*Ben Livings**

SENTENCING TO PROTECT THE SAFETY OF THE COMMUNITY

Abstract

Section 3 of the *Sentencing Act 2017* (SA) states that '[t]he primary purpose for sentencing a defendant for an offence is to protect the safety of the community (whether as individuals or in general)'. Under s 9, this primary purpose 'must be the paramount consideration when a court is determining and imposing the sentence'. There is no legislative indication of how to construe community safety, nor guidance as to how it might best be protected, and the primary purpose could influence sentencing practices in a variety of ways. This article suggests that a narrow construction, synonymous with incapacitation, should be avoided, since it may have undesirable effects, such as an increase in incarceration rates and the length of prison terms. Rather, the primary purpose of protecting the safety of the community should serve as a focal point for engagement with research into the effectiveness of criminal sanctions and a progressive agenda of public education.

I Introduction

On 30 April 2018, the *Sentencing Act 2017* (SA) ('new Act') came into effect. The new Act implemented amendments to the South Australian sentencing regime that include the introduction of intensive correction orders, changes to the treatment of dangerous offenders and an overhaul and reorganisation of the preceding legislation: the *Criminal Law (Sentencing) Act 1988* (SA). Alongside these substantive and organisational amendments was the introduction of a new 'primary sentencing purpose': under s 3 of the new Act, '[t]he primary purpose for sentencing a defendant for an offence is to protect the safety of the community (whether as individuals or in general)'. Although the promulgation of sentencing as a means by which to further community safety is neither novel nor unusual in the Australian context, its elevation to 'the primary purpose' sets the South Australian regime apart.

The adoption of this primary purpose presents opportunities to improve sentencing practice and the way in which it is understood and communicated, but there are

* Associate Professor, UniSA: Justice and Society. I would like to thank Katherine McLachlan, Matthew Goode, John Rau and the attendees at the 2019 Australian and New Zealand Society of Criminology (ANZSOC) conference in Perth. I would also like to thank the anonymous reviewers and journal editors.

challenges that attend a focus on community safety. This article begins by setting out the place of sentencing purposes within the complex milieu of the sentencing exercise, and suggests that they can and should play an important role in structuring the sentencing calculation and in communicating the basis for this to the courtroom and beyond. From here, the article moves to examine the concept of 'community safety' and how the sentencing exercise might be oriented to its protection. Two principal advantages of this singular focus are proposed: the opportunity it presents to facilitate the implementation of effective, evidence-based sentencing practices; and the straightforward message that it communicates to the public about the roles and functions of sentencing and criminal punishment.

Alongside these potential advantages, the article also addresses problems that might arise in aligning the sentencing exercise with the primary purpose. For instance, there is a danger of over-simplification, whereby community protection is read as synonymous with incapacitation. The advent of the new Act came towards the end of a prolonged period of Labor governments, during which there had been a heavy emphasis on 'populist and hard-line stances' in relation to criminal justice matters.[1] Despite the potential for an overtly 'law and order' reading of the primary purpose, it is suggested that this would be an inadequate and ineffective interpretation, liable to create unrealistic expectations and perpetuate an unwelcome rise in incarceration rates. Moreover, concentrating sentencing on one primary purpose necessarily involves moving the focus away from other established sentencing purposes and principles. Four important areas of sentencing may be affected: the other traditional purposes of sentencing, now labelled 'secondary purposes' under s 4 of the new Act; proportionality; consistency in sentencing; and the participation and input of the victim.

This article therefore points to some of the potential ramifications of the foregrounding of community safety and urges sentencing judges and others involved in the policy and practice of sentencing offenders to take a broad and progressive view of how community safety might be protected.

II Protecting the Safety of the Community in the Sentencing Calculation

A *Sentencing Purposes and the Sentencing Calculation in South Australia*

In Australia and similar jurisdictions, the sentencing exercise comprises a multifactorial calculation that draws upon a great deal of judicial discretion, set within a complex legislative and common law framework. A central part of this is commonly a statutory statement of the purposes of sentencing.[2] Although framed differently

---

1 Rob Manwaring, 'The Renewal of Social Democracy? The Rann Labor Government (2002–11)' (2016) 62(2) *Australian Journal of Politics and History* 236, 249.

2 In the Australian jurisdictions, these are found in: *Crimes (Sentencing) Act 2005* (ACT) s 7 ('*Sentencing Act* (ACT)'); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A ('*Sentencing Act* (NSW)'); *Sentencing Act 1995* (NT) s 5; *Penalties*

in each Australian jurisdiction, this statement generally comprises an unranked list of punitive (retribution, denunciation)[3] and utilitarian (deterrence, rehabilitation, incapacitation) purposes that must inform the sentencing decision.[4] These statutory sentencing purposes are overlaid onto similar common law purposes. In *Veen v The Queen [No 2]*, the High Court stated:

> The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case.[5]

The new Act includes these familiar sentencing purposes but departs from the usual practice by introducing a hierarchy: protecting the safety of the community is the primary purpose, and all others are now relegated to secondary purposes. The relevant provisions are found in ss 3 and 4 of the new Act:

> **3 — Primary sentencing purpose**
>
> The primary purpose for sentencing a defendant for an offence is to protect the safety of the community (whether as individuals or in general).
>
> **4 — Secondary sentencing purposes**
>
> (1) The secondary purposes for sentencing a defendant for an offence are as follows:
>
> (a) to ensure that the defendant—
>
> (i) is punished for the offending behaviour; and
>
> (ii) is held accountable to the community for the offending behaviour;
>
> (b) to publicly denounce the offending behaviour;

---

and Sentences Act 1992 (Qld) s 3 (‘*Sentencing Act* (Qld)’); *Sentencing Act 2017* (SA) ss 3–4 (‘*Sentencing Act* (SA)’); *Sentencing Act 1997* (Tas) s 3 (‘*Sentencing Act* (Tas)’); *Sentencing Act 1991* (Vic) s 5(1) (‘*Sentencing Act* (Vic)’).

3 Denunciation is sometimes said to constitute an additional category itself, furthering an ‘expressive’ purpose for criminal justice: Joel Feinberg, ‘The Expressive Function of Punishment’ (1965) 49(3) *The Monist* 397.

4 Whether or not protecting the safety of the community is addressed explicitly, or as an implicit purpose to be inferred from such lists, varies according to the jurisdiction.

5 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ) (‘*Veen [No 2]*’). See also *R v Sargeant* (1974) 60 Cr App R 74, 77.

(c) to publicly recognise the harm done to the community and to any victim of the offending behaviour;

(d) to deter the defendant and others in the community from committing offences;

(da) to deter the defendant and others in the community from harming or assaulting prescribed emergency workers (within the meaning of section 20AA of the *Criminal Law Consolidation Act 1935*) acting in the course of official duties;

(e) to promote the rehabilitation of the defendant.

The legislation also sets out the 'sentencing factors' and common law 'principles of sentencing' that might legitimately be taken into account to achieve these sentencing purposes.[6] The relevant sentencing factors relate to the circumstances of the offence and the situation of the offender. The new Act gives South Australian sentencing judges and magistrates[7] a single list of factors that might be relevant in terms of aggravating or mitigating the punishment to be imposed for the offence. Under s 11 of the new Act, and alongside sundry other particularised and qualificatory considerations, the court 'must take into account' the following factors insofar as they are 'known' and 'relevant':

(a) the nature, circumstances and seriousness of the offence;

(b) the personal circumstances and vulnerability of any victim of the offence whether because of the victim's age, occupation, relationship to the defendant, disability or otherwise;

(c) the extent of any injury, emotional harm, loss or damage resulting from the offence or any significant risk or danger created by the offence, including any risk to national security;

(d) the defendant's character, general background and offending history;

(e) the likelihood of the defendant re-offending;

(f) the defendant's age, and physical and mental condition (including any cognitive impairment);

(g) the extent of the defendant's remorse for the offence …;

(h) the defendant's prospects of rehabilitation.

6 *Sentencing Act* (SA) (n 2).

7 For expediency, the terms 'judge' and 'sentencing judge' will be used to refer collectively to judges and magistrates carrying out the sentencing function.

This list is shorter than those in some equivalent jurisdictions,[8] but this is not necessarily indicative of a narrow scope. Each of the factors in the new Act must be construed against the backdrop of the facts of the particular case, and the list is not exhaustive. In reality, the range of factors that could be taken into consideration is perhaps as extensive as the diverse contexts of offending.[9]

Overlaid onto these purposes and factors, and operating in conjunction with them, are the common law sentencing principles set out in s 10 of the new Act: proportionality; parity (equally situated offenders should be treated equally); totality (where offenders are being sentenced for more than one offence, the total sentence must be just, proportionate and appropriate to the overall criminality of the total offending behaviour); and the rule that a defendant may not be sentenced on the basis of having committed an offence for which the defendant was not convicted (commonly known as the '*De Simoni* principle').[10] The most prominent and influential of these is 'proportionality', which dictates that the punishment imposed should be proportionate to the crime committed.[11]

Other considerations exist that constrain sentencing judges and inform the sentencing calculation in South Australia. Judges can only impose a penalty that is available for the given offence and are bound by that offence's statutory maximum penalty, applicable to cases that comprise the worst possible example of the relevant offence. Rarely (and controversially), offences may also entail a statutory minimum, which must also be observed by the sentencing judge.[12] This may also involve the imposition of a mandatory non-parole period, as in the case of murder.[13]

For those who plead guilty or otherwise cooperate with law enforcement agencies, legislative provisions set out prescriptive formulae by which a discount on sentence will be applied.[14] Looming over all of this is the possibility of appeal. An appeal

---

8 See, eg, the more than 30 mitigating or aggravating factors that appear in s 21A of the *Sentencing Act* (NSW) (n 2).

9 Most legislation allows for a catch-all whereby these factors are effectively supplemented by a host of accepted common law factors. In recent articles, Mirko Bagaric has suggested that there are 'more than 200 mitigating and aggravating factors in sentencing law': Mirko Bagaric, 'Redefining the Circumstances in Which Family Hardship Should Mitigate Sentence Severity' (2019) 42(1) *University of New South Wales Law Journal* 154, 157 ('Redefining the Circumstances in Which Family Hardship Should Mitigate Sentence Severity'); Mirko Bagaric, 'An Argument for Abolishing Delay as a Mitigating Factor in Sentencing' (2019) 40(3) *Adelaide Law Review* 725, 728.

10 *R v De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ).

11 *Veen [No 2]* (n 5) 472, 486, 490–1.

12 In South Australia, the offence of murder brings a mandatory life sentence: *Criminal Law Consolidation Act 1935* (SA) s 11 ('*CLCA*').

13 Under s 47(5)(b) of the *Sentencing Act* (SA) (n 2), the mandatory non-parole period for murder is 20 years.

14 Ibid pt 2 div 2 sub-div 4.

against sentence may be brought by the offender or by the prosecution and will be successful where the sentencing judge can be shown to have: taken into account an irrelevant consideration; omitted to take into account a relevant consideration; or imposed a sentence that is 'manifestly wrong'.[15] As well as providing an avenue for redress in cases where there is held to be a sentencing error, the possibility of appeal is likely to encourage the sentencing judge to impose a sentence that is in the 'normal range' at first instance.[16] In conjunction with the principle of proportionality, the possibility of appeal therefore helps to ensure a degree of consistency; as McHugh J pointed out in *Everett v The Queen*, the appellate courts 'can ensure that, so far as the subject matter permits, there will be uniformity of sentencing'.[17]

Given this complex web of interrelating and interdependent considerations, it is difficult to weigh the influence of sentencing purposes in the sentencing calculation, particularly as there is no set formula that must be employed by sentencing judges under the 'instinctive synthesis' model of reasoning preferred in Australian jurisdictions.[18] It is, however, expected that judges will align the imposition of punishment with the relevant sentencing purposes and this should be evident in their sentencing remarks. Kate Warner, Julia Davis and Helen Cockburn note that Victorian County Court judges, for example, almost always refer to at least one of six purposes of sentencing permissible under s 5(1) of the *Sentencing Act 1991* (Vic) ('*Sentencing Act* (Vic)').[19] Moreover, in *R v Stunden*, the New South Wales Court of Criminal Appeal held that it was an appellable error for a sentencing judge not to address the purposes of sentencing:

> Each of the [statutory purposes of sentencing] … must be taken into account by a sentencing judge '… *at least to an extent that is fairly related to the facts of the given case*.' … It is an appellable error for a judge to fail to address these fundamental purposes at all because they are each relevant to the purpose to be achieved by the imposition of a sentence … The weight to be accorded to these matters in the consideration of any particular sentence is one upon which minds may legitimately differ.[20]

[15] *House v The King* (1936) 55 CLR 499, 505. Note that a Crown appeal on the grounds of manifest inadequacy should be a 'rarity': *Griffiths v The Queen* (1977) 137 CLR 293, 310 (Barwick CJ).

[16] Geraldine Mackenzie, *How Judges Sentence* (Federation Press, 2005) 60–1.

[17] (1994) 181 CLR 295, 306. See also *R v Knight* (1986) 40 SASR 479, 480 (King CJ).

[18] *Markarian v The Queen* (2005) 228 CLR 357.

[19] Kate Warner, Julia Davis and Helen Cockburn, 'The Purposes of Punishment: How Do Judges Apply a Legislative Statement of Sentencing Purposes?' (2017) 41(2) *Criminal Law Journal* 69, 72.

[20] *R v Stunden* [2011] NSWCCA 8, [111]–[112] (Garling J) (emphasis in original) (citations omitted) ('*Stunden*').

In New South Wales, as in Victoria, there is no single primary purpose. The legislative regimes in both jurisdictions set out a range of purposes that must be balanced and addressed according to their relevance and applicability to the particular case.[21]

The new Act is emphatic about the centrality of the primary purpose. In addition to setting out the primacy of community protection in s 3, this is repeated in s 9, which asserts: 'For the avoidance of doubt, the primary purpose for sentencing a defendant for an offence must be the paramount consideration when a court is determining and imposing the sentence.' The legislative intent of the centrality of the primary purpose was clear in the second reading of the Sentencing Bill 2016 (SA) ('Bill'), where the then Attorney-General, the Hon John Rau SC, quoted cl 4 of the Bill (s 3 of the Act) and said:

> Every sentencing purpose and principle in the Act and, therefore, in the sentencing process that it controls, must be subject to that overriding consideration. The provisions of the Bill emphasise the primacy of this purpose at every turn.[22]

Following the logic of *R v Stunden*,[23] it is arguable that a sentencing judge is falling into error if he or she does not address the primary purpose of sentencing in South Australia.

Even when judges adopt the language of the new Act, it is arguable whether the legislative reform has had a substantive effect on sentencing practices. Warner, Davis and Cockburn suggest that the implementation of sentencing purposes contained in s 5(1) of the *Sentencing Act* (Vic) led the judges of the County Court of Victoria to 'adapt … those purposes to fit into the patterns that were already established by traditional common law sentencing practice'.[24] Warner, Davis and Cockburn suggest that this might have the effect of rendering the legislative statement of sentencing purposes somewhat redundant. The extent to which this may also be true of South Australia is difficult to discern; the new Act makes it clear that protecting the safety of the community should be — and should be seen to be — the primary purpose in sentencing, and this should have an effect on sentencing practices.

B *The Communicative Function of Sentencing*

The legislated sentencing purposes can make a substantive contribution to sentencing practices by framing, and thereby shaping, the approach taken by the judge. Beyond the courtroom, a clear statement of sentencing purposes can also serve an important communicative function and contribute to public understanding of sentencing practices. Promulgating the law in such a way that it is accessible and understandable to the public is vital for several reasons. At a fundamental level, adherence to the rule

---

21 *Sentencing Act* (NSW) (n 2) s 3A; *Sentencing Act* (Vic) (n 2) s 5(1).

22 South Australia, *Parliamentary Debates*, House of Assembly, 16 November 2016, 7884 (John Rau, Attorney-General) ('*Hansard*').

23 *Stunden* (n 20).

24 Warner, Davis and Cockburn (n 19) 84–5.

of law requires that those who are subject to laws are able to understand their reach and application.[25] But the importance of effective communication goes far beyond this, since public attitudes have an impact upon the effective and efficient administration of criminal justice.[26] Warner et al suggest that public attitudes to sentencing are significant for three key reasons: because of the contribution these attitudes make to public confidence in the criminal justice system; because 'it is generally accepted that sentencing policy and practice should be responsive to public opinion'; and because 'perceptions of public opinion can force changes to the law'.[27]

Studies have indicated general public dissatisfaction with sentencing policy and practices, chiefly centred around a perceived leniency on the part of sentencing judges.[28] However, research also demonstrates that a greater degree of familiarity with particular cases and the policy behind individual sentencing decisions leads to higher rates of public approval of the sentences imposed.[29] Studies carried out by

---

25 Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 37–9.

26 Julian Roberts and Mojca M Plesničar, 'Sentencing, Legitimacy, and Public Opinion' in Gorazd Meško and Justice Tankebe (eds), *Trust and Legitimacy in Criminal Justice: European Perspectives* (Springer, 2015) 33.

27 Kate Warner et al, *Gauging Public Opinion on Sentencing: Can Asking Jurors Help?* (Trends and Issues in Crime and Criminal Justice Report No 371, 16 March 2009) 1 ('*Gauging Public Opinion on Sentencing*').

28 Nicola Marsh et al, *Public Knowledge of and Confidence in the Criminal Justice System and Sentencing: A Report for the Sentencing Council* (Report, Sentencing Council (UK), August 2019) 4; Carolyn Black et al, *Public Perceptions of Sentencing: National Survey Report* (Report, Sentencing Council (Scotland), September 2019) 12; Natalie Gately et al, 'The Prisoners Review Board of Western Australia: What Do the Public Know about Parole?' (2017) 28(3) *Current Issues in Criminal Justice* 293, 295; Geraldine Mackenzie et al, 'Sentencing and Public Confidence: Results from a National Australian Survey on Public Opinions towards Sentencing' (2012) 45(1) *Australian and New Zealand Journal of Criminology* 45, 53; Lorana Bartels, Robin Fitzgerald and Arie Freiberg, 'Public Opinion on Sentencing and Parole in Australia' (2018) 65(3) *Probation Journal* 269, 272.

29 Austin Lovegrove, 'Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community' [2007] (October) *Criminal Law Review* 769, 776; Kate Warner and Julia Davis, 'Using Jurors to Explore Public Attitudes to Sentencing' (2012) 52(1) *British Journal of Criminology* 93, 96–7; Kate Warner and Julia Davis, 'Involving Juries in Sentencing: Insights from the Tasmanian Jury Study' (2013) 37(4) *Criminal Law Journal* 246, 248–9; Kate Warner and Caroline Spiranovic, 'Jurors' Views of Suspended Sentences' (2014) 47(1) *Australian and New Zealand Journal of Criminology* 141, 142–3, 145–8; Warner et al, *Gauging Public Opinion on Sentencing* (n 27) 4; Kate Warner et al, *Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study* (Trends and Issues in Crime and Criminal Justice Report No 407, 10 February 2011) 3 ('*Public Judgement on Sentencing*'); Kate Warner et al, 'Are Judges Out of Touch?' (2014) 25(3) *Current Issues in Criminal Justice* 729, 741 ('Are Judges Out of Touch?'); Kate Warner et al, 'Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (2017) 19(2) *Punishment and Society* 180, 186 ('Measuring Jurors' Views on Sentencing').

Warner et al, drawing on the views of jurors who have taken part in the proceedings, demonstrate broad congruence between the views of those jurors and sentencing judges in relation to most crimes.[30] Widespread knowledge and understanding is therefore key to public support. Julian Roberts and Mojca M Plesničar are correct to state that 'the sentencing system must be communicated to the public in an understandable fashion in order to avoid erroneous expectations. The mere existence of sound sentencing principles is insufficient to ensure a high degree of legitimacy.'[31]

Unfortunately, several factors mean that research into, and public dissemination of, sentencing practices in South Australia are disadvantaged relative to comparable jurisdictions. First, there is the recent disestablishment — and non-replacement — of the South Australian Sentencing Advisory Council, which was originally set up in 2012.[32] A body such as this is a common feature of comparable criminal justice systems, with larger jurisdictions generally having higher-profile, better-funded and more influential advisory bodies. The Victorian Sentencing Advisory Council ('Council'), for example, has a statutory footing under pt 9A of the *Sentencing Act* (Vic). The Council's functions are set out in s 108C and include the provision of advice, the conduct of research, policy development, and public engagement and education.[33]

Second, recent changes to the provision of crime-related statistics and research publications have diminished their availability and also, seemingly, their compilation. The former South Australian Office of Crime Statistics and Research ('OCSAR') no longer exists, and accessing work undertaken and published by OCSAR, which was previously available online, now depends on making a request to the Justice Policy and Analytics group in the Attorney-General's Department.[34]

---

30 Warner et al, *Gauging Public Opinion on Sentencing* (n 27); Warner et al, *Public Judgement on Sentencing* (n 29); Warner et al, 'Are Judges Out of Touch?' (n 29); Warner et al, 'Measuring Jurors' Views on Sentencing' (n 29). There is some divergence, notably in relation to certain sexual offences committed against children under the age of 12, where the jurors considered the judges' sentences too lenient: Warner et al, 'Measuring Jurors' Views on Sentencing' (n 29) 189–90.

31 Roberts and Plesničar (n 26) 34.

32 South Australia's short-lived Sentencing Advisory Council was set up under the Weatherill Labor government in 2012, but was defunded and thus effectively disestablished by the incoming Marshall Liberal government in 2018: Sentencing Advisory Council, *A Discussion Paper Considering the Operation of Part 8A of the Criminal Law Consolidation Act 1935 (SA)* (July 2013) iv; Government of South Australia, Department of Treasury and Finance, *State Budget 2018–19: Budget Measures Statement* (Report, 4 September 2018) 18.

33 The Sentencing Advisory Councils in New South Wales, Victoria and Tasmania carry out analogous functions.

34 'Crime and Justice Data', *Government of South Australia Attorney-General's Department* (Web Page) <https://www.agd.sa.gov.au/justice-system/crime-and-justice-data>.

Third, although sentencing remarks from the District Court and Supreme Court of South Australia are published on the website of the Courts Administration Authority, they are only made available for four weeks after publication.[35] Access beyond this period depends upon making a successful request to the Courts Administration Authority and may involve paying a fee.

Fourth, South Australia is disadvantaged relative to other jurisdictions due to the lack of a publicly available sentencing benchbook, such as those that exist in New South Wales, Victoria and Queensland.[36] In New South Wales, there is also the Judicial Commission, a statutory function of which is to 'disseminate information and reports on sentences imposed by courts'.[37]

Without wishing to overstate its potential effect, it could be argued that the promulgation of the primary purpose in the new Act provides a focal point for the discussion of sentencing, in a way that more complex or multi-faceted expressions of its function do not. It was clearly intended that the new Act would increase public understanding of sentencing; part of the second reading speech reads:

> The criminal law should be accessible so that it is written in language that is capable of being understood by citizens of reasonable literacy. That means that it must address not only an audience of lawyers, but also an audience of average citizens.[38]

The new Act embodies a clear legislative intent to increase the clarity and accessibility — and thus public understanding — of sentencing practice, but it should be noted that South Australia is the only Australian jurisdiction that does not issue explanatory memoranda alongside legislation.[39] In any event, it is unlikely that a large proportion of the public will engage directly with statutory sentencing provisions. Instead, the primary source of information is likely to be the media, which are apt to focus on extreme cases in a way that could increase public scepticism and fuel the demand for harsher penalties.[40] Although it may be fanciful to imagine that the legislative

---

35 The sentencing remarks from the Magistrates Court of South Australia are not publicly available at all: 'Sentencing Remarks', *Courts Administration Authority of South Australia* (Web Page) <http://www.courts.sa.gov.au/SentencingRemarks/Pages/default.aspx>

36 Judicial Commission of NSW, *Sentencing Bench Book* (rev ed, 2019); Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed, 2020); Michael Shanahan DCJ, *Benchbook on Sentencing* (Supreme Court Library Queensland, rev ed, 2017).

37 *Judicial Officers Act 1986* (NSW) s 8(1)(b).

38 *Hansard* (n 22) 7888 (John Rau, Attorney-General).

39 For views on how inadequacies/idiosyncrasies in the South Australian legislative process may also hinder public engagement in the lawmaking process, see Sarah Moulds and Laura Grenfell, 'Youth Treatment Orders Bill Highlights Ad Hoc Approach to Rights-Scrutiny of Bills' (2019) 41(4) *Law Society of South Australia Bulletin* 36.

40 Roberts and Plesničar (n 26) 35, 47.

primary purpose will impact media reporting in a tangible way, stating the primary purpose is a good starting point for a public conversation about the role and aims of criminal sentencing, and does at least portray an accessible and strong message about what the sentencing exercise is trying to achieve. The potency of the primary purpose therefore depends upon developing an understanding of how sentencing can protect the safety of the community and communicating this effectively.

C *Community Protection in Sentencing*

The new Act does not provide a definition of what is meant by 'to protect the safety of the community', nor guidance as to how it might be achieved, and this ambiguity is problematic. Looking to the sentencing regimes of other jurisdictions offers some limited assistance, but also demonstrates the distinctiveness of the South Australian approach. Community protection is cited in most sentencing statutes across Australia, where it often appears as one of a number of unranked sentencing purposes.[41] The same is true of the common law that undergirds these statutory purposes.[42]

In addition to this undifferentiated role, the sentencing regimes of Victoria and Western Australia give added prominence to community protection. In these jurisdictions, the means by which community safety is to be protected is construed narrowly, focussing on the direct threat posed by offenders perceived to be dangerous and on their incapacitation. The *Sentencing Act* (Vic) refers to the protection of the community as one of its generalised 'sentencing guidelines',[43] and also uses the concept as a key determinant in deciding the length of the term of imprisonment imposed upon a 'serious offender' who is being sentenced for a 'relevant offence';[44] s 6D of the *Sentencing Act* (Vic) states:

> If under section 5 the Supreme Court or the County Court in sentencing a serious offender for a relevant offence considers that a sentence of imprisonment is justified, the Court, in determining the length of that sentence—
>
> (a) must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and

---

41 *Sentencing Act* (ACT) (n 2) s 7(1)(c); *Sentencing Act* (NSW) (n 2) s 3A(c); *Sentencing Act* (Vic) (n 2) s 5(1)(e). In Queensland and Tasmania, protecting the community is 'a paramount' or 'a primary' consideration: *Sentencing Act* (Qld) (n 2) s 3(b); *Sentencing Act* (Tas) (n 2) s 3(b).

42 *Veen [No 2]* (n 5) 476 (Mason CJ, Brennan, Dawson and Toohey JJ).

43 *Sentencing Act* (Vic) (n 2) s 5(1)(e).

44 A 'serious offender' is defined under s 6B(3) of the *Sentencing Act* (Vic) (n 2) as one of the following: a serious arson offender; a serious drug offender; a serious sexual offender; or a serious violent offender. Each of those terms are defined in s 6B(2). A 'relevant offence' is defined in s 6B(3) as one of the following: an arson offence in the case of a serious arson offender; a drug offence in the case of a serious drug offender; a sexual offence in the case of a serious sexual offender; or a serious violent offence in the case of a serious violent offender.

> (b) may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances.

Therefore, the Victorian regime makes provision for the court to *over*-punish in these circumstances, to impose a sentence of imprisonment that is 'longer than that which is proportionate to the gravity of the offence' where the sentence is imposed in order to achieve the 'principal purpose' of 'the protection of the community from the offender'.[45]

The Western Australian sentencing legislation also makes the connection between community protection and the incarceration of the offender, stating in s 6(4) of the *Sentencing Act 1995* (WA) ('*Sentencing Act* (WA)'):

> A court must not impose a sentence of imprisonment on an offender unless it decides that—
>
> (a) the seriousness of the offence is such that only imprisonment can be justified; or
>
> (b) the protection of the community requires it.

It is notable that these Victorian and Western Australian provisions intimately and exclusively connect community protection to imprisonment and to the immediate threat posed by the offender. This places the focus on incapacitation as the means by which to protect the community, and explicitly (in the case of Victoria) or implicitly (for Western Australia) endorses the imposition of a disproportionately long sentence of imprisonment where it is considered necessary in order to protect the community from the offender. In other words, in both Victoria and Western Australia, an assessment of protecting the safety of the community looks only to the threat posed by the offender and can only operate to inflate the sentence.

It is worth noting that there are features of the new Act that point towards a link between imprisonment and community protection. For instance, s 10(2) of the new Act comprises a provision analogous to s 6(4) of the *Sentencing Act* (WA): a sentence of imprisonment is to be used only where it is necessitated by the 'seriousness of the offence', or where 'it is required for the purpose of protecting the safety of the community'. In addition, and as noted above, the sentencing purpose of incapacitation is not explicitly included under the new Act and this omission may suggest that the purpose of community protection therefore stands in its stead.

[45] For a contemporary account of the provisions, see Richard G Fox, 'Legislative Comment: Victoria Turns to the Right in Sentencing Reform' (1993) 17(6) *Criminal Law Journal* 394. For an account of judicial reluctance to use the provisions, see Elizabeth Richardson and Arie Freiberg, 'Protecting Dangerous Offenders from the Community: The Application of Protective Sentencing Laws in Victoria' (2004) 4(1) *Criminal Justice* 81; Warner, Davis and Cockburn (n 19) 83–4.

However, there are numerous reasons to suppose that the meaning of 'to protect the safety of the community' under the new Act is significantly more expansive. Unlike the Victorian and Western Australian examples offered above, it must be remembered that in South Australia the primary purpose applies to the sentencing exercise in respect of *all* offences and offenders. Since the majority of offenders are convicted of an offence for which imprisonment is either not available or is unlikely to be imposed, it follows that the concept of community safety applies to more than just incapacitation.[46] It would be strange indeed if the generalised 'primary purpose' and 'paramount consideration' of sentencing applied only to a minority of offenders.

An expansive reading of the protection of community safety is evident in the parliamentary debates that preceded the enactment of the new Act, where parliamentarians evinced a desire to move away from imprisonment as a punishment for non-violent offenders and to increase the opportunities for rehabilitation and reintegration of offenders.[47] This is also supported by aspects of the consultation exercises carried out during the drafting and carriage of the new Act. In a public factsheet released alongside the Bill, it was noted: 'If the offender is spared [imprisonment], they are more likely to be rehabilitated, increasing public safety and providing better outcomes for the whole community.'[48] This approach was echoed in the second reading of the Bill:

> [I]n introducing the sentencing option of intensive correction orders, the legislation de-emphasises immediate custodial orders in favour of community based correction for non-violent and non-dangerous offenders. The provision of a wider variety of sentencing options promotes alternatives to expensive and sometimes criminalising imprisonment.[49]

This passage illustrates an understanding of the reductive way in which community safety might be construed and recognises the potentially deleterious impact of over-incarceration policies that make re-offending more likely.[50]

D *What Is Community Safety, and How Is It Best Achieved?*

The application of the primary purpose to sentencing the full range of offending in South Australia demands more than a narrow concentration on the immediate threat posed by a serious violent offender, and imprisonment as the sole appropriate

---

46 The Australian Bureau of Statistics reports that 9% of offenders convicted in the period 2018–19 were sentenced to 'custody in a correctional institution': Australian Bureau of Statistics, *Criminal Courts, Australia, 2018–19* (Catalogue No 4513.0, 27 February 2020) tbl 32.

47 South Australia, *Parliamentary Debates*, Legislative Council, 18 May 2017, 6774 (Tung Ngo).

48 Attorney-General's Department (SA), *Transforming Criminal Justice: New Sentencing Principles and Options* (Factsheet, 25 August 2016) 2.

49 *Hansard* (n 22) 7883 (John Rau, Attorney-General).

50 See *Yardley v Betts* (1979) 22 SASR 108, 113.

response. Protecting the safety of the community should be given an expansive meaning and significance. If this is to be addressed by sentencing judges, questions arise around the scope and definition of community safety, and how best to achieve its protection. The first of these challenges is definitional: what (or who) is the community, and what does it mean to protect its 'safety'? Once these definitional issues have been resolved, the second question is empirical: how is protecting the safety of the community best achieved?

1 *The Definitional Question*

The question of what constitutes the community is not addressed by the legislation beyond noting that it can be construed 'as individuals or in general'.[51] Since this formulation is inclusive, it leaves open a broad definition of the term, taking in former and potential future victims of crime, and the families and communities in which, and with whom, they reside. Although it is perhaps not something that was in the minds of legislators, it should be noted that offenders are also members of the community, and thus the primary purpose may need to have regard for their safety. This could have implications inter alia for the imprisonment of vulnerable offenders. Save this point, the concept of 'community' is relatively uncontroversial, but this leads to questions around what is meant by 'safety'.

In common with the narrow reading adopted in the Victorian and Western Australian legislation discussed above, protecting the safety of the community could connote protection from the immediate threat of a violent offender, with this protection achieved through the imposition of a (possibly disproportionately long) sentence of imprisonment. This may be reasonable in the case of a minority of dangerous offenders but is too narrow in light of the discussion above around the universality of the primary purpose.

According to a more expansive view, community safety might be read as akin to promoting the welfare of the community. However, even the most ardently progressive advocates of penal policy and criminal justice reform would have to recognise the limitations of sentencing practices in this respect. A more measured and circumspect view, therefore, might recognise the effects of criminal offending as the relevant social harm with which the new Act is concerned, and protecting the safety of the community as effectively synonymous with crime reduction. Contemporaneous policy initiatives addressed at reducing reoffending (such as the South Australian Department for Correctional Services' '10 by 20' initiative)[52] reinforce this intermediate view, which seems more in keeping with the legislative intent. It is also a more realistic purpose for sentencing practices. As Brennan J stated in *Channon v The Queen*

---

51 *Sentencing Act* (SA) (n 2) s 3.

52 See Department for Correctional Services (SA), *A Safer Community by Reducing Reoffending: 10% by 2020* (Report, December 2016).

> [t]he necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the law proscribes. Punishment is the means by which society marks its disapproval of criminal conduct, by which warning is given of the consequences of crime and by which reform of an offender can sometimes be assisted. Criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose.[53]

2 *The Empirical Question*

If this connection between protecting community safety and crime reduction is accepted, achieving the former becomes an empirical question. That is to say, the efficacy of different approaches can be measured against their effect and this in turn can shape sentencing practices to further the primary purpose of protecting the safety of the community. In its examination of the deterrent effect of imprisonment, the Victorian Sentencing Council stated:

> If a sentencing purpose is intended to result in a reduction in crime, then in order to determine what weight should be given to that purpose, it is critical to examine the evidence of whether or not — or the extent to which — that goal of crime reduction is achieved.[54]

This is not to say that answers to this empirical question are or will be easily found, and it is beyond the scope of this article to recommend particular forms of punishment as optimal. The utility of a focus on protecting the safety of the community as the primary purpose of sentencing is that it directs the enquiry towards the evidence. Wide-ranging research has been, and continues to be, undertaken into the effectiveness of different punishment options, sometimes coalescing under banners such as 'what works' or 'smart' sentencing and at other times existing as discrete studies into the effects of particular sentencing outcomes and punishments.[55]

These studies look to perennial difficulties, such as the challenges involved in predicting the 'dangerousness' of an individual,[56] and the link between sentence severity and deterrence.[57] They point to the lack of evidence for imprisonment's

---

[53] *Channon v The Queen* (1978) 20 ALR 1, 5.

[54] Donald Ritchie, *Does Imprisonment Deter? A Review of the Evidence* (Report, Sentencing Advisory Council, April 2011) 2.

[55] Maria Sapouna et al, *What Works to Reduce Reoffending: A Summary of the Evidence* (Report, Justice Analytical Services (Scotland), 8 May 2015) 96–8; Peggy Fulton Hora, 'Tough on Crime Is Not Smart on Crime' (2013) 8 *Insight* 18, 21.

[56] Michael Tonry, 'Predictions of Dangerousness in Sentencing: Déjà Vu All Over Again' (2019) 48(1) *Crime and Justice* 439.

[57] Andrew von Hirsch, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Hart Publishing, 1999).

effectiveness in reducing recidivism,[58] and suggest that the experience of imprisonment may be criminogenic.[59] Research highlights the deleterious effects of short sentences of imprisonment,[60] and the benefits and negative outcomes of decreasing incarceration rates.[61] The benefits of decarceration include limiting the damage caused by imprisonment,[62] which has a heightened effect on the Indigenous population, who are imprisoned at a far higher rate than the non-Indigenous population.[63] This damage reaches beyond the incarcerated individual and can have a devastating effect on communities.[64]

While its effectiveness as a means by which to achieve community safety is contested, it is clear that imprisonment is a costly option, and significantly more so than alternatives.[65] The effectiveness of these alternatives is also contested. For instance,

58 Daniel S Nagin, Francis T Cullen and Cheryl Lero Jonson, 'Imprisonment and Reoffending' (2009) 38(1) *Crime and Justice* 115; Francis T Cullen, Cheryl Lero Jonson and Daniel S Nagin, 'Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science' (2011) 91(3) *The Prison Journal* 48S.

59 José Cid, 'Is Imprisonment Criminogenic?: A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions' (2009) 6(6) *European Journal of Criminology* 459.

60 Georgina Eaton and Aidan Mews, *The Impact of Short Custodial Sentences, Community Orders and Suspended Sentence Orders on Reoffending* (Analytical Series, Ministry of Justice (UK), 2019). In 1995, Western Australia became the first Australian jurisdiction to abolish short prison sentences, being those less than three months. This has since been expanded to cover sentences of less than six months' imprisonment: *Sentencing Act 1995* (WA) s 86.

61 Brett Garland et al, 'Decarceration and Its Possible Effects on Inmates, Staff, and Communities' (2014) 16(4) *Punishment and Society* 448.

62 The damage attributed to the experience of incarceration includes harm to mental and physical health, to family and other relationships and to future housing and employment opportunities: John Irwin and Barbara Owen, 'Harm and the Contemporary Prison' in Alison Liebling and Shadd Maruna (eds), *The Effects of Imprisonment* (Routledge, 2005) 94; Julie Moschion and Guy Johnson, 'Homelessness and Incarceration: A Reciprocal Relationship?' (2019) 35(4) *Journal of Quantitative Criminology* 855; Alec Ewald and Christopher Uggen, 'The Collateral Effects of Imprisonment on Prisoners, Their Families, and Communities' in Joan Petersilia and Kevin R Reitz (eds), *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press, 2012) 83.

63 Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) 21–2.

64 Don Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014).

65 Anthony Morgan, *How Much Does Prison Really Cost? Comparing the Costs of Imprisonment with Community Corrections* (Research Report No 5, Australian Institute of Criminology, 2018).

studies have examined the effects of good behaviour bonds on recidivism,[66] and suggested that the rehabilitation prospects of offenders at a low risk of recidivism might be negatively affected by strict supervision practices.[67] The use of suspended sentences of imprisonment has been criticised,[68] leading to a cessation in their use, most recently in New South Wales.[69]

Further research has considered the potential benefits yielded by the use of alternatives to mainstream punishments, such as problem-solving courts,[70] restorative justice,[71] and justice reinvestment initiatives.[72] Such research provides — sometimes conflicting — evidence about the effects and effectiveness of different criminal justice processes and outcomes, and can be used to inform sentencing practices; its continuance and use to inform sentencing practices are key to protecting community safety.

III The Casualties of a Community Safety-Led Approach

It has already been explained that community safety in the new Act must be construed more broadly than in terms of the immediate threat posed by the offender, since that is only likely to apply to a small minority of offenders. In a system in which protecting the safety of the community is the universal primary purpose of sentencing, the concept must in principle extend to all, or at least the majority of, sentencing decisions. This raises questions of how the primary purpose will interact

66 Suzanne Poynton, Don Weatherburn and Lorana Bartels, 'Good Behaviour Bonds and Re-Offending: The Effect of Bond Length' (2014) 47(1) *Australia and New Zealand Journal of Criminology* 25.

67 Christopher T Lowenkamp and Edward J Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders* (Topics in Community Corrections Report, 2004).

68 Arie Freiberg, 'Suspended Sentences in Australia: Uncertain, Unstable, Unpopular, and Unnecessary?' (2019) 82(1) *Law and Contemporary Problems* 81; Lorana Bartels, 'The Use of Suspended Sentences in Australia: Unsheathing the Sword of Damocles' (2007) 31(2) *Criminal Law Journal* 113.

69 Through repeal of s 12 of the *Sentencing Act* (NSW) (n 2): *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) sch 1 [14].

70 For a recent review of the operation of problem-solving courts in Queensland, see Arie Freiberg et al, *Queensland Drug and Specialist Courts Review* (Final Report, November 2016). See also Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009).

71 Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Research and Public Policy Report No 127, Australian Institute of Criminology, 18 February 2014).

72 Matthew Willis and Madeleine Kapira, *Justice Reinvestment in Australia: A Review of the Literature* (Research Report No 9, Australian Institute of Criminology, 2018); Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (Report, June 2013).

with the secondary purposes set out in s 4 of the new Act, the common law principles set out in s 10 (principally proportionality and the implied requirement for consistency), and the extent to which the principal sentencing purpose may erode the increasingly prominent role played by victims in sentencing.

A *W[h]ither the Secondary Purposes of Sentencing?*

In its response to the consultation process undertaken before the new Act was introduced, the Law Society of South Australia expressed concerns about the elevation of community safety as a priority above all the other aims of sentencing, stating that 'no sentencing consideration should be given primacy over another. We assert that in each case judicial discretion should be exercised by judicial officers.'[73] This concern reflects a view also expressed by the High Court: that sentencing may have a number of aims; that these may sometimes conflict with each other; and that the sentencing judge is in the best position to decide which purpose(s) should apply in a given case.[74]

The new Act does not give much guidance as to the relationship between the primary purpose of protecting the safety of the community and the secondary purposes listed in s 4. The primary–secondary distinction and the assertion in s 9 that the primary purpose is 'the paramount consideration' might suggest that the secondary purposes will only be relevant to a sentencing decision where there is no conflict with the primary purpose. However, this ostensibly straightforward hierarchical relationship is not without difficulties in practice. For instance, it may be difficult to argue that the primary purpose must take precedence where its pursuit points weakly towards one course of action, while one or more of the secondary purposes point strongly in another. In other words, it is arguable that the primacy afforded to protecting the safety of the community is not absolute, but a matter of degree that depends upon the relative strength of other, potentially opposing, considerations.

In some cases, this will not be a material concern, since the primary and secondary purposes will align to guide a particular result. Take, for example, hypothetical Offender A, who has been convicted of a violent and premeditated offence which caused serious harm to the victim and is the latest in a line of similar offences committed by Offender A. For Offender A, the imposition of a lengthy sentence of imprisonment may simultaneously accord with the primary purpose under s 3 of the new Act (to protect the safety of the community) and each of the secondary purposes listed under s 4:

> (a) to ensure that the defendant—
>
> > (i) is punished for the offending behaviour; and
> >
> > (ii) is held accountable to the community for the offending behaviour;

---

73 Law Society of South Australia, Submission to Attorney-General of South Australia (13 September 2016) 2 [9] <https://www.lawsocietysa.asn.au/pdf/Submissions/L%20130916_%20Sentencing%20_Bill.pdf>.

74 *Magaming v The Queen* (2013) 252 CLR 381 ('*Magaming*').

(b) to publicly denounce the offending behaviour;

(c) to publicly recognise the harm done to the community and to any victim of the offending behaviour;

(d) to deter the defendant and others in the community from committing offences;

…

(e) to promote the rehabilitation of the defendant.

The sentence of imprisonment may promote rehabilitation insofar as imprisonment may be the only or most effective means by which to ensure that the offender engages with programs that can address the underlying causes of the offending and help to effect behaviour change. Overall, there is a straightforward and relatively obvious alignment of the primary and secondary purposes, and imprisonment can be justified according to each of them separately. Moreover, achieving the secondary purpose often serves to further the primary purpose of protecting community safety. For example, if the imposition of a prison sentence successfully achieves one or both of the secondary purposes of deterrence and rehabilitation, this also serves to protect community safety by reducing the incidence of this type of crime.

In other cases, however, achieving alignment of the purposes will be more difficult — or even impossible — since the primary purpose may conflict with one or more of the secondary purposes. This can be illustrated by hypothetical Offender B, a young person of previously good character, who has been found guilty of causing death by negligent driving. Offender B has caused significant harm, and the imposition of a lengthy prison sentence might be justified according to the secondary purposes of retribution, accountability, denunciation and the recognition of harm done to the community and to the victims.[75] However, it is less clear that this will serve the remaining secondary purposes of deterrence and rehabilitation, and crucially nor is it clear that it will serve the primary purpose of protecting the safety of the community.

The seriousness of the offence that Offender B has committed is reflected in the applicable maximum penalties. Under s 19A(2)(a)(i) of the *Criminal Law Consolidation Act 1935* (SA), the offence of 'causing death or harm by use of vehicle or vessel' is punishable by up to 15 years' imprisonment (or life imprisonment for an aggravated offence). In addition, the offender can be disqualified 'from holding or obtaining a driver's licence for 10 years or such longer period as the court orders'.[76] However, the offence that Offender B has committed is often difficult to sentence, chiefly because of the difficulty involved in assessing the culpability of a person whose conduct may be attributable to a momentary lapse in concentration, but which

75 *Sentencing Act* (SA) (n 2) s 4.

76 *CLCA* (n 12) s 19A(2)(a)(i).

has led to catastrophic consequences.[77] This type of case was discussed in the parliamentary debates during the second reading of the Bill,[78] and opposition Member of the Legislative Council, The Hon Andrew McLachlan, said of the balance to be struck when sentencing: 'We must be careful that the punishments that are inflicted in our name do not harden individuals into career criminals.'[79]

The courts have wrestled with the difficulties these cases present for the sentencing calculation. In *R v Payne*,[80] the South Australian Court of Criminal Appeal declined to issue a sentencing guideline in relation to the offence, noting the wide range of culpability that it might involve. Although the Court accepted the need for deterrence in such cases, it did not accept that this would necessarily be achieved through the imposition of a long sentence of imprisonment, due to the circumstances in which such offences often occur.[81] The Court stated that 'whether an increased level of sentences would have any significant effect is doubtful'.[82] The Court pointed to the potential benefits of restorative justice in such cases.[83] There may also be a role for problem-solving courts, which seek to reduce crime through bringing about behaviour change.[84]

There are clearly tensions when it comes to trying to accommodate the primary and secondary purposes set out in the new Act. Notwithstanding these, severe punishment (most likely a sentence of imprisonment) might be justified for each of the hypothetical offenders described above on the grounds that it is necessary in order to maintain public confidence in sentencing and the operation of the criminal justice system more broadly. The importance of public education about sentencing as part of ensuring confidence in the operation of criminal justice was emphasised above, and it is possible to frame this as an aspect of community safety; for instance, a lack of confidence in the system might lead to an increase in vigilantism.

This expansive view of community safety highlights its potential flexibility, and this may be disadvantageous. If it is construed overly broadly, it is susceptible to the

---

77 See *R v Payne* (2004) 89 SASR 49 ('*Payne*'). See also the guideline judgment issued in relation to the equivalent offence in New South Wales in *R v Jurisic* (1998) 45 NSWLR 209.

78 South Australia, *Parliamentary Debates*, Legislative Council, 16 May 2017, 6692 (Mark Parnell).

79 Ibid 6687 (Andrew McLachlan).

80 *Payne* (n 77).

81 The Court noted the following: 'driver inexperience, immaturity, attitudes to alcohol and the belief, that one tends to encounter with young people, that "it cannot happen to me"': ibid 63 [49].

82 Ibid.

83 Ibid 60–1 [37], 66 [57].

84 It has been suggested that 'driving while intoxicated courts' could be instituted in Australia, following a United States model: see Elizabeth Richardson, *A Driving while Intoxicated/Suspended List for Victoria* (Background Paper, Australian Centre for Justice Innovation, 23 June 2013).

criticism that it offers little direction to the sentencing exercise, and it may decrease its significance in sentencing practice. If it is considered that there is a lack of clarity around how the primary and secondary purposes should apply, this may lead to the appellate courts reasserting judicial discretion as the only outcome. The High Court did as much in redressing the balance in favour of discretion when it came to the operation of 'standard non-parole periods' in New South Wales in *Muldrock v The Queen*.[85]

B *Proportionality*

A focus on the primary purpose of community safety may diminish the importance of other, competing sentencing purposes that under the new Act have been relegated to secondary purposes. A further notable casualty might be the principle of proportionality, which dictates that the punishment meted out to the offender should be proportionate to the crime committed. Proportionality has for some time held sway as the pre-eminent consideration in sentencing across Australia,[86] and it is maintained as a sentencing principle under s 10 of the new Act. Given the emphasis on the 'primary purpose' of protecting community safety as the 'paramount consideration', however, its pre-eminence must now be in question in South Australia.

A proportionate sentencing response from the criminal justice system will be neither too lenient nor too severe. This calculation is rooted in an assessment of the 'objective seriousness' of the offence,[87] and must also take into account the subjective features of the offender that bear on culpability. The calculation can be intractably complex, both when it comes to deciding the proportionate punishment for a given offence and between the relative seriousness of different types of offences (which is worse: defrauding an elderly pensioner of her life savings or committing an assault that causes a person to require surgery?).[88] These problems are exacerbated by the broad range of potentially applicable offender characteristics that might serve to aggravate or mitigate the offence, such as offending history and degree of planning. Mirko Bagaric has suggested that there are 'more than 200 mitigating and aggravating factors in sentencing'.[89] If a proportionate punishment requires that the offender experience hardship proportionate to the harm caused by the offence, a further complication is that the subjective experience of punishment will vary from

85 *Muldrock v The Queen* (2011) 244 CLR 120 ('*Muldrock*'), in which the High Court overturned *R v Way* (2004) 60 NSWLR 168, which had placed much greater influence on the 'standard non-parole period' in the offences to which they apply.

86 *Veen [No 2]* (n 5) 472, 486, 490–1.

87 For a discussion by the High Court of what 'objective seriousness' is, see *Muldrock* (n 85) 132 [27]–[29].

88 These are sometimes referred to as questions of 'cardinal proportionality' and 'ordinal desert', respectively: see Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16(1) *Crime and Justice* 55.

89 Bagaric, 'Redefining the Circumstances in Which Family Hardship Should Mitigate Sentence Severity' (n 9) 157.

person to person.[90] Even without considering the effect of the primary purpose, the implementation of the principle of proportionality is inherently problematic, since there are many ways of thinking about what should affect offence seriousness — and concomitant offender culpability — for the purposes of proportionate sentencing.[91]

The High Court has endorsed the pre-eminence of proportionality, and it has been suggested that it is so ingrained into the thinking of sentencing judges that it often does not warrant mention in sentencing remarks.[92] Despite its high profile, it is not constitutionally enshrined and parliaments are free to shape the discretion wielded by sentencing judges.[93] The new Act's focus on protecting community safety necessarily diminishes proportionality in sentencing in South Australia, as acknowledged in the second reading of the Bill:

> This reform will be a reform of the way in which the courts sentence offenders and the results of that process. To take a major example, in requiring that '*The primary consideration of a court in sentencing a defendant for an offence must be the protection of the safety of the community (whether as individuals or in general)*', the legislation will require the court to de-emphasise the predominance of proportionality in fixing sentence (although it is still very relevant).[94]

Given the concession in the second reading speech that it remains 'very relevant', it is probably safe to assume that proportionality will continue to be influential, but proportionality in sentencing is difficult to reconcile with the prioritisation of community safety. Unlike the latter, proportionality cannot be considered an empirical question, since it depends upon normative value judgements. It is concerned with a retrospective appraisal of the offender's desert as a justification for punishment, rather than the prospective question of what course of action will serve to enhance the protection of the safety of the community. Under a system that prioritises the latter, the disjunct might manifest in either of two ways: the imposition of a disproportionately *punitive* sentence (such as a long term of imprisonment) where the offender is deemed to be an unacceptable risk to public safety; or the imposition of a disproportionately *lenient* sentence where the rehabilitative prospects of the offender are high and the probability of recidivism low.

---

90 Adam J Kolber, 'The Comparative Nature of Punishment' (2009) 89(5) *Boston University Law Review* 1565; Adam J Kolber, 'The Subjective Experience of Punishment' (2009) 109(1) *Columbia Law Review* 182.

91 Matt Matravers, 'The Place of Proportionality in Penal Theory: Or Re-Thinking Thinking about Punishment' in Michael Tonry (ed), *Of One-Eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (Oxford University Press, 2019) 76.

92 Warner, Davis and Cockburn (n 19) 12.

93 See generally *Magaming* (n 74). See also *Payne* (n 77) 57–8 [24]–[25].

94 *Hansard* (n 22) 7883 (John Rau, Attorney-General) (emphasis in original).

C *Consistency*

The High Court has repeatedly asserted the importance of consistency in sentencing. In *Wong v The Queen*, Gleeson CJ stated that inconsistency could constitute 'a form of injustice'[95] because

> [l]ike cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.[96]

Similarly, Mason J has said: 'It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle.'[97]

Adherence to this 'basic principle' necessitates consistency on the part of sentencing judges; as Gleeson CJ states, the decision 'ought to depend as little as possible upon the identity of the judge who happens to hear the case'.[98] Alongside proportionality, s 10 of the new Act maintains the common law principle of 'parity', and consistency is likely to remain a key consideration.[99] However, achieving consistency can be difficult for two important reasons. The first of these echoes the complexity of proportionality alluded to above: the myriad differences between cases means that achieving consistency in sentencing is inherently difficult, as it involves balancing often incommensurable considerations relating to the offence and the subjective features of the offender. The late Justice Scalia of the United States Supreme Court likened such exercises to 'judging whether a particular line is longer than a particular rock is heavy'.[100] Navigating these complexities also led Lord Lane CJ of the Court of Appeal of England and Wales to describe sentencing as 'an art and not a science'.[101]

The second complication is that the concept of consistency itself is open to interpretation, with a distinction commonly drawn between consistency of approach and consistency of outcome.[102] Put simply, an assessment of consistency of approach will

95 *Wong v The Queen* (2001) 207 CLR 584, 591 [6] ('*Wong*').

96 Ibid.

97 *Walker v New South Wales* (1994) 182 CLR 45, 49 (citations omitted).

98 *Wong* (n 95) 591 [6].

99 Strictly construed, the parity principle applies to the sentencing of co-offenders, but it forms part of a larger expectation of consistency in sentencing arising out of the requirement that all should be treated as equal by the law.

100 *Bendix Autolite Corp v Midwesco Enterprises Inc*, 486 US 888, 897 (1988).

101 *Attorney-General's Reference (No 4 of 1989)* [1990] 1 WLR 41, 46, quoted in Andrew Ashworth, *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) 49–50.

102 Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There' (2013) 76(1) *Law and Contemporary Problems* 265, 270.

prioritise the consistent application of principles, whereas consistency of outcome tends to look to whether those who have committed similar offences have been treated similarly. As Sarah Krasnostein and Arie Freiberg explain, consistency of outcome is readily achieved through the use of 'statistical grids of the type employed by the US federal courts or mandatory sentencing schemes',[103] methods that are largely alien to Australian sentencing. In *Hili v The Queen*, the High Court suggested that consistency of outcome should not predominate over the more important consistency of approach.[104] The Court stated:

> Consistency is not demonstrated by, and does not require, numerical equivalence … It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes … *The consistency that is sought is consistency in the application of the relevant legal principles*.[105]

Adopting the primary purpose should promote consistency of approach to a greater extent than would be the case where there is not a single, overarching, paramount consideration. However, a focus on consistency of approach may erode the more visible measure of consistency of outcome. Justice Mason has noted that the appearance of inconsistency in sentencing may 'lead to an erosion of public confidence in the integrity of the administration of justice'.[106] Although the primary purpose actually has the potential to improve the consistency with which sentencing judges approach their task, it is important that this is communicated effectively in order to maintain the legitimacy of the sentencing process.

D *Victims' Interests*

A further aspect of sentencing practice that warrants consideration under a sentencing regime which has the primary purpose of protecting the safety of the community is the position of victims of crime. Recent decades have seen a relatively rapid expansion of opportunities for the involvement of victims in the adversarial criminal process.[107] The most pertinent from a sentencing perspective is the 'victim impact statement', which allows those who have been affected by crime a voice in the sentencing process. Section 10(1) of the *Victims of Crime Act 2001* (SA) states: 'A victim is entitled to have any injury, loss or damage suffered as a result of the offence considered by the sentencing court before it passes sentence.'

---

[103] Ibid 271.

[104] *Hili v The Queen* (2010) 242 CLR 520.

[105] Ibid 535 [48] (emphasis added).

[106] *Lowe v The Queen* (1984) 154 CLR 606, 610–11 (Mason J).

[107] See Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, August 2016) 12–13.

The South Australian mechanism for making either a 'victim impact statement' or 'community impact statement' is set out in div 2 of the new Act. Under s 14(1), a victim of crime 'who has suffered injury, loss or damage resulting from an indictable offence or a prescribed summary offence' can tender a written statement to the court setting out 'the impact of that injury, loss or damage on the person and the person's family'. Further, s 15 makes provision for '[a]ny person' to make a submission to the Commissioner for Victims' Rights so that the Commissioner (or alternatively, the prosecutor) may submit a written 'community impact statement' during sentencing proceedings, pertaining to the effect an offence has had on the community. Except insofar as they may provide evidence of relevant harm, impact statements are not intended to have a substantive effect on sentence severity,[108] but they may contain recommendations as to an appropriate sentence.[109]

The compatibility of the primary purpose with victims' interests and the promotion of their productive participation in the sentencing exercise can be read in two ways. Since the primary purpose is concerned with reducing victimisation through promoting community safety, it is ostensibly compatible with the interests of victims. Moreover, the new Act specifically states that sentencing practice is to protect the community 'as individuals or in general'.[110] In some cases, therefore, where the offender poses an ongoing threat to the victim, the new Act reinforces the victim's personal safety as paramount. Victim statements may also offer insights into the context of the offending that can assist in judging the likelihood of future offending. This can be important in reflecting on how best to promote community safety and how (if at all) this can inform the sentencing decision.

Where the primary purpose may not accord with the interests and wishes of some victims is in relation to the retributive aspects of punishment, which research shows to be one of the predominant reported victim (and victim-family) priorities.[111] As with consistency, this discrepancy correlates with a move away from proportionality as the pre-eminent organising principle of sentencing. Where a victim expresses the desire to see the offender punished, but the primary purpose points towards the potential for rehabilitation to be achieved through pursuing a 'softer' sentencing option, it might be perceived that the victim's wishes are being unreasonably frustrated.

108 For a discussion of the role of victim impact statements, see Julian V Roberts, 'Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole' (2009) 38(1) *Crime and Justice* 347. Research undertaken in South Australia has suggested that the implementation of victim impact statements did not have an effect on sentence severity, either in terms of likelihood of imprisonment or length of sentence: Edna Erez and Leigh Roeger, 'The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience' (1995) 23(4) *Journal of Criminal Justice* 363.

109 *Sentencing Act* (SA) (n 2) s 16(2).

110 Ibid s 3.

111 Tracey Booth, *Accommodating Justice: Victim Impact Statements* (Federation Press, 2016) 64.

IV Conclusion

Aligning sentencing with protecting the safety of the community as its primary purpose holds promise as a means to promote evidence-based sentencing. The intuitive appeal of the primary purpose as a central organising principle of criminal justice also lends itself to public education, which could serve to reinforce the legitimacy of the process. However, an inherent ambiguity in the new Act means that the relationship of the primary purpose to other, potentially competing sentencing priorities and principles, is unclear. This ambiguity risks undermining the utility of the primary purpose, and the lack of publicly disseminated research and information when it comes to sentencing in South Australia risks exacerbating community discontent around its practice. If the promise of the primary purpose is to be fulfilled, there is a need to take seriously the means by which community safety can be protected through sentencing practices, and to communicate this to the public.