

Sentencing according to current and past practices

Hugh Donnelly¹

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¹ BA (Melb) LLB (UNSW) LLM (Syd) Magistrate, Local Court of New South Wales,

The requirement of currency recognises that sentencing practices for a particular offence or type of offence may change over time reflecting changes in community attitudes to some forms of offending. For example, current sentencing practices with respect to sexual offences may be seen to depart from past practices by reason, inter alia, of changes in understanding of the long-term harm done to the victim. So, too, may current sentencing practices for offences involving domestic violence depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations.²

Introduction

This paper explores the approaches taken across Australian jurisdictions to sentencing for historical offences with a focus upon New South Wales (NSW). There is a common law sentencing principle applied in NSW that where there has been a long delay between the date of the offence and sentencing, and the law has moved adversely to the offender, the sentencing court must – where possible – sentence the offender according to sentencing patterns and practices as they existed at the time of the offence. The Royal Commission into Institutional Abuse recommended³ that courts should apply current sentencing standards when sentencing offenders for child sexual assault offences.

The NSW Parliament, in its response to the recommendation, enacted a provision in August 2018⁴ which abrogated the common law sentencing principle but only in relation to sentencing for child sexual assault offences. The Australian Capital Territory⁵ and Tasmania⁶ later passed legislation with the same effect. Queensland has a Bill before the Parliament which abrogates the rule but also makes retrospective the current penalties for the offence of maintaining a sexual relation with a child.⁷ In other jurisdictions the common law sentencing principle continues to apply but there appears to be differences among the States both in terms of the scope and application of the principle. A form of the principle is acknowledged in Victoria but it is expressed and applied differently than NSW and Queensland.⁸ The time is ripe for the High Court, at the apex of the judicial hierarchy, to articulate the scope of the common law principle and “to give [a decision] upon the common law which [is] binding on all courts.”⁹

² *The Queen v Kilic* (2016) 259 CLR 256 Bell, Gageler, Keane, Nettle and Gordon JJ at [21]

³ Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report, August 2017) Recommendation 76. The Commission took into account a sentencing report that it had commissioned: Freiberg, A, Donnelly, H, and Gelb, K (2015) *Sentencing for Child Sexual Abuse in Institutional Contexts*, Sydney: Royal Commission into Institutional Responses to Child Sexual Abuse

⁴ s 25AA *Crimes (Sentencing Procedure) Act* 1999 commenced 31 August 2018

⁵ s 11A(3) *Sentencing Act* 1997 (Tas) commenced on 2 October 2019.

⁶ s 34A *Crimes (Sentencing) Act* 2005 (ACT) commenced 5 December 2018

⁷ Criminal Code (Child Sexual Offences Reform) and Other legislation Amendment Bill 2019

⁸ See discussion of *Stalio v The Queen* [2012] VSCA 120 and *Carter (a Pseudonym) v The Queen* [2018] VSCA 88 below.

⁹ *Lipohar v The Queen* (1999) 200 CLR 485 at [45] Gaudron, Gummow and Hayne JJ in a joint judgment. Their Honours said further: *Different intermediate appellate courts within that hierarchy may give inconsistent rulings upon questions of common law. This disagreement will indicate that not all of these courts will have correctly applied or declared the common law.*

New South Wales

The law prior to s 25AA

In order to appreciate the meaning, scope and impact of s 25AA it is necessary to set out the law that existed for child sexual assault offences and still exists for all other offences in the criminal calendar in NSW. The statement of the High Court in *Conway v The Queen*¹⁰ applies:

*When a statute enters a field that has been governed by the common law, the pre-existing common law almost invariably gives guidance as to the statute's meaning and purpose. That is because the meaning of legislation usually depends on a background of concepts, principles, practices and circumstances that the drafters "took for granted or understood, without conscious advertence, by reason of their common language or culture." [Footnote 5 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 196].*

The common law rule was articulated in a 5 judge bench decision of *R v MJR*.¹¹ Spigelman CJ explained in *R v MJR* that the court sat 5 Justices "by reason of the fact that a conflict has emerged in previous judgments of the Court."¹² In *MJR* the court disapproved its previous decision of *R v PLV*¹³ which had held that a sentencing court was not required to take into account the sentencing practice as at the date of the commission of an offence. Spigelman CJ observed in *MJR* that the decision of *PLV* was decided without the court being referred to two of its own previous decisions: *R v Moon*¹⁴ and *R v Shore*.¹⁵ In *R v Shore* the offender was sentenced for the Commonwealth offence of conspiracy to import narcotic goods under the *Customs Act* (1901) (Cth). The offender committed the offence in 1974, was arrested in the same year, absconded to the United States and was extradited and sentenced in 1991. The sentencing judge rejected a submission of the prosecution that he "should have regard to the intervening strengthening of judicial attitude towards the offence" and said:

*I should, so far as I am able to do so, seek to impose upon the offender, a sentence appropriate not only to then applicable statutory maxima but also to then appropriate sentencing patterns. That is by no means easy, but in my view I must endeavour to do so."*¹⁶

The Court of Criminal Appeal unequivocally endorsed the approach. Badgery-Parker J said with support of the other Justices:

*That description of his Honour's task and the way in which the law required him to approach it was, with respect, completely correct, and neither party before us submitted otherwise.*¹⁷

¹⁰ (2002) 209 CLR 203 Gaudron, McHugh, Hayne and Callinan JJ at [5].

¹¹ [2002] NSWCCA 129; (2002) 54 NSWLR 368

¹² *Ibid* at [2]

¹³ (2001) 51 NSWLR 736; (2002) 123 A Crim R 194

¹⁴ [2000] NSWCCA 534; (2000) 117 A Crim R 497

¹⁵ (1992) 66 A Crim R 37

¹⁶ *R v Shore* (1992) 66 A Crim R 37

¹⁷ *Ibid* at 39

The appellate court in *R v Shore* was supplied with a schedule of sentences for upwards of 20 cases of importation. It is important to recognise that *R v Shore* was decided well before the High Court decisions of *Hili v The Queen*,¹⁸ *Barbaro v The Queen*¹⁹ and *The Queen v Pham*.²⁰ The sentencing information used in *R v Shore* may not withstand the scrutiny and criticisms by the High Court in *The Queen v Pham*.²¹ But whatever may be said of the shortcomings of the material relied upon in *R v Shore*, Spigelman CJ noted that the case had been applied in a later two bench decision of *R v Watson*²² and *R v Moon*.²³

In *R v Moon*²⁴ Whealy J (as he was then) referred to “*the principle stated in R v Shore*” and that it “...requires that an offender be sentenced in accordance with the range of sentences imposed at the time when the offence was committed”.²⁵ Howie J, with whom Fitzgerald JA agreed, held that even where no sentencing range could be established the court had to sentence an offender according to the legislative policy at the time of the offence:²⁶

When sentencing an offender for offences committed many years earlier and where no sentencing range current at the time of offending can be established, the court will by approaching the sentencing task in this way effectively sentence the offender in accordance with the policy of the legislature current at the time of offending and consistently with the approach adopted by sentencing courts at that time.

Spigelman CJ framed the issue before the court in *MJR* as follows:²⁷

Sentencing practices change and can do so in both directions. Community attitudes to particular offences is not static. Matters which were once regarded as significant crimes, e.g. consensual homosexual intercourse, came to be not so regarded and, eventually, ceased to be offences at all. For a period prior to the repeal of the relevant legislation, the courts would have imposed lower sentences than they had at a previous time. On the other hand, some matters, perhaps including sexual

¹⁸ (2010) 242 CLR 520

¹⁹ (2014) 253 CLR 58

²⁰ *The Queen v Pham* (2015) 256 CLR 550

²¹ In *The Queen v Pham* the court held that the Victorian Court of Appeal erred by “adopting an impermissible statistical analysis of comparable cases to determine the objective seriousness of the subject offence”: French CJ, Keane and Nettle JJ at [3]. The plurality criticised the use by the Victorian Court of Appeal of a table of 32 Victorian cases of importing a marketable quantity of a border controlled drug under s 307.2(1) of the Criminal Code (Cth). This is because it excluded cases from other jurisdictions and also because of the limitations of the information: at [32]. The plurality said the case illustrated “*the inutility of the presentation of sentences imposed on federal offenders using numerical tables, bar charts and graphs.*” Bell and Gageler JJ criticised the table because of its exclusion of relevant prior convictions and cases from other jurisdictions: at [48]. But they accepted that comparable cases and sentencing statistics are “*aids as part of the material which the sentencer must take into account:* at [51].

²² [1999] NSWCCA 227 at [26].

²³ [2000] NSWCCA 534; (2000) 117 A Crim R 497

²⁴ [2000] NSWCCA 534; (2000) 117 A Crim R 497

²⁵ *Ibid* at [22]

²⁶ [2000] NSWCCA 534; (2000) 117 A Crim R 497 at [71].

²⁷ *MJR* at [11]-[13].

assault, have come to be regarded as requiring increased sentences. This may be by reason of a change of community attitudes. Alternatively, it may be as a result of a change in objective circumstances, e.g. an increase in prevalence of the offence.

The basic submission made on behalf of the Applicant in this case was to the effect that there was an element of unfairness involved in sentencing an offender on a harsher basis than would have been the case if he had been sentenced at a time reasonably proximate to the commission of the offence.

Spigelman CJ reasoned that to apply current practices as opposed to past practices is “*out of keeping*” with statutory provisions which prohibit taking into account an increase in penalty for an offence.²⁸ Therefore a presumption against retrospectivity should be adopted by analogy to sentencing for past offences. His Honour found further support in *Radenkovic v The Queen*²⁹ where Mason CJ and McHugh J said in relation to the task of re-sentencing following an appeal:

“...considerations of justice and equity ordinarily require that the convicted person be re-sentenced according to the law as it stood at the time when he was initially sentenced, particularly when that law was more favourable to him than the law as it existed at the hearing of the appeal”

The High Court decision of *Dimozantos v The Queen (No 2)*³⁰ could also have been added where the Court applied *Radenkovic v The Queen* and affirmed the principle that it is erroneous for a sentencing court to take into account a later increase in the maximum penalty for an offence which does not apply to the case at hand.³¹

Spigelman CJ concluded in *MJR* that the decision of *PLV* was “incorrect” for holding that a court could “...refuse to take into account the sentencing practice as at the date of the commission of an offence when sentencing practice has moved adversely to an offender.”³²

Mason P dissented in *MJR* declaring that “...it is wrong for a court to apply earlier patterns that have been repudiated as erroneous in the single eye of the law.”³³ Mason P opined that the case law relied upon by the majority did not bind the court and that the rule would be too difficult to apply.³⁴

²⁸*MJR v R* at [31] with reference to s 19 *Crimes (Sentencing Procedure) Act* NSW 1999

²⁹ (1990) 170 CLR 623 at 632

³⁰ [1993] HCA 52; (1993) 178 CLR 122

³¹ *Ibid* Mason CJ, Brennan, Deane, Toohey and Gaudron JJ said at [15]:

“...the fact that, since the present appeal was argued before this court, the further amendment to s321I of the Crimes Act has become effective with the result that the present maximum penalty for incitement to murder is life imprisonment cannot operate retroactively to confirm the validity upon the sentence imposed by the Court of Criminal Appeal. To the contrary, the effect of quashing the appellant’s sentence is that he is entitled to be resentenced without being prejudiced by an inapplicable legislative amendment and acted at a time when, but for the error of the Court of Criminal Appeal, he would already have been properly resentenced.

However a subsequent reduction in a maximum penalty that does not apply can be taken in to account to reduce the impact of the maximum penalty for a repealed offence. See *R v Ronen* [2006] NSWCCA 123; (2006) 161 A Crim R 300 at [73]–[74].

³² *MJR* at [31]. Grove and Sully JJ and Newman AJ agreed.

³³ *Ibid* Mason P at [45].

³⁴ *Ibid* Mason P at [56].

Question: How does today's judge know if yesterday's prevalent sentencing patterns were aberrant or correct? Answer: The judge should consult authoritative decisions. Question: What if recent authorities contradict earlier authorities? How does the judge know which is correct? Answer: The judge does not need to know if the earlier authorities were correct, because he or she must accept current orthodoxy as binding even if it differs from the orthodoxy evidenced by yesterday's sentencing patterns.

After the decisions of *R v Moon* and *R v MJR* the Court of Criminal Appeal grappled with the scope and application of the rule in the specific context of child sexual assault. It is fair to say that *MJR* substantially altered sentencing method for historical child sexual assault offences. Below is a list of some notable Court of Criminal Appeal cases ordered from the least to most recent:

AJB v R (2007) 169 A Crim R 32
MJL v R [2007] NSWCCA 261
Nelson v R [2007] NSWCCA 221
Featherstone v R [2008] NSWCCA 71
Bradbery v R [2008] NSWCCA 93
Dousha v R [2008] NSWCCA 263
GRD v R [2009] NSWCCA 149
PH v R [2009] NSWCCA 161
Chivers v R [2010] NSWCCA 134
BP v R; R v BP [2010] NSWCCA 303
PWB v R [2011] NSWCCA 84
Rosenstrauss v R [2012] NSWCCA 25
Magnuson v R [2013] NSWCCA 50
MPB v R [2013] NSWCCA 213; (2013) 234 A Crim R 576
SHR v R [2014] NSWCCA 94
Hughes v R [2015] NSWCCA 330; (2015) 93 NSWLR 474
Henderson v R [2016] NSWCCA 8
Denham v R [2016] NSWCCA 309
CT v R [2017] NSWCCA 15
Woodward v R [2017] NSWCCA 44
MC v R [2017] NSWCCA 316; (2017) 271 A Crim R 83

I do not propose to discuss all the cases. As the discussion will show the court developed a specific approach to sentencing for historic child sexual assault offences. First instance courts encountered practical difficulties in their attempt to apply *MJR*. I will first deal with the use of terminology and then focus upon some common errors. What is clear from these NSW cases is that the reason for delay in bringing an offender to justice does not have a significant bearing upon the sentencing process as it may in Victoria (see below).

The expressions “sentencing patterns” and “sentencing practices”

The precise meaning of the terms “sentencing practice” and “sentencing patterns” is important because they are used in the recently enacted s 25AA. Given that the NSW

Parliament chose not to define either expression we must look to the common law. Button J in *Magnuson v R*³⁵ expanded upon the meaning of the expression “sentencing pattern” and the kind of material that a court use in determining whether a past pattern is established:

I consider that a sentencing pattern with regard to sexual offences committed against children in the late 1970s and early 1980s can be established. That is founded upon five factors. The first is the statistics that were before her Honour and this Court relating to disposition of offences in 1976 and 1978. The second is summaries of cases. Some were provided by the parties to her Honour. Others are contained in other decisions of this Court dealing with this question. The third is the general increase in sentences that has occurred across the board in New South Wales over the past quarter century. The fourth is the upward movement in maximum penalties with regard to the crimes of the applicant between the period under consideration and today. The fifth is judicial memory.

As to the fifth factor views have differed in the Court of Criminal Appeal about the efficacy of judicial memory.³⁶

Following *Magnuson v R* there was a further discussion of the issue in *MPB*.³⁷ In that case Basten JA declined to follow and apply *MJR*. His Honour sought to elucidate the meaning of the expressions “sentencing practice” and “sentencing pattern” in his dissenting judgment. Basten JA said in *MPB*:³⁸

*The language of "sentencing practice" and "sentencing pattern" has acquired a currency of its own: see *AJB v The Queen* [2007] NSWCCA 51; 169 A Crim R 32 at [31] (Howie J distinguishing "sentencing practices" from "executive practices" with respect to remission); and at [39] (referring to fixing of non-parole periods); *Rosenstraus v R* [2012] NSWCCA 25 at [7]-[9] (in my judgment) and *Magnuson v R* [2013] NSWCCA 50 at [84]-[88] (Button J, McClellan CJ at CL and Bellew J agreeing). This language is, however, imprecise and covers a range of considerations and a range of sources. Thus, with respect to sources, the statements would appear to cover:*

- (a) statutory provisions;*
- (b) general law principles and underlying policies, and*
- (c) practices (that is, application of principles) as revealed by outcomes.*

With respect to the subject matter covered, this would include:

- (a) prescribed penalties (including maxima);*
- (b) methods of proceeding (including the fixing of non-parole periods);*
- (c) factors to be taken into account, and*
- (d) facts as found.*

³⁵ [2013] NSWCCA 50

³⁶ See discussion in *MC v R* [2017] NSWCCA 316 Hamill J at [46]-[52].

³⁷ *MPB v R* [2013] NSWCCA 213; 234 A Crim R 576 at [9].

³⁸ *Ibid.*

For clarity in relation to Basten JA's quote above the court held in *AJB v The Queen*³⁹ that "sentencing practices" did not include "executive practices" and therefore a sentencing judge was not required to have regard to the policy of the executive government to grant remissions on head sentences at the time of the offence.

Failure to follow past practice in setting a non-parole period

In *CPW v R*⁴⁰ the sentencing judge erred by failing "to apply the law and practice relating to non-parole periods which existed at the time of the commission of the old offences." The court concluded with reference to its previous decisions that the court should find:⁴¹

...there was a sentencing practice in the 1980s of usually setting a non-parole period of between one third and one half of the head sentence and hold that the existence of that sentencing practice should be regarded as amounting to special circumstances within s 44(2) of the Crimes (Sentencing Procedure) Act in sentencing the applicant for the old offences.

CPW v R confirmed a line of decisions which requires a sentencing judge to adjust a non-parole period for a historic offence downwards because the law in that area had moved adversely to the offender.⁴² The four decisions of *Bradbery v R*⁴³, *PH v R*,⁴⁴ *PWB v R*,⁴⁵ and *Denham v R*⁴⁶ are further examples of where the judge erred in failing to follow past practice in setting a non-parole period and imposed a non-parole period which the appellate court regarded as excessive. In *Wilson v R*⁴⁷ the judge was led into error by an obvious misstatement of the law (cited above) by finding that the ordinary sentencing practice at the time of the offence was that the ratio of the *parole* period to the total sentence was between one third and one half rather than the ratio of the *non-parole period* to the total sentence was between one third and one half.⁴⁸

Hardening of common law sentencing principles

It was held in *Magnusson v R* that the principle of totality as articulated by the High Court in *Pearce v The Queen*⁴⁹ was an area of sentencing law that has moved adversely to an offender.⁵⁰ Button J observed that the decision of *Pearce v The Queen* "...led to more focus upon accumulation and partial accumulation when sentencing for more than one offence."⁵¹ The court held that the judge's approach to totality was not consistent with the sentencing standards of the late 1970s to early 1980s. Button J concluded:

³⁹ [2007] NSWCCA 51; 169 A Crim R 32 at [31]

⁴⁰ [2009] NSWCCA 105; (2009) 195 A Crim R 149 James J at [64]-[66], McClellan CJ at CL and Adams J agreed.

⁴¹ [2009] NSWCCA 105; (2009) 195 A Crim R 149 James J at [69].

⁴² *AJB v R* (2007) 169 A Crim R 32, *MJL v R* [2007] NSWCCA 261 and *Featherstone v R* [2008] NSWCCA 71

⁴³ [2008] NSWCCA 93 at [38]

⁴⁴ [2009] NSWCCA 161 at [40]

⁴⁵ [2011] NSWCCA 84; (2011) 216 A Crim R 305 at [64]

⁴⁶ [2016] NSWCCA 309 at [52]-[54]

⁴⁷ *Wilson v R* [2017] NSWCCA 41 at [35]-[36]

⁴⁸ *Ibid* at [36].

⁴⁹ (1998) 194 CLR 610

⁵⁰ [2013] NSWCCA 50 at [193].

⁵¹ *Ibid* at [117]

“.....the overarching structure resulting from the approach of her Honour to questions of totality, concurrence, and cumulation needs to be considered in light of the sentencing standards of the late 1970s to early 1980s. The fact is that the approach to questions of cumulation and concurrence was more lax before the handing down of the decision in Pearce v The Queen in 1998.

More recently the Court of Criminal Appeal in *MC v R*⁵² accepted these observations of Button J as settled noting that there has been less focus on accumulation of sentences since the introduction of aggregate sentences in NSW.

Juvenile offenders

In *TC v R*⁵³ the offender committed sexual assault offences in 1976 as a 17 year old juvenile. The failure of the judge to refer to either the *Child Welfare Act 1939* (NSW) which the law at the time or the *Children (Criminal Proceedings) Act* and take into account the sentencing options in respect of juveniles constituted a failure “...to sentence in accordance with the standards at the time of the offence: *R v MJR*”⁵⁴. However neither the sentencing judge nor the appellate court was provided with that information which disclosed the sentencing practices of the Children’s Court. The court held that notwithstanding the error no lesser sentence was warranted in law.⁵⁵

Failure to apply sentencing patterns

In *PWD v R* the judge failed to have proper regard to the sentencing standards applicable at the time the offences were committed and the sentences imposed were manifestly excessive.⁵⁶ RS Hulme annexed to his reasons a copy of the summary of pre-1999 cases provided by the Judicial Commission.⁵⁷ In *Henderson v R*⁵⁸ although the judge was supplied “a discernible sentencing pattern” the judge failed to give it appropriate consideration revealed by the fact that “...the head sentence in most cases was considerably above that which would be appropriate if the approach recommended in *Magnuson v R* and...*Garling J* in *MPB v R* were followed.”⁵⁹

However in both *SHR v R*⁶⁰ and *CT v R*⁶¹ it was held the judge successfully applied the effect of sentencing practices and patterns at the time when the offences were

⁵² [2017] NSWCCA 316; (2017) 271 A Crim R 83 at [44]

⁵³ [2016] NSWCCA 3 at [45].

⁵⁴ *Ibid* Gleeson JA at [45], Rothman and Bellew JJ agreed.

⁵⁵ *Ibid* at [

⁵⁶ [2011] NSWCCA 84; (2011) 216 A Crim R 305 RS Hulme at [55] Beazley JA at [18] and Harrison J at [93] agreed.

⁵⁷ His Honour said at [70] “...information included two publications in the [Judicial] Commission’s Monograph Series, number 15, “*Child Sexual Assault*” published in 1997, and number 25, “*Sentencing Offenders Convicted of Child Sexual Assault*” published in 2004, and summaries of some 47 cases decided in this Court prior to 1 January 1999 involving breaches of s 61E and s 61M(2) together with the reports of those cases.

⁵⁸ [2016] NSWCCA 8; (2016) 256 A Crim R 519 Hoeben CJ at CL at [46]

⁵⁹ *Ibid* Hoeben CJ at CL at [48], Bathurst CJ and RS Hulme J agreeing.

⁶⁰[2014] NSWCCA 94

⁶¹ [2017] NSWCCA 15

committed. In both of those cases the judge was supplied a schedule of comparable cases. Fullerton J in *SHR v R*⁶² extracted a more refined schedule from the material and annexed a short summary of each case to Her Honour’s judgment.

Failure to properly assess the objective seriousness of repealed offence

In *Nelson v R* the offender was aged 31 at the time of the offence in 1972 and 66 at the time of sentence.⁶³ The judge erred by finding that the offence of indecent assault of a female under s 76 *Crimes Act* (rep) fell in the mid-range. At the time the offence encompassed the acts of fellatio, cunnilingus and anal intercourse.⁶⁴ Applying *MJR* and *Moon* the conduct fell within the lower end of the range.⁶⁵ It is to be noted that the maximum penalty for the offence at the time was 3 years. An identical error was made by the sentencing judge in *Bradbery v R*⁶⁶ where the judge described the offences as falling “within the upper range of objective seriousness”. Again the judge had failed to have regard to the width of conduct caught by the offence. The court concluded that three of the offences fell within the lower range of seriousness.⁶⁷

Offences other than child sexual assault

The principle in *MJR* applies to all historical offences other than child sexual assault as defined in s 25AA. There are several examples where the Supreme Court of NSW have been required to sentence a person convicted of murder or manslaughter according to the prevailing sentencing patterns at the time the offence was committed.⁶⁸ Often it is difficult for the court to determine whether there is an established pattern. It is accepted that the introduction of standard non-parole periods is a prime example of the law moving adversely to an offender. It has been held that there was not a legislative intention that the standard non parole period for murder should apply retrospectively.⁶⁹ In *R v Afu; R v Caleo* RA Hulme J said:⁷⁰

In relation to the crime of murder it is quite apparent that sentencing patterns have moved adversely in the intervening period. This is partly because of the introduction of the standard non-parole period regime. [3] It is also clearly apparent from a comparison between the numerous cases in the Public Defenders' database of sentences imposed for murder in the periods 1990-1993 and 1994-1996 on the one hand and Judicial Commission sentencing statistics for the current era on the other.

The “intervening period” in *R v Afu* was between 1989 and 2018. In *Katsis v R* the offender committed a murder in 1988. The judge imposed a non-parole period of 15

⁶²[2014] NSWCCA 94

⁶³ [2007] NSWCCA 221

⁶⁴ *Ibid* Latham J at [18], Tobias JA and Mathews AJ agreed

⁶⁵ *Ibid* at [18]

⁶⁶ [2008] NSWCCA 93 at [26]

⁶⁷ *ibid*

⁶⁸ *R v Bunce* [2007] NSWSC 469; *R v Fleming* [2007] NSWSC 673; *R v Armstrong* [2010] NSWSC 800; *R v Cousens* [2011] NSWSC 1375; *R v Keli Lane* [2011] NSWSC 289; *R v Smith (No 4)* NSWSC 1082; *R v Haines* [2015] NSWSC 390; *R v Afu (No 17)* [2018] NSWSC 1127

⁶⁹ *R v Keli Lane* [2011] NSWSC 289 Whealy JA at [61]-[62]

⁷⁰ (No 17) [2018] NSWSC 1127 at

years and a balance of term of 5 years. The Court of Criminal Appeal did not accept that the non-parole period for murder should be between one third and one half of the term of sentence. Hoeben CJ at CL said:⁷¹

While it can be accepted that historical sentencing practices in relation to some sexual offences, particularly those against children, can be identified those practices do not automatically translate to an appropriate sentence for an offence of murder associated with sexual intercourse. None of the authorities provided by the applicant in support of the proposition that non-parole periods during the 1980s were typically between one-third and one-half of the full term of sentence, are murder cases.

The court held that the judge did not err in having regard to the statements of principle in the five generally similar cases or by finding that the statistics provided did not disclose that “a relevant sentencing pattern or practice had not been established”.⁷²

In *R v Lane* the judge found notwithstanding that he had to sentence according to the patterns at the time the “...body of relevant cases is simply too small. There is insufficient statistical material.”⁷³ In *R v Afu; R v Caleo*⁷⁴ RA Hulme was required to sentence the offenders for murder and soliciting to murder committed in the late 1980’s and early 1990’s. Mr Afu was 23 at the time of the murder and 51 at the time of sentence. Mr Caleo was aged 27 at the time of the offence of solicit to murder and 55 at the time of sentence. RA Hulme J described this area of the law “controversial”:⁷⁵

An issue that applies to the sentencing of both offenders arises from the fact that their offences were committed so long ago. This is the need to sentence in accordance with the sentencing patterns prevailing in 1990 if in the intervening period they have moved adversely to the offenders. This is a controversial area of sentencing law, recently the subject of rectification by the State Parliament in respect of child sexual abuse offences but not in relation to other types of offences. [footnote 2 The insertion of s 25AA in the Crimes (Sentencing Procedure) Act by Sch 3[6] of the Criminal Legislation Amendment (Child Sexual Abuse) Act 2018 (NSW)]

His Honour said there was no definitive material to show that sentencing patterns for the offence of solicit to murder had moved adversely to the offender but his impression was that “they may have to some extent”.⁷⁶ The difficulty was “[n]o cases going back to the 1980’s and 1990’s seemed to be available”.⁷⁷ In *Scott v R*⁷⁸ the appellant was sentenced for manslaughter. The Court made clear that the onus was on the appellant to show what the sentencing patterns were at the time. It was also for the appellant to show whether they had moved adversely since the date of the offence.⁷⁹ The court was

⁷¹ [2018] NSWCCA 9 at [83] Schmidt and Campbell JJ agreed.

⁷² Ibid at [85], [91].

⁷³ *R v Keli Lane* [2011] NSWSC 289 Whealy JA at [61]-[62] and the quote at [97].

⁷⁴ *R v Afu; R v Caleo* (No 17) [2018] NSWSC 1127

⁷⁵ Ibid at [99]ff

⁷⁶ Ibid at [102]

⁷⁷ Ibid at [103]

⁷⁸ [2011] NSWCCA 221

⁷⁹ Ibid at [52] James J, Bathurst CJ and Johnson J agreeing

not prepared to find on the material before it that sentencing practice had moved adversely.⁸⁰

The enactment of s 25AA

The *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* amended the *Crimes (Sentencing Procedure) Act 1999* by inserting a new s 25AA which provides:

25AA Sentencing for child sexual offences

(1) A court must sentence an offender for a child sexual offence in accordance with the sentencing patterns and practices at the time of sentencing, not at the time of the offence.

(2) However, the standard non-parole period for a child sexual offence is the standard non-parole period (if any) that applied at the time of the offence, not at the time of sentencing.

(3) When sentencing an offender for a child sexual offence, a court must have regard to the trauma of sexual abuse on children as understood at the time of sentencing (which may include recent psychological research or the common experience of courts).

(4) This section does not affect section 19.

(5) In this section—

“child sexual offence” means the following offences regardless of when the offence occurred but only if the person against whom the offence was committed was then under the age of 16 years—

(a) an offence under a provision of Division 10, 10A, 10B, 15 or 15A of Part 3 of the *Crimes Act 1900*,

(b) an offence under a provision of that Act set out in Column 1 of Schedule 1A to that Act,

(c) an offence of attempting to commit any offence referred to in paragraph (a) or (b),

(d) an offence under a previous enactment that is substantially similar to an offence referred to in paragraphs (a)–(c).

Section 25AA applied from 31 August 2018, following the commencement of Schedule 3(6) of the amending Act. Norrish DCJ SC noted in *R v Farrell*⁸¹ that there were no transitional provisions and therefore s 25AA applied to sentencing proceedings commenced before the enactment but in force the day the proceedings were finalised. Berman SC DCJ held in *R v Cameron (a Pseudonym)* that the definition of child sexual offence in s 25AA did not extend to the crime of buggery.⁸²

Rationale for s 25AA

When the Bill was read for a second time the Attorney General, The Honourable Mark Speakman SC, set out the purpose and rationale for the amendment.⁸³

⁸⁰ Ibid at [67]

⁸¹ [2018] NSWDC 327 at [43]

⁸² [2018] NSWDC 432

⁸³ NSW Legislative Assembly *Hansard* 6 June 2018

The purpose of this new provision is to override the current common law rule that a court must apply the sentencing standards from the time of the offence. In historical cases of child sexual abuse, this is resulting in lower sentences and discounts applied to reflect the leniency of sentencing for these offences in times past. This perpetuates our past lack of understanding of how seriously these offences should be treated and our past lack of understanding of the significant impact they have on the victim. The new provision will ensure that sentences meet current community expectations, to the extent possible within the upper limit of the maximum penalty from the time of the offence.

His Honour Judge Berman SC, sitting in the District Court of NSW, had declared in *R v Gavin*⁸⁴ that to sentence an offender according to standards which existed in the late 1980s is to perpetuate the errors that were made by sentencing courts at that time. It was an objection to assessing the objective seriousness of child sexual assault using decisions of the past which did not appreciate odious conduct such as grooming and the lasting psychological consequences suffered by the victim.

Section 25AA directs the sentencing court to have regard to the trauma of sexual abuse on children as understood at the time of sentencing. Simpson AJA is one of the most experienced criminal law judges in New South Wales. Her Honour sat on Court of Criminal Appeal benches in the mid 1990's. In the course of a discussion of the cases concerning the use of victim impact statements to prove harm to the victim Her Honour said this about 1990's judges:⁸⁵

*These decisions must be seen in their historical context. In the early 1990s judges had not accumulated the experience of dealing with sexual offences against children that, by 2014, they (regrettably) had. It could scarcely, in 2014, be said that, in order to prove that sexual abuse of children causes substantial damage, the Crown ought to produce "the results of studies conducted over a significantly broad base and over a significant period of time". In no small measure, this is because those very studies have been conducted and are not only in the public arena but also in the public (and judicial) consciousness. Such damage is now assumed: see *R v MJB [2014] NSWCCA 195 per Adamson J*.*

In *R v Cattell*⁸⁶ Price J referred to the rationale for s 25AA and the current judicial understanding of harm to the victim. His Honour said:

Justice Peter McClellan AM in his speech "Justice for Victims" observed:

"Judicial assumptions have also played a role in the sentencing of offenders who have been convicted of sexual offences against children. These include assumptions about the harm caused by sexual offending.

In New South Wales it is now accepted that:

⁸⁴ [2014] NSWDC 189 at [13]

⁸⁵ *R v Tuala* [2015] NSWCCA 8; (2015) 248 A Crim R 502 at [56], Ward JA and Wilson J agreed..

⁸⁶ [2019] NSWCCA 297 at [110]-[111]

“...child sex offences have profound and deleterious effects upon victims for many years, if not the whole of their lives: R v CMB [2014] NSWCCA 5 at [92]. Sexual abuse of children will inevitably give rise to psychological damage: SW v R [2013] NSWCCA 255 at [52]. In R v G [2008] UKHL 39; [2009] 1 AC 92, Baroness Hale of Richmond (at [49]) referred to the “long term and serious harm, both physical and psychological, which premature sexual activity can do”. [21]

This position is the product of a shift in judicial understanding. From the early 2000s the decisions of the New South Wales Court of Criminal Appeal reveal a greater willingness on the part of judges to assume that harmful consequences result from child sexual abuse. [22] This has been accompanied by increased severity in the sentences for these offences.” [23] (Citations in original.)

I have no doubt that the understanding of the harmful effects of sexual offending against children has increased since the Royal Commission delivered its Criminal Justice Report in 2017.

Standard non-parole periods and sentencing practice

Section 25AA(2) makes clear that standard non-parole periods enacted for various child sexual assault offences are not to be applied retrospectively. Further, it appears s 25AA(2) also overrules the decision of *GSH v R*.⁸⁷ In that case the appellant was convicted after trial of three child sexual assault offences of aggravated indecent assault contrary to s 61M(2) *Crimes Act*. The standard non-parole period at the time of the offence was 5 years. By the time the appellant was sentenced in 2008 Parliament had increased the standard non-parole period from 5 to 8 years following the passing of the *Crimes (Sentencing Procedure) Amendment Act 2007*. The transitional provision stated the amendments applied to “a sentence for an offence whenever committed.”⁸⁸ The Court of Criminal Appeal held in *GSH v R* that the sentencing judge erred by referring to the lower 5 year standard non-parole period and that it could not be assumed that this error “exerted no influence on the sentence ultimately imposed.”⁸⁹ An application for special leave to appeal to the High Court was refused on 12 March 2010 on the basis there were insufficient prospects of success. Suffice to state that s 25AA(2) clearly states that the court is to apply the standard non-parole period at the time of the child sexual offence and not at the time of sentence.

⁸⁷[2009] NSWCCA 214

⁸⁸See *Crimes (Sentencing Procedure) Act*, Sch 2, Pt 17, cl 57

“The amendments made to this Act by the *Crimes (Sentencing Procedure) Amendment Act 2007* apply to the determination of a sentence for an offence whenever committed, unless—

(a) the court has convicted the person being sentenced of the offence, or
(b) a court has accepted a plea of guilty and the plea has not been withdrawn, before the commencement of the amendments.”

⁸⁹ Latham J at [46]–[47]. Giles JA and Howie J agreed.

Applying s 25AA

In *R v Cattell*⁹⁰ the court discussed the meaning and effect of s 25AA. The court held that the absence of any reference to s 25AA by the sentencing judge when it applied to some offences and not others led to the inference it may have been overlooked.⁹¹ One of the victims was aged 16 and therefore that particular offence did not fall within the definition of child sexual offence.⁹² In *R v Cattell*⁹³ the court made abundantly clear that the past practice of setting a non-parole period does not apply to sentences imposed under s 25AA. The sentencing court must set the non-parole period applying the law at the time of sentencing. The court must have “...no regard to patterns or practices of sentencing which may have operated at the time of the offending.”⁹⁴

As to applying current sentencing patterns Price J acknowledged that if past patterns are to be disregarded there could not be expected to be a body of available information:⁹⁵

As to current sentencing “patterns,” it is not unexpected that the Crown has been unable to provide statistical material given the recent enactment of s 25AA. This will resolve over time and be provided by the Judicial Commission sentencing statistics and comparative cases.

Price J provided a list of matters that the sentencing court should consider:⁹⁶

When fixing a sentence for an old child sexual offence which falls within s 25AA, a sentencing judge should:

- (a) Take into account the sentencing pattern which exists at the time of sentence where such a pattern is able to be discerned;*
- (b) Determine the facts as now available to the court;*
- (c) Pay regard to the maximum penalty and standard non-parole period (if any) that applied at the time of the offence;*
- (d) Identify where the offence falls in the range of objective gravity of that offence;*
- (e) Take into account any relevant aggravating factors and mitigating factors in s 21A(2) and (3) of the CSP Act;*
- (f) Set a non-parole period in accordance with s 44 of the CSP Act as it operates at the time of sentence, and*

⁹⁰ [2019] NSWCCA 297 Price J authored the lead judgment. Hoeben CJ at CL and Campbell J agreed

⁹¹ *Ibid* at [116]

⁹² *Ibid*

⁹³ *Ibid* at [121]

⁹⁴ Price J at [125]

⁹⁵ [2019] NSWCCA 297 at [116]

⁹⁶ *Ibid*

(g) *Fix the balance of the term of the sentence.*

Section 25AA had been considered earlier in *O'Sullivan v R*⁹⁷. The case is a very good illustration of the degree to which sentencing remarks can be scrutinised in an appeal. The appellant had already been sentenced for child sexual assault offences by the same judge (Her Honour Judge Traill) in 2016. He stood for sentence again but after s 25AA had commenced. Hoeben CJ at CL quoted Traill DCJ's remarks at length and accepted every observation concerning sentencing method following the enactment of s 25AA:⁹⁸

Importantly, her Honour appreciated the wide spectrum of offending which was covered by the now repealed s 81 of the Crimes Act. Her Honour appreciated that although s 25AA allowed a sentencing judge to have regard to current sentencing practice, other restraints were operative such as the maximum penalty and the absence of any non-parole period.

The court rejected a submission that Traill DCJ had erred in applying the principle of totality in the scenario where there is an existing sentence. More particularly the court rejected a submission that the beneficial non-parole period imposed for the 2016 sentence had been negated by the structure of the later sentences.⁹⁹

Re-sentencing in appeals

A question arises as to whether s 25AA should apply where the Court of Criminal Appeal re-sentences a respondent to a Crown appeal under s 5D or an applicant in a severity appeal under s 6(3) *Criminal Appeal Act*. Similarly, its application where the District Court is required to sentence an appellant or respondent following an appeal from the Local Court. The High Court decision of *Radenkovic v The Queen* relied upon by Spigelman CJ in *MJR* (quoted earlier) arguably informs the issue.¹⁰⁰ The correct approach following the enactment of the more punitive *Sentencing Act 1989* (NSW) was described by the High Court in *Radenkovic v The Queen* as the "T approach" – a reference to the case of *R v T*.¹⁰¹ The applicant or the respondent should not be any worse off in an appeal. He or she is entitled to be re-sentenced according to the laws as they stood at the time of sentencing. The entitlement should not be denied at the time of re-sentencing because the first instance court made an appealable error which resulted in a sentence that is too severe or inadequate.

In both *Franklin v R*¹⁰² and *Lissock v R*¹⁰³ the issue was raised as to whether s 25AA applies in re-sentencing but it was not necessary for the Court to decide the issue.

In *GC v R*¹⁰⁴ the appellant was sentenced for 8 child sexual assault offences and further offences were taken into account on a Form 1. The offences were committed between

⁹⁷ [2019] NSWCCA 261.

⁹⁸ *Ibid* Hoeben CJ at CL at [46]ff, Walton and Price JJ agreed.

⁹⁹ See submission at [42] the court's finding at [47]-[51].

¹⁰⁰ See footnote 28 above

¹⁰¹ (unreported) NSWCCA, 15 March 1990

¹⁰² [2019] NSWCCA 325

¹⁰³ [2019] NSWCCA 282

1975 and 1983. He was sentenced in August 2017 prior to the commencement of s 25AA. The Court accepted the appellant's submission that the judge erred in failing to take into account an earlier sentence in applying the principle of totality.¹⁰⁵ The error required the court to re-sentence the appellant.¹⁰⁶ The Court said:¹⁰⁷

"Any re-sentence must be conducted on the basis of s 25AA of the Crimes (Sentencing Procedure) Act, which provides as follows...."

The court made several adverse findings against the appellant and concluded it would have imposed a longer non-parole period than the sentencing judge. Therefore it declined to re-sentence the applicant. The approach taken in this decision is not easy to reconcile with earlier law in relation to re-sentencing.

Juvenile offenders

Section 25AA directs the court to apply sentencing law as it exists at the time of sentence in a scenario where an offender is a juvenile at the time of committing a child sexual assault offence but an adult at the time of sentencing. That is, unlike in the decision of *TC v R*¹⁰⁸ the court is not required to consider what would have occurred under the *Child Welfare Act 1939*. In *R v MW*¹⁰⁹ Lerve DCJ said his research failed to find any Court of Criminal Appeal decision addressing how s 25AA applies to juveniles. In *R v JA Wilson* SC DCJ said:¹¹⁰

There is a tension in this matter between the need for general deterrence for child sexual offences and the Offender's status as a child himself at the time of the offending. Section 25AA of the Crimes (Sentencing Procedure) Act requires the Court to sentence the Offender in accordance with the sentencing patterns and practices at the time of sentence, that is today, having regard to the trauma of the child sexual abuse on children as understood at the time of sentencing. That question in this case is informed by the Victim Impact Statement to which I have already referred.

Application of s 25AA in the lower courts

Section 25AA applies to all criminal jurisdictions. The Local Court of NSW deals with the bulk of indecent assault offences. In *DPP v IJL*¹¹¹ His Honour Judge Henson AO, Chief Magistrate, acknowledged that s 25AA "...requires the court to sentence according to current community standards not those that prevailed at the time of the offending"

Below are some further examples where the District Court has applied s 25AA:

R v Farrell [2018] NSWDC 327

R v LV [2018] NSWDC 530

¹⁰⁴ *GC v R* [2019] NSWCCA 241

¹⁰⁵ *Ibid* at [35]

¹⁰⁶ *Ibid* [36]

¹⁰⁷ *Ibid* at [44]

¹⁰⁸ [2016] NSWCCA 3 at [45]

¹⁰⁹ [2019] NSWDC 307 at [25]

¹¹⁰ [2019] NSWDC 314 at [82]

¹¹¹ [2019] NSWLC 2 at [33]

R v RDW [2019] NSWDC 488
R v Carr (a pseudonym) [2019] NSWDC 805
R v Stevenson (No 2) [2019] NSWDC 611

There appeared to be a suggestion in *R v Carr*¹¹² that s 25AA required the court to decide whether special circumstances should be found under s 44(2) of the *Crimes (Sentencing Procedure) Act 1999* in accordance with *MPB v R* and *Moon v R*.¹¹³ However as the Court of Criminal Appeal made explicit in *R v Cattell*¹¹⁴ that past practice of setting a non-parole period does not apply to sentences imposed under s 25AA.

Victoria

My discussion of other jurisdictions will be more abbreviated. Below are some of the recent cases that have discussed the issue of historical sentencing in Victoria:

R v RL [2009] VSCA 95
Stalio v The Queen [2012] VSCA 120
Bradley v The Queen [2017] VSCA 69
Carter (a Pseudonym) v The Queen [2018] VSCA 88
Mush v The Queen [2019] VSCA 307
DPP v Mean [2019] VSC 675

Stalio v The Queen remains the leading decision. It held a sentencing court is to have regard to past sentencing practices at the time of offending as part of principle of equal justice before the law. In *Stalio v The Queen* the Court reasoned:¹¹⁵

It would be wrong for a prisoner to be sentenced to a substantially higher sentence than an offender who committed like offences at or about the time of the offences in issue, simply because of the lapse of time.

Weinberg, Beach and Hargrave JJA explained in *Carter (a Pseudonym) v The Queen*¹¹⁶ that past sentencing practice is a sentencing factor which the court attributes specific weight in the circumstances of the case but there are limits as to how the principle is to be applied. For present purposes the following passage from that case is pertinent:

The following matters should be noted about the above statement. First, Lowe involved parity between co-offenders — where the principle of equality was obviously relevant — and Stalio did not. Second, when read as a whole, the decision in Stalio does not (as the applicant contends) require a sentencing court when sentencing occurs after a substantial lapse of time from the offending to sentence in accordance with prevailing sentencing practices at about the time of the offending. Stalio requires only that 'regard can be had to sentencing practice

¹¹² [2019] NSWDC 805 at [34]

¹¹³ [2013] NSWCCA 213

¹¹⁴ [2019] NSWCCA 297 at [121]

¹¹⁵ *Stalio v The Queen* [2012] VSCA 120 at [xx]

¹¹⁶ [2018] VSCA 88 at [55] ff

at the time of offending for the purpose of ascertaining just punishment in accordance with the principle of equal justice'. The weight to be given to this factor in any given case will depend upon its own circumstances, which will usually involve more than 'simply ... the lapse of time'. [emphasis added].

The court in *Carter* rejected a submission that the effect of two High Court decisions of *Kilic v The Queen*¹¹⁷ and *Dalgliesh v The Queen*¹¹⁸ effectively overruled *Stalio's* case:¹¹⁹

The requirement in s 5(2)(b) of the Sentencing Act that a sentencing court must have regard to current sentencing practices in the sense discussed in Kilic and Dalgliesh, as one factor in the sentencing mix, does not mean that other relevant sentencing factors such as the principle in Stalio, as properly understood, should be disregarded.

Section 5(2) of the *Sentencing Act* 1991 (Vic) sets out matters the court "must have regard to" when sentencing an offender and include "current sentencing practices". In *DPP v Dalgliesh (a pseudonym)*¹²⁰ the High Court held that as a matter of sentencing principle and statutory construction it is one factor but not the "controlling factor."

The distinction between sentencing *according to* past practice at the time of offending and *having regard to* past sentencing practice at the time was noted by Dixon J in *DPP v Mean*.¹²¹ Her Honour was required to sentence an offender for a murder that was committed in 1987. Dixon J said in footnote 49 of the judgment:

In Carter [v The Queen [2018] VSCA 88], the Court of Appeal confirmed that Stalio does not require sentencing courts to sentence in accordance with the prevailing sentencing practices at the time of the offending; it only requires the court to have regard to sentencing practices at that time. The Court also stated that the weight to be given to that factor will depend upon the circumstances of the case.

Her Honour concluded in her remarks:¹²²

83. In sentencing you I intend to give effect to the principle in Stalio v R,^[45] that has also been applied in the recent cases of Bradley v the Queen^[46] and Carter v the Queen.^[47] That principle requires me to have regard to the sentencing practices around the time of your offending as a relevant factor in 'the imposition of punishment to the extent which is just in all the circumstances'.^[48] I have done so.

¹¹⁷ (2016) 259 CLR 256

¹¹⁸ (2017) 262 CLR 428

¹¹⁹ Ibid at [63]

¹²⁰ (2017) 262 CLR 428 Kiefel CJ, Bell and Keane JJ said at [9] "...the terms of s 5(2) are clear such that, while s 5(2)(b) states a factor that must be taken into account in sentencing an offender, that factor is only one factor, and it is not said to be the controlling factor."

Gageler and Gordon JJ said at [68]...s 5(2) contemplates that current sentencing practices must be taken into account, but only as one factor, and not the controlling factor, in the fixing of a just sentence.

¹²¹ [2019] VSC 675

¹²² Ibid at [83]ff

84. *In determining what weight to give to past sentencing practices, I have considered the circumstances of your case.^[49] In your case, you left the crime scene after hiding the wood, and maintained your silence for three decades. However, I accept the submission of Mr Lewis that your move to Western Australia was conducted by your whole family and you simply went with them.*

The Victorian Court of Appeal returned to the topic of applying *Stalio's* case in *Mush v The Queen*.¹²³ It made reference to the decision of *Bradley v The Queen*,¹²⁴ and where the offender's conduct is the reason he or she could not be sentenced at the time of the offence:¹²⁵

In Stalio, the Court identified two relevant propositions in respect of that question. First, the phrase 'current sentencing practices', in s 5(2) of the Sentencing Act, relates to present sentencing practices (and not practices that were current at the time of the offending).^[49] Secondly, however, the concept of equal justice requires that regard be had to sentencing practices at the time of the offence, if those practices can be demonstrated to have required the imposition of a materially lesser sentence for like offences.^[50]

.....
109 *In respect of the second proposition stated in Stalio, the Court in Bradley identified a qualification to the application of the principle of equal justice in cases in which the offending occurred decades before the offender is sentenced. The Court considered that, where it was the offender's own conduct which made it impossible for him or her to be sentenced contemporaneously with the offending, the offender may not be entitled to seek to be treated as if his or her criminal responsibility had been established at the time of the offending.^[51]*

These recent cases appear to be inconsistent with the earlier decision of *R v RL*¹²⁶ where Nettle JA said with reference to the *MJR*:¹²⁷

Counsel for the applicant argued that, because these offences were committed more than 30 years ago, the sentences now to be imposed should reflect the sentencing practices that were current at that time rather than the higher levels of sentences which are imposed these days for comparable offences.

59 *There is more force in that submission. The maximum sentence for each of the offences of sexual penetration with which we are here concerned was five years' imprisonment.[29] Today, the maximum sentence for the comparable offence of sexual penetration of a child aged between 10 and 16 years is 15 years' imprisonment[30] and many of the sentences reflected in so called current sentencing snapshots are informed by that higher maximum. In R v MJR,[31] the New South Wales Court of Appeal held that, when sentencing practice has moved*

¹²³ [2019] VSCA 307

¹²⁴ [2017] VSCA 69

¹²⁵ Maxwell P and Kaye JA at [107]-[109]. Case references in the footnotes are excluded from the quote and the underline has been added.

¹²⁶ [2009] VSCA 95

¹²⁷ *Ibid* Nettle JA at [59] Dodds-Streeton JA and Coglán AJA agreed.

adversely to an offender, it is proper for a court to take into account the sentencing practice as at the date of the commission of the offence. In my view, it is appropriate that we do the same.

Queensland

The common law position was set out by the Court of Appeal in *Wruck v R*.¹²⁸ A sentencing court is required to impose a sentence according to the sentencing levels which applied at the time of the offending.¹²⁹ *Wruck v R* remains the leading case. The decisions below also ventilate the issue:

C; ex parte A-G (Qld) [2003] QCA 510

R v Karlsson [2015] QCA 158.

R v WBB [2015] QCA 152

R v MCT [2018] QCA 189

The case of *R v WBB* confirmed the correctness of *Wruck v R*:¹³⁰

The learned trial judge also, correctly, recognised that he was required to impose a sentence according to the sentencing levels which applied at the time of the offending, that is, 1977 and 1978. In doing that, the learned sentencing judge said that the appropriate level of imprisonment “would be no less than two years and likely somewhere between two and three years”. In recognition of the factors referred to above, he imposed a sentence of 18 months. We were not referred to any comparable authority which would have supported a sentence in which no actual custody was to be served. But we were referred to authorities which do support the sentence imposed

There is a Bill before Queensland Parliament which abrogates the common law principle. The Bill amends s 9 of the *Penalties and Sentences Act 1992* headed “Sentencing Guidelines” to insert a new s 9(4):¹³¹

(4) Also, in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years or a child exploitation material offence—

(a) the court must have regard to the sentencing practices, principles and guidelines applicable when the sentence is imposed rather than when the offence was committed; and

(b) the principles mentioned in subsection (2)(a) do not apply; and (c) the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.

The “*principles mentioned in subsection 9 (2)(a)*” are that a sentence of imprisonment should only be imposed as a last resort and that a sentence that allows the offender to

¹²⁸ [2014] QCA 39; (2014) 239 A Crim R 111

¹²⁹ *ibid*

¹³⁰ [2015] QCA 152 at Martin J at [43], Gotterson and Philippides JJA agreeing

¹³¹ Criminal Code (Child Sexual Offences Reform) and Other legislation Amendment Bill 2019 Part 11

stay in the community is preferable. The Explanatory Notes to the Bill made reference to Recommendation 76 of the Royal Commission and argues that sentencing according to sentencing standards at the time of the offence results in “shorter sentences” than a sentence having regard to contemporary standards and *[t]his can be distressing for victims and may undermine community confidence in the administration of justice.*¹³²

The Bill retrospectively applies the offence of maintaining a sexual relationship with a child which was created in 1989 to apply to conduct that occurred prior to the enactment of the offence. Clause 21 of the Bill inserts a new pt 9, ch 102, ch div 1 in which s 746(1) provides:

Section 229B as in force on the commencement of this section applies, and is taken always to have applied, in relation to acts done before the commencement of the 1989 amendment.

Section 746(2) provides that maximum penalties are to be applied retrospectively:

For applying section 229B under subsection (1), the section applies, and is taken always to have applied, as if—

(a) the maximum penalty under section 229B(1) were—

(i) if in the course of the unlawful sexual relationship the adult committed an unlawful sexual act for which the adult is liable to imprisonment for 14 years or more—life imprisonment; or

(ii) if in the course of the unlawful sexual relationship the adult committed an unlawful sexual act for which the adult is liable to imprisonment for 5 years or more but less than 14 years—14 years imprisonment; or

(iii) otherwise—7 years imprisonment;

The Attorney- General, Hon Y D'Ath MP confirmed the intent of the Bill in the Reading Speech:¹³³

The bill being introduced clarifies the retrospective application of the offence of maintaining a sexual relationship with a child in relation to maximum penalties. It provides that the maximum penalties applying to a pre-1989 offence of maintaining will mirror those applying when the offence was first enacted in 1989. Retrospective application of the current maintaining offence to post-1989 conduct retains the maximum penalty in place when the maintaining offence was committed.

Clause 21 is retrospective in its operation by applying penalties to the commission of an act to which that penalty was not attached when the act was done. The proposed law is an exception to s 11 of the Criminal Code¹³⁴ and s 20C of the *Acts Interpretation Act*

¹³² Explanatory Notes Criminal Code (Child Sexual Offences Reform) and Other legislation Amendment Bill 2019 at p 7.

¹³³ Explanatory Speech 27 November 2019 at p 3876-3877

<https://www.parliament.qld.gov.au/documents/tableOffice/BillMaterial/191127/Criminal.pdf>

¹³⁴ A person can not be punished for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred; nor unless doing or omitting to do the act under the

1954 in relation to the application of maximum penalties.¹³⁵ The retrospective imposition of criminal liability has long been regarded as within power¹³⁶ but “most objectionable” and not justified unless there is a “strong argument”¹³⁷ The Explanatory Notes to the Bill justified clause 21 on the basis that it will “*enable potential survivors of historical child sexual abuse to access justice and ensures that justice is seen to be done by the broader community.*”¹³⁸ The Legal Affairs and Community Safety Committee, tasked to assess the impact of the Bill on rights and obligations, concluded that “*the policy and intent behind the provisions justified the retrospective operation of the law.*”¹³⁹

Tasmania

Examples of the application of the common law sentencing principle can be found in the following Tasmanian cases of *Director of Public Prosecutions v Harington*¹⁴⁰ and *JWM v Tasmania*.¹⁴¹ Section 11A(3) *Sentencing Act 1997* (Tas) provides:

“In determining the appropriate sentence for an offender convicted of a child sexual offence, the court is to take into account the sentencing patterns and practices at the time of sentencing.”

Section 11A(3) was inserted by the *Criminal Code and Related Legislation Amendment (Child Abuse) Act 2019*. It commenced on assent which was 2 October 2019. When introducing the Bill the Hon Elise Archer MP said:

“...the Bill also amends the Sentencing Act 1997 to require sentencing courts to consider current sentencing standards when sentencing offenders for child sexual abuse offences, consistent with recommendation 76 in the Royal Commission’s Criminal Justice Report.”

There is no judicial consideration of s 11A(3) by the Tasmanian Court of Criminal Appeal to date.

Australian Capital Territory

Section 34A was inserted by the *Royal Commission Criminal Justice Legislation Amendment Act 2018* and commenced 5 December 2018. It provides:

same circumstances would constitute an offence under the law in force at the time when the person is charged with the offence.

¹³⁵ If an Act makes an act or omission an offence, the act or omission is only an offence if committed after the Act commences. If an Act increases the maximum or minimum penalty, or the penalty, for an offence, the increase applies only to an offence committed after the Act commences.

¹³⁶ *R v Kidman* (1915) 20 CLR 425 applied in *Polyukhovich v Commonwealth* (“War Crimes Act case”) [1991] HCA 32; (1991) 172 CLR 501 Brennan J at [1].

¹³⁷ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, pp, 55, 57.

¹³⁸ Explanatory Notes Criminal Code (Child Sexual Offences Reform) and Other legislation Amendment Bill 2019 at p 16

¹³⁹ Report No. 59,56th Parliament Legal Affairs and Community Safety Committee, February 2020.

¹⁴⁰ [2017] TASCRA 4

¹⁴¹ [2017] TASCRA 22

For a sexual offence against a child, a court—

(a) must sentence the offender in accordance with sentencing practice, including sentencing patterns, at the time of sentencing;

When the Bill was introduced Hon Mr Ramsay, Attorney-General said:¹⁴²

Additionally, to better recognise the shift in attitudes towards child sexual offending, the bill amends sentencing legislation to ensure that current sentencing practices are applied when sentencing for historic offences. It is important to note, however, that there is no proposed increase to any penalty available at the time the offences were committed. In recommending this change, the royal commission noted that historic sentencing practices downplay the long-term psychological harm to victims caused by sexual abuse and that sentencing offenders under historic standards could potentially have the effect of undermining public confidence in the judicial system or deterring complainants from coming forward in historic cases.

Conclusion

In NSW the common law sentencing principle that an offender must be punished in accordance with the sentencing patterns and practices at the time of the offence still applies to offences other than child sexual assault. In Queensland the sentencing court must impose a sentence according to the sentencing levels which applied at the time of the offence. In Victoria past sentencing practices and patterns are merely matters that the sentencing court has regard to or takes into account. If the offender is the cause of the delay in sentencing it may have limited weight. There is a clear difference of approach between NSW on the one hand and Victoria on the other. The difference can be resolved by the High Court because there is only one common law and not “*as many bodies of common law as there are intermediate courts of appeal.*”¹⁴³ The enactment of s 25AA abrogates the principle as it was declared and applied by NSW courts. It has resulted in a significant change to sentencing method for those offences. It is yet to be resolved whether s 25AA applies to re-sentencing in an appeal where sentencing error is established but the offender was not subject to s 25AA at first instance.

¹⁴² Legislative Assembly for the ACT: 2018 Week 11 Hansard (25 October) p 4239

¹⁴³ *Lipohar v The Queen* (1999) 200 CLR 485 Gaudron, Gummow and Hayne JJ at [45].