

THE MEANING OF PROPORTIONALITY IN SENTENCING*

BY RICHARD G FOX†

[The High Court has repeatedly stressed the central role of proportionality in the sentencing of offenders. However, that concept, as propounded by the court, requires much refinement. This article explores its meaning by reference to the factors that are to be taken into account in assessing what is proportionate. It considers the relationship between proportionality and other sentencing principles, such as community protection, rehabilitation, mitigation and mercy. The conflicts which exist regarding the appropriate methodology to be adopted by the judges in ascertaining what is a proportionate sentence are also discussed.]

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† LLM, Dip Crim (Melbourne), LLD (Monash). Barrister and Solicitor of the Supreme Court of Victoria. Professor of Law, Monash University.

In our attempts to award pain according to desert, we are fated to err either on the side of mercy or of severity. Hence, it has been a favourite habit with editors of newspapers to compare two discrepant sentences with a chuckle of triumph over the folly of one or other of the judges on whose proceedings they are animadverting, without a thought that the judges have neither weight nor scales In apportioning a time-sentence to a given offence, we assume that some assignable proportion exists between offences and inflictions; that a pound weight of crime should be visited with a pound weight of punishment. But, although we are able to establish in our minds some vague proportion of this kind, yet all that we can do carries us but a very little way towards the exactitude required for practical purposes.¹

I THE IDEA OF PROPORTIONALITY

A History

The notion of proportionate punishment, which seems so deeply rooted in common law jurisprudence, has had a chequered history. It is an old idea which has been expressed in both lay and legal literature in a variety of ways. The *lex talionis* of the book of Exodus required a high degree of equivalence between the offence and the sanction: 'eye for eye, tooth for tooth, hand for hand, foot for foot'.² Cicero saw proportionality as only setting outer limits: 'take care that the punishment does not exceed the guilt'.³ In 1215, three chapters of the *Magna Carta* were devoted to ensuring that 'ameracements' were not excessive.⁴ The 1689 Bill of Rights prohibition on excessive fines and cruel and unusual punishments conveys the same notion. In Italy, in 1764, the father of the classical school of criminology, the Marchese de Beccaria, published a much translated and influential *Essay on Crimes and Punishments*⁵ in which he argued for the courts to be bound by a graduated and legislatively defined scale of crimes and punishments.

At that time proportionality was not a paramount sentencing principle. The standard sanction in England for almost all serious offences was death. Even when transportation to the new colonies started to be offered as an alternative to execution by hanging, the period of transportation was, uniformly, life. Only later was it possible for the courts to select a lesser period. With the drying up of England's export markets for convicts, imprisonment was raised to its present status as the primary penal measure for serious offenders.

¹ Matthew Davenport Hill, 'On the Objections Incident to Sentences of Imprisonment for Limited Periods' in Enoch Cobb Wines (ed), *Transactions of the National Congress on Penitentiary and Reformatory Discipline*, held at Cincinnati, Ohio, October 12-18, 1870 (1st published 1871 as an appendix to Prisons Association of New York, *26th Annual Report of the Executive Committee of the Prisons Association of New York, and Accompanying Documents for the Year 1870*; 1970 reprint, American Correctional Association) 105, 106-7.

² Exodus, 21:24. See also Matthew, 5:38.

³ *De Officio* Bk 1, ch 25, s 89, quoted by Murphy J in *Veen v The Queen [No 1]* (1979) 143 CLR 458, 494.

⁴ Chapters 20-22. The principle was repeated and extended in the first Statute of Westminster (1275) 3 Edw I, c 6.

⁵ Cesare Bonesana Beccaria, *An Essay on Crimes and Punishments, translated from the Italian; with a commentary attributed to M de Voltaire, translated from the French* (1767).

The efforts of the United Kingdom Criminal Law Commissioners in the mid-nineteenth century to devise, as part of a proposed criminal code, a systematic and rational hierarchy of penalties, met with no success other than the passing of the Criminal Law Consolidation Acts of 1861. It was the mishmash of penalties brought together by this consolidation,⁶ and the resultant difficulties faced by the judges in applying them fairly, that was being mocked by the lawyer W S Gilbert when he wrote the libretto for *The Mikado* containing the famous lines: 'My object all sublime, I shall achieve in time — To let the punishment fit the crime'.⁷

B *Wide acceptance*

During the late 1970s and 1980s, in reaction to the greater use in the USA of open-ended 'rehabilitative' or 'preventive' forms of sentence, academic writings there began to call for return to the classical notion that punishments had to bear a reasonably predictable relationship to the offender's criminal conduct.⁸ It was said that this was not merely good philosophy, but was part of our intuitive approach to fairness in the allocation of praise and blame.⁹ The principle seems to embody notions of justice:

People have a sense that punishments scaled to the gravity of offences are fairer than punishments that are not ... if punishment is seen as an expression of blame for reprehensible conduct, then the quantum of punishment should depend on how reprehensible the conduct is.¹⁰

Certainly the idea that a response must be commensurate to the harm caused, or sought to be prevented, is to be found in many other areas of the law, both criminal and civil, such as the defences of provocation and self-defence¹¹ and awards of compensatory damages for personal injury or death.¹² Similarly, in fashioning equitable remedies, the courts require that the relief awarded be proportional to the detriment sought to be avoided.¹³ In administrative law, delegated legislation has been invalidated on the ground of 'unreasonableness'.

⁶ David Thomas, *The Penal Equation: Derivations of the Penalty Structure of English Criminal Law*, Institute of Criminology, University of Cambridge (1978); David Thomas, *Constraints on Judgment: The Search for Structured Discretion in Sentencing 1860-1910* (1979).

⁷ William Schenck Gilbert, *The Mikado* (1885), Act II. In *Veen v The Queen* [No 2] (1988) 164 CLR 465 (*Veen* [No 2]), 486, Wilson J identified the task in the same terms.

⁸ Ernest Vanden Haag, *Punishing Criminals* (1975); James Wilson, *Thinking About Crime* (1975); Andrew Von Hirsch, *Doing Justice: The Choice of Punishments* (1978); D Galligan, 'Guidelines and Just Deserts: A Critique of Recent Trends in Sentencing Reform' [1981] *Criminal Law Review* 297; Andrew Von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (1986).

⁹ Andrew Von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (1986) 52.

¹⁰ Andrew Von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55, 56-8.

¹¹ Stanley Yeo, 'Proportionality in Criminal Defences' (1988) 12 *Criminal Law Journal* 211.

¹² Harold Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) 3-5. The aim is for damages to be, in money terms, no more and no less than the plaintiff's actual loss. Because of the inherent imprecision of the exercise, the law acknowledges that in this area its aim is fair, not perfect compensation.

¹³ *Commonwealth v Verwayen* (1990) 170 CLR 394, 417, 441.

One of the tests of unreasonableness is whether the regulation is reasonably adapted to achieving the purpose of the enabling power, and this itself turns on the 'reasonable proportionality test'.¹⁴ It has been explained by the High Court in these terms:

In determining whether that requirement of reasonable proportionality is satisfied, it is material to ascertain whether, and to what extent, the law goes beyond what is reasonably necessary or conceivably desirable for the achievement of the legitimate object sought to be attained and, in so doing, causes adverse consequences unrelated to the achievement of that object. In particular, it is material to ascertain whether those adverse consequences result in any infringement of fundamental values traditionally protected by the common law ...¹⁵

Proportionality can thus be seen as rooted in respect for the basic human rights of those before the court. In the case of crime, though punishment may be deserved, the fundamental values of the law restrain excessive, arbitrary and capricious punishment. The doctrine of proportionality is one of the means by which that restraint is enforced.¹⁶

Proportionality is fundamental to the common law of sentencing. Its significance has been endorsed by the High Court in the case of *Veen v The Queen [No 1]*¹⁷ and dramatically restated by that court in *Veen [No 2]*.¹⁸ Though sentencing options and practices differ from jurisdiction to jurisdiction within Australia, the court has treated the principle of proportionality as common to all by re-affirming it in the cases of *Veen [No 2]*,¹⁹ *Chester v The Queen*,²⁰ *Baumer v The Queen*,²¹ *Hoare v The Queen*²² and *Bugmy v The Queen*²³ which arose out of prosecutions in New South Wales, Western Australia, Northern Territory, South Australia and Victoria respectively. The principle is one which commands unanimous support within the court.²⁴

It has also been endorsed in major governmental reports concerned with

¹⁴ *Davis v The Commonwealth* (1988) 166 CLR 79; *South Australia v Tanner* (1989) 166 CLR 161, 165, 168. See generally, Peter Bayne, 'Reasonableness, Proportionality and Delegated Legislation' (1993) 67 *Australian Law Journal* 448; Jeffrey Jowell and Anthony Lester, 'Proportionality: Neither Novel Nor Dangerous' in Jeffrey Jowell and Dawn Oliver (eds), *New Directions in Judicial Review* (1988) 51.

¹⁵ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 30-1 (Mason J) citing *Davis v The Commonwealth* (1988) 166 CLR 79. In *R v Intervention Board for Agricultural Produce* [1986] 2 All ER 115, a regulation authorising forfeiture of a deposit of £1.5 million because application was late by a few hours was declared to be invalid. The consequence was disproportionate to the fault.

¹⁶ Andrew Ashworth, *Sentencing and Criminal Justice* (1992) 68.

¹⁷ (1979) 143 CLR 458 (*Veen [No 1]*).

¹⁸ (1988) 164 CLR 465. See Richard Fox, 'The Killings of Bobby Veen: The High Court on Proportion in Sentencing' (1988) 12 *Criminal Law Journal* 339; David Wood, 'The Abolition of Mandatory Life Imprisonment for Murder: Some Jurisprudential Issues' in Heather Strang and Sally-Anne Gerull (eds), *Homicide: Patterns, Prevention and Control* (1993) 237.

¹⁹ (1988) 164 CLR 465.

²⁰ (1988) 165 CLR 611.

²¹ (1988) 166 CLR 51, 58.

²² (1989) 167 CLR 348.

²³ (1990) 169 CLR 525.

²⁴ *Veen [No 2]* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ), 485-6 (Wilson J), 490-1 (Deane J), 496 (Gaudron J).

legislative reforms of sentencing at state and federal levels. The Victorian Sentencing Committee's 1988 Report declared:

In the Committee's view the just deserts principles ought to set the maximum sentence that can be imposed on an offender in any particular case In no circumstances should a sentence be increased beyond that which is justified on just deserts principles in order that one or more of the secondary aims are met.²⁵

Likewise, the Australian Law Reform Commission, in its final report on sentencing in the federal sphere, gave priority to 'just deserts' in calculating the type and quantum of penalty.²⁶ This view is held internationally in overseas jurisdictions which share our inheritance. In 1987, after a major inquiry into the sentencing system, the Canadian Sentencing Commission stated:

The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence.²⁷

In the United Kingdom the government White Paper, which was the precursor of the Criminal Justice Act 1991 (UK), indicated that its objective was to introduce 'a new legislative framework for sentencing, based on the seriousness of the offence or just desserts [*sic*]'.²⁸ The 1991 Act says that the length of custodial sentences, the obligations of a community sentence and the size of fines *shall* be 'commensurate with the seriousness of the offence'.²⁹

In the United States, levels of punishment that are grossly disproportionate to the degree of wrongdoing may be struck down as unconstitutional because they amount to cruel and unusual punishment contrary to the Eighth Amendment.³⁰ The Australian Constitution is silent on the matter, but the prohibition on cruel and unusual punishment is found in the Bill of Rights 1689 which is still part of Australian federal³¹ and state law.³² Its ramifications as fundamental law have never been fully explored in this country but, in *Dietrich v The Queen*,³³ the point was recently made that the High Court could declare an individual right, bearing some resemblance to a right conferred by a constitutional Bill of Rights in other countries, in the form of an immunity resulting from an implied limitation on legislative power.³⁴ In *Sillery v R*,³⁵ a decade before, Justice Lionel Murphy had warned that if legislation could be characterised as requiring or

²⁵ Victoria, Attorney General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (1988) vol 1, 122.

²⁶ Australian Law Reform Commission, Report No 44, *Sentencing* (1988) 14-5.

²⁷ Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach, Report of the Canadian Sentencing Commission* (1987) 154.

²⁸ Great Britain, Home Office, *White Paper: Crime Justice and Protecting the Public* (1990) 5.

²⁹ Criminal Justice Act 1991 (UK) s 2(2)(a), s 6(2)(b), s 18(2)(a).

³⁰ *Weems v United States* 217 US 349 (1910); *North Carolina v Pearce* 395 US 711 (1969); *Solem v Helm* 463 US 277 (1983).

³¹ *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 463; *Sillery v R* (1981) 35 ALR 227, 234 (Murphy J).

³² See, eg, Imperial Acts Applications Act 1980 (Vic) Part II Division 3.

³³ (1992) 177 CLR 292.

³⁴ *Ibid* 317-18.

³⁵ (1981) 35 ALR 227.

permitting the infliction of cruel or unusual punishment, a question of Parliament's very competence to pass such a law for the 'peace, order and good government' of the relevant jurisdiction would be raised.³⁶ Proportionality may thus be even more basic and more entrenched than first appears.

It is a principle which is acknowledged legislatively as well as judicially and is one which affects the lower as well as the upper reaches of sentencing. It also has an impact on the methodology of sentencing. However, the concept, as propounded by the High Court, carries an implicit claim of greater precision in its formulation and its operation than it really possesses. It still needs much refinement. The purpose of this article is to chart some of the territory.

C *The rule formulated*

An authoritative statement of the High Court's current position on proportionality is to be found in the 1989 case of *Hoare v The Queen*.³⁷ In a joint judgment, a five member bench led by the Chief Justice declared that:

a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its *objective* circumstances.³⁸

This is not a justification for the use of criminal sanctions, but acts as a guide to restraint in their use. The Canadian Sentencing Commission makes the point neatly:

The assertion that sanctions are commensurate with the blameworthiness of conduct does no more to legitimise the existence of penal sanctions than the fact that income tax is proportionate to revenue justifies the practice of taxation in itself.³⁹

The rule assumes that there is some other justification, usually retributive, for the use of punishment as a social control mechanism and is offered as a principle confining the sentencer's discretion in selecting the degree of that punishment. The rule is not incompatible with objectives other than retribution, but it uses the boundaries set by what is deserved retribution as a limit on state intervention in the life of the offender: 'All I plead for is the *prior* condition of ill desert; loss of liberty justified on retributive grounds before we *begin* considering the other factors.'⁴⁰ This limiting aspect of the concept was emphasised by Deane J in *Veen [No 2]*:

It is only within the outer limit of what represents proportionate punishment for

³⁶ *Ibid* 234 (Murphy J).

³⁷ (1989) 167 CLR 348, 354.

³⁸ *Ibid*. The emphasis is in the original judgment. The court cited *Veen [No 2]* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ), 485-6 (Wilson J), 490-1 (Deane J) and 496 (Gaudron J) in support of this proposition.

³⁹ Canadian Sentencing Commission, above n 27, 131.

⁴⁰ *Veen [No 2]* (1988) 164 CLR 465, 473 (Mason CJ, Brennan, Dawson and Toohey JJ) quoting C Lewis, 'On Punishment: A Reply' (1954) 6 *Res Judicatae* 519, 522. See also C Lewis, 'A Humanitarian Theory of Punishment' (1953) 6 *Res Judicatae* 224.

the actual crime that the interplay of other relevant favourable and unfavourable factors — such as good character, previous offences, repentance, restitution, possible rehabilitation and intransigence — will point to what is the appropriate sentence in all the circumstances of the particular case.⁴¹

The scope of the rule would appear to be this: except where overridden by competent legislation,⁴² the common law of sentencing in Australia prohibits judges or magistrates from awarding sentences exceeding that which is commensurate to the gravity of the crime then being punished. It is impermissible for any punishment to be extended above this limit in an effort to isolate potentially dangerous persons, or to punish offenders with criminal histories more severely than the offence itself warrants, or to provide for medical, psychiatric or other treatment for convicted persons in penal or other settings, or to enhance special or general deterrence through exemplary sentences, or to promote other 'educative' purposes,⁴³ or to force cooperation, restitution or compensation irrespective of whether fulfilment of these ancillary objectives would protect the community against further crime. The rule applies to sentences of imprisonment (including the non-parole period⁴⁴) whether immediate or deferred and, arguably, to all other forms of sentence.⁴⁵ Logically, proportionality operates to define the lower, as well as the upper reaches of punishment, thus containing excessively lenient as well as overly severe responses to crime, but other principles, such as mitigation and mercy, are accepted as allowing some forbearance from punishment.

D *Determining or limiting?*

There is a difference between calling for sentences to 'fit the crime', which was what was being described in *The Mikado* and in the Canadian Sentencing Commission report, and using the concept of proportion to provide a ceiling upon punishment (or upon excessive efforts at rehabilitation within a punitive framework). The two forms of proportionality have different implications for the role of the judiciary in sentencing. When proportionality is used only as a limiting principle to define the outer bounds of punishment, it leaves trial judges and appellate courts a wide leeway of discretion to pursue secondary goals of rehabilitation or incapacitation. But if sentences are truly to fit the crime, and the idea of proportion is raised to a more powerful and far reaching 'determining' principle as advocated by Andrew von Hirsch, the leading American proponent of the just deserts model,⁴⁶ it requires precise and narrow

⁴¹ (1988) 164 CLR 465, 491 (Deane J).

⁴² Such as legislation which approves the diversion of offenders from court to psychiatric hospitals, or allows for the special treatment of juveniles, or the imposition of indeterminate or extended sentences on habitual criminals.

⁴³ *Walden v Hensler* (1987) 163 CLR 561, 570.

⁴⁴ *R v Addabbo* (1990) 47 A Crim R 329 (SA Supreme Court).

⁴⁵ The making of ancillary orders, such as those relating to compensation, restitution or reparation, is not governed by the proportionality principle where the additional order basically amounts to the handing down of a civil judgment in criminal proceedings.

⁴⁶ Andrew Von Hirsch, *Doing Justice: The Choice of Punishments* (1978); Andrew Von Hirsch, *Past*

penalty limits for each class of offence. The most common recurrent instances of each class of offence have to be matched with different penalties within a finely graded hierarchy of offences and sanctions. This is a legislative rather than a judicial exercise. It produces results like those enacted by regulation by the Minnesota legislature. There, for each offender convicted of an offence, the guidelines specify whether or not imprisonment should be imposed and, if so, specify a term in months. Under schemes like this, where conformation to these limits is made mandatory, judicial discretion is largely eliminated.⁴⁷

E *Statutory recognition*

This raises the question of the legislature's role in defining what is proportionate. The broad references to proportionality in the cases contrast with the more complex expressions of the idea in modern sentencing legislation. While Australia has not yet gone so far as the USA in setting down narrow statutory guidelines, proportionality is receiving statutory recognition. For instance, the Victorian Sentencing Act 1991 incorporates the concept of proportionality in a number of separate ways. First, by listing 'just' punishment as one of the purposes of the Act.⁴⁸ Secondly, by the obligation imposed upon sentencers to have regard to the 'nature and gravity' of the offence and the 'offender's culpability and degree of responsibility for the offence'.⁴⁹ Thirdly, by grading the different types of sanction allowed under the Act into levels of severity and by the instruction that no sentence more severe than is necessary to achieve its purpose be imposed.⁵⁰ Fourthly, by the incorporation of a carefully crafted sentencing scale based on fourteen levels of imprisonment, fines and community service orders⁵¹ and the application of that scale to indictable offences in the Crimes Act 1958 (Vic) after a re-assessment of the relative seriousness of the offences defined by that Act.⁵²

After all it is the legislature's function to set out the offences it creates in some order of gravity as represented by the maximum statutory penalty attached to each one. Examination of the penalties listed for offences in the statute book in most jurisdictions will show many to be inadequate, anachronistic and internally inconsistent. Similar offences are assigned different maxima; offences of obviously different gravity attract the same statutory penalty; the relationship between imprisonment and fines is not consistent, and the rate at which penalties for second and subsequent offences escalate is variable. Any genuine

and Future Crimes: Deservedness and Dangerousness In the Sentencing of Criminals (1985).

⁴⁷ For these and other techniques, see Richard Fox, 'Controlling Sentencers' (1987) 20 *Australian and New Zealand Journal of Criminology* 218.

⁴⁸ Sentencing Act 1991 (Vic) s 5(1)(a).

⁴⁹ *Ibid* s 5(2)(c)-(d).

⁵⁰ *Ibid* s 5(3)-(7).

⁵¹ *Ibid* s 109.

⁵² Richard Fox and Arie Freiberg, 'Ranking Offence Seriousness in Reviewing Statutory Maximum Penalties' (1990) 23 *Australian and New Zealand Journal of Criminology* 165; Richard Fox, 'Order out of Chaos: Victoria's New Maximum Penalty Structure' (1991) 17 *Monash Law Review* 106.

attempt to remedy even some of most glaring faults of the statutory penalty structure would produce an improvement in proportionality. It is the overall structure of penalties which has to be addressed as well as the judicial use of those sanctions.

Both tasks can be aided by empirical data on the pattern of sentencing in the courts and projections of the effects of proposed changes on correctional services. For this purpose it is necessary to have some permanent agency of government to engage in on-going monitoring of the criminal justice system. Bureaus of Crime Statistics can already be found in New South Wales, South Australia and Victoria. In addition, the Judicial Commission of New South Wales, whose primary function is to superintend judicial standards in the state, is under a duty to assist the courts in achieving consistency in imposing sentences by monitoring sentences and disseminating information on judicial sentencing behaviour.⁵³ The Victorian Judicial Studies Board has similar functions,⁵⁴ but is still awaiting funding.

F *Statutory departures*

Though the legislature has been called to play its part in clarifying what is proportionate by revamping the sentencing legislation, continuation of government support for the doctrine of proportionality cannot be assumed. There is an emerging tendency to return to incapacitative strategies in the hope of assuaging communal fears and of protecting the community. In mid 1993, in Victoria, the principle of proportionality contained in the statutory objectives of the Sentencing Act 1991 was expressly ousted by new legislation aimed at extending the prison terms of serious sexual and violent offenders.⁵⁵ When a sentencer in the Supreme Court or the County Court is considering imprisoning a recidivist 'serious sexual offender' or a recidivist 'serious violent offender', a re-orientation of the statutory purposes of sentencing takes place. The court is directed to regard the protection of the community as the principal purpose for which the sentence is imposed. The new legislation expressly declares that the sentencer may, in order to achieve that purpose, impose a custodial sentence 'longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances'.⁵⁶

Already legislation creating indeterminate sentences for habitual and dangerous offenders exists in every State and Territory other than New South Wales and the Australian Capital Territory.⁵⁷ There is little consistency between the

⁵³ Judicial Officers Act 1986 (NSW) s 8. For a description of the computerised sentencing information systems designed by the Commission, see Graham Greenleaf, 'Making the Sentencing Fit the Computer - or the Accused?' (1991) 65 *Australian Law Journal* 45.

⁵⁴ Judicial Studies Board Act 1990 (Vic).

⁵⁵ Sentencing Act 1991 (Vic) s 5A, inserted by the Sentencing (Amendment) Act 1993 (Vic). See Richard Fox, 'Victoria Turns to the Right in Sentencing Reform: The Sentencing (Amendment) Act 1993' (1993) 17 *Criminal Law Journal* 394.

⁵⁶ Sentencing Act 1991 (Vic) s 5A(b).

⁵⁷ Criminal Code 1983 (NT) s 397(1) and s 401(2); Penalties and Sentences Act 1992 (Qld) Part 10 ss 162-179; Criminal Law (Sentencing) Act 1988 (SA) Part II Division III; Criminal Code 1924

states in the form of their legislation and the procedural safeguards to prevent its inappropriate use. The criteria for invoking it generally requires serious offending. But because the measure amounts to an indefinite extension of what would normally be a determinate conventional custodial sentence, it necessarily means the imposition of disproportionately long sentences.

The danger of abandoning the restraining influence of proportionality in favour of incapacitation, even selective incapacitation, is that the latter is inefficient and potentially arbitrary. Even if limited to serious 'dangerous' offenders, the inevitable problem is that of being unable to identify, with sufficient confidence, those so likely to recidivate as to justify their detention for periods beyond the normal maximum applicable to the offence. Doubt has already been expressed by the High Court in *Veen [No 1]*⁵⁸ and elsewhere⁵⁹ about the ability of experts to predict future dangerousness and the pitfalls of basing extreme punitive responses on such predictions.⁶⁰ The risk that they may be used against persons who are not in fact dangerous has not yet been sufficient to bring down the legislation.

II WHAT IS TO BE TAKEN INTO ACCOUNT?

A *Objective circumstances of the offence*

The rule is that, in the first instance, the gravity of a crime has to be considered in the light of its *objective* circumstances. Obviously the maximum statutory penalty is the starting point. It defines the absolute limit on how far those who perpetrate the worst examples of the type of offence in question (that is those with no mitigating aspects) can be punished. Thereafter a notional point must be found somewhere on the scale set by the maximum to represent the most that proportionate sentencing would allow. For this, the basic idea is that the seriousness of the offence should be assessed without taking into account factors personal to the offender. However, the use of the word *objective* (which is not explained further by the High Court) does not exclude all elements of the offender's involvement which might be regarded as *subjective*.⁶¹

The seriousness of crime has two main elements — the degree of harmfulness of the conduct and the extent of the offender's culpability. Culpability normally turns on the mental state of the offender. In inchoate crimes, such as attempt, the offender's intended objective is more significant in evaluating the gravity of the crime than the actual harmfulness of his or her actions. The finding of guilt establishes, as an 'objective' fact, the existence of the minimum *mens rea* and *actus reus* elements of the offence. These may define some of the circumstances in which the offence must have taken place, for example in sexual offences, the

(Tas) s 392; Sentencing Act 1991 (Vic) ss 18A-Q; Criminal Code 1913 (WA) s 662(a) and Crime (Serious and Repeat Offenders) Sentencing Act 1992 (WA).

⁵⁸ (1979) 143 CLR 458.

⁵⁹ Allen Bartholomew and Kerry Milte, 'The Reliability and Validity of Psychiatric Diagnoses in Courts of Law' (1976) 50 *Australian Law Journal* 450.

⁶⁰ (1979) 143 CLR 458, 462-7, 494.

⁶¹ *R v Mulholland* (1991) 1 NTLR 1, 13-4.

fact that the victim was below a certain age, or stood in a particular relationship to the offender. However since more than one mental state may satisfy the definition of the offence, for example rape may be committed intentionally or recklessly, and the external elements of the crime may be fulfilled by many scenarios, the court must form a picture of and weigh the variable features of the crime in determining how grave an example it is of that class.

Harm is obviously an objective circumstance, but the problem is to weigh the harmfulness of criminal behaviour that invades different interests, for example physical integrity, personal privacy, proprietary rights, public order, moral standards, administration of justice and government, etc. Harm must include both advantages gained by the offender and losses caused to the victim. The latter may have to be offset by reference to the victim's role in instigating the crime and care must be taken in jurisdictions, such as the Northern Territory, which do not have provision for victim impact statements, to ensure that the material presented in relation to the effect of the crime on the victim does not have the flavour of advocacy for or against the victim.⁶² Not only are the actual consequences part of the assessment of gravity, but, as in attempt, so are the intended ones (although assessments of the latter are subjective).

So far as actual repercussions are concerned, there are limits on what may be considered because the harm may be too remote and because of the rule that the offender is not to be sentenced on the basis of consequences that amount to another uncharged or acquitted crime.⁶³ The sentencer is entitled to look at the potential or actual consequences of the criminal conduct even if there is a difference between what the accused intended to occur or took the risk of occurring and what in fact happened. The accused's lack of foresight is a matter of mitigation rather than an 'objective' feature of the crime.⁶⁴ As has been noted in England:

It is rather illogical in some ways ... that a given piece of driving which causes three deaths should be punished more heavily than the identical piece of driving causing one death, or indeed causing no death at all, given that no one suggests this appellant was deliberately driving so as to kill people. The fact is that in the public estimation it is a factor which people in general do take into account. People do regard killing three as more criminal than killing one. That is a fact of life which this court recognises.⁶⁵

The method by which the crime was committed is also relevant to assessing its gravity for the proportionality rule. This covers such matters as use or possession of weapons and their actual or apparent offensiveness, whether the offence involved a breach of confidence or trust, or whether particularly

⁶² *R v P* (1992) 39 FCR 276. See generally Christopher John Sumner, 'Victim Participation in the Criminal Justice System' (1987) 20 *Australian and New Zealand Journal of Criminology* 195. In those that do have victim impact statements, care must be taken in establishing the factual accuracy of their contents: see *R v Nicholls* (1991) 53 A Crim R 455, 458-9 (SA Court of Criminal Appeal).

⁶³ *R v De Simoni* (1981) 147 CLR 383, 389. See generally Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (1985) 48-9.

⁶⁴ *R v McCormack* [1981] VR 104.

⁶⁵ *R v Pettipher* (1989) 11 Cr App R (S) 321, 323.

vulnerable victims were being exploited. The relevance of the offender's degree of participation is a little more contentious. That the crime was sophisticated and required complex planning goes to its inherent seriousness, but the fact that the defendant played a minor role in it and did so impulsively and/or at the last minute goes to mitigation.

Events which occur after the crime, particularly the offender's responses to the accusations, are not relevant to estimating the objective gravity of the offence. They can only mitigate the penalty that would otherwise apply. These not only include factors personal to the accused, such as illness, remorse, confession, informing, restitution, voluntary seeking of treatment, maturation, cooperative conduct at the trial and a willingness to plead guilty,⁶⁶ but also matters outside the offender's control that affect the trial or sentencing process. These can include prosecution delay, a jury recommendation to mercy, the level of sentence imposed upon a co-defendant, or the fact that the conviction is the result of a retrial. So too with the direct or indirect effects of the proposed sanction on the offender and/or his or her family.

There are some culpability factors (other than the proven *mens rea*) that are personal to the accused and present at the time of the offence which are sometimes thought to bear upon judgments of the objective gravity of the crime because they seem to aggravate it. These include whether the offender was suffering from mental disorder, or was acting under the influence of alcohol or drugs. However, considerations such as these have been treated ambivalently by sentencers as either aggravating *or* mitigating:

An abnormality may reduce the moral culpability of the offender and the deliberation which attended his criminal conduct; yet it may mark him as a more intractable subject for reform than one who is not so affected, or even as one who is so likely to offend again that he should be removed from society for a lengthy or indeterminate period. The abnormality may seem, on one view, to lead towards a lenient sentence, and on another to a sentence which is severe.⁶⁷

The better view, it is submitted, is that these are personal factors which go to mitigation (or its absence), rather than to the question of how inherently bad is the crime. Under this head would also then fall other partial excuses and failed defences⁶⁸ as well as any further evidence of the deliberateness of the offending.

B *Antecedent criminal history*

The objective circumstances of the offence do not include the antecedent criminal history of the offender except where legislation prescribes prior criminality as an aggravating component of the offence, for example being a felon in possession of a gun, or has specified higher penalties for second and subsequent offences. The latter clearly raises the punishment ceiling. Otherwise, proportionate sentencing prohibits enlarging the punishment for the current

⁶⁶ *R v Jabaltjari* (1989) 64 NTR 1.

⁶⁷ *Channon v The Queen* (1978) 33 FCR 433, 436-7 (Brennan J).

⁶⁸ Martin Wasik, 'Excuses at the Sentencing Stage' [1983] *Criminal Law Review* 450.

offence because of previous convictions:

It would be clearly wrong if, because of the record, His Honour was intending to increase the sentence beyond what he considered to be an appropriate sentence for the instant offence.⁶⁹

However, although an adverse record does not operate to increase the sentence beyond limits set by an appropriate response to the current offence, it can inhibit mitigation by depriving the offender of any credit which he or she would have received for having a good character and record:

antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence.⁷⁰

C *Community protection*

Protection of the community is always a legitimate objective in sentencing, but it cannot be pursued untrammelled by any consideration of proportionality. In *Veen [No 1]*, the trial judge had imposed the maximum sentence for manslaughter, namely life imprisonment, even though elements of diminished responsibility and provocation were present. He did so because he considered that the need to protect the community from Veen's predicted future dangerousness was paramount. In 1979, the High Court said this was wrong in principle and substituted a proportionate sentence of 12 years. When Veen, having killed a second time, reappeared before the High Court in 1987 to complain that his second life sentence for manslaughter was manifestly excessive, the Full Bench of seven judges convened to hear the matter could have admitted that the court had made a faulty choice of principle on the previous occasion by preferring proportionality to protection. Yet they did not resile from the earlier position. The majority was able to distinguish the two cases on the facts so as to now justify the life sentence as proportionate. The entire court also re-endorsed the proposition that a sentence should not be increased beyond that which is proportionate to the crime in order to extend the period of protection of society from the risk of recidivism on the part of the offender.

However, perhaps to assuage a sense of guilt, the court added a significant gloss to the reaffirmed principle. The protection of society is relevant to the fixing of the sentence itself:

It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is

⁶⁹ *Baumer v The Queen* (1988) 166 CLR 51, 57 (Mason CJ, Wilson, Deane, Dawson and Gaudron JJ).

⁷⁰ *Veen [No 2]* (1988) 164 CLR 465, 477 (Mason CJ, Brennan, Dawson and Toohey JJ). See also *Baumer v The Queen* (1988) 166 CLR 51, 57. *Contra R v Mulholland* (1991) 1 NTLR 1, 13-4.

impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.⁷¹

Thus community protection remains relevant to fixing sentence, but only within outer limits set by proportionality.

D *Local circumstances*

While it is desirable that, in the sentencing of offenders, like offenders be punished alike,⁷² the High Court has recognised that sentencing law in Australia is necessarily applied on a state by state, territory by territory basis. It accepts that sentencing practices therefore may not be uniform from jurisdiction to jurisdiction, but may be affected by local values and circumstances.⁷³ Unlawful conduct may be regarded differently in different areas of Australia. This may be less so with federal crimes where it is proper to assume they are equally grave wherever committed in the nation, and to have regard to sentences imposed under the same law elsewhere in Australia in order to achieve a measure of consistency in penalty levels.⁷⁴ However, at a state or territory level, consideration has to be given, in assessing the objective gravity of the crime, to the way in which the conduct is viewed locally.⁷⁵ This is particularly true where cultural boundaries are being crossed.⁷⁶

In such circumstances, assessment of whether the punitive response is appropriate may also have to allow for local conditions. This may involve taking into account the punitive handling of the offender in accordance with aboriginal customary law. Thus, as a matter of mitigation, a non-custodial sanction may be selected, or a custodial sentence reduced in length, in order to allow an offender to undergo 'payback'. It would otherwise be excessive for the person to undergo two full sets of punishment.⁷⁷

E *The conviction itself*

Criminal sanctions are not merely intended to be painful in themselves, they are also an act of public censure. This censure is registered in the conviction which is a permanent diminution of the offender's legal status. The change of status produces civil repercussions which continue as added punishment after the sentence itself has been executed.⁷⁸ The very fact of conviction is properly regarded as a major act of condemnation and public stigmatisation⁷⁹ and is

⁷¹ *Veen [No 2]* (1988) 164 CLR 465, 473 (Mason CJ, Brennan, Dawson and Toohey JJ).

⁷² See *Lowe v The Queen* (1984) 154 CLR 606, 610-1 (Mason J).

⁷³ *Veen [No 1]* (1979) 143 CLR 458, 497 (Aickin J); *Neal v The Queen* (1982) 149 CLR 305, 309 (Gibbs CJ), 323 (Brennan J).

⁷⁴ *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).

⁷⁵ *Veen [No 1]* (1979) 143 CLR 458, 497-8; *Neal v The Queen* (1982) 149 CLR 305, 315-9, 323.

⁷⁶ See, eg, *Walden v Hensler* (1987) 163 CLR 561, 578, 584.

⁷⁷ *R v Minor* (1992) 79 NTR 1 (NT Court of Criminal Appeal).

⁷⁸ Richard Fox and Arie Freiberg 'Sentences without Conviction: From Status to Contract in Sentencing' (1989) 13 *Criminal Law Journal* 297.

⁷⁹ 'A conviction is a formal and solemn act marking the court's, and society's disapproval of a defendant's wrongdoing': *R v McInerney* (1986) 28 A Crim R 318, 329 (Cox J); see also Nigel

treated as a significant sanction in its own right. In assessing whether the punishment is within fair limits, account has to be taken of the fact that there are now non-conviction or optional-conviction sanctions and that the decision to use a conviction-based one means that it is intended to be, and is in fact, more severe than a response which does not contain this element.

III SCOPE OF THE RULE

A *Non-parole period*

The principle of proportionality not only applies to the fixing of the head sentence, but also to the non-parole period. The minimum term the offender must spend in custody before being eligible for parole is not set for treatment purposes, but for punitive ones. It is not the shortest time required for the paroling authority to form a view of the prisoner's prospects of rehabilitation,⁸⁰ but is the minimum time that the sentencer determines justice (that is desert) requires the offender must serve having regard to the circumstances of the offence.⁸¹ It follows from this that the non-parole period must not be unduly extended in order to protect the community from the prisoner if that would produce a sentence which is disproportionate to the crime.⁸²

B *Totality principle*

Individual sentences must not only fall within the perimeter of proportionality, but, in the case of multiple offences, the total sentence must be proportionate to the totality of the offending. The common law requires that a separate sentence be imposed for each offence. By default, custodial sentences are served concurrently with each other. This rule derives from the fact that consecutive sentences for felony had no meaning when the death penalty was the principal punishment. The rule also applied to misdemeanours, but courts were allowed to direct, by a special order, that a prison sentence be wholly or partially cumulative upon other terms imposed. Statutory powers to impose cumulative sentences for felony were soon added.⁸³ The courts then made it clear that if the totality of the prisoner's liability to incarceration produced figures which crushed any hope of reformation and any reasonable expectation of useful life after release, some of the sentences would have to be modified by being made concurrent or partially concurrent with each other.⁸⁴ The courts have repeatedly said that they do not wish to impose upon offenders sentences which would produce a feeling that it was hopeless ever to expect release. Hope, even distant hope, has always been regarded as a significant factor in reformation.⁸⁵

Walker, *Punishment, Danger and Stigma* (1980) 146.

⁸⁰ *Power v The Queen* (1974) 131 CLR 623.

⁸¹ *Bugmy v The Queen* (1990) 169 CLR 525, 536-8.

⁸² *R v Addabbo* (1990) 47 A Crim R 329 (South Australian Supreme Court).

⁸³ See, eg, Criminal Code 1983 (NT) s 405(3).

⁸⁴ See generally, Fox and Freiberg, above n 63, 370-1.

⁸⁵ Extreme length of sentence alone, even in relation to a youthful offender, does not necessarily mean

C Other non-custodial sanctions

The limits set by the concept of proportionality also apply to non-custodial sanctions. The Bill of Rights already prohibits excessive fines and the references in *Veen* and subsequent cases to restrictions on extended use of sentences for educative and treatment purposes are ample to cover all forms of sanction which can be used for punitive or treatment purposes.

D Forfeiture

In recent years, forfeiture as a crime control technique has been actively revived in Australia. Powerful forfeiture measures, originally included in the Customs Act 1901 (Cth) for the protection of federal revenue in customs matters, were remodelled into weapons against illegal drug importation and the proceeds of such importation. These confiscatory concepts were soon applied to other forms of profitable crime at state as well as federal levels.⁸⁶ The place of forfeiture in the general array of criminal sanctions is still poorly defined. Much of modern forfeiture legislation has a civil character though often depending on criminal convictions. There appears to be a policy of deliberately dissociating the sentencing and confiscatory processes, treating them as though they were competing sanction systems, even to the point of express statutory directions that forfeiture is to be ignored in sentencing. But sentencers have tended to balk at treating the fact of forfeiture as irrelevant to sentence and have often adjusted sentences downwards so as not to create a total punitive effect that is disproportionate to the offending.⁸⁷

E Treatment

The preoccupation in this century with treatment-based sanctions in an effort to rehabilitate offenders led to a watering down of the classical concept of proportionality. The habitual and sexual offender provisions of the Northern Territory Criminal Code⁸⁸ manifest this shift: greater use is made of extended or indeterminate sentences ostensibly to achieve therapeutic purposes, but the therapeutic purpose is backed up by pure incapacitation. Indeterminacy was used on an even greater scale in the United States. There the promised rehabilitation was slow in forthcoming and the elements of indeterminacy and preventive detention caused civil libertarians to worry about the consequences of the

it will be characterised as 'crushing': see *R v Vaitos* (1981) 4 A Crim R 238 (28 years with a minimum of 26); *R v Knight* [1989] VR 705 (life with a minimum of 27 years).

⁸⁶ See, eg, Proceeds of Crime Act 1987 (Cth); Crimes (Confiscation of Profits) Act 1986 (Vic); Crimes (Forfeiture of Proceeds) Act 1988 (NT); Drug Trafficking (Civil Proceedings) Act 1990 (NSW).

⁸⁷ See Arie Freiberg and Richard Fox, 'Forfeiture, Confiscation and Sentencing' in Brent Fisse, David Fraser and Graeme Coss, *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting* (1992) 106; Brent Fisse, 'Confiscation of Proceeds of Crime: Discretionary Forfeiture or Proportionate Punishment' (1992) 16 *Criminal Law Journal* 138.

⁸⁸ Criminal Code Act 1983 (NT) s 397 ('habitual criminal'), s 401 ('incapable of exercising proper control over sexual instincts').

predictive failures of the experts on whom the system depended. The resurgence of interest in proportionality is a result of these concerns.

At first glance it appears that what is to be made commensurate to the crime is 'punishment' not 'treatment'. Rehabilitative approaches to sentencing are based, in essence, on medical models of treatment and medicine is not inhibited by concepts of desert. Treatment is not punishment, so the argument goes. Punishment involves condemnation and the intentional infliction of personal deprivation, suffering and disability. Treatment is concerned with the alleviation of personal suffering and disability. It is not in the business of censure. Treatment may also unavoidably involve pain, but punishment deliberately uses suffering that is avoidable.

The counter argument is that punishment does not lose its character merely because, as part of a criminal sanction, treatment is offered.⁸⁹ Whether or not accompanied by a conviction, it remains coercive and inflictive. This is well illustrated by the case of *Freeman v Harris*.⁹⁰ There the sentencer used the maximum custodial sentence available on summary conviction for a relatively minor theft in order to gain time for drug abuse treatment for the offender; Murphy J said:

In my view it would be quite wrong for a sentencing tribunal to impose a sentence of imprisonment upon an offender which is dictated not by the gravity or heinousness of the crimes committed, but by the tribunal's desire to cure the offender of some disease such as drug addiction In sentencing, the punishment in the particular case should be proportionate to the offence. It is not open to the Court to punish [a]n offender more, because he is ill, and because it is considered to be for his own benefit to try to cure him. The gravity of the offence must be the first and paramount consideration [*sic*].⁹¹

In the United Kingdom, a similar sentiment was expressed in more forceful terms by Lord Justice Lawton in a case in which a mentally disturbed 23 year old woman, with a history of 'nuisance' offences, was sentenced to eighteen months imprisonment on being convicted of damaging a flowerpot valued at £1 in a fit of temper:

The first thing to be said, and said very firmly indeed, is that Her Majesty's Courts are not dustbins into which the social services can sweep difficult members of the public. Still less should Her Majesty's judges use their sentencing powers to dispose of those who are socially inconvenient. If the Courts became disposers of those who are socially inconvenient the road ahead would lead to the destruction of liberty. It should be clearly understood that Her Majesty's judges stand on that road barring the way. The Courts exist to punish according to the law those convicted of offences. Sentences should fit crimes One truth has been revealed by this distressing case. The National Health Service and the social services cannot cope with a woman of this type who does not require treatment (so it is said) but who cannot live in the community without disturbing others and being a source of danger to herself and to others. The welfare

⁸⁹ *Power v The Queen* (1974) 131 CLR 623.

⁹⁰ [1980] VR 267.

⁹¹ *Ibid* 280-1.

system makes no provision for dealing with that kind of case. This Court has no intention of filling that gap by sending people to prison when a prison sentence is wholly inappropriate. We ask ourselves, what was the appropriate sentence for breaking a flowerpot? The answer is a fine of £2.⁹²

Treatment is thus subject to the doctrine of proportionality. This may inhibit the more creative, constructive and experimental ways of tackling crime, but the just deserts approach calls upon the sentencer to ensure that his or her efforts at rehabilitation are not excessive in their duration or their severity. The fact that the offender has consented to a treatment condition in a non-custodial order does not resolve the issue of proportionality. The order may demand participation for too long or too intensely, the condition may impose unrealistic and oppressive burdens, or the treatment (whether physical, pharmaceutical, or psychological) may carry significant risk of bodily harm.⁹³

F Mitigation

The objective or proportionate sentence should only be awarded if no mitigating factors are present. It is accepted that all sentences, except mandatory ones, can be mitigated. Indeed it is a reviewable failure of the sentencing discretion not to take into account all relevant mitigating factors in fixing the penalty. To this extent mitigation is the right of an accused if he or she can make out a proper factual basis for a recognised ground of mitigation at the sentencing hearing. Sentencing legislation is beginning to incorporate checklists of some of the main acceptable mitigating factors,⁹⁴ but the categories are not closed. The actual sentence will ordinarily be less than the objective sentence. Sometimes the former will be a mere fraction of the latter because of allowances made for mitigating circumstances:⁹⁵ the relative importance of the objective features of the crime and the mitigating elements must obviously vary from case to case.⁹⁶

G Mercy

Judicial officers have an inherent right to 'temper their justice with mercy'.⁹⁷ Unlike mitigation, mercy is never owed to an offender as of right, nor are there recognised grounds for its exercise. It is also granted less frequently. Mercy allows a departure from the principle of proportionality in that it permits the sentencer to impose on the offender a sanction less than his or her just deserts,

⁹² *R v Clarke* (1975) 61 Cr App R 320, 323.

⁹³ For instance, those that use electrical and chemical aversive conditioning, or psychological techniques which are unusually degrading in their deliberate use of shame and humiliation: see Michael Serber, 'Shame Aversion Therapy' (1970) 1 *Journal of Behaviour Therapy and Experimental Psychiatry* 213.

⁹⁴ See, eg, Crimes Act 1914 (Cth) s 16A (2), discussed in *R v El Karhani* (1990) 51 A Crim R 123, 134 (NSW Court of Criminal Appeal).

⁹⁵ *R v Ireland* (1987) 49 NTR 10, 23 (Nader J).

⁹⁶ *R v Todd* [1982] 2 NSWLR 517 (NSW Court of Criminal Appeal).

⁹⁷ See generally Jeffrie Murphy and Jean Hampton, *Forgiveness and Mercy* (1988); Kathleen Moore, *Pardons: Justice, Mercy and the Public Interest* (1989).

even after allowing for the presence of mitigating circumstances.⁹⁸ Mercy is best regarded as an act of grace, compassion or forgiveness that is beyond human claims of right, duty, or obligation ('The quality of mercy is not [con]strain'd').⁹⁹

IV METHODOLOGY

A *Two-stage versus instinctive synthesis*

As the judges initially read the *Veen* cases, it seemed that the proper methodology of sentencing involved a 'two-stage' approach. *First*, a *proportionate* sentence would be determined by the court, having regard to certain *objective* criteria and *secondly*, a sentence *appropriate* to the circumstances of the individual case would be determined having regard to additional mitigating criteria, normally personal to the accused.

In late 1989 and early 1990, in *R v Young*,¹⁰⁰ the Victorian Full Supreme Court had before it two appeals from sentences imposed by a County Court judge who had applied this type of two-stage approach to each. The judge believed that the procedure was implicit in the common law as stated by the High Court in *Veen [No 1]*¹⁰¹ and *Veen [No 2]*.¹⁰² Though he did not think he was bound to adopt such an approach, he regarded it as 'helpful' in that it required him 'to go about the sentencing task in a more orderly way and ... ensure that all relevant matters *are* considered'.¹⁰³ The Full Court declared that while it was disinclined to prevent a sentencer from adopting a course that ensured that all relevant matters were considered, the methodology used was such a great departure from long established sentencing practice in the state, and so likely to lead to error and injustice, 'that the adoption of the process should itself be regarded as sentencing error'.¹⁰⁴ It insisted that the task of sentencing could not be confined, without risk of injustice, 'within rigid formulae'.¹⁰⁵ It pointed out that, in none of the cases up to *Hoare v The Queen*,¹⁰⁶ did the High Court either directly state that a two-stage approach was needed, or apply one itself. Indeed in *Baumer v The Queen*,¹⁰⁷ the High Court expressly rejected the suggestion that the provision required a two-stage approach to sentencing (the primary sanction, plus a loading for intoxication). It opted, instead, for a global sanction taking into account the circumstances of the

⁹⁸ *R v Jabaltjari* (1989) 64 NTR 1, 31 (Angel J).

⁹⁹ 'But mercy is above this sceptered sway; It is enthroned in the heart of kings, It is an attribute to God himself; And earthly power doth then show likest God's When mercy seasons justice.': William Shakespeare, *Merchant of Venice* Act 4, Scene 1, Portia.

¹⁰⁰ [1990] 2 VR 951 (*Young's* case).

¹⁰¹ (1979) 143 CLR 458.

¹⁰² (1988) 164 CLR 465.

¹⁰³ [1990] 2 VR 951, 952.

¹⁰⁴ *Ibid* 961.

¹⁰⁵ *Ibid* 955.

¹⁰⁶ (1989) 167 CLR 348.

¹⁰⁷ (1988) 166 CLR 51. The case dealt with the Criminal Code Act 1983 (NT) s 154(4).

offending in their entirety.¹⁰⁸ In the opinion of the Victorian Full Court, to try to be more precise by applying rigid, or formulaic, approaches:

would be likely to lead either to the imposition of inadequate sentences or to injustice. It would certainly lead to an increase in appeals against sentence. What is a sentence proportionate to an offence is a matter of discretion and there must in most cases be a range of sentences open to a sentencing judge which are proportionate to the offence. There cannot be said to be a sentence which is the proportionate sentence¹⁰⁹

It reaffirmed the 'instinctive synthesis' approach it had articulated 14 years earlier in *R v Williscroft*¹¹⁰ (and which it was quick to point out had never been rejected by the High Court¹¹¹) according to which:

ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process. Moreover, in our view, it is profitless ... to attempt to allot to the various considerations their proper part in the assessment of the particular punishments presently under examination We are aware that such a conclusion rests upon what is essentially a subjective judgment largely intuitively reached by an appellate judge as to what punishment is appropriate.¹¹²

The validity of the position taken in *Young's* case soon came under pressure because of the sentencing discounts offered by the courts for pleading guilty and for informing. The former has a statutory foundation in Victoria¹¹³ and the latter a public policy base. In 1990, in *Tierney*,¹¹⁴ the sentencer had quantified and announced the amount of the reduction he had allowed for the defendant pleading guilty before fixing the actual sentence. Objection was taken because it was inconsistent with the direction given in *Young's* case not to engage in 'two-stage' sentencing. However, in this case, and later in *O'Brien*,¹¹⁵ the members of the Full Court conceded that the statutory obligation to take into account a guilty plea in reduction of a sentence that otherwise would have been passed justified some form of two-stage process. Nonetheless, they re-affirmed the correctness of *Young's* case, by reminding sentencers that they were not obliged by the statute to state the extent of any reduction they chose to grant and that it was preferable that they did not do so.¹¹⁶

*R v Nagy*¹¹⁷ concerned a federal prosecution in Victoria of drug traffickers who later turned informers. A majority in the Victorian Full Supreme Court

¹⁰⁸ (1988) 166 CLR 51, 56-7.

¹⁰⁹ [1990] 2 VR 951, 960.

¹¹⁰ [1975] VR 292.

¹¹¹ [1990] 2 VR 951, 955.

¹¹² [1975] VR 292, 300.

¹¹³ Penalties and Sentences Act 1985 (Vic) s 4, repealed and replaced by Sentencing Act 1991 (Vic) s 5(2)(e). See also Crimes Act 1914 (Cth) s 16A(2)(g) and J Willis, 'The Sentencing Discount for Guilty Pleas: Are we Paying Too Much for Efficiency?' (1985) 18 *Australian and New Zealand Journal of Criminology* 131.

¹¹⁴ *R v Tierney* (1990) 51 A Crim R 446 (Vic Court of Criminal Appeal).

¹¹⁵ *R v O'Brien* (1991) 55 A Crim R 410 (Vic Court of Criminal Appeal).

¹¹⁶ *Ibid* 414.

¹¹⁷ [1992] 1 VR 637.

held that, unless compelled to do so by public policy or statute, Victorian sentencers should avoid announcing what the 'undiscounted' term of imprisonment would have been. To do so would involve the type of 'two-stage' sentencing expressly proscribed in *Young's* case. Again they preferred sentencers to take into account all matters of aggravation and mitigation and pronounce the sentence which the 'instinctive synthesis' produced. However, because under Commonwealth law all sentencers are required to state the extent of any discount they grant for promised co-operation with law enforcement agencies,¹¹⁸ the members of the majority did identify the extent of the reduction.¹¹⁹

McGarvie J argued against the majority position. His view was that a two-stage approach to sentencing was not totally precluded by the decision in *Young's* case. First, there was the statutory obligation to state the discount for promised cooperation under federal law. Secondly, at common law it had always been open to a judge, in sentencing informers, to select the appropriate sentence before discount, reduce it by the specific amount of the discount, and announce what had been done.¹²⁰ Thirdly, the former was long established sentencing practice and *Young's* case was only concerned with departures from established practice. Fourthly, a two-stage approach was desirable on public policy grounds, at least in relation to informers, because unless the discounts were both substantial and publicly known, the cooperation of potential informers would not be forthcoming.

In the United Kingdom Lord Lane explained, in *R v Bibi*,¹²¹ that 'We are not aiming at uniformity of sentence We are aiming at uniformity of approach'.¹²² But that is not so in Australia. It is understandable that the Victorian Supreme Court resists demands for precision in what is accepted to be an imprecise and highly subjective process. Such attempts at precision multiply the possibility of error and encourage appeals based on objection to the particular weighting of factors even if only some of the elements in the process are revealed. In no other Australian jurisdiction, however, has there been such an intense rejection of any form of 'two-stage' approach to sentencing.¹²³

¹¹⁸ Crimes Act 1914 (Cth) s 21E(1) states:

Where a federal sentence, or federal non-parole period, is reduced by the court imposing the sentence or fixing the non-parole period because the offender has undertaken to co-operate with law enforcement agencies in proceedings, including confiscation proceedings, relating to any offence, the court must:

- (a) if sentence imposed is reduced — specify that the sentence is being reduced for that reason and state the sentence that would have been imposed but for that reduction; and
- (b) if the non-parole period is reduced — specify that the non-parole period is being reduced for that reason and state what the period would have been but for that reduction.

¹¹⁹ If the co-operation is subsequently refused, the Director of Public Prosecutions may later appeal against the reduction under s 21E(2).

¹²⁰ [1992] 1 VR 637, 645. At 648, McGarvie J also cited *R v Gallagher* (1991) 23 NSWLR 220 (NSW Court of Criminal Appeal: a sentencer who gives a discount for assistance to law enforcement authorities is entitled, though not bound, to announce that a discrete quantifiable discount has been given).

¹²¹ (1980) 71 Crim App R 360.

¹²² *Ibid* 361-2.

¹²³ See criticism in Wood, above n 18, 240-1.

In the Northern Territory, in *R v Raggett*,¹²⁴ Kearney J noted that ‘the fixing of an “objective sentence” and then allowing for any proper mitigation — appears to be proper, and well-accepted in this jurisdiction’.¹²⁵ But, shortly afterwards, in *R v Mulholland*,¹²⁶ the Court of Criminal Appeal indicated that it was not always necessary to follow a two-stage approach,¹²⁷ but if it was followed, the inclusion of subjective elements in considering the *mens rea* of the offender as part of the ‘objective’ features of the offence meant that there was little difference in principle between the two approaches.¹²⁸ The court did not, however, discuss the extent to which factors applied in arriving at the sentence should be quantified and disclosed.

In truth, in most reported cases in Australia which purport to apply the two-stage approach, there is little more than a passing obeisance to the calculation of a proportionate sentence based on the objective features of the offence.¹²⁹ What does or does not count as an objective feature of an offence is only beginning to be judicially dissected.¹³⁰ Intuitive processes still operate. But at least objections to methodology are not getting in the way of the courts using sentencing policy to assist in the fight against crime, or preventing those judges and magistrates inclined to do so being more informative about the manner in which they reach their decisions. Such openness can only benefit the jurisprudence and psychology of judicial sentencing.¹³¹ It remains to note only that the High Court has so far refused to rule on the methodology debate.¹³²

B *Magisterial guidelines*

Guideline judgments or statistics could, in theory, assist in indicating what are the ‘normal’ proportionate responses in recurrent sentencing situations. However, even in England, where they are most used, guideline judgments are not handed down with sufficient frequency in areas relevant to the normal work of the Magistrates’ Courts. In many jurisdictions sentencing statistics in the lower courts are practically non-existent. One ray of hope is offered by the United Kingdom Magistrates’ Association, which, with the approval of the Lord Chancellor and the Lord Chief Justice, prepared its own guidelines for the

¹²⁴ (1990) 50 A Crim R 41.

¹²⁵ *Ibid* 52, citing *R v Ireland* (1987) 49 NTR 10, 22-4 and *R v Jabaltjari* (1989) 64 NTR 1.

¹²⁶ (1991) 1 NTLR 1 (NT Court of Criminal Appeal).

¹²⁷ *Ibid* 10 (Gallop J).

¹²⁸ *Ibid* 15 (Angel J, with whom Gallop J agreed).

¹²⁹ See, eg, *R v Cosgrove* (1988) 34 A Crim R 299, 307 (NSW Court of Criminal Appeal); *R v MacIntyre* (1988) 38 A Crim R 135, 139 (NSW Court of Criminal Appeal); *R v Malvaso* (1989) 40 A Crim R 123, 127-8 (SA Court of Criminal Appeal); *Wicks v The Queen* (1989) 44 A Crim R 147, 154-5 (WA Court of Criminal Appeal); *Rogers v The Queen* (1989) 44 A Crim R 301, 309 (WA Court of Criminal Appeal); *R v Dodd* (1991) 57 A Crim R 349 (NSW Court of Criminal Appeal); *R v Constantine* (1991) 25 NSWLR 431, 438 (NSW Court of Criminal Appeal).

¹³⁰ *R v Mulholland* (1991) 1 NTLR 1, 15.

¹³¹ See Catherine Fitzmaurice and Ken Pease, *The Psychology of Judicial Sentencing* (1986); Donald Pennington and Sally Lloyd-Bostock (eds), *The Psychology of Judicial Sentencing: Approaches to Consistency and Disparity* (1987).

¹³² *Bugmy v The Queen* (1990) 169 CLR 525.

sentencing of offenders. Its *Suggestions for Traffic Offence Penalties*¹³³ and its *Sentencing Guide for Criminal Offences (other than Road Traffic)*¹³⁴ are designed to assist the lower courts to achieve a consistent approach throughout England and Wales. The Association insists that its listing of recommended penalties is not intended to create a tariff of binding effect, but only represents a consensus of view within the Association of what would be appropriate penalties for 'average' examples of common offences by first offenders of 'average' means.¹³⁵

V CONCLUSION

As articulated by the High Court, the concept of proportionality is a reminder that there are significant restraints on sentencing power even if it is intended to be used for beneficent ends. Though it may be difficult to translate into practical terms it is not a concept without teeth. Most recently the *Veen* cases and their successors have been successfully invoked to reduce one life sentence for attempted murder to sixteen years,¹³⁶ another for armed robbery to twenty years,¹³⁷ and a six year sentence with no minimum imposed on an intellectually disabled paedophile charged with a single count of sexual penetration to a \$10 three year good behaviour bond.¹³⁸ Nonetheless, the principle of proportionality can only be implemented crudely and idiosyncratically until better guidance comes from the legislature, or from the judicial officers themselves. A fresh approach to defining what proportionality actually means in the magistrates' courts is needed. In *Tarry v Pryce*, Kearney J said:

Although the discretionary aspect of sentencing is of great importance, there is to my mind no doubt that there is scope for a more scientific approach. A lack of consistency between sentencers dealing with run-of-the-mill cases cannot be supported by reliance on the discretionary power to sentence. The need for consistency in the punishment in like cases of like persons overrides the right of the sentencer to impose his idiosyncratic view.¹³⁹

The United Kingdom Magistrates' Association has shown the way to one such approach in the courts in which the bulk of criminal prosecutions is conducted.

¹³³ The Magistrates' Association, *Suggestions for Traffic Offence Penalties* (9th ed, 1985).

¹³⁴ The Magistrates' Association, *Sentencing Guide for Criminal Offences (other than Road Traffic)* (1989).

¹³⁵ Roger Tarling, *Sentencing Practice in Magistrates' Courts* (1979).

¹³⁶ *R v Chivers* (1991) 54 A Crim R 272 (Qld Court of Appeal).

¹³⁷ *R v Aston [No 1]* [1991] 1 Qd R 363 (Qld Court of Appeal).

¹³⁸ *R v Roadley* (1990) 51 A Crim R 336 (Vic Court of Criminal Appeal).

¹³⁹ *Tarry v Pryce* (1987) 24 A Crim R 394, 402.