

JACK GOLDRING MEMORIAL LECTURE

The Hon Justice Virginia Bell AC¹
The University of Wollongong
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Chancellor, Professor Gullett, members of the academic staff, ladies and gentlemen, it is an honour to be invited to deliver the 2014 Jack Goldring Memorial Lecture. Jack had a most distinguished career as a legal academic and law reformer. Jack's output as an academic was prodigious; notable in this respect was his very considerable contribution to consumer protection law in Australia. His standing within the academic and wider legal community served this University well when he took up his position as Foundation Dean of Law in 1990. The Law School of the University of Wollongong has thrived and enjoys an enviable reputation for excellence.

I no longer remember when I first met Jack. It was in my early years as a young practitioner when Jack was one of the driving forces behind the *Legal Services Bulletin*. The *Bulletin*, now the *Alternative Law Journal*, was an important voice for lawyers involved in the community legal centre movement. I do remember

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the last time I saw Jack. It was at a congenial dinner with mutual friends in Austinmer not so long before his untimely death. Always a stimulating and enjoyable companion, Jack was in many respects larger than life and pre-eminently a man of goodwill. It is fitting that the University of Wollongong acknowledge his life and work by the institution of this Lecture.

In 1998, Jack was appointed a Judge of the District Court of New South Wales. Within the Australian legal community, it has not been common for academic lawyers to be appointed to the Bench. As far as I am aware, Jack enjoyed moving from the empyrean heights of the Academy to the daily grind of administering justice, much of it in the exercise of the Court's criminal jurisdiction.

The District Court is a busy court. It is the court that handles the vast bulk of serious criminal offences that are tried on indictment by a judge and jury. Jack presided over a steady diet of jury trials many of them involving sexual offences and other offences of violence. It was a diet that was interspersed with the sentencing of offenders.

It was common for Jack to sit as a judge here in Wollongong, in a community of which he formed a part. Yet, no doubt from the moment he became a judge, this genial man with wide experience of

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life fell to be viewed, as the research tells us judges are², as out of touch with the community.

The administration of criminal justice in civil society is the central function of the courts. It is important that the public have confidence in it. For that reason, it has been troubling to learn that surveys of public opinion in the Australian jurisdictions and overseas are consistent in finding that between seventy and eighty per cent of respondents consider that the sentences imposed by courts are too lenient³. Despite the consistency of the results, researchers questioned the usefulness of data obtained by asking members of the public general, abstract questions about sentencing. They discerned a correlation between the high level of punitiveness of the responses and the respondents' lack of knowledge of the incidence

² Mackenzie et al, "Sentencing and Public Confidence: Results from a National Australian Survey on Public Opinions towards Sentencing", (2012) 45 *Australian & New Zealand Journal of Criminology* 45 at 55-57. See also Hough and Roberts, *Understanding Public Attitudes to Criminal Justice*, (2005) at 73.

³ Gelb, *More Myths and Misconceptions*, Sentencing Advisory Council, Victoria, (2008) at 4; Warner et al, *Jury Sentencing Survey*, Report to the Criminology Research Council, (2010) at 1, 11. See also Mackenzie et al, "Sentencing and Public Confidence: Results from a National Australian Survey on Public Opinions towards Sentencing", (2012) 45 *Australian & New Zealand Journal of Criminology* 45 at 56; Judge, "The Sentencing Decision", The Atkin Lecture, delivered at the Reform Club, London on 2 November 2005, citing the finding of the British Crime Survey 2004 that seventy-six per cent of the 20,000 respondents believed that sentences handed down by judges were lenient or much too lenient.

of crime and the administration of justice⁴. This observation led to the view that it would be more useful to provide survey recipients with information about the offence, the offender and the effect of the offence on the victim before seeking a response⁵.

In a speech delivered to the Judicial Conference of Australia a decade ago, Gleeson CJ pointed out that jurors might provide a useful source of information about sentencing: jurors are well informed about the circumstances of the case that they have tried and they are likely to be interested in its outcome. His Honour thought that a survey of jurors' responses to the sentences imposed by the courts might serve as a practical test of whether the system of criminal justice is failing to meet the expectations of well-informed members of the public⁶.

Professor Warner and colleagues at the University of Tasmania took up Gleeson CJ's suggestion⁷. The results of the Tasmanian Jury Sentencing Survey were interesting. Responses were received

⁴ Gelb, *More Myths and Misconceptions*, Sentencing Advisory Council, Victoria, (2008) at 6.

⁵ Gelb, *More Myths and Misconceptions*, Sentencing Advisory Council, Victoria, (2008) at 6-7.

⁶ Gleeson, "Out of Touch or Out of Reach?", speech delivered to the Judicial Conference of Australia Colloquium in Adelaide on 2 October 2004.

⁷ Warner et al, *Jury Sentencing Survey*, Report to the Criminology Research Council, (2010).

from 698 jurors who had sat on 138 trials covering a range of offences. In the first phase of the survey, the jurors were asked to nominate the sentence that they would have imposed on the offender whom they had convicted⁸. They nominated a sentence without knowing the sentence that had been imposed by the judge. Fifty-two per cent of jurors nominated a more lenient sentence than the sentence imposed by the judge. The jurors' responses were evenly split between more severe and less severe sentences for sexual and other offences of violence. They were most likely to be more lenient than the judge with respect to sentencing for property and culpable driving offences.

The jurors' knowledge of crime and sentencing generally was also surveyed⁹. Despite the fact that recorded crime rates have been declining nationally and in Tasmania, only seven per cent of the respondents thought that crime had decreased. Only seventeen per cent of the respondents correctly estimated the incidence of violent offending. Many overestimated it. Seventy-one per cent underestimated the imprisonment rate for offenders convicted of rape.

⁸ Warner et al, *Jury Sentencing Survey*, Report to the Criminology Research Council, (2010) at 34-36.

⁹ Warner et al, *Jury Sentencing Survey*, Report to the Criminology Research Council, (2010) at 36-41.

These misconceptions were consistent with the results of other Australian and international studies¹⁰.

In the second stage of the survey, the jurors were informed of the sentence that the judge had imposed and the reasons for it, and they were asked to rate its appropriateness¹¹. Almost ninety per cent of jurors assessed the sentence as appropriate. There was variation in satisfaction levels for different offences. Jurors were least satisfied with sentences for sex and drugs offences.

In addition to being given information about reasons for the sentence imposed in the case that they had tried, the jurors were also given information about the incidence of crime. They were asked further questions about the pattern of sentencing generally. Sixty-six per cent thought that sentences for violent offences were

¹⁰ Warner et al, *Jury Sentencing Survey*, Report to the Criminology Research Council, (2010) at 37-38. See, eg, Gelb, *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing*, Sentencing Advisory Council, Victoria, (2006); Jones, Weatherburn and McFarlane, *Public Confidence in the New South Wales Criminal Justice System*, NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 118, (2008); Roberts and Indermaur, *What Australians Think about Crime and Justice: Results from the 2007 Survey of Social Attitudes*, Australian Institute of Criminology, Research and Public Policy Series No 101, (2009).

¹¹ Warner et al, *Jury Sentencing Survey*, Report to the Criminology Research Council, (2010) at 49-54.

too lenient¹², even though only thirty-five per cent wanted a more severe sentence in the case that they had tried¹³.

As Professor Warner and her colleagues observed, it would seem that informed members of the public have opinions that are less punitive and more nuanced than telephone polls might suggest¹⁴. Professor Warner and other distinguished academics have now embarked on a national jury sentencing research project¹⁵. This is a valuable project. It is desirable that the sentencing of offenders should be in keeping with informed public opinion.

An eminent criminologist, and later judge of the Supreme Court of Victoria, Sir John Barry gave a good account of an effective system of criminal justice in a monograph on criminal punishment. He said the system¹⁶:

"should avoid excessive subtleties and refinement. It must be administered publicly in such a fashion that its activities can be understood by ordinary citizens and regarded by them as conforming with the community's

¹² Warner et al, *Jury Sentencing Survey*, Report to the Criminology Research Council, (2010) at 63.

¹³ Warner et al, *Jury Sentencing Survey*, Report to the Criminology Research Council, (2010) at 53.

¹⁴ Warner et al, *Jury Sentencing Survey*, Report to the Criminology Research Council, (2010) at 76.

¹⁵ See <<http://www.utas.edu.au/law/research/jury-study/national-jury-project>>.

¹⁶ Barry, *The Courts and Criminal Punishment*, (1969) at 14-15.

generally accepted standards of what is fair and just. ...
[I]t is a fundamental requirement of a sound legal system
that it should reflect and correspond with the sensible
ideas about right and wrong of the society it controls ..."

The idea that sentencing should be free of excessive subtleties
and refinement has found favour in the High Court¹⁷.

Perhaps in response to the perception of undue leniency,
parliaments have sought to guide the exercise of the sentencing
discretion by detailed legislative provision¹⁸. By way of example,
under s 21A of the New South Wales sentencing statute¹⁹, the
judge is required to take into account thirty-five aggravating and
mitigating factors, to the extent that they are known, in addition to

¹⁷ *Pearce v The Queen* (1998) 194 CLR 610 at 622-623 [39] per
McHugh, Hayne and Callinan JJ; [1998] HCA 57.

¹⁸ See, eg, *Crimes (Sentencing) Act* 2005 (ACT) ss 10(2),
11(3)(b), 12(3), 29(2), 33-35, 65, 78; *Crimes Act* 1914 (Cth) ss
16A, 17A, 17B, 19AB, 19AF, 19AG; *Crimes (Sentencing
Procedure) Act* 1999 (NSW) ss 5(1), 21A, 22, 24, 42A, 44-46,
49, 54B, 61; *Sentencing Act* 1995 (NT) ss 5, 40(3), 53-55A,
78B, 101, 103; *Penalties and Sentences Act* 1992 (Q) ss 9, 13,
93, 96, 144(2), 160B-160D, 160F; *Criminal Law (Sentencing)
Act* 1988 (SA) ss 10, 11, 29A(5), 29D, 32, 32A; *Sentencing
Act* 1997 (Tas) s 18; *Sentencing Act* 1991 (Vic) ss 5, 6AG, 6D,
11, 18B; *Sentencing Act* 1995 (WA) ss 6, 35, 39, 76, 81, 86,
89, 90, 98, 143. See also *Criminal Justice Act* 2003 (UK) ss
142-146; *Coroners and Justice Act* 2009 (UK) s 125, which,
amongst other things, provides that "every court ... must, in
sentencing an offender, follow any sentencing guidelines [issued
by the Sentencing Council for England and Wales] ... unless the
court is satisfied that it would be contrary to the interests of
justice to do so"; Roberts, "Sentencing Guidelines and Judicial
Discretion: Evolution of the Duty of Courts to Comply in
England and Wales", (2011) 51 *British Journal of Criminology*
997.

¹⁹ *Crimes (Sentencing Procedure) Act* 1999 (NSW).

well-settled principles. In its most recent review of the law governing sentencing, the New South Wales Law Reform Commission notes that s 21A has provided a fertile ground for appellate challenge²⁰. The Commission recommends its repeal and replacement with a less prescriptive provision²¹. There is much to be said in favour of the recommendation²².

Sentencing is not a science. It involves an evaluative judgment – a judgment that takes into account the maximum penalty for the offence and the circumstances of the offence and the offender in order to arrive at a sentence measured in years and months. Two fundamental principles inform the judgment: proportionality²³ and equality²⁴. The court may not increase a sentence beyond the limit of that which is proportionate to the objective seriousness of the offence²⁵. And the court must strive to

²⁰ New South Wales Law Reform Commission, *Sentencing*, Report No 139, (2013) at xvi [0.9], 69.

²¹ New South Wales Law Reform Commission, *Sentencing*, Report No 139, (2013) at xvi [0.10], 79-85 [4.39]-[4.61].

²² New South Wales Law Reform Commission, *Sentencing*, Report No 139, (2013) at 81 [4.50].

²³ *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472 per Mason CJ, Brennan, Dawson and Toohey JJ; [1988] HCA 14.

²⁴ *Green v The Queen* (2011) 244 CLR 462 at 472-473 [28] per French CJ, Crennan and Kiefel JJ; [2011] HCA 49.

²⁵ *Veen v The Queen (No 2)* (1998) 164 CLR 465 at 472 per Mason CJ, Brennan, Dawson and Toohey JJ, 485-486 per Wilson J, 490-491 per Deane J, 496 per Gaudron J; *Hoare v The Queen* (1988) 167 CLR 348 at 354; [1988] HCA 33;

sentence like offenders in like manner for like offences²⁶. Because the determination is an exercise of judgment, there is not a single correct sentence. If the judge takes into account all relevant factors, and correctly applies the governing principles, the sentence will be a correct sentence provided it is within the permissible range of sentences for the offence and the offender.

The eminent English criminal lawyer, Professor Ashworth, observes that the aims of criminal justice might be variously identified as "the prevention of crime, or the fair treatment of suspects and defendants, due respect for the victims of crime, the fair labelling of offences according to their relative gravity and so on"²⁷. His point is that one cannot usefully distil them into some overarching aim because it would fail to reflect the conflicts that inhere in administering criminal justice²⁸.

In the balance of these remarks, I propose to touch on two issues which, if not correctly described as conflicts, at least involve

Chester v The Queen (1988) 165 CLR 611 at 618; [1988] HCA 62.

²⁶ *Lowe v The Queen* (1984) 154 CLR 606 at 610-611 per Mason J; [1984] HCA 46; *Green v The Queen* (2011) 244 CLR 462.

²⁷ Ashworth, *Sentencing and Criminal Justice*, 5th ed (2010) at 71.

²⁸ Ashworth, *Sentencing and Criminal Justice*, 5th ed (2010) at 71. See also Husak, "Criminal Law Theory", in Golding and Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory*, (2005) 107 at 111-112.

a tension in this respect. The first is the tension in providing for the "fair treatment of ... defendants" while according "due respect [to] the victims of crime". The second is the content of equal treatment in a multicultural society.

I should commence by saying something about the criminal law and how courts determine criminal guilt. At an early stage in English legal history, offences of violence were dealt with as wrongs to be redressed by the payment of compensation by the offender to the victim or his or her relations²⁹. Gradually, the commission of offences of violence and other forms of criminal offending came to be seen as a public wrong³⁰. By the second half of the 18th Century, when Blackstone drew the common law together in his *Commentaries*, he devoted his final book to "public wrongs"³¹. He

²⁹ Pike, *A History of Crime in England*, (1873) vol 1 at 41-50; Stephen, *A History of the Criminal Law of England*, (1883) vol 1 at 57-58; Hostettler, *A History of Criminal Justice in England and Wales*, (2009) at 14-15, 24-25, 38-39.

³⁰ Hostettler, *A History of Criminal Justice in England and Wales*, (2009) at 17. On the history of criminal prosecutions and, in particular, the development of public criminal prosecutions, see Stephen, *A History of the Criminal Law of England*, (1883) vol 1 at 493-503; Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England*, (1987) at 35-73; Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, (1948) vol 2 at 15-16, 25-27, 74-79, 98-101, (1956) vol 3 at 26-27, 78-79, 82-83, 110-111, 258-259, 289, 308, 402-403, 444-445, (1968) vol 4 at 68, 75, 200, 224-225, 313; Corns, *Public Prosecutions in Australia: Law, Policy and Practice*, (2014) at 49-82.

³¹ Blackstone, *Commentaries on the Laws of England*, 8th ed (1778) bk 4, c 1 at 1.

explained the distinction between public and private wrongs in this way:

"[P]rivate wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanours, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity."³²

A person who commits an act of violence against another may be prosecuted by the Director of Public Prosecutions in the name of the Queen on behalf of the community and sentenced to imprisonment upon conviction. He or she may also be the subject of a civil action brought by the victim claiming damages. The court may only convict or, in the case of the civil action, make an award of damages, if it is first satisfied that the person did the act. In a case in which this is in issue, the court must determine the facts. Under any rational system of justice, the determination of historical fact must be subject to rules that govern the kinds of information that the court may take into account in proof of a fact, and the standard of satisfaction that the court is required to attain before finding the fact is proved. In the civil action, the standard of proof is the balance of probabilities: once the plaintiff satisfies the court that it more likely than not that the act occurred, the court proceeds

³² Blackstone, *Commentaries on the Laws of England*, 8th ed (1778) bk 4, c 1 at 5-6.

upon acceptance that that is the fact³³. It is conventional to explain the standard to the jury in the trial of a civil action by reference to a set of scales: the evidence in favour of X is put in one scale and the evidence against X in the other; if the scale tips ever so slightly in favour of X, X is proved.

This is not a standard that the law accepts as sufficient to support a judgment of criminal guilt. Probably few people would approve of a system which allowed a person to be deprived of his or her liberty because it was slightly more likely that the person was guilty than that the person was not guilty. The standard of proof under the criminal law is a designedly exacting one: beyond reasonable doubt. It reflects the value that a free society places on liberty, with the consequence that the bias is in favour of the guilty being acquitted rather than the innocent being convicted.

This fundamental feature of our system of criminal justice needs to be kept in mind when considering some claimed deficiencies of criminal trial process.

In recent years, it has become more common for individuals to report incidents of sexual abuse that occurred many years ago. This willingness to bring serious criminal offending to the attention of the

³³ *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 639 per Brennan and Dawson JJ; [1990] HCA 20.

authorities may reflect society's belated recognition of the widespread incidence of child sexual abuse and the lifelong harm that it occasions. Where these allegations are brought to attention, the accused will ordinarily face a jury trial. Some commentators are critical of what are said to be the "low" conviction rates for "historical child sexual abuse"³⁴. A moment's thought will suggest that the prosecution of an offence that is alleged to have occurred twenty, or perhaps thirty or more years ago, is likely to present difficulties of proof that are greater than those encountered in the prosecution of a more recent offence of a similar kind. A verdict of "not guilty" is no more and no less than a finding that the prosecution failed to establish guilt beyond reasonable doubt. A verdict of "not guilty" does not reflect adversely on the credit of the complainant. The verdict of the jury, whether "guilty" or "not guilty", following a trial conducted according to law does not reflect any deficiency in the administration of criminal justice.

The complainant at the trial of a sexual offence (or other offence of violence) is a witness like any other witness in the prosecution case. Of course, the experience for the complainant of

³⁴ Shead, "Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions", (2014) 26 *Current Issues in Criminal Justice* 55 at 56; Fitzgerald, *The Attrition of Sexual Offences from the New South Wales Criminal Justice System*, NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 92, (2006) at 11. See also Flatman and Bagaric, "Problems in Prosecuting Cases Involving Historical Child Sexual Abuse: The Victorian Experience", (1997-1998) 4(1) *Deakin Law Review* 1.

being questioned about a traumatic event, and commonly being challenged about the reliability of the answers given, is likely to be distressing. Parliaments and the courts have come to recognise the need to accommodate the special needs of complainants and other vulnerable witnesses in giving evidence. Improvements in the conduct of the trial of sexual offences designed to relieve the stress on complainants have been introduced in all of the Australian jurisdictions. They can be illustrated by reference to the position in New South Wales.

In this State, any part of proceedings for a prescribed sexual offence in which the complainant gives evidence is held in camera unless the court otherwise directs³⁵. This is so even if the complainant is giving evidence by means of closed-circuit television from a location outside the courtroom. She or he is entitled, but not required, to give evidence by means of closed-circuit television or by the use of arrangements that restrict contact (including visual contact) with the accused³⁶. She or he is entitled to have a support person near and within sight when giving evidence³⁷.

³⁵ *Criminal Procedure Act 1986 (NSW)*, s 291(1). See also *Evidence (Miscellaneous Provisions) Act 1991 (ACT)*, s 39; *Evidence Act (NT)*, ss 21A(2)(d), 21F; *Criminal Law (Sexual Offences) Act 1978 (Q)*, s 5; *Evidence (Children and Special Witnesses) Act 2001 (Tas)*, ss 8(1)(b), 8(2)(b)(iii); *Criminal Procedure Act 2009 (Vic)*, s 133.

³⁶ *Criminal Procedure Act*, s 294B(3). See also *Evidence (Miscellaneous Provisions) Act 1991 (ACT)*, s 38C; *Evidence Act (NT)*, ss 21A(2)(a)-(b), 21B, 21C; *Evidence Act 1977 (Q)*, ss

The law now confers a privilege with respect to the confidential communications made by a complainant to a counsellor about the offence and the harm that has been occasioned by it³⁸.

The complainant is no longer exposed to the risk of being cross-examined by her or his alleged abuser: an unrepresented accused may not cross-examine the complainant. In such a case, the court is empowered to appoint a person to question the complainant³⁹.

21A(2)(a)-(c); *Evidence Act* 1929 (SA), ss 13A(1), 13A(2)(a)-(d); *Evidence (Children and Special Witnesses) Act* 2001 (Tas), ss 8(1)(b), 8(2)(b)(ii)-(iic); *Criminal Procedure Act* 2009 (Vic), ss 360-364; *Evidence Act* 1906 (WA), ss 106R(3a), 106R(4)(c).

³⁷ *Criminal Procedure Act*, s 294C(1). See also *Evidence (Miscellaneous Provisions) Act* 1991 (ACT), ss 38E, 43; *Evidence Act* (NT), s 21A(2)(c); *Evidence Act* 1977 (Q), s 21A(2)(d); *Evidence Act* 1929 (SA), ss 13A(1), 13A(2)(e); *Evidence (Children and Special Witnesses) Act* 2001 (Tas), ss 8(1)(b), 8(2)(b)(i); *Criminal Procedure Act* 2009 (Vic), s 365; *Evidence Act* 1906 (WA), ss 106R(3a), 106R(4)(a).

³⁸ *Criminal Procedure Act*, ss 297-298. See also *Evidence (Miscellaneous Provisions) Act* 1991 (ACT), ss 54-67; *Evidence Act* 1929 (SA), ss 67D-67F; *Evidence Act* (NT), ss 56-56G; *Evidence Act* 2001 (Tas), s 127B; *Evidence (Miscellaneous Provisions) Act* 1958 (Vic), ss 32AB-32G; *Evidence Act* 1906 (WA), ss 19A-19M.

³⁹ *Criminal Procedure Act*, s 294A. See also *Evidence (Miscellaneous Provisions) Act* 1991 (ACT), s 38D; *Sexual Offences (Evidence and Procedure) Act* (NT), s 5; *Evidence Act* 1977 (Q), ss 21L-21S; *Evidence Act* 1929 (SA), s 13B; *Evidence (Children and Special Witnesses) Act* 2001 (Tas), s 8A; *Criminal Procedure Act* 2009 (Vic), ss 353-358; *Evidence Act* 1906 (WA), s 25A.

It has been common in the past for complainants to be subject to hectoring, offensive cross-examination. The law now requires the trial judge to disallow a question if it is harassing, intimidating, offensive, oppressive, or humiliating⁴⁰. The judge must disallow a question if the judge considers the manner or tone in which the question is put is belittling, insulting or otherwise inappropriate⁴¹. Importantly, evidence relating to the sexual reputation of the complainant is inadmissible⁴².

In the event that a new trial is ordered, there is now provision for the record of the complainant's evidence at the first trial to be

⁴⁰ *Evidence Act 1995 (NSW)*, s 41(1)(b). See also *Evidence Act 2011 (ACT)*, s 41(1)(b); *Evidence (National Uniform Legislation Act) (NT)*, ss 41(2), 41(3)(b); *Evidence Act 1977 (Q)*, s 21; *Evidence Act 1929 (SA)*, ss 25(1)(c), 25(3), 25(4)(e); *Evidence Act 2001 (Tas)*, s 41(1)(b); *Evidence Act 2008 (Vic)*, s 41(2), 41(3)(b), 41(4)(c)(iii)(B); *Evidence Act 1906 (WA)*, s 26(1)(b).

⁴¹ *Evidence Act*, s 41(1)(c). See also *Evidence Act 2011 (ACT)*, s 41(1)(c); *Evidence (National Uniform Legislation Act) (NT)*, ss 41(2), 41(3)(c); *Evidence Act 1929 (SA)*, ss 25(1)(d), 25(3), 25(4)(e); *Evidence Act 2001 (Tas)*, s 41(1)(c); *Evidence Act 2008 (Vic)*, ss 41(2), 41(3)(c), 41(4)(c)(iii)(B).

⁴² *Criminal Procedure Act*, s 293(2). See also *Evidence (Miscellaneous Provisions) Act 1991 (ACT)*, s 51; *Sexual Offences (Evidence and Procedure) Act (NT)*, s 4(1); *Criminal Law (Sexual Offences) Act 1978 (Q)*, ss 4, 4A(4); *Evidence Act 1929 (SA)*, s 34L(1); *Evidence Act 2001 (Tas)*, s 194M; *Criminal Procedure Act 2009 (Vic)*, ss 342-343, 352; *Evidence Act 1906 (WA)*, ss 36B-36BC.

tendered to relieve her or him of the stress of having to give evidence again⁴³.

In the past, judges were required to give the jury directions about the assessment of the reliability of the evidence of complainants that were the demeaning product of a bygone age⁴⁴. Those directions may no longer be given⁴⁵.

The rules of procedure and evidence at the trial of a sexual offence have in these respects been substantially modified in recognition of the burden placed on complainants in giving evidence. They are modifications that are considered to maintain the court's capacity to ensure the fair trial of the accused. It remains that many complainants will still find the experience a confronting and distressing one. This recognition has led some commentators to

⁴³ *Criminal Procedure Act*, ss 306I-306J. See also *Evidence Act* (NT), ss 21E(4)-(6); *Evidence Act 1977* (Q), s 21A(6)(b); *Evidence Act 1929* (SA), ss 13(1), 13D; *Evidence (Children and Special Witnesses) Act 2001* (Tas), s 7B; *Criminal Procedure Act 2009* (Vic), ss 378-387.

⁴⁴ See, eg, *R v Henry; R v Manning* (1969) 53 Cr App R 150 at 153-154 per Salmon LJ; *Kelleher v The Queen* (1974) 131 CLR 534 at 541-543 per Barwick CJ, 553 per Gibbs J, 559-560 per Mason J; [1974] HCA 48.

⁴⁵ *Criminal Procedure Act*, ss 294(2)(c), 294AA. See also *Evidence (Miscellaneous Provisions) Act 1991* (ACT), ss 68-73; *Sexual Offences (Evidence and Procedure) Act* (NT), s 4(5); *Evidence Act 1929* (SA), ss 34L(5), 34M-34N; *Criminal Code* (Tas), ss 136, 371A; *Crimes Act 1958* (Vic), s 61; *Evidence Act 1906* (WA), ss 36BD, 50.

propose that at the trial of prescribed sexual offences the complainant should be legally represented⁴⁶.

The proposal would effect a radical alteration to our adversarial trial process. The introduction of a lawyer representing the complainant would be likely to give rise to the wrong perception that the trial is in some sense a contest between the complainant and the accused. That perception in a system of criminal justice that requires the prosecution to prove guilt beyond reasonable doubt would do no small disservice to the complainant.

Sexual offences prosecuted on indictment, like all offences prosecuted on indictment, are brought by the Director of Public Prosecutions on behalf of the community. It is the community's interest that is vindicated by putting the criminal law in motion and not that of the victim of the offending conduct. This explains why the Director of Public Prosecutions, while taking into account the wishes of the complainant in determining whether to prosecute,

⁴⁶ See, eg, Braiden, "The Case for Separate Legal Representation for Rape Victims", (1999) 93(1) *Law Society Gazette* 5; Currie and Kift, "Add Victims and Stir? Or Change the Recipe? Achieving Justice for Victims of Crime in Queensland", (1999) 6 *James Cook University Law Review* 78 at 107; Kirchengast, "The Integration of Victim Lawyers into the Adversarial Criminal Trial", paper delivered at the Australian and New Zealand Critical Criminology Conference at the University of Sydney on 1-2 July 2010; Braun, "Legal Representation for Sexual Assault Victims – Possibilities for Law Reform", (2014) 25 *Current Issues in Criminal Justice* 819. For criticism of this view, see Kimber, "20 Years of the ODPP: How Far Have We Come?", Justice Oration delivered at TAFE SA, Adelaide on 18 October 2012.

does not view those wishes as determinative⁴⁷. The public interest may favour the prosecution of a person for a serious sexual offence (or other offence of violence) notwithstanding that the complainant does not wish the prosecution to proceed.

Consideration of the public interest in the administration of criminal justice explains the caution with which courts approach the views of the victim when sentencing the offender. Commonly enough, offences of violence, including sexual offences, take place in the context of an existing relationship between the offender and the victim. And not uncommonly, despite the offending conduct, the victim may want the court to impose an unduly lenient sentence. Superior courts dealing with serious offences of violence do not give weight to those wishes⁴⁸. The reason for this approach was explained in *R v Palu*⁴⁹:

⁴⁷ Office of the Director of Public Prosecutions for New South Wales, *Prosecution Guidelines*, (2007) at 8-10, 33-34, issued under s 13 of the *Director of Public Prosecutions Act 1986* (NSW). See also Corns, *Public Prosecutions in Australia: Law, Policy and Practice*, (2014) at 277-279 [8.200]-[8.220].

⁴⁸ *R v Glen* unreported, Court of Criminal Appeal of the Supreme Court of New South Wales, 19 December 1994; *R v Begbie* (2001) 124 A Crim R 300 at 307 [43] per Mason P (Dowd J agreeing at 311 [78]), 308 [58] per Sully J; *R v Dawes* [2004] NSWCCA 363 at [30] per Dunford J (Hoeben J agreeing at [75]); *R v Newman* (2004) 145 A Crim R 361 at 380-382 [79]-[82] per Howie J (McColl JA agreeing at [1]); *R v Burton* [2008] NSWCCA 128 at [102]-[105] per Johnson J (Campbell JA agreeing at [1], Grove J agreeing at [2]).

⁴⁹ (2002) 134 A Crim R 174 at 183-184 [37] per Howie J.

"The attitude of the victim cannot be allowed to interfere with a proper exercise of the sentencing discretion. This is so whether the attitude expressed is one of vengeance or of forgiveness ... Sentencing proceedings are not a private matter between the victim and the offender, not even to the extent that the determination of the appropriate punishment may involve meting out retribution for the wrong suffered by the victim. A serious crime is a wrong committed against the community at large and the community is itself entitled to retribution. In particular, crimes of violence committed in public are an affront to the peace and good order of the community and require deterrent sentences ... Matters of general public importance are at the heart of the policies and principles that direct the proper assessment of punishment, the purpose of which is to protect the public, not to mollify the victim."

Appreciation that the criminal law treats the offence as an affront to the community generally is not to say that, in assessing the gravity of the offence, the court is not concerned to ascertain its effect upon the victim. Evidence of the harm suffered by the victim is always relevant to the determination of the seriousness of the offending. That determination sets the outer limits of a proportionate sentence.

Statutory provision has been made in the Australian jurisdictions for the victim of an offence to make a victim impact statement⁵⁰. Under the New South Wales sentencing statute, it is

⁵⁰ *Crimes (Sentencing) Act 2005 (ACT)*, ss 47-53; *Crimes (Sentencing Procedure) Act 1999 (NSW)*, ss 26-30A; *Sentencing Act (NT)*, ss 106A-106B; *Criminal Offence Victims Act 1995 (Q)*, s 14; *Criminal Law (Sentencing) Act 1988 (SA)*, s 7A; *Sentencing Act 1997 (Tas)*, s 81A; *Sentencing Act 1991 (Vic)*, ss 8J-8S; *Sentencing Act 1995, (WA)* ss 24-26. For an overview of the development of victims' rights and entitlements in Australia, see Corns, *Public Prosecutions in Australia: Law, Policy and Practice*, (2014) at 259-277 [8.10]-[8.190].

provided that the court may receive and consider a victim impact statement at any time after it convicts, but before it sentences, an offender⁵¹. In the case of a homicide offence, there is provision for the family members of the deceased to make a victim impact statement⁵². Until recently, the Act required the court to receive a victim impact statement in a homicide case and to acknowledge its receipt⁵³, but provided that the court must not consider the statement in connection with the determination of the punishment to be imposed unless the court considers it appropriate to do so⁵⁴.

The question of whether it is ever appropriate for a court, when sentencing an offender for unlawful killing, to take into account the contents of victim impact statements in determining the punishment has not proved easy to answer. It raises profound questions which have sparked vigorous academic debate⁵⁵ and over

⁵¹ *Crimes (Sentencing Procedure) Act*, s 28(1).

⁵² See the definitions of "victim" and "family victim" in *Crimes (Sentencing Procedure) Act*, s 26.

⁵³ *Crimes (Sentencing Procedure) Act*, s 28(3).

⁵⁴ *Crimes (Sentencing Procedure) Act*, s 28(4), prior to its repeal and replacement by *Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act 2014* (NSW), Sched 1, item 1.

⁵⁵ See, eg, Kirchengast, "Victim Impact Statements and the *Previtera* Rule: Delimiting the Voice and Representation of Family Victims in New South Wales Homicide Cases", (2005) 24 *University of Tasmania Law Review* 114; Booth, "Homicide, Family Victims and Sentencing: Continuing the Debate about Victim Impact Statements", (2005) 15 *Current Issues in Criminal Justice* 253; Walters, "Victim Impact Statements in Homicide Cases: Should 'Recognising the Harm Done ... to the

which judicial opinion has been divided in Australia⁵⁶ and overseas⁵⁷. At the heart of the debate is the question of whether it is right to assess the seriousness of the offence by taking into account the personal qualities of the deceased and the extent to which his or her life was valued.

In New South Wales, the view has prevailed that it is never appropriate to take into account the statements of family members in determining the punishment for an unlawful killing. The reasons for this view were articulated by Hunt CJ at CL in *Previtera* in this way⁵⁸:

"The law already recognises, without specific evidence, the value which the community places upon human life; that is why unlawful homicide is recognised by the law as a most serious crime, one of the most dreadful crimes in the criminal calendar. It is regarded by all thinking persons as offensive to fundamental concepts of equality and justice for criminal courts to value one life as greater than another. It would therefore be wholly inappropriate to impose a harsher sentence upon an offender because

Community' Signify a New Direction?", (2006) 2 *International Journal of Punishment and Sentencing* 53; Booth, "Penalty, Harm and the Community: What Role Now for Victim Impact Statements in Sentencing Homicide Offenders in NSW?" (2007) 30 *University of New South Wales Law Journal* 664.

⁵⁶ *R v Previtera* (1997) 94 A Crim R 76; *R v Birmingham (No 2)* (1997) 69 SASR 502 at 506-507 per Perry J; *Mitchell v The Queen* (1998) 20 WAR 257 at 265-267 per Ipp J.

⁵⁷ *Booth v Maryland* 482 US 496 (1987); *Payne v Tennessee* 501 US 808 (1991); *R v Gabriel* (1999) 137 CCC (3d) 1.

⁵⁸ *R v Previtera* (1997) 94 A Crim R 76 at 86-87 (footnotes omitted).

the value of the life lost is perceived to be greater in the one case than it is in the other."

In *Birmingham (No 2)*, Perry J in the Supreme Court of South Australia questioned whether consideration of equality demands that one life not be valued above another⁵⁹. His Honour considered it was a matter of taking into account the "totality of the injury, loss or damage" occasioned by the offence and that this may include injury loss or damage suffered by persons apart from the immediate victim⁶⁰.

The approach enunciated in *Previtera* was in line with the recommendations of the New South Wales Law Reform Commission in its 1996 report on sentencing⁶¹. Despite some suggestion that the Court of Criminal Appeal of New South Wales might revisit the question⁶², it has not done so. The New South Wales Law Reform Commission in its 2013 report recommended adhering to the *Previtera* approach⁶³.

⁵⁹ *R v Birmingham (No 2)* (1997) 69 SASR 502 at 506-507.

⁶⁰ *R v Birmingham (No 2)* (1997) 69 SASR 502 at 506.

⁶¹ New South Wales Law Reform Commission, *Sentencing*, Report No 79, (1996) at 34-37 [2.20]-[2.25].

⁶² *R v Berg* (2004) 41 MVR 399 at 407 [42]-[45] per Spigelman CJ; *R v Tzanis* (2005) 44 MVR 160 at 163 [15]-[16] per Spigelman CJ.

⁶³ New South Wales Law Reform Commission, *Sentencing*, Report No 139, (2013) at 397 [19.9].

The Parliament did not accept this recommendation and the New South Wales sentencing statute has been amended to provide that a victim impact statement given by a family victim may, if the court considers it appropriate, be taken into account in the determination of the punishment of the offence on the basis that the harmful impact of the primary victim's death on the members of the primary victim's immediate family is an aspect of the harm done to the community⁶⁴. It is too early to assess the effect, if any, that this change will have on the pattern of sentencing for homicide offences in New South Wales.

Turning to equal treatment in the criminal law, the content of that principle was raised by McHugh J in the context of the application of the "partial defence" of provocation⁶⁵. Provocation, if not negated by the prosecution, reduces what would otherwise be murder to manslaughter upon a view that the moral culpability of a person who kills while in a state of loss of self-control brought about by the deceased's provocative conduct is less than that of a person who kills in cold blood⁶⁶. It is a concept that has fallen out of favour

⁶⁴ *Crimes (Sentencing Procedure) Act*, s 28(4), introduced by *Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act*, Sched 1, item 1, which received Royal Assent on 20 May 2014 and commenced on 1 July 2014.

⁶⁵ *Masciantonio v The Queen* (1995) 183 CLR 58 at 73-74; [1995] HCA 67.

⁶⁶ *Parker v The Queen* (1963) 111 CLR 610 at 651 per Windeyer J; [1963] HCA 14. See also East, *Pleas of the Crown*, (1803) vol 1 at 238.

in a number of jurisdictions⁶⁷ and its availability in New South Wales has been confined as the result of recent amendments⁶⁸.

In those jurisdictions where provocation applies⁶⁹, the jury may be required to consider whether the deceased's provocative conduct could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill or to do grievous bodily harm⁷⁰. The function of this objective test, which looks to the effect of the provocative conduct on an ordinary person, is to ensure that the partial defence does not operate to reduce the liability of an overly pugnacious individual.

In *Masciantonio v The Queen*, McHugh J reasoned that the application of the "ordinary person" standard in our multicultural society operates unfairly in the case of an accused from a non-

⁶⁷ The defence of provocation was abolished, in Victoria, by s 3 of the *Crimes (Homicide) Act 2005 (Vic)*, which inserted *Crimes Act 1958 (Vic)*, s 3B; in Tasmania, by s 4 of the *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas)*, which repealed *Criminal Code (Tas)*, s 160; and, in Western Australia, in relation to murder, by s 12 of the *Criminal Law Amendment (Homicide) Act 2008 (WA)*.

⁶⁸ *Crimes Act 1900 (NSW)*, s 23, inserted by the *Crimes Amendment (Provocation) Act 2014 (NSW)*, which received Royal Assent on 20 May 2014 and commenced on 13 June 2014.

⁶⁹ The ACT, New South Wales, the Northern Territory, Queensland, South Australia and Western Australia.

⁷⁰ *Stingel v The Queen* (1990) 171 CLR 312; [1990] HCA 61.

Anglo-Saxon-Celtic background⁷¹. His Honour suggested that real equality before the law requires that an accused from an ethnic or cultural minority be judged according to the standard reflecting the values of that minority and not the dominant class⁷². His Honour's view was a dissenting one and that issue has not been revisited since⁷³.

A related question in the context of sentencing was canvassed by the New South Wales Court of Criminal Appeal some years ago⁷⁴. The Court was divided on the question of whether, in sentencing an offender for an offence that had been prompted by cultural and religious factors, it had been right for the trial judge to impose an otherwise unduly lenient non-parole period to restore harmony within the offender's community. Spigelman CJ considered that it was not an error to give weight to the need to reintegrate an offender into his or her community⁷⁵. His Honour referred approvingly to the concept of restorative justice⁷⁶. The other members of the Court did not

⁷¹ (1995) 183 CLR 58 at 73.

⁷² *Masciantonio v The Queen* (1995) 183 CLR 58 at 74.

⁷³ For academic commentary, see Leader-Elliott, "Sex, Race and Provocation: In Defence of *Stingel*", (1996) 20 *Criminal Law Journal* 72; Bronitt and Amirthalingam, "Cultural Blindness: Criminal Law in Multicultural Australia", (1996) 21 *Alternative Law Journal* 58.

⁷⁴ *R v Qutami* (2001) 127 A Crim R 369.

⁷⁵ *R v Qutami* (2001) 127 A Crim R 369 at 379 [73]-[75].

⁷⁶ *R v Qutami* (2001) 127 A Crim R 369 at 379 [74].

endorse these views⁷⁷. The case did not provide the occasion for detailed consideration of restorative justice or the significance of cultural factors that are suggested to explain the commission of the offence in sentencing.

Factors personal to the offender that may serve to explain the offending conduct, including cultural and religious factors, may be relevant in sentencing. But the seriousness of the offence, which serves to fix the limit of a proportionate sentence for it, involves an objective assessment for which there are not varying standards.

The high rate of incarceration of Aboriginal Australians, their history of dispossession and the extent of their social and economic disadvantage measured by recognised indices has been argued to justify the adoption of special principles in sentencing Aboriginal offenders⁷⁸. The argument drew on the approach that has been adopted by the Supreme Court of Canada⁷⁹. The Canadian *Criminal Code* requires a sentencing court to pay particular attention to the circumstances of Aboriginal offenders when applying the principle

⁷⁷ *R v Qutami* (2001) 127 A Crim R 369 at 375 [41] per Smart AJ (Simpson J agreeing but not deciding at 380 [80]-[83]).

⁷⁸ This was the appellant's argument in *Bugmy v The Queen* (2013) 249 CLR 571 at 576-578; [2013] HCA 37.

⁷⁹ *Bugmy v The Queen* (2013) 249 CLR 571 at 590-591 [30]-[31] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, citing *R v Gladue* [1999] 1 SCR 688.

that imprisonment should be the sanction of last resort⁸⁰. The Supreme Court of Canada has characterised this provision as a direction to judges to sentence Aboriginal offenders differently to the manner of sentencing non-Aboriginal offenders in order to achieve a truly fit and proper sentence in the particular case⁸¹. On this analysis, the court is administering equal justice by taking into account the unique circumstances of Aboriginal offenders.

There is a question of the power of the Parliament of a State or Territory to enact a provision requiring a court to treat persons of a particular race differently for the purposes of sentencing. It may be that a provision of that kind would be inconsistent with the *Racial Discrimination Act* 1975 (Cth) and invalid to the extent of that inconsistency⁸². In the case in which the High Court recently considered the sentencing of Aboriginal offenders, it was unnecessary to address that question because New South Wales law

⁸⁰ *Bugmy v The Queen* (2013) 249 CLR 571 at 589-590 [29] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, citing *Criminal Code* (Can) RSC 1985, c C-46, s 718.2(e).

⁸¹ *Bugmy v The Queen* (2013) 249 CLR 571 at 590 [31] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, citing *R v Gladue* [1999] 1 SCR 688 at 706 [33].

⁸² *Bugmy v The Queen* (2013) 249 CLR 571 at 592 [36] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, referring to s 10 of the *Racial Discrimination Act* 1975 (Cth).

does not direct courts to treat Aboriginal offenders differently to other offenders⁸³.

The Court rejected the contention that, in sentencing an Aboriginal offender, the judge should take into account the high rate of incarceration of Aboriginal offenders or the "unique circumstances" of Aboriginal Australians arising from their history of dispossession⁸⁴. To sentence Aboriginal offenders differently from the way in which non-Aboriginal offenders are sentenced, it was pointed out, would be to depart from individualised justice⁸⁵. The Court recognised that there are some Aboriginal communities in which alcohol abuse and alcohol-related violence are endemic. It is accepted that an Aboriginal offender raised in such a community may bear less moral culpability than an offender whose formative years have not been so marred⁸⁶. Importantly, the same would be true of a non-Aboriginal offender raised in an environment in which alcohol abuse and alcohol-related violence go hand-in-hand. In either case, while the background of profound social deprivation may

⁸³ *Bugmy v The Queen* (2013) 249 CLR 571 at 592 [36] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

⁸⁴ *Bugmy v The Queen* (2013) 249 CLR 571 at 592 [36] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

⁸⁵ *Bugmy v The Queen* (2013) 249 CLR 571 at 592 [36] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

⁸⁶ *Bugmy v The Queen* (2013) 249 CLR 571 at 594 [40] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; *R v Fernando* (1992) 76 A Crim R 58 at 62-63 per Wood J.

reduce the offender's moral culpability, his or her inability to control violent outbursts may require a sentence weighted in favour of protecting the community. Individualised justice involves balancing competing factors in light of the circumstances of the individual case.

Within the limits of proportionality, the judge must give weight to the various purposes of punishment: the protection of society, deterring the offender and others who might be tempted to offend, retribution and rehabilitation. They are often in tension. Mason CJ, Brennan, Dawson and Toohey JJ in a joint judgment said of the purposes of punishment, "They are guideposts to the appropriate sentence but sometimes they point in different directions"⁸⁷. As their Honours also observed, the determination of a sentence that is proportionate to the offence in a case in which it is necessary to give weight to the need to protect society "calls for a judgment of experience and discernment"⁸⁸. These are not judgments that are easily or lightly made.

Judges are required to give reasons for the sentences that they impose. The reasons give an account of how the competing factors were weighed in the offender's case. The judge exercises a discretion in the determination of the sentence. However, the

⁸⁷ *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476.

⁸⁸ *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 474.

system is not without a control mechanism. If the offender or the Director of Public Prosecutions considers that the judge's reasons are flawed, or simply that the sentence is too long or too short, there is an avenue of appeal to the Court of Criminal Appeal. By special leave, there is a further avenue of appeal to the High Court.

In the case of sentences that are imposed in the Supreme Courts of the States and Territories, the judge's reasons are published on the Court's website. Sometimes in cases that have attracted considerable public interest a newspaper report will include a link to the reasons. It is a helpful way of promoting informed awareness among the readership of a system of criminal justice that has much to commend it.