Domestic Violence and Sexual Abuse: Should the Courts Abandon the 'Welfare Approach' to Sentencing?

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This paper analyses the Western Australian 'welfare approach' to sentencing in cases of domestic violence and sexual abuse. It begins with an analysis of the justifications put forward for this alternative sentencing method and provides a detailed critique of the strategies and fictions which it entails. The author argues that there is no reason to maintain the welfare approach in its present form. She concludes that unless it can be reconciled with mainstream sentencing principles, or supported by legislation, the welfare approach should be abandoned.

WESTERN AUSTRALIAN sentencing law contains a small but intriguing aberration known as the 'welfare approach'. The Court of Criminal Appeal ('CCA') first used this distinctive terminology in the 1984 incest case of *Boyd*[1] and the sentencing strategy it stands for reached its highest expression in *Hodder*,[2] a case of serious sexual violence committed by a husband against his wife. The

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1. *Boyd* [1984] WAR 236, Brinsden J 240-241. The phrase 'a welfare rather than a penological approach' is a quotation from the Report of the English Parole Board (1968), cited in V Bailey & S McCabe 'Reforming the Law of Incest' [1979] Crim L Rev 749, 753.
2. (1995) 15 WAR 264; 81 A Crim R 88.

welfare approach is an alternative method of sentencing which allows the trial judge, in rare and exceptional cases of domestic abuse, to depart from a proportionate sentence based on the goals of deterrence, retribution and denunciation, and instead to devise a sentence which takes full account of the position of the victim and the family of the offender and is aimed at rehabilitating and maintaining the family unit.[3] In *Boyd,* the result was a three year sentence with a short five month non-parole period; in *Hodder,* the CCA imposed a probation order instead of a 'deserved' sentence of between seven and eight years.[4]

The sentencing strategy begun in *Boyd* appears to be both infrequently used and very difficult to apply: only two of the eleven sentences which were taken on appeal to the Supreme Court in later welfare approach cases were left undisturbed.[5] Five of those cases resulted in complete reversals of the decision to apply the welfare approach, and at times the judges could not agree whether it was appropriate to use it.[6] One of the reasons for this lack of a uniform pattern is the fact that the cases are so easily distinguished.[7] This, combined with a technique which makes selective use of the case law,[8] allows judges to apply the welfare approach in chosen cases[9] instead of following a policy which consistently emphasises proportionality and the seriousness of the offence.

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3. See *Hodder* supra n 2, Malcolm CJ 98; *Boyd* supra n 1, Wallace J 239, Brinsden J 240, Olney J 244.
4. *Hodder* supra n 2, Malcolm CJ 94, 95, 103, Murray J 106-107.
5. The 11 Supreme Court cases appearing after *Boyd* are: *Doyle* v *Bell* (unreported) WA Sup Ct 8 Oct 1985; *Price* (unreported) WA CCA 8 Apr 1988 BC 8801146; *O'Connor* (unreported) WA CCA 9 May 1989 BC 8901101; (1989) 41 A Crim R 360; *Squance* (unreported) WA CCA 31 May 1990 BC 9001300; *Johnson* (unreported) WA CCA 5 Mar 1992 BC 9201293; *Spence* (unreported) WA CCA 22 Dec 1992 BC 9200823; *Terranova* (unreported) WA CCA 26 Oct 1993 BC 9301518; *Keding* (unreported) WA CCA 22 Sept 1994 BC 9401921; *Wilson* (unreported) WA CCA 26 May 1995 BC 9503633; *Hodder* supra n 2; *Bosnjak v Pownall* (unreported) WA Sup Ct 22 Jan 1996 BC 9600099.
6. Eg *Price* ibid; *Wilson* ibid; *Hodder* supra n 2.
7. The cases deal with a range of sentencing dispositions imposed on husbands, fathers and stepfathers who have been convicted of offences including indecent dealing, incest, aggravated sexual penetration, aggravated sexual assault, grievous bodily harm and assault against their children or wives. See Appendix 'The Welfare Approach in Practice' pp 246-247.
8. Eg the CCA's comparison of the sentence in *O'Connor* supra n 5 with those imposed in other cases where sexual offences were *not* committed by family members. See also the use of the Victorian case of *Van Roosmalen* (1989) 43 A Crim R 358, which is often cited in WA welfare approach cases. Yet other Victorian cases emphasising the need to impose a custodial sentence are not mentioned.
9. Eg *O'Connor* supra n 5, 363 where the court referred to taking the 'welfare rather than penological approach'; but the CCA did not discuss *Boyd* supra n 1 or the welfare approach in the judgment.

Recourse to the welfare approach is triggered by the victim's forgiveness of the offender, her wish to be reunited with him and an allegation of hardship which will be suffered if the offender is imprisoned. In most cases strong remorse and the potential for rehabilitation are also required.[10] These post-offence factors, which have no bearing on the culpability of the offender, have traditionally been given little, if any, effect on sentence.[11] However, domestic abuse cases can create unique sentencing difficulties if a victim claims that imprisoning the offender will cause her more harm than the offence itself, and asks the court to reduce the offender's punishment and set him free for her sake and that of the family.

The welfare approach thus raises two problems which may well occur more often in the future, given recent trends to increase the role of victims in the sentencing process and to encourage courts to be more responsive to their interests. The first challenge is whether a victim-oriented approach can be justified in principle; the second is to find a way to put it into effect under the existing sentencing rules.

This paper begins by considering the justifications put forward for the welfare approach in the *Boyd/Hodder* series of cases, and goes on to analyse the repeated efforts made by sentencing judges to give it a valid practical form. It discusses the unusual methods and strategies which have been used to side-step the obstacles within the sentencing system and contrasts the welfare approach with the attitudes taken to these issues in other jurisdictions. I conclude that the Western Australian courts have not produced satisfying answers to the two questions raised by the welfare approach and I suggest that it should either be abandoned, supported by special legislation or modified in its scope so that it no longer subverts fundamental sentencing principles.

THE ORIGINS AND FOUNDATIONS OF THE WELFARE APPROACH: THE INCEST CASE OF *BOYD*

The CCA decided in *Boyd* that, provided the possibility of re-offending could be ruled out, it was more important in incest cases to try and keep the family unit

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10. Exceptions have been made: eg *Keding* supra n 5, where the CCA applied the welfare approach and reduced the sentence from 6 years to 3 years, despite the fact that the offender still maintained his innocence, showed no remorse and offered poor prospects of rehabilitation.
11. In *Johnson* supra n 5, 3 Malcolm CJ said that these factors 'may be relevant mitigating factors'. But by the time *Hodder* supra n 2, 99 was decided they had become '*powerful* mitigating factors' (emphasis added).

together rather than to impose a deterrent sentence.[12] So, despite the gravity of Boyd's crime of having intercourse with his nine year old daughter, the CCA agreed that it was correct to put the welfare of the victim first and dismissed the Crown's appeal against the non-parole period of five months imposed by the trial judge. This decision was based on community attitudes which no longer exist, research on incest which has since been discredited and a view of the judge's role in sentencing which is not held today.

The first of the three foundations justifying the decision was a general tendency noted by the CCA towards more benign attitudes to incest within the community and a tempering of the 'natural feeling of disgust and abhorrence' for this offence.[13] This support for the welfare approach no longer exists, however, as a significant hardening of public opinion has occurred since *Boyd* was decided. This has been reflected in judicial attitudes to the 'rising tide' of child sexual abuse cases across Australia.[14]

The second justification came from research cited by the court showing that incest was committed by those who are 'mentally ill, backward, the product of poverty, isolation and marital unhappiness' and that incest was a 'reflection of inadequacy in the father's sexual relationship with his wife.'[15] By using this evidence to show that the offence was caused by factors over which Mr Boyd had no control, and by widening the circle of blame to include Mrs Boyd,[16] the CCA was able to conclude that his culpability was thereby lessened, and was able to portray him as a victim who needed treatment and support rather than an offender

12. *Boyd* supra n 1, Wallace J 239, Brinsden J 240, Olney J 244.
13. *Boyd* supra n 1, Brinsden J 240. See also Wallace J 239, who cited as evidence: the removal of the jurisdiction in WA to the District Court and the Queensland case of *Nancarrow* (1972) QWN 1. But *Nancarrow* was a case of incest between a father and his 18 year old daughter (whereas the child in *Boyd* was 9) and the attitudes noted by the CCA may have arisen from the view that consensual incest between *adults* ought not to be criminal. This was also a period when incest with children was thought to be rare, and not necessarily harmful to the child: see Bailey & McCabe supra n 1, 755, 760-764.
14. See the cases cited infra n 33, and the recent WA case *GP* (1997) 93 A Crim R 351.
15. *Boyd* supra n 1, Wallace J 239, Brinsden J 240, quoting an extract from the Report of the English Parole Board (1968) found in Bailey & McCable supra n 1, 753. However, this statement was cited by Bailey & McCabe in order to attack it as an example of the 'received wisdom' as to the causes of incest which was *not* based on any sound empirical evidence — a point not noted by Brinsden J.
16. The acceptance of such views by Wallace J in *Boyd* supra n 1, 238 led to a focus not on the seriousness of the offence committed on the child, but on the relationship between the husband and wife. Wallace J devoted more space to describing the relationship between Mr and Mrs Boyd, and her outside interests, than to describing the offence and its effects on the child.

requiring punishment. Yet this outdated research can no longer provide any foundation for the welfare approach. More recent research and experience tells us that child sexual abuse occurs in all social groups[17] and is much more common than previously thought. My investigation of incest sentencing cases shows that mental illness is rarely cited as a causative factor; moreover the idea that incest is a symptom of unhappy marriages and caused by 'frigid' wives is grotesque.[18]

The third ground for the welfare approach arose from an assessment that the community would receive 'little service from an extended term of imprisonment which might have the effect of destroying the possibility of this family overcoming the disruption caused to it by the commission of this offence.'[19] The court was presented with reports from Mr Boyd's therapist and welfare authorities suggesting not only that the child had not been traumatised and was no longer in danger from her father, but also claiming that she would be better off if he were to be reunited with the family sooner rather than later. This led the court to ask itself, 'What good would imprisonment do in this case?' and to jettison the more usual question, 'What did the offender do?' The court then weighed the 'harm' that would be caused to the victim, the family and the community by a sentence of imprisonment against the harm already done to the child by the offence.[20] It concluded that taking the welfare approach was justified because it would, on balance, produce less harm than the 'penological' approach.

In effect, the judges were invited to choose between family welfare and the standard sentencing approach, which required them to arrive at a sentence based on the objective seriousness of the offence taking into account all the aggravating and mitigating factors. The CCA accepted the experts' opinions and devised a sentence which appeared to maximise human happiness and overall welfare; however, whether judges still have the power to follow such a course may be doubted. The essentially utilitarian, post-offence calculus in *Boyd* can best be seen as a relic of earlier times when ideological debates raged over whether the controlling aim of sentencing ought to be treatment or punishment,[21] and when

17. This point had also been made by Bailey & McCabe supra n 1, 755.
18. This is an 'excuse' which is propounded, sometimes by offenders, sometimes by their therapists, and sadly, sometimes accepted by their wives. An example where this interpretation of the causes of incest was rejected in emphatic terms is *H* (1981) 3 A Crim R 53 (NSW CCA), Moffitt P 63-64, 66-67.
19. *Boyd* supra n 1, Brinsden J 241.
20. *Boyd* ibid, Wallace J 238: The child 'did not appear traumatised' by her experience and remained 'very fond' of her father. See also Brinsden J 240-241.
21. See eg the exchange between CS Lewis 'The Humanitarian Theory of Punishment' (1953) 6 Res Judicatae 224 and his critics, N Morris & D Buckle 'A Reply' (1953) 6 Res Judicatae 231.

judges saw themselves as having a choice between applying the tariff or devising an individualised sentence.[22]

The forward-looking, problem-solving role adopted by the CCA in *Boyd* is an anachronism and is inconsistent with current conceptions of a judge's role in sentencing which emphasise consistency and proportionality.[23] In the absence of legislative authority,[24] the uppermost question for a sentencing judge ought not to be, 'What is best for this family?' or 'What good would prison do?' No amount of slippage[25] from victim interests to family or community interests can avoid the real question which ought to be: 'In the light of the sentences we have imposed on other offenders, what should be done with this offender, given the culpability of his behaviour and the harm he has done?' The essential comparison to be made is between this offender and other offenders, and between this sentence and other sentences — not between the effect of the sentence and the effects of the crime.

Reunification and support for families are best taken into account by welfare authorities and parole boards, not by judges when imposing sentences. If treatment-oriented alternatives to punishment are to be tried, they must have the imprimatur of parliament because only parliaments have both the power to make such policy decisions and the resources to implement and monitor treatment programs. Moreover, diversionary programs like the one used in New South Wales not only provide a legitimate alternative to the criminal justice machinery which is justified by the authority of parliament but — equally important — they are alternatives which leave the integrity of the judge's role within the sentencing system intact.

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22. This policy choice was described by DA Thomas *Principles of Sentencing* 2nd edn (London: Heinemann, 1979) 3: 'The primary decision of the sentencer in a particular case is to determine on which side of the system the case is to be decided; is one of the individualized measures ... to be used, or is the case to be dealt with on a tariff basis?' I am grateful to Kate Warner for alerting me to this passage.
23. While treatment and future rehabilitation are naturally the uppermost concern for therapists treating families, rehabilitation is now only one of the goals which a sentencing judge must consider.
24. For an example of such a legislative policy choice, see the Pre-Trial Diversion of Offenders Act 1985 (NSW) which, in the interests of the child, provides for treatment as an alternative to punishment.
25. This useful term originated in literary criticism. It is 'the [normally unconscious] redefinition of terms or commitments in the course of an argument, often as a result of ideological pressure': see J Hawthorn *A Concise Glossary of Contemporary Literary Theory* (London: Hodder & Stoughton, 1992).

THE SHIFT FROM INCEST TO DOMESTIC VIOLENCE

In *Terranova*[26] and *Hodder* [27] the CCA applied the reasoning in *Boyd* to cases of domestic violence. This complicates the task of seeking a new justification for the continued use of the *Boyd* principle, as the move to a wider scope was achieved without any further consideration of the underlying foundations. This too was unjustified slippage. The outdated views in *Boyd* cannot credibly be utilised in relation to rape and domestic violence; indeed, those judges who have applied the welfare approach in more recent cases have tended to justify its use by precedent rather than principle.

A further obstacle to finding a new justification arises from the fact that the welfare approach has not been applied outside the context of family abuse cases. This is so notwithstanding that significant hardship to an innocent family may follow upon the imprisonment of *any* family's breadwinner and great remorse and a much greater potential for rehabilitation may exist in cases where the victim is not a member of the family.[28] If families in the domestic abuse category are to be treated as having an interest in remaining together which the criminal courts will protect, then *all* families at risk of disruption should be so treated. The criterion of 'hurt' does not provide a satisfactory distinction between families damaged by abuse and other families suffering indirectly as a result of crime and its aftermath.

The special exception which the welfare approach makes for these families has been strongly resisted by judges in other jurisdictions, despite the existence of forgiveness and the fact that the victim and the family 'are also going to suffer the punishment imposed on the offender.'[29] While exceptional cases allowing non-custodial sentences can be found in other jurisdictions, they are not presented as amounting to an alternative sentencing strategy limited to a special category of offenders. Nor do they support the proposition in the *Boyd/Hodder* cases that protection of the family should take precedence over deterrence in cases of domestic

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26. Supra n 5.
27. Supra n 2.
28. Kate Warner has pointed out the irony of placing more importance 'on the need to preserve the family unit in cases where the offender has offended within it, than in cases when the offence has not concerned a member of the family: see (1996) 3 Psychiatry, Psychology & Law 107, 112.
29. *Rowe* (1996) 89 A Crim R 467, Hunt CJ 473, following *Glen* (unreported) NSW CCA 19 Dec 1994 BC 9403423. The offender in *Rowe* was sentenced for the violent rape of his girlfriend, who later forgave him. See also to the same effect the incest cases: *H* supra n 18, Moffit P 66; *Page* (unreported) Vic CCA 9 Aug 1996 BC 9603507, Hayne J 13.

abuse.[30] I have been able to find only five higher court decisions where results similar to the welfare approach cases have been approved,[31] and in each case there are strong arguments against classifying them as providing any particular support for the welfare approach.[32] Significantly, none of these cases have been followed by courts in the States in which they were decided; moreover, where they have been cited, it has been for their statements condemning the evils of family abuse.[33] All are inconsistent with later lengthy, stern and repeated condemnations of child sexual abuse and domestic violence made uniformly throughout Australia by courts of appeal. These cases emphasise the importance of deterrence, denunciation and retribution in cases of family abuse and doubt the relevance of forgiveness and hardship to sentence.[34]

THE WELFARE APPROACH AND THE NEW FOCUS ON VICTIMS' INTERESTS

Although the foundations supporting the reasoning in *Boyd* have been undermined, the welfare approach has remained embedded within Western Australian sentencing law for so long that it has now come to be justified under the new banner of 'victims' rights'.[35] This new justification raises the issue of whether judges are in a position to decide what is best in individual cases, and whether

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30. Electronic searches of Australian reported and unreported decisions reveal that *Boyd's* welfare approach has not been cited or applied outside WA.
31. *J* (1982) 45 ALR 331; *L* (unreported) NSW CCA 3 Jul 1985; *C* (unreported) SA CCA 31 Mar 1988; *Van Roosmalen* supra n 8; *Rose* (unreported) NSW Sup Ct 8 Feb 1991. Two other cases where family reunification was emphasised are *Reynolds* (unreported) NSW CCA 13 Mar 1990 and *BR* (unreported) ACT Sup Ct 31 Oct 1996; but both are portrayed as an application of the principles of proportionality and offence seriousness, not as special exceptions to standard sentencing methods.
32. *J* ibid and *C* ibid contained strong dissents, and *C* was doubted in the same year it appeared: see *Nathan* (unreported) SA CCA 12 Aug 1988 BC 8800274, White J 3. *C* and *Rose* ibid are better accounted for by the principles relating to delay and intervening rehabilitation; *L* ibid was arguably an error in the light of the High Court decision in *Power* infra n 43. *Van Roosmalen* supra n 8 is an unhelpful decision as the court did not disclose the nature of the 'exceptional circumstances' which justified the release of the offender: see *Hodder* supra n 2, Malcolm CJ 99.
33. *J* ibid was cited in *G* (1989) 98 FLR 32 for its comments as to the seriousness of incest offences; and *Van Roosmalen* ibid was cited in *Hasling* (unreported) Vic CCA 29 Aug 1990 for similar reasons. *Van Roosmalen's* example has never been followed in Victoria.
34. Eg *H* (1993) 66 A Crim R 505 (Qld CCA); *Wayland* (unreported) Vic CCA 14 Sept 1992; *Sposito* (unreported) Vic CCA 7 Jun 1993; *D* (1993) 65 A Crim R 79; *Clare* (1984) 14 A Crim R 322; *G* ibid. See also *H* supra n 18, *Rowe*, *Glen* and *Page* supra n 29 in relation to forgiveness.
35. See *Hodder* supra n 2, Malcolm CJ 98.

judges should abandon their usual focus on what has already occurred and enter into speculation about what may occur in the future.

The criminal justice system has traditionally allowed a family's desire to be reunited with an offender to be taken into account when a decision to release an offender on parole is made. Parole boards, in their forward-looking role of considering how best to rehabilitate prisoners and their families, do have a choice between taking a 'welfare' or a 'penological' approach to the release of a prisoner — and there are a number of advantages in allowing these factors to be relevant at this later point rather than at the earlier sentencing stage. An obvious benefit arises from the fact that parole boards, unlike courts, do not restrict the relevance of family attitudes only to cases of family abuse and so are able to treat like cases alike. Furthermore, the welfare factors are considered by parole boards *after* a proportionate head sentence has been served, thus allowing standard sentencing procedure to give primacy to the objective facts of the offence and allowing post-offence factors to remain in a limited, secondary role.

By delaying the release decision until after the non-parole period has been served, parole boards can allow time for the treatment of the offender and the victim to take effect before the family reunion actually takes place. This makes it more probable that the wish of the victim to be reunited with the offender is genuine and not the result of secondary victimisation by the family or manipulation by the offender. In addition, the deterrent benefits of imprisoning the offender may protect the victim once the family is together again by bringing home to him the enormity of his actions and the strength of the community's revulsion for them. The balance of the term of imprisonment can provide an added incentive for the offender to continue treatment once released.

By taking the welfare factors into account at the sentencing stage, judges are intruding into a role better suited to parole boards, and in doing so they are speculating on the future safety of victims and their families. Judges who accept the assurances made by offenders and their therapists at an early stage of the offender's treatment run the risk of further offences occurring at a time when victims are particularly vulnerable. These dangers are well illustrated by a tragic South Australian case where an offender who was convicted of serious sexual offences against his de facto wife's daughter was permitted to return to the family after a suspended gaol term was imposed. Despite professional counselling for all concerned, the offender later committed a sexual offence against his de facto wife's son, with devastating consequences for both the mother and the children.[36]

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36. *T v SA & Bridge* (unreported) SA Sup Ct 19 Jun 1992.

Although it purports to take the victim's interests into account, one of the most striking features of the welfare approach is the way it can elevate the interests of the family above the interests not only of the community but also, paradoxically, of the victim. The offender, his crime and his response to it become submerged beneath the concern for the family, even though the family may be divided in its attitude both to the victim and the offender and, if reunited, will contain a damaged victim in intimate proximity with her abuser. The 'family' as an entity is nevertheless treated as having an interest separate from, and in some cases greater than, those of the individuals who comprise it.

This view of the family as an entity with an interest of its own in remaining together is inconsistent with the notions of individual criminal responsibility and equal treatment embodied in the criminal law, and also with the nature of individual rights and interests protected by the law more generally.[37] Although domestic abuse is clearly a 'family problem', it is also a crime for which the offender has been found to be individually responsible. To treat the family, which contains the offender, as having an interest in remaining together, and to add that to the interest of the offender in remaining at liberty, is to give double weight to the same interest under cover of two different labels.

Judges applying the welfare approach tend to give greater weight to the attitudes of forgiving family members over non-forgiving members, allowing them to speak for the victim and the family. Often the focus on the primary victim becomes blurred as third parties, mothers and siblings of victims take centre stage (as happened in *Keding*, *Wilson* and *Price*).[38] In *Keding*, the CCA cited the state of the offender's wife, the reported attitude of the victim who did not give evidence against the offender[39] and the supportive attitude of other family members who had taken the father's side against the complainant as the reasons for reducing the proportionate sentence of six years to three years. In this case the victim's neutral stance of 'No comment' was filtered through her forgiving sister and treated by the court as a mitigating factor. In *Wilson*, the offender had been convicted of 15 sexual offences over four years against his two daughters. The family had not been reconciled and

37. The need of a family to remain together cannot be raised as an argument to prevent a divorce: even the 'best interests of the child' are not allowed to trump the right of the parents to separate.
38. Supra n 5.
39. The victim's attitude was reported to the court by her sister who had 'forgiven' their father and taken his side against the victim: see *Keding* supra n 5, Nicholson J 4. This is common in welfare approach cases where hearsay reports of victims' attitudes are provided by forgiving mothers or sisters.

one of the victims still living at home 'hated' the offender. Yet Malcolm CJ, applying the welfare approach in a dissenting judgment, would have allowed the sentence of two years' probation to stand as a result of pleas from the mother and the other victim who had forgiven her father and left home, thus failing to value even the views of two victims from the same family equally.

In *Price* too, it was by no means apparent that forgiveness or reconciliation had happened or was likely, yet the attitude of the victim's mother was accepted as triggering the welfare approach. In this case the victim's mother had forgiven the offender and was so dependent upon and concerned to be reunited with him that she was prepared to arrange for her daughter to live elsewhere. The court applied the welfare approach and reduced the sentence by four years.[40] The attitude of the child victim is nowhere recorded in the judgments. This elevation of third party 'forgiveness' above genuine victim forgiveness is another feature of the welfare approach which opens it up to criticism. It is a view which has not found favour in other cases, where the fact that family members have taken the side of the offender, against the victim, has been held to be an aggravating rather than a mitigating circumstance.[41]

I have argued that the original justifications for the welfare approach have collapsed and suggested that recent versions of this alternative approach have further blurred the issues. The welfare approach not only fails to treat like cases alike, but it has also led judges to adopt an inappropriate role and to consider the reunification of families at the wrong time. If the interests of the family or the child in these special cases are to be elevated to a position of pre-eminence which justifies the release of offenders, then this decision should be taken by parliament and not by the judges.

Professor Andrew Ashworth has argued that a victim-oriented approach is not compatible with a retributive system of sentencing.[42] In the second part of this paper I consider whether the Western Australian experiment with the welfare approach confirms this analysis. I ask whether judges who wish to continue using the welfare approach can meet its second challenge, which is to find a valid practical form for this sentencing strategy within the rules of the system they administer.

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40. *Price* supra n 5, Wallace J 3-9.
41. See *Forbes* (unreported) WA CCA 20 Feb 1995 BC 9503613, Malcolm CJ 19. See also *D* (1993) 65 A Crim R 79, Marks J 80; *McNeill* (unreported) Vic CCA 8 Oct 1996 BC 9604808, Southwell J 7.
42. A Ashworth 'Victim Impact Statements and Sentencing' [1993] Crim L Rev 498; A Ashworth 'Some Doubts About Restorative Justice' (1993) 4 Crim L Forum 277.

THE WELFARE APPROACH IN SEARCH OF A FORM

When the welfare approach was first used in *Boyd* it led to the setting of a very short non-parole period. This meant that the offender could be reunited with his family after only five months' imprisonment and be subject to two years of supervision and treatment in the community. This disposition was arguably an error in the light of the decision in *Power*,[43] where the High Court held that the primary concern when fixing a minimum term was not to identify the shortest time required for a paroling authority to form a proper view of the prisoner's prospects of rehabilitation. Rather, the fixing of the non-parole period should be concerned with deterrence and retribution, and it should provide for

> mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom ... once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence.[44]

In *Boyd,* the Crown's appeal against the inadequacy of the minimum term drew the comment from Olney J that it is 'generally accepted that the parole period ought to be neither too long nor too short to achieve the desirable result of the *rehabilitation* of the offender'.[45] This suggests that the CCA had not considered the High Court's views on setting the non-parole period. However, factors beyond the control of the courts made this version of the welfare approach impossible to use again, because in 1988 the Western Australian parliament took away the power of judges to impose a sentence of imprisonment with a very low minimum term.[46] This move towards truth-in-sentencing resulted in a shift of focus as the welfare approach came to be used to reduce head sentences, impose probation orders and order other non-custodial options.

This new direction brought Western Australian judges into direct conflict with two fundamental sentencing principles: (i) the principle of proportionality[47] and (ii) the seriousness (or gravity) test which determines whether a sentence of imprisonment

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43. (1974) 131 CLR 623.
44. *Power* ibid, Barwick CJ, Menzies, Stephen and Mason JJ 628-629. This approach was approved in *Deakin* (1984) 54 ALR 765 and *Bugmy* (1990) 169 CLR 525.
45. *Boyd* supra n 1, 244 (emphasis added). *Power* ibid was not discussed in the appeal judgments.
46. *Hodder* supra n 2, Malcolm CJ 99.
47. *Veen [No 1]* (1979) 143 CLR 458; *Veen [No 2]* (1988) 164 CLR 465. For a discussion of how this common law principle of proportionality is enshrined in the seriousness provisions of the new Sentencing Act 1995 (WA): see N Morgan 'Business as Usual or a "New Utopia"? Non-Custodial Sentences Under Western Australia's New Sentencing Laws' (1996) 26 UWAL Rev 364, 369.

should be imposed.[48] This in turn led to the development of a number of strategies designed to support the use of the welfare approach in its new form. Using the local case of *Boyd* as a precedent, and without reference to the High Court authority of *Veen*,[49] the judges devised a threshold test which purported to justify displacing the usual sentencing method.[50] The trial judge in *Hodder* had correctly identified that the 'critical question' was 'whether the gravity of the crimes are such that the court must inevitably conclude that no form of punishment other than imprisonment is appropriate'.[51] Malcolm CJ, on the other hand, recast the traditional test as follows:

> Whether the gravity of the criminal conduct concerned and the need for personal and general deterrence outweighs the desires and wishes of the complainant and the future prospects, of not only reconciliation and maintaining the continuity of the family unit, but also the rehabilitation of the offender.[52]

This version of the test allows the judges to weigh the strength of the victim's desires and the value of preserving the family unit directly against the need to follow usual sentencing procedures, taking for granted that one can be permitted to 'knock out' the other. Furthermore, the assumption in family sexual abuse cases is that protecting the family unit has primacy over deterrence.[53] If the test is passed, the gravity of the offence is displaced as a relevant consideration, a sentence which maximises the chances of family reunification is devised and a proportionate sentence may be departed from.[54] Crucially, however, if the test is failed, then the welfare factors assume their place in the constellation of factors relevant to the devising of a proportionate sentence, where they will be given much less weight.[55]

Because the same factor can be either 'paramount' or 'relative' depending on the outcome of the welfare test, the results are striking if the original sentence is disturbed on appeal.[56] So, in addition to the criticism made above (ie, that the

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48. This common law rule is also restated in the Sentencing Act 1995 (WA) s 6(4).
49. Supra n 47.
50. The incompatibility of the two approaches was made evident in *Squance* supra n 5, 14 where the CCA agreed that once the welfare approach had properly been excluded, it then became 'necessary ... to determine what sentence was proportionate to the gravity of the offences.'
51. *Hodder* supra n 2, 94.
52. *Hodder* ibid, 103-104.
53. *Squance* supra n 5, 12. See also *Hodder* ibid, Malcolm CJ 103-104.
54. Eg *Boyd* supra n 1; *Hodder* ibid; *Keding* supra n 5; and at first instance in *Wilson* and *O'Connor* supra n 5.
55. This procedure was followed in the appeals in *O'Connor* and *Wilson* and at first instance in *Squance*, *Johnson*, *Spence* and *Terranova* supra n 5.
56. The welfare approach cases show that it is rarely possible to get this test right: see text accompanying n 5. *Hodder* supra n 2 provides the most extreme example of reversal: the 'deserved' sentence of 7-8 years was reduced to an effective term of 3 years by the trial judge and was then further reduced by the CCA to a probation order.

restriction of the welfare approach to cases of family abuse does not treat like families alike) a greater criticism arises from the fact that *within* the category, the existence of the threshold test results in a further failure to treat even cases of family abuse equally. This outcome cannot be reconciled with the leading aim of sentencing identified in *Lowe*,[57] namely, the consistent application of the law in all cases.

To support this new form of the welfare approach, which on its face produced disproportionate sentences, judges bolstered the test with two interpretive fictions which were directed at reducing the objective seriousness of cases of sexual assault and violence. These fictions, which relate to the relevance of forgiveness and the issue of harm, were used to great effect in *Hodder*. In that case, the fact that forgiveness and reconciliation had occurred was taken as evidence that the harm done, and the consequent seriousness of the offences, was 'apparently not great'.[58] However, this does not follow from the existence of forgiveness, which is an overcoming of resentment, not an overcoming of harm.[59] Further, it is a response which allows the subjective view of the offence taken by the victim to be substituted for the objective view of the seriousness of the offence taken by parliament and the courts.[60] While Hodder's violent attack may have been forgiven by his wife, it should not have been forgotten by the criminal justice system which exists to respond in the community's name to such crimes. This use of forgiveness also gives 'double weight' to the attitude of the victim. Forgiveness, which is first given recognition as a mitigating factor in its own right, is used a second time as evidence of a lack of harm and therefore lowered seriousness.

The Chief Justice concluded that the impact of the violent sexual assaults upon the complainant was 'not great' despite her repeated descriptions of the offences as inexcusable and the trial judge's characterisation of them as a brutal, vicious, humiliating and terrifying attack.[61] This involved taking a very limited view of harm. The harm risked and actually done in *Hodder*, by the offender beating and

57. (1984) 154 CLR 606, Mason J 610-611. This aim requires that the relative weight given to any one factor be constant in all cases.
58. *Hodder* supra n 2, Malcolm CJ 104.
59. We are accustomed to the use of the term 'forgiveness' in relation to debts. But while forgiveness may wipe out a debt, the same does not follow in relation to physical or psychological harm.
60. Eg in *Hodder* supra n 2 part of the victim's reason for forgiving her husband was the fact that he was drunk when he attacked her; but that factor is not held to be a mitigating factor by the courts.
61. See *Hodder* ibid, 89, 104. The victim's and the trial judge's descriptions are cited throughout the judgment of Malcolm CJ.

both orally and anally raping his wife, could not be described as anything but great[62] and neither that harm, nor his moral culpability, can be erased by the victim's forgiveness. Murray J, dissenting, described the events as 'savage acts of violence' and 'sexual assaults of considerable severity carried out for the apparent purpose of degrading, humiliating and punishing [Mrs Hodder]'.[63] Yet Malcolm CJ was forced to try and reason away the seriousness and harmful effects of the offences in order to adopt the welfare approach. This 'no harm' fiction is commonly used to move the balance in favour of the offender when the offences involve sexual abuse,[64] but it is less successful when there is no sexual element in the offence, as the case of *Terranova*[65] shows.

This unorthodox approach to minimising harm is to be contrasted with that taken by the CCA in the more recent case of *GP*.[66] In that case, the trial judge was found to have erred in taking the view that the victim of child sexual abuse may not have suffered any long-term harm. Malcolm CJ noted that the literature showed that

> being sexually abused as a child by a trusted adult does necessarily involve a number of long-term consequences for mental health and relationships in adult life.... [T]he normal consequences of child sexual abuse will be harmful, although the pattern of consequences may vary from one individual to another.[67]

The Chief Justice also cited the Western Australian case of *Pinder,* where the CCA took judicial notice of the fact that, regardless of the robustness, resilience or capacity of a victim of sexual abuse to re-order her life, sexual abuse is 'inevitably demeaning' and 'destructive of the victim's sense of self-worth'.[68] His Honour also

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62. Even considering the physical harm alone, the victim sustained fractures to her skull as well as serious bruising and bleeding. Such was the force of the offender's 'jealous fit of blind rage' that he himself sustained a fracture of a bone in his own hand: see *Hodder* ibid, Murray J 107.
63. *Hodder* ibid, Murray J 107.
64. Examples of this strategy can be found in *Boyd* supra n 1, Wallace J 238, Brinsden J 240-241; *Hodder* supra n 2; *Price* supra n 5, Wallace J 3: '[T]he complainant is an intelligent, physically capable young girl and a good sport. From school reports to hand she does not appear to have suffered.'
65. Supra n 5. In that case the offender blinded his wife in one eye by thrusting a steel rod into it.
66. In *GP* supra n 14 the CCA upheld a Crown appeal against a suspended 2 year sentence imposed on a stepfather for the offence of having a sexual relationship with a child under 16, contrary to s 321A of the Criminal Code (WA).
67. *GP* ibid, Malcolm CJ 367.
68. *Pinder* (1992) 8 WAR 19, Murray J 40, with whom Malcolm CJ and Pidgeon J agreed; cited in *GP* ibid, Malcolm CJ 367. Note that this case was not cited in *Hodder* supra n 2.

referred to the Queensland case of *R v H* where it was said that it was 'enough in cases of this nature to appreciate that there may be adverse consequences' and that it was 'unwise for a sentencing judge to engage in predictions of the unpredictable'.[69] He approved the view of the Queensland court that deterrence was 'a very important factor' in cases of child sexual abuse.[70]

This approach to harm, and the importance of deterrence, stands in stark contrast to Malcolm CJ's earlier welfare approach judgments in *Hodder* and *Wilson*. It is much closer to the consistent treatment of these issues taken by Murray J in *Hodder* and *GP*. This change indicates that another of the foundations of the Western Australian welfare approach may have collapsed; but, while it is tempting to suggest that the CCA may have quietly abandoned the welfare approach in *GP*,[71] the history of the inconsistent application of this approach suggests otherwise. It may, however, be much more difficult to invoke the welfare approach in future cases of domestic abuse in the face of *GP's* strong judicial debunking of the 'no harm' fiction.

THE SENTENCING ACT 1995 (WA), THE HARDSHIP RULE AND THE FUTURE OF THE WELFARE APPROACH

I have argued that the welfare approach in its current form is seriously flawed both in principle and in practice. In the final part of this paper I consider whether there can be any role for the welfare approach in future. I suggest a way to give it a practical form which does not conflict with the authorities of *Power*,[72] *Veen*[73] and *Lowe*.[74]

The welfare approach does not appear to have been applied in any case since the new statute came into force. Section 6(1) of the Sentencing Act 1995 (WA) requires a sentence to be 'commensurate with the seriousness of the offence' and section 6(2) directs that seriousness must be determined by taking into account the statutory penalty, the circumstances of the offence and any aggravating or mitigating factors. In 1996, Neil Morgan considered whether the decision in *Hodder* could

69. *H* supra n 34, 507, cited in *GP* supra n 14, Malcolm CJ 369.
70. *GP* ibid.
71. The criticisms of the suspended sentence in *GP* supra n 14, Malcolm CJ 375, could also be applied to the welfare approach cases. They do not 'mark the seriousness of the offence', 'serve as a deterrent to others' or 'send a clear signal of the court's condemnation of the behaviour involved'.
72. Supra n 43.
73. Supra n 47.
74. Supra n 57.

have been made under the new statute and whether section 8(1) (which defines mitigating factors as those which 'decrease the culpability of the offender or decrease the extent to which the offender should be punished') is wide enough to include such factors as hardship.[75] He argued that although the matters which were taken into account in *Hodder* can still be raised under the second limb of the definition in section 8(1), the weight which can be given to them must be limited by the key principle of proportionality. The approach taken by the CCA in *GP*[76] may seem to have confirmed Morgan's views. However, as I have demonstrated, judges following the welfare approach have been willing to construct paths around these obstacles and *GP* may simply have been another case where the CCA disagreed with the sentencing judge on the proper approach to take in a case of domestic abuse.

One possible solution for judges who wish to continue to give effect to the instincts which have led them to use the welfare approach is to reconcile it with the hardship rule. Until recently this would not have appeared possible because, traditionally, hardship to the family of an offender was excluded as a general mitigating factor bearing on the severity of sentence unless it was 'extreme' or 'exceptional'.[77] Indeed, it is very likely that the Western Australian courts initially devised the welfare approach as a way around the stern common law interpretation of the hardship rule which existed at the time *Boyd* was decided. The welfare approach, like the hardship rule, also requires 'rare and exceptional' circumstances before the welfare factors can be taken into account. But, as judges throughout Australia have noted, the phenomenon of forgiveness and hardship in these cases is not at all rare; indeed the reverse is true.[78] The problem for judges wishing to keep the welfare approach in place as a separate alternative is that once they accept that forgiveness is not rare, then all that is left for the welfare approach to weigh is the degree of hardship suffered — and this position is almost indistinguishable from the general hardship rule, as Murray J pointed out in *Hodder*.[79]

75. Morgan supra n 47, 369.
76. Supra n 14.
77. See K Warner 'Relevant Factors' in *Laws of Australia: Criminal Sentencing* (Sydney: Law Book Co, 1996) Ch 5; 'Hardship to Others' 209-212 and cases cited there. This rule was considered in WA in *Sinclair* (1990) 108 FLR 370; *Stewart* (1994) 72 A Crim R 17; *Burns* (1994) 71 A Crim R 450. The CCA held in *Sinclair* and *Burns* that s 16A of the Crimes Act 1914 (Cth) providing that the court must take into account the probable effect that any sentence would have on any of the offender's family or dependents, does not alter the common law rule requiring 'highly exceptional' circumstances before the judge may draw back (ie, only where 'it would be inhuman to refuse to do so': see *Wirth* (1976) 14 SASR 291, Wells J 296).
78. See eg *Keding* supra n 5, Nicholson J 4, with whom the other judges agreed; and the judgment in *Glen* supra n 29, Simpson J 12-19.
79. Supra n 2, 106-111.

The failure of the majority in *Hodder* to cite the hardship cases and to consider the relationship between the hardship rule and the welfare approach must weaken its persuasiveness.[80] In a revealing move, however, the majority in *Hodder* did not use the word 'hardship' when describing the victim's plight. Rather, they adopted Mrs Hodder's own characterisation of the issue as found in her testimony at sentencing.[81] Kennedy J, using a re-worded version of *Boyd's* harm-balancing test, agreed with Malcolm CJ that gaoling the offender would be 'punishing' the victim more than the offender.[82] This strategy disguised the true nature of the exercise, deflected criticism and allowed the judges — by creating a distinction without a difference — to avoid the hardship issue faced by Murray J.[83]

The similarities between the triggering factors, the test used, the forward-looking aim and the sentencing consequences in both streams of authority is striking. Both are strictly limited for the same reason: the shift away from culpability towards family wishes or family hardship takes the moral dimension out of the sentencing decision and leads judges to adopt a method at odds with their proper role. The only substantial difference between the two streams of authority lies in the fact that the welfare approach is unjustifiably restricted to family abuse cases, whereas the hardship rule is subject to no such limit. One reason for reuniting the welfare approach with the hardship cases is to eliminate this unnecessary restriction.

Recent cases have moved the common law hardship rule even closer to the position which has been taken under the welfare approach. These cases have relaxed the hardship rule by allowing a family's hardship to mitigate the severity of an offender's sentence, without first requiring the hardship to be so 'extreme' or 'exceptional' as to warrant a non-custodial sentence.[84] I suggest that the time has

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80. The failure of Kennedy J to cite these cases is the more remarkable as he did in fact cite s 16A when discussing the impact of the sentence on the victim and her children: see *Hodder* supra n 2, 105.

81. *Hodder* ibid, Malcolm CJ 92, Murray J 111-112.

82. *Hodder* ibid, Kennedy J 105. This characterisation was also made by Malcolm CJ 104.

83. It appears the decision in *Hodder* ibid was taken solely on the basis of the impact of the sentence. Both Kennedy J 105 and Murray J 106 pointed out that it was not a matter of taking the victim's wishes into account, but rather of assessing the hardship imposed by the sentence upon her and her children.

84. The following cases held that family hardship may be relevant, though not necessarily decisive: *Van De Heuval* (1992) 63 A Crim R 75; *Bullock* (1993) 112 FLR 323; *Keeley* (unreported) SA Sup Ct 14 Jul 1993; *Warrell v Kay* (1995) 83 A Crim R 493; *Petrou* (unreported) NSW Sup Ct 24 Mar 1995; *Walsh* (unreported) SA Sup Ct 21 Aug 1996; *Pearce* (unreported) Vic CCA 19 Sept 1996; *Singh-Bal* (unreported) NSW CCA 25 Mar 1997; *Sluka* (unreported) NSW CCA 28 Jul 1997; *Stafford* (unreported) Fed Ct 10 Oct 1997. Support is also found in *Sinclair* supra n 77, *Burns* supra n 77 and the dissenting judgment of Wallwork J in *Stewart* supra n 77. See also ALRC *Sentencing* (Canberra: AGPS, 1988) and s 16A of the Crimes Act 1914 (Cth).

come to reconcile the welfare approach with the hardship rule and abandon the fiction that it has any independent role. The approaches should be read together to support the proposition that while family need may be a secondary factor relevant to the determination of a proportionate sentence, it cannot normally be the controlling factor.

The construction of the harm-balancing test in *Boyd*, the use of the special threshold test and the 'punishment of the victim' mantra in *Hodder* result from the difficulties in reconciling the aims of the welfare approach with standard sentencing practice. It is by these results that the welfare approach must be judged. I have argued that the welfare approach in its extreme form (one which treats domestic abusers as a special class and aims to secure their immediate release from imprisonment) should be abandoned by sentencing judges and left to parliament to implement (assuming parliament finds it necessary to follow this course in the interests of preserving families and protecting victims). If, however, the judges want to follow the spirit of the welfare approach and take the position of victims and families into account when sentencing offenders, then I suggest that the welfare approach should be modified so that it conforms with wider sentencing principles and practices.

First, the welfare approach needs to be widened in scope and reconciled with the hardship rule so that the welfare factors can be taken into account in *any* case where a family may suffer hardship by the imprisonment of one of its members. Secondly, the effect of this new hybrid approach should be limited by the principle of proportionality and by the aim of treating like cases alike. This means that the special threshold tests, and the strategies which support them, must be abandoned so that a consistent weight can be given to the welfare factors whenever they occur. Such a development would have the added advantage of bringing Western Australian sentencing law into line with the consensus elsewhere in Australia, which is that while welfare factors may sometimes mitigate, they can only rarely dictate.

(Refer table of cases overleaf.)

THE WELFARE APPROACH IN PRACTICE: 1984 – 1996

(pp 246-247)

Case	Year	Offence	Sentence	Comments
Boyd	1984	1 count of incest by father on 9 year old daughter	3 years' imprisonment with 5 months' non-parole period upheld (Crown's appeal)	See text above, pp 229-232, 237-238.
Doyle v Bell	1985	1 representative count of indecent dealing by stepfather on 12 year old daughter	9 months' imprisonment with 3 months' non-parole period, reduced to $1 000 fine (offender's appeal)	Rowland J followed *Boyd*.
Price	1988	4 counts of indecent assault and sexual penetration of de facto wife's daughter over a 3 year period, when child aged 9-12 years	$9^1/_4$ years' imprisonment, reduced to $5^1/_4$ years (offender's appeal)	Wallace J applied *Boyd* and compared the case with other incest cases. Franklyn J distinguished *Boyd*, but found that the sentence was greater than the circumstances of the offence warranted. Burt CJ agreed with the reasons of Wallace and Franklyn JJ.
O'Connor	1989	1 count of sexual penetration (digital) by father on 14 year old daughter	2 years' probation imposed by the trial judge who applied the welfare appraoch; increased to 12 months' imprisonment (Crown's appeal)	The court did not discuss *Boyd*, even though the trial judge had used the 'welfare rather than the penological approach'. The decision focused on whether the offence was so serious that no other form of punishment was appropriate.
Squance	1990	13 counts of indecent dealing and aggravated sexual assault by father on 8 year old daughter	Effective term of 6 years' imprisonment upheld (offender's appeal)	The welfare approach achieved a 'very substantial discount' but it could not justify a non-custodial option as the offences were too serious.
Johnson	1992	22 counts of sexual penetration by father on daughter over 3 years, when child aged 7-9 years	$11^1/_3$ years' imprisonment, reduced to $9^1/_3$ years to allow for offender's plea of guilty and co-operation with police (offender's appeal)	Welfare factors were relevant, but the full welfare approach could not be applied because of the strong likelihood of re-offending.

Spence	1992	12 counts of aggravated indecent assault and aggravated sexual assault on stepdaughter over 2 years, when child aged 4-6 years	6 years' imprisonment, reduced to 5 years because of full disclosure by offender (offender's appeal)	Welfare factors considered significant but, following *Johnson*, the full welfare approach could not be applied because of the strong likelihood of re-offending.
Terranova	1993	Grievous bodily harm — offender thrust steel rod into wife's eye, blinding her	21 months' imprisonment upheld (offender's appeal)	Welfare approach factors relevant and were applied to reduce the sentence by trial judge, but the gravity of the offence justified a custodial sentence.
Keding	1994	2 counts of indecent dealing and aggravated sexual penetration by father on 14 year old daughter	6 years' imprisonment reduced to 3 years (offender's appeal)	The court took into account the state of the offender's wife and the attitude of the family, citing *Boyd, Johnson, Spence* and *Terranova* but not *O'Connor*. Imprisonment was appropriate.
Wilson	1995	15 counts of indecent dealing, sexual penetration and aggra-vated sexual assault committed over 7 years against 2 daughters aged 10-15 and 12-17 years	2 years' probation increased to 18 months' imprisonment (Crown's appeal; majority decision)	Malcolm CJ (dissenting) would have applied the welfare approach and allowed the non-custodial sentence to stand. Ipp J (with whom Kennedy J agreed) emphasised the paramount importance of the gravity of the criminal conduct. Welfare factors were significant, but not decisive.
Hodder	1995	3 counts of aggravated sexual penetration of offender's wife	A 'deserved' sentence of 7-8 years' imprisonment was reduced by the trial judge to 2 years 11 months, and was further reduced by the CCA to a probation order (offender's appeal, majority decision)	Malcolm CJ applied the welfare approach citing *Boyd, Johnson, Spence, Terranova, Keding, Wilson* and the Victorian case of *Van Roosmalen*, but did not consider any hardship cases or *O'Connor*. Kennedy J noted that 'very unusual circumstances' amounted to 'punishment' of the victim, but maintained that it was not a case of taking the wishes of the victim into account. Again, no mention of hardship cases. Murray J (dissenting) would have followed the hardship cases of *Burns* and *Stewart. Boyd* shows how 'cogent and weighty' matters must be before the court can be diverted from a proportionate sentence.
Bosnjak v Pownall	1996	Assault on wife and breach of restraining order	12 months' imprisonment reduced to 12 months' probation order (offender's appeal)	Wallwork J cited *Hodder* as an example of the approach taken where a sentence can cause 'hardship in a marriage or to persons dependent on a wage earner'.