislation, regulations and administrative directives concerning the treatment of child asylum seekers.

Detention of children incompatible with human rights standards current laws and policies

Australian law protects people against unlawful detention by ensuring that a person who has been detained can apply to a court to test the legality of the detention. In the absence of any other specific provision, application can be made for a writ of habeas corpus.

Under the Migration Act, as amended in 1992, unauthorised asylum seekers who arrive without a valid visa are defined as "designated persons" whose detention is not subject to court review, other than to determine whether they fall within the definition. To this mandatory detention regime was added a system of temporary protection visas instead of permanent protection to asylum seekers arriving in this way whose refugee status was later recognised. The Border Protection laws of 2001 have restricted even more severely the access of asylum seekers to Australian courts by excising external territories from the application of migration laws.

asylum seeker detention policy incompatible with Australia's international obligations

The Human Rights Committee has determined that Australia's laws and policies on mandatory detention of asylum seekers violate its obligations under article 9 of the International Covenant on Civil and Political Rights. [4] The Committee's view was that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed, and that the detention of an individual should not continue beyond the period for which the State can provide appropriate justification. Australia did not advance any grounds particular to the author's case, which would justify his continued detention for a period as long as four years. The Committee concluded that the author's detention for a period of over four years was arbitrary within the meaning of article 9, paragraph 1. As the court review available to A was limited to a formal assessment of the self-evident fact that he was indeed a "designated person" within the meaning of the Migration Amendment Act, the Committee concluded that the author's right, under article 9, paragraph 4, to have the

lawfulness of his detention reviewed by a court, was violated.

When the Human Rights Committee reviewed Australia's report under the ICCPR in 2000, it expressed its concern at Australia's rejection of its views in the *A case*, indicating that it undermined Australia's recognition of the Committee's competence under the Optional Protocol. It reiterated its concerns about the mandatory detention of "unlawful non-citizens", including asylum seekers, and about the policy of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organizations to the detainees in order to inform them of this right. Australia was urged to reconsider these policies.

The position, which is not accepted by the Australian government, is that mandatory detention of asylum seekers extending beyond the period which can be justified for legitimate purposes violates our obligations under the ICCPR. Under article 24 (1) of the Covenant, a child is entitled to such measures of protection as 'are required by his status as a minor, on the part of his family, society and the State. This provision reinforces the prohibition on arbitrary. Such measures would certainly weigh heavily against the detention of a child.

detention of children violates the CRC

The provisions of the ICCPR apply with equal force to the detention of child asylum seekers. The mandatory detention of child asylum seekers also violates provisions of the Convention on the Rights of the Child which are parallel to article 9 of the Covenant:

CRC art 37 (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a **measure of last resort and for the shortest appropriate period of time;**

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the **right to challenge the legality of the deprivation of his or her liberty** before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Mandatory detention of child asylum seekers clearly violates these provisions for the reasons outlined above.

detention of children is discriminatory under CRC article 2

Detention of children who are classified as 'unauthorised entrants' violates the anti-discrimination provisions of international human rights treaties. Children who enter Australia lawfully, with a visitors visa or otherwise and who then apply for asylum are not subjected to detention. As the majority of children have no choice as to the means by which they are brought to Australia, this distinction violates article 2 of CRC. Paragraph (2) of article 2 requires States to ensure that children protected against all forms of discrimination or punishment on the basis of the activities of the child's parents, legal guardians, or family members.

The distinction mentioned is also incompatible with article 2 (1) of CRC and with article 26 of the ICCPR in that it makes a distinction on the ground of these children's status. Such a distinction is not reasonable or justifiable in respect of children who had no freedom of choice as to how they came to Australia.

detention of children incompatible with accepted UN standards

The detention of children is incompatible with two important instruments adopted by the General Assembly. Under these widely accepted United Nations standards, deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. United Nations Rules for the Protection of Juveniles Deprived of their Liberty (GA Res 45/113, 14 December 1990) article 2; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules, GA Res 40/33 29 November 1985) article 19. Under the Beijing Rules, article 17.1 (c) deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in offending and there is no other appropriate response. The well-being of the juvenile shall be the guiding factor in the consideration of the case (art 17.1 (d)). Detention pending trial is a measure of last resort and for the shortest possible period. Clearly, the deprivation of liberty for lengthy periods and in circumstances where there may have been no offence committed whatsoever, is incompatible with the letter and the spirit of these provisions.

detention may be an improper penalty

Depending on the circumstances of the case, the detention of child asylum seekers may also be in violation of article 31 (1) of the Refugee Convention, which prohibits the imposition of penalties on refugees on account of their illegal entry or presence when they have come directly from a territory where their life or freedoms were threatened.

proposals

It is submitted that Australia's detention policies and practices applied to child asylum seekers are incompatible with Australia's commitments under international human rights treaties and the Convention on Refugees.

It is proposed that after a reasonable period for necessary screening (identity, health, etc), child asylum seekers who are accompanied should be released into the community with their parent or parents. Where appropriate, such release may place the family in the care of a responsible individual or organisation, or be subject to reporting obligations. After a reasonable period for screening, unaccompanied child asylum seekers should be released into the care of a responsible individual or organisation. The processing of claims of children under 18 and their accompanying families should be given priority.

Arbitrary separation of child from family violates standards

Both the Covenant and the CRC include provisions requiring States to protect individuals and children against arbitrary interference with the family. [5] Article 23 (1) of the ICCPR provides that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Article 9 of the Convention on the Rights of the Child, which requires States not to separate children from parents unless that is in the best interests of the child. Article 18 requires States to recognise the primary responsibility of parents for the upbringing and development of the child, in accordance with their best interests. States are called on to render assistance to parents in carrying out those responsibilities.

It is incompatible with these provisions for States to take action which arbitrarily separates children from their parents and family members without justification, eg, where family abuse of children requires that they be removed in their best interests.

The provisions apply even if the separation of the child from its parents is part of the enforcement of immigration laws. In *Winata v Australia*, [6] the Human Rights Committee found that the deportation of parents whose child had been born in Australia and who had become an Australian citizen was incompatible with articles 17, 23 and 24 of the Covenant. The Committee's view was that in view of the length of time that had elapsed (13 years) and the social relationships that had been developed by the child in Australia [and the consequent hardship to the child of being forced to leave Australia], it was incumbent on the State to demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterisation of arbitrariness. In that case, it was primarily the rights of the child which were put in jeopardy by the threatened deportation of the parents.

The provisions protecting the family and precluding arbitrary interference with the family are individual rights which apply to child asylum seekers and to all persons under Australian jurisdiction, whether or not they have a right to reside in Australia.

parental responsibility, autonomy stripped,

The CRC , article 18 requires States to recognise the primary responsibility of parents for the upbringing and development of the child, in accordance with their best interests. States are called on to render assistance to parents in carrying out those responsibilities. In practice, the system of detention, and the limits on family

reunion, mean that parents may be stripped of their role and responsibilities, and be left with no control or input whatsoever into important decisions concerning the future of their children, such as those concerning education, diet, health, recreation. In the detention conditions which prevail control over family life is taken away from detainees, depriving children of the guidance of their parents in their upbringing and development.

family protection and detention

The obligation to protect and support the family and to ensure that children are not removed from their families, requires that children and their parents should be released from detention unless there are special factors applicable, in order to ensure that family protection is ensured and that the child is neither detained nor deprived of family support.

assessment practice incompatible with protection of family

Under current Australian law and practice if family members who are unauthorised non-citizens do not arrive in Australia together, their claims for asylum may be assessed independently from each other. The result may be that the claims of a wife or child of a recognised refugee may not be accepted, as their claim is essentially bound up with the member of the family who is or has been recognised. This policy may prolong the detention of a child or other family members, and thus tend to perpetuate family separation, contrary to human rights obligations.

temporary protection visa policy incompatible with family reunion

The policy of granting temporary protection visas with no right to sponsor family members has the same effect. Children granted such visas are thus denied the opportunity of family reunion. This is incompatible with the obligation under human rights instruments to protect the family and contrary to article 10 of the Convention on the Rights of the Child, which provides that applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.

proposals

The importance of maintaining family unity as a measure of protection for children should be adopted as a policy to guide decisions about detention and recognition of refugee claims by children and their parents. The role and responsibility of parents in the upbringing and development of their children should be recognised in policy and in practice. The claims of spouses and dependent children of recognised refugees for refugee status should be granted, whether or not they have travelled together to Australia, in order to ensure protection of the family, and the rights of children not to be separated from their parents. Persons whose refugee status has been recognised should be entitled to seek family reunion and the applications of their parents or dependent children to enter Australia for that purpose should be considered positively.

Personal and family autonomy

participation by children in decisions

The Convention states in article 12(1) that a child has the right to express his or her views freely in all matters concerning him or her, and to have appropriate weight given to his views. Under article 12 (2) the child has the right to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body. This right entitles child asylum seekers to participate in the hearing of their claim to asylum "and to express their concerns" directly or through their representative, parent or guardian. It extends to all decisions concerning the treatment of the child while in the control of the State.

The purpose of this provision is partly to ensure the developmental needs of the child, and partly to ensure that the best possible decisions are taken.

proposals

Steps should be taken to ensure that children are able to put forward their own views and to have those views considered before any decision is taken as to the status, custody or care of that child by the State or its agencies, including the managers of detention facilities.

General conditions of detention for child asylum seekers

relevant general standards

The Convention on the Rights of the Child includes several provisions relevant to the conditions and treatment of children in detention: Article 19 (1): obliges the State to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. Article 20, calls for special protection for children who are temporarily or permanently deprived of their family. Article 22, requires States to provide appropriate protection and humanitarian assistance to children seeking refugee status in the enjoyment of applicable rights.

Under the ICCPR, article 10 (1), all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Under article 7, "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The Convention Against Torture has comparable provisions in article 2, which prohibits torture and article 16 which precludes acts of cruel, inhuman or degrading treatment or punishment.

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (GA Res 45/113, 14 December 1990) sets out the minimum standards for the treatment of juveniles in detention. These minimum standards apply to all persons under the age of 18 and to all types of detention facility. Under these rules, any deprivation of liberty should be effected in conditions and circumstances which ensure

respect for the human rights of juveniles (article 12). Juveniles in detention should be provided with

meaningful activities and programmes which would serve to promote and sustain their health and self-respect (art 12). There are specific provisions, mentioned later, covering such issues as education, health, recreation. An important provision of the UN Rules calls for juveniles to be allowed communication with the outside world, to leave facilities for family visits and for educational or vocational purposes (article 59 ff)

actual situation

Most immigration detention centres are in remote areas subject to inhospitable landscape and climate. For example, the Woomera Detention Centre is over 500 miles from the nearest major urban centre in a semi-desert environment. Children in that centre as in Curtin and Port Hedland have very limited access to visitors from their own communities; moreover they are deprived of seeing other children who would normally attend to visit other detainees in the detention centre. Their access with non detainee children is very limited.

The harsh environment in Woomera, Curtin and Port Hedland means the children have no access to playing n areas where there is shade, water and decorative plant live. Therefore children, who spend significant amount of time in detention, are being deprived of pleasant sensory stimulation for the natural environment.

This should be put in the context of the children's experience in their country of origin and their voyage to Australia. For example, a child fleeing persecution in Afghanistan may have fled across inhospitable wastelands and mountainous country to reach an urban centre in Pakistan. From Pakistan, they would have been transported in a state of fear and dislocation to Indonesia to be placed on a crowded vessel. Following arrival n Australia, they are taken again into a desolate landscape. The only sight that such children may experience for six to eight months, is harsh environment without any aspect of flowers, small animals and hospitable environment for play.

Conditions in immigration detention centres are not suitable for children as little appropriate furniture or recreational equipment is provided for them. As there is no adequate sleeping accommodation for toddlers, they are often forced to sleep with older children or their parents. Living conditions in detention centres are often overcrowded and tense and anxious. This is prevalent in the initial screening process when asylum seekers are crowded together in an area segregated from other detainees.

It is reported that children also face difficulties in accessing food in immigration detention centres. An example is that if small children do not want to eat at the fixed mealtime, there is no provision for them to be fed outside set hours. In addition, detainees do not have a fridge or access to food heating equipment so that parents could feed their children at other times. This becomes essential when children are ill.

In addition, food is generally cooked by other detainees, not specialized kitchen staff. Therefore, the dietary needs of children may be overlooked. One detainee complained that his 18 month old child could not eat the food provided at Villawood Detention Centre because it was very heavily spiced by the Afghan detainee cook. These conditions of detention have a negative impact on the well being of children asylum seekers and are n ot consistent with human rights obligations to provide adequate standards of treatment and care for children.

proposals

Detention centres should be located close to centres of habitation, and in an environment comparable with that available to the Australian community.

Children in detention should be entitled to a diet acceptable to their family, and to have their meals

prepared by their family. Cooking facilities should be made available for this purpose.

All children in detention should have access to play, games, sports and leisure facilities appropriate to age, and with appropriate supervision on a daily basis.

Day release should be available to children and their parents on a reasonable basis, eg for medical or dental attention, for educational or vocations purposes, or to participate in community activities, organised excursions.

Monitoring of conditions and treatment of children in detention

situation and standards

There is at present no provision for the independent monitoring of conditions in detention centres. The government has agreed to accept visits from a representative of the UN High Commissioner for Human Rights and from the Committee on Arbitrary Detention. These visits are not, however, an adequate substitute for on-going supervision by an independent body established in Australia.

The UN Rules for the Protection of Juveniles Deprived of their Liberty provide that there should be independent inspectors appointed to conduct inspections on a regular basis of facilities where juveniles are held in detention, and with unrestricted access to all persons employed there and to the juveniles (article 72 ff).

proposals

An independent Special Visitor should be appointed to monitor the treatment of children in detention, with unrestricted access to facilities, staff and detainees.

The welfare of children in detention should be subject to the supervision of State and Territory Welfare Departments.

The responsibilities of the Minister as guardian of children in detention should be clearly defined and their implementation subject to scrutiny.

Health, including mental health, development and disability

relevant standards

Under article 24 (1) of the Convention on the Rights of the Child, States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. The remainder of article 24 elaborates on this principle.

Article 12 of the Covenant on Economic, Social and Cultural Rights requires States to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Steps to be taken to that end include creating conditions which would assure to all medical service and medical attention in the event of sickness. The UN Rules for the Protection of Juveniles Deprived of their Liberty requires the provision of medical and health care. (articles 49 ff).

All the rights outlined are to be ensured on the basis of equality, without discrimination. That means that, in principle, children who are detained must have access to the same level of services as are available to the general community. In the case of children, there can be no justifiable grounds for making a distinction between those in asylum detention and other children.

actual situation

There have been frequent reports that the health care of children in detention is constantly ignored by ACM. In detention centres where there are a large number of families in isolated areas such as Woomera and Curtin, there are no specialised doctors available to provide for the care of children.

There is no ongoing nursing or medical process to supervise children's physical and mental well-being. This is essential in environments where children are traumatised on arrival and witness traumatic incidents while in detention. They are unwilling participants in disturbances in detention centres and often are aware of hunger strikes and other attempts at self-harm. For many older children, self-harm becomes a desperate call for assistance or recognition of their plight. The lack of medical services must be seen in the context of the lengthy periods of detention which many children experience.

There are numerous specialist trauma torture counselling services in Australia which could provide ongoing supervision of the mental health needs of children. In addition, children may have specialist health complaints requiring a paediatrician's care.

Unaccompanied minors, who travel to Australia without family support, are in a particularly vulnerable position. Their mental health and physical well-being is put at risk soon after arrival when they are placed into solitary confinement. There have been reports that this solitary confinement may last months.

Unaccompanied children are often placed in maximum security areas of immigration detention centres supposedly to protect them from sexual abuse or other forms of harm from other detainees. However, these maximum security areas also house people facing deportation and people at serious risk of self-harm. Exposing children to such threatening and traumatic environments is contrary to ordinary child welfare standards.

The negative effects of detention on the physical and mental health of children is likely to be compounded by a deterioration in the quality of parenting caused by the same conditions and by the fact that parents are deprived of their autonomy in carrying out their supervisory and caring functions. The longer the detention the more adverse are the effects likely to be.

proposals

ACM should be required to ensure that child detainees have early and regular access to medical services, and that no artificial barriers are imposed to restrict access to such services by children and their parents.

ACM should be required to ensure that specialised trauma counselling services have access to detention centres and that those children needing specialist medical attention have access to such services when required.

The Department of Immigration and ACM should provide safe and secure accommodation for unaccompanied children, and ensure that they are not exposed to other detainees who may be a danger to themselves or others.

Education

standards

The Convention on the Rights of the Child, article 28, recognises the right of the child to education on the basis of equal opportunity. Article 13 of the ICESCR recognises the right of everyone to education; it is to be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.

As in the case of health, the right to education under both instruments is to be ensured on the basis of equality, without discrimination. Under the Refugee Convention, refugees must receive the "same treatment" as nationals in primary education, and treatment at least as favourable as that given to non refugee aliens in secondary education (art. 22).

Play, recreational cultural and sporting activities are also guaranteed rights under the Convention on the Rights of the Child, article 31, (and ICESCR art 15, culture). The UN Rules for the Protection of Juveniles Deprived of their Liberty provides that Juveniles should have the opportunity to continue education or vocational training. (c) and should have materials for leisure and recreation (articles 18 (b) and (d), 38, 42). They are entitled to education outside the facility in community schools wherever possible (article 38).

current situation

The Minister, IMIA, was recently reported in the media as indicating that there is no curriculum for children who are held in immigration detention. It is the experience of many refugee lawyers attending detention centres that educational resources are severely limited, if in existence at all. The Villawood Detention Centre has one small classroom with a small bookcase of reading material. There are very few picture books for children. There are limited toys and the main playtime activity for children in detention centres is to play sport either together or with adults. There seems to be very little scope for children to undertake creative play.

There are few provisions for English language training for children in detention centres. However, there are many intensive English teachers available in Australia. There are many teachers who could undertake to teach a small class of children from a number of language groups. This should be made a priority for both ACM and the Department of Immigration.

Because of the inhospitable position of many detention centres and the difficulty of teaching children under those conditions, it is rare that teachers retain these positions for any period. Therefore, children are faced with a constant cycle of changing teachers, and are unable to bond with them. This must disadvantage the children and the children's educational abilities when they are eventually released into the community. Teachers involved in the education of children in detention have complained of the lack of resources and other matters.

It has been reported that there have been offers made to the Department of Immigration and to ACM for children to attend normal schools. For example, the Catholic Education Office indicated that they would supervise the travel to and from and their education at a local Catholic School at Port Hedland. Clearly, children would have better education if they were able to attend regular schools. However, neither the Department nor ACM were interested in taking up this offer.

proposals

- English language teaching should be provided as a priority to children in detention.
- Children in detention should also have access to vocational training.
- Teachers who educate children in detention centres should be provided with adequate curriculum support, and with appropriate resources and equipment to ensure that children have equal and non-discriminatory access to educational opportunities.
- Children who are in detention (or more than 4 weeks) should be entitled to day release to attend schools in the community where arrangements can be made for that purpose.
- Children in detention should have access to play, games, sports and leisure facilities appropriate to age, and with appropriate supervision on a daily basis. Equipment and toys should be provided to put these children on an equal footing with others in the community.

Culture

Articles 30 and 31 of the Convention on the Rights of the Child protect the child's right to cultural identity and to participate in cultural activities. Important aspects of this are to ensure that children in detention can use their own language and become literate in that language and to ensure that cultural and religious practices in which they and their families normally participate can continue. The UN Rules for the Protection of Juveniles Deprived of their Liberty also requires that provision be made for cultural activities and for religious practice (articles 47, 48).

Children from minority cultural groups in detention centres suffer disadvantages with problems in maintaining language and cultural identity. For example, Tamil children in immigration detention centres have very few people with whom they can communicate freely and with whom they share a religion. It has been reported that Tamils often feel very isolated in large detention centres such as Port Hedland and Woomera and that young Tamil boys are at risk of self-harm because of this.

security practices in detention

The invasive nature of security control by ACM impacts adversely on the well-being and growth of children in immigration detention. It is normal practice that detainees are called to muster at regular times of the day. This is done through a loudspeaker system. Children who are sleeping have their rest invaded. Muster will occur when there is any security alert, therefore, children may be woken in the middle of the night and forced to participate.

It is reported that ACM staff regularly enter detainees rooms at night to check their whereabouts. During such a process, young children sleeping with their family would be disturbed and put into a fearful environment.

The visual aspect of maximum security fences and razor wire is very disadvantageous to the development of especially young children. Drawings completed by young children often indicate that they portray people as bound by wire and bleeding. This reflects their self-image while they are in detention, and the effects of this could be long-lasting.

Alternative detention programs

Under a pilot program (under which bridging visas are granted?), a number of women and their children are permitted to live the Woomera township while their husbands remain in detention. This option is limited to people who are making their first application to be refugees. It is understood that there is close supervision of the families, and that the women may not move around the town without being accompanied.

The option appears to be limited to Woomera because of the relative proximity of the detention centre to the town. The ICJ supports the alternative detention model proposed by the Refugee Council of Australia.

proposal

The Alternative Detention Model proposed by the Refugee Council of Australia should be adopted and implemented.

The alternative detention program should be extended and should permit husbands and fathers to join their families. Relocating detention facilities nearer to population centres would enable greater use of this option.

Discriminatory effects of the temporary protection visa

The temporary protection visa is discriminatory in its application to children. Under this kind of visa, which is of three years duration, there is no access to tertiary education or to family reunion or to re-entry. There is no right of entry for spouses, no access to settlement assistance, to Newstart, to English lessons or to disability services.

The temporary protection visa distinguishes between children who are classified as 'unauthorised entrants' and those who enter Australia lawfully, with a visitors visa or otherwise and who then apply for asylum. This kind of distinction is discriminatory as regards children who had no choice as to the means by which they are brought to Australia, and violates article 2 (2) of CRC. Such a distinction is not reasonable or justifiable in respect of children who had no freedom of choice as to how they came to Australia.

The Pacific solution

Australia should also accept responsibility for the human rights of children who have been transferred by Australia to Manus or Nauru. For these children there is even greater isolation than in Australia as there are no community agencies to visit the centres and no support from the local community. There are also health risks for children, who are mainly from temperate climates, being exposed to malaria and other tropical diseases.

-
1. art 1: For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.
 2. Minister for Immigration and Ethnic Affairs v Ah Hin Teoh, 1995 69 ALJR 423.
 3. ICCPR art 24(1); see also articles 17, 23.
 4. A v Australia 560/93, HRC 1997 Report, A/52/40, vol II, p 125.
 5. ICPR arts 17, 23; CRC, art 16.
 6. Winata v Australia, 930/2000, decided 2001, a majority decision.

Submission to National Inquiry into Children in Immigration Detention from the Queensland Teachers' Union (Dudley Cowan Acting Assistant Secretary 15 March 2002)

- [Current position](#)
 - [Convention on the Rights of the Child \(1989\)](#)
 - [Education](#)
-

Queensland Teachers Union Policy States:

"The QTU condemns the current Federal Government policy and practices which deny refugees access to a range of government support services.

The QTU believes that refugee detention centres should be immediately closed down and replaced with the placement of all refugees in appropriate communities."

Current Position

Currently all refugees/asylum seekers attempting to enter Australia without government sanction are placed in detention centres. Prior to late 2001 these centres were in Australia with several centres(Woomera, Port Headland) being in isolated, inhospitable locations. Currently detention centres are being used in Nairu and on Manus Island. These centres form part of the "Pacific Basin Solution" and will continue to be used for future arrivals. Detainees in these centre face inappropriately long periods while their applications are processed and a determination made on their status.

This being the case it can be argued that this arbitrary detention of children over an extended period is in contravention of the rights of children under the "Convention on the rights of the Child" 1989 where the children in detention have the right to "not be deprived of their liberty unlawfully or arbitrarily, with detention only in conformity with the law, as a measure of last resort and for the shortest appropriate time."

While such detention for children accompanied by adult family members is traumatic, the detention of unaccompanied children is indefensible.

While the QTU's position is that detention centres should be closed, the Union recognises that, under current government policy, this will not occur in the foreseeable future. This being the case, the QTU believes -

1. No unaccompanied child should be placed in detention centres. Such Children should be placed with supportive, culturally aware carers if they are unable to be placed with families of the same ethnic background.
2. Greater support and encouragement needs to be given to programs that place families (including adult males, not just mothers and children) in appropriate communities outside detention centres. Reports indicate that such a program associated with Woomera Centre is only partially successful as adult, male family members are excluded from placement in community, family situations.

Convention on the Rights of the Child (1989)

As previously indicated it can be argued that this convention has been breached by the arbitrary detention of children. It can also be argued that under the convention, the following rights of children in detention are not met -

1. Protection from all forms of physical or mental violence. They also have the right to recover and be rehabilitated from neglect, exploitation, abuse, torture or ill treatment or armed conflicts. In view of the recent "unrest" at Woomera and Port Headland Centres, the children in those centres were not protected from all forms of physical or mental violence. Indeed the effects of any counselling and rehabilitation programs for the children would have been negated if the media reports of the events and conditions in these centre (during the periods of "unrest") are accurate.

2. To rest and play

The very placement of camps in isolated areas precludes conditions and amenities that a reasonable person would consider prerequisites for children to enjoy appropriate rest and play.

3. Family life

The very nature of detention centres circumvents the practise of normal family life.

4. Be treated with humanity and respect for their inherent dignity and in a manner which takes into account their age.

This is particularly so in the case of unaccompanied children.

5. Privacy

The standards of privacy we expect and enjoy in our everyday life are far superior to the limited privacy experienced by all housed in detention centres.

Education

The QTU believes that children in detention centres should receive educational programs - no less favourable than those delivered to children in the wider Australian community. The QTU adopts a socially critical orientation toward schooling i.e education must develop the power of critical thinking, not just in individuals but also in group processes; education must engage social issues and give students experience in working on them - experience in critical reflection, social negotiation and the organisation of action. Specifically, the school curriculum in both content and process should develop democratic values, cooperative decision making, critical awareness, ability to relate theory to practise and problem solving ability.

The QTU believes that in providing quality education to children in detention which encompasses the above principals, the Federal Government must -

1. Provide sufficient financial resources so that any schools established in detention centres-

(a) are housed in adequate facilities;

(b) are staffed by qualified, culturally aware teachers;

(c) are staffed with culturally aware support personnel, including staff who have a knowledge of the children they are working with;

(d) Are able to access professional counsellors who are able to communicate with the children in their first language.

2. Where schooling is provided in facilities outside detention centres, the Federal Government should ensure funding is available to meet the provisions in 1(a) - (d) above. Personnel should also be made available to ensure the integration of refugee children into established "outside" facilities proceeds smoothly and with appropriate sensitivity.

3. Because of the importance of the English language in Australia, provisions for the support in learning English as a second language should be made for all children.

In conclusion, the QTU believes -

- (a) Refugee detention centres should be immediately closed.
- (b) Should the closure of detention centres not occur, the Federal Government should ensure that all the rights of the children under the "Convention on the Rights of the Child(1989)" are protected.
- (c) These rights can only be protected when Governments of "Good will" establish adequately funded programs that cater for the emotional, physical and intellectual well being of the children in detention.
- (d) Educational facilities, designed and staffed to cater for all development needs of the children in these centre be established as a matter of urgency.

Other instances where the sovereign power of a state has been allowed to breach international human rights obligations unabated can be seen in relation to:

- **Mandatory sentencing legislation passed in W.A. and the N.T.** An extract from LIAC Hot Topic 3 best summarises the issues involved in this domestic matter:

(ii) International

Human rights violations in East Timor at the hands of local militia groups with the tacit support of elements of Indonesia's military during East Timor's petition for independence which was the final chapter in a litany of human rights abuses during Indonesia's occupation and annexation of East Timor in the 1960s. The international community failed to intervene in what Indonesia termed the internal affairs of a sovereign state. (An in depth answer is not covered in this handout).

Human rights violations in relation to the detention of suspected Al Qada terrorists.

SECTION II: FOCUS STUDY – CRIME

QUESTION 17 (25 MARKS)

(a) (4 Marks)

What factors would the judge consider when deciding on Sam's sentence?

Answer

Noting that the question specifically focuses on Sam; a sample answer may include a reference to the following:

- The nature of the offence itself. Statutory offences have maximum sentences attached to them and are used as a guide to judges in the sentencing process. **The offence of sexual assault is a particularly serious matter.** Sam would probably be charged under s.61I or s.61J of the Crimes Act 1900 (NSW) (see below) which carries a maximum sentence of 14 and 20 years respectively. The judge is not obliged to impose such a sentence but has a discretion to order a lesser penalty if the circumstances require. The brutality of the assault is a matter that feeds into the nature of the offence.
- Whether the offender has any prior convictions. In this case **Sam's lack of prior convictions** would work in his favour but by itself may not be determinative of the actual sentence/penalty given the serious nature of the offence.
- The **offender's good character** would be regarded in the same light as no prior record.
- The offender's age. In the current matter **Sam is 40 years**; generally the younger the offender the more concerned are the court's to consider the issue of rehabilitation and impose a more lenient sentence.
- The age of the victim is a matter to be considered. In the current matter the **victim is quite old at 90 years** and particularly vulnerable. This would work against the offender when considering what sentence should be imposed. It would be akin to an 'aggravating factor'.
- The fact that **the offence is the third such similar attack in the past year** may require the judge to impose a harsher penalty for as a deterrent. (see below s.21A (f))

The above factors and further ones can be seen from an extract of the contents page of the Crimes (Sentencing Procedure) Act; Part 3 and in particular s.21A. Other such factors include **Victim's Impact Statements, Guideline Judgments of the NSW Court of Criminal Appeal and pleas of guilty at an early stage of proceedings.**

CRIMES (SENTENCING PROCEDURE) ACT 1999 (NSW)

Part 3 Sentencing procedures generally

Division 1 General

- 21 General power to reduce penalties
- 21A General sentencing principles**
- 22 Guilty plea to be taken into account
- 22A Power to reduce penalties for pre-trial disclosure
- 23 Power to reduce penalties for assistance provided to law enforcement authorities
- 24 Court to take other matters into account
- 25 Local Court not to impose certain penalties if offender is absent

Division 2 Victim impact statements

- 26 Definitions
- 27 Application of Division
- 28 When victim impact statements may be received and considered
- 29 Victim impact statements discretionary
- 30 Formal requirements for victim impact statements

Division 3 Taking further offences into account

- 31 Definitions
- 32 Prosecutor may file list of additional charges
- 33 Outstanding charges may be taken into account
- 34 Ancillary orders relating to offences taken into account
- 35 Consequences of taking offences into account

Division 4 Sentencing guidelines

- 36 Definitions
- 37 Guideline judgments on application of Attorney General
- 37A Guideline judgments on own motion
- 37B Review, variation and revocation of guideline judgments

- 38 Senior Public Defender may intervene
- 39 Director of Public Prosecutions may intervene
- 39A Attorney General may intervene
- 40 Discretion of Court preserved
- 41 Rules of court
- 42 Use of evidence in giving guideline judgments
- 42A Relationship of guidelines and other sentencing matters

SECT 21A

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.

Crimes Act 1900 No 40

61I Sexual assault

Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years.

61J Aggravated sexual assault

(1) Any person who has sexual intercourse with another person without the consent of the other person and in circumstances of aggravation and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 20 years.

(2) In this section, circumstances of aggravation means circumstances in which:

- (a) at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or
- (b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or
- (c) the alleged offender is in the company of another person or persons, or
- (d) the alleged victim is under the age of 16 years, or
- (e) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or
- (f) the alleged victim has a serious physical disability, or
- (g) the alleged victim has a serious intellectual disability.

Marking Criteria	Marks
<ul style="list-style-type: none">• Makes a comprehensive list of relevant factors to be taken into account when determining sentencing.• Elaborates on the effect of such factors in such manner as to indicate a solid knowledge of their operation with respect to sentencing.• Incorporates the hypothetical factual scenario involving Sam in responding to the question	3 – 4
<ul style="list-style-type: none">• Makes a list of relevant factors to be taken into account when determining sentencing and/or• Makes a generalised comment about the role of factors with respect to sentencing options	2
<ul style="list-style-type: none">• Lists some factors to be taken into account when determining sentencing or• Makes a generalised comment about the role of factors with respect to sentencing options	1

(b) (4 Marks)

Outline the range of sentences appropriate for Sam’s offence

Answer

This question asks the student to list the different types of sentences/penalties available to a justice in summary fashion and then requires an outline of what would be appropriate in Sam’s case; noting that the question requires candidates to assume that Sam is already convicted.

Below is a list of alternate punishments that may be available to a judge when determining an appropriate penalty:

CRIMES (SENTENCING PROCEDURE) ACT (NSW)

PART 2 PENALTIES THAT MAY BE IMPOSED

Division 1 General

- 4 Penalties generally
- 5 Penalties of imprisonment

Division 2 Alternatives to full-time detention

- 6 Periodic detention
- 7 Home detention

Division 3 Non-custodial alternatives

- 8 Community service orders
- 9 Good behaviour bonds
- 10 Dismissal of charges and conditional discharge of offender
- 11 Deferral of sentencing for rehabilitation and other purposes
- 12 Suspended sentences
- 13 Community service orders and good behaviour bonds to be alternative penalties only

Division 4 Fines

- 14 Fines as an additional penalty to good behaviour bond
- 15 Fines as an additional or alternative penalty to imprisonment for offences dealt with on indictment
- 16 Fines for bodies corporate for offences punishable by imprisonment only
- 17 Penalty units

As the question focuses on Sam and given that the offence is serious, it would be more than likely that Sam would be liable to face a custodial sentence of some duration and that 'guideline judgments' for this type of offence would preclude an order of a non-custodial alternative. The question then becomes a matter of duration. Two cases have been extracted below to indicate the likely sentencing outcome.

Regina v Dayeian [2000] NSWCCA 348 (29 August 2000)

NEW SOUTH WALES CRIMINAL COURT OF APPEAL

JUDGMENT OF: Mason P Levine J Greg James J

LOWER COURT JURISDICTION: District Court

LOWER COURT FILE NUMBER(S): 98/21/0354

LOWER COURT JUDICIAL OFFICER: Ford ADCJ

CATCHWORDS:

Criminal law - **Crimes Act 1900 s 61I** - sexual intercourse without consent - husband/wife - severity - special circumstances - sentence appropriate

DECISION: Leave to appeal granted. Appeal dismissed.

REGINA v JOHN DAYEIAN

1 **LEVINE J:** The applicant seeks leave to appeal against the asserted severity of the sentence imposed upon him by his Honour Acting Judge Ford at the Campbelltown District Court on 12 November 1999.

2 The applicant had pleaded not guilty to one count of sexual intercourse without consent (s 61I of the Crimes Act 1900) and not guilty to three counts of sexual intercourse without consent in circumstances of aggravation (s 61J).

3 He was found guilty by the jury of the charge in the first count. With respect to the other three counts the jury did not find acts of aggravation, but found the applicant guilty of the available alternative under section 61I

4 Thus the applicant stood to be sentenced in relation to four jury findings of guilt in relation to four counts, each carrying the maximum of fourteen years penal servitude as then provided.

5 It was in respect of the fourth count in the indictment that the applicant was sentenced to a minimum term of two years penal servitude to commence on 12 November 1999 and to expire on 11 November 2001 and an additional term of two years. With respect to each of the other counts, a fixed term of twelve months to be served concurrently was imposed.

6 The jury's verdict clearly reflected the failure of the Crown to satisfy that tribunal beyond reasonable doubt of the attendant circumstances of aggravation in respect of the three counts under section 61J.

7 The four acts of sexual intercourse were digital. The first count relating to anal intercourse in that sense, the remaining three counts vaginal. The applicant and the complainant were husband and wife. The acts of sexual intercourse took place over a period of about five months between September 1997

and March 1998. I do not consider it necessary to elucidate further the facts of each incident, save to remark that perhaps in the scheme of things, if I might use that phrase in a non-technical sense, an idiosyncratic predilection on the part of the applicant in relation to sexual conduct was connected with the acts the subject of the first count.

8 The grounds of appeal are that the sentence imposed by his Honour was manifestly excessive, and outside of any appropriate range.

9 It has been submitted, in a two-pronged attack as it were, on the sentence that his Honour, without explanation, seized upon the fourth count to impose the four year sentence structured, as I have indicated. In reality, it was submitted, the conduct founding the verdict on that count was no different to that in respect of the second and third, though is different from the first by reason of anatomical considerations.

10 The explanation, in my view, for the imposition of the two plus two years sentence is implicit when one reads his Honour's remarks on sentence. It was founded upon his Honour, in my view, quite properly in the circumstances (at the conclusion of the trial over which he had presided); sentencing this applicant for a series of four separate acts committed over a period of five months. The absence of any express indication by his Honour as to why the fourth count was selected, in my view, exposes no error in procedure, principle or in due course substantively on the matters attending sentence. His Honour, in effect, can be seen to have imposed a sentence reflecting a view of the criminality involved in the four offences of which the applicant had been found guilty and had chosen that which was the most recent in time, the last in the series.

11 The second attack made upon the sentence rests upon what is asserted to be his Honour not having taken into account material said to have been available to him on the subject of "*special circumstances*". It was submitted that in that part of his Honour's remarks on sentence where he refers to special circumstances, he deals with but few of what are said to have been the many components of such circumstances.

12 The relevant part of his Honour's remarks on sentence are, true enough, brief and appear on page four, where his Honour says:

"Special circumstances arise because, in my view, the prisoner would require assistance when he is released back into the community to overcome or try to keep in check his tendency to drink too much and resort to other matters of allaying depression".

13 That part of his Honour's remarks on sentence follows upon his Honour's remarks at page two where he states,

"It has been pointed out to me that the prisoner suffers quite significant defects, not only as a matter of personality, but also in relation to social contacts and intercourse. I do not doubt that the over-indulgence of intoxicating liquor did lead to the commission of these offences. Dr Hooper regards Mr Dayeian as having an alcohol dependence disorder. He also, according to Dr Hooper, had an adjustment disorder reactive depression relating to charges made against him and it is quite possible that he had suicidal tendencies".

14 Speaking for myself, bearing in mind those remarks at page two, the brief nature of his Honour's comments at page four, on any reasonable view, can be taken to have encapsulated, embraced and included the matters to which he referred on page two. It is nonetheless still contended that his Honour overlooked a catalogue of characteristics on the subject of special circumstances ranging from very poor education, parenting difficulties, addictive personality, difficulty in human relationships, unemployment, and what is said to be linguistic impairment or language impairment. But when one takes a view of what his Honour said and of the material his Honour undoubtedly had before him made up of not only Dr Hooper's report, the psychologist's report and the pre-sentence report, his Honour, with some economy of language, nonetheless can still, in my view, be taken to have turned his mind to each of those matters to which Mr Radojev has referred.

15 It is clear to me that his Honour took into account the objective seriousness of these four offences which this Court has described, time and again, as **acts of violence, serious acts of violence**, and acts of humiliation. His Honour clearly took into account that this applicant had no criminal antecedents. His Honour rejected, and properly so in my view, submissions made by trial counsel that the case fell within "*exceptional*" circumstances, thus calling for the dispensation of the requirement for a custodial sentence.

16 In the context of having rejected the submission as to "*exceptional*" circumstances, his Honour appears to me, as I have said, to have made a finding as to available special circumstances and conducted the sentencing exercise that reflected the proper measuring of the objective seriousness of those offences of which the applicant had been found guilty and the subjective circumstances attending the applicant. His Honour arrived at a sentence which cannot be impugned on either of the bases advanced for the applicant, and which viewed in all the circumstances could not be said to be manifestly excessive in the sense generally understood.

17 It is not a light sentence, but as far as I am concerned, no error having been exposed in the process at which his Honour arrived at it, no basis for intervention by this Court has been established. The relevant authority as to the objective seriousness of the offence is clear: ***Regina v Hartikainen*** (unreported CCA, 8 June 1993) being the judgment of the Chief Justice (see p 3). The authorities in relation to the rejection of "*exceptional*" circumstances also being clear ***Regina v May [1999] NSWCCA 40*** and see also ***Regina v Crisologo*** (1997) 99 ACR 178 at 191.

This case has had an appellate history insofar as this is the second bench to which it has come. Also the unusual and, in my view, quite sad and peculiar facts attending the verdicts of guilty warrant the grant of leave. However, as I have said, nothing warrants appellate intervention. I would propose therefore that leave be granted and that the appeal be dismissed.

18 **MASON P:** I agree.

19 **GREG JAMES J:** I do also.

20 **MASON P:** The orders of the Court will be as indicated.

R v SMITH [2000] NSWCCA 148 (10 April 2000)

NEW SOUTH WALES CRIMINAL COURT OF APPEAL

LOWER COURT JURISDICTION: District Court

LOWER COURT FILE NUMBER(S): 98/51/0117

LOWER COURT JUDICIAL OFFICER: Twigg DCJ

DECISION:

Leave to appeal granted

That that part of His Honour's sentence as commenced "the parole period is continued" be quashed but that otherwise the appeal is dismissed

JUDGMENT:

HULME J

DOWD J

REGINA -v Timothy Edward SMITH
JUDGMENT

1 **HULME J:** On 17th February 1999 the above-named applicant for leave to appeal pleaded guilty to a charge that on 5 May 1998 he had sexual intercourse with the complainant without the consent of the complainant and knowing that she was not consenting thereto. On the following day Twigg QC DCJ sentenced the appellant to penal servitude for a minimum term of four and a half years, commencing 15 May 1998, the day after the appellant's arrest, together with an additional term of two and a half years commencing on 15 November 2002. His Honour found special circumstances in the need for the prisoner's rehabilitation.

2 The grounds of appeal are:

"(1) That the learned sentencing Judge erred in assessing the objective seriousness of the offence at an inappropriate level of gravity.

(2) That the learned sentencing Judge erred in selecting a starting point for calculation of the sentence which was too high.

(3) That the learned sentencing Judge erred in taking into account facts which were not properly before the court.

(4) That the learned sentencing Judge gave inadequate weight to subjective factors which included:

(a) the value of the applicant's plea in the particular circumstances of the Crown case;

(b) general and specific disabilities flowing from the applicant's aboriginality;

(c) contrition, insight and prospects of rehabilitation;

(5) Having regard to all of the above and as a result of errors impacting upon the exercise of the sentencing discretion, the sentence was manifestly excessive."

3 It is convenient to quote what his Honour said concerning the offence and other matters. Under a heading "The Facts" his Honour said:

"The facts show that Mr Smith had been drinking extensively, as he conceded when he gave evidence on sentence. During the night of Monday 4 May 1998 the victim was accosted by the offender and dragged to the laundry where the victim got away and ran out of the front door.

On the following day in the morning of Tuesday 5 May 1998 the victim was in the lounge room and the offender was there also. Others had left the house leaving the victim, the offender and the owner of the house there. They watched a midday movie and later when the victim went to the toilet the owner of the house was asleep on the lounge. When the victim left the toilet the offender was standing near the lounge room door and thereafter the offence was committed.

The offender inserted his penis into the victim's vagina without her consent and he did other things to her and she left the room and went to the lounge room where the owner of the house was. Others returned and she made immediate complaint and...

Although in her statement the victim refers to the use of a knife the circumstances surrounding that lead me to the conclusion that I should not take into account any suggestion that there was a knife used..."

4 Under a heading "Objective Factors" his Honour also said:

"It is clear that there was a situation for this victim which was harrowing to her and caused her extensive embarrassment and harm. I can understand her horror and fear and I can understand the effect that it must have had on her by this attack. There must be given to the community a general deterrence to avoid these sorts of matters occurring".

When dealing with the subjective factors, his Honour observed that the appellant was an aboriginal and had had difficulty with alcohol since young. The appellant himself referred graphically to this:

"Well I live where my family is and like people I went to school with and all that and you seem to be - you're in the same you know surroundings all the time and you know, the old saying is you can lead a horse to water, you can't make it drink, but if you're out there amongst them like, they're doing it everyday...well I sort of find that I've got to joint them sort of virtually because it is always there, the grog, and you need to get away from the area where you come from to...get off the grog."

Asked whether, among people he had known all his life, pressure was applied he said:

"Well, it's the old saying, you know, like if you're not drinking because you want to keep your marriage going and that, they're all singing out, "you're under the thumb and the woman controls you" and things like that... You get in a lot of pressure that way and if the boys are calling on you to come...have a drink and you know you sort of - you just sort of can't break the..."

5 On the other hand, there was evidence in a pre-sentence report to which his Honour specifically referred, that the applicant had failed to keep appointments on at least two occasions with the Macquarie Drug and Alcohol Service. In that report the author observed that the Probation Service records indicate that at any time the appellant was not drinking, his cooperation with the Probation and Parole officers was excellent but that the appellant's problems with alcohol were of major proportion. The report doubted the appellant's motivation to reform in that area.

6 The report also went on under the heading of "Alcohol and Other Drugs" to refer to the fact that the appellant indicated that he was severely affected by alcohol on each occasion to which the report refers, adding that such had been the case at each time he had offended in the past.

7 It may be inferred that it was these references which in part led his Honour, after saying that he had the guidelines stated by Wood CJ at CL in **Stanley Edward Fernando** (1994) 76 A Crim R 58 ringing in his ears, to observe that there was also to be balanced "other community factors, particularly those who do nothing to take into account alcohol as their problem".

8 Under the heading "Conclusion", his Honour referred to the circumstance of the offence as very serious, although not at the upper end of the range. He said the prisoner was entitled to a substantial discount for his plea, which his Honour found had occurred at the earliest opportunity. His Honour also said he took into account the appellant's contrition and remorse but there was a need to have regard to both general and particular deterrence and an extensive record which the appellant had, including a similar offence for which the appellant had been sentenced to three and a half years imprisonment in April 1992.

9 To appreciate some of the grounds of appeal, it is necessary to have regard to some further matters. Not only did the complainant allege the applicant had threatened her with a knife, she also had said the applicant had put fingers into her anus and committed cunnilingus before having penile-vaginal intercourse.

10 Each of these activities is, or is capable of amounting to, sexual intercourse as that is defined in s 61H of the Crimes Act 1900 and initially the Crown had charged the applicant with three counts of aggravated sexual intercourse without consent. However, ultimately a fresh indictment charging the applicant with only one offence was preferred. Regrettably there was no specific identification of which of the acts was relied on by the Crown as the subject of the charge. It may, I think, be inferred that it was the acts of penile-vaginal intercourse but at least in the absence of some agreement - and there was none - it was not appropriate to regard the charge as embracing all of the acts of penetration which the complainant had alleged.

11 There was also further evidence of events during the previous night. In her statement the complainant said that after she escaped from the applicant in the laundry she was again grabbed by him near the front door before again escaping. The applicant gave evidence that consensual sexual intercourse had occurred in the laundry.

12 I turn to the grounds of appeal. It is convenient firstly to deal with ground 3. It is submitted his Honour's reference to the plaintiff being "accosted and dragged to the laundry" on the previous night and the statement that "he did other things to her" indicates that his Honour took into account against the applicant matters he was not entitled to.

13 The reference to the applicant accosting the complainant on the previous night was in the course of an abbreviated chronology of events. So irrelevant was that incident to the applicant's criminality on the following day that I would not readily infer that his Honour took it into account in assessing the penalty he imposed on the applicant. Particularly is this so in light of the fact that his Honour did not advert expressly to the difference between the complainant's account of events in the laundry and that of the applicant.

14 On the other hand, the reference to doing "other things" occurs in the only sentence in which his Honour described the actual offence and it does not seem to me that the same approach can be taken as readily. Furthermore, I am unable to see in the complainant's statement, reference to any matters of significance occurring in the bedroom other than the presence of and threats with a knife and the incidents of other sexual intercourse to which I have referred. In those circumstances, it seems to me impossible to avoid the conclusion that his Honour's reference to "other things" was a reference to the anal penetration and cunnilingus.

15 There was, of course, no reason why in an account of what occurred his Honour should not have referred to these matters. However as, if they occurred, they constituted further offences committed by the applicant and were not the subject of any charge for which the applicant stood for sentence, they could not, at least in the absence of agreement, be taken into account in determining the sentence to be imposed for the offence which was charged. The difficulty lies in determining whether his Honour did so take them into account. His Honour did not say whether he did or did not and the matter must be judged solely by the context in which the "other things" are mentioned. Although the matter is not clear, I think the more likely inference is that his Honour did take those matters into account. He should not have done so **R v De Simoni** (1981) 147 CLR 383

16 There is another observation of his Honour which is also of concern and that is his reference as to the impact of the offence on the complainant. While the courts can and do take judicial notice of the likely impact of offences on victims of them, not all victims are affected the same way and the criminal onus of proof imposes constraints on how far a court is entitled to go in a particular case or in reference to a particular victim. His Honour's references under the heading "Objective Factors" to "her extensive embarrassment and harm" and "her horror" are expressed in terms which would require specific evidence to justify. There does not seem to have been any such evidence and in this respect also his Honour seems to have taken into account matters he was not entitled to.

17 But for these matters, I would have found no error in his Honour's sentence. The offence to which the applicant pleaded guilty carries, pursuant to s 61I of the Crimes Act, a maximum penalty of 14 years imprisonment. The full term of 7 years imposed on the applicant is but half

that and it is his second offence. The leniency extended to offenders for first offences or the first

Offence of an uncharacteristic type has a corollary in that repeat offenders must expect a significantly greater sentence for further or subsequent sentences. Furthermore, although his Honour did not refer to the fact and presumably did not take it into account against the applicant, the applicant was subject to a recognisance at the time, a matter of significant aggravation.

18 In stressing the view which I have, I do not neglect the submission made on behalf of the applicant to the effect that his Honour did not give adequate attention to the principles for which **Fernando's** case is commonly cited. I disagree. Although his Honour's reference to that case was slight, it is clear that his Honour was fully conscious of the applicant's aboriginality and of the impact, particularly in terms of drinking, of that aboriginality upon him. It was not, I think, necessary for his Honour to go in any more detail than he did to this topic. I see no reason why one should not treat his Honour's reference to **Fernando's** case as meaning exactly what it said.

19 Given his Honour's errors, the question before this court is whether "some other sentence whether more or less severe is warranted in law and should have been passed" (see Criminal Appeal Acts 63). In my view this question should be answered in the negative. **The fact that the offence was committed on recognisance and it was the applicant's second offence of rape, means that a total sentence of not less than 7 years, as I said, half the maximum provided for, was appropriate.**

20 Subject to one matter, I would grant leave to appeal but dismiss the appeal.

21 The one matter to which I have referred was an order by his Honour to the effect that the parole period to which he had referred earlier in his remarks was conditioned in a number of respects. Given the terms of s 24 of the Sentencing Act, and the length of the non-parole period, his Honour had no power to impose conditions on the grant of parole. That was a matter for the Parole Board.

22 In the result, I would propose that leave to appeal be given, that that part of his Honour's sentence as commenced "the parole period is conditioned" be quashed but that otherwise the appeal be dismissed.

23 DOWD J: I agree with his Honour the presiding Judge's reasons for the proposed orders and the proposed orders.

24 HULME J: The orders of the court will be as I have stated.

Marking Criteria	Marks
Makes a comprehensive list of penalty options commenting upon appropriateness with respect to the factual scenario in Sam's case and the likely sentence outcome.	3 – 4
Makes a list of some penalty options and gives a general comment upon appropriateness.	2
Mentions a limited number of penalty options with little or no analysis of the penalty and its appropriateness in relation to the particular factual scenario in Sam's case.	1

(c) (8 Marks)

Explain how these sentences would reflect the *objectives of punishment*.

Answer

The objectives of punishment include:

- **Reform/rehabilitation** of the offender: The purpose of such an objective is to change the behaviour of the offender for the future in order to reduce the commission of further offences and reduce recidivism.
- **Deterrence:** This objective aims at discouraging people from committing certain crimes. General Deterrence refers to the aim of deterring society at large from committing an offence by the imposition of a harsh penalty. Specific Deterrence refers to the aim of deterring a particular person/the defendant from committing the same offence again by the imposition of a harsh penalty.
- **Retribution:** *Lex talionis* (an eye for an eye); this objective aims at some restorative justice to the victim/victims family by way of revenge/pay back; strictly punitive in nature. To some extent, restitution falls within this category of objective as it promotes restorative justice.
- **Incapacitation:** This is the concept of making an offender incapable of committing further offences by detaining them in some form of incarceration and thereby protects the community.

While each objective is ideologically specific, each of the various punishments handed down by a court can incorporate more than one objective.

As a general rule the harsher the punishment the less likely it meets the rehabilitation objective unless it is coupled with some form of counseling or therapy to solve the underlying problem.

Mode of Punishment	Deterrent Objective operates	Rehabilitation Objective operates	Retribution Objective operates	Incapacitation Objective operates	Restitution Operates
Prison sentence	✓	Unlikely unless combined with other programmes	To a large extent but note the State administers the punishment and the punishment is not identical to the crime.	✓	No, as the offender does not compensate the victim directly.
Home detention	✓	Unlikely unless combined with other programmes	To a large extent but note the State administers the punishment and the punishment is not identical to the crime.	✓	No, as the offender does not compensate the victim directly.
Good behaviour bond	✓	✓	To a large extent but note the State administers the	No, as offender is not detained	No, as the offender does not

			punishment and the punishment is not identical to the crime.		compensate the victim directly.
Dismissal of charges and conditional discharge of offender	Not to a great extent	✓	Not to a large extent	No, as offender is not detained	No, as the offender does not compensate the victim directly.
Mode of Punishment	Deterrent Objective operates	Rehabilitation Objective operates	Retribution Objective operates	Incapacitation Objective operates	Restitution Objective operates
Deferral of sentencing for rehabilitation purposes	No	✓	Not to a large extent	No, as offender is not detained	No, as the offender does not compensate the victim directly.
Suspended sentences	Not to a great extent	✓	Not to a large extent	No, as offender is not detained	No, as the offender does not compensate the victim directly.
Community service orders	✓	✓	To a large extent but note the State administers the punishment and the punishment is not identical to the crime.	No, as offender is not detained	No, as the offender does not compensate the victim directly. But yes in the sense of restorative justice to the community as a whole.
Fines	✓	✓	To a large extent but note the State administers the punishment and the punishment is not identical to the crime.	No, as offender is not detained	No, as the offender does not compensate the victim directly.
Periodic detention	✓	✓	To a large extent but note the State administers the punishment and the punishment is not identical to the crime.	Not to a great extent, as offender at liberty for periods	No, as the offender does not compensate the victim directly.

Note: that this question by implication connects with the previous Question (b) in that it refers to how sentences appropriate to Sam’s offence reflect the objectives of punishment; in which case candidates should have given considerable attention to custodial sentences when considering objectives of punishment.

Marking Criteria	Marks
Identifies the full range of punishment objectives and critically analyses the extent to which a variety of sentences reflect or give effect to those objectives in a manner that gives emphasis to the objectives of sentencing options peculiar to Sam.	7-8
Identifies a range of punishment objectives and gives a reasonable analysis of the extent to which a variety of sentences reflect or give effect to those objectives in a manner that gives some emphasis to the objectives of sentencing options peculiar to Sam.	5-6
Identifies some punishment objectives and gives a basic analysis of the extent to which a variety of sentences reflect or give effect to those objectives in a manner that gives/fails to give some emphasis to the objectives of sentencing options peculiar to Sam.	3-4
Identifies a limited number of punishment objectives and gives a limited analysis/no analysis of the extent to which a variety of sentences reflect or give effect to those objectives in a manner that gives/fails to give some emphasis to the objectives of sentencing options peculiar to Sam.	1-2

(d) (9 Marks)

Evaluate the effectiveness of the legal system in achieving justice for:

- **individuals; and**
 - **society**
- when determining appropriate sentences.**

Answer

This question does not require a reference to Sam’s case but invites the student to comment on the effectiveness of the sentencing system in relation to all cases in the criminal system in all jurisdictions.

There are a number of fundamental features of the sentencing system which contribute to equitable and just results for individuals and society as a whole; they include:

- Existence of discretionary sentencing powers enables justices to consider all relevant circumstances which may vary from case to case and deliver sentences appropriate to the peculiarities of each offence. The benefits of this discretion being absent under a ‘mandatory sentencing regime’.
- Existence of the doctrine of precedence manifested through the system of ‘guideline judgments’ on appropriate sentencing ranges for particular crimes delivered by the NSW Supreme Court of Appeal under the **Crimes (Sentencing Procedure) Act** ensures the delivery of consistent penalties across offenders.
- A variety of sentencing options that allow orders to be tailor made to the particular offender.
- Legal reform commencing with the **Sentencing Act 1989 (NSW)** and permeating through to the **Crimes (Sentencing Procedure) Act** which introduced a sentencing regime that reflected community sentiment with respect to realistic compliance with head sentences.

- Existence of legislation that provides for the submission of victim impact statements allows for a more holistic assessment of the factors pertaining to the crime, including the victim in the process and fulfilling the objective of delivering restorative justice.

There are however, a number of systemic features which limit the delivery of just and equitable sentence outcomes for society and individuals and so detract from effectiveness; they include:

- On a jurisprudential level, the arbitrary method society has used in determining the appropriate penalty for the range of offences. There is no exact science for calculating what sentence is required to ensure restorative justice to society. The recent sentence of 55 years imprisonment in relation to an offender involved in a string of sexual assaults is higher than that given in convicted murder cases. The courts and parliament are unable to compute what tariff needs to be exacted from an offender to restore the philosophical balance of restorative justice. Whilst one person may think a particular sentence is manifestly unfair another may think is just an equitable.
- The fact that although justices have discretion in sentencing, they are increasingly under implied pressure from the media and politicians to deliver tougher sentences in an environment where debate on appropriate sentencing options is driven by political opportunism and arguably uninformed public opinion.
- The fact that victim impact statements have met with some resistance by members of the judiciary.
- The fact that budgetary expenditure and political will has been lacking with respect to funding for rehabilitation programmes. This has diminished the courts ability to order punishments that deliver on the reform objective of sentencing.
- (Although not an instance of ineffectiveness concerning the determination of sentences) the existence of high rates of recidivism and burgeoning prison populations indicates that the sentences being delivered are not delivering on the deterrent objective.

Marking Criteria	Marks
Identifies criteria against which effectiveness can be evaluated, critically examines the sentencing process and provides a comprehensive range of relevant examples / instances / factors / cases to support the evaluation.	7-9
Identifies some criteria against which effectiveness can be evaluated, examines the sentencing process and provides some examples / instances / factors / cases to support the evaluation.	4-6
Examines the sentencing process and provides some examples / instances / factors / cases to support the evaluation.	1-3

EBE LEGAL STUDIES 2007. Question 19a Optional Focus Study—FAMILY.

Evaluate the effectiveness of the legal system in addressing the rights of the child in family law.

<ul style="list-style-type: none"> • Makes a sound judgement, based on criteria, relating to who is a child, under what circumstances a person is considered to be a child, legally / morally / circumstantially / socially, according to current Family Law Provisions – domestically and internationally • Provides a concise and accurate description of at least 4 legal issues that relate to the rights of a child • Provides a concise and accurate description of the appropriate legislation for protection of children’s rights • Makes a sound judgement, based on criteria, as to the effectiveness of the law, in terms of addressing the rights of the child, as demonstrated in the current domestic Family Law Act • Synthesises relevant legislation and / or cases and / or media reports into the response • Presents a sustained, logical and well structured answer using relevant terminology and concepts 	21-25 marks
<ul style="list-style-type: none"> • Makes a judgement, based on some criteria, relating to who is a child, and under what circumstances a person is considered to be a child. Makes reference to Family Law provisions • Provides at least 3 descriptions of legal issues which concern the rights of a child • Provides a description of the appropriate legislation • Makes a judgement, based on some criteria, as to the effectiveness of the law, in addressing the rights of the child, according to the current Family Law Act. • Integrates some relevant legislation and/or cases and/or media reports in the response • Presents a sustained, logical and well structured answer, using relevant legal terminology and concepts 	16-20 marks
<ul style="list-style-type: none"> • Makes statements about the rights of the child. Identifies a “child” • Describes some legal issues which concern the rights of the child • Describes/lists relevant legislation pertaining to the child. • Attempts to evaluate the effectiveness of the law, in relation to the child • Uses some legislation/cases/media reports in the response • Presents a structured answer, with some appropriate terminology 	11-15 marks
<ul style="list-style-type: none"> • Makes reference to the rights of the child • Lists some legal issues facing children • Includes some relevant legislation/cases/media reports • Makes basic assumptions about the effectiveness of the law • Uses some appropriate legal information, terminology and concepts • Presents an answer 	6-10 marks
<ul style="list-style-type: none"> • Makes general statements about the rights of the child • Makes some reference to legislation 	1-5 marks

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| <ul style="list-style-type: none"> • Makes limited reference to legal information / terms | |
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EBE LEGAL STUDIES 2007. Question 19 b. Optional Focus Study –FAMILY

With reference to the legal system, assess the effectiveness of the law, in achieving justice for all individuals in the breakdown of a marriage.

<ul style="list-style-type: none"> • Makes a sound judgement, based on criteria, relating to what is justice, in terms of family members in the event of a marriage breakdown. Identifies individuals affected, and their access to the law • Provides a concise and accurate description of appropriate legislation for delivering justice • Provides a concise and accurate description of at least 3 affected parties, and what the law can offer them in their pursuit of justice • Makes a sound judgement, based on criteria, as to the effectiveness of the law, in relation to that pursuit • Synthesises relevant legislation and/or cases and/or media reports into the response • Presents a sustained, logical and well structured answer, using relevant legal terminology and concepts 	21-25 marks
<ul style="list-style-type: none"> • Makes a judgement, based on some criteria, relating to what is justice, in terms of family members in the event of a marriage breakdown. Identifies individuals affected, and their access to the law • Provides descriptions of appropriate legislation • Provides an accurate description of two affected parties, and what the law can offer them in their pursuit of justice • Makes a judgement, based on some criteria, as to the effectiveness of the law, in relation to that pursuit • Integrates some relevant legislation and/or cases and/or media reports into the response • Presents a sustained, logical and well structured answer using relevant legal terminology and concepts 	16-20 marks
<ul style="list-style-type: none"> • Makes statements about justice, and identifies family members who may be affected by a marriage breakdown • Describes/lists some relevant legislation dealing with marriage • Attempts to evaluate the effectiveness of this legislation • Uses some legislation / cases / media reports in the response • Presents a structured answer with some appropriate terminology 	11-15 marks
<ul style="list-style-type: none"> • Makes reference to justice, and lists individuals involved in a marriage breakdown • Lists some legal issues involved in marriage breakdown • Makes basic assumptions about the effectiveness of the law • Includes some relevant legislation / cases / media reports • Presents an answer, with some appropriate concepts and terms 	6-10 marks
<ul style="list-style-type: none"> • Makes a general statement about justice and family members 	1-5

<ul style="list-style-type: none"> • Makes some reference to legislation pertaining to marriage breakdown • Makes limited reference to legal information / terms 	marks
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EBE LEGAL STUDIES 2007. Q20 a) Focus Study- GLOBAL ENVIRONMENT

Evaluate the effectiveness of the legal system in addressing the implementation of international agreements on the environment.

<ul style="list-style-type: none"> • Makes a sound judgement, based on criteria, relating to the mechanisms of international agreement and enforcement • Provides a concise, balanced and accurate understanding of at least 3 international agreements on the environment • Makes a sound judgement, based on criteria, as to the effectiveness of the legal system in addressing implementation of international agreements • Synthesises relevant legislation and/or cases and/or media reports into the response • Presents a sustained, logical and well structured answer, using relevant terminology and concepts 	21-25 marks
<ul style="list-style-type: none"> • Makes a judgement, based on some criteria, relating to the mechanisms of international agreement and enforcement • Provides an accurate understanding of at least 3 international agreements on the environment • Makes a judgement, based on some criteria, as to the effectiveness of the legal system in addressing implementation of international agreements • Integrates relevant legislation and/or cases and/or media reports into the response • Presents a sustained, logical and well structured answer, using relevant legal terminology and concepts 	16-20 marks
<ul style="list-style-type: none"> • Makes statements about the mechanisms of international agreement and enforcement • Describes/lists some international agreements on the environment • Attempts to evaluate the effectiveness of the legal system in addressing implementation of international agreements • Uses some legislation / cases / media reports • Presents a structured answer, using some legal terminology and concepts 	11-15 marks
<ul style="list-style-type: none"> • Makes reference to the mechanisms of international agreement and enforcement • Mentions some international agreements on the environment • Makes basic assumptions about the effectiveness of the legal system in addressing international agreements 	6-10 marks

<ul style="list-style-type: none"> • Includes some legislation /cases / media reports • Uses some legal information, terms and concepts 	
<ul style="list-style-type: none"> • Makes a general statement about international agreements • Makes some reference to legislation pertaining to the international environment • Makes limited use of legal information / terms 	1-5 marks

EBE LEGAL STUDIES 2007. Q20 b) Focus Study –GLOBAL ENVIRONMENT

With reference to the legal system, assess the effectiveness of the law in achieving justice for individuals, society and nation states when implementing international agreements.

<ul style="list-style-type: none"> • Makes a sound judgement, based on criteria, relating to what is justice, in terms of individuals, society and nation states in the implementation and enforcement of international agreements • Provides a concise and accurate description of at least 3 international agreements and the effects of those on individuals, society and nation states – be these political, social, environmental or others • Provides a concise and accurate understanding of the mechanisms for achieving justice, internationally • Makes a sound judgement, based on criteria, as to the effectiveness of the legal system in providing justice for all 3 parties, in the implementation and enforcement of such agreements • Synthesises relevant legislation and/or cases and/or media reports into the response • Presents a sustained, logical and well structured answer, using relevant legal terminology and concepts 	21-25 marks
<ul style="list-style-type: none"> • Makes a judgement, based on criteria, relating to what is justice, in terms of individuals, society and nation states, in the implementation of international agreements • Provides an accurate description of 3 international agreements, and the effects of those, on individuals, society and nation states • Provides an accurate understanding of the mechanisms fo achieving justice, internationally • Makes a judgement, based on some criteria, as to the effectiveness of the legal system in providing justice for all 3 parties, in the implementation of international agreements • Integrates relevant legislation and/or cases and/or media reports into the response • Presents a sustained, logical and well structured answer, using relevant legal terms and concepts 	16-20 marks

<ul style="list-style-type: none"> • Makes statements about justice for individuals, society and nation states relevant to international agreements • Describes/lists some international agreements • Mentions some avenues for achieving justice, internationally • Attempts to evaluate the effectiveness of the legal system in relation to achieving justice • Uses some legislation / cases / media reports to illustrate international implementation • Presents a structured answer, using some legal terminology and concepts 	11-15 marks
<ul style="list-style-type: none"> • Makes reference to justice • Mentions international agreements • Makes basic assumptions about the effectiveness of the law • Includes some legislation / cases / media reports • Presents a structured answer, using some legal terms and concepts 	6-10 marks
<ul style="list-style-type: none"> • Makes a general statement about justice • Makes some reference to international agreements • Makes limited use of legal information / terms 	1-5 marks

EBE LEGAL STUDIES 2007. Q24a) Focus Study – WORKPLACE

Evaluate the effectiveness of the legal system in addressing workplace issues and reforms.

<ul style="list-style-type: none"> • Makes a sound judgement, based on criteria, as to which issues are the most current in the workplace, and the reforms which have occurred over an historic period – 2 decades would be ample • Provides a concise and accurate description of the current legislation pertaining to the workplace • Provides a concise, balanced and accurate understanding of workplace issues, the effects of legislation on individuals, society and the state, and the reasons for reform, using at least 3 current issues to illustrate • Makes a sound judgement, based on criteria, as to the effectiveness of the legal system, in addressing workplace issues, including avenues for redress • Synthesises legislation and/or cases and/or media reports into the response • Presents a sustained, logical and well structured answer, using relevant legal terminology and concepts 	21-25 marks
<ul style="list-style-type: none"> • Makes a judgement, based on some criteria, as to some current workplace issues, and reforms which have occurred recently • Provides an accurate description of the current legislation pertaining to the workplace • Provides an accurate understanding of workplace issues, the effects of this legislation on less than 3 parties, the reasons for reform, by using some current issues to illustrate • Makes a judgement, based on some criteria, as to the effectiveness of 	16-20 marks

<p>the legal system, in addressing workplace issues. Mentions avenues for reform</p> <ul style="list-style-type: none"> • Integrates legislation and/or cases and/or media reports into the response • Presents a sustained, logical and well structured answer, using relevant legal terminology and concepts 	
<ul style="list-style-type: none"> • Makes statements about workplace issues and reforms • Describes/lists current legislation pertaining to the workplace • Uses some workplace issues to illustrate current knowledge. Mentions changes which have occurred • Attempts to evaluate the effectiveness of the legal system in addressing workplace issues • Uses some legislation / cases / media reports to illustrate • Presents a structured answer, using some legal terminology and concepts 	11-15 marks
<ul style="list-style-type: none"> • Makes reference to workplace issues and reforms • Mentions some legislation relating to the workplace • Lists some workplace issues and changes • Makes basic assumptions about the effectiveness of the legal system • Mentions some media reports or cases • Uses some legal information, terms and concepts 	6-10 marks
<ul style="list-style-type: none"> • Makes a general statement about the workplace and the government • Makes some reference to current legislation relating to the workplace • Makes limited evaluation of the legal system • Uses limited legal information / terms 	1-5 marks

EBE LEGAL STUDIES 2007. Q 24 b) Focus Study – WORKPLACE

With reference to the legal system, assess the effectiveness of the law in achieving justice for individuals and society within the state.

<ul style="list-style-type: none"> • Makes a sound judgement, based on criteria, as to what is justice, for individuals in the workplace, and for society, as a result of workplace outcomes – be they economic, political, social or others. • Provides a concise and accurate knowledge of the current workplace legislation • Provides a concise and accurate understanding of the mechanisms for achieving justice, for both the individual and society • Makes a sound judgement, based on criteria, as to the effectiveness of the legal system, in achieving justice for individuals in the workplace, and society via the workplace, within the state • Synthesises relevant legislation and/or cases and/or media reports into the response • Presents a sustained, logical and well structured answer, using relevant legal terminology and concepts 	21-25 marks
<ul style="list-style-type: none"> • Makes a judgement, based on some criteria, as to what justice is, for individuals in the workplace, and for society, as a result of workplace outcomes • Provides an accurate knowledge of current workplace legislation • Provides an accurate understanding of the mechanisms for achieving 	16-20 marks

<ul style="list-style-type: none"> justice for both the individual and society • Makes a judgement, based on some criteria, as to the effectiveness of the legal system in achieving justice for individuals in the workplace, and for society via the workplace • Integrates legislation and/or cases and/or media reports into the response • Presents a sustained, logical and well structured answer, using relevant legal terminology and concepts 	
<ul style="list-style-type: none"> • Makes statements about justice for individuals in the workplace and for society • Describes / lists relevant workplace legislation • Mentions mechanisms for achieving justice • Attempts to evaluate the effectiveness of the legal system in achieving justice • Includes some relevant legislation / cases / media reports • Presents a structured answer 	11-15 marks
<ul style="list-style-type: none"> • Makes reference to justice. Indicates some individuals in the workplace • Mentions current legislation pertaining to the workforce • Makes basic assumptions about the effectiveness of the legal system • Includes some relevant legislation /cases/ media reports • Presents an answer 	6-10 marks
<ul style="list-style-type: none"> • Makes a general statement about justice for individuals and society • Makes some reference to legislation pertaining the workplace • Uses limited legal terms / information 	1-5 marks

Disclaimer.

Please note that these marking criteria are guides only.

Your students may take an entirely different approach to the questions, and therefore the guidelines may need to be adjusted to suit those needs.

Maybe some aspects of your answers have not been included in the criteria. There are always left field answers, so you may have to adapt

Marking criteria have only been provided for the three most common focus studies.

Should your students answer any of the other focus studies, it is possible to use these criteria as templates.

You will notice that they all follow the same structure.

Band 6 students will present sound judgements, concise and accurate knowledge, logical well - structured responses, and be able to synthesise textbook information with contemporary knowledge. Each band will present slightly lower levels of competence in the response.

EBE Legal Studies Trial Co-ordinator.

2007.