



Singapore Academy of Law &  
State Courts of Singapore

Sentencing Conference 2014

*The Art of Sentencing - an appellate court perspective*

by

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It is an honour and a pleasure to have been invited to address the 2014 conference on sentencing organised by the Singapore Academy of Law and the State Courts of Singapore. I congratulate the organisers who have succeeded in bringing together a distinguished array of speakers with considerable experience in both the theory and practice of sentencing.

### **The importance of sentencing**

It is difficult to overstate the importance of sentencing in the administration of any system of criminal justice. In a very real sense it is where the 'the rubber meets the road'. The exercise of the power to administer punishment is one of the two critical components of any system for the administration of criminal justice - the other being the determination of guilt or innocence. The manner in which the power to impose punishment is exercised is one of the two critical determinants of the quality and calibre of justice provided in any jurisdiction. Any system which imposes punishments which are cruel, harsh or arbitrary cannot be described as a just system. The extent to which 'the punishment fits the crime', and the offender, provides a tangible measure of justice.

### **Public confidence**

In many jurisdictions, and certainly in Australia, sentencing is the judicial function which attracts the most public interest and attention by far.<sup>1</sup>

During my term as Chief Justice of Western Australia, sentencing is the topic upon which I have received more correspondence than any other, and it is the topic about which I am most commonly asked when I speak publicly. This leads me to conclude that public perceptions of the manner in which a system of courts exercises the power to impose sentence is critical to public confidence in the administration of justice. Regrettably, in many jurisdictions, including my own, there is a disconnection between public perception and reality in relation to sentencing. This is a topic to which I will return.

### **The art of sentencing**

This paper is primarily concerned with appeals against sentence, and draws upon my experience in hearing and deciding such appeals. It is necessary to place that experience in context by commencing with a brief overview of the principles which govern the imposition of sentence in my jurisdiction. Unfortunately, I am not qualified to comment upon the extent to which those principles correspond with the principles applicable in Singapore. However, even though the principles of sentencing are governed by statute in my State, they draw

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<sup>1</sup> At least if public interest is measured by media coverage, letters to the editor, discussion on talk-back radio, internet commentary, blogs, etc.

heavily from the common law heritage which we share with Singapore.

### **Reasonable proportionality**

Consistently with the common law of Australia, the primary sentencing principle in Western Australia may be loosely described as the principle of 'reasonable proportionality' - that is, the principle that the sentence must be proportionate to the objective circumstances of the offence and the culpability of the offender. I say loosely described because the term is not a term which has always been used consistently. At times it has been used to refer to the limits of the sentencing discretion which derive from the objective circumstances of the offence.<sup>2</sup> However, the High Court of Australia has recently confirmed that the common law principle of proportionality requires account to be taken of the personal circumstances of the particular offender and the principle of consistency, that is, the sentence must be comparable to sentences imposed upon other offenders guilty of similar offences and with similar personal circumstances.<sup>3</sup>

In Western Australia, the principle of reasonable proportionality (as I use it) is embodied in s 6 of the *Sentencing Act 1995* (WA). That section requires that 'a sentence imposed on an offender must be commensurate with the seriousness of the offence'. But 'the seriousness of an offence' must be determined by a court after taking

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<sup>2</sup> *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472; *DPP (Cth) v Northcote* [2014] NSW CCA 26 [75]; *R v Hadchiti* [No 3] [2014] NSWSC 257.

<sup>3</sup> *Magaming v The Queen* [2013] HCA 40; 87 ALJR 1060 [51] (French CJ, Hayne, Crennan, Kiefel & Bell JJ).

into account any aggravating and mitigating factors, being the factors defined (somewhat loosely) in other sections of the *Sentencing Act 1995* (WA) which decrease or increase the culpability of the offender or the extent to which the offender should be punished including factors personal to the offender.<sup>4</sup>

Similar principles are embodied in the legislation which governs sentencing for federal offences - that is, offences committed against the laws of the Commonwealth of Australia. Section 16A of the *Crimes Act 1914* (Cth) provides that the sentence to be imposed in respect of a federal offence must be 'of a severity appropriate in all the circumstances of the offence'. Other provisions in the same section require the court to take account of various specified matters being, very generally speaking, the matters that would be described as aggravating or mitigating factors under Western Australian law.

### **Balancing contradictory and incommensurable objectives**

Within this framework of principle provided by statute and common law, a court imposing sentence in Australia is required to take account of the manner in which the sentence imposed might achieve any and each of the following objectives:

- Punishment of the offender
- Denunciation of the offending conduct
- Vindication of the victim
- Specific deterrence of the offender

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<sup>4</sup> *Sentencing Act 1995* (WA), ss 6, 7, 8.

- General deterrence of other prospective offenders
- Prevention (incapacitation)
- Rehabilitation of the offender (thereby protecting the community)

Thus, as the Hon James Spigelman AC pointed out, while Chief Justice of New South Wales:

'The ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice, do not generally point in the same direction. Specifically, the requirements of justice, in the sense of just desserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy.'<sup>5</sup>

### **Intuitive or instinctive synthesis**

Because the process of sentencing<sup>6</sup> involves the balancing of contradictory and incommensurable objectives, it seems to me to have more in common with the field of art than that of science. That is particularly so in Australia, where the High Court of Australia has, on a number of occasions, decried a mathematical or formulaic approach to the calculation of sentence and has instead mandated what has been

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<sup>5</sup> The Hon JJ Spigelman AC, Chief Justice of NSW, 'Sentencing Guideline Judgments' (1999) *Current Issues in Criminal Justice* 11(1):5, p 6.

<sup>6</sup> In Australia at least.

described as a process of intuitive or instinctive synthesis.<sup>7</sup> By these decisions, the court has resolved a previous controversy as to whether the process of sentencing involved what was described as a mathematical or 'sequential or two-tiered' approach, by which a court starts 'from some apparently subliminally derived figure'<sup>8</sup> and then adds and subtracts item by item, by reference to aggravating and mitigating factors respectively, so as to calculate the actual sentence to be imposed. Although the High Court has acknowledged that there may be some cases in which transparency and accessible reasoning may justify 'some indulgence in an arithmetical process'<sup>9</sup> generally speaking, the number and complexity of the competing considerations which must be weighed by a trial judge will militate against mathematical calculation and instead will favour the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors. Of course, the enunciation of the factors taken into account by the trial judge is necessary so as to enable an appellate court to ascertain whether the sentencing process has miscarried because of failure to take into account a relevant consideration, or as a result of taking into account an irrelevant consideration.

However, in many Australian jurisdictions, there will be occasions upon which mathematical calculation is an essential part of the sentencing process. For example, in Western Australia, if an offender

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<sup>7</sup> *Markarian v R* [2005] HCA 25; 228 CLR 357; *Wong v R* [2001] HCA 64; 207 CLR 584, 611 - 612.

<sup>8</sup> *Markarian*, above [39].

<sup>9</sup> *Markarian*, above [39].

pleads guilty, the court may reduce the sentence in order to recognise the benefits to the State and to any victim or witness to the offence.<sup>10</sup> However, if the sentence to be imposed is a fixed term of imprisonment, the court must not reduce that term by more than 25% on account of the plea, and if the sentence is reduced as a consequence of the plea, the court must state that fact and the extent of the reduction in open court.<sup>11</sup> The deduction must be applied before any other mitigating factors are taken into account<sup>12</sup> - a process which is more consistent with the sequential or tiered approach to sentencing than a process of intuitive or instinctive synthesis.

### **Some common law principles - totality and parity**

There are a number of principles of sentencing which are applied pursuant to the common law of Australia without necessarily finding expression in the relevant sentencing statute. Perhaps the two most significant principles, at least from the perspective of an appellate court, are the principles of totality and parity.

#### **Totality**

The common law principle of totality applies where an offender is to be sentenced for more than one offence. It embodies two quite distinct concepts although, in practice, it is not uncommon for each concept to apply to a particular case.

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<sup>10</sup> *Sentencing Act 1995* (WA), s 9AA(2).

<sup>11</sup> *Sentencing Act 1995* (WA), s 9AA(5).

<sup>12</sup> The *Sentencing Act 1995* (WA) requires that the reduction applies to the head sentence, which is defined to exclude any mitigation (s 9AA (1)(b), (2)).

The first aspect of the principle of totality requires that the total effective sentence imposed must be reasonably proportional to the total criminality or culpability of the offender, taking into account the circumstances of each offence and the personal circumstances of the offender.<sup>13</sup> The principle is most commonly applied when decisions have to be made as to whether a sentence of imprisonment is to be served concurrently with, or cumulatively upon, a term of imprisonment to be served for another offence. The 'one transaction rule' has emerged as a general but not inflexible guide to the exercise of this discretion. Under that rule, generally speaking, sentences imposed in respect of different offences committed in the course of one transaction will often be directed to be served concurrently, whereas sentences of imprisonment imposed in respect of offences committed in the course of quite separate and discrete transactions will often be ordered to be served cumulatively.<sup>14</sup> The discretion to order sentences to be served cumulatively or concurrently will often be utilised to produce a total effective sentence which corresponds to the court's assessment of the total criminality involved.

The second aspect of the totality principle prevents a court from imposing a total effective sentence which is so great as to be crushing - that is, a sentence which is so great as to prevent the offender from having any vision or expectation of a productive life following release

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<sup>13</sup> See, for example, *Bui v The State of Western Australia* [2014] WASCA 168, [20].

<sup>14</sup> I must, however, emphasise that the 'one transaction rule' is a very general guide, and will not be applied if it would be contrary to the overall interests of justice in a particular case. See, for example, *Guler v The State of Western Australia* [2014] WASCA 83 [37].

from prison, thereby discouraging attempts at rehabilitation.<sup>15</sup> This aspect of the totality principle comes into play much less frequently at the appellate level, as it will usually only apply where a very substantial effective sentence has been imposed.<sup>16</sup> It can raise difficult questions when sentences are imposed upon offenders of advanced years or limited life expectancy due to illness.

### **Parity**

The parity principle is an aspect of the broader principle of equal justice.<sup>17</sup> Like the totality principle, it has two components:

Equal justice requires identity of outcome in cases that are relevantly identical. It requires different outcomes in cases that are different in some relevant respect.<sup>18</sup>

The parity principle is often expressed in terms of the disparity giving rise to an objectively justifiable or legitimate sense of grievance on the part of the offender invoking the principle, or an appearance that justice has not been done.

The parity principle is to be distinguished from the general objective of consistency in sentencing, which applies to persons charged with similar offences arising out of unrelated events. In this context, consistency does not mean numerical or mathematical equivalence,

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<sup>15</sup> See, for example, *Bui* above [20].

<sup>16</sup> Usually 10 years or more.

<sup>17</sup> *Green v The Queen* [2011] HCA 49 [28] (French CJ, Crennan and Kiefel JJ).

<sup>18</sup> *Wong v The Queen* [2001] HCA 64; 207 CLR 584, 608 (Gaudron, Gummow and Hayne JJ).

but consistency in the application of relevant legal principles.<sup>19</sup> However, the parity principle applies only to the punishment of those engaged in the commission of the same offence, or in related offences arising from one transaction in which they were engaged. As already noted, the principle allows for different sentences to be imposed upon like offenders in order to reflect differing degrees of culpability or differing personal circumstances, but requires that the sentences imposed bear an appropriate relationship to each other, after taking account of those differences.

### **Other factors**

#### **Imprisonment as a last resort**

Most Australian jurisdictions contain statutory provisions which constrain the sentencing process which I have just described by expressly or impliedly requiring that a sentence of imprisonment can only be imposed after all other alternative forms of sentence have been excluded - that is, imprisonment is a last resort.<sup>20</sup> In Western Australia, the discretion is further constrained by a provision which prohibits a court from imposing a term of imprisonment (in aggregate) of six months or less.<sup>21</sup> This provision was introduced in 2003 to encourage courts to make greater use of alternatives to imprisonment,

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<sup>19</sup> *Hilli v The Queen* [2010] HCA 45; 242 CLR 520, at 527.

<sup>20</sup> Eg, *Crimes Act 1914* (Cth), s 17A; *Sentencing Act 1995* (WA), s 6(4). However, Queensland has enacted legislation to override this principle (see *Youth Justice and Other Legislation Amendment Act 2014* (Qld)).

<sup>21</sup> *Sentencing Act 1995* (WA), s 86.

by precluding use of the 'short sharp shock' of a short term.<sup>22</sup> This provision does not apply to young offenders.<sup>23</sup>

### **Mandatory minimum sentences**

The sentencing discretion can also be constrained by a mandatory requirement to impose a sentence at or above a specified minimum. Mandatory minimum sentences are not new, and were a feature of British criminal law exported to Britain's colonies. All Australian jurisdictions retain at least some vestiges of mandatory sentencing, such as the common requirement that a sentence of life imprisonment be imposed for the offence of murder. Since colonial days, the range of offences to which mandatory minimum sentences applied were reduced significantly until about 20 years ago, when some legislatures started imposing mandatory minimum terms in respect of a variety of offences - sometimes triggered by a 'three strikes' rule relating to the number of convictions sustained by a particular offender. The issues of public policy relating to mandatory minimum sentencing are a suitable topic for a paper devoted to that subject alone. For present purposes it is sufficient to note that in Australia the recent resurgence of legislation requiring courts to impose minimum sentences for particular sentences strongly suggests that legislators perceive that the public has lost some confidence in the capacity of the judiciary to exercise the sentencing discretion appropriately.

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<sup>22</sup> However, it is not clear that the provision has had the intended effect. A review of the *Sentencing Act 1995 (WA)* has recommended the reduction of the minimum aggregate term to three months (Department of the Attorney General, *Statutory Review of the Sentencing Act 1995 (WA)* (October 2013) p 58).

<sup>23</sup> That is, offenders who are under the age of 18 at the time of commission of their offence.

## **Parole**

All Australian jurisdictions make provision for the conditional release of offenders prior to the completion of the terms of imprisonment imposed upon them. In some jurisdictions the court has the power to fix the minimum period which must be served prior to the offender becoming eligible for parole. In other jurisdictions, like Western Australia, the discretion of the court is limited to making an order for eligibility for parole, after which the minimum period which must be served prior to eligibility for parole is set by a statutory mathematical formula.<sup>24</sup>

## **Juveniles**

All Australian jurisdictions require different principles to be applied to the sentencing of juvenile offenders, although the precise definition of offenders to whom those principles apply varies from jurisdiction to jurisdiction. At the risk of over-generalisation, those principles require much greater emphasis to be placed upon the objective of rehabilitation when a juvenile offender is sentenced. The public policies underlying such an approach are obvious - they include the desirability of endeavouring to protect society by taking whatever steps can be taken to encourage young offenders to develop into law-abiding adults, and a policy of compassion and mercy properly

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<sup>24</sup> In general terms, the Western Australian formula requires the offender to serve half the total effective term of imprisonment imposed prior to eligibility for parole, if that term is 12 months or more, up to 4 years, or, if the total effective term is more than 4 years, 2 years less than the term imposed (*Sentence Administration Act 2003* (WA) s 93).

applied to offenders who lack the powers of reasoning and experience necessary to make informed decisions with respect to their conduct.

### **Solution-focused sentencing**

The alternative sentences available to contemporary Australian courts enable the court to take an approach which is focused upon addressing an underlying problem which has caused the offending behaviour, with a view to reducing the risk of further offending behaviour. This approach is given various descriptors, including therapeutic jurisprudence, problem solving or solution-focused sentencing.<sup>25</sup> In many Australian jurisdictions, separate courts have been created to deal with specific areas of offending behaviour, or types of offender, in which it is considered that this approach is particularly appropriate. So, in different jurisdictions around Australia there are courts which deal exclusively with offenders whose offending behaviour has been caused by drug or substance abuse, offenders guilty of domestic violence, Aboriginal offenders, or offenders who suffer from mental illness or cognitive disability. Most of these courts operate on quite different principles to the general principles which I have enunciated above, although conformably with the general sentencing framework. Very generally speaking, the usual approach in such courts is to defer the imposition of sentence over a period during which the offender is required to participate in programmes or undergo treatment aimed at behavioural change. Successful completion of the programme is

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<sup>25</sup> My personal preference is for the latter descriptor - 'therapeutic jurisprudence' has a medical or clinical connotation and 'problem solving' can have a negative connotation.

regarded as a significant mitigating factor, and will usually result in a non-custodial sentence. On the other hand, if the offender fails to complete the programme, or breaches various conditions usually imposed upon participation in the programme, the offender will be sentenced in the ordinary way.

### **Sentencing Appeals**

In most, if not all, State and Territory courts in Australia, appeals against sentence are the largest single category of appellate case, measured by the number of cases rather than time spent resolving the cases. In Western Australia, very roughly speaking, about 60% of the appeals brought to the Court of Appeal are criminal cases, and about 60% of those are appeals against sentence. I suspect these proportions would be characteristic of most Australian Courts of Appeal with combined criminal and civil jurisdiction.

However, the approach taken to criminal appeals, including appeals against sentence, varies significantly amongst the Australian jurisdictions. In some jurisdictions, appeals against sentences imposed by magistrates go to a single judge of the intermediate trial court.<sup>26</sup> However, in Western Australia, and in jurisdictions which do not have an intermediate trial court<sup>27</sup> appeals against sentences imposed by magistrates go to a single judge of the Supreme Court. In all jurisdictions there is a right of further appeal from the decision of a single judge on appeal to the Court of Appeal. Appeals from

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<sup>26</sup> In most States the District Court, in Victoria the County Court.

<sup>27</sup> Tasmania, Australian Capital Territory, Northern Territory.

sentences imposed by intermediate trial courts or by judges of the Supreme Court also go to the Court of Appeal.

There are however jurisdictional differences relating to the composition of the Courts of Appeal which hear and determine appeals against sentence. Four States and both Territories have separate Courts of Appeals, whereas in the two other States, appeals are heard by a Full Court comprising three members of the court drawn from the general body of judges. Of the jurisdictions which have a distinct Court of Appeal, New South Wales alone has a separate Court of Criminal Appeal, which often comprises one member of the Court of Appeal and two members of the trial division of the court with significant experience in criminal work. In the other three States, less use is made of trial division judges, and greater use made of appellate judges in the disposition of criminal appeals.

### **Variations between different Australian jurisdictions**

#### ***Appellate process - Victoria***

There are also procedural variations as between the different Australian jurisdictions. For example, three years ago, the Court of Appeal of Victoria embarked upon a significant project aimed at reducing a very substantial backlog of criminal appeals, including appeals against sentence. The project drew its inspiration from the procedures followed by the Court of Appeal of England and Wales and includes the provision of research assistance to the judiciary from an experienced criminal lawyer, so as to enable the judges to prepare

well in advance of the hearing, with a view to increasing the proportion of cases in which judgments are given extempore. The project has been very successful in reducing the backlog.<sup>28</sup>

### ***Appellate process - Western Australia***

By contrast, in Western Australia a quite different approach has been taken. Since 2005, when the Court of Appeal was created, the leave of the court must be obtained in respect of every criminal appeal<sup>29</sup> and in respect of each and every ground of appeal. The legislation provides that leave to appeal can be granted or refused by any judge of the court,<sup>30</sup> but two judges may sit as the Court of Appeal to hear leave applications.<sup>31</sup>

All applications for leave to appeal in criminal cases are considered in the first instance by one or other of two designated members of the court. Those two members of the court confer regularly so as to ensure that they are maintaining consistent standard with respect to the grant or refusal of leave. If leave is granted in respect of one or more grounds of appeal, the question of whether leave should be granted in respect of other grounds of appeal will invariably be referred to the court hearing the appeal.

However, if the judge conducting the initial review is not disposed to grant leave to appeal on any ground, the matter is referred to the other judge responsible for leave applications. If that judge is similarly

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<sup>28</sup> Supreme Court of Victoria, *2011–12 Annual Report* pp 58, 59.

<sup>29</sup> Including appeals from magistrates (*Criminal Appeals Act 2004* (WA) ss 9, 27).

<sup>30</sup> *Supreme Court (Court of Appeal) Rules 2005* (WA), r 43(2)(b), (c).

<sup>31</sup> *Supreme Court Act 1935* (WA), s 57(1).

disposed, in the case of appeals against sentence the application for leave to appeal is listed for hearing before two members of the court. The respondent to the appeal (almost always the State) is not expected to attend the hearing and is not given notice of it. Counsel for the applicant is invited to address the court in support of the application for leave to appeal. Such addresses seldom take more than half an hour. If the court decides to grant leave, no reasons are given. However, if the court decides to refuse leave, short reasons are given, usually in writing shortly after the hearing. If leave to appeal is refused, the applicant's only other avenue of appeal is by way of special leave to appeal to the High Court of Australia. However, since this procedure has been in place, the High Court has never granted special leave to appeal from a decision of the Court of Appeal refusing leave to appeal.

We have found that this system works well in filtering out those cases in which an appeal against sentence has no significant prospect of success while at the same time affording an appropriate measure of procedural fairness. It has had an added advantage, in that the authorities responsible for the grant of legal aid in Western Australia regard the grant of leave as sufficient to satisfy the requirement of legal merit in relation to any application for legal aid, with the consequence that offenders who lack the resources to engage counsel in appeals against sentence are invariably granted legal aid and represented by counsel on their appeal. This is another aspect of our system which works particularly well.

## State appeals against sentence

### **Rare and exceptional**

All Australian jurisdictions provide for appeals by the State (Crown) against the inadequacy of a sentence imposed.<sup>32</sup> The High Court of Australia has long held that such appeals should be limited to the rare and exceptional case which involves a substantial matter of principle and which can provide guidance to sentencing courts.<sup>33</sup> In any event, more recently, a majority of the High Court held that a statutory provision in Queensland which empowered a court hearing an appeal against sentence by the prosecution to 'in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper' only authorised the appellate court to intervene and alter the sentence when express or implied error had been demonstrated in respect of the sentence imposed at first instance.<sup>34</sup> Further the High Court has also recently reaffirmed the broad residual discretion of an appellate court to dismiss a state appeal against sentence even if an error has been established.<sup>35</sup>

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<sup>32</sup> In Western Australia, the legislation authorising State appeals against sentence came into force in 1975, although other jurisdictions provided for such appeals much earlier (NSW and Tasmania in 1924, Queensland in 1939). (See Georgia Brignell & Hugh Donnelly (Judicial Commission of New South Wales), *Crown Appeals Against Sentence* (June 2005) p 1.)

<sup>33</sup> *Griffiths v The Queen* (1977) 137 CLR 293, 310 per Barwick CJ; *Everett v The Queen* (1994) 68 ALJR 875 at 878.

<sup>34</sup> *Lacey v Attorney General for the State of Queensland* (2011) 242 CLR 573

<sup>35</sup> *Munda v The State of Western Australia* [2013] HCA 38 [73], [90].

## **Double jeopardy**

Consistently with what has been described as 'deep-rooted notions of fairness and decency which underlie the common law principle against double jeopardy',<sup>36</sup> it was established that when a Court of Appeal resentenced an offender after upholding the prosecution appeal against sentence, the court should take account of the hardship suffered by the offender as a result of being sentenced, in effect, twice, and impose a sentence somewhat less than that which should have been imposed at first instance.<sup>37</sup> However, in 2007 the Council of Australian Governments reached an agreement that each of the Australian jurisdictions should enact legislation to remove consideration of the element of double jeopardy from the determination of prosecution appeals.<sup>38</sup> Legislation giving effect to that agreement was introduced in most States and Territories.<sup>39</sup>

## **Fundamental principles relating to sentence appeals**

In Australia there are a number of related principles which can be said to be fundamental to all appeals against sentence. They stem from, and are the necessary consequence of the nature of the sentencing process, which I have endeavoured to describe above. The dominant characteristic of that process involves the exercise of discretion, to be

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<sup>36</sup> *Malvaso v The Queen* (1989) 168 CLR 227 at 234 per Deane and McHugh JJ.

<sup>37</sup> See for example, *R v Allpass* (1993) 72 A Crim R 561, 562, 563.

<sup>38</sup> Council of Australian Governments, *Double Jeopardy Law Reform: Model Agreed by COAG* (2007).

<sup>39</sup> Except Queensland and the ACT - see *Green v The Queen* [2011] HCA 49 at [25]. A bill that proposed to effect this change in Queensland lapsed with the State election in 2012 and has not been revived (Criminal and Other Legislation Amendment Bill 2011(Qld) - see Legal Affairs and Community Safety Committee, *Criminal Law Amendment Bill 2014* (July 2014) pp 11, 12).

performed after an assessment of the extent to which any particular sentence would achieve to a greater or lesser extent an appropriate balance between competing and inconsistent incommensurable objectives. Such a process is incapable of producing a single uniquely correct sentence, but necessarily admits of a range of sentences which can be imposed in the proper exercise of the discretion conferred upon the sentencing judge.

### **Error must be established**

The vital point to note is that the discretion to pass sentence is conferred upon the judge at first instance. The power to pass sentence is only conferred upon a Court of Appeal if the exercise of the discretion at first instance has miscarried as a consequence of error. It follows that the sentence imposed at first instance is not to be regarded as provisional, in the sense that it requires confirmation by an appellate court. Rather, the correct approach to proceed on the basis that the discretion with respect to the imposition of sentence has been validly exercised, and will stand, unless and until error has been demonstrated by the party moving to set the sentence aside.

### **Appeals from discretionary judgments**

For Australian purposes, the classic statement of the role of an appellate court considering an appeal from the exercise of a discretionary judgment is contained in the following passage from the decision of the High Court of Australia in *House v The King*:

... the judgment complained of, namely, sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.<sup>40</sup>

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<sup>40</sup> *House v The King* [1936] HCA 40; 55 CLR 499, 504-505 per Dixon, Evatt and McTiernan JJ.

Since that passage was written almost 80 years ago, its sentiments have been reaffirmed many times. So, in *Lowndes v The Queen*<sup>41</sup> it was emphasised that an appellate court must not allow an appeal against sentence solely because it would have imposed a different sentence if it had been the sentencing judge. More recently in *Barbaro v The Queen* the plurality in the High Court observed:

The conclusion that a sentence passed at first instance should be set aside as manifestly excessive or manifestly inadequate says no more or less than that some 'substantial wrong has in fact occurred' in fixing that sentence. For the reasons which follow, the essentially *negative* proposition that a sentence is so wrong that there must have been some misapplication of principle in fixing it cannot safely be transformed into any *positive* statement of the upper and lower limits within which a sentence could properly have been imposed.

Despite the frequency with which reference is made in reasons for judgment disposing of sentencing appeals to an 'available range' of sentences, stating the bounds of an 'available range' of sentences is apt to mislead. The conclusion that an error has (or has not) been made neither permits nor requires setting the bounds of the range of sentences within which the sentence should (or could) have fallen. If a sentence passed at first instance is set aside as manifestly excessive or manifestly

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<sup>41</sup> *Lowndes v The Queen* [1999] HCA 29; 195 CLR 665, [15].

inadequate, the sentencing discretion must be re-exercised and a different sentence fixed. Fixing that different sentence neither permits nor requires the re-sentencing court to determine the bounds of the range within which the sentence should fall.<sup>42</sup>

### **Error is not dependent upon a 'range' being established**

This is an important point in relation to sentencing appeals in Australia. As is noted in the passage above, it has been common for both counsel and judges to talk of error being established because the sentence imposed is outside a permissible range. That language carries the risk of misconceiving the appellate process, which does not depend upon the establishment of a permissible range either for the purposes of ascertaining whether error is established, or for the purposes of resentencing in the event that error is established. Rather, what an appellant must establish is error of the kind identified in *House v R* above. That process does not necessarily require the establishment of a range of sentences which, if imposed, would be unaffected by error.

### **Express and implied error - the difference**

It is common to describe the principles enunciated in *House* as connoting two categories of error which, if established, vitiate the exercise of discretion. The first is commonly described as 'express'

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<sup>42</sup> *Barbaro v The Queen* [2014] HCA 2 [27] - [28] per French CJ, Hayne, Kiefel and Bell JJ.

error and includes an error of principle, an error of law, an error of fact, taking account of irrelevant matters or failing to take into account relevant matters. The other category of error is commonly referred to as 'implied' error because even though an express error is not evident from a review of the process or the observations made at the time of sentence, the sentence imposed is 'unreasonable or plainly unjust' with the consequence that error can be implied from the outcome.<sup>43</sup>

### **Express error**

Little more needs to be said about the category of express error. It embraces the types of error which are commonly found in appellate proceedings of all kinds, whether civil or criminal. Error of that kind will be established from a review of the evidence or other materials before the sentencing judge at the time of sentence, and the observations made at the time of sentence. However, even if express error is established, an appellate court will only intervene if satisfied that a different sentence should have been imposed.<sup>44</sup>

### **Implied error**

The category of implied error is, on the other hand, under Australian law at least, peculiar to appeals from a discretionary judgment, such as the passing of sentence. In the context of appeals against sentence, this category of error is most commonly expressed by an assertion that

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<sup>43</sup> For an enunciation of the distinction between express and implied error, see *Wilson v The State of Western Australia* [2010] WASCA 82 [2], McLure P and Owen JA

<sup>44</sup> See, for example, in *Western Australia Criminal Appeals Act* s 31(4)(a)

the sentence imposed is manifestly excessive (in the case of an appeal by an offender) or 'manifestly inadequate' (in the case of an appeal by the State). Assertions of that kind are to be understood in the sense evident in the authorities to which I have referred - namely, as embodying an assertion that the sentence imposed is *so wrong* that error must be inferred. Such grounds of appeal should not be construed as contending, nor will the ground necessarily be made out by establishing only that the appellate court would itself have imposed some other sentence at first instance, or that the sentence imposed falls outside a range of sentences to be derived from other decisions.

***How is implied error established?***

How then are grounds of appeal which assert manifest excess or manifest inadequacy made out? The answer to that question is to be found in the basic principles of sentencing which I endeavoured to overview earlier in this paper. At a general level the principles enunciated by the High Court in *Chan v The Queen*<sup>45</sup> are often cited:

To determine whether a sentence is excessive, it is necessary to view it in the perspective of the maximum sentence prescribed by law for the crime, the standards of sentencing customarily observed with respect to the crime, the place which the criminal conduct occupies in the scale of seriousness of crimes of that type and the personal circumstances of the offender.

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<sup>45</sup> (1989) 38 A Crim R 337, 342.

So, if the sentence imposed is so far removed from a sentence that would reflect a proper evaluation and balancing of the competing and inconsistent incommensurable objectives which underlie the sentencing process as to impute error because the sentence is unreasonable or unjust, the ground will be made out. If the sentence is so inconsistent with sentences imposed upon offenders convicted of similar offences committed in similar circumstances and who have similar personal circumstances as to bespeak error, the ground will be made out on the ground of inconsistency. If the sentence imposed contravenes one or other aspects of the totality principle, or the parity principle, error will also be established.

### **The role of an appellate sentencing court**

The primary role of any court hearing an appeal against sentence will be apparent from the observations above. Its essential function is to determine whether error has been established in one or other of the senses I have described and, if so, either to exercise the sentencing discretion afresh, or remit the matter to the court below in order that the discretion may be re-exercised by a member of that court. So, the primary role of a court hearing an appeal against sentence is to determine whether an injustice has occurred, and if so, to correct it.

However, where the appellate court sits at an upper level in a judicial hierarchy, it is both desirable and appropriate for its decisions on appeals against sentence to provide guidance to other courts within

that hierarchy as to the manner in which the sentencing discretion should be exercised. There are various ways in which that important function is commonly performed. Some examples follow:

### **Consistency - a review of the cases**

From time to time when an appellant asserts that a sentence is manifestly excessive, or manifestly inadequate because it is not consistent (in the sense described above) with sentences imposed for similar offences committed in similar circumstances, the appellate court will undertake a review of cases that are said to be similar. That review should go further than simply providing a database of comparable decisions. Rather, the review should identify the particular features of each case which renders it more or less comparable to the case under appeal, and the extent to which particular features of the cases which are said to be comparable can explain or justify the difference between the sentence imposed in that case, and the sentence imposed in the case under appeal. Without necessarily descending to the two-tiered or mathematical approach to sentencing, such analysis provides helpful guidance to the weight appropriately given to different facts, circumstances and objectives in the process of intuitive synthesis to which I have referred.

### **Changes in sentencing practice**

It is appropriate for an appellate court at the upper level of any judicial hierarchy to propose changes in sentencing practice from time to time.

It is not possible to exhaustively identify the circumstances which will justify such a course. They include changes in the prevalence of a particular type of offence, which can justify a general increase in penalties in the interests of deterrence, changes in community standards and expectations with respect to a particular class of offending (such as domestic violence) or an appreciation that the penalties customarily imposed for one type of offence may be out of alignment with the penalties customarily imposed within the hierarchy of offences generally.

Experienced lawyers and judges will no doubt be able to provide examples of such circumstances from their own experience. Drawing upon my own recent experience in Western Australia, in the last few years the Court of Appeal has reviewed the sentencing principles pertaining to offences of assault committed with the use of a glass, often in hotels or nightclubs, due to an increase in the prevalence of that type of offence.<sup>46</sup> The court has also acknowledged and approved an upward trend in sentences for manslaughter, having regard to community expectations in relation to the sentences appropriately imposed for offences which have resulted in the loss of human life.<sup>47</sup> It has also been suggested in the course of recent argument that penalties customarily imposed for property offences, like stealing, are out of alignment with sentences customarily imposed for offences of violence, and do not accord with contemporary community values

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<sup>46</sup> *Powell v Tickner* [2010] WASCA 224.

<sup>47</sup> *Hishmeh v The State of Western Australia* [2012] WASCA 183.

relating to personal safety on the one hand, and the value of property on the other.

### **Establishing principles for newly created offences**

From time to time the legislature will create new offences for which there is no customary sentencing practice or principle. Obviously the primary guide to the sentence contemplated by the legislature at the time of creating the new offence is the maximum penalty stipulated for the offence created. However, it will often be desirable for an appellate court to establish the principle factors which will be relevant to the identification of an appropriate sentence within the range provided by the legislature. Examples of this practice will be common in most jurisdictions. Recent Australian examples include the sentencing principles to be applied for the offence of assault occasioning death (even if death was not the foreseeable consequence of the assault) which has been recently created in a number of jurisdictions.

### **Sentencing guidelines**

In many jurisdictions, Courts of Appeal have from time to time formulated sentencing guidelines, with or without specific statutory authority for the practice. Commonly those guidelines will identify a range of sentences which are appropriate if particular circumstances are present - such as, in the case of drug trafficking, particular quantities and purities of the drug trafficked. There has been a

difference of judicial opinion in Australia in relation to the utility of guideline judgments of this kind. In the Court of Criminal Appeal of New South Wales there was general support for the provision of such judgments, which was said to enhance consistency and transparency. However, such guideline judgments have largely gone out of favour in Australia since the decision of the High Court in *Wong v The Queen*,<sup>48</sup> in which a majority was critical of the practice. So, in Australia at least, there appears to be no prospect of guideline judgments being used to establish a sentencing matrix of the kind introduced in other jurisdictions, at least without significant legislative change.

### **Some practical assistance for counsel**

In this part of the paper I will make some practical suggestions for counsel preparing and presenting appeals against sentence. Obviously those suggestions are made in the context of Australian principles of sentencing. The extent to which these suggestions are appropriate to other jurisdictions will depend upon the extent to which there are common principles involved.

### **Enunciate the error with precision**

It follows from the observations which I have made with respect to the fundamental character of the appellate process relating to sentencing that the focus of every appeal must be upon the precise enunciation of the alleged error or errors. It will be quite insufficient for an appellant

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<sup>48</sup> [2001] HCA 64; 207 CLR 584.

seeking to demonstrate manifest excess, or manifest inadequacy, to make that bald assertion and leave the assessment to the appellate court. An appellant must condescend to the enunciation of the precise reasons why the sentence is said to be excessive or inadequate as the case may be. If the sentence is said to be inconsistent with other comparable sentences, it will be necessary to identify with precision the relevant factors and circumstances in the case under appeal which combine to support the conclusion that the sentence imposed is inconsistent with other comparable sentences, which are appropriately analysed by reference to their particular facts and circumstances, in the manner I have suggested above.

For example, an appellant alleging manifest excess should be able to identify all the factors which are said to favour a lower sentence - such as prior good record, remorse, good prospects of rehabilitation, co-operation with the authorities, early plea of guilty, etc, and then should analyse other comparable cases by reference to similar factors, identifying any aggravating factors present in those cases. In Australia at least, it will not be sufficient of itself to suggest that there is an established range, and that the sentence falls outside that range, although it is common to talk in such terms. Rather, the appellant must establish that, having regard to sentences customarily imposed for the particular offence, taking into account all relevant facts and circumstances and the competing objectives to which I have referred, the sentence is so unreasonable or so unjust that error can be inferred.

Similarly, if the sentence is said to be manifestly excessive on the first limb of the totality principle, it will be necessary for the appellant to enunciate why the total effective sentence fails to reflect the total criminality or culpability involved in the various offences for which the offender was sentenced. If the parity principle is relied upon, it will be insufficient to simply point to a different sentence having been imposed upon a co-offender, and necessary to identify all relevant facts and circumstances relating to the two offenders so that, after giving appropriate weight to any differing facts and circumstances, the sentences can be demonstrated to be out of parity in such a way as to give rise to a legitimate sense of grievance on the part of the offender receiving the greater sentence.

### **Public perception of sentencing practice**

Earlier in this paper I suggested that, in Australia at least, there is a substantial disconnection between public perception of sentencing practice and what actually occurs in our courts. This is a proposition I have advanced in the past.<sup>49</sup> In particular, in most Australian jurisdictions there is a public perception that the courts are unnecessarily lenient when it comes to passing sentence, with the result that crime is becoming more prevalent. Neither of these things are true. In most Australian jurisdictions there have been consistent trends towards increasing levels of punishment, and decreasing levels

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<sup>49</sup> W Martin, '*Popular Punitivism - the Role of the Courts in the Development of Criminal Justice Policies*' (Australian and New Zealand Society of Criminology Conference, Perth, 23 November 2009).

of crime. However, no connection has been established between these phenomena in research conducted on the topic.

### **The nature of news**

How does this disconnection of perception occur? Partly it is because of the limited information available to the public on sentencing. Australian studies have shown that public dissatisfaction with the 'leniency' of sentences is often associated with a lack of specific detail about the relevant circumstances of the case and the legal system more broadly. When members of the public have access to better and more detailed information, the majority impose the same or lesser sentences than judges.<sup>50</sup>

Currently however the public are largely reliant upon the news for their information about sentencing – and news by its nature engenders that disconnection of perception. Things which are typical and lack controversy are not interesting to readers or viewers of the popular media. By contrast, events which are atypical or controversial are of interest, and are more likely to be reported. So, if the Marina Bay Sands platform remains intact overnight, it is unlikely to be reported in the Straits Times. However, if it collapses, or shows signs of stress or fracture, it will be reported extensively.

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<sup>50</sup> Lenny Roth, *Public opinion on sentencing: recent research in Australia* (NSW Parliamentary Research Service e-brief 8/2014 – June 2014) p 12.

So it is with sentencing. I am yet to see an article in my local newspaper reporting a sentence which I have imposed observing that I have taken all relevant facts and circumstances into account and delivered a sentence which is eminently fair and reasonable. However, when family members of the victim of a manslaughter case express outrage at the inadequacy of the sentence I have imposed, it is likely to be reported in colourful terms.

It follows that the sentences which are most likely to be reported in the popular media are those which are atypical or controversial, usually because a victim or secondary victim asserts that the sentence imposed is inadequate. Those exposed to such reports will infer that the sentences reported are typical of those customarily imposed by the courts, when in fact they are not. Thus a perception of undue lenience is generated from the handful of cases in respect of which there is controversy, and which are reported because they are newsworthy.

In making these observations I do not mean to suggest that the media pursue a strategy aimed at creating public misconceptions. Rather, I suggest that the misconceptions arise from the nature of that which is newsworthy.

### **The consequences of a disconnection in perception**

There are two unfortunate consequences of this disconnection between perception and reality. The first is that public confidence in the administration of justice is unjustifiably diminished. This is

significant not because of the egos or reputations of the judiciary, but because the effective administration of justice depends to a significant extent upon public confidence. Courts rely upon citizens performing their obligations without coercion, even though coercive powers are available if required. If citizens lose confidence in their courts, their voluntary participation in the judicial process will be more difficult to achieve, and the efficiency of justice thereby diminished.

The second adverse consequence of the disconnection between perception and reality in relation to sentencing is that there have been instances in which public policy has been driven by perception rather than actuality. There is a real risk that politicians respond to public opinion and perception by passing legislation which is increasingly punitive. Legislation which imposes mandatory minimum sentences for particular types of offences is often justified in the political arena by reference to a lack of confidence in the capacity of the judiciary to impose sentences at appropriate levels.

### **What can be done?**

At the risk of ending on a pessimistic note, there are significant limits upon the steps which can be taken by the courts to address this public misconception. Since 2008, our court has been publishing the transcript of all sentencing remarks on the court's website within 24 hours of sentence being passed. We did so for the purpose of enabling members of the public to assess all the factors that were

taken into account by the judge at the time of passing sentence, thereby hopefully improving public understanding of the sentence ultimately imposed. However, there has been limited public response to this initiative, and most members of the public (perhaps understandably) continue to rely upon media summaries of the decision, rather than the transcript of the sentencing remarks.

Similarly, Courts of Appeal have limited capacity to influence public perception by their reasons for judgment. Very often the initial sentence imposed will be that which generates heated public controversy. Even in those cases in which the sentence is subsequently altered on appeal some months later, that decision seldom receives as much media attention as the initial decision, and does little to quell the controversy. And, of course, in only a very small, in fact tiny, proportion of cases is the sentence imposed at first instance appealed - no doubt due to the stringency with which such appeals are assessed.

What Courts of Appeal can and must do, however, is to strive to properly respond to public concerns about sentencing without compromising the 'process of balancing overlapping, contradictory and incommensurable objectives' described above. The capacity of Courts of Appeal to propose changes in sentencing practice from time to time, referred to above, will be of critical importance if this challenge is to be met. And perhaps, from an appellate court perspective on sentencing, that could be described as its highest art.