"Legal Aid Commission of New South Wales: Aiding the Individual, the Nation and the Institutions"

The Hon Justice Michelle Gordon AC*

Introduction

On being asked to speak at the Legal Aid Commission of New South Wales' Criminal Law Conference, I spoke to a senior criminal silk at the New South Wales Bar. My question was simple: tell me about the Criminal Law Section of the Legal Aid Commission of New South Wales ("the Commission") and what might be of interest to them. His response was telling – "they punch above their weight. The work that the Commission does is important and has a profound impact at three distinct levels – for the individual, in the development of the criminal law nationally, and institutionally".

His message to me was do not focus on what might be of interest to the Commission but what I – Justice Michelle Gordon – might learn from them. And he was right. This is what I learnt.

The Commission provides access to justice for the individuals it represents. The Commission significantly contributes to and shapes the development of criminal law in Australia. And the Commission assists the judiciary in the proper performance of its

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* Justice of the High Court of Australia. This is an edited version of a speech delivered at the Legal Aid Commission of New South Wales' Criminal Law Conference on 2 June 2021. The author acknowledges the assistance of her Associate, Arlette Regan, and National Registry Manager at the High Court of Australia, Emma Will, in the preparation of this paper.

work, thereby contributing to public confidence in the integrity of the administration of justice in this country.

How do I know this – well, with some considerable assistance, I undertook extensive research into the work that the Commission has done in the High Court over the last 27 years. I identified and then reviewed the High Court criminal cases involving the Commission and examined the outcomes of, and legal developments arising from, those cases. The results were impressive.

The Playing Field – Criminal Cases

Before saying something about what the survey of cases showed, I should make some obvious points that can be lost in the detail of individual cases. Criminal cases are contests between a government and a citizen[1]. Prosecutions are instituted against individuals by prosecuting authorities who are part of the executive government.

The trial is "the central feature of the criminal justice system"[2]. In a jury trial the judge is responsible for supervising and controlling the trial process. The judge must instruct the jury on so much of the law as the jury need to know to decide the issues in the case, make rulings about evidence and resolve legal issues that arise in the trial[3]. The role of the jury is as the trier of fact. The jury is to

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1 Gleeson, "The Role of a Judge in a Criminal Trial", speech delivered at LawAsia Conference (6 June 2007) at 2.

2 *Crampton v The Queen* (2000) 206 CLR 161 at 217 [157] (Hayne J).

3 Gleeson, "The Role of a Judge in a Criminal Trial", speech delivered at LawAsia Conference (6 June 2007) at 5. See also *Crampton* (2000) 206 CLR 161 at 217 [157] (Hayne J).

apply the law as explained by the judge to the facts (upon the evidence) and to reach a verdict as to whether the accused is guilty or not[4]. If a person is convicted, they are given a sentence, much more often than not as an exercise of judicial discretion[5].

Errors and irregularities can occur at just about every step in the trial and sentencing process.

The role of courts of criminal appeal is, in essence, to correct such errors[6]. Criminal appeals can, and do, raise questions about substantive criminal law, practice and procedure, evidence and exercises of discretion about sentencing, among other things. They involve the application of common law principles, statutory interpretation, and the interaction between the common law and statutes[7].

It is essential for the key players – the legal practitioners, the jury and the judges – to focus upon the details of the particular case before them. That must not, however, come at the cost of paying close attention to the broader playing field – the basic principles of the criminal justice system in Australia.

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4 Gleeson, "The Role of a Judge in a Criminal Trial", speech delivered at LawAsia Conference (6 June 2007) at 5. See also *Ratten v The Queen* (1974) 131 CLR 510 at 517 (Barwick CJ).

5 See *Wong v The Queen* (2001) 207 CLR 584 at 591 [7] (Gleeson CJ).

6 See Mason, "The Distinctiveness and Independence of Intermediate Courts of Appeal" (2012) 86 *Australian Law Journal* 308 at 310; Thomson, "'Doing Justice': The Error Principle and Sentencing Appeals" (2011) 85 *Australian Law Journal* 668.

7 French, "Criminal Law in the 21st Century: The High Court and Criminal Law", speech delivered at 15th International Criminal Law Congress (15 October 2016) at 3, 16.

The "fundamental prescript"[8] of the criminal law – the "golden thread"[9] running through it – is that a person accused of a crime has certain basic rights necessary to ensure a fair trial according to law (such as the right to be presumed innocent and the right to have criminal guilt proved beyond reasonable doubt[10], among others).

Special Leave to Appeal – The Gateway to Final Appellate Consideration

For the better part of the twentieth century the High Court was reluctant to hear criminal appeals[11]. That has changed considerably over time, particularly since the 1980s[12].

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8 *Dietrich v The Queen* (1992) 177 CLR 292 at 326 (Deane J); see also at 299 (Mason CJ and McHugh J), 361 (Toohey J), 362 (Gaudron J). The right to a fair trial according to law has also been described as "[t]he central thesis of the administration of criminal justice": see *McKinney v The Queen* (1991) 171 CLR 468 at 478 (Mason CJ, Deane, Gaudron and McHugh JJ); *Dietrich v The Queen* (1992) 177 CLR 292 at 327-328 (Deane J).

9 *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481 (Viscount Sankey LC); Kirby, "Turbulent Years of Change in Australia's Criminal Laws", speech delivered at Australian and New Zealand Society of Criminology Conference (22 February 2001).

10 See *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 344 (Latham CJ); *Momcilovic v The Queen* (2011) 245 CLR 1 at 51 [53]-[54] (French CJ); Warren, "Justice Gaudron's Contribution to the Jurisprudence of Criminal Law" (2004) 15 *Public Law Review* 328 at 333; Hogg, "Criminal Procedure" in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).

11 Kirby, "Why has the High Court Become More Involved in Criminal Appeals?" (2002) 23 *Australian Bar Review* 4 at 5-6.

12 Kirby, "Turbulent Years of Change in Australia's Criminal Laws", speech delivered at Australian and New Zealand Society of Criminology Conference (22 February 2001).

Criminal appeals now make up a large and important part of the Court's work[13].

Special leave to appeal "is the gateway to final appellate consideration … by the High Court"[14]. It is the mechanism through which the High Court controls the number and nature of appeals it hears[15]. Most special leave applications are unsuccessful. The Court's resources are limited. It cannot rescrutinise every case involving an alleged error. Special leave is the condition that ensures the cases that come before the Court are of a character that warrants the Court's attention[16].

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13 Refshauge, "Criminal Law" in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001); Kirby, "Why has the High Court Become More Involved in Criminal Appeals?" (2002) 23 *Australian Bar Review* 4 at 7-8; Nettle, "The Jurisprudence of the High Court of Australia on Sentencing", paper delivered at the National Judicial College of Australia Conference – Sentencing: New Challenges (3-5 March 2018) at 1; Priest, "Special Leave to Appeal to the High Court in Criminal Cases: A Change of Approach?" (2018) 92 *Australian Law Journal* 957 at 957.

14 Stewart and Stuhmcke, "Litigants and Legal Representatives: A Study of Special Leave Applications in the High Court of Australia" (2019) 41(1) *Sydney Law Review* 35 at 35. See also Kirby, "Maximising Special Leave Performance in the High Court of Australia" (2007) 30(3) *University of New South Wales Law Journal* 731 at 732-733.

15 Jackson, "The Australian Judicial System: Judicial Power of the Commonwealth" (2001) 24(3) *University of New South Wales Law Journal* 737 at 738.

16 Mason, "The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal" (1996) 15(1) *University of Tasmania Law Review* 1 at 6; Mason, "The High Court as Gatekeeper" (2000) 24(3) *Melbourne University Law Review* 784 at 785.

The *Judiciary Act 1903* (Cth) sets out the criteria for the grant of special leave to appeal[17]. The Court is required to "have regard to" whether the case raises a question of law "that is of public importance" or in respect of which there is divergence of opinion in the decisions of lower courts and, importantly (especially for criminal appeals), "whether the interests of the administration of justice, either generally or in the particular case", require consideration by the High Court. The last criterion is sometimes called the "visitation" jurisdiction[18].

The Statistics – The Commission in the High Court

A range of factors may impact success in the High Court[19]. It will come as a surprise to no one that whether a party is legally represented is one of the most important factors. It was recognised in *Dietrich v The Queen*[20] that, save in the exceptional case of a

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17 *Judiciary Act 1903* (Cth), s 35A.

18 Kirby, "Maximising Special Leave Performance in the High Court of Australia" (2007) 30(3) *University of New South Wales Law Journal* 731 at 744; Wickham, "The Procedural and Substantive Aspects of Applications for Special Leave to Appeal in the High Court of Australia" (2007) 28 *Adelaide Law Review* 153 at 157.

19 There is a growing body of academic work that seeks to understand and analyse trends about who wins and loses among parties to litigation, including in the High Court of Australia: See, eg, Sheehan and Randazzo, "Explaining Litigant Success in the High Court of Australia" (2012) 47(2) *Australian Journal of Political Science* 239; Stewart and Stuhmcke, "Litigants and Legal Representatives: A Study of Special Leave Applications in the High Court of Australia" (2019) 41(1) *Sydney Law Review* 35. See also Kirby, "Maximising Special Leave Performance in the High Court of Australia" (2007) 30(3) *University of New South Wales Law Journal* 731.

20 (1992) 177 CLR 292 at 302 (Mason CJ and McHugh J). See also *Mansfield v Director of Public Prosecutions (WA)* (2006)

skilled litigant, in practice the adversarial system of litigation breaks down where there is no legal representation. But not all legal representation is equal. The statistics to which I am about to refer demonstrate the high-quality legal representation provided by the Commission and counsel briefed by the Commission.

National criminal special leave applications and criminal appeals

So what did my research discover? Critically analysing the records held by the High Court between 1998 and 2020, a period of 22 years, revealed:

(1) The Commission was involved in about 7 per cent of all *criminal* special leave applications nationally[21].

(2) Special leave was granted in about a quarter of the applications filed by the Commission[22].

(3) The Commission was involved in about 13 per cent of all the *criminal* appeals in the High Court[23].

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226 CLR 486 at 503 [49] (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ).

21 Of the 1,992 criminal special leave applications filed nationally between 1998 and 2020, the Commission was involved in 135 (6.77%).

22 Of the 135 criminal special leave applications the Commission was involved in, special leave was granted in 35 applications (excludes applications brought by the Crown) (25.9%). These statistics do not include *Baker v The Queen* (2004) 223 CLR 513 and *Magaming v The Queen* (2013) 252 CLR 381. Although technically "criminal appeals", these cases primarily concern constitutional law, albeit in a criminal context.

23 Of the 313 criminal appeals heard nationally between 1998 and 2020, the Commission was involved in 41 (13.09%). That includes appeals that were heard and determined instanter upon the grant of special leave: see, eg, *R v Taufahema* (2007) 228 CLR 232; *Gedeon v Commissioner of the New South Wales*

Those statistics are remarkable. They indicate that the Commission is carrying a heavy part of the load of criminal special leave applications and appeals in the High Court. Its rate of success at the special leave stage (the number of cases in which special leave was granted in favour of the Commission's clients) is also significant. As I have observed, the vast majority of special leave applications are refused[24]. Special leave is a significant hurdle to surmount – getting in the door in about one in four cases is an achievement in and of itself, even if the outcome on appeal is ultimately not a "win".

Commission's success in High Court appeals (criminal and other)

Even more impressive is the Commission's rate of success in High Court appeals (that is, whether an appeal is allowed or dismissed in favour of the Commission's client). Between 1993 and 2020 (a slightly longer period than referred to in the context of the national criminal special leave and appeal statistics) the Commission's client won 29 out of the 47 criminal appeals involving the Commission. 47 appeals, or just under 2 appeals each year.[25]

Crime Commission (2008) 236 CLR 120; *Reeves v The Queen* (2013) 88 ALJR 215.

24 Mason, "The High Court as Gatekeeper" (2000) 24(3) *Melbourne University Law Review* 784 at 786. See also *Burrell v The Queen* (2008) 238 CLR 218 at 240 [90] (Kirby J).

25 That is 20 per cent higher than the Commission's success rate in non-criminal appeals over the same period, where the Commission won 5 out of 12 appeals (which in and of itself is an impressive number, given that the cases that come before the High Court ordinarily involve the most challenging problems arising in our legal system). See also Hayne, "Advocacy and Special Leave Applications in the High Court of Australia", speech delivered to the Victorian Bar, Continuing Legal Education (22 November 2004).

Table 1: High Court appeals[26] (criminal and other) involving the Commission between 1993 and 2020

Category	Number of cases	Percentage
All cases – total wins	34 out of 59 cases	57.62%
Criminal cases – total wins[27]	29 out of 47 cases	61.70%
Non-criminal cases – total wins[28]	5 out of 12 cases	41.66%

Unanimous decisions and dissents

The proportion of unanimous and dissenting judgments in those same appeals involving the Commission is also noteworthy. In criminal appeals involving the Commission between 1993 and 2020:

(1) Of the cases it won, the Court was *unanimously in favour of* the Commission's client in about two thirds of the cases.

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26 These statistics relate only to appeals (not original jurisdiction cases) in which the Commission acted for an appellant or respondent (not an intervener). The statistics therefore do not include *Crump v New South Wales* (2012) 247 CLR 1 and *CDJ v VAJ* (1998) 197 CLR 172.

27 For cases where two appeals where brought, but one judgment delivered, two appeals have been included in these statistics: see *Burrell v The Queen* (2008) 238 CLR 218 and *Jamieson v The Queen* (1993) 177 CLR 574.

28 As noted above in fn 22, cases raising only questions of constitutional law (although on appeal from the New South Wales Court of Criminal Appeal) have been designated "non-criminal cases" for the purposes of these statistics: see *Baker v The Queen* (2004) 223 CLR 513 and *Magaming v The Queen* (2013) 252 CLR 381.

(2) Of the cases it lost, nearly half of the cases contained at least one dissenting opinion.

Table 2: Dissents and unanimous decisions between 1993 and 2020 in High Court criminal appeals

Category	Number of cases	Percentage
Cases won by the Commission's client		
Cases with a dissenting opinion	10 out of 29 cases	34.48%
Cases with a unanimous decision	19 out of 29 cases	65.51%
Cases lost by the Commission's client		
Cases with a dissenting opinion	8 out of 18 cases	44.44%
Cases with a unanimous decision	10 out of 18 cases	55.55%

Table 3: Dissents and unanimous decisions between 1993 and 2020 in High Court non-criminal appeals

Category	Number of cases	Percentage
Cases won by the Commission's client		
Cases with a dissenting opinion	0 out of 5 cases	0%
Cases with a unanimous decision	5 out of 5 cases	100%
Cases lost by the Commission's client		
Cases with a dissenting opinion	6 out of 7 cases	85.71%

Cases with a unanimous decision	1 out of 7 cases	14.28%

The statistics are impressive, and I will return to their significance later. But they paint only part of the picture. It is even more revealing to look at the cases themselves, which I will turn to now. Three points can be made.

Aiding the individual

The first concerns the Commission's impact at what can be conveniently described as the "individual" level.

Not every case surveyed was a "seminal" case. Some did not raise any point of principle. Many turned on the facts of the particular case and may not ultimately have wider impacts on the direction or development of the criminal law. And, for those reasons, they may be thought to be "banal"[29] or not regarded as especially significant by those within the legal profession. That does not mean they are unimportant.

It is an unremarkable observation that errors in criminal cases can have significant consequences for the individuals affected – harsh punishment[30]. Because of this, the existence of an error in a criminal case *may* weigh strongly in favour of the grant of special leave to appeal to the High Court on the basis that leave is

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29 See Bagaric, "The High Court on Crime in 2018: Outcomes and Jurisprudence" (2019) 43 *Criminal Law Journal* 6 at 25.

30 See Bagaric, "The 'Civil-isation' of the Criminal Law" (2001) 25 *Criminal Law Journal* 184 at 185; Bagaric, "The High Court on Crime in 2020: Analysis and Jurisprudence" (2021) 45 *Criminal Law Journal* 4 at 4.

necessary in the interests of justice in the particular case, notwithstanding that no point of principle arises and there is no dispute among lower courts to be resolved[31]. Although not every case raising the possibility of error is suitable for the grant of special leave[32], the Court recognises the importance of correcting miscarriages of justice and preventing manifest unfairness in criminal cases[33].

The Commission's rate of success in criminal appeals directly facilitates access to justice for the individuals concerned – by bringing appeals to correct errors in relation to convictions, errors in relation to sentencing, and the incorrect application of the proviso. Let me illustrate these points by reference to some of the cases – all appeals conducted by the Commission.

Errors relating to convictions

A number of the cases surveyed involved errors relating to convictions. Of those I mention only two in detail. First, *Cesan v The Queen*[34]. We all know it – the trial judge was asleep during significant parts of the trial. It proved to be a source of distraction for the jury. The Court of Criminal Appeal of New South Wales had

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31 cf *Judiciary Act 1903* (Cth), s 35A.

32 cf *Digi-Tech (Australia) Ltd v Kalifair Pty Ltd* [2003] HCATrans 598 (18 February 2003) at lines 302-308 (McHugh J stating that "[i]f arguable error constituted a miscarriage of justice for the purposes of the *Judiciary Act*, every arguably wrong decision would be a candidate for special leave to appeal"); O'Brien, *Special Leave to Appeal*, 2nd ed (2007) at 138.

33 Mason, "The High Court as Gatekeeper" (2000) 24(3) *Melbourne University Law Review* 784 at 786.

34 (2008) 236 CLR 358.

held that there was no demonstrated error or prejudice to the accused flowing from the trial judge's conduct. The High Court unanimously allowed the appeals, set aside the convictions and remitted the matters for retrial[35]. The error affected a central feature of the criminal justice system – the individual's trial – and required correction. It will be necessary to return to consider this case in a different context later.

RP v The Queen[36] in 2016 is another. It concerned the application of existing principles regarding the common law presumption that a child under 14 lacks the capacity to be criminally responsible (the doli incapax doctrine). RP was 11 when he engaged in certain sexual acts with his younger brother. He was convicted of having sexual intercourse with a child under 10 and aggravated indecent assault. The Court held that, on the basis of the evidence, it was not open to the Court of Criminal Appeal to conclude that it had been proved beyond reasonable doubt that RP understood his conduct was seriously wrong in a moral sense, as required to rebut the presumption[37]. The Court considered that there was insufficient evidence about RP's maturity, the environment in which he was raised, and his moral development[38]. The convictions were quashed

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35 *Cesan v The Queen* (2008) 236 CLR 358 at 388 [96]-[97] (French CJ), 391 [106]-[107] (Gummow J), 395 [127] (Hayne, Crennan and Kiefel JJ), 396 [133] (Heydon J).

36 (2016) 259 CLR 641.

37 *RP v The Queen* (2016) 259 CLR 641 at 658 [36] (Kiefel, Bell, Keane and Gordon JJ), 659 [39] (Gageler J).

38 *RP* (2016) 259 CLR 641 at 658 [36] (Kiefel, Bell, Keane and Gordon JJ).

and verdicts of acquittal entered[39]. Again, correction of error that affected the individual – a child.

Errors in sentencing

Other cases involved errors in sentencing.

In *Nguyen v The Queen*[40] in 1993, the Court of Criminal Appeal "simply failed to advert to the substance of [Mr Nguyen's] submissions when it came to determine the appropriate sentence to be imposed on resentencing"[41]. The Director of Public Prosecutions conceded the appeal should be allowed and the matter remitted for reconsideration[42].

In *Carroll v The Queen*[43] in 2009, the appellant pleaded guilty to manslaughter for head-butting a man who fell backwards, hit the back of his head and died 10 days later. The primary judge sentenced him to three years' imprisonment by periodic detention. The Court of Criminal Appeal allowed an appeal by the DPP, holding the sentence manifestly inadequate. The High Court unanimously allowed an appeal, holding that the Court of Criminal Appeal had wrongly "evaluate[d] the adequacy of the sentence by discarding reference to why [Carroll] had acted as he had" and "by attributing to him the ability to foresee that his conduct could cause … severe

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39 *RP* (2016) 259 CLR 641 at 648 [7], 658 [37] (Kiefel, Bell, Keane and Gordon JJ).

40 (1993) 68 ALJR 121.

41 *Nguyen v The Queen* (1993) 68 ALJR 121 at 121-122 (Deane J).

42 *Nguyen* (1993) 68 ALJR 121 at 122.

43 (2009) 83 ALJR 579; 254 ALR 379.

injury or the possibility of death" in circumstances where the trial judge's findings as to those matters had not been challenged[44].

Incorrect application of the proviso

Several cases involved the incorrect application of the "proviso". The meaning, scope and application of the proviso has been the subject of frequent attention in the High Court in recent years[45].

The appellant in *Evans v The Queen*[46] in 2007 was convicted of armed robbery and assault with intent to rob. At trial he was required to wear a balaclava and overalls found at his house and a pair of sunglasses that were not in evidence. The jury was asked to compare the appellant's appearance with that of the offender who had been photographed by security cameras. The Court of Criminal Appeal held that the trial judge erred in requiring the appellant to wear the sunglasses, and by excluding certain alibi evidence, but that neither error occasioned a substantial miscarriage of justice. The High Court (by majority) allowed the appeal[47]. Justices

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44 *Carroll v The Queen* (2009) 83 ALJR 579 at 584 [24] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added); 254 ALR 379 at 385.

45 See, eg, *OKS v Western Australia* (2019) 265 CLR 268 at 280-281 [34] (Edelman J, noting that "[t]he meaning and application of [the] simple expression ['no *substantial* miscarriage of justice has occurred'], capturing immaterial errors and miscarriages, has resulted in hundreds of applications for special leave and appeals to this Court"); Bagaric, "The High Court on Crime in 2018: Outcomes and Jurisprudence" (2019) 43 *Criminal Law Journal* 6 at 21.

46 (2007) 235 CLR 521.

47 *Evans v The Queen* (2007) 235 CLR 521 at 525 [8] (Gummow and Hayne JJ), 555 [128] (Kirby J).

Gummow and Hayne held that, in addition to the errors identified, the appellant should not have been required to put on the balaclava and overalls because having him dress in those items tendered no relevant evidence,[48] and may have depreciated his credibility as a witness[49]. Justice Kirby considered that requiring the appellant to "sit, in the jury's presence, in a garb often associated with armed robberies; inescapably similar to the appearance of the offender shown on the video film and photographic stills; and necessarily looking sinister and criminal-like … would etch an eidetic imprint on the jury's collective mind" which was unfairly prejudicial to the appellant[50]. As his Honour held, where such a prejudicial course had been allowed at trial and excused by the Court of Criminal Appeal, it fell to the High Court "to insist on a return to basic standards of fairness in prosecution practice and in the conduct of such trials"[51]. But that cannot happen unless the Commission files the application for special leave and runs the appeal.

Lane v The Queen[52] is a more recent example. Mr Lane was convicted of manslaughter after being tried for murder. There had been an altercation between the deceased and Mr Lane, much of which was captured by CCTV. The footage depicted the deceased falling to the ground on two occasions, but did not clearly depict Mr Lane punching him before either fall. Consistent with the Crown's case at trial, the trial judge directed the jury that it was

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48 *Evans* (2007) 235 CLR 521 at 525 [9], 530 [28].

49 *Evans* (2007) 235 CLR 521 at 530 [29].

50 *Evans* (2007) 235 CLR 521 at 550 [108].

51 *Evans* (2007) 235 CLR 521 at 551 [111] (Kirby J).

52 (2018) 265 CLR 196.

open to it to find that a deliberate act by Mr Lane had caused the death of the deceased if it found that *either fall* was caused by Mr Lane. The trial judge did not, however, direct the jury that in order to find Mr Lane guilty they had to unanimously agree as to whether one of both of the acts said to cause the deceased to fall was a criminal act. The Court of Criminal Appeal held that the trial judge erred in failing to give a unanimity direction of the kind just described, but dismissed the appeal, concluding that no substantial miscarriage of justice had occurred. The High Court disagreed, holding that in the absence of an unanimity direction "it could not be assumed that the jury had discharged its function to reach a unanimous verdict"[53].

Some of the cases just discussed involved what may now seem to be blatant or fundamental errors. Others involved the incorrect application of established principles. But there is a common theme. In each case, the correction of error achieved justice for the individual. The Commission's role in facilitating that access to justice cannot be overstated.

Aiding the development of the criminal law nationally

My second point is directed to the Commission's impact on a "national" level – its role in shaping the development of criminal law in Australia. A number of the cases surveyed were significant, even seminal, cases that brought about change or clarified uncertainty about issues of substantive criminal law, criminal procedure, evidence and sentencing. They had, and continue to have, legal

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53 *Lane v The Queen* (2018) 265 CLR 196 at 210 [47] (Kiefel CJ, Bell, Keane and Edelman JJ); see also at 213-214 [63] (Gageler J).

significance and application beyond the facts of the particular case[54].

Fundamental principles regarding criminal justice

Some cases concerned fundamental aspects of our criminal justice system, such as the separation of prosecutorial and judicial functions; the requirement that a jury be free to deliberate; the materials to be provided to an accused to ensure a fair trial; and the role of a trial judge in a jury trial. These are not abstract or esoteric legal issues. They have direct bearing on how the key players in our criminal justice system – legal practitioners, juries and judges – are to conduct themselves.

Black v The Queen[55] in 1993 is seminal. The facts are well known. After the jury had been deliberating for several hours the trial judge gave a direction including statements that "there must necessarily be … a certain amount of give and take and adjustment" by jurors and "[i]t makes for considerable public inconvenience and expense if a jury cannot agree and it is most unfortunate indeed if such a failure to agree is due to some unwillingness on the part of one or more members of the jury to listen to and consider the arguments of the rest of the jury"[56]. The High Court held that the direction "may well have resulted in the jury failing to give the issues that free deliberation to which both the accused and the Crown were

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54 See Bagaric, "The High Court on Crime in 2020: Analysis and Jurisprudence" (2021) 45 *Criminal Law Journal* 4 at 4.

55 (1993) 179 CLR 44.

56 *Black v The Queen* (1993) 179 CLR 44 at 47 (Mason CJ, Brennan, Dawson and McHugh JJ).

entitled"[57] and that the trial judge might have been taken to suggest, wrongly, "that a juror is to compromise with other jurors in reaching a verdict"[58]. Justice Deane, agreeing with the rest of the Court, emphasised that "[a]ny suggestion that a minority juror should democratically submit to the view of the majority is antithetical to the jury process"[59]. The Court set out a formulation of a direction that would be appropriate where it appears that a jury is encountering difficulty in reaching a verdict which has proved influential, now commonly known as a "*Black* direction"[60].

In *Maxwell v The Queen*[61] in 1996, the High Court held by majority that where a prosecutor elects to accept a guilty plea, the trial judge has no power to reject the plea. Justices Dawson and McHugh emphasised that "[o]ur courts do not purport to exercise control over the institution or continuation of criminal proceedings, save where it is necessary to do so to prevent an abuse of process or to ensure a fair trial"[62]. Those observations have been endorsed by the High Court in a number of subsequent cases[63].

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57 *Black* (1993) 179 CLR 44 at 51 (Mason CJ, Brennan, Dawson and McHugh JJ), 55 (Deane J agreeing).

58 *Black* (1993) 179 CLR 44 at 50 (Mason CJ, Brennan, Dawson and McHugh JJ), 55 (Deane J agreeing).

59 *Black* (1993) 179 CLR 44 at 56.

60 See, eg, *Gassy v The Queen* (2008) 236 CLR 293 at 302 [22], 322 [93]; *Stanton v The Queen* (2003) 77 ALJR 1151 at 1155 [18]; 198 ALR 41 at 46.

61 (1996) 184 CLR 501 at 510-511 (Dawson and McHugh JJ).

62 *Maxwell v The Queen* (1996) 184 CLR 501 at 512.

63 See, eg, *Elias v The Queen* (2013) 248 CLR 483 at 497 [34] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 135 [99] (Hayne and

The High Court's decision in *Grey v The Queen*[64] in 2001 stands as authority for the proposition that, to ensure a fair trial, the prosecution must at common law disclose all relevant evidence to an accused[65]. The prosecution in that case had failed to provide to the accused a letter which revealed that the prosecution's principal witness was a police informer who had, for that reason, secured advantages in his own criminal proceedings[66].

Cesan v The Queen[67] – the case involving the sleeping trial judge – has broader implications for the function of the trial judge in a jury trial. Chief Justice French observed that a trial judge's function in a jury trial is the "supervision and control of and participation in the trial process", which "requires no less a standard of attentiveness to the evidence and the conduct of the trial generally than the standard applicable to a judge sitting alone"[68]. His Honour held that the judge's failure to maintain the necessary supervision and control of the trial amounted to a miscarriage of

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Bell JJ); *Magaming v The Queen* (2013) 252 CLR 381 at 390 [20] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 432 [63] (French CJ, Hayne, Crennan, Bell and Keane JJ).

64 (2001) 75 ALJR 1708; 184 ALR 593.

65 See also, eg, *Mallard v The Queen* (2005) 224 CLR 125 at 133 [17] (Gummow, Hayne, Callinan and Heydon JJ); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 270 [190] (Kiefel J); *HT v The Queen* (2019) 92 ALJR 1307 at 1342 [78] fn 92.

66 See *Grey v The Queen* (2001) 75 ALJR 1708 at 1714 [30] (Kirby J); 184 ALR 593 at 601.

67 (2008) 236 CLR 358.

68 *Cesan v The Queen* (2008) 236 CLR 358 at 381-382 [74].

justice[69]. Justices Hayne, Crennan and Kiefel considered that a miscarriage of justice occurred "because the trial judge did not exercise the degree of supervision of the proceedings which would ensure, so far as reasonably practicable, that the jury paid attention to all of the evidence as it was given"[70]. These are fundamental principles of the criminal justice system.

Substantive criminal law

Other cases involving the Commission resulted in significant development in the substantive criminal law.

In *McAuliffe v The Queen*[71] the High Court enunciated principles regarding the doctrine of complicity known as "extended joint criminal enterprise". Before *McAuliffe* the test of what fell within the scope of a "common purpose" to commit a crime was to be determined objectively[72]. The Court held that, having regard to "the emphasis which the law now places on the actual state of mind of an accused person", the test of what came within a common purpose must be subjective[73]. The Court also held that a party to a joint criminal enterprise is guilty of a crime which falls outside the

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69 *Cesan* (2008) 236 CLR 358 at 388 [96] (French CJ).

70 *Cesan* (2008) 236 CLR 358 at 391 [112]; see, similarly, at 390-391 [105]-[106] (Gummow J).

71 (1995) 183 CLR 108.

72 *McAuliffe v The Queen* (1995) 183 CLR 108 at 114 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ).

73 *McAuliffe* (1995) 183 CLR 108 at 114 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ). See also Refshauge, "Criminal Law" in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).

common purpose if that party contemplated or foresaw as a possibility the commission of that offence by one of the parties in carrying out the joint criminal enterprise and continued to participate with that knowledge[74]. In 2006 in *Clayton v The Queen*[75] and again in 2016, in *Miller v The Queen*[76], the High Court was asked to "abandon or confine" the doctrine of extended joint criminal enterprise. In each case, the Court, by majority, declined to do so[77].

Although *McAuliffe* was a loss for the Commission's client, it is significant both because it is a seminal case on joint criminal enterprise liability[78] but also because it has also been the subject of debate and criticism by those who consider that the scope of liability is excessive[79]. Indeed, it differs from the approach in the United Kingdom, where the Supreme Court held in *R v Jogee* that the doctrine of "parasitic accessory liability" represented a "wrong

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74 *McAuliffe* (1995) 183 CLR 108 at 117-118 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ).

75 (2006) 81 ALJR 439; 231 ALR 500.

76 (2016) 259 CLR 380 at 387 [1] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

77 *Clayton v The Queen* (2006) 81 ALJR 439 at 441 [3] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ); 231 ALR 500 at 502; *Miller v The Queen* (2016) 259 CLR 380 at 388 [2] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), 424 [131] (Keane J).

78 Refshauge, "Criminal Law" in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).

79 See Bell, "Keeping the Criminal Law in 'Serviceable Condition': A Task for the Courts or the Parliament?", speech delivered at Paul Byrne Memorial Lecture (22 October 2015) at 26.

turn"[80]. But three times the Court has held, in the last 25 years, that extended joint enterprise is part of the law of Australia.

Burns v The Queen[81] (another case in which the Commission was engaged) is a decision of wide significance[82]. The appellant was convicted of manslaughter for supplying methadone to an individual who died as a result of the combined effect of the methadone and a prescription drug. The prosecution raised two alternative bases for the manslaughter offence. First, that supplying methadone was an unlawful and dangerous act. Second, that the appellant's failure to seek medical attention for the deceased was grossly negligent.

As to the first basis, there had not previously been "any extended consideration in Australia of the application of the law of manslaughter" to the illicit supply of drugs the consumption of which causes death[83]. The Crown belatedly conceded before the High Court that the supply of methadone without more was not capable of supporting the appellant's conviction for manslaughter by unlawful and dangerous act. The High Court unanimously endorsed

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80 [2016] UKSC 8 at [2]-[3]; see also [80]-[87], [90]-[100]. See also Bagaric, "The High Court on Crime in 2016: Outcomes and Jurisprudence" (2017) 41 *Criminal Law Journal* 7 at 8; French, "Criminal Law in the 21st Century: The High Court and Criminal Law", speech delivered at 15th International Criminal Law Congress (15 October 2016) at 12.

81 (2012) 246 CLR 334.

82 See Bagaric, "The High Court on Crime in 2012: Outcomes and Jurisprudence" (2013) 27 *Criminal Law Journal* 6 at 7.

83 *Burns v The Queen* (2012) 246 CLR 334 at 361 [77] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

that concession as correctly made[84]. The plurality emphasised that "[a] foolish decision to take a prohibited drug not knowing its likely effects is nonetheless the drug taker's voluntary and informed decision"[85]. Their Honours held that "[t]he cause of the death of the deceased in law was the consumption of the methadone and not the anterior act of supply of the drug"[86]. As to the second basis for the offence, the plurality emphasised that "[c]riminal liability does not fasten on the omission to act, save in the case of an omission to do something that a person is under a legal obligation to do"[87]. Their Honours held that "[t]he appellant was not in a relationship with the deceased which the law recognises as imposing an obligation to act to preserve life. She had not voluntarily assumed the care of the deceased nor had she secluded him such as to deny him the opportunity that others would assist him"[88]. The issues, the analysis and the principles, are significant and continue to have a daily impact on the administration of the criminal law in this area – what charges are laid and why.

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84 *Burns* (2012) 246 CLR 334 at 353 [41] (French CJ), 357 [56], 361 [78] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 371 [118] (Heydon J).

85 *Burns* (2012) 246 CLR 334 at 364 [87] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

86 *Burns* (2012) 246 CLR 334 at 364 [88] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

87 *Burns* (2012) 246 CLR 334 at 366-367 [97] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

88 *Burns* (2012) 246 CLR 334 at 367 [101] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); see also at 366-367 [97].

Practice and procedure

Then there are cases about matters of practice and procedure. In *Burrell v The Queen*[89] in 2008, the Court of Criminal Appeal had published reasons and pronounced orders dismissing the appellant's appeals against conviction and sentence. After the orders were formally recorded, the Court discovered that its reasons contained substantial factual errors. The Court re-opened the appeals, reconsidered and confirmed its previous orders. The High Court unanimously held that the Court of Criminal Appeal did not have the power to re-open the appeals after its orders had been formally recorded[90]. The plurality emphasised that conclusion was necessary to give effect to the principle of finality[91]. They held that "[i]dentifying the formal recording of the order of a superior court of record as the point at which that court's power to reconsider the matter is at an end provides a readily ascertainable and easily applied criterion", and further, that the recording of orders "marks the end of the litigation in that court, and provides conclusive certainty about what was the end result in that court"[92]. *Burrell* is an important case about the finality of proceedings and the powers of superior courts of record generally; and its significance is not limited to the

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89 (2008) 238 CLR 218.

90 *Burrell v The Queen* (2008) 238 CLR 218 at 220 [2] (Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ), 249 [130] (Kirby J).

91 *Burrell* (2008) 238 CLR 218 at 224 [18] (Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ).

92 (2008) 238 CLR 218 at 224 [20] (Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ).

criminal context[93]. It records the significance and importance of superior courts of record generally to get the facts right. We owe it to the litigants.

Evidence

Several cases involving the Commission concerned the law of evidence.

The issue in *Hawkins v The Queen*[94], for example, was whether a confession given by the appellant was inadmissible on the basis that it had been induced by an untrue representation made by a person in authority. The Court unanimously held that the purpose of the relevant provision of the *Crimes Act 1900* (NSW) was "to protect the individual who is induced to make a confession by an untrue representation made by a person in authority, just as the common law rule protects an accused who is induced to make a confession by a threat or promise made by such a person"[95]. The Court held that "[a] representation may be made by acts and conduct as well as words or by a combination of words, acts and conduct", and "the content of a representation ... is to be ascertained, where appropriate, by reference to the circumstances in

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93 See, eg, *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 376 [129] (Hayne, Crennan and Kiefel JJ); *Achurch v The Queen* (2014) 253 CLR 141 at 152-153 [14]-[15] (French CJ, Crennan, Kiefel and Bell JJ); *NH v Director of Public Prosecutions (SA)* (2016) 260 CLR 546 at 581-582 [70] (French CJ, Kiefel and Bell JJ), 589 [99] (Nettle and Gordon JJ); *Clone Pty Ltd v Players Pty Ltd* (2018) 264 CLR 165 at 198 [69] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

94 (1994) 181 CLR 440 at 442.

95 *Hawkins v The Queen* (1994) 181 CLR 440 at 446-447.

which it was made and the matters to which it related"[96].
Again, the issue, the analysis and the principle, are significant and continue to have a daily impact on the administration of the criminal law – interviews of, and confessions by, an accused.

Then there is the decision last year in *Kadir v The Queen*[97]*.* The appellants were convicted of animal cruelty offences relating to the use of rabbits as live bait in training racing greyhounds.
The High Court unanimously allowed the appeals in part, holding that video-recordings obtained by Animals Australia in contravention of the *Surveillance Devices Act 2007* (NSW) had been correctly excluded from evidence by the trial judge and that the Court of Criminal Appeal had erred in holding otherwise[98]. The High Court held that the Court of Criminal Appeal had correctly concluded that other evidence obtained in the execution of a search warrant and evidence of admissions made by Mr Kadir was admissible[99].
The case provided what has been described as "long-overdue guidance" on s 138 of the *Uniform Evidence Law*[100] – that evidence obtained improperly or illegally is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of

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96 *Hawkins* (1994) 181 CLR 440 at 447.

97 (2020) 267 CLR 109.

98 *Kadir v The Queen* (2020) 267 CLR 109 at 122-123 [9] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ); see also at 120-121 [4], [5].

99 *Kadir* (2020) 267 CLR 109 at 122-123 [9] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

100 Bagaric, "The High Court on Crime in 2020: Analysis and Jurisprudence" (2021) 45 *Criminal Law Journal* 4 at 5.

admitting evidence obtained in the way in which the evidence was obtained.

The High Court clarified the significance of one of the matters that must be taken into account when determining whether to exercise that discretion: "the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law"[101]. The Court explained that the significance of that factor "will vary depending upon the circumstances. In a case in which action is taken in circumstances of urgency in order to preserve evidence from loss or destruction, it is possible that factor … would weigh in favour of admission, notwithstanding that the action involved deliberate impropriety or illegality", but "[p]utting such a case to one side, where the impropriety or illegality involved … is deliberate or reckless … proof that it would have been difficult to obtain the evidence lawfully will ordinarily weigh against admission. By contrast, where the impropriety or illegality was neither deliberate nor reckless, the difficulty of obtaining the evidence lawfully is likely to be a neutral consideration"[102]. Their Honours held that "demonstration of the difficulty of obtaining evidence of the commission of acts of animal cruelty lawfully" by the appellants "did not weigh in favour of admitting evidence obtained in deliberate defiance of the law"[103]. In holding the search warrant evidence and admissions admissible, the Court emphasised that the importance of that evidence was "greater" because of the

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101 *Evidence Act 1995* (NSW), s 138(3)(h).

102 *Kadir* (2020) 267 CLR 109 at 127-128 [20] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

103 *Kadir* (2020) 267 CLR 109 at 122-123 [9] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

exclusion of the illegally obtained video-recordings[104] and that there is a strong "public interest in the conviction of wrongdoers"[105].

Sentencing

Several cases in which the Commission was engaged involved major developments in Australian sentencing jurisprudence.

The appellant in *Pearce v The Queen*[106] was charged with maliciously inflicting grievous bodily harm with intent and breaking and entering a dwelling house and, while in it, inflicting grievous bodily harm. Each charge arose from a single incident.
The elements of the offences overlapped but were not identical. The appellant sought a stay on one or other of the charges on the ground that the indictment placed him in double jeopardy. That application was refused. He pleaded guilty and was sentenced to 12 years' imprisonment on each count, to be served concurrently. By majority, the High Court allowed an appeal against sentence.
The majority held that, subject to contrary legislative intention, where an offender stands convicted for two offences which contain common elements "it would be wrong to punish that offender twice for the commission of the elements that are common"[107]. Their Honours emphasised that "the punishment to be exacted should reflect *what an offender has done*" (emphasis added), not "the way

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104 *Kadir* (2020) 267 CLR 109 at 135 [41] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

105 *Kadir* (2020) 267 CLR 109 at 137 [48] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

106 (1998) 194 CLR 610.

107 *Pearce v The Queen* (1998) 194 CLR 610 at 623 [40] (McHugh, Hayne, Callinan JJ); see also at 629-630 [67] (Gummow J).

in which the boundaries of particular offences are drawn"[108]. Because the trial judge sentenced the appellant to identical terms of imprisonment for each offence, the majority considered that the sentence on each count contained a portion which was to punish for a single act of inflicting grievous bodily harm, so "he was doubly punished for the one act"[109]. As Justice Nettle later remarked, although the rule against double punishment has a long history, the High Court's decision in *Pearce* "gave it a significance not previously apprehended"[110].

So called guideline judgments were addressed in *Wong v The Queen*[111]. A majority of the High Court held that a "guideline judgment" delivered by the Court of Criminal Appeal for sentencing the Commonwealth offence of being knowingly concerned in the importation of narcotics revealed error. The majority considered that the selection of weight of narcotic as the "chief factor" to be taken into account in fixing a sentence was contrary to the statute, which expressly required a range of factors to be considered[112]. Justices Gaudron, Gummow and Hayne also held it was not within

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108 *Pearce* (1998) 194 CLR 610 at 623 [40] (McHugh, Hayne, Callinan JJ); see also at 629-630 [67] (Gummow J).

109 *Pearce* (1998) 194 CLR 610 at 623 [43], 624 [49] (McHugh, Hayne, Callinan JJ); see also at 629-630 [67] (Gummow J).

110 Nettle, "The Jurisprudence of the High Court of Australia on Sentencing", paper delivered at the National Judicial College of Australia Conference – Sentencing: New Challenges (3-5 March 2018) at 16. See also Mildren, "Crown Appeals and Double Jeopardy" (2011) 2 *Northern Territory Law Journal* 3 at 6.

111 (2001) 207 CLR 584.

112 *Wong v The Queen* (2001) 207 CLR 584 at 609 [70] (Gaudron, Gummow and Hayne JJ), 631-632 [129]-[131], 634 [138]-[139] (Kirby J).

"the jurisdiction or the powers" of the Court of Criminal Appeal to publish the guideline judgment, because it was not directed at quelling a dispute which constituted the matter before the Court and was instead intended to have "prescriptive effect" in respect of the results *of future cases*[113]. Even the dissenting Justices criticised the guidelines. Chief Justice Gleeson considered there was a "substantial risk" the guidelines would constrain the exercise of sentencing discretion in a manner inconsistent with the statutory requirements[114]. Justice Callinan expressed strong doubts that the formulation and application of guidelines could be a proper exercise of Commonwealth judicial power[115], noting the guidelines had a "legislative" flavour or quality about them[116]. Since *Wong*, "enthusiasm for guidelines judgments" has, naturally, diminished[117]. All participants in the administration of the criminal law have the Commission to thank for your role in that outcome.

And then there is the Commission's role in the "instinctive synthesis" approach to sentencing. In *Wong*, Justices Gaudron, Gummow and Hayne criticised the Court of Criminal Appeal's reasons for employing "a mathematical approach to sentencing in

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113 *Wong* (2001) 207 CLR 584 at 615 [83], [84] (Gaudron, Gummow and Hayne JJ).

114 *Wong* (2001) 207 CLR 584 at 597 [31].

115 *Wong* (2001) 207 CLR 584 at 642 [165].

116 *Wong* (2001) 207 CLR 584 at 642 [165], 643 [167] (Callinan J).

117 Bagaric and Edney, *Sentencing in Australia* (7th ed, 2019) at 68 [200.1780]. See also Nettle, "The Jurisprudence of the High Court of Australia on Sentencing", paper delivered at the National Judicial College of Australia Conference – Sentencing: New Challenges (3-5 March 2018) at 40-41.

which there are to be 'increment[s]' to, or decrements from, a predetermined range of sentences"[118]. Their Honours described that as a "two-stage approach", "apt to give rise to error" and which fails to take into account the many conflicting and contradictory elements bearing upon sentencing[119]. Their Honours instead endorsed an "instinctive synthesis" approach, whereby the sentencing judge is "to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all"[120] (emphasis in original).

Four years later, in *Markarian v The Queen*[121] (another case run by the Commission), a majority of the High Court expressly endorsed those observations[122]. Their Honours held that, following *Wong*, it cannot be doubted that "sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison"[123]. Justice McHugh expressed a particularly firm view in favour of the "instinctive synthesis" method of sentencing and rejecting the "two-tier sentencing approach"[124]. His Honour considered that an instinctive synthesis approach –

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118 *Wong* (2001) 207 CLR 584 at 611 [74] (footnote omitted).

119 *Wong* 2001) 207 CLR 584 at 611 [74].

120 *Wong* (2001) 207 CLR 584 at 611 [75].

121 (2005) 228 CLR 357.

122 *Markarian v The Queen* (2005) 228 CLR 357 at 373-374 [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

123 *Markarian* (2005) 228 CLR 357 at 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

124 *Markarian* (2005) 228 CLR 357 at 377-380 [50]-[56], 390 [84].

whereby "the judge identifies *all* the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case"[125] (emphasis added) – is "likely to lead to better outcomes than the pseudo-science of two-tier sentencing"[126], whereby "a judge first determines a sentence by reference to the 'objective circumstances' of the case" and then "increases or reduces this hypothetical sentence incrementally or decrementally by reference to other factors"[127]. The instinctive synthesis approach has remained since *Markarian*[128].

Then, there is the Commission's role in clarifying the "parity principle" in sentencing and Crown appeals against sentence – two significant aspects of the criminal justice system. In *Green v The Queen*[129] when sentencing the appellants, who were participants in a substantial criminal enterprise involving cultivation of cannabis plants, the sentencing judge took into account the sentence imposed

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125 *Markarian* (2005) 228 CLR 357 at 378 [51] (McHugh J).

126 *Markarian* (2005) 228 CLR 357 at 390 [84] (McHugh J).

127 *Markarian* (2005) 228 CLR 357 at 377-378 [51] (McHugh J).

128 See *Muldrock v The Queen* (2011) 244 CLR 120 at 131-132 [26] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, expressly endorsing the approach enunciated by McHugh J in *Markarian v The Queen* (2005) 228 CLR 357 at 378 [51]). See also *Hili v The Queen* (2010) 242 CLR 520 at 539 [60]; *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at 506-507 [56] (French CJ, Kiefel, Bell, Nettle and Gordon JJ); *Director of Public Prosecutions (Vic) v Dalgliesh (A Pseudonym)* (2017) 262 CLR 428 at 443 [45] (Kiefel CJ, Bell and Keane JJ), 452 [79] (Gageler and Gordon JJ).

129 (2011) 244 CLR 462.

on another individual involved in the same criminal enterprise. The Court of Criminal Appeal allowed appeals by the Crown and increased the sentences. The appellants appealed to the High Court, arguing the resentencing created a disparity with the sentence of the other individual, which had not been challenged by the Crown. The majority emphasised that the "parity principle" "requires that like offenders should be treated in a like manner"[130] and "allows for different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances"[131]. Their Honours considered that the principle must be "governed by consideration of substance rather than form", and therefore not confined to "co-offenders" in a strict sense (that is, individuals charged *with the same offences* arising out of the same criminal conduct)[132]; it may extend to participants in the same criminal enterprise.

The majority noted that, unlike appeals by offenders which are concerned with the correction of error in the particular case[133], the primary purpose of Crown appeals against sentences is "to lay down principles for the governance and guidance of courts"[134].

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130 *Green v The Queen* (2011) 244 CLR 462 at 473 [28] (French CJ, Crennan and Kiefel JJ).

131 *Green* (2011) 244 CLR 462 at 473 [28] (French CJ, Crennan and Kiefel JJ).

132 *Green* (2011) 244 CLR 462 at 474 [30] (French CJ, Crennan and Kiefel JJ).

133 *Green* (2011) 244 CLR 462 at 465 [1]; see also at 477 [36] (French CJ, Crennan and Kiefel JJ).

134 *Green* (2011) 244 CLR 462 at 465 [1], 477 [36] (French CJ, Crennan and Kiefel JJ), quoting *Griffiths v The Queen* (1977) 137 CLR 293 at 310 (Barwick CJ).

Their Honours considered that "a powerful consideration against allowing a Crown appeal would be the ... creation of unjustifiable disparity between any new sentence and an unchallenged sentence previously imposed upon a co-offender", because "the extent of the guidance afforded to lower courts may be questionable" where "an anomalous disparity" results from "the Crown's selective invocation of the Court's jurisdiction"[135]. They held that the Court of Criminal Appeal had disturbed the relativity between the appellants' sentences and that of the other individual involved in the same enterprise, "creat[ing] an unjustified disparity"[136]. The Court had become "the instrument of unequal justice"[137]. Again, the Commission's role in these areas cannot be overstated.

Development of Australian law more generally (non-criminal appeals)

It is not possible to address the Commission's impact on the development of the law outside the criminal law. But it would be remiss not to note that, during the period surveyed, the Commission was involved in a number of important High Court appeals relating to constitutional law – *Baker v The Queen* in 2004; *Magaming v The*

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135 *Green* (2011) 244 CLR 462 at 477 [37] (French CJ, Crennan and Kiefel JJ).

136 *Green* (2011) 244 CLR 462 at 466 [3] (French CJ, Crennan and Kiefel JJ).

137 *Green* (2011) 244 CLR 462 at 466 [4] (French CJ, Crennan and Kiefel JJ).

Queen in 2013 and *Masson v Parsons* in 2019[138] – and immigration[139], discrimination[140] and family law[141].

Aiding the judiciary

The final point I wish to make relates to the Commission's impact at an "institutional" level: its impact on the "judiciary" and, in particular, the High Court. I acknowledge the Commission's impacts may be most clearly apparent at the "individual" and "national" levels. Indeed, as this speech has demonstrated, its role in facilitating access to justice for individuals and shaping the development of the criminal law can be assessed simply by looking at the cases in which it has been involved. Its impact at an institutional level is less tangible, but no less significant. That proposition can be made good by making some general observations about what the statistics and cases surveyed reveal about the Commission.

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138 *Baker v The Queen* (2004) 223 CLR 513; *Magaming v The Queen* (2013) 252 CLR 381; *Masson v Parsons* (2019) 266 CLR 554. Although *Baker* and *Magaming* are technically "criminal appeals", they only raise questions about constitutional law, albeit arising in a criminal context.

139 *A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1; *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCATrans 356; *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189.

140 *Purvis v New South Wales* (2003) 217 CLR 92

141 *LK v Director-General, Department of Community Services* (2009) 237 CLR 582; *Bondelmonte v Bondelmonte* (2017) 259 CLR 662; *Masson v Parsons* (2019) 266 CLR 554.

Identifying appropriate cases for final appellate consideration

First, they highlight the Commission's exercise of judgment in identifying appropriate cases. Justice Kirby once described the process of judging special leave applications as involving "[a]n inescapable element of intuition, wrapped in experience, within an exercise of judgment"[142]. That description applies equally to the work of legal practitioners who successfully screen and assess suitable cases for special leave.

The Commission's rate of success both at the special leave and appeal stages indicate that it is performing that task exceptionally well. The high proportion of unanimous decisions in favour of the Commission's clients demonstrates that the Commission has identified strong cases that frequently generated consensus among the Justices of the High Court. On the other hand, the high proportion of dissenting judgments in cases lost by the Commission reinforces the view that the cases lost were contestable and therefore appropriate for final appellate consideration.

The Commission's effectiveness in identifying suitable cases aids the Justices of the High Court in the performance of their roles in controlling the gateway to final appellate consideration. As Justice Kirby said[143]:

> "All of the High Court Justices have a stake, and a part to play, in control of the gateway and in the choice of the matters that will form the appellate business of the entire Court. Each of them has experience, and an

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142 Kirby, "Maximising Special Leave Performance in the High Court of Australia" (2007) 30(3) *University of New South Wales Law Journal* 731 at 731.

143 Kirby, "Maximising Special Leave Performance in the High Court of Australia" (2007) 30(3) *University of New South Wales Law Journal* 731 at 732-733.

> interest, in ensuring that the Court selects its business wisely and deploys the relatively scarce judicial resources appropriately for the performance of the functions of the nation's final appellate and constitutional tribunal."

The Court can only hear the cases that are brought before it. Your role is therefore critical.

Wise decisions about who to brief

Second, the statistics and cases indicate that the Commission has made wise decisions about who to brief. In criminal cases where the Court is dealing with the exercise of the power of the State against the individual, and particularly where individuals are in custody, there is a large responsibility on judges. No matter how a special leave application or appeal is prepared or argued, it is always possible there is an issue warranting the Court's attention[144]. The cases are, with few exceptions, hard[145]; and the volume of work is large[146]. Judges require skilled assistance. A high standard of advocacy is imperative to assist the Court to fulfil its constitutional

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144 Kirby, "Why has the High Court Become More Involved in Criminal Appeals?" (2002) 23 *Australian Bar Review* 4 at 14-15. See also McHugh, "Working as a High Court Justice", speech delivered to Women Lawyers Association of New South Wales and the Law Society of Newcastle (17 August 2005) at 7; *Sinanovic v The Queen* (1998) 72 ALJR 1050 at 1050 [1] (Kirby J); 154 ALR 702 at 703.

145 Kirby, "What is it *Really* Like to be a Justice of the High Court of Australia?" speech delivered at the University of Sydney, Faculty of Law, Constitutional Law Class (23 May 1997).

146 McHugh, "Working as a High Court Justice", speech delivered to Women Lawyers Association of New South Wales and the Law Society of Newcastle (17 August 2005) at 10.

function; advocacy informs the exercise of judicial power by the Court[147].

Good advocacy is important to the Court because[148]:

> "The legal problems that come to the High Court are, or should be, the most difficult and challenging problems in the Australian legal system ... *[P]roper performance of the advocates' task is essential to the proper performance of the Court's work ... We who must decide the cases look for as much help as we can get in performing our task*."

And the quality of barristers matters a great deal for the development of the law. A skilled advocate will identify an area where there is judicial appetite for shifting boundaries, re-examining or formulating new principles; and they will bring an element of "imagination and boldness" in seeking to persuade the Court as to how the law should be developed[149].

Effective use of resources

Third, and finally, the statistics and cases suggest that the Commission has used its limited resources effectively. This is

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147 French, "Appellate Advocacy in the High Court of Australia", speech delivered at World Bar Conference (29 June 2012).

148 Hayne, "Advocacy and Special Leave Applications in the High Court of Australia", speech delivered to Victorian Bar, Continuing Legal Education (22 November 2004) (emphasis added).

149 Mason, "The Role of Counsel and Appellate Advocacy" (1984) 58 *Australian Law Journal* 537 at 538. See also French, "Legal Change – The Role of Advocates", Sir Maurice Byers Lecture (22 June 2016) at 11; Gibbs, "Recent Developments in Criminal Law in the Australian High Court" (1986) 6 *Commonwealth Judicial Journal* 4 at 4.

important[150]. If there is not enough legal aid funding for criminal appeals – if the money runs out and a person lacks representation on appeal – that creates a number of obvious problems. It is a barrier for individuals accessing justice if they are deterred from pursuing a case on appeal due to lack of legal aid or, if they choose to proceed without legal representation, but are not able to properly advance their case. Unrepresented litigants, in turn, create burdens for appellate courts.

But ineffective use of legal aid funding also has the potential to create a more insidious and less perceptible problem at an institutional level. Miscarriages of justice and other errors are inevitable – human decision-makers are fallible and processes imperfect[151]. But errors have the capacity to erode confidence in the criminal justice system if they go uncorrected. The identification and correction of errors through the appeal process is necessary to reinforce and promote confidence in the integrity of the administration of justice by courts[152]. The legal profession and the

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150 Kirby, "The Future of Criminal Law – Some Big Issues", speech delivered at the Criminal Lawyers' Association Northern Territory Bali Conference (28 June 1999); *Sinanovic v The Queen* (1998) 72 ALJR 1050 at 1051 [7] (Kirby J); 154 ALR 702 at 704.

151 *Dietrich v The Queen* (1992) 177 CLR 292 at 362 (Gaudron J); Kirby, "Maximising Special Leave Performance in the High Court of Australia" (2007) 30(3) *University of New South Wales Law Journal* 731 at 731.

152 Gleeson, "Public Confidence in the Courts", speech delivered to the National Judicial College of Australia (9 February 2007) at 8. See also Refshauge, "Criminal Law" in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001); Mason, "The High Court as Gatekeeper" (2000) 24(3) *Melbourne University Law Review* 784 at 786. See also Kunc, "A Crisis for Legal Aid Funding in NSW" (2019) 93 *Australian Law Journal* 807 at 807.

judiciary both have a role to play[153]. Management of limited legal aid resources is critical. The statistics speak for themselves. For each dollar spent, value has been generated in so many ways - for the individual, in the development of the criminal law nationally and institutionally.

Conclusion

The Commission's role has been instrumental. In one way or another each case in the High Court involved the correction of error or irregularity in the criminal justice process, thereby enforcing the rights of citizens and holding to account the institutions of government (the Crown and lower courts). Of course, not all cases are of "public importance" in a legal sense. But each and every one has contributed to promoting public confidence in the integrity of the administration of justice. Each holds intrinsic value that extends beyond achieving justice for the particular individual concerned. Each has significantly contributed to the maintenance and advancement of our legal system and to the administration of criminal justice nationally. Your history is rich and remarkable. So many people and institutions are the beneficiaries of that rich history, history which continues to resonate on a daily basis in the administration of the criminal law.

I accepted the submission of the senior silk and was right to do so. I have learned a lot about the Criminal Division of the Legal Aid Commission of New South Wales. The statistics are only part of the legacy, a legacy about which you all should be very proud. But it is the details behind the statistics that complete the picture

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153 Kirby, "Maximising Special Leave Performance in the High Court of Australia" (2007) 30(3) *University of New South Wales Law Journal* 731 at 752.

and speak for themselves. And in the future – I look forward to continuing to be the beneficiary of your work and to continuing my learning.