

SEXUAL OFFENCES AGAINST CHILDREN – AN ANALYSIS OF SENTENCING PURPOSES AND PROCEDURES

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A joint initiative between Macquarie University & HAQ: Centre for Child Rights



This report is part of a larger research on understanding sentencing principles and policies relating to sexual offences against children in different jurisdictions, and their impact on crime reduction, deterrence or crime control and restorative justice. It is a joint initiative between Macquarie University, Sydney, Australia and HAQ: Centre for Child Rights, a non-profit organization based in New Delhi, India.

Written & Compiled By:

Yasmin Cherry, Janson Lim, Jakeb Thornton, and Jessica Vines

Supervised by:

Bharti Ali (Co-Director at HAQ) & Debra Ronan (Director of PACE at Macquarie University)

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PART 1: DETERRENCE & STRICTER PENALTIES

Jakeb Thornton

INTRODUCTION

Part 1 of this Report focuses on the relationship between deterrence theory and the effect of implementing stricter penalties, with a specific focus where applicable, on the realm of sexual offences against children. It will attempt address the question of whether stricter penalties (such as fixing a minimum mandatory sentence, capital punishment and such measures) support the claims associated with deterrence theory. It seeks to further the research put forward in an earlier Report,¹ particularly in relation to the authors' observations that the concept of deterrence may not necessarily be an effective mechanism of reducing crime rates, and that certain empirical findings cannot be reconciled with the traditional claims of deterrence theory.²

Part 1 is divided into four main sections. First, it will discuss traditional deterrence theory and the concept of deterrence as a 'purpose of sentencing'.³ Secondly, a few 'stricter' sentencing options that are (or were) utilised under the rationale of deterrence, and their application in eight jurisdictions, will be outlined. Thirdly, an analysis of the current scholarly debate on deterrence and crime statistics sourced from a range of jurisdictions, will be presented in order to determine the extent to which these stricter penalties, actually have a deterrent effect.

This part of the Report concludes that the implementation of stricter penalties does not have a corresponding deterrent effect. There is insufficient evidence to suggest that marginal deterrence works – increasing the severity of sentence does not lead to a corresponding decrease in crime or reoffending rates.⁴ However, there is sufficient evidence that absolute general deterrence does work – in the absence of the threat of *any* criminal punishment, a far greater number of people would commit criminal offences.⁵ Despite the common focus on severity, evidence illustrates that increasing the certainty and celerity/swiftness of punishment is more effective than increasing the severity of the penalties.

* The body of work presented in this section of the Report would not have been possible without the extensive research and analysis carried out by the authors of the previous Report, which served as an invaluable source of information.

¹ Anita Burkart, Ellie Chapman, Michael Kendall, Amanda Thorpe, Alexander Tieu, Calli Tsipidis, Shelley Xu, and Lucy Wu. Sexual Offences Against Children: Sentencing Principles and Trends In Eight Jurisdictions (June 2016) <<http://haqcrc.org/wp-content/uploads/2016/06/sexual-offences-against-children-sentencing-principles-and-trends-june-2016.pdf>> ('Report 1').

² Report 1, 27–8.

³ Refer to Report 1, Part 1 for a complete look at the 'Principles and Purposes of Sentencing'.

⁴ Mirko Bagaric, 'A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals' (2014) 62 *Buffalo Law Review* 1159, 1202; Carla Cesaroni and Nicholas Bala, 'Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges' (2008) 34(1) *Queen's Law Journal* 447, 472

⁵ Mirko Bagaric, 'What Sort of Mandatory Penalties Should We Have?' (2002) 23 *Adelaide Law Review* 113, 125.

A DETERRENCE THEORY

1 CONCEPTUAL FRAMEWORK

1.1 Definition and Background

Deterrence, in its most simple form, is ‘the omission or curtailment of crime out of fear of legal punishment’.⁶ As a concept underlying sentencing, it generally refers to the notion of imposing a more severe sanction for an offence in order to emphasise the consequences of offending, with the aim of reducing the likelihood of reoffending for the individual being sentenced (‘specific deterrence’),⁷ while also acting as a warning for other potential offenders, discouraging them from engaging in criminal conduct (‘general deterrence’).⁸

As a theory of crime, it assumes that humans are rational enough to contemplate the consequences of their actions, and to be influenced by those consequences.⁹ An early version of the theory can be seen in the writings of utilitarian philosophers Cesare Beccaria and Jeremy Bentham. Beccaria and Bentham supposed that individuals are motivated by to seek pleasurable consequences (rewards) and avoid painful consequences (costs).¹⁰ In relation to crime, this means a person’s behaviour would be guided by a process in which they would weigh the benefits of committing a crime, against the potential punishment for offending.¹¹ Thus, this theory holds that where people anticipate pleasure from crime, they can, in turn, be deterred from committing that crime by making the potential consequences more painful or costly.¹²

Deterrence theorists consider there to be three properties which impact the ‘costliness’ of punishment: *certainty*, *celerity* (swiftness) and *severity*.¹³ A punishment is more costly or painful when it is certain (high likelihood of legal punishment for commission of a crime), swift (punishment arrives shortly after commission of the offence), and severe (greater magnitude of punishment).¹⁴ These properties are linked, and deterrence depends on an interplay between them; for example, an offence may carry an extremely long prison sentence (severity), but this will not deter if there is no prospect of being caught and punished (certainty).¹⁵

From these ideas first put forward by Beccaria and Bentham, which have guided empirical research on

⁶ Mark C Stafford, ‘Deterrence Theory – Crime’ in James D Wright (ed), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, 2nd ed, 2015) 255, 255.

⁷ Carla Cesaroni and Nicholas Bala, ‘Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges’ (2008) 34(1) *Queen’s Law Journal* 447, 452.

⁸ Ibid.

⁹ David M Kennedy, *Deterrence as Crime Prevention: Reconsidering the Prospect of Sanction* (Routledge, 2009) 15–23.

¹⁰ Mark C Stafford, ‘Deterrence Theory – Crime’ in James D Wright (ed), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, 2nd ed, 2015) 255, 255.

¹¹ Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence?’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 767.

¹² Mark C Stafford, ‘Deterrence Theory – Crime’ in James D Wright (ed), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, 2nd ed, 2015) 255, 255.

¹³ Ibid.

¹⁴ Ibid; Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence?’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 783–4.

¹⁵ Mark C Stafford, ‘Deterrence Theory – Crime’ in James D Wright (ed), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, 2nd ed, 2015) 255, 255.

deterrence since,¹⁶ we can establish that the broad claim of deterrence theory is that the rate of offending (or reoffending) for a particular type of crime should vary inversely with the celerity, certainty, and severity of punishment attached to that type of crime.¹⁷ In the context of sexual offences, this would dictate that the greater the certainty, celerity and severity of sentencing for sexual offences, the greater their deterrent effect, and the lower the offending (and reoffending) rates.¹⁸

Moving from this background of deterrence theory, it is also important to examine some other important complexities that contemporary deterrence theorists have identified, including distinctions between specific and general deterrence, and absolute and marginal deterrence.¹⁹

1.2 Specific Deterrence

When deterrence is aimed at the offender before the court, it is called ‘specific deterrence’. Specific deterrence aims to discourage the individual offender by punishing them for their transgressions and, in doing so, illustrating to them the consequences of offending. It operates on the assumption that the individual offender will be dissuaded from re-offending, as they seek to avoid this adverse experience (legal punishment), in the future.²⁰

1.3 General Deterrence

When deterrence is directed at others, it is called ‘general deterrence’. General deterrence aims to discourage potential offenders from committing similar offences through the threat of expected punishment, illustrating the negative consequences of offending.²¹ It operates under the assumption that potential offenders will be dissuaded from offending because of the example provided by the punishment imposed on the individual offender, which they will seek to avoid.²² The corollary of this is, when general deterrence is considered as a factor in a sentencing assessment, the individual offender is punished more severely, not on the basis that they deserve it, but because the court is attempting to send a message to others who may be inclined to engage in similar criminal activity.²³

There are two forms of general deterrence. *Marginal* general deterrence and *Absolute* general deterrence.²⁴

¹⁶ See generally, Jack P Gibbs, *Crime, Punishment, and Deterrence* (Elsevier, 1975); Raymond Paternoster, ‘The Deterrent Effect of the Perceived Certainty and Severity of Punishment: A Review of the Evidence and Issues’ (1987) 4 *Justice Quarterly* 173.

¹⁷ Jack P Gibbs, *Crime, Punishment, and Deterrence* (Elsevier, 1975) 5.

¹⁸ Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence?’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 784.

¹⁹ Mark C. Stafford, ‘Deterrence Theory – Crime’ in James D. Wright (ed), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, 2nd ed, 2015) 255, 255.

²⁰ Mirko Bagaric & Theo Alexander, ‘The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn’t Work, Rehabilitation Might and the Implications for Sentencing’ (2012) 36 *Criminal Law Journal* 159, 159; Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ (2014) 62 *Buffalo Law Review* 1159, 1200

²¹ Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ (2014) 62 *Buffalo Law Review* 1159, 1202.

²² Ibid.

²³ *R. v. B.W.P.; R. v. B.V.N.* [2006] 1 SCR 941, [2] (Charron J), cited in Carla Cesaroni and Nicholas Bala, ‘Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges’ (2008) 34(1) *Queen’s Law Journal* 447, 465.

²⁴ Mirko Bagaric and Theo Alexander, ‘(Marginal) General Deterrence Doesn’t Work – and what it Means for Sentencing’ (2010) 35 *Criminal Law Journal* 269, 270.

Marginal General Deterrence

Marginal general deterrence concerns the question of whether there is a corresponding connection between the severity of the sanction and the frequency of an offence.²⁵

Marginal general deterrence will be the main focus of this report as, first, it is commonly raised as an objective to justify imposing heavier penalties for certain crimes, and secondly, it is the form in which general deterrence most often appears in the sentences of courts – judges regularly act on the basis that increases in sentence severity limits crime through the mechanism of marginal deterrence.²⁶

In considering this form of deterrence, we will attempt to determine the extent to which increases in sentence severity can reasonably be expected to lead to a corresponding reduction in offending.

Absolute General Deterrence

Absolute general deterrence, on the other hand, concerns the threshold question of whether there is *any* connection (not necessarily a linear one) between the presence of criminal sanctions, of whatever nature, and the incidence of criminal conduct.²⁷ General deterrence in the absolute sense, refers to the idea that there is a connection between a drastic reduction/increase in the likelihood (perceived or real) of punishment for criminal conduct, and human behavioural responses²⁸

In considering this form of deterrence, the question becomes more of an examination of the extent to which the *certainty* (and to a certain extent swiftness) of criminal sanctions leads to any reduction in offending.

2 A ‘PURPOSE OF SENTENCING’

As outlined in Report 1, ‘deterrence’ is one of the five ‘purposes of sentencing’ – the others being retribution, incapacitation, rehabilitation, and denunciation.²⁹ To illustrate the concept of deterrence as a purpose of sentencing, its application in Australian sentencing law and practice will be briefly explored, by way of example.

Deterrence remains a key concept in sentencing legislation in each Australian jurisdiction,³⁰ and courts have

²⁵ Mirko Bagaric and Theo Alexander, '(Marginal) General Deterrence Doesn't Work – and what it Means for Sentencing' (2010) 35 *Criminal Law Journal* 269, 270; Mirko Bagaric, 'A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals' (2014) 62 *Buffalo Law Review* 1159, 1202.

²⁶ Sir William Young, 'The Effects of Imprisonment on Offending: A Judge's Perspective' (2010) 1 *Criminal Law Review* 3, 9.

²⁷ Mirko Bagaric and Theo Alexander, '(Marginal) General Deterrence Doesn't Work – and what it Means for Sentencing' (2010) 35 *Criminal Law Journal* 269, 270; Mirko Bagaric, 'A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals' (2014) 62 *Buffalo Law Review* 1159, 1202.

²⁸ Mirko Bagaric and Theo Alexander, '(Marginal) General Deterrence Doesn't Work – and what it Means for Sentencing' (2010) 35 *Criminal Law Journal* 269, 280.

²⁹ See Part 1 of Report 1 for a complete look at the other ‘Principles and Purposes of Sentencing’.

³⁰ See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(b); *Sentencing Act 1995* (NT) s 5(1)(c); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c); *Sentencing Act 1991* (Vic) s 5(1)(b); *Criminal Law (Sentencing) Act 1988* (SA) s 10(j).

continually held that weight should be given to both specific and general deterrence for a range of offences,³¹ including cases involving sexual offences against children.³² Deterrence (especially in the form of marginal general deterrence as discussed above) has played a ‘cardinal role in sentencing law and practice’ for some time, and has been widely endorsed as ‘the paramount objective of sentencing.’³³ An early statement of this idea is seen *R v Radich*, where the New Zealand Supreme Court stated that:

One of the main purposes of punishment … is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, [deterrence] has been the main purpose of punishment and still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only light punishment.³⁴

This passage has been cited with approval in numerous Australian cases,³⁵ and it has since even been asserted that the ‘chief purpose of the criminal law is to deter those who are tempted to breach its provisions.’³⁶ However, the courts have also noted over this time, that there is limited evidence regarding the effectiveness of deterrence, especially general deterrence. For example, in *Yardley v Betts* (1979), King CJ remarked:

The courts must assume, *although the evidence is wanting*, that the sentences which they impose have the effect of deterring *at least some people* from committing crime.³⁷

The sentiment that general deterrence may be of limited utility in some circumstances was reiterated by the High Court of Australia in *Munda v Western Australia* (2013), where the court noted that:

…general deterrence has little rational claim upon the sentencing discretion in relation to crimes which are not premeditated. That argument has special force where prolonged and widespread social disadvantage has produced communities so demoralised or alienated that it is unreasonable to expect the conduct of individuals within those communities to be controlled by rational calculation of the consequences of misconduct. In such cases it may be said that heavy sentences are likely to be of little utility in reducing the general incidence of crimes, especially crimes of passion.³⁸

Despite questions as to the utility of deterrence, the need to acknowledge and incorporate general deterrence in sentencing assessments is recognised as a legal imperative in Australia.³⁹ For example, even before s 3A(b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) was enacted (affirming the continued relevance of deterrence), Spigelman CJ, in *R v Wong*, stated that:

There are significant differences of opinion as to the deterrent effect of sentences, particularly, the deterrent effect of marginal changes in sentence. Nevertheless, the fact that penalties operate as a deterrent is a structural assumption of our criminal justice system. Legislation would be required to change the traditional

³¹ Judicial Commission of New South Wales, *Sentencing Bench Book – Purposes of Sentencing* (at May 2014) [2-240].

³² See especially, *R v ABS* [2005] NSWCCA 255 [26] (Buddin J); *R v CMB* [2014] NSWCCA 5, [47]–[48] (Ward JA); *R v MJR* (2002) 54 NSWLR 368, 377 (Mason P); *R v TJH* [2001] NSWCCA 433, [35] (Wood CJ at CL).

³³ Mirko Bagaric and Theo Alexander, ‘(Marginal) General Deterrence Doesn’t Work – and what it Means for Sentencing’ (2010) 35 *Criminal Law Journal* 269, 270.

³⁴ *R v Radich* [1954] NZLR 86, 87.

³⁵ See, eg, *R v Porter* (1933) 55 CLR 182, 186; *R v Goodrich* (1955) 72 WN (NSW) 42; *R v AEM* [2002] NSWCCA 58, [92]; *R v Williscroft* [1975] VR 292, 298–9; *R v Lambert* (1990) 51 A Crim R 160, 171.

³⁶ *Walden v Hensler* (1987) 163 CLR 561, 569 (Brennen CJ).

³⁷ *Yardley v Betts* (1979) 22 SASR 108, 112 (King CJ) (emphasis added).

³⁸ *Munda v Western Australia* (2013) 249 CLR 600, 620 (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ)

³⁹ See, eg, *R v Miria* [2009] NSWCCA 68 [8], [11] (Grove J). In this appeal, the sentencing Judge’s failure to incorporate any reflection of general deterrence among the elements constituting his sentence assessment was held to be erroneous.

approach of the courts to this matter.⁴⁰

Deterrence remains a key purpose of sentencing and is applied in many jurisdictions, notwithstanding its increasing criticisms. However, if it can be determined that the weight of empirical evidence illustrates that specific and/or general deterrence is ineffective, as a purpose of sentencing, in reducing crimes rates or rates of reoffending, then this raises the question of whether legislatures and courts should continue to pursue deterrence as a sentencing aim, at least until its effectiveness can be proven.⁴¹

⁴⁰ *R v Wong* (1999) 48 NSWLR 340, 363 [127]–[128] (Spigelman CJ).

⁴¹ Mirko Bagaric and Theo Alexander, '(Marginal) General Deterrence Doesn't Work – and what it Means for Sentencing' (2010) 35 *Criminal Law Journal* 269, 283.

B SENTENCING MEASURES

1 IMPLEMENTING ‘STRICTER PENALTIES’

In examining and building on the previous research and analysis, this section of the report will briefly reiterate the examination of the sentencing measures covered in Report 1, namely, Mandatory Minimum Sentences, Capital Punishment, and Castration.⁴² Particular focus is given here (and the latter parts of this Report) to mandatory minimum sentences, as they represent a sentencing practice which is commonly implemented for sexual offences, under the rationale of deterrence (especially marginal general deterrence). References will be made throughout, where applicable, to the eight jurisdictions which were the focus of Report 1.

1.1 Mandatory Minimum Sentences

<i>Mandatory Sentences for Sexual Offences?</i>	<i>Yes</i>	<i>No</i>
Australia	✓	
Canada	✓	
United Kingdom		✓
Germany	✓	
Malaysia	✓	
New Zealand		✓
South Africa	✓	
USA (California and Florida)	✓	

Table 1 – Jurisdictional Overview of Mandatory Sentencing⁴³

As illustrated by Table 1, legislation requiring mandatory sentences for sexual offences has not been enacted in the United Kingdom or New Zealand; those countries that do employ mandatory sentencing for sexual offences each have their own method of application based on that jurisdiction’s prioritisation of certain sentencing principles.⁴⁴

Australia

Mandatory minimum sentences and/or standard non-parole periods (which are to be considered by a judge

⁴² See Report 1, Part 2 for a detailed analysis of these sentencing measures in various jurisdictions.

⁴³ Report 1, 3.

⁴⁴ See Report 1, Part 2.

when making a sentencing assessment),⁴⁵ have been enacted in New South Wales, the Northern Territory, South Australia and Queensland. For example, in NSW, there is a standard non-parole period of 15 years for the offence of sexual intercourse with a child under 10,⁴⁶ with a maximum penalty of life imprisonment.⁴⁷ Queensland's 'Two Strike Child Sex Offender' amendments⁴⁸ introduced in 2010, imposes a mandatory sentence of life imprisonment (25 years), with a minimum non-parole period of 20 years, on repeat serious child sex offenders.⁴⁹ Further, the offender may also be liable to indefinite detention if the court determines that they represent a serious danger to the community, on the basis of their character or the exceptional severity of the nature of their offence, among other things.⁵⁰

Such measures were brought in amongst broader calls for governments to introduce more stringent and consistent sentencing for serious offences.⁵¹ This approach reflects the 'tough on crime' position that is increasingly common across many Australian jurisdictions,⁵² and deterrence is frequently invoked as a purpose and aim of sentencing across these jurisdictions.⁵³

Canada

Mandatory minimum sentences currently apply for offences of a sexual nature where the victim is under the age of 16;⁵⁴ if the victim is over 16 years of age, there is no mandatory minimum sentence that must be imposed.⁵⁵ For example, 'sexual interference' with a person under 16 carries a minimum punishment of 1 year imprisonment.⁵⁶ These mandatory minimum penalties for sexual offences against children were mainly introduced under the *Safe Streets and Communities Act*,⁵⁷ in 2012. Similar to the Australian context, they were drafted in response to increasing concern about the rates of sexual offences against children, and were introduced as a means for Parliament to appear as being 'tough on crime',⁵⁸ under the rationale of deterring such offences.⁵⁹

⁴⁵ See, eg, *Muldock v The Queen* (2011) 244 CLR 120, which outlines how this fits into appropriate assessment procedure.

⁴⁶ *Crimes Act 1900* (NSW) s 66A.

⁴⁷ *Ibid* s 66A(1).

⁴⁸ *Criminal Law (Two Strike Child Sex Offender) Amendment Act 2010* (Qld)

⁴⁹ *Penalties and Sentences Act 1992* (Qld) s 161E(2).

⁵⁰ See *Penalties and Sentences Act 1992* (Qld) s 163.

⁵¹ Law Library of Congress, *Sentencing Guidelines* (April 2014) <<https://www.loc.gov/law/help/sentencing-guidelines/sentencing-guidelines.pdf>>.

⁵² Mirko Bagaric and Athula Pathinayake, 'Jail Up; Crime Down Does Not Justify Australia Becoming an Incarceration Nation' (2014) 40 *Australian Bar Review* 64, 64.

⁵³ *Ibid*.

⁵⁴ *Criminal Code*, RSC 1985, c C-46, ss 151–3, 155, 271–3.

⁵⁵ But see: *Criminal Code*, s 153(1) for sexual exploitation which applies to a child between the ages of 14 years and 18 years.

⁵⁶ *Criminal Code*, RSC 1985, c C-46, ss 151.

⁵⁷ *Safe Streets and Communities Act*, SC 2012, c 1.

⁵⁸ Nicole Crutcher, 'The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada' (2001) 39 *Osgoode Hall Law Journal* 273, 273, 280.

⁵⁹ Elizabeth Sheehy, 'Mandatory Minimum Sentences: Law and Policy' (2001) 39 *Osgoode Hall Law Journal* 261, 263; Nicole Crutcher, 'The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada' (2001) 39 *Osgoode Hall Law Journal* 273, 280; Anthony N Doob and Carla Cesaroni, 'The Political Attractiveness of Mandatory Minimum Sentences' (2001) 39 *Osgoode Hall Law Journal* 287, 288; Anthony N Doob, 'Principled sentencing, politics, and restraint in the use of imprisonment: Canada's break with its history' (2012) IX *Champ Pénal* 48.

England and Wales

Mandatory minimum sentences are only imposed for murder offences, which carry a life sentence⁶⁰ (though in most cases the offender will be considered for parole once they have served the minimum term prescribed by the court).⁶¹

However, in relation to sexual offences against children,⁶² the Sentencing Council for England and Wales has issued a *Sexual Offences Definitive Guideline*,⁶³ to assist courts in sentencing assessments. The guidelines provide a ‘framework for the sentencing of sexual offences’,⁶⁴ under which the courts must examine, inter alia, the suggested ‘starting point’ and ‘category range’ for sentencing offenders, including in relation to sexual crimes where the victim is a child.⁶⁵ For example, where an offender is convicted of rape of a child under 13⁶⁶ the broad offence range is 6–19 years custody,⁶⁷ but in cases of ‘particular gravity, reflected by multiple features of harm and culpability’ the guidelines sets a starting point of 16 years’ custody and a category range of 13–19 years’ custody,⁶⁸ with a maximum of life.

It is also worth noting that a ‘quasi-mandatory’ minimum sentence of life may also be imposed upon a second conviction for a serious violent or sexual offence;⁶⁹ there are also a range of other ‘mandatory’ sentences for drug,⁷⁰ burglary,⁷¹ and weapons⁷² related offences. However, the courts are not required to follow the Guidelines, nor are they required to hand down these ‘quasi-mandatory’ sentences, if there are circumstances relating to the offence, or the offender, which in all circumstances ‘would make it unjust to do so’.⁷³

Germany

Minimum sentences are imposed for a broad range of offences,⁷⁴ however, for selected offences considered the most serious, including homicide and rape, this minimum is raised to raised two, three, five, or in exceptional cases, ten years.⁷⁵ Despite this, such increased minimums often contain a provision which reopens

⁶⁰ *Criminal Justice Act 2003* (UK) s 277; However, if the offender is under 18, then they are detained during Her Majesty’s Pleasure, and if under 21, they are sentenced to custody for life under the *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 90, 93.

⁶¹ The Crown Prosecution Service, *Sentencing – Mandatory Life Sentences in Murder Cases* <http://www.cps.gov.uk/legal/s_to_u/sentencing_-_mandatory_life_sentences_in_murder_cases/>.

⁶² Covered in the *Sexual Offences Act 2003* (UK) c 42, ss 5–24, 45–50. See also the *Sexual Offences Act 1956*, 4 & 5 Eliz 2, c 69 (although most the 1956 Act has been repealed by the 2003 Act (except ss 33–7), the repealed sections still apply to sex crimes committed before the repeal (1 May 2004). Anyone under the age of 18 in England is considered a child: Department of Education, ‘United Nations Convention on the Rights of the Child: How Legislation Underpins Implementation in England’ (Policy Paper, UK Government, 2010). The current age of consent is 16: The Crown Prosecution Service, *Rape and Sexual Offences: Chapter 3: Consent* <http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/consent/>.

⁶³ Sentencing Council for England and Wales, *Sexual Offences Definitive Guideline* (2014) (‘the Guidelines’).

⁶⁴ Carol Nicholls Et Al, Center for Gender and Violence Research, University of Bristol, *Attitudes to Sentencing Sexual Offences* (2012) 2.

⁶⁵ Sentencing Council for England and Wales, *Sexual Offences Definitive Guideline* (2014) 27–75.

⁶⁶ *Sexual Offences Act 2003* (UK) c 42, s 5.

⁶⁷ Sentencing Council for England and Wales, *Sexual Offences Definitive Guideline* (2014) 27

⁶⁸ *Ibid* 30.

⁶⁹ *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) s 122; *Criminal Justice Act 2003* (UK) s 224A.

⁷⁰ *Power of Criminal Courts (Sentencing) Act 2000* (UK) s 110.

⁷¹ *Ibid* s 111.

⁷² *Firearms Act 1968* (UK) s 51A.

⁷³ The Crown Prosecution Service, *Sentencing Dangerous Offenders* <http://www.cps.gov.uk/legal/s_to_u/sentencing_and_dangerous_offenders/>.

⁷⁴ Hans-Jörg Albrecht, ‘Sentencing in Germany: Explaining long-term stability in the structure of criminal sanctions and sentencing’ (2013) 76(1) *Law of Contemporary Problems* 211, 214–5.

⁷⁵ *Ibid*.

the minimum, and provides for a lesser minimum in cases of crimes of ‘minder schwere Fälle’ (‘less seriousness’).⁷⁶

In relation to minimum sentences for sexual offences against children, ‘Child abuse’ carries a minimum sentence of 3 months, or 1 year in cases of a child under 14 or an otherwise ‘serious case’,⁷⁷ ‘Aggravated child abuse’ carries a minimum sentence of 3 months, or 1 year if convicted of similar offence within previous five years, 2 years for cases involving rape of child, serious injury, production of child pornography, or 5 years for cases involving serious physical abuse, danger of death;⁷⁸ and ‘Child abuse causing death’ carries a minimum sentence of 10 years’ imprisonment.⁷⁹

There are two key factors of consideration in determining the duration of a sentencing: the personal guilt of the offender (which remains the central factor),⁸⁰ and the impact the sentence may have on the offender.⁸¹ Handing down separate or consecutive sentences, in the case of multiple offences, is prohibited.⁸² The provision allowing for higher maximum sentence for repeat offenders was abolished in 1986,⁸³ although the German Criminal Code does include recidivism as an aggravating factor in sexual assault cases.⁸⁴

In considering the substantive and procedural rules of the German system of sentencing as a whole, Albrecht concluded that, in reality, there are ‘no effective statutory mandatory minimums’ and there are ‘incentives to resort to lower penalty ranges with provisions for: (i) Simplified proceedings, and (ii) Reduced obligations to give reasons for sentencing’.⁸⁵

Given that the minimums outlined are quite low, and there is a relatively broad range between the minimum and maximum sentence, their application appears to be somewhat less focussed on the aim of deterrence through severity (in contrast to other jurisdictions ‘tough on crime’ approach), but more focused on ensuring that the sentencing principles of proportionality, equal application and the protection of human rights and human dignity, are upheld.⁸⁶

Malaysia

Mandatory minimum sentences are in place for a range of criminal offences, including provisions regarding sexual offences against children, which are specified in both the *Penal Code*⁸⁷ and the *Child Act*.⁸⁸

In relation to minimum sentences for sexual offences against children, the offence of ‘rape’, where the intercourse is without consent where the female is under 16, or regardless of consent where female is under 12, carries a minimum sentence of 10 years, with a maximum of 30 years, plus the offender may be liable to

⁷⁶ Ibid.

⁷⁷ *Strafgesetzbuch* [German Criminal Code] (Germany) § 176 (‘German Criminal Code’).

⁷⁸ *Strafgesetzbuch* [German Criminal Code] (Germany) § 176a.

⁷⁹ Ibid § 176b.

⁸⁰ Hans-Jörg Albrecht, ‘Sentencing in Germany: Explaining long-term stability in the structure of criminal sanctions and sentencing’ (2013) 76(1) *Law of Contemporary Problems* 211, 214.

⁸¹ *Strafgesetzbuch* [German Criminal Code] (Germany) § 46.

⁸² Ibid § 54.

⁸³ Hans-Jörg Albrecht, ‘Sentencing in Germany: Explaining long-term stability in the structure of criminal sanctions and sentencing’ (2013) 76(1) *Law of Contemporary Problems* 211, 215.

⁸⁴ Ibid 215.

⁸⁵ Ibid 216.

⁸⁶ For a discussion of these principles in the context of sentencing in Germany, see Report 1, Part 2, Chapter 4.

⁸⁷ *Penal Code 2015* (Malaysia)

⁸⁸ *Child Act 2001* (Malaysia)

judicial whipping.⁸⁹ ‘Rape resulting in death’ carries a minimum sentence of 15 years, a maximum of 30 years, and the possibility of being sentenced to death.⁹⁰ ‘Incest’ carries a minimum of 6 years, and a maximum of 20, and the offender may be liable to whipping.⁹¹ Any person in the care of a child, who sexually abuses the child, or permits that to child to be so abused, is liable to a maximum fine of RM20 000 (around US\$4800), a maximum of 10 years’ imprisonment, or both; additionally, a good behaviour bond may also be permissible.⁹²

Sentences falling near the maximum sentence are reserved for the ‘worst cases of the sort falling within the prohibition’, which involves consideration of the nature of the crime and the circumstances of the criminal.⁹³

New Zealand

There is a statutory presumption in favour of a sentence of life imprisonment for murder, unless such a sentence would be manifestly unjust.⁹⁴ In the strict sense, there are no statutory mandatory minimum sentences for sexual offences, including offences against children, in New Zealand.⁹⁵

In relation to sexual offences against children, the *Crimes Act 1961* (NZ) contains offences for ‘sexual conduct with a child under 12’,⁹⁶ and ‘sexual conduct with a young person under 16’.⁹⁷ These carry maximum sentences of up to 14 years for ‘sexual connection’⁹⁸ with a child under 12,⁹⁹ and up to 10 years for sexual connection with a young person under 16.¹⁰⁰ The general offence of ‘sexual violation’¹⁰¹ which includes rape and unlawful sexual connection, carries a sentence of up to 20 years’ imprisonment.¹⁰²

Despite the lack of statutory minimum sentences in relation to sexual offences, courts generally follow a staged approach in determining the length of a sentence,¹⁰³ as found within certain guideline judgements.¹⁰⁴ The Court of Appeal in *R v AM*¹⁰⁵ outlined a number of ‘rape bands’ and ‘unlawful sexual connection bands’, from which a judge is to establish a starting point for sentencing those found guilty of sexual violation offences – the lowest band for rape directs a starting point of between 6-8 years,¹⁰⁶ while the minimum band for unlawful sexual connection is a starting point of between 2-5 years.¹⁰⁷

⁸⁹ *Penal Code 2015* (Malaysia) s 376(2).

⁹⁰ *Ibid* s 376(4)

⁹¹ *Ibid* s 376A.

⁹² *Child Act 2001* (Malaysia) s 31(2).

⁹³ Office of the Chief Registrar – Federal Court of Malaysia, *Bench Book - Sentencing*, (27 January 2014) 153; See, eg, *PP v Tia Ah Leng* [2000] 5 MLJ 401; *Mohd Jalani bin Sailman v PP* [1997] 5 MLJ 583.

⁹⁴ *Crimes Act 1961* (NZ) s 102.

⁹⁵ Ministry of Justice, 2. *Legislative Framework for Use of Imprisonment* (June 1998)

<<http://www.justice.govt.nz/publications/publications-archived/1998/the-use-of-imprisonment-in-new-zealand>>.

⁹⁶ *Crimes Act 1961* (NZ) s 132.

⁹⁷ *Ibid* s 134.

⁹⁸ *Ibid* s 2(1) (definition of ‘sexual connection’)

⁹⁹ *Ibid* s 132(1).

¹⁰⁰ *Ibid* s 134(1).

¹⁰¹ *Ibid* s 128.

¹⁰² *Ibid* s 128B(1).

¹⁰³ Rebecca Stoop, ‘Sentencing Sex Offenders: A Therapeutic Jurisprudence Inquiry into the Current Legal Framework’ (University of Otago, 10 October 2014) 9.

¹⁰⁴ *R v Taukei* [2005] 3 NZLR 372; *Hessell v R* [2011] 1 NZLR 607; *R v AM* [2010] 2 NZLR 750.

¹⁰⁵ [2010] 2 NZLR 750.

¹⁰⁶ *R v AM* [2010] 2 NZLR 750, [90]–[112].

¹⁰⁷ *R v AM* [2010] 2 NZLR 750, [113]–[124].

New Zealand also has a ‘three strikes’¹⁰⁸ regime;¹⁰⁹ under this regime, when sentenced for their first ‘serious violent offence’,¹¹⁰ an offender also receives a warning of the consequences of further serious convictions.¹¹¹ If then convicted of a second serious violent offence and sentenced to imprisonment, the offender must serve the sentence in full, without parole.¹¹² If then convicted of a third serious offence, the offender will be given the maximum sentence prescribed for that offence (in effect, becoming a mandatory sentence), with no parole, unless the court determines it would be ‘manifestly unjust to make the order’.¹¹³

The ‘bands’ sentencing approach, and the ‘three strikes’ regime (which both arguably have the effect of acting as ‘quasi-mandatory’ sentences), in conjunction other regimes including Mandatory Periods of Imprisonment (which act to extend the standard non-parole period for an offence), Extended Supervision Orders and preventative detention,¹¹⁴ can all be used to extend the duration of imprisonment, thereby increasing the severity of potential sanctions.

South Africa

Mandatory minimum sentences of varying degrees¹¹⁵ are prescribed for a range of certain ‘serious offences’.¹¹⁶

Schedule 2 of the *Criminal Law Amendment Act* prescribes that for sexual offences against children falling under Part I – including rape,¹¹⁷ or compelled rape,¹¹⁸ where the victim is under the age of 16 – there is a mandatory minimum sentence of imprisonment for life.¹¹⁹ For sexual offences against children falling under Part III – including sexual exploitation of a child¹²⁰ – there is a mandatory minimum sentence of 10 years (first time offender),¹²¹ 15 years (second time offender),¹²² or 20 years (third time offender).¹²³ However, courts are permitted to depart from these prescribed minimum sentences if they are stratified that there are ‘substantial or compelling circumstances’,¹²⁴ warranting a lesser sentence.¹²⁵

After South Africa’s transition into democracy in the 1990s, criticism began to be levelled at the judiciary for their perceived leniency in the treatment of serious crimes.¹²⁶ In response to the public outcry, a committee was established to examine sentencing practices, and the desirability of putting in place a mandatory minimum

¹⁰⁸ Terminology adopted from: Rebecca Stoop, ‘Sentencing Sex Offenders: A Therapeutic Jurisprudence Inquiry into the Current Legal Framework’ (University of Otago, 10 October 2014).

¹⁰⁹ *Sentencing Act 2002* (NZ) ss 86A–I;

¹¹⁰ *Sentencing Act 2002* (NZ) s 86A (definition of ‘serious violent offence’)

¹¹¹ *Ibid* s 86B(1).

¹¹² *Ibid* s 86C(4)(a).

¹¹³ *Ibid* s 86D(3).

¹¹⁴ For a full exploration of the application of these regimes in New Zealand sentencing procedure, see Report 1, Part 2, Chapter 6, 128–31.

¹¹⁵ *Criminal Law Amendment Act 1997* (South Africa) s 51(1)–(2) (‘*Criminal Law Amendment Act*’).

¹¹⁶ *Criminal Law Amendment Act 1997* (South Africa) sch 2 pts I, II, III, IV.

¹¹⁷ *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007* (South Africa) s 3 (‘*Sexual Offences Act*’)

¹¹⁸ *Ibid* s 4.

¹¹⁹ *Criminal Law Amendment Act 1997* (South Africa) s 51(1)

¹²⁰ *Ibid* s 17.

¹²¹ *Ibid* s 51(2)(b)(i).

¹²² *Ibid* s 51(2)(b)(ii).

¹²³ *Ibid* s 51(2)(b)(iii).

¹²⁴ *Ibid* s 51(3)(a).

¹²⁵ Law Library of Congress, *Sentencing Guidelines* (April 2014) 29 <<https://www.loc.gov/law/help/sentencing-guidelines/sentencing-guidelines.pdf>>.

¹²⁶ Julia Sloth-Nielsen and Louise Ehlers, ‘A Pyrrhic Victory? Mandatory and Minimum Sentences in South Africa’ (ISS Paper No. 111, Institute for Security Studies, 2005) 1.

sentencing regime.¹²⁷ In 1997 the Van de Heeven Committee¹²⁸ proposed a number of reforms to the sentencing regime, including the introduction of mandatory minimum sentences. In 1998, Parliament enacted the legislation prescribing mandatory minimum sentences for certain serious offences, ‘aimed at ensuring a *severe*, standardised, and consistent response from courts to the commission of such crimes’,¹²⁹ in order to curb the rising crime rates.¹³⁰

United States of America

Mandatory minimum sentences have been enacted in many US jurisdictions, including in California and Florida.

In relation to sexual offences against children, under the *California Penal Code*, the offence of rape,¹³¹ if the victim is a child under 14, carries a minimum sentence of 9 years’ imprisonment;¹³² if the victim is a minor,¹³³ but over the age of 14, the minimum sentence is 7 years’ imprisonment.¹³⁴ Where an adult engages in sexual intercourse with a child under 10 (whether under duress or not), the mandatory minimum sentence is 25 years’ imprisonment;¹³⁵ if engaged in oral copulation or ‘sexual penetration’,¹³⁶ the minimum sentence is 15 years.

The sentence for statutory rape (called ‘unlawful sexual intercourse’)¹³⁷ varies depending on the age difference between the offender and victim.¹³⁸ Where the offender is no more than 3 years older than the victim, statutory rape is classed a misdemeanour,¹³⁹ and the potential penalties include: informal probation, up to 1 year in county jail, and/or up to US\$1000 in fines.¹⁴⁰ Where the offender is more than 3 years older than the victim, the offense may be classed as either a misdemeanour or a felony¹⁴¹ – if charged as a felony, the potential sentence is 16 months, 2 years, or 3 years’ imprisonment.¹⁴² However, where the offender is 21 or over, and the victim is under 16, the potential sentence is increased to 2, 3 or 4 years’ imprisonment.¹⁴³

Recent changes to the *California Penal Code* expanded the scope of conduct falling under the rape and sexual battery offences,¹⁴⁴ and the severity of the mandatory minimum penalties in place for those offences.¹⁴⁵

Florida has followed a similar path, with a focus on increasing the severity of the punishments for offences. In relation to sexual offences against children, the broad offence of ‘sexual battery’¹⁴⁶ covers a range of

¹²⁷ Ibid.

¹²⁸ South African Law Reform Commission, *Sentencing: Mandatory Minimum Sentences*, Issue Paper 11 (1997) 54.

¹²⁹ *S v Malgas* [2001] 2 SA 1222, [8] (emphasis added).

¹³⁰ Law Library of Congress, *Sentencing Guidelines* (April 2014) 35 <<https://www.loc.gov/law/help/sentencing-guidelines/sentencing-guidelines.pdf>>.

¹³¹ Where it is accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another: Cal Penal Code § 261(a)(2).

¹³² Cal Penal Code § 264(c)(1).

¹³³ Ibid § 261.5: ‘a “minor” is a person under the age of 18 years’.

¹³⁴ Ibid § 264(c)(2).

¹³⁵ Ibid § 288.7.

¹³⁶ Ibid § 289

¹³⁷ Ibid § 261.5.

¹³⁸ Ibid § 261.5(b)–(d).

¹³⁹ Ibid § 261.5(b).

¹⁴⁰ Ibid § 272.

¹⁴¹ Ibid § 261.5(c).

¹⁴² Ibid §§ 261.5(c), 1170(h)(1).

¹⁴³ Ibid § 261.5(d)

¹⁴⁴ 2010 Cal. Legis. Serv. Ch. 219 (A.B. 1844) (West); 2013 Cal. Legis. Serv. Ch. 259 (A.B. 65) (West);

¹⁴⁵ 2002 Cal. Legis. Serv. Ch. 302 (S.B. 1421) (West)

¹⁴⁶ Fla Stat § 794.011.

conduct.¹⁴⁷ Sexual battery, where the offender is 18 or older, and the victim is younger than 12, carries a minimum sentence of 25 years' imprisonment.¹⁴⁸ For, aggravated sexual battery, where the victim is older than 12 but under 18, the mandatory minimum is 15 years.¹⁴⁹

1.2 Capital Punishment

<i>Capital Punishment</i>	<i>Prohibition</i>	<i>No Prohibition</i>
Australia	✓	
Canada	✓	
United Kingdom	✓	
Germany	✓	
Malaysia		✓
New Zealand	✓	
South Africa	✓	
USA (California & Florida)		✓

Table 2 – Jurisdictional Overview of Capital Punishment¹⁵⁰

As Table 2 shows, capital punishment has been abolished in six of the eight focus jurisdictions. In the context of sexual offences, in Malaysia the death penalty is a sentencing option in the case of rape resulting in death, and it is also available in the United States of America, in cases where a victim dies in the commission of any crime, including a sexual offence.

Malaysia

Capital Punishment remains sentencing option in Malaysia, both as a discretionary and a mandatory punishment. In relation to sexual offences against children, for example, rape or attempted rape of a child resulting in their death, would potentially be punishable by death.¹⁵¹ Despite capital sentences still being handed down relatively regularly, the actual number of executions is quite low in comparison; with more than 100 sentences imposed, but only 10 executions, over the last ten years.¹⁵² There have also been signs that Malaysia intends to abolish capital punishment as a sentencing option, with a Malaysian representative to the UN stating that the Malaysian Parliament was discussing 'replacing the death penalty with life imprisonment'.¹⁵³ Similarly, the Attorney General's Chambers stated that it was no longer going to

¹⁴⁷ Ibid § 794.011(1)(b) (definition of 'sexual battery')

¹⁴⁸ Ibid § 794.011(2)

¹⁴⁹ Ibid § 794.011(4)(a).

¹⁵⁰ Report 1, 4.

¹⁵¹ *Penal Code 2015* (Malaysia) s 376(4).

¹⁵² Roger Hood, *The Death Penalty in Malaysia: Public opinion on the mandatory death penalty for drug trafficking, murder and firearms offences* (October 2012) vii <<http://www.deathpenaltyproject.org/wp-content/uploads/2013/07/Malaysia-report.pdf>>.

¹⁵³ Ibid.

contemplate enacting laws carrying capital punishment, and were evaluating whether the mandatory death penalty attaching to certain offences should be changed to a discretionary sentence.¹⁵⁴

United States

The long enduring practice of capital punishment remains a sentencing option in the US, and is still a regular occurrence in some states.¹⁵⁵ However, the Supreme Court of the United States has concluded that capital punishment is not available for offences of sexual assault, or any other kind of sexual offence against children, unless the offending conduct results in the death of the victim.¹⁵⁶

1.3 Castration

<i>Castration:</i>	<i>As a Sentencing Option</i>	<i>As a Condition for Release from Prison</i>	<i>Other</i>
Australia		✓	
Canada		✓	
United Kingdom			✓
Germany			✓
Malaysia			
New Zealand			
South Africa			
USA (California & Florida)	✓	✓	

Table 3 – Jurisdictional Overview of Castration¹⁵⁷

As outlined in Table 3, castration is not utilised in South Africa, New Zealand and Malaysia. In Australia, castration is offered to convicted offenders as an alternative to incarceration,¹⁵⁸ or as a condition for early release from prison, in the states of Queensland, New South Wales, and Western Australia in matters involving offenders classified as ‘dangerous sex offenders’.¹⁵⁹

Canada uses castration as a condition of release for a limited scope of offenders. England and Wales does have surgical castration available as a treatment option, as does Germany. Finally, the United States of America has chemical castration as both a sentencing option and as a condition for release from prison.

As is evident, castration is widely used in a range of jurisdictions in relation to sexual offenders. While

¹⁵⁴ Ibid.

¹⁵⁵ See generally, Paul Marcus, ‘Capital Punishment in the United States and Beyond’ (2007) 31(3) *Melbourne University Law Review* 837.

¹⁵⁶ See especially, *Gregg v Georgia*, 428 US 153, 173 (1976); *Coker v Georgia*, 433 US 584 (1977); *Kennedy v Louisiana* 554 US 407 (2008).

¹⁵⁷ Report 1, 4.

¹⁵⁸ Richard G Fox, ‘The Compulsion of Voluntary Treatment in Sentencing’ (1992) 16 *Criminal Law Journal* 37, 40.

¹⁵⁹ Ibid 39.

arguments have been put forward that castration could serve as both a general deterrent to potential offenders¹⁶⁰ and specific deterrent to the offender – on the basis that ‘it is axiomatic that an offender would not want to undergo such a procedure and lose his ability to function sexually’¹⁶¹ – it will not be given the same treatment in this report as mandatory minimum sentences.

Castration is more closely related with the other purposes of sentencing, rather than deterrence, in the strict sense. Chemical castration is largely an incapacitative measure,¹⁶² in that it is aimed at preventing the possibility of reoffending for convicted paedophiles and child sex offenders.¹⁶³ It may also satisfy a rehabilitation purpose, given there are no permanent effects on sex offenders after treatment has ceased.¹⁶⁴

With regard to castration and deterrence, studies have noted that many sexual offenders lack ‘volitional control’ over sexual behaviour, which means, in effect, they are unable to control the criminal sexual conduct.¹⁶⁵ Since they lack the ability to control their behaviour, threats of chemical castration will not ‘deter’ this class of offenders.¹⁶⁶ Further, to be deterred by the possibility of castration, the offender must perceive the experience of chemical castration as unpleasant or painful, or otherwise detrimental practice to be avoided.¹⁶⁷ However, this would not be the case where a sex offender wishes to be castrated, to help deal with their urges and stop their criminal sexual behaviour. Thus, if the practice reduces the offender’s strong sexual urges, and allows them to make rational and responsible sexual decisions, it is very likely the experience would be, and be perceived to be, an effective treatment for an unwanted illness;¹⁶⁸ in which case, the practice would have no specific deterrence effect for this class of offender. Correspondingly, an offender who does *not* wish to deal with their criminal sexual urges, is the kind most unlikely to be deterred anyway.

¹⁶⁰ See, eg, Ryan Cauley, ‘Is chemical castration a progressive or primitive punishment’ (2014) 17(3) *Journal of Gender, Race and Justice* 493, 508.

¹⁶¹ *Ibid.*

¹⁶² Kelly M Socia, *Residence Restriction Legislation, Sex Crime Rates, and the Spatial Distribution of Sex Offender Residences* (PhD Dissertation, State University of New York, Albany, 2011) 2.

¹⁶³ Department of Justice (NSW), ‘Taskforce on Anti-Libido Treatment for Child Sex Offenders’ (Media Release, 26 August 2015) <<http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2015/Taskforce-on-anti-libido-treatment-of-child-sex-offenders.aspx>>.

¹⁶⁴ Uger Nedim, *Chemical Castration of Child Sex Offenders: Is It Effective?* (2 September 2015) Sydney Criminal Lawyers <<http://www.sydneycriminallawyers.com.au/blog/chemical-castration-of-child-sex-offenders-is-it-effective/>>.

¹⁶⁵ Ellen F Carey, ‘Dangerous Sex Offenders and Volitional Control: Due Process Clause Does Not Require Complete Lack of Volition for Involuntary Civil Commitment’ (2003) 36 *Suffolk University Law Review* 591, 591 (2003).

¹⁶⁶ Ryan Cauley, ‘Is chemical castration a progressive or primitive punishment’ (2014) 17(3) *Journal of Gender, Race and Justice* 493, 508.

¹⁶⁷ Katrina L Sifferd, ‘Chemical Castration as Punishment’ in Nicole A Vincent (ed), *Neuro-Interventions And The Law: Regulating Human Mental Capacity* (Oxford University Press, forthcoming) 12.

¹⁶⁸ *Ibid.*

C DO STRICTER PENALTIES HAVE A DETERRENT EFFECT?

1 CRITICAL DEBATES AND DISCUSSION

1.1 Introduction

As noted above, deterrence theory is a virtually unchallenged orthodoxy in Australian courts,¹⁶⁹ which is widely endorsed as ‘the paramount objective of sentencing’,¹⁷⁰ and has even been described as the ‘chief purpose of the criminal law’.¹⁷¹

The major rationale for imposing stricter penalties, such as mandatory sentences, for certain offences, is predicated on the assumption that the harsher the punishment, the greater the deterrent effect on current and potential offenders,¹⁷² leading to a corresponding reduction in offending, and reoffending, rates.¹⁷³

The early ‘rational’ or ‘economic’ crime models,¹⁷⁴ based on the premise that the commission of an offence is a rational response to a situation where the marginal benefit of committing the offence outweighs the marginal cost, provide support the concept of deterrence through stricter penalties. Under this model, offenders will only commit crimes (or reoffend) where the benefit they derive from the offence exceeds the consequences of possible penalties flowing from the offending behaviour.¹⁷⁵ Thus, under the rational choice theory, imposing harsher penalties should result in lower crime and reoffending rates – the individual offender is specifically deterred from reoffending (as they look avoid the punishment in the future), and potential offenders are deterred generally because of the example provided by the punishment imposed on the individual offender, which they will seek to avoid.¹⁷⁶

1.2 Deterrence Through Severity of Punishment

This section will examine whether increasing the severity of punishment for an offence, such as setting a mandatory minimum sentence, has a corresponding increase its deterrent effect, and achieves the intended

¹⁶⁹ Mirko Bagaric and Theo Alexander, ‘(Marginal) General Deterrence Doesn’t Work – and what it Means for Sentencing’ (2010) 35 *Criminal Law Journal* 269, 269, 272.

¹⁷⁰ *Ibid* 270.

¹⁷¹ *Walden v Hensler* (1987) 163 CLR 561, 569 (Brennen CJ).

¹⁷² *R v Henry* (1999) 46 NSWLR 346, 386 (Spigelman CJ); Judicial Commission of New South Wales, *Sentencing Bench Book – Purposes of Sentencing* (at May 2014) [2-240].

¹⁷³ Michael Tonry, ‘The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings’ (2009) 38(1) *Crime and Justice* 65, 90.

¹⁷⁴ See, eg, M K Block and John M Heineke, ‘A Labor Theoretic Analysis of the Criminal Choice’ (1975) 65(3) *American Economic Review* 314; Gary Becker and Kevin Murphy, ‘A Theory of Rational Addiction’ (1988) 96(4) *Journal of Political Economy* 675; Mitchell Polinsky and Steven Shavell, ‘On the Disutility and Discounting of Imprisonment and the Theory of Deterrence’ (1999) 28(1) *Journal of Legal Studies* 1.

¹⁷⁵ David A. Anderson, ‘The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging’ (2002) 4(2) *American Law and Economics Review* 295, 298; Carla Cesaroni and Nicholas Bala, ‘Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges’ (2008) 34(1) *Queen’s Law Journal* 447, 468.

¹⁷⁶ David A. Anderson, ‘The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging’ (2002) 4(2) *American Law and Economics Review* 295, 298; Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ (2014) 62 *Buffalo Law Review* 1159, 1202.

aim of reducing crime rates (general deterrence) and rates of recidivism (specific deterrence).

1.2.1 Specific Deterrence

As discussed above, specific deterrence aims to discourage the individual offender by punishing them for their transgressions and, in doing so, illustrating to them the harsh consequences of offending, and dissuading them from re-offending in the future.¹⁷⁷

However, as to whether the length of imprisonment, or even imprisonment itself, is effective in deterring crime for those who experience it (that is, specific deterrence), remains questionable.¹⁷⁸

Nagin, Cullen and Jonson, in their analysis of the impact of custodial sanctions versus non-custodial sanctions and the effect of sentence length on re-offending, provide an extensive review of the literature regarding the utility of specific deterrence.¹⁷⁹ Their review examined over 50 studies – 6 experimental studies where custodial versus non-custodial sentences were randomly assigned,¹⁸⁰ 11 studies involving matched pairs,¹⁸¹ 31 regression-based studies,¹⁸² and 7 other studies not falling under any of those three categories.¹⁸³ They acknowledge that very little is known about the effects of imprisonment on deterrence and recidivism, and that strong arguments have been put forward that it may even have a ‘criminogenic effect’ – referring to the possible corrupting effects of punishment,¹⁸⁴ e.g. due to anti-social experiences in prison, or the stigma experience upon release.¹⁸⁵ Nagin et al observe that the literature on the subject establishes that, imprisonment appears to have a null or mildly criminogenic effect, rather than the intended preventative effect, on future criminal behaviour¹⁸⁶ – with the rate of reoffending among those sent to prison being the same or even higher than those who receive non-custodial punishments.¹⁸⁷ Subsequent studies have similarly observed that inflicting harsher sanctions on people does not make them less likely to re-offend in the future.¹⁸⁸

As is clear from the above, the current empirical data suggests that specific deterrence does not work, and it is futile to increase penalties with the aim of decreasing recidivism.

¹⁷⁷ Mirko Bagaric & Theo Alexander, ‘The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn’t Work, Rehabilitation Might and the Implications for Sentencing’ (2012) 36 *Criminal Law Journal* 159, 159; Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ (2014) 62 *Buffalo Law Review* 1159, 1200

¹⁷⁸ Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 818.

¹⁷⁹ Daniel S Nagin, Francis T Cullen, and Cheryl L Jonson, ‘Imprisonment and Reoffending’ (2009) 38 *Crime and Justice* 115.

¹⁸⁰ Ibid 144–7.

¹⁸¹ Ibid 148–53.

¹⁸² Ibid 154–62.

¹⁸³ Ibid 163–7.

¹⁸⁴ Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ (2014) 62 *Buffalo Law Review* 1159, 1202.

¹⁸⁵ Daniel S Nagin, Francis T Cullen, and Cheryl L Jonson, ‘Imprisonment and Reoffending’ (2009) 38 *Crime and Justice* 115, 115.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid 145.

¹⁸⁸ See, eg, Donald P. Green and Daniel Winik, ‘Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders’ (2010) 48 *Criminology* 357; Mirko Bagaric & Theo Alexander, ‘The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn’t Work, Rehabilitation Might and the Implications for Sentencing’ (2012) 36 *Criminal Law Journal* 159, 161; Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ (2014) 62 *Buffalo Law Review* 1159, 1201.

1.2.2 General Deterrence

General deterrence aims to dissuade potential offenders through the threat of expected punishment, using the sentence imposed on an individual offender to illustrate the negative consequences of offending.¹⁸⁹

The courts' allegiance to general deterrence theory, at least in Australia, is so steadfast that judges have refused to abandon it even in the face of apparent legislative exclusion of it as a sentencing objective.¹⁹⁰ For example, general deterrence was not expressly included as one of the mandatory factors of consideration in sentencing, under s 16A(1) of the *Crimes Act 1914* (Cth).¹⁹¹ Preceding the enactment of s 16A, the Australian Law Reform Commission, rejecting the philosophy behind the objective of sentencing to deter others, stated that:

To impose a punishment on one person by reference to a hypothetical crime of another runs completely counter to the overriding principle that punishment imposed on a person must be linked to the crime that he or she has committed. To single out an offender for increased punishment *pour encourager les autres* runs counter to the principles of consistency and justice...¹⁹²

The Commission considered it unfair to impose a stricter sanction on an individual offender because of the effects it might have on the behaviour of others.¹⁹³ Despite this explicit exclusion, in proceedings subsequent to the enactment of s 16A, the NSW Court of Criminal Appeal noted that general deterrence is one of 'the fundamental principles of sentencing, inherited from the ages', and promptly declared that this omission was 'surprising' and a 'legislative slip'.¹⁹⁴ The Court seemingly ignoring the purpose of the exclusion, considered general deterrence as one of the 'other matters'¹⁹⁵ which could be considered in addition to the fourteen express mandatory factors.¹⁹⁶ In a later case, the NSW Court of Criminal Appeal also held that a trial judge's statement that '[t]he general deterrent effect of any sentence is debatable, given that it will at best be published as a statistic and thus unlikely to cause anyone else to act differently', implied that he had not incorporated any reflection of general deterrence into the factors constituting his sentencing assessment, and that such an omission was erroneous.¹⁹⁷

This devotion to this principle of deterrence has proved to be impervious, not only to the research questioning its effectiveness (as we will see below), but also to appeals by defendants whose sentences, supposedly based largely on the objective of deterring others, were not reported by the media at all.¹⁹⁸

Marginal General Deterrence

As outlined above, marginal general deterrence is broadly understood as the theory that correlates increased

¹⁸⁹ Mirko Bagaric, 'A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals' (2014) 62 *Buffalo Law Review* 1159, 1202.

¹⁹⁰ Mirko Bagaric and Theo Alexander, '(Marginal) General Deterrence Doesn't Work – and what it Means for Sentencing' (2010) 35 *Criminal Law Journal* 269, 272.

¹⁹¹ *Crimes Act 1914* (Cth), ss 16A(1)–(2); note, specific deterrence is mentioned: s 16A(2)(j).

¹⁹² Law Reform Commission, *Sentencing*, Report No 44 (1988) 18, quoted in Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2012) 170.

¹⁹³ Mirko Bagaric and Theo Alexander, '(Marginal) General Deterrence Doesn't Work – and what it Means for Sentencing' (2010) 35 *Criminal Law Journal* 269, 272.

¹⁹⁴ *DPP (Cth) v Said KhodorEl Karhani* (1990) 21 NSWLR 370, 378.

¹⁹⁵ *Crimes Act 1914* (Cth), ss 16A(2).

¹⁹⁶ *DPP (Cth) v Said KhodorEl Karhani* (1990) 21 NSWLR 370, 378.

¹⁹⁷ *R v Miria* [2009] NSWCCA 68 [7]–[8] (Grove J); Judicial Commission of New South Wales, *Sentencing Bench Book – Purposes of Sentencing* (at May 2014) [2-240].

¹⁹⁸ *R v Dube & Knowles* (1987) 46 SASR 118, 120; *R v Riordan* (Unreported, Supreme Court of Victoria, 6 February 1984), cited in Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2012) 170

sanctions with decreased crime rates¹⁹⁹ – it operates under the premise that the more severe the sanction for an offence, the more its deterrent effect, leading to a corresponding reduction in the frequency of the offence.²⁰⁰ It is common for legislatures to enact, and courts to impose, heavier penalties for certain offences, on the basis that it will limit crime through the mechanism of marginal deterrence.²⁰¹ However, the extent to which increases in sentence severity (which are not without cost) can reasonably be expected to result in a corresponding reduction in offending – marginal deterrence – has been increasingly questioned.²⁰²

In relation to this, without completely dismissing the entire theory of deterrence, current empirical research and evidence has failed to establish the validity of the claim that there is a link between higher penalties and the crime rate,²⁰³ suggesting that the length of punishment is not the key to a substantial reduction in crime.²⁰⁴ The evidence tends to support the notion that most criminals are ‘impervious to harsher punishments’, either due to the fact that they have no knowledge of the likely punishments for their contemplated crime, or because they perceive little or no risk of apprehension and conviction for that crime.²⁰⁵

These results illustrate that the major problems with marginal deterrence (and general deterrence more broadly) stem from two of the key assumptions underlying the hypothesis: (i) that criminals are informed about the potential punishments; and (ii) that they are rational in the way they perceive those punishments.²⁰⁶

i) Knowledge of punishment

Perhaps the biggest issue with general deterrence theory is that it is underpinned by a fundamental presumption that would-be offenders know the penalty for committing an offence.²⁰⁷ Further, while it is appealing to think that with harsher punishments would come increased awareness, simply because raised stakes become more notable, unfortunately this is not the case.²⁰⁸

If a potential offender is not aware of the particular penalty for committing an offence, they cannot respond to it (rationally or otherwise),²⁰⁹ and thus the severity of the punishment cannot deter them. Regarding this, a 2002 study conducted in California found that, at the time of their offences, convicted offenders were largely unaware of the potential penalties they could face, with 76% of all offenders and 89% of the most violent offenders, reporting that they were completely unaware of the penalty for the crime they committed, or that it was not even a factor they considered before committing the offence.²¹⁰ Such findings are evidence against

¹⁹⁹ Mirko Bagaric & Theo Alexander, ‘The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn’t Work, Rehabilitation Might and the Implications for Sentencing’ (2012) 36 *Criminal Law Journal* 159, 159.

²⁰⁰ Mirko Bagaric and Theo Alexander, (Marginal) General Deterrence Doesn’t Work – and what it Means for Sentencing’ (2010) 35 *Criminal Law Journal* 269, 270; Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ (2014) 62 *Buffalo Law Review* 1159, 1202.

²⁰¹ Sir William Young, ‘The Effects of Imprisonment on Offending: A Judge’s Perspective’ (2010) 1 *Criminal Law Review* 3, 9–10.

²⁰² Sir William Young, ‘The Effects of Imprisonment on Offending: A Judge’s Perspective’ (2010) 1 *Criminal Law Review* 3, 9–10.

²⁰³ Mirko Bagaric, ‘What Sort of Mandatory Penalties Should We Have?’ (2002) 23 *Adelaide Law Review* 113, 125

²⁰⁴ David A. Anderson, ‘The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging’ (2002) 4(2) *American Law and Economics Review* 295, 297

²⁰⁵ Ibid.

²⁰⁶ Ibid 302.

²⁰⁷ Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 804.

²⁰⁸ David A. Anderson, ‘The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging’ (2002) 4(2) *American Law and Economics Review* 295, 306.

²⁰⁹ Ibid 302.

²¹⁰ Ibid, 305, 308; Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 805.

imposing more severe sentences, not for any emotional reasons, but because most current criminals do not have the information required to respond to these disincentives for offending.²¹¹

Even if potential offenders do know the consequences, the assumption that they have the mindset required to rationally weigh-up and respond to them is also problematic.²¹²

ii) Problems with Rational Choice Theory

Sociologists suggest that the rationalist theory of choice on which the marginal deterrence argument is based – which assumes that offenders rationally choose to offend in a type of criminological cost vs benefit analysis – fails to consider the numerous reasons that some individuals, and some groups, are predisposed to crime.²¹³

First, rational choice theory has been criticised on the basis that it fails to account for ‘irrational’ offenders, which research has shown comprise a majority of the prison population; that is, those affected by alcohol or drugs, or those suffering a mental disorder or mental illness.²¹⁴ For example, in relation to sexual offences, the data suggests that 91% of sex offenders may lack the requirements necessary to make informed, rational judgments and to respond as intended to harsher punishments.²¹⁵ Further, although the remaining 9% have at least some thought of apprehension, and some concept of likely punishments, this does not imply a knowledge of, or response to, changes in punishments, or that these criminals are close to the margin between committing and not committing an offense.²¹⁶

Secondly, the idea of rational choice has also been criticised because of its highly ‘normative’ viewpoint – the assumption that individuals make purely rational, utilitarian calculations of costs vs benefits, without being influenced by individual, subjective perceptions.²¹⁷ In relation to this, contemporary studies of ‘behavioural economics’ has explored the ways in which individuals depart from this ‘rational actor’ model.²¹⁸ Behavioural economics asserts that individuals are not perfectly rational, but instead make decisions based on imperfect knowledge, by employing rules of thumb, and ‘are subject to bounded rationality, bounded willpower and influenced by cognitive biases.’²¹⁹ These cognitive biases, which result in deviations from perfect rationality, have a particular bearing upon decision-making in the context of deterrence. Two of these are explored below.

a) Optimism Bias

Despite having knowledge that there is, or may be, a severe penalty for committing a particular offence, offenders often overestimate their own ability to carry out the offence successfully without being apprehended.²²⁰ McAdams and Ulen argue that this thought process reflects the cognitive bias known as the ‘optimism’ or ‘overconfidence’ bias.²²¹ For example, one study found that, from the perspective of the criminals themselves, of those that *did* have both the information and mindset to respond to harsher

²¹¹ David A. Anderson, ‘The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging’ (2002) 4(2) *American Law and Economics Review* 295, 308.

²¹² Ibid.

²¹³ Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ (2014) 62 *Buffalo Law Review* 1159, 1204.

²¹⁴ Sentencing Advisory Council of Victoria, ‘Does Imprisonment Deter? A Review of the Evidence’, *Sentencing Matters* (April 2011) 8–9.

²¹⁵ David A. Anderson, ‘The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging’ (2002) 4(2) *American Law and Economics Review* 295, 305.

²¹⁶ Ibid.

²¹⁷ Ibid 8.

²¹⁸ Ibid 9

²¹⁹ Ibid 8–9.

²²⁰ Ibid 9.

²²¹ Richard H McAdams and Thomas S Ulen, ‘Behavioral Criminal Law and Economics’ in Nuno Garoupa (ed) *Criminal Law and Economics: Encyclopedia of Law and Economics* (Edward Elgar Publishing, 2nd ed, 2009).

punishments, 72% of violent offenders, and 66% of all offenders, reported that no punishment or detection method would have prevented them from committing their crimes.²²²

b) *Present Bias*

Jolls, Sunstein and Thaler note that offenders tend to place greater value on immediate circumstances (whether a cost or a reward) while ‘discounting’ future consequences.²²³ Where an individual subconsciously reduces the cost of things distant in time,²²⁴ the degree to which the individual devalues those delayed consequences is described as their subjective ‘discount rate’.²²⁵

It has been shown that, due to the effect of these subjective discount rates, increasing the severity of the punishment does not have a significant impact.²²⁶ A 1985 survey found that a 5-year prison sentence was judged as only being twice as severe as a 1-year sentence,²²⁷ while a 1993 survey similarly reported that a 10-year sentence was only considered to be four times more severe than a 1-year sentence and a 20-year sentence was only six times more severe.²²⁸ Further, even those who have actually experienced punishment, on average, rate a ten-year prison sentence as much less than twice as severe as a five-year sentence.²²⁹

While we may think that doubling the length of sentences will greatly enhance its deterrent effects, it is likely that this will have far less of an impact on the offending calculus of criminals. Subjective discounting applies to the entire array of sanctions available to the legal system, punishments occur in the future, and severity may be greatly discounted in an individual’s decision whether to offend or not.²³⁰

Robinson and Darley provide a comprehensive summary of the challenges presented by behavioural science to deterrence theory:

Potential offenders commonly do not know the legal rules … Even if they know the rules, the cost-benefit analysis potential offenders perceive … commonly leads to … violation rather than compliance, either because the perceived likelihood of punishment is so small, or because it is so distant as to be highly discounted … And, even if they know the legal rules and perceive a cost-benefit analysis that urges compliance, potential offenders commonly cannot or will not bring such knowledge to bear [because of] a variety of social, situational or chemical influences. Even if no one of these three hurdles is fatal to the law’s

²²² David A. Anderson, ‘The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging’ (2002) 4(2) *American Law and Economics Review* 295, 305.

²²³ Christine Jolls, Cass R Sunstein and Richard Thaler, ‘A Behavioral Approach to Law and Economics.’ (1998) 50 *Stanford Law Review* 1471, 1538–9.

²²⁴ Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 805.

²²⁵ Christine Jolls, Cass R Sunstein and Richard Thaler, ‘A Behavioral Approach to Law and Economics.’ (1998) 50 *Stanford Law Review* 1471, 1538–9, cited in Sentencing Advisory Council of Victoria, ‘Does Imprisonment Deter? A Review of the Evidence’, *Sentencing Matters* (April 2011) 10.

²²⁶ Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 805.

²²⁷ Kent A McClelland and Geoffrey P Alpert, ‘Factor Analysis Applied to Magnitude Estimates of Punishment Seriousness: Patterns of Individual Differences’ (1985) 1 *Journal of Quantitative Criminology* 307, 309–10, cited in Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 805–6.

²²⁸ Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 806.

²²⁹ Kent A McClelland and Geoffrey P Alpert, ‘Factor Analysis Applied to Magnitude Estimates of Punishment Seriousness: Patterns of Individual Differences’ (1985) 1 *Journal of Quantitative Criminology* 307, 311, cited in Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 822.

²³⁰ Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 822.

behavioural influence, their cumulative effect typically is.²³¹

In conclusion, even where those who commit crimes know that their acts may be subject to criminal punishment, the severity of punishment applied appears to have little effect on their decision-making,²³² and there is insufficient evidence to support a direct correlation between harsher penalties and a reduction in the crime rate.²³³ The evidence is relatively definitive that, despite its intuitive appeal, marginal deterrence does not work;²³⁴ one study has even suggested that more severe legal penalties may increase offending amongst certain social deviants who respond with defiance.²³⁵

Absolute General Deterrence

While the evidence presented above suggests that marginal deterrence does not work, the evidence regarding absolute general deterrence, suggests that it does work.²³⁶ That is, general deterrence has been shown to be effective in the sense that there is a general connection between the existence of criminal sanctions and the incidence of criminal conduct.²³⁷

The existing data shows that ‘in the absence of the threat of punishment for criminal conduct, the social fabric of society would readily dissipate; crime would escalate and overwhelmingly frustrate the capacity of people to lead happy and fulfilled lives.’²³⁸ Natural social experiments concerning the effects of police strikes (and similar circumstances) illustrate that, in the absence of the threat of *any* criminal punishment, a far greater number of people would commit criminal offences.²³⁹ For example, widespread civil disobedience occurred following the 1923 police strike in Melbourne,²⁴⁰ similarly, there was also widespread civil disobedience following the police strike in Liverpool in 1919,²⁴¹ and the internment of the Danish police force during World War II.²⁴²

Thus, it can be said that the evidence suggests that general deterrence works in the absolute sense: there is a connection between criminal sanctions and criminal conduct,²⁴³ only to the extent that if there was no real

²³¹ Robinson and Darley (2004, p. 174), quoted in Sentencing Advisory Council of Victoria, ‘Does Imprisonment Deter? A Review of the Evidence’, *Sentencing Matters* (April 2011) 10.

²³² Michael Tonry, ‘Learning from the Limitation of Deterrence Research’ (2008) 37 *Crime and Justice* 279.

²³³ Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ (2014) 62 *Buffalo Law Review* 1159, 1203.

²³⁴ Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ (2014) 62 *Buffalo Law Review* 1159, 1202. Cf Mirko Bagaric and Theo Alexander, (Marginal) General Deterrence Doesn’t Work – and what it Means for Sentencing’ (2010) 35 *Criminal Law Journal* 269, 283:

The empirical evidence suggesting that marginal general deterrence does not work is weighty. But it is not definitive for the reasons set out earlier in this article – in particular the number of variables that impact on the crime rate. Further, most of the data is derived from the United States. Also, generally speaking, the data is not offence specific. It may be the case that certain forms of crimes are more amenable to deterrence by harsh penalties than others and that United States findings are not transferrable to the Australian setting.

²³⁵ Carla Cesaroni and Nicholas Bala, ‘Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges’ (2008) 34(1) *Queen’s Law Journal* 447, 472.

²³⁶ Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ (2014) 62 *Buffalo Law Review* 1159, 1202.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Mirko Bagaric, ‘What Sort of Mandatory Penalties Should We Have?’ (2002) 23 *Adelaide Law Review* 113, 125.

²⁴⁰ Kerry Milte and Thomas Weber, *Police in Australia* (Butterworths, 1977) 287–92.

²⁴¹ Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory & Policy* (Oxford Hart Publishing, 2nd ed, 1998) 44–5.

²⁴² Nigel Walker, *Sentencing: Theory, Law and Practice* (Butterworths, 1985) 85.

²⁴³ Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ (2014) 62 *Buffalo Law Review* 1159, 1202

threat of punishment for engaging in unlawful conduct, the crime rate would soar. It follows that the threat of punishment discourages potential offenders from committing crime, and this justifies the punishment of wrongdoers. However, the evidence does not support the view that this relationship operates in a linear fashion; that is, the deterrent effect of sanctions does not increase in direct proportion to the severity of sanctions.²⁴⁴

From this, we can conclude that deterrence should properly inform sentencing only to the extent that it requires *some* pain or hardship to be imposed for offending. It does not, however, require a particularly burdensome penalty, merely one that people would seek to avoid. Thus, there is no foundation for increasing penalties to reduce the crime rate,²⁴⁵ as the evidence justifies the existence of some form of criminal sanctions, but not higher sanctions.²⁴⁶

1.3 Deterrence Through *Certainty* and *Celerity* of Punishment

This section will examine whether increasing the certainty and swiftness of legal punishment for an offence, has a deterrent effect, leading to a reducing in crime and recidivism rates. In this context, certainty refers to the notion that people are unlikely to offend if they strongly believe they will be caught, and celerity refers to the temporal idea that the closer the punishment comes after the commission of the offence, the higher the deterrent effect.²⁴⁷

While there appears to be no evidence for the increase in the severity of a sentence leading to an increase the deterrent effect, there is some evidence of a modest inverse relationship between the perceived certainty of punishment and crime rates.²⁴⁸ Even in their early version of deterrence theory, Beccaria and Bentham supposed the certainty and the promptness of punishment, was more important than the severity of the punishment.²⁴⁹ They argued that in order for punishment to be effective in offsetting the perceived benefits of crime, it must have a high level of certainty, and come as soon as possible after the commission of the offence.²⁵⁰

In regards to celerity, Beccaria stated that, ‘[t]he more promptly and the more closely punishment follows upon the commission of a crime, the more just and useful it will be.’²⁵¹ To Beccaria, punishment is more ‘useful’ when it is prompt. He argued that the crime and the punishment must be closely linked for a deterrence system to be effective, so that when contemplating criminal behaviour, a would-be offender immediately calls up the associated idea of punishment.²⁵²

It has been argued that one of the biggest limits of criminal deterrence is that the legal consequences are far removed in time and that people in general find it difficult to feel the pain of the longer-term consequences of

²⁴⁴ Mirko Bagaric and Theo Alexander, '(Marginal) General Deterrence Doesn't Work – and what it Means for Sentencing' (2010) 35 *Criminal Law Journal* 269, 282.

²⁴⁵ Mirko Bagaric, 'A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals' (2014) 62 *Buffalo Law Review* 1159, 1205.

²⁴⁶ Mirko Bagaric, 'What Sort of Mandatory Penalties Should We Have?' (2002) 23 *Adelaide Law Review* 113, 125.

²⁴⁷ Michael Radelet and Marian Borg, 'The Changing Nature of Death Penalty Debates' [2000] *Annual Review of Sociology* 26, 44-45.

²⁴⁸ Raymond Paternoster, 'How Much Do We Really Know About Criminal Deterrence' (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 818.

²⁴⁹ Michael Tonry, 'Learning from the Limitation of Deterrence Research' (2008) 37 *Crime and Justice* 279, 280.

²⁵⁰ Raymond Paternoster, 'How Much Do We Really Know About Criminal Deterrence?' (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 820-1.

²⁵¹ Cesare Beccaria, *On Crimes And Punishments* (Macmillan, 1764) 55.

²⁵² Ibid 57.

their actions – as discussed above regarding ‘present bias’. Hans von Hentig, a critic of deterrence theory, referred to the pain of criminal punishment as a ‘long-distance danger’ and stated that a criminal’s ‘appetites and desires are irresistibly attracted by a near object’;²⁵³ thus, formal legal sanctions may be too far removed in time to provide the necessary immediate pain of paying.²⁵⁴ A similar point was put forward by Clarence Ray Jeffery, who noted that one of the most unfortunate features of criminal offending and legal sanctions, affecting the notion of deterrence, is that ‘[t]here are no aversive stimuli in the environment at that moment.’²⁵⁵

In regards to certainty, one of the earliest empirical studies of deterrence²⁵⁶ – examining the relationship between the actual certainty and severity of imprisonment and rates for seven crime type among U.S. states – found that the actual severity of imprisonment had no deterrent effect unless ‘there was a high [actual] certainty of imprisonment.’²⁵⁷ Further, actual certainty had a negative association with the crime rate – that is, the greater the actual certainty, the lower the crime rate, regardless of the level of actual severity of sentence.²⁵⁸ In the context of sexual offences, a study carried out during the 1990s, found that an increased perceived certainty of formal sanctions resulted in the decreased likelihood of a theoretical sexual assault.²⁵⁹

While offenders or potential offenders may not be perfectly rational beings (as discussed above), they are at least rational in the sense that they react to incentives and disincentives. For example, studies at the individual-level show that people are affected by their perceptions about the risk of getting caught for misconduct, and that these perceptions of risk are affected by the outcomes of behaviour. The evidence shows that a person’s perception of the risk of crime decreases when people commit crimes and get away with them, and increases when offenders get arrested.²⁶⁰ Policy studies into the policing of crime ‘hot spots’ as well as police ‘crackdowns’, generally show that there is at least an initial general deterrent effect in response to the enhanced presence of police and the police actions, and that offenders rationally readjust their perceptions of the risk of sanctions and reduce their offending.²⁶¹

For example, as discussed above in relation to absolute deterrence, studies have shown that large changes in police presence do affect crime rates. Nagin notes that, regardless of whether the change in police presence is the result of an unplanned event (e.g. a terror alert triggering a large increase in police officers in public areas) or a strategic response to a known crime problem (e.g. in ‘hot spots’ policing deployments), in either case, crime rates are reduced in areas where police presence has been materially increased.²⁶² However, it must also be acknowledged that the evidence is not quite definitive on this issue, for example, in Canada between 1990 – 2000, the rate of violent crimes, including rape, decreased despite the number of police officers declining

²⁵³ Hans von Hentig, ‘The Limits of Deterrence’ (1938) 29 *Journal of the American Institute of Criminal Law and Criminology* 555, 559, cited in Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence?’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 821.

²⁵⁴ *Ibid* 822.

²⁵⁵ Clarence Ray Jeffery, ‘Criminal Behavior and Learning Theory’ (1965) 56 *Journal of Criminal Law, Criminology and Police Science* 294, 299, cited in Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence?’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 822.

²⁵⁶ Charles R Tittle, ‘Crime Rates and Legal Sanctions’ (1969) 16 *Social Problems* 408.

²⁵⁷ *Ibid* 408, 415; Mark C Stafford, ‘Deterrence Theory – Crime’ in James D Wright (ed), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, 2nd ed, 2015) 255, 256

²⁵⁸ Charles R Tittle, ‘Crime Rates and Legal Sanctions’ (1969) 16 *Social Problems* 408, 415; Mark C Stafford, ‘Deterrence Theory – Crime’ in James D Wright (ed), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, 2nd ed, 2015) 255, 256.

²⁵⁹ Ronet Bachman, Raymond Paternoster and Sally Ward, ‘The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault’ (1992) 26(2) *Law & Society Review* 343, 357.

²⁶⁰ Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence?’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 819

²⁶¹ *Ibid*.

²⁶² Daniel Nagin, ‘Deterrence in the Twenty-First Century’ (2013) 42 *Crime and Justice in America* 199, 240.

by 10% per 100,000 residents, during the same period.²⁶³

From the above, it is evident that increasing the certainty and swiftness of apprehension and punishment for a particular offence, appears to be more effective in deterring offenders, lowering crime rates and decreasing recidivism, than increasing the severity of the penalties for that offence. Thus, the commonly invoked notion that punishment deters a great many people cannot pass unchallenged,²⁶⁴ and the body of evidence suggests that the fear of being caught is a more powerful deterrent than fear of punishment.²⁶⁵ To this extent, a deterrent effect can be achieved simply by ensuring that offenders are penalised by the imposition of swift and appropriate hardship; but such penalties should not be aggravated in order to achieve an unattainable objective (marginal general deterrence).²⁶⁶

1.4 Type of Punishment

While the above discussion has focused mainly on severity in terms of length of punishment, the arguments are also applicable to severity in terms of type of punishment, e.g. capital punishment. In relation to this, the arguments appear to be even more settled – the evidence shows that the presence of the death penalty has proven to have very little to no deterrent value on offenders over and above imprisonment;²⁶⁷ and statistics show that ending capital punishment in other countries did not lead to higher murder rates.²⁶⁸

Radelet and Borg argue that in relation to capital punishment, the celerity aspect is almost completely absent when compared to a life sentence without parole sentence,²⁶⁹ as (in at least in the U.S. context) people sentenced to death usually sit on death row for decades, with many dying in prison from other causes before their execution is ever set. While this extended interval is necessary due to the finality of the death penalty, and the need for all avenues of appeal to be exhausted before the execution can take place, due to this extreme delay between the commission of the crime and the end punishment, the deterrence benefit over a life sentence without parole is extremely small, if it exists at all.²⁷⁰

²⁶³ Sara Beattie and Amy Mole, ‘Police Resources In Canada’ (Canadian Centre For Justice Statistics, 2007) 108, figure 5.1, cited in Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence?’ (2010) 100(3) *Journal of Criminal Law & Criminology* 765, 797, 799.

²⁶⁴ Neil Morgan, ‘Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities’ (2002) 23 *Adelaide Law Review* 141, 148–9.

²⁶⁵ See, eg, Franklin Zimring and Gordon Hawkins, *Deterrence: The Legal Threat in Crime Control* (University of Chicago Press, 1973); Deryck Beyleveld, *A Bibliography on General Deterrence* (Saxon House, 1980); Andrew Von Hirsch, Anthony E Bottoms, Elizabeth Burney, and Per-Olof Wikström, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Hart Publishing, 1999).

²⁶⁶ Mirko Bagaric and Theo Alexander, (Marginal) General Deterrence Doesn’t Work – and what it Means for Sentencing’ (2010) 35 *Criminal Law Journal* 269, 270

²⁶⁷ Ivan Potas and John Walker, ‘Trends & Issues in Crime and Criminal Justice: No. 3 Capital Punishment’ (February 1987) 1, 5.

²⁶⁸ ‘Some Murderers in Jail Too Long,’ *BBC News* (online) 9 March 2007 <http://news.bbc.co.uk/2/hi/uk_news/6433195.stm>.

²⁶⁹ Michael Radelet and Marian Borg, ‘The Changing Nature of Death Penalty Debates’ [2000] *Annual Review of Sociology* 26, 43, 45–56.

²⁷⁰ Ibid.

2 JURISDICTIONAL PERSPECTIVES

2.1 Overview

In Australia, the Sentencing Advisory Council of Victoria has noted that the body of research in the area of deterrence indicates that it is very unlikely that mandatory sentencing regime will achieve any deterrence aims. For example, when the Northern Territory introduced mandatory sentencing for property crime in 1997, property crime rates in the state actually increased, only to decrease after mandatory sentencing was removed.²⁷¹ Further, there is even evidence that even when implemented, such sentences are circumvented by lawyers, judges, and juries both by accepted measures (such as plea bargaining) and by less transparent means, which seriously jeopardises one of the other important, if not the most important, aims of mandatory sentences which is ensuring proportionality and parity in sentencing.²⁷² However, despite all the evidence, Australian courts have continually held that weight should be given to both specific and general deterrence for a range of offences,²⁷³ including cases involving sexual offences against children.²⁷⁴

Similarly, it has been stated that the Canadian Parliament's preference for mandatory minimum sentences is in stark contrast with the evidence, and the recommendations of the Canadian Sentencing Commission, which has continually recommended that they be abolished.²⁷⁵

Studies in England and Wales have noted that, with respect to certainty of punishment, the evidence is unequivocal in its finding that more detection through increased police numbers is associated with and plays a sustained role in preventing crime.²⁷⁶

As discussed above, Malaysia has quite extreme mandatory sentences for sexual offences, including against children. However, while the offences outlined in the Acts are strict in terms of sentence severity, in terms of certainty, it has been stated that in reality the limited definitions make it difficult to convict child sex offenders unless the crime was either rape (defined as penile penetration)²⁷⁷ or incest²⁷⁸ – thus many forms of child sex abuse are, in effect, not covered by the Acts.²⁷⁹ Mariza Abdulkadir, of the Protect and Save the Children organisation in Malaysia has stated that ‘incidents of child sexual abuse are very, very high...[the police] cannot do anything much because the legal definition is so limited... Malaysia has convicted only three or four people for child sexual abuse over the last 17 years.’²⁸⁰ This statement serves as an example of how certainty is may be more important than the severity of the sentence. With regard to the capital punishment, it

²⁷¹ Office of Crime Prevention, Northern Territory Government, *Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience* (August 2003) 10.

²⁷² Michael Tonry, ‘The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings’ (2009) 38(1) *Crime and Justice* 65.

²⁷³ Judicial Commission of New South Wales, *Sentencing Bench Book – Purposes of Sentencing* (at May 2014) [2-240].

²⁷⁴ See especially, *R v ABS* [2005] NSWCCA 255 [26] (Buddin J); *R v CMB* [2014] NSWCCA 5, [47]–[48] (Ward JA); *R v MJR* (2002) 54 NSWLR 368, 377 (Mason P); *R v TJH* [2001] NSWCCA 433, [35] (Wood CJ at CL).

²⁷⁵ Anthony N. Doob and Carla Cesaroni, ‘The Political Attractiveness of Mandatory Minimum Sentences’ (2001) 39(2–3) *Osgoode Hall Law Journal* 287, 288.

²⁷⁶ Siddhartha Bandyopadhyay, *Acquisitive Crime: Imprisonment, Detection and Social Factors* (Institute for the Study of Civil Society, 2012) 12 <<http://www.civitas.org.uk/content/files/crimeanalysis2012.pdf>>.

²⁷⁷ *Penal Code 2015* (Malaysia) s 375.

²⁷⁸ *Ibid* s 376A.

²⁷⁹ A Ananthalakshmi and Joseph Sipalan, ‘British paedophile exploited stigma of abuse in vulnerable communities’, *Reuters* (online), 9 June 2016 <<http://news.trust.org/item/20160609025710-2dazo/?source=fiOtherNews3>>.

²⁸⁰ *Ibid*. Note however, this claim could not be verified as Malaysia has no published official statistics on child abuse.

is apparent that despite the imposition of death penalty, it has not deterred individuals from committing offences punishable by death, indicative in the 924 individuals who are now on ‘death row.’²⁸¹

The South African experience is perhaps the best demonstration of how implementing minimum sentences legislation had no consistent effect on crime rates. Looking at the statistics of crimes which were specially targeted by the 1998 Act, in the periods before and after the legislation was enacted, we see that the murder rate did in fact drop by 41% (from 67 per 100,000 in 1994/95 down to 40 per 100,000 in 2005/2006) however, during this same period, the crime rate for rape remained largely constant (at about 115 per 100,000) and robbery with aggravating circumstances actually increased by 17% (from 219 to 255 per 100,000).²⁸² Further, there was also no change in the rate of any particular offence in 1998, the year the Act came into effect. From the above, it is clear that there is no consistent trend in the rates of offences for which information is available.²⁸³

As stated above, the United States has had mandatory minimum sentences for a range of criminal offences for some time, to dubious effect. Over the 30-year period 1960–1993, violent crime in the US increased by up to 4–5 times, the murder rate stayed static, but imprisonment numbers went up 3–4 times. In comparison, in Germany where there were no such mandatory sentences, violent crime increased by only 3.5 times, the murder rate remained at the same level, but imprisonment went down in the 1960s and stayed flat for 30 years.²⁸⁴ These crime statistics in relation to violent crimes carrying mandatory sentences, show no evidence that they are successful in deterring crime – if mandatory schemes had an impact on crime rates, one would have expected crime rates in the United States, where many mandatory schemes were during this time, to have lower crime rate increases than comparative nations, where such schemes were absent.²⁸⁵

Researchers, experienced practitioners, and policy analysts have long agreed that mandatory penalties in all their forms are a bad idea,²⁸⁶ and no matter which body of evidence is consulted – whether it be the general literature on the deterrent effects of criminal sanctions, the work more narrowly focused on the marginal deterrence hypothesis, or the evaluation literature on mandatory penalties – the conclusion is the same: there is little basis for believing that mandatory penalties have any significant effects on rates of serious crime.²⁸⁷ In one very comprehensive example, Tonry analysed the results of multiple studies into the deterrent effect of the ‘three strikes’ laws in California – all the studies except one, found the laws had no deterrent effect (see table over):²⁸⁸

²⁸¹ Roger Hood, *The Death Penalty in Malaysia: Public opinion on the mandatory death penalty for drug trafficking, murder and firearms offences* (October 2012) <<http://www.deathpenaltyproject.org/wp-content/uploads/2013/07/Malaysia-report.pdf>> at vii.

²⁸² Stephan Terblanche and Geraldine Mackenzie, ‘Mandatory sentences in South Africa – Lessons for Australia’ (2008) 41(3) *Australian and New Zealand Journal of Criminology* 408.

²⁸³ Ibid.

²⁸⁴ Michael Tonry, ‘Crime does not cause punishment: The impact of sentencing policy on levels of crime’ (2007) 20 *South African Crime Quarterly* 13, 13; Stephan Terblanche and Geraldine Mackenzie, ‘Mandatory sentences in South Africa - Lessons for Australia’ (2008) 41(3) *Australian and New Zealand Journal of Criminology*, 404.

²⁸⁵ Stephan Terblanche and Geraldine Mackenzie, ‘Mandatory sentences in South Africa - Lessons for Australia’ (2008) 41(3) *Australian and New Zealand Journal of Criminology*, 408

²⁸⁶ Michael Tonry, ‘The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings (2009) 38(1) *Crime and Justice* 65, 65.

²⁸⁷ Ibid.

²⁸⁸ Ibid 98.

California Three Strikes: Effects on Reduced Crime Rates

<i>Authors of Study</i>	<i>Method</i>	<i>Deterrent Effects?</i>
<i>Schiraldi and Ambrosio (1997)</i>	Yes/no three-strike state comparisons	None
<i>Stolzenberg and D'Alessio (1997)</i>	Time series: 10 largest California cities	None
<i>Males and Macallair (1999)</i>	California age group comparisons	None
	California county comparisons	None
<i>Chen (2000, 2008)</i>	Time series: 50 states	None
	Time series: California	Not significant
<i>Austin et al. (2000)</i>	California county comparisons	None
	Yes/no three-strike state comparisons	None
<i>Caulkins (2001)</i>	National econometric model	None
<i>Marvell and Moody (2001)</i>	Time series: 50 states	None: increased murder rates
<i>Moody, Marvell, and Kaminski (2003)</i>	Time series: 50 states	None: increased murder rates
	California county comparisons	None
<i>Zimring et al. (2001)</i>	California age group comparisons	None
	California county comparisons	None
<i>Shepherd (2002)</i>	California econometric model	Yes
<i>Ehlers et al. (2004)</i>	California county comparisons	None
	Yes/no three-strike state comparisons	None
<i>Kovandzic et al. (2004)</i>	Model: U.S. cities	None: increased murder rates
<i>Justice Policy Institute (2004)</i> <i>Tonry (2004)</i>	Yes/no three-strike state comparisons	None
	Time series: 10 most populous states	None
<i>Legislative Analyst's Office, California (2005)</i>	California county comparisons	None
	None	None

3 IMPLICATIONS FOR SENTENCING LAW & PRACTICE

3.1 Introduction

Sentencing, specifically in relation to deterrence and stricter sentences (such as mandatory penalties), has been described by numerous commentators as the area of law where there is the greatest discord between evidence and policy/practice.²⁸⁹ It is clear from the above, that seeking to lower crime rates and rates of reoffending by implementing stricter penalties is problematic – it puts too much focus on the *severity* of punishment, yet *certainty* and *celerity* of punishment have been shown to be more important in deterring offenders and reducing crime.

3.2 Utility of Stricter Penalties

In relation to mandatory minimum sentencing – which have the effect of removing sentencing discretion from judges and enforcing a minimum sentencing floor for individuals convicted of specific offences²⁹⁰ – the evidence above has illustrated that imposing a mandatory sentence does not increase its deterrent effect, nor does it have a corresponding effect of lowering crimes rates or rates of recidivism. Regarding capital punishment, while often supported in the US and other countries by politicians wanting to show that they are ‘tough on crime’,²⁹¹ analysis of the evidence demonstrates unequivocally, that the death penalty does not act as a deterrent, nor does its implementation significantly reduce the number of murders.²⁹²

While clear that on their own they do not act as effective deterrents to crime, this is not to say stricter penalties like mandatory minimum sentencing are of no merit whatsoever, or that they do not play *some* role in decreasing crime rates. Where they are implemented under the principle of parity or consistency of sentencing,²⁹³ or when implemented for the purpose of incapacitation, many of criticisms above become less relevant.²⁹⁴ With regards to the latter, the argument is that when people are in prison, they are not committing offences in the community, thus, increasing the length of imprisonment could be seen as almost automatically leading to crime reduction. However, it is worth noting that such arguments have been challenged on the basis of the findings that imprisonment can actually make people *more* likely to reoffend once released (see discussion above regarding the ‘criminogenic’ effect of prison). So, while people may not commit offences while incarcerated, this incapacitative benefit for public safety could be nullified, or even outweighed, if they

²⁸⁹ Michael Tonry, ‘Learning from the Limitation of Deterrence Research’ (2008) 37 *Crime and Justice* 279, 279; Mirko Bagaric and Theo Alexander, ‘(Marginal) General Deterrence Doesn’t Work – and what it Means for Sentencing’ (2010) 35 *Criminal Law Journal* 269, 269; Mirko Bagaric & Theo Alexander, ‘The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn’t Work, Rehabilitation Might and the Implications for Sentencing’ (2012) 36 *Criminal Law Journal* 159, 159; Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ (2014) 62 *Buffalo Law Review* 1159, 1159.

²⁹⁰ Gary Lowenthal, ‘Mandatory Sentencing Laws: Undermining the effectiveness of Determinate Sentencing Reform’ 81(1) *California Law Review* (1993) 61, 64.

²⁹¹ Anthony N Doob, Cheryl Marie Webster and Rosemary Gartner, *Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation* (14 February 2014) Centre for Criminology & Sociolegal Studies <<http://criminology.utoronto.ca/wp-content/uploads/2013/09/DWG-GeneralDeterrenceHighlights14Feb2013.pdf>>.

²⁹² Anthony N Doob, Cheryl Marie Webster and Rosemary Gartner, *Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation* (14 February 2014) Centre for Criminology & Sociolegal Studies <<http://criminology.utoronto.ca/wp-content/uploads/2013/09/DWG-GeneralDeterrenceHighlights14Feb2013.pdf>>.

²⁹³ See Report 1 for an extensive analysis of the Principles of Sentencing.

²⁹⁴ Mirko Bagaric, ‘What Sort of Mandatory Penalties Should We Have?’ (2002) 23 *Adelaide Law Review* 113, 136.

are more likely to commit offences once released.²⁹⁵

3.3 Changes to Sentencing Policy

One of the main reasons the deterrence hypothesis, especially marginal deterrence, has survived this long is because it appears intuitive – that is until one considers carefully, the steps that are necessary for it to be effective.²⁹⁶

There is no evidence that inflicting harsh sanctions on people has a specific deterrent effect making them less likely to re-offend in the future; the evidence is, in some cases, to the contrary. Thus, there is an argument that specific deterrence should also be abolished as a sentencing consideration.²⁹⁷ Similarly, in consideration of the theory and evidence espoused above, marginal general deterrence, the idea commonly associated with implementing stricter penalties for offending, should be disregarded as a purpose of sentencing. Therefore, legislatures and courts should not increase sentences in the futile pursuit of marginal general deterrence,²⁹⁸ at least until there is sufficient proof of its effectiveness.²⁹⁹ We should be very reluctant to adopt any approach to sentencing which is premised on something that is, by all the available evidence, a fiction.³⁰⁰

In contrast, the pursuit of absolute general deterrence remains a valid sentencing objective which can be achieved by ensuring offenders are swiftly penalised with an appropriate pain and hardship,³⁰¹ reflecting the importance of certainty and celerity over severity of punishment.

Arie Freiberg, chairman of Sentencing Advisory Council of Victoria, in an article discussing the direction of sentencing policy and its effectiveness within the realm of sexual offences against children, noted that:

Over recent years, sentencing policy has too often been the result of notorious cases, media depictions of extreme and heinous cases, the severe grief experiences of some victims and the claims of law enforcement officials. Too often, laws have been over-encompassing, insufficiently considered, expensive and ineffective. They are more about managing public fear than managing dangerous offenders.

In the end, fear-based policies can do more harm to the fabric of the law than the offenders themselves. We need to look beyond opinion polls to recognise the importance of making decisions on the basis of evidence, not anecdote.³⁰²

²⁹⁵ Anthony N Doob, Cheryl Marie Webster and Rosemary Gartner, *Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation* (14 February 2014) Centre for Criminology & Sociolegal Studies <<http://criminology.utoronto.ca/wp-content/uploads/2013/09/DWG-GeneralDeterrenceHighlights14Feb2013.pdf>>.

²⁹⁶ Anthony N Doob, Cheryl Marie Webster and Rosemary Gartner, *Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation* (14 February 2014) Centre for Criminology & Sociolegal Studies <<http://criminology.utoronto.ca/wp-content/uploads/2013/09/DWG-GeneralDeterrenceHighlights14Feb2013.pdf>>.

²⁹⁷ Mirko Bagaric & Theo Alexander, ‘The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn’t Work, Rehabilitation Might and the Implications for Sentencing’ (2012) 36 *Criminal Law Journal* 159, 161.

²⁹⁸ Mirko Bagaric and Theo Alexander, (Marginal) General Deterrence Doesn’t Work – and what it Means for Sentencing’ (2010) 35 *Criminal Law Journal* 269, 270.

²⁹⁹ Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ (2014) 62 *Buffalo Law Review* 1159, 1202.

³⁰⁰ Sir William Young, ‘The Effects of Imprisonment on Offending: A Judge’s Perspective’ (2010) 1 *Criminal Law Review* 3, 9–10.

³⁰¹ Mirko Bagaric and Theo Alexander, (Marginal) General Deterrence Doesn’t Work – and what it Means for Sentencing’ (2010) 35 *Criminal Law Journal* 269, 270

³⁰² Arie Freiberg, ‘Think twice before demanding harsher sentences for child sex offenders’, *The Sydney Morning Herald* (Sydney) 30 June 2015.

4 ALTERNATIVE APPROACHES

4.1 Introduction

Sexual offences, especially when committed against children, are an area of law involving some of the most heinous crimes, and any discussion of sentencing is inevitably going to be an emotionally charged process. However, while it is certain that more needs to be done to curtail this type of behaviour before it leads to offending, the evidence is clear that increasing the severity of the penalties for sexual offences is not the answer to deterring such crimes.

4.2 Addressing the Underlying Issues

In addition to the logical criticisms presented throughout this report, simply imposing stricter sentences also fail to address the structural issues underlying child sexual offences. The vast majority of child sexual assault victims are known to the offender or take place in the family, and stricter penalties imposed under the banner of deterrence, or even incapacitative measures such as chemical castration which act to reduce the offender's sexual libido, do not address the power dynamics underlying sexual offences against children.³⁰³ For example, in the context of the South African criminal justice system, Baehr argues:

To have a more effective sentencing regime and reduce the number of sexual offences against women and children, there needs to be a societal, institutional and cultural change in the country, as years of violence and political struggle during the apartheid era has fostered a warrior culture emphasising hyper-masculinity.³⁰⁴

Further, acts of sexual violation are highly unlikely to ever actually be reported to the police; the findings of a study in New Zealand³⁰⁵ showed 'as few as 7% of victims [chose] to report their experiences³⁰⁶... [w]here police do become aware of sex offending, they frequently choose not to go ahead with prosecution³⁰⁷ [and] where prosecution does proceed, as few as 13% of alleged offenders will be convicted.'³⁰⁸ Therefore, stricter penalties such as mandatory minimums, which focus on severity of punishment, ignore the more important aspects of punishment – that it be certain and swift. The severity of a sentence will have little bearing if the offender is never reported, apprehended and convicted.

Regarding these factors, while outside the scope of this report, it is worth briefly mentioning some potential alternative approaches which could be effective in reducing sexual crime rates and reoffending. Indeed, many of the scholarly articles on deterrence and stricter penalties bookend their discussion by suggesting some possible alternative approaches – improved educational offerings, increased investment into mental health treatment, a focus on rehabilitation, and implementing youth programs, are some of the more commonly

³⁰³ Uger Nedim, *Chemical Castration of Child Sex Offenders: Is It Effective?* (2 September 2015) Sydney Criminal Lawyers <<http://www.sydneycriminallawyers.com.au/blog/chemical-castration-of-child-sex-offenders-is-it-effective/>>.

³⁰⁴ Kristina Scurry Baehr, 'Mandatory minimums making minimal difference: Ten years of sentencing sex offenders in South Africa' [2008] 20(8) *Yale Journal of Law and Feminism* 218-219.

³⁰⁵ Rebecca Stoop, 'Sentencing Sex Offenders: A Therapeutic Jurisprudence Inquiry into the Current Legal Framework' (University of Otago, 10 October 2014) 3.

³⁰⁶ Ministry of Justice, *New Zealand Crime & Safety Survey 2009: Main Findings Report* (2010) 45.

³⁰⁷ Ministry of Women's Affairs, *Responding to sexual violence: Attrition in the New Zealand Criminal Justice System* (2009) viii.

³⁰⁸ Ministry of Women's Affairs, *Responding to sexual violence: Attrition in the New Zealand Criminal Justice System* (2009) vii.

offered approaches.³⁰⁹

In terms of alternative preventative measures, Germany currently has a system of confidential counselling for persons diagnosed as paedophiles, aimed at preventing sexual offending.³¹⁰ In terms of preventing re-offending, England and Wales have a system of treatment for sex offenders based on ‘containment, supervision sessions, monitoring and possibly restriction of movement, restrictions on residence, surveillance and control of movement through curfews and electronic monitoring.’³¹¹ Under this system, courts can impose non-custodial sentences (e.g. requiring the offender to attend treatment or rehabilitation programs, and adhering to supervision requirements or curfews), disqualification orders (which prevent sexual offenders from working with children), deprivation orders (e.g. depriving offenders of equipment, such as computers, which are used to commit an offence), and sexual offender prevention orders (which prevent the offender from doing anything described for a period of not less than five years or until further notice).³¹²

Exploration of the alternative means through which to deter and prevent sexual offences against children represents an area that requires further research and analysis.

³⁰⁹ See, eg, David A. Anderson, ‘The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging’ (2002) 4(2) *American Law and Economics Review* 295, 309.

³¹⁰ Kate Connolly, ‘How Germany treats paedophiles before they offend’, *The Guardian* (online) 16 October 2016 <<https://www.theguardian.com/society/2015/oct/16/how-germany-treats-paedophiles-before-they-offend>>.

³¹¹ Karen Harrison, ‘The High-Risk Sex Offender Strategy in England and Wales: Is Chemical Castration an Option?’ (2007) 46 *The Howard Journal* 16.

³¹² Carol Nicholls Et Al, Center for Gender and Violence Research, University of Bristol, *Attitudes to Sentencing Sexual Offences* (2012) 5.

SUMMARY AND CONCLUSION

Through analysis of studies and statistics in relation to deterrence, specifically in relation to sexual offences against children, it has been demonstrated that the implementation of stricter penalties does not have a corresponding deterrent effect. The evidence suggests that marginal deterrence does not work – there is no corresponding relationship between increasing the severity of sentence, and a decrease in crime or reoffending rates.³¹³ However, there is sufficient evidence that absolute general deterrence does work – in the absence of the threat of *any* criminal punishment, a far greater number of people would commit criminal offences.³¹⁴ Despite the focus on severity, the evidence illustrates that increasing the certainty and celerity/swiftness of punishment is more effective than increasing the severity of the penalties.

These finding may have implications for the concept of deterrence as one of the integral purposes of imposing harsher penalties for sexual crimes, including in the eight jurisdictions discussed above, and for offences in a wider sense. In short, it means that legislatures and courts should not increase sentences in the futile pursuit of marginal general deterrence; although, the pursuit of absolute general deterrence remains a valid sentencing objective – which can be achieved simply by ensuring that offenders are penalised by the imposition of appropriate pain and hardship, but such penalties should not be aggravated in order to achieve an unattainable objective.³¹⁵ Possible alternative approaches to deterring sexual offences against children, represents an area requiring, and deserving of, further research and analysis.

³¹³ Mirko Bagaric, ‘A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When it Comes to Punishing Criminals’ (2014) 62 *Buffalo Law Review* 1159, 1202; Carla Cesaroni and Nicholas Bala, ‘Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges’ (2008) 34(1) *Queen’s Law Journal* 447, 472

³¹⁴ Mirko Bagaric, ‘What Sort of Mandatory Penalties Should We Have?’ (2002) 23 *Adelaide Law Review* 113, 125.

³¹⁵ Mirko Bagaric and Theo Alexander, (Marginal) General Deterrence Doesn’t Work – and what it Means for Sentencing’ (2010) 35 *Criminal Law Journal* 269, 270.

PART 2: ROLE OF PSYCHOLOGICAL ASSESSMENTS IN SENTENCING

Yasmin Cherry

INTRODUCTION

A ‘psychological assessment’ is the use of standardised measures to evaluate the abilities, behaviours and personal qualities of people.³¹⁶ These measures attempt to shed some light on an individual’s intelligence, personality, psychopathology and ability. Traditionally, these assessments were only used in the context of clinical and psychiatric populations and were mainly used for diagnosis and treatment. Despite this, courts are now using psychological assessments in order to help determine legal questions.³¹⁷ Psychological assessments are particularly important in the context of sentencing. These assessments can help decipher whether a prison sentence is an appropriate option for offenders who are insane or mentally impaired.³¹⁸ For these types of offenders there tends to be a general notion that their time might be more effectively served rehabilitating in a psychiatric institution, rather than in prison. Contrastingly, psychological assessments may also aggravate the sentence of an offender in light of the need to protect the community, if it emerges that the offender has a high rate of violent recidivism.³¹⁹

This section of the report is split up into two main parts:

The first part will cover using psychological assessments to sentence:

1. Insane Offenders in the United States of America
2. Mentally Impaired Offenders in Victoria, Australia

The second part will cover using psychological assessments to aggravate the sentence of:

3. High Risk Violent Offenders

Part 1 focuses on the insanity defence and the effect an offender’s mental impairment may have on the sentencing procedure. This part of the report seeks to demonstrate why psychological assessments are important in sentencing these types of offenders, as in many cases these types of offenders do not have the mental capabilities to make a rational decision regarding their actions.³²⁰ Moreover, they are also sometimes unable to comprehend the pronouncements of the court in a meaningful way.³²¹ As will be discussed, it is suggested in several jurisdictions, such as Australia and the United States of America that mentally impaired and insane offenders should be placed in alternative environments to the traditional prison setting. These alternative environments tend to include mental hospitals or specific prisons that contain mental health management programs for offenders.³²² The rationale for this treatment of mentally ill offenders is broad and encapsulates many different reasons, which will be addressed in the analysis of the insanity defence and the *Verdins* principles. Furthermore, this part of the report aims to highlight the issues that can be created as a result of using psychological assessments in sentencing. Within the context of the insanity defence, it has been asserted that offenders are being sentenced to mental health institutions for an indeterminate period of time, which sometimes results in offenders spending more time in these institutions than they would have if they

³¹⁶ Richard Gerrig and Philip Zimbardo, *Psychology and Life* (Pearson Education, 16th ed, 2002) 16.

³¹⁷ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 17.

³¹⁸ Ibid.

³¹⁹ Ibid 33.

³²⁰ Ibid 23.

³²¹ Ibid.

³²² Ibid 33.

were sentenced to prison.³²³ Moreover, the influence of mental health professionals in the sentencing procedure has been criticised within the context of the insanity defence, as many of these professionals are not trained in legal processes. Additionally, the methods used to evaluate an offender's sanity, specifically in the United States of America have been described as ill-structured and lacking external consistency between mental health professionals.³²⁴ Lastly, it has been asserted that in Victoria, Australia there are inadequate mental healthcare services established in prison management regimes for offenders that suffer from mental impairment. This is a critical issue as it means that courts are not able to administer appropriate sentences that do not exacerbate the mental health conditions of offenders.³²⁵

Part 2 of this report seeks to unpack violence risk assessments. This involves addressing the major issues that are involved with their utilisation, mainly that many risk assessments used in the past have not been able to accurately predict future risk.³²⁶ As a consequence of this, the report attempts to highlight alternative risk assessment models that have been considered to increase predictive validity. Other ways in which the accuracy of risk assessments can be increased are also acknowledged in this part of the report. They include encouraging the practicing patterns of forensic diplomats and also ensuring that there is a clear understanding that the accuracy of risk assessments depends on the type of offender that is being assessed. This is due to the notion that certain types of offenders require special considerations when assessing their risk of recidivism. This will be explored having specific regard to sexual offenders.³²⁷

³²³ Norman Finkel 'Insanity's Disconnect, the Law's Madness, and the Irresistible Impulse of Experts' in Mark Constanzo, Daniel Krauss and Kathy Pezdeck (eds), *Expert Psychological Testimony for the Courts* (Psychology Press, 2006) 61.

³²⁴ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 30.

³²⁵ Dion Gee and James Ogloff, 'Sentencing Offenders with Impaired Mental Functioning: R v Verdins, Buckley and Vo [2007] at the Clinical Coalface' (2014) 21 *Psychiatry, Psychology and Law* 46, 62.

³²⁶ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 34.

³²⁷ Ibid 31, 38.

A ROLE OF PSYCHOLOGICAL ASSESSMENTS IN SENTENCING

1 SENTENCING INSANE OFFENDERS

1.1 Sanity Evaluations

In many cases, mental healthcare professionals are required to undertake the difficult task of trying to assess the mental state of an offender at the time of the alleged offence. These types of evaluations are retrospective in nature and require other sources of data including, medical or mental health records, police records and psychosocial history from friends and family.³²⁸ It is an unfortunate reality that these types of evaluations have an extremely ill structured format. Rogers Criminal Responsibility Assessment Scales (R-CRAS) remains the only published measure intended to aid in these evaluations. The R-CRAS provides a forensic psychologist with an empirically based approach to evaluating criminal responsibility. It allows them to quantify impairment at the time of the crime, to relate the impairment to the appropriate legal standard and to render an expert opinion with respect to the legal standard.³²⁹ However, there has been very little research supporting the effectiveness of this model. Moreover, other standard psychological tests such as MMPI-2, PAI or MCMI-III examine only some aspects of the offender's current functioning. Therefore, the results of these evaluations only at best examine the periphery of the mental state of the offender at the commission of the crime.³³⁰ Despite the evident limitations of sanity evaluations they are likely to be continuously used in forensic settings, due to the application of differing forms of the Insanity Defence, which is employed in numerous jurisdictions such as the United Kingdom, Australia, Canada, Norway, Denmark and the United States of America.³³¹

The Insanity Defence

'Insanity' in the context of this defence is a specific legal term meaning 'any mental disorder severe enough that it prevents one from having legal capacity and excuses one from criminal or civil responsibility'.³³² The reason for this defence in America is due to the notion that the American legal system is based upon the principles of morality and blameworthiness. Therefore, in order to be criminally responsible and subject to punishment for one's action, one must be capable of making a moral decision regarding one's action in order to be blameworthy.³³³ As a consequence of this, theories of punishment tend to be founded upon the idea that individuals are free to make their own rational decisions concerning their actions and therefore they should be held accountable for these actions.³³⁴ However, the doctrine of insanity interferes with this free and rational decision-making ability, as the presence of insanity does not allow an individual to form the intent that is

³²⁸ William Reid, 'Sanity Evaluations and Criminal Responsibility' (2006) 2 *Applied Psychology in Criminal Justice* 114, 126.

³²⁹ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 23.

³³⁰ Ibid.

³³¹ Ibid 25.

³³² Bryan Garner (ed), *Black's Law Dictionary* (West Group, 4th ed, 2011).

³³³ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 28.

³³⁴ Ibid.

necessary for finding of blameworthiness in the American legal system.³³⁵ Thus, in circumstances where insanity can be established, the offender is not held liable for their actions and it is usually asserted that they are in need of important treatment rather than punishment.³³⁶

Test for Insanity

This defence is only employed in only about nine of every one thousand criminal cases in the United States of America and it is only successfully used in twenty-five per cent of these cases. One of the major reasons for its diminutive success rate is due to the stringent tests that need to be proved.³³⁷ The different states in America use differing tests, however both California and Florida use the McNaughton Test. This test requires clear proof that the individual was, at the time they committed the offence, under defect of reason resulting from a disease of the mind and that such a defect resulted in the individual not being able to recognise the nature and quality of their actions. Over time the scope of this test expanded to include an ‘irresistible impulse’ component.³³⁸ Meaning that a person knew the nature and the quality of their actions, thus they knew it was wrong, however their mental disability resulted in an ‘overwhelming compulsion’, which did not enable the individual to resist the actions that they undertook.³³⁹ The rationale for this expansion was that such a powerful compulsion was sufficiently strong enough so that the prospect of criminal punishment would not act as a deterrent. Due to this, it has been argued that offenders who suffer from such an overwhelming compulsion should not be held accountable for their actions.³⁴⁰

1.2 Issues Surrounding the Insanity Defence

Timed served by insanity acquittees

The main rationale behind the insanity defence is that those who are not of a sound mind and lack capacity to make a rational decision should not be punished and sentenced to prison. Rather their time would be better served rehabilitating in a psychiatric institution. Although, this provides a sense of compassion for the minute group of offenders who satisfy this defence, there is a major issue with the practical consequences of sending these acquittees to a psychiatric institution.³⁴¹ The major controversy surrounds the notion that these acquittees are confined to this specific type of institution for an indeterminate period of time. It is extremely rare in the circumstances of insane offenders that they are released within several years of admission. Rather, many of these insane offenders remain there for most of their lives if their mental illnesses are resistant to treatments. Therefore, it is not uncommon that an insanity acquittee serves more time in a mental hospital than they would have in prison if the jury returned a guilty verdict. This is largely due to the fact that release of an insanity acquittee from a mental health institution in the United States of America is subject to an extensive and stringent criterion.³⁴² Information that would not ordinarily be relied on in the custodial setting such as the patient’s Psychopathy Checklist-Revised scores and age of their first crime are utilised in order to determine the decision whether a patient should be released. As a consequence of this, the current system with regards

³³⁵ Ibid.

³³⁶ Ibid 29.

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Ibid.

³⁴⁰ Ibid.

³⁴¹ Ibid 28.

³⁴² Norman Finkel ‘Insanity’s Disconnect, the Law’s Madness, and the Irresistible Impulse of Experts’ in Mark Constanzo, Daniel Krauss and Kathy Pezdeck (eds), *Expert Psychological Testimony for the Courts* (Psychology Press, 2006) 61.

to insanity acquitees has meant that a vast majority of patients are serving sentences in hospital that exceed the prison sentences that would have been administered to them by the court if there was no finding of insanity.³⁴³

Reliance on Psychologists

Another major criticism of the insanity defence is its reliance on expert testimony. This means that the disposition of the cases in which insanity is an issue is placed in the hands of mental health professionals, such as psychologists who may ultimately influence the jurors' opinions as to the defendant's mental state at the time of the offence. This is particularly pertinent, as insanity evaluations conducted by psychologists in the United States of America have been criticised as being ill structured and subjective.³⁴⁴ This raises an important question regarding the extent to which psychology should be involved in the legal process. More importantly, as the insanity defence is a specific legal term there are many legal questions that stem from its use. Many of these questions are answered by the expert opinion of the psychologist conducting the evaluation, which is misguided as many of these mental health professionals are untrained or undertrained in understanding legal matters.³⁴⁵ This gap in the knowledge of psychologists needs to be filled, as it has the potential to adversely affect the sentence of an offender. Therefore, in order to provide justice to offenders it is necessary that mental health professionals who intend to provide sanity evaluations complete cross-disciplinary training. Meaning that any mental healthcare professional should have a background in programs that stress both psychology and law, such as forensic psychology, if they intend to conduct sanity evaluations in the sentencing procedure.

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³⁴³ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 30.

³⁴⁴ Ibid 25.

³⁴⁵ Ibid 31.

³⁴⁶ Ibid 32.

2 SENTENCING CONSIDERATIONS FOR MENTALLY IMPAIRED OFFENDERS

2.1 Verdins Principles in *R v Verdins, Beckley and Vo* [2007] VSCA 102.

The Victorian Supreme Court of Appeal in Australia greatly broadened the scope for sentence mitigation with regard to offenders who are mentally impaired.³⁴⁷ It asserted that an offender does not need to be suffering from a serious psychiatric illness in order for sentencing considerations to be taken into account. Rather it is enough that an individual suffers ‘a mental disorder or abnormality or an impairment of mental function’. The Court of Appeal’s adoption of ‘impaired mental functioning’ is significant as it is deliberately broad and encompasses any symptomatology that ‘impacts deleteriously upon the capacity to exercise appropriate judgement, to make calm or rational choices, to think clearly or to disinhibit the offender, to appreciate the wrongfulness of conduct or, which obscures the intent to commit the offence’.³⁴⁸ Moreover, the use of this terminology encapsulates a variety of conditions that result in the impairment of mental functioning, which had been previously applied within the legal context to demarcate the boundaries of an individual’s psychopathology. The variety of terms/conditions it encapsulates may include, mental illness, serious mental illness, mental disorder, mental condition, abnormality, serious psychiatric illness, psychiatric illness, major mental illness, and psychiatric symptoms.³⁴⁹

Despite the acceptance of the nexus between mental impairment and judicial sentencing, it should be noted that that an offender’s sentence is not subject to automatic mitigation if the offender suffers from mental impairment.³⁵⁰ Rather, what is necessary is the assessment based on cogent evidence of the relationship between the mental impairment and the offending behaviour.³⁵¹ Therefore, an offender’s mental impairment would only be considered mitigatory if a causal link can be established between the offender’s condition and their actual offending.³⁵² If no causal link is established, focus will shift to whether the condition exists at the time of sentencing or will likely exist while the offender is undergoing sentencing.³⁵³ In order to establish these connections it is necessary to have regard to the *Verdins* principles that were elucidated in this case.³⁵⁴

Moral Culpability

It was asserted that it would be unjust in certain circumstances to attribute a full measure of personal responsibility to an offender if they were suffering from some form of mental impairment at the time they committed the offence.³⁵⁵ Therefore, an offender’s impaired mental function may be taken into account during the sentencing process if it reduces their moral culpability for committing the crime.³⁵⁶ However, if it cannot

³⁴⁷ Dion Gee and James Ogloff, ‘Sentencing Offenders with Impaired Mental Functioning: R v Verdins, Buckley and Vo [2007] at the Clinical Coalface’ (2014) 21 *Psychiatry, Psychology and Law* 46, 47.

³⁴⁸ *R v Verdins, Beckley and Vo* [2007] VSCA 102 (23 May 2007) [26].

³⁴⁹ Dion Gee and James Ogloff, ‘Sentencing Offenders with Impaired Mental Functioning: R v Verdins, Buckley and Vo [2007] at the Clinical Coalface’ (2014) 21 *Psychiatry, Psychology and Law* 46, 49.

³⁵⁰ *R v Zander* [2009] VSCA 10 (5 February 2009).

³⁵¹ *R v Verdins, Beckley and Vo* [2007] VSCA 102 (23 May 2007) [24].

³⁵² *Ibid.*

³⁵³ *Ibid*

³⁵⁴ Dion Gee and James Ogloff, ‘Sentencing Offenders with Impaired Mental Functioning: R v Verdins, Buckley and Vo [2007] at the Clinical Coalface’ (2014) 21 *Psychiatry, Psychology and Law* 46, 49.

³⁵⁵ *Ibid* 48.

³⁵⁶ *R v Verdins, Beckley and Vo* [2007] VSCA 102 (23 May 2007) [25].

be shown that the impairment contributed to the aberrant behaviour in some significant and direct way, then the individual will be held fully culpable.³⁵⁷ In order to establish the connection between an offender's symptom profile and the commission of the crime, it is essential that the mental capacity of the offender be affected in the relevant way:

- Impairing the offender's ability to exercise appropriate judgement,
- Impairing the offender's ability make calm and rational choices, or to think clearly,
- Appreciate the wrongfulness of the conduct,
- Obscuring the intent to commit the offence.³⁵⁸

Forensic psychologists are useful in deciphering the moral culpability of an offender, as this profession specialises in applying psychological knowledge to legal matters. Therefore, they play a vital role in unpacking the relevance of the potential symptoms displayed by the offender in relation to its causal influence on the offending behaviour. This is an extremely difficult task as it goes far beyond the clinical diagnosis of presenting symptomatology and discussing how these symptoms might impact an individual's functioning.³⁵⁹ Rather, what it requires is a formulation around how the mental symptoms of an individual offender impaired their mental functioning and how these impairments were relevant in the commission of their specific aberrant behaviour.³⁶⁰

In measuring moral culpability the court must also take into account community protection.³⁶¹ In *R v Kerbatieh* [2005] it was noted that, 'where offences are very grave and denunciation and deterrence and protection of the community are the principle sentencing considerations... mitigating aspects of offending must play a lesser role in the formulation of the appropriate sentencing disposition'.³⁶² Therefore, in the context of sexually deviant crimes when the offender shows sign of mental impairment at the time of the commission of the offence, it has been asserted that lengthy custodial sentences might still be enforced. This is because it will have the effect of putting these sexual offenders in a place where they cannot harm others.³⁶³ This works to protect the community and also reinforces the pursuantly punitive attitude that the Australian community has towards sexually deviant offenders.³⁶⁴

General Deterrence

Mental impairment also reduces the weight given to deterrence theory in sentencing. This is because most individuals who suffer from impaired mental functioning tend to not digest a court's sentence in a suitably meaningful way. This therefore calls into question whether this offender should be used as an example to deter other people from committing similar crimes.³⁶⁵ This is particularly important as it is argued in the case of *Verdins* that mentally impaired offenders differ from the 'average offender'. In order to assist the court in taking this consideration into account it is necessary that a forensic psychologist inform the court about the extent to which the individual differs from the 'average offender,' having due regard to the baseline

³⁵⁷ Ibid.

³⁵⁸ Ibid [26].

³⁵⁹ Dion Gee and James Ogloff, 'Sentencing Offenders with Impaired Mental Functioning: R v Verdins, Buckley and Vo [2007] at the Clinical Coalface' (2014) 21 *Psychiatry, Psychology and Law* 46, 51.

³⁶⁰ *R v Verdins, Beckley and Vo* [2007] VSCA 102 (23 May 2007) [13].

³⁶¹ Ibid [19].

³⁶² *R v Kerbatieh* [2005] VSCA 194 (30 August 2005) [119].

³⁶³ Ibid.

³⁶⁴ *Director of Public Prosecutions v EB* [2008] VSCA 127 (17 July 2008) [14].

³⁶⁵ Dion Gee and James Ogloff, 'Sentencing Offenders with Impaired Mental Functioning: R v Verdins, Buckley and Vo [2007] at the Clinical Coalface' (2014) 21 *Psychiatry, Psychology and Law* 46, 53.

characteristic of the specific population.³⁶⁶ To demonstrate, it is arguable that an offender whose primary trauma pathology, which consisted of dissociative experiences would be less of a vehicle for general deterrence than an individual whose trauma symptoms stemmed from physiological arousal, as the latter is often seen to be present in the general offender population.³⁶⁷ Thus, by unpacking the symptoms of the ‘average offender’ population, a forensic psychologist is able to provide the judiciary with a more informed position that allows the court to discriminate between an offender with a complex mental disorder that gives rise to the sentencing considerations in *Verdins* and the presence of symptoms that have little nexus to the aberrant behaviour.³⁶⁸

Specific Deterrence

The court followed the case in *R v Tsiaras* [1996] and gave very little attention to the principle of specific deterrence. The court in *Tsiaras* stated that ‘specific deterrence may be more difficult to achieve and it is often not worth pursuing’.³⁶⁹ Despite the lack of application, this principle is engaged when a sanction is unlikely to deter an offender from reoffending. As a consequence of this, the court may impose a more onerous sanction in an attempt to achieve specific deterrence. However, it was stated in *Verdins* that if the reason why the usual sanction will not deter the offender is because he or she suffers from mental impairment, the court is not required to escalate the sentence. Specific deterrence may therefore not be enlivened in sentencing when a mentally impaired offender shows several factors such as diminished moral culpability, imprisonment would weigh more heavily on them than on others, the individual is unlikely to reoffend, and where an offender displays an impaired capacity to learn from the pronouncements of the court.³⁷⁰ These guiding factors essentially allow the court to determine whether specific deterrence should be eliminated or moderated when sentencing a mentally impaired offender.³⁷¹

Type of Sentence

An offender’s impaired mental function may also have an impact on the kind of sentence that the court imposes and the conditions in which the sentence should be served. The particular sentences the court is to consider specifically are:

- Imprisonment,
- Detained in a secure mental health facility,
- A non-custodial sentence.³⁷²

Furthermore, the mental impairment of an offender might require certain conditions to be imposed such as longer than usual parole periods. This decision has at times flowed from the court’s acceptance that specific intervention for an offender’s impaired mental functioning could not adequately be undertaken in a prison environment, or the court has recognised that the specific intervention options were more likely to present

³⁶⁶ *R v Verdins, Beckley and Vo* [2007] VSCA 102 (23 May 2007) [16].

³⁶⁷ Dion Gee and James Ogloff, ‘Sentencing Offenders with Impaired Mental Functioning: *R v Verdins, Buckley and Vo* [2007] at the Clinical Coalface’ (2014) 21 *Psychiatry, Psychology and Law* 46, 54.

³⁶⁸ *R v Verdins, Beckley and Vo* [2007] VSCA 102 (23 May 2007) [22].

³⁶⁹ *R v Tsiaras* [1996] 1 VR 398 (28 November 1995) 400.

³⁷⁰ *Ibid* [32].

³⁷¹ *Ibid*.

³⁷² *Ibid* [1].

themselves upon the individuals release from custody.³⁷³ Furthermore, whilst community protection is not explicitly mentioned within the *Verdins* principles, the need for community safety always underlies a court's sentence. Therefore, the court may also consider the need for increased monitoring of the offender's condition by appropriate authorities following their return to the community.³⁷⁴

Ultimately, the final decision of how an offender is going to carry out their sentence is up to the judiciary. Despite this, forensic psychologists can provide fundamental information to the judiciary that can help them to inform their decision-making process.³⁷⁵ It is generally argued that this principle should be addressed in pre-sentence reports where a forensic psychologist is able to comment on the efficacy and likelihood of an offender receiving treatment for their impaired mental functioning across the various sentencing settings. Moreover, the report should also entail the capacity of the correctional/mental health systems to tailor programmes to cater for the specific needs of the individual offender. By providing such a comprehensive report, the judiciary will be able to effectively conclude the appropriate sentence for the particular offender in the case.³⁷⁶

Burden of Imprisonment

A sentence may also be mitigated if the likely burden of being imprisoned exceeds that experienced by an average offender in the confines of a prison.³⁷⁷ However, the mere presence of a psychiatric condition will not, without evidence, establish that imprisonment will present a greater burden.³⁷⁸ It will ultimately depend on the nature and severity of the mental condition and whether such a condition will cause imprisonment to be far more burdensome.³⁷⁹ In deciding the burden of imprisonment, the court may take into account, if an individual is likely to spend part or their entire sentence in a seclusion cell, if the offender will spend part/all of their sentence in specialised units, such as that for intellectually disabled prisoners or for individuals with acute major mental illnesses.³⁸⁰ Further factors include, whether the offender is likely to feel alienated due to their impaired mental functioning, whether the management of the offender's condition would be difficult in a prison setting and where an individual's conviction results in the need for differential circumstances of imprisonment.³⁸¹

Effect of Imprisonment on the Offender's Mental Health

Mitigation of sentence will also occur if there is a 'serious risk of imprisonment having a significant adverse effect on an individual's mental health.'³⁸² This consideration is much more difficult to decipher as there is little discussion on what constitutes 'serious risk' and 'significant adverse effect'.³⁸³ Despite this, there are

³⁷³ Dion Gee and James Ogloff, 'Sentencing Offenders with Impaired Mental Functioning: R v Verdins, Buckley and Vo [2007] at the Clinical Coalface' (2014) 21 *Psychiatry, Psychology and Law* 46, 56.

³⁷⁴ Ibid.

³⁷⁵ Ibid.

³⁷⁶ Ibid.

³⁷⁷ *R v Verdins, Buckley and Vo* [2007] VSCA 102 (23 May 2007) [25].

³⁷⁸ Ibid [24].

³⁷⁹ *R v Zander* [2009] VSCA 10 (5 February 2009) [12].

³⁸⁰ Dion Gee and James Ogloff, 'Sentencing Offenders with Impaired Mental Functioning: R v Verdins, Buckley and Vo [2007] at the Clinical Coalface' (2014) 21 *Psychiatry, Psychology and Law* 46, 59.

³⁸¹ Ibid.

³⁸² Ibid [30].

³⁸³ Dion Gee and James Ogloff, 'Sentencing Offenders with Impaired Mental Functioning: R v Verdins, Buckley and Vo [2007] at the Clinical Coalface' (2014) 21 *Psychiatry, Psychology and Law* 46, 61.

non-exhaustive considerations that could be taken into account when considering the effect that imprisonment will have on a mentally impaired offender:

- History of the offender's mental impairment,
- The particular management regime of a prison,
- Whether prisons provide behavioural programs specifically tailored to the needs of mentally impaired offenders,
- The likelihood of receiving effective intervention, whilst incarcerated.³⁸⁴

Due to the foregoing lack of clarity around this area, forensic psychologists have a crucial role of providing an expert opinion to the court with regards to the likely impact of imprisonment on the offender, given their psychopathology. Their assessments are to provide a view of the mental impairment of the offender and their necessary treatment. This is balanced with analysis of the prison environment options that realistically demonstrates the complexities and limitations inherent within these imprisonment options, which may hinder the provision of mental healthcare services to prisoners.³⁸⁵ By incorporating an understanding of the limitations of the differing prison environments into the sentencing decision, the judge is able to assess the probability of a condition's foreseeable recurrence within these environments. This therefore helps with understanding the likelihood of whether imprisonment will have a significant adverse effect on an offender's mental health.³⁸⁶

In the Australian jurisdiction of Victoria it has been asserted that nearly one third of Victoria's male prisoners have diagnosed mental health conditions, however the level of mental health services available to them is grossly inadequate.³⁸⁷ This is because the provision of mental health services in Victorian prisons tends to only deal with prisoners who have a serious psychiatric illness amounting to insanity. Thus, leaving mentally impaired offenders who do not have conditions amounting to insanity with no real mental health support. This lack of service provision can lead to stigmatisation and alienation within prison environments, as unchecked and mismanaged psychopathology can heighten interpersonal conflict and can highlight self-harm and suicidal ideation. Therefore, an increased provision of mental health care services for offenders who suffer from impairment of mental function is necessary to ensure that the court is able to give an appropriate sentence to the offender that does not exacerbate their condition.³⁸⁸

³⁸⁴ Ibid.

³⁸⁵ Ibid 60.

³⁸⁶ Ibid 62.

³⁸⁷ Ibid 60.

³⁸⁸ Ibid.

CONCLUSION

Ultimately, the nexus between mental health and sentencing is not neglected within the current context of the United States of America and Australia. Therefore, the mental and behavioural attributes of an offender play a crucial role in deciding the type and conditions of a sentence.³⁸⁹ There are obvious reasons why psychological attributes of an offender should be taken into account. For example many offenders with a defect of the mind do not have requisite understanding of the nature and quality of their actions.³⁹⁰ Thus, they are unable to make a moral and rational decision about their action, which diminishes their level of culpability.³⁹¹ Moreover, conducting psychological assessments are beneficial in the sense that they aim to place a certain offender in an alternative environment to the prison setting, which does not inflict further harm to their psychological problems.³⁹² However, in order for psychological assessments to serve their intended purpose it is necessary that there are service provisions in place that work to meet the needs of a mentally impaired offender.³⁹³ Moreover, other issues concerning psychological assessments need to be rectified. Issues include the fact that many mentally ill offenders are spending an indeterminate amount of time in mental institutions, which contrasts the pre-determined length of custodial sentences.³⁹⁴ Also, these assessments rely extremely heavily on mental health professionals such as clinical psychologists who are not well trained in dealing with legal issues. Thus, if a psychologist intends to conduct a psychological assessment within the criminal sentencing procedure, it is necessary that they have some form of training in applying their knowledge of psychology to legal matters.³⁹⁵

³⁸⁹ Ibid 47.

³⁹⁰ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 17.

³⁹¹ *R v Verdins, Beckley and Vo* [2007] VSCA 102 (23 May 2007) [25].

³⁹² Dion Gee and James Ogloff, ‘Sentencing Offenders with Impaired Mental Functioning: R v Verdins, Buckley and Vo [2007] at the Clinical Coalface’ (2014) 21 *Psychiatry, Psychology and Law* 46, 60.

³⁹³ Ibid.

³⁹⁴ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 30.

³⁹⁵ Norman Finkel ‘Insanity’s Disconnect, the Law’s Madness, and the Irresistible Impulse of Experts’ in Mark Constanzo, Daniel Krauss and Kathy Pezdeck (eds), *Expert Psychological Testimony for the Courts* (Psychology Press, 2006) 61.

3 SENTENCING HIGH RISK VIOLENT OFFENDERS

3.1 Risk Assessments

Analysing the risk of an individual has become very important to the criminal justice system and sentencing process. It has been argued that in order to protect society, there will always be a need for the courts to take into account the risk of future violent behaviour when imposing sentences. In the American criminal justice system, the sentencing hearing is a common time for the court to ask a psychologist to generate an assessment about an individual's risk of reoffending.³⁹⁶ These assessments tend to be a result of gathering empirical data from demographic characteristics (age, gender, socio-economic status, ethnicity), level and history of past violence (criminal histories, sexual versus nonsexual offenders), psychiatric diagnosis (presence of a personality disorder or symptoms or presence of psychosis), whether any treatment is being received, the specific type of behaviour that is being predicted and the environmental setting. In this regard, a psychologist serving as an expert for the court can have a significant influence on the sentence imposed.³⁹⁷

3.2 Issues with Risk Assessments

Despite the significant role of risk assessments within the criminal justice system, there are still considerable criticisms surrounding its utilisation. The most significant and worrisome criticism is that these assessments have a very limited ability to predict future violence. Back in 1981, Monahan noted that a prediction by a mental health professional from clinical judgement in America only accurately predicted future violence one third of the time.³⁹⁸ Moreover, the use of clinical practice in order to determine the risk of future violence has been criticised on other grounds as it lacks external consistency and there tends to be a failure to specify the decision-making process. Based on this, in the past three decades there has been an emphasis on improving the predictive models of violence used by the clinicians who make these assessments. It has been asserted that the use of actuarial instruments has improved the ability to predict future violent behaviour.³⁹⁹ Actuarial instruments are statistically normed on a given population and allow a user to score an individual with regard to the presence/absence/degree of a certain trait or historical variable and then provide a quantitative measure of risk.⁴⁰⁰ Despite the promotion of these actuarial instruments, it is necessary to understand that they are promoted in favour of earlier unaided clinical assessments. Therefore, they are generally just seen as an improvement on the earlier approach of risk assessments. Thus, the validity of these actuarial instruments is still contended.⁴⁰¹

³⁹⁶ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 34.

³⁹⁷ Ming Yang, Stephen Wong and Jeremy Coid, 'The Efficacy of Violent Prediction: A Meta-Analysis Comparison of Nine Risk Assessment Tools' (2010) 136 *Psychological Bulletin* 740, 741.

³⁹⁸ John Monahan, *The Clinical Prediction of Violent Behaviour* (Sage, 1981) 24.

³⁹⁹ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 36.

⁴⁰⁰ John Monahan, *The Clinical Prediction of Violent Behaviour* (Sage, 1981) 26.

⁴⁰¹ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 36.

Yang et al in 2010 reviewed studies examining the accuracy of eight commonly-used actuarial measures and found that all of them demonstrated moderate, above chance levels of predictive accuracy with regard to risk of future violence.⁴⁰² This is a significant issue as the stakes with regards to violence risk assessment are particularly high as they can substantially deprive an offender of their civil liberties for a significant period of time. Within the American context the stakes are extremely high, as capital sentencing is a possible option if the risk assessment produces a result that shows the risk of recidivism is substantially high. With these matters in mind, it is essential to inspect alternative risk assessment models that have been recommended to improve predictive accuracy.⁴⁰³

3.3 Recommendations for Who Should Conduct Risk Assessments

The professional that carries out the risk assessment significantly contributes to the utility and validity of the risk assessment. This was made evident from Tolman and Mullendore's study that compared the practice patterns of generally licensed psychologists with those of specialist forensic diplomats in providing risk assessments for the court.⁴⁰⁴ These specialist forensic diplomats are licensed psychologists but have also undergone a rigorous certification process by specialty boards in which they were required to submit and defend work samples, as well as pass oral and written examinations in the area of physical anthropology. These examinations specifically focus on how the biological and behavioural aspects of human beings can influence the legal and sentencing process in criminal matters.⁴⁰⁵

The results from this comparative study displayed that general clinicians frequently conduct risk assessments. However, the practicing patterns of forensic diplomats are far more extensive and should be the preferred way of carrying out risk assessments. This is due to the fact that forensic diplomats are more likely to use modern actuarial risk instruments, and provide the court with more information about the scientific basis of the testimony.⁴⁰⁶ Moreover, forensic diplomats in general were more likely to be aware of the relevant legislation, most recent literature surrounding risk assessments and to have had extensive experience and training in risk assessments with forensic populations.⁴⁰⁷ Considering, the potential implications of a risk assessment in the sentencing procedure, it appears that the practicing patterns of forensic diplomats should be encouraged when conducting risk assessments. Therefore, if general psychologists intend to take on this specific area of work they have an obligation to familiarise themselves with the relevant research and ground their conclusions on solid empirical data that relates to violence risk assessment.⁴⁰⁸

3.4 Recommendations for Risk Assessment Models

It has been suggested that decisions that stem from risk assessments, which ultimately affect the liberty of offenders and the safety of the community should be based on a combination of clinical experience and

⁴⁰² Ming Yang, Stephen Wong and Jeremy Coid, 'The Efficacy of Violent Prediction: A Meta-Analysis Comparison of Nine Risk Assessment Tools' (2010) 136 *Psychological Bulletin* 740, 741.

⁴⁰³ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 34.

⁴⁰⁴ Anton Tolman and Kristen Mullendore, 'Risk Evaluations for the Courts: Is Service Quality a Function of Specialization?' 34 *Professional Psychology-Research and Practice* 225, 229.

⁴⁰⁵ Ibid 230.

⁴⁰⁶ Ibid 231.

⁴⁰⁷ Ibid.

⁴⁰⁸ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 40.

actuarial assessments. It has been asserted that the combination of these two approaches is required as it increases the accuracy of prediction for future recidivism.⁴⁰⁹ There are several features of this combined approach, which assists in increased predictive accuracy:

- These assessments are conducted using a well-defined scheme,
- Agreement between assessors is respectable, through their training, knowledge and experience,
- Prediction is for a specific, defined type of behaviour over a set period,
- Violent acts are detectable and recorded,
- All relevant information is available and substantiated,
- Actuarial estimates are adjusted only if there is sufficient justification.⁴¹⁰

The ‘Psychopathy Checklist (Revised)’ (PCL-R) is a well-known example of a risk assessment model that uses both clinical and actuarial expertise in order to assess the risk of recidivism. This assessment tool is scored on a three-point scale and scores range from 0 to 40, with a cut-off of less than 30 reflecting a prototypical psychopath. It has a stable structure in which Factor 1 reflects interpersonal/affective traits, whilst Factor 2 reflects the behaviour components of psychopathy. The PCL-R has been shown to have good psychometric properties and has been able to reveal a variety of factors that assist in predicting violence, including recent violence history and substance abuse.⁴¹¹ Moreover, it gains a significant amount of its predictive power from the behavioural factors listed in Factor 2. Determinants such as command hallucinations with violent content, violent thoughts and anger were significant factors in increasing risk of future violence. Other specific factors exhibited by individuals were also found to show a higher risk of future violence:

- Poor impulse control,
- Poor insight,
- Noncompliance with mental health treatment,
- Lower IQ score.⁴¹²

In North America, studies have shown that PCL-R has the greatest utility as a risk assessment tool in identifying recidivists and predicting violence in forensic and prison samples.⁴¹³ Moreover, studies in Sweden have demonstrated that the PCL-R scores were the best predictor of violent recidivism two years after release from containment for offenders who suffered from personality disorders. Ultimately, the PCL-R is currently believed to be one of the most reliable tools for assessing personality constructs that are likely to be relevant to violent risk prediction. Consequently, if courts are to continue to rely on risk assessments, it is arguable that a mixture between clinical experience and actuarial assessments, similar to the PCL-R are necessary in order to ensure that the most accurate prediction is produced.⁴¹⁴

3.5 Special Considerations in Conducting Risk Assessments for Sexual Offenders

⁴⁰⁹ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 37.

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

⁴¹² Paola Rocca, Vincent Villari and Filipo Bogetto, ‘Managing the Aggressive Patient in the Psychiatry Emergency’ (2006) 30 *Psychiatry in Neuropsychopharmacol & Biological Psychiatry* 586, 590.

⁴¹³ Ibid 591.

⁴¹⁴ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 37.

It is essential to understand that there are special considerations in conducting risk assessments for sexual offenders, such as assessing the individual's cognitive process, their general lifestyle, their history of sexual deviance, as well as the unique presentation of mental illness among sex offenders, which can differ from the presentation of mental health symptoms in other types of offenders. Moreover, the predictive validity of a particular risk assessment can vary considerably depending on the specific type of sexual offender that is being assessed.⁴¹⁵ This was shown through the comparative study of differing actuarial risk instruments for sex offenders performed by Harris, Rice, Quinsey, Lalumiere, Boer and Lang in 2003.⁴¹⁶ They compared the several notable risk assessment models used in America:

- Violence Risk Appraisal Guide (VRAG)
- Sex Offender Risk Appraisal Guide (SORAG)
- Rapid Risk Assessment for Sex Offenders Recidivism (RRASOR)
- Static-99

All of these instruments work along the same line in the sense that they are an actuarial scale with a certain number of items. Each item is scored and then assigned a weight based on the relationship of that item with regards to violent recidivism in the construction sample, these weights are then summed up to obtain a total score. This score yields the percentile rank of the offender as compared with the construction sample and the estimated probability of violent recidivism based on a 7-year and a 10-year period of opportunity to re-offend.⁴¹⁷ Ultimately, what came out of this comparative study was that the predictive validity of these instruments was higher for particular sexual offenders, namely child molesters. The Static-99 and RRASOR had a particularly high predictive validity for child molesters. Conversely, these instruments could not replicate such high predictive validity with other specific subcategories of sexual offenders such as rapists.⁴¹⁸ Therefore, it is extremely important to understand that sexual offenders cannot be treated as a homogenous group with regards to risk assessment. Rather they must be treated in a way that recognises the differences between the subcategories of sexual crimes. As a consequence, the specific risk assessment that has been found to have the highest predictive validity should be used for the particular subcategory of crime that is in question. The application of this works to lessen the risk associated with subtypes of offenders and decreases the likelihood of mental healthcare professionals drawing erroneous conclusions.⁴¹⁹

⁴¹⁵ Ibid 38.

⁴¹⁶ Grant Harris, Marnie Rice, Vernon Quinsey, Martin Lalumiere and Douglas Boer, 'A Multisite Comparison of Actuarial Risk Instruments for Sex Offenders' (2003) 15 *Psychological Assessment* 413.

⁴¹⁷ Ibid 415.

⁴¹⁸ Ibid 424.

⁴¹⁹ Stacey Shipley and Bruce Arrigo, *Introduction to Forensic Psychology: Court, Law Enforcement and Correctional Practices* (Academic Press, 3rd ed, 2012) 38.

CONCLUSION

Experts have consistently conceded that accurately predicting future violent risk is an extremely difficult task. Nevertheless, it is likely that courts and juries will continue to give significant weight to risk assessments in order to protect the greater community.⁴²⁰ As a consequence of this, it is necessary that the criminal justice and mental health system work to place parameters around the predictions that can be offered in court, as these assessments can considerably affect the rights and liberty of an offender.⁴²¹ Moreover, along the same lines as discussed in **3.4 Recommendations for Risk Assessment Models**, it is necessary that the criminal justice system work to adopt risk assessment approaches that combine clinical psychological experience with actuarial methods in order to improve predictive validity.⁴²² Additionally, as risk assessments are extremely complex instruments it is also necessary to identify what type of profession is most qualified to carry out this process. Forensic diplomats have been suggested as being a suitable option as their work combines legal matters with the study of psychology.⁴²³ Furthermore, there must also be a concentration on clearly establishing what is the most efficacious risk assessment for each type of offender, as the validity of a risk assessment greatly depends on the type of offender that is being assessed. This is particularly important with regards to sexual offenders as they have a unique presentation of mental illness that differs from other types of offenders.⁴²⁴ Moreover, within the sexual offender category the predictive validity of different risk assessments varies considerably with differing types of sexual offenders. Therefore, there must be a clear understanding of what particular risk assessment is most compatible to maximise the predictive validity of these instruments.⁴²⁵

⁴²⁰ Ibid 34.

⁴²¹ Ibid 42.

⁴²² Ibid 37.

⁴²³ Anton Tolman and Kristen Mullendore, ‘Risk Evaluations for the Courts: Is Service Quality a Function of Specialization?’ 34 *Professional Psychology-Research and Practice* 225, 229.

⁴²⁴ Grant Harris, Marnie Rice, Vernon Quinsey, Martin Lalumiere and Douglas Boer, ‘A Multisite Comparison of Actuarial Risk Instruments for Sex Offenders’ (2003) 15 *Psychological Assessment* 413, 414.

⁴²⁵ Ibid.

PART 3: ROLE AND EFFECT OF VICTIM IMPACT STATEMENTS

Jessica Vines

INTRODUCTION

Part 3 of the report focuses on the role that victim impact statements play in the criminal justice system, and its effect on sentencing outcomes.

Part 3 is divided into three sections; first, it will provide an overview of the main elements of victim impact statements and its philosophical and historical background; secondly, it will discuss the position of victim impact statements in the legal framework of USA, Canada and Australia. In this part, there will be a specific focus on how the judiciary in each country interpret the legislative framework and the actual effect victim impact statements play on shaping sentencing outcomes; finally, the final section of this chapter will discuss various academic opinions about the utility of victim impact statements and its advantages and shortcomings from the perspective of the victim, criminal justice system and offender.

A ELEMENTS OF VICTIM IMPACT STATEMENTS

1 CONCEPTUAL FRAMEWORK

1.1 Definition

Broadly speaking, Victim Impact Statements are accounts made by victims of crime, which outlines the impact that a crime has on the individual. In Australia, Canada and USA, they are presented to the court during the sentencing phase⁴²⁶ (after a guilty conviction has been determined, but before a penalty is passed). In all three jurisdictions, judges have discretion to consider Victim Impact Statements when deciding a sentence for the offender.

The contents of Victim Impact Statements can include:

- Physical damage caused by the crime
- Emotional damage caused by the crime
- Financial cost to the victim as a result of the crime
- Medical or psychological treatments required by the victim
- The need for restitution
- The victims' views on the crime or the offender
- The victims' views on the appropriate sentence (in some US jurisdictions)⁴²⁷

In most cases, Victim Impact Statements will be delivered orally by the victim in the courthouse, or presented to the judge in written format.⁴²⁸ In some Australian jurisdictions (South Australia, Victoria and Queensland) and Canada, young children with limited language abilities can also submit Victim Impact Statements through drawings and/ or simple written accounts.⁴²⁹ Victims who are intimidated by the court process and/or do not want to confront the offender also have the option of delivering their statement through closed circuit television.⁴³⁰

⁴²⁶ Kim Lens and Antony Pemberton, 'Delivering a Victim Impact Statement: Emotionally Effective or counter productive' (2015) 12(1) *European Journal of Criminology* 12, 18.

⁴²⁷ *Ibid* 19.

⁴²⁸ Christine M. Englebrecht, 'Whose Statement is it? An Examination of Victim Impact Statements Delivered in Court' (2014) 9(4) *Victims and Offenders* 386, 388.

⁴²⁹ Rita Shackel, 'Victim Impact Statements in Child Sexual Assault Cases: A Restorative Role or Restrained Rhetoric?' (2011) 34(1) *University of New South Wales Law Journal* 212, 220.

⁴³⁰ *Ibid* 222.

1.2 Historical and philosophical background

The utility of Victim Impact Statements in the criminal justice system is based on restorative justice theory.⁴³¹ This theory prescribes that the objective of the criminal justice system should be about reconciliation and reparation of relationships between the offender, victim of crime and wider community.⁴³²

Victim Impact Statements and Restorative Justice Theory developed momentum during the 1970's, by grass-root Victim Rights Movements; they were concerned that the criminal justice system alienated victims, as the only opportunity they have to participate in the court proceeding is as a witness or observer. In addition, because of the role the state plays in criminal proceedings, harm caused by the offender is conceptualised against the state, which undermines the personal damage caused to the victim.⁴³³

The Victims' Rights Movement was reflected in the United Nations Declaration (*The Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985)), which asserts that views of victims should be "presented and considered at appropriate stages of court proceedings where their interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system".⁴³⁴

Young children's role in the court system was equally encouraged in the United Nations Convention on the Rights of a Child, which provides that children should 'be provided the opportunity to be heard in any judicial...proceedings affecting the child', including 'victims of sexual abuse'.⁴³⁵

⁴³¹ David A. Starkweather, 'The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining' (1992) 67(3) *India Law Journal* 845, 854.

⁴³² Michael Flatman, 'The Victim and the Prosecutor: The Relevance of Victims in Prosecution Decision Making' (2001) 6(2) *Deakin Law Review* 235,241.

⁴³³ Ibid.

⁴³⁴ Ibid 244.

⁴³⁵ Ibid.

B ANALYSIS OF JURISDICTIONS

United States

At a federal level, the right to make Victim Impact Statements derives from the *Crime Victim's Rights Act*.⁴³⁶ This Act provides a general stipulation that victims have "the right to be reasonably heard at any public proceeding in the district court involving sentencing".⁴³⁷ Former United States Senator Jon Kyl stated that to be 'reasonably heard' includes the right to discuss the impact of the crime, the right to speak about the character of the victim and to make recommendations about what is an appropriate sentence for the offender.⁴³⁸ However, not all states have adopted this interpretation. For instance, only a number of states, such as Michigan and Kentucky, permit victims to provide recommendations about the appropriate sentence.⁴³⁹ In Kentucky, the courts even permit children to give recommendations. For instance, a form is available to assist young children deliver an impact statement, and a question on the form is: "If you were the judge, what would you do to [the offender]?" The options include send to jail, pay some money, go to a doctor, nothing, stay away from kids, and "Put your own idea here".⁴⁴⁰

At the moment, all 50 states have either statutory or constitutional provisions reflecting a version of the Federal Act.⁴⁴¹ In all states, there is a requirement to receive notice of and the right to participate in any criminal proceedings against the alleged perpetrators.⁴⁴² However, not all states have interpreted victim impact statements according with Senator Jon Kyl's interpretation- with only a number of states being able to make recommendations about the appropriate sentence for offenders.

Although each state has their own laws, two cases- *Maryland v Booth* and *Payne v Tennessee*- have had a significant impact in shaping the way judges regulate Victim Impact Statements.

In *Booth v Maryland*, the Supreme Court held that Victim Impact Statements are unconstitutional and should not be permitted during sentencing for two main reasons; they are irrelevant, as it focuses on the character of the victim rather than the offender's culpability and any "probative value from impact statements are outweighed by its prejudicial effect" to the defendant'.⁴⁴³

In *Payne v Tennessee*, Payne had been convicted of murdering a mother and her daughter. During sentencing, a victim impact statement was delivered by the child's grandmother, who explained the effects that the murder had on the remaining three-year-old son. She said that the boy missed and cried for his murdered sister and mother, and that the mother would never be able to kiss her son goodnight again, or sing him lullabies. This evidence played a role in the judge's determination to sentence Payne to death. Payne's counsel appealed, on the basis that *Maryland v Booth* held the use of victim impact statements for capital punishment sentencing to

⁴³⁶ Vera Institute of Justice, "Statement of Paul G. Cassell before the United States Sentencing Commission" (2005) 19(2) *University of California Press* 136.

⁴³⁷ Ibid.

⁴³⁸ Ibid.

⁴³⁹ United States Department of Justice, *Victim Impact Statements/ Restitution*, United States Department of Justice<https://www.justice.gov/sites/default/files/usao-edtn/legacy/2012/01/06/EDTN_VictimImpactStatements_brochure.pdf>.

⁴⁴⁰ Ibid.

⁴⁴¹ JH Blume, "Ten years of Payne: Victim impact evidence in capital cases" (2002) 88(2) *Cornell Law Review* 258, 262.

⁴⁴² Michael Solimine, 'federalism, Victims Courts and Victims Rights' (2015) 65(1) *Catholic University Law Review* 912.

⁴⁴³ *Booth v. Maryland*. 482 U.S. 496. (1987).

be constitutional. However, the Supreme Court overturned *Booth v Maryland*, and held that the constitution does not bar victims from delivering impact statements for capital punishment sentencing. The court held that victim impact statements are relevant to offender's culpability, because the harm one inflicts is a sentencing consideration.⁴⁴⁴

This case has been frequently cited as authority for allowing victims to make impact statements and using them as sentencing considerations.⁴⁴⁵ However, *Payne* has been criticised for failing to make coherent and comprehensive guidelines about how victim impact statements should be regulated and how zealously it should be enforced in courts.⁴⁴⁶ This view has been expressed by a Supreme Court judge, Stephen J, who said that in the years since *Payne* has been handed down, the court is still unguided in efforts to distinguish the barriers between victim impact statements that are permissible and impermissible.⁴⁴⁷ Many people, including legal academics and judges, have considered *Payne* as authority for making victim impact statements automatically admissible in court.⁴⁴⁸ However, many other scholars and judges have held a different interpretation; in *Payne*, the court held that impact statements are not barred per se; however, the court also expressly stated that victim impact statements could be unconstitutional in some circumstances, particularly when impact statements are prejudice and conflicts with the due process.⁴⁴⁹

As a result of this caution, some judges have not accepted Victim Impact Statements as an automatic right that victims have. For instance, in the case *Mcmillan v State*, the Alabama Supreme Court held that a victim impact statement delivered by the parents whose child was murdered should be permitted and did not violate due process, because "it was brief and did not reach the level and extent of statement condemned in *Booth v Maryland*".⁴⁵⁰

This case is just one example from many cases that shows how the limitations of victim impact statements that were enunciated in *Maryland v Booth* as well as *Payne* have been influential in judicial decision making, and have prevented impact statements from being an automatic right.

How and when Victim Impact Statements are delivered also varies significantly according to the judge that is preceding and the jurisdiction. For instance, in New York, victims or their family members are able to make an oral delivery on "any matter relevant to sentencing".⁴⁵¹ However, the judge has discretion to decide whether or not a family member should speak, and if the impact statement should be presented in front of the offender or office courts.⁴⁵² A study that assessed the regulation of impact statements in New York revealed that only one third to one half of family members that were interviewed were able to present their statements in the presence of the offender.⁴⁵³

In some states, such as Jersey, offenders may have a right to miss sentencing hearings when victims deliver their impact statements.⁴⁵⁴ In one case where a defendant did not want to be present during the delivery of an

⁴⁴⁴ Jonathan Levy, 'Limiting Victim Impact Evidence and Argument after Payne v. Tennessee' (1993) 45(4) *Stanford Law Review* 1045.

⁴⁴⁵ JH Blume, "Ten years of Payne: Victim impact evidence in capital cases" (2002) 88(2) *Cornell Law Review* 258, 270.

⁴⁴⁶ Jonathan Levy, 'Limiting Victim Impact Evidence and Argument after Payne v. Tennessee' (1993) 45(4) *Stanford Law Review* 1052.

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid.

⁴⁴⁹ Ibid 1058.

⁴⁵⁰ Ibid 1060.

⁴⁵¹ Michael Solimine, 'Federalism, Victims Courts and Victims Rights' (2015) 65(1) *Catholic University Law Review* 912.

⁴⁵² Ibid.

⁴⁵³ Ibid.

⁴⁵⁴ Ibid 928.

impact statement, the Supreme Court of Jersey unanimously held that criminal defendants do not have an absolute right to miss the delivery of impact statements, because "from the standpoint of the victim, their statements will carry more meaning if they are heard by the defendant".⁴⁵⁵ Although in this case illustrates that judges can play a role in strengthening the rights of victims in courts, it also demonstrates that there is a reserved right for defendants not to attend impact statement deliveries, which can be exercised at the discretion of the judge. This shows inconsistency and an unstable legal framework regarding the rights of victims. It can also lead to loss of expectations and confusion for victims who may feel misled about their rights in courts. Finally, it also shows how victims and defendants can have conflicting interests, and the difficulties the courts have trying to balance them.

Another example that shows the interpretive nature of victim impact statements is in *US v Marcelllo*,⁴⁵⁶ which was a murder case that was heard at Federal Court level. In this case, the son of the murder victim requested to give an oral delivery, but was refused. According to the district court, the term 'heard' and the facts of the case (the son had no personal knowledge of the crime) limited the statement to be delivered in written format. However, the court also acknowledged that "reasonable minds may differ" on this interpretation.⁴⁵⁷

Canada

In Canada, Victim Impact Statements are permitted under *The Criminal Code*, section 722. The Act stipulates that: '*when determining a sentence to be imposed on an offender in respect to any offence, the court shall consider any statement a victim prepared in accordance with this section...describing the physical, or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim*'.⁴⁵⁸

The meaning of 'the court shall consider' is not explained by the Act, and there is no guidance about the weight that should be apportioned to victim impact statements compared to other sentencing considerations. As a result, this has led to differing interpretations about the utility of victim impact statements in case law. This is evident in the following examples:

In the case of *Cook*, the Quebec Court of Appeal used a victim impact statement to arrive at the conclusion that there were aggravating factors in the offence and that a higher sentence was imposed as a result. In the case, Hilton CJ held that the trial judge made no error by using the victim's daughter's statement to come to the conclusion that there were additional harms related to the mother's murder which constituted an aggravating factor.⁴⁵⁹

Cook shows that Victim Impact Statements can play a significant role determining sentencing outcomes, and in many cases, it is cited as a factor taken into consideration by trial judges when they determine a sentence; however, in many cases, the judiciary has been cautious to use them as evidence or accounts of factual truths. As a result, in some cases, there has been reluctance by the judiciary to allow Victim Impact Statements to play a direct role determining the actual sentence. This can be illustrated in the cases below:

⁴⁵⁵ Ibid 929.

⁴⁵⁶ Federal Judicial Centre, *The Crime Victims' Rights Act of 2004 and the Federal Courts* (June 2 2008) <file:///home/chronos/u-751abe801551b4f4ed82c3be27be37c5b31509f8/Downloads/cvra0806_1.pdf>.

⁴⁵⁷ Ibid.

⁴⁵⁸ Department of Justice, Legislative History of Victim Impact Statements (07 January 2001) <http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr07_vic4/p1aa.html>.

⁴⁵⁹ Marie Manikis and Julian Roberts, 'Victim Impact Statements: Recent Guidance from the Court of Appeal' (Research Paper No 5, Department of Justice Canada, 2012).

Victim Impact Statements can also be crossed-examined, which implies that they can be influential in shaping the perception of the crime and its effects on victims. For instance, in the case *R v G(K)*, at the appeal stage, the appellant asserted that information contained in a victim impact statement went beyond the scope of what is permitted. However, the court of appeal held that it was the responsibility of the appellant to object to the elements of the Victim Impact Statement at trial. Failure to do so implied that the defence counsel agreed with its content, which could ultimately affect sentencing.⁴⁶⁰

Nonetheless, the court unanimously held that within an adversarial model of justice, facts relevant to sentencing must 'derive from parties and not other sources, such as victim impact statements or pre-sentencing reports'.⁴⁶¹

This view has been followed in other cases, such as *R v M(W)*, which was about sexual assault against a minor. In this case, the British Columbia Court of Appeal held that statements "are not tendered for their factual truth, but were rather emotional impacts that the offence had on the complainant". This case suggests that Victim Impact Statement did not carry any probative value relating to evidence, but are used to facilitate the court's understanding of the effects of the offence.⁴⁶²

When all three cases are read together, it shows different ways that victim impact statements are used, and that each judge can apportion different evidentiary value. Perhaps this inconsistency is partially due to what Justice Wood said in the British Columbia Court of Appeal Case *R v Sweeney*- that the court faces a dilemma to balance the consideration of the effects of a criminal act against the reality that the criminal justice system is not designed to heal victims of crime from suffering.⁴⁶³

Australia

In Australia, Victim Impact Statements are protected by both statutory law and common law in All Australian jurisdictions.⁴⁶⁴ For instance, in the New South Wales jurisdiction, the *Victims Rights Act 1996* (NSW) provides that a victim should have access to information and assistance to prepare a victim impact statement, and to ensure that the complete effects of crime on victims is placed before the court.⁴⁶⁵

In the High Court Case *Munda v Western Australia* (2013),⁴⁶⁶ the court held that Victim Impact Statements reflect long-standing position of the common law that the state has an obligation to express the community's disapproval of an offending behaviour, vindicate crime victims, and for the state to protect victims and other vulnerable persons against repetition of violence.

A study was conducted by the Victorian Sentencing Committee to assess the value of victim impact statements from the perspective of the judiciary. Out of the judges interviewed, one-third stated that Victim Impact Statements were important to sentencing; One-Third were of the view that they were not useful; and the

⁴⁶⁰ Department of Justice, *Victim Participation in the Plea Negotiation Process in Canada* (7 January 2015) <http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/p0.html>.

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ Ibid.

⁴⁶⁴ Tyrone Kirchengast, 'Recent Developments in Victim Agency in the New South Wales Justice System: The Case of Victim Impact Statements' (2006) 13(7) *James Cook University Law Review* 125.

⁴⁶⁵ Ibid.

⁴⁶⁶ Judicial Commission of New South Wales, *Victims and Victim Impact Statements* (30 October 2016) <<https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/victims.html>>.

remaining judges thought that they were only important in some cases, in particular offences against the person.⁴⁶⁷

The main value that the court system derives from Victim Impact Statements is that helps the judiciary have a greater understanding of the harm caused by the offence. Without Victim Impact Statements, the harm is not completely understood, particularly during the trial phase when a guilty plea is entered. This view was reflected by Chief Justice Miles of the Supreme Court of Australia, who said that: judges do not always have all the relevant information about the effect of crime on the victim, which is sufficient to impose a just and appropriate sentence. ‘This realisation came to me over a number of years, when I was often required to determine sentences on the assumption that it had little, to no effect on the victim, only to realise later, during an application for compensation by the victim, which established the catastrophic effects of the crime’.⁴⁶⁸

However, like Canada, there is no statutory guidance about the weight that should be apportioned to victim impact statements. This means that judges can exercise discretion about the extent that victim impact statements affect the sentencing process. As a result, the case law demonstrates that judges can be reluctant to utilise Victim Impact Statements towards sentencing outcomes, because by nature it conflicts with rules of evidence.

This is evident in the High Court case *R v Slack*,⁴⁶⁹ in which a victim impact statement was delivered by immediate family members in relation to a sexual assault against a minor.

The High Court held that substantial weight cannot be apportioned to Victim Impact Statements, because it is an unsworn statement, uncontested by cross-examination, ‘not necessarily and almost certainly not in the victim’s own words’ and is ‘far from an objective and impartial account of the effect of the offence on the victim’.⁴⁷⁰ However, on appeal, when the defence counsel tried to reduce the offender’s sentence by arguing that the sexual assault was not accompanied by trauma, the court referred to the Victim Impact Statement to refute this claim.⁴⁷¹ Therefore, while little value might be apportioned to Victim Impact Statements in sentencing decisions, it still plays a role, particularly when issues are in dispute. It can also strengthen facts established by the prosecution at trial, as evidenced by this case.

Other cases, such as *R v Thomas*, confirm that victim impact statements can only be taken into account if a fact has already been established beyond reasonable doubt in trial.⁴⁷² This suggest that Victim Impact Statements can have little utility shaping decision making.

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid.

⁴⁷² Ibid.

C DISCUSSION OF ACADEMIC DEBATES

Since Victim Impact Statements have become more accepted in the criminal justice system, its utility has been an issue of contention in academic literature. These views are reflected below:

1 ADVANTAGES OF VICTIM IMPACT STATEMENTS

1.1 Therapeutic benefits

There is wide acclaim that the delivery of Victim Impact Statements facilitates the recovery and healing process for victims who suffer from trauma. Psychological theory asserts that after crimes are committed, many victims feel lost sense of control and develop the perception that the world is unjust.⁴⁷³ Many studies based on interviews conducted with participants of Victim Impact Statements show that they find the experience empowering, fair and have overall greater opinions about the court process, compared with people who have not presented them.⁴⁷⁴ Some theorists even assert that the delivery of Victim Impact Statements is linked with having reduced anxiety and anger.⁴⁷⁵ The therapeutic benefits of Impact Statements is a result of having the victim's harm acknowledged and validated in an open court; retaining control from the truth being told from their perspective; having an avenue to release emotions and having a choice about whether to make a statement.⁴⁷⁶

However, this perspective has also been widely challenged in academia. Firstly, Pemberton and Reynaers finds that there is inconclusive empirical evidence regarding the link between delivery of Victim Impact Statements and emotional recovery.⁴⁷⁷ According to many theorists, recovery from trauma requires time. This makes it unlikely that one event, like the delivery of Impact Statements, can reduce grievances or lead to decreased feelings of anger and anxiety.⁴⁷⁸

Literature also suggests that the experience can lead to secondary victimisation, if their expectations from Victim Impact Statements are not met. For instance, some participants in interviews revealed they felt even more angry when they were confronted by the offender.⁴⁷⁹ In addition, some studies suggest that some participants expect to have a greater contribution in sentencing outcomes. When this expectation is not met, it can lead to anger at the system for being misled and reignite lack of control.⁴⁸⁰

However, disappointments, particularly with the latter, can be resolved by ensuring participants have a good understanding about the purpose and boundaries of Victim Impact Statements.

⁴⁷³ Paul Cassell, "In defense of victim impact statements." (2008) 6(1) *Ohio State Criminal Law Journal* (2008) 611.

⁴⁷⁴ Tracey Booth, 'The restorative capacities of victim impact statements: analysis of the victim—judge communication dyad in the sentencing of homicide offenders' (2015) 2(3) *An International Journal of Restorative Justice* 282, 303.

⁴⁷⁵ Ibid 310.

⁴⁷⁶ Ibid.

⁴⁷⁷ Kim Lens and Antony Pemberton, 'Delivering a Victim Impact Statement: Emotionally Effective or counter-productive?' (2015) 12(1) *European Journal of Criminology* 12, 16.

⁴⁷⁸ Ibid 21.

⁴⁷⁹ Ibid 32.

⁴⁸⁰ Ibid.

1.2 Promotes Sentencing Goals

Victim Impact Statement can also reflect sentencing goals of rehabilitation, deterrence and proportionality.

Firstly, proportionality is a principle which prescribes that the offender's punishment should reflect the degree of harm that has been caused.⁴⁸¹ In the South African Supreme Court case *Holtzhausen v Roodt*, Satchwell J held that a judge cannot comprehend the emotion, experience and extent of harm caused to a rape victim, because '*rape is so devastating in its consequences that it is rightly perceived as striking at the very fundament of human...privacy, dignity and personhood*'.⁴⁸² This view reflects psychology research which asserts that every child and case of child sexual abuse is unique and has its own individual characteristics, which makes it misleading to understand cases through clear patterns and objective laws.⁴⁸³ These examples demonstrate that Victim Impact Statements can greatly facilitate courts to understand the consequence of the crime and the proportionality, by having knowledge of the unique impact it has on individual victims. Without the statements, the human impact can be divorced from the crime, because in traditional court setting harm is understood through abstract and objective laws of adducing evidence.⁴⁸⁴

Some scholars assert that rehabilitation of the offender and deterrence are embodied principles in victim impact statements, because it is inspired by a philosophy based on mending the relationship between the community and offender.⁴⁸⁵ In traditional court settings, offenders are not presented an opportunity to take accountability for their actions, because victims do not have a right to personally address the offender.⁴⁸⁶ However, during the presentation of a Victim Impact Statement, offenders are confronted with the human impact of the offence, and sometimes, they must engage with the victim through Face-to-Face interaction. Some scholars assert that this interaction facilitates the rehabilitation process for offenders, as it invokes feelings of shame and guilt for what they have done, and provides the offender an opportunity to engage in empathy building.⁴⁸⁷

However, this perspective has been widely challenged, since the effects of institutionalisation, the offender's past history, and the minimal contact between victim and offender after the sentencing phase is said to overcome any feelings of guilt and shame that may have been felt during the delivery of the impact statement.⁴⁸⁸ In addition, victim impact statements are delivered in highly charged court environment, and without trained mediators to facilitate peaceful discussions between the victim and offender.⁴⁸⁹ As a result, it is unlikely that mutual understanding and restoration of relationships is likely to take place.

⁴⁸¹ Tyrone Kirchengast, 'Recent Developments in Victim Agency in the New South Wales Justice System: The Case of Victim Impact Statements' (2006) 13(7) *James Cook University Law Review* 125.

⁴⁸² Annette van der Merwe, "Minimum Sentences in Child Sexual Abuse Cases: The after-effects of Rape as a Factor in Imposing Life Imprisonment" (2004) 15(3) *Criminal Justice Forum* 312.

⁴⁸³ Kristin Henning, "What's Wrong With Victims' Rights in Juvenile Court?: Retributive v. Rehabilitative Systems of Justice" (2009) 97(1) *California Law Review* 1055, 1069.

⁴⁸⁴ Tyrone Kirchengast, 'Recent Developments in Victim Agency in the New South Wales Justice System: The Case of Victim Impact Statements' (2006) 13(7) *James Cook University Law Review* 125.

⁴⁸⁵ Shannon Gottschall and Leigh Greiner, "Value, Challenges, and Solutions in Incorporating Victim Impact Awareness in Offender-Rehabilitation: The Results of Qualitative Interviews with Stakeholders" (2015) 10(3) *Victims and Offenders* 10.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid 11.

⁴⁸⁸ Ibid 5.

⁴⁸⁹ Kristin Henning, "What's Wrong With Victims' Rights in Juvenile Court?: Retributive v. Rehabilitative Systems of Justice" (2009) 97(1) *California Law Review* 1055, 1069, 1223.

1.3 Balances the voices in court

Finally, victim impact statements allow victims of crime to have some level of control over cases that personally affect them, rather than being sidelined by the state, who represents them. In addition, it creates more balance with the contributions of the accused, who is able to give good character statements.⁴⁹⁰

2 CRITICISMS OF VICTIM IMPACT STATEMENTS

2.1 Prejudicial effect on defendants

In Canada, Australia and the US, admission of evidence to courts are regulated to ensure that the accused does not suffer from prejudice. These safeguards intend to limit power imbalance between the offender, who is the less powerful party, and the state.⁴⁹¹

Victim Impact Statements are considered highly prejudicial, because they are often emotive, subjective and are not scrutinised to the same level as other evidence. In the US Supreme Court case *Maryland v Booth* (1987),⁴⁹² the issue before the court was if Victim Impact Statements are constitutional and should be allowed for cases regarding capital punishment. The court expressed the view that juries would be 'overwhelmed by emotional statements from victims...about their suffering and loss'. As a result, this would 'divert the sentencer's attention from the defendant's culpability to the character and reputation of the victim'.⁴⁹³ Although in adversarial systems the accused is considered innocent until proven guilty, many studies also show that people often have negative stereotypes about offenders, which would be exacerbated by victim impact statements.⁴⁹⁴ As discussed under the heading 'Jurisdictions', courts may not have enough guidance from legislation to determine the boundaries and limits that should be placed on victim impact statements, which makes them even more of a risk. Based on these arguments, critics of Victim Impact Statements are afraid that court would impose a disproportionately higher sentence, out of sympathy for the victim.⁴⁹⁵ A study conducted in the United States assessed how mock jurors felt before and after the delivery of a victim impact statement, and if this affected their decision. The study concluded that jury members felt more sympathy for victims after the delivery of impact statements, and that it 'aroused strong emotions', which caused them to impose disproportionately harsher penalties.⁴⁹⁶

Furthermore, there are also concerns that victim impact statements will cause inconsistency in sentencing between similar cases, which allow for greater judicial bias.⁴⁹⁷ Because victim impact statements are voluntary, it is not admitted in every case. In addition, the content between each statement varies significantly. Therefore, there is fear that courts will impose harsher penalties on offenders where a victim impact statement

⁴⁹⁰ Michael Flatman, 'The Victim and the Prosecutor: The Relevance of Victims in Prosecution Decision Making' (2001) 6(2) *Deakin Law Review* 235, 241.

⁴⁹¹ Tyrone Kirchengast, 'Recent Developments in Victim Agency in the New South Wales Justice System: The Case of Victim Impact Statements' (2006) 13(7) *James Cook University Law Review* 125.

⁴⁹² *Booth v. Maryland* (1987) 482 U.S. 496.

⁴⁹³ *Ibid.*

⁴⁹⁴ Sam Garkawe, 'The Legal Rights of Victims of Crime in America' (1992) 1(3) *Journal of the Australasian Society of Victimology* 12.

⁴⁹⁵ Brianna Boppre and Monica Miller, 'How Victim and Execution Impact Statements Affect Mock Jurors Perception, Emotions and Verdict' (2014) 9(4) *Victims & Offenders* 420.

⁴⁹⁶ *Ibid* 425.

⁴⁹⁷ *Ibid.*

are presented.⁴⁹⁸ This will cause a prejudicial effect to the offender, and may undermine proportionality and fairness, which are keystones to the judicial system.

However, there are a number of limitations to these arguments; firstly, even if every person has biases, judges are trained to identify prejudicial material and exclude it from their decision making. Similarly, during the court process juries are given extensive direction about how to approach evidence and fact-finding process, whereas this was not a feature of the study on mock jurors.⁴⁹⁹ An example of this can be seen in the Australian case *R v Olbrich*, where the majority of the High Court held that a court '*may not take facts into account that is adverse to the interests of the accused, unless those facts have been established beyond reasonable doubt*'.⁵⁰⁰ This example shows that evidence law is designed to protect the rights of the accused, and that there is an exceptionally high evidence burden to meet, before proving a fact that is adverse to the interests of the accused. As a result, it limits the scope for prejudicial material to be used during sentencing.

2.2 Symbolic Value of Victim Impact Statement

Many critics of Victim Impact Statements argue that it creates a false illusion that victims are contributing to the process; however, in reality, victim impact statements have little to no effect on the sentencing process, because, as discussed earlier, under the heading 'Jurisdictions' it cannot be a substitute for facts, and in most jurisdictions, the victim's views about the appropriate sentence cannot be taken into account. Studies that have analysed victim impact statements presented in court also express this view.⁵⁰¹ This still shows that restorative theory of justice has not yet become accepted as mainstream in the court system. In addition, it shows that Victim Impact Statements may add very little value to court, because any statements that would have any probative value would have already been established at trial when adducing evidence. This could cause re-victimisation of offenders, who have expectations that their statements and experiences will be validated by the court and considered truthful testaments.

In addition, there have been suggestions for victim impact statements to be presented at the stage when determining a guilty verdict.⁵⁰² Victim research suggests that child sexual assault has one of the lowest conviction rates and that the criminal justice system has a poor response to this particular crime. In Australia, the New South Wales Standing Committee on Law and Justice cited that the overall conviction rate for child sexual assault offences is 70 percent, compared to 80 percent for all other offences.⁵⁰³ This conviction rate dropped by 20 percent when the accused pleaded not guilty.⁵⁰⁴ Referring back to the case of *R v Olbrich* (discussed under heading 'Prejudice to Offender'), it is clear that the high threshold of 'beyond reasonable doubt' makes it difficult for victims and prosecutors to establish factual evidence and prove their case. Considering that a lot of child sexual abuse cases are reported after a long period of time from the commission of the offence, as well as the secretive nature of the offence,⁵⁰⁵ having Victim Impact Statements as an authoritative source of facts during the trial phase would be a more appropriate response to the nature of the

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid 428.

⁵⁰⁰ Rita Shackel, 'Victim Impact Statements in Child Sexual Assault Cases: A Restorative Role or Restrained Rhetoric?' (2011) 34(1) *University of New South Wales Law Journal* 212, 235.

⁵⁰¹ Robert Davis and Barbara Smith, 'The effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting' (2006) 11(3) *Justice Quarterly* 453, 459.

⁵⁰² Rita Shackel, 'Victim Impact Statements in Child Sexual Assault Cases: A Restorative Role or Restrained Rhetoric?' (2011) 34(1) *University of New South Wales Law Journal* 212, 245.

⁵⁰³ Ibid 234.

⁵⁰⁴ Ibid.

⁵⁰⁵ Ibid 212.

offence.⁵⁰⁶ This would also overcome suggestions that Impact Statements are merely symbolic and have no probative value to the court system, and would allow all victims to have the opportunity to present a statement.

⁵⁰⁶ Ibid 253.

CONCLUSION

Through analysis of the legal and academic debates about Victim Impact Statements, findings show that its utility to the sentencing process is very mixed and inconclusive. Victim Impact Statements are covered in legislative frameworks in USA, Canada and Australia, which shows effort to promote victims right movement in the law. However, because of wide judicial discretion, there are at times inconsistency about the role victim impact statements play in sentencing outcomes. The case law also shows that the main purpose of impact statements in sentencing is to round the courts' understanding of the consequences of the offence and to encourage greater participation from victims in the criminal justice system; however, in some cases it seems to have no effect on either increasing or decreasing penalties. Likewise, scholarly debates show mixed results and diverging opinions about the advantages of victim impact statements. A lot of the inconsistency is a result of two factors; difficulties trying to balance the rights of victims with offenders, and because they are often characterised as speculative or subjective account, which is inconsistent with evidence laws or the doctrine of proportionality- an objective evaluation of harm.⁵⁰⁷ To overcome these shortcomings, scholars have suggested that legislation should be amended so that victim impact statements are subject to cross examination and sworn testimony by statutory declaration or oath. Although in some jurisdictions judges can cross-examine impact statements, this is optional and not exercised widely. This reform will permit judges to tender impact statements for their factual truth and enable them to be considered more greatly in determining sentencing outcomes. It will also eliminate any objections and risks of the accounts being subjective and speculative. The main criticism to this reform is that it may lead to secondary victimisation, as victim accounts will be challenged and contested. In addition, scholars have proposed greater legislative guidance about the weight that should be apportioned in sentencing.⁵⁰⁸ This could reduce inconsistency between cases and encourage judges not to make limited use of impact statements.

⁵⁰⁷ Tyrone Kirchengast, 'Recent Developments in Victim Agency in the New South Wales Justice System: The Case of Victim Impact Statements' (2006) 13(7) *James Cook University Law Review* 125.

⁵⁰⁸ Ibid.

PART 4: GOOD CHARACTER EVIDENCE IN SENTENCING

Janson Lim

INTRODUCTION

Part 4 of this report focuses on the admission of good character evidence (GCE) in various jurisdictions and an analysis of its ultimate impact on sentencing. In criminal cases where credibility is essential to determining guilt and the physical evidence is not conclusive, various jurisdiction has allowed the jury to look at the character of the accused to assist in clarifying different facets of the accused.⁵⁰⁹ Part 4 of this report will look at the merit of admitting such evidence, with a focus on its effect regarding sentencing procedures.

Good character evidence is based on the premise than an individual who has led a lawful and morally sound existence should be viewed more favourably in criminal trials as opposed to someone with a history of bad action or an amoral approach to society.⁵¹⁰ They generally take into account family history, employment history, educational levels and current marital status.⁵¹¹ Indeed, various jurisdictions have carried different weightings on the concept of good character evidence. There is some difference in the weighing and consideration of such evidence, and the analysed nations of the USA, Canada, United Kingdom, South Africa, Australia and China will be contrasted with as such. Through examining the use of these assessments during the sentencing process, this report aims to clarify the originating reasons, moral integrity and ultimate effectiveness of its continued employment. The report will ascertain this through three lenses: firstly, the functionality of CGE as a whole, the theoretical basis for the use of CGE, and ultimately the levels of equality or status-based discrimination as the ultimate effect.

The findings of Part 4 of this report will ultimately dictate that GCE ultimately carries the huge potential of being obscured by the judge's personal view of morality and good character through the natural process of unconscious bias. Indeed, descriptions like moral, intellectual power, talented, hardworking and young can all be easily misconstrued. As a result of my analysis, it will be asserted that there are two main problem areas with relying too heavily on GCR'S during criminal sentencing procedures, firstly in the lack of uniform standard applied in judging "good character", as well as the real danger that admitting such evidence entrenches status-based discrimination.

⁵⁰⁹ Chris William Sanchirico, 'Character evidence and the object of trial' (2001) *Columbia Law Review*, 1229.

⁵¹⁰ Pierrette Mizzi, Tom Gotsis, and Patrizia Poletti, 'Sentencing offenders convicted of child pornography and child abuse material offences.' (Research Report, Judicial Commission of New South Wales, 2010) 97.

⁵¹¹ Josephine Ross, 'He looks guilty: Reforming good character evidence to undercut the presumption of guilt.' (2004) 65(2) *University of Pittsburgh Law Review* 228.

A THEORETICAL BACKGROUND AND BASIS

1 WHAT ARE THE THEORIES BEHIND “GOOD CHARACTER”?

There are generally two prevailing jurisprudential schools of thought supporting the use of good character evidence. Both will be briefly analysed prior to examining its real-world use and effects

1.1 Lapse Theory

Lapse theory proposes that some individuals with good character have a temporary lapse of judgement, and given the particular moment and circumstance commit crimes (such as sexual assault).⁵¹² It denotes that the crime was "out of character" and these individuals have a general tendency of self-composure and are as such less likely to commit further crimes due to their inherent good nature.⁵¹³

In application, this was seen in Gummow J's comments in the Australian case *Simic v The Queen* where he stated that "good character" is relevant in a number of contexts to the sentencing process,⁵¹⁴ including where the offending is an isolated lapse or where the person's previous conduct suggests a capacity to appreciate the censure of the criminal process and an unlikelihood of their re-offending.

1.2 Punishment theory

Punishment is a school of thought based on the sentencing principle that imprisonment is a form of justified suffering. There are two streams in the application of this: consequentialism and retributivism. The first denotes that human actions are dependent on expected consequences, i.e. the idea that people are lawful and well behaved out of fear of punishment of the consequences of committing crimes. It is a deterrent view of human society and sentencing.⁵¹⁵ Retributivism, on the other hand, asserts that offenders should have to pay for their crimes through punishment in direct proportionality of their offence. It is a retrospective view on the merit of sentencing.⁵¹⁶

Legal academics today agree that a mixture of the two ideas drives many sentencing policy procedures.⁵¹⁷ In relation to the application of CGE's, the character of the individual has generally been considered as a mitigating factor in the approaching the mental state of the accused, the circumstances for their crime and as such directly affect proportionality. This theory may also be used against its continued use with arguments proposing that the crime should be divorced from the character of the accused; i.e. regardless of how "moral"

⁵¹² Nicole Stevens and Sarah Wendt, *The 'good' Child Sex Offender: Constructions of Defendants in Child Sexual Abuse Sentencing* (Thomson Reuters, 2013) 161.

⁵¹³ Ibid 163.

⁵¹⁴ *Simic v The Queen* (1980) 144 CLR 319.

⁵¹⁵ Alfred Ewing 'The morality of punishment: with some suggestions for a general theory of ethics.' (2013) *Routledge Publications* 95.

⁵¹⁶ Ibid 99.

⁵¹⁷ Benjamin Sendor, 'The Relevance of Conduct and Character to Guilt and Punishment' (1996) 10 *Notre Dame Journal Ethics & Public Policy* 99.

he or she may be the crime and sentencing should be weighed in its seriousness, balanced on the standards of societal norms and damaging or deterrent effect of its verdict.⁵¹⁸

⁵¹⁸ Ibid 98.

B CHARACTER EVIDENCE IN PRACTICE

Jurisdictional analysis completed, we will now examine seminal statutes and case studies to further illustrate how good character evidence is actually used in practice, and its ability to shape the outcome during the sentencing process.

1 LEGAL FRAMEWORK ACROSS JURISDICTIONS

Throughout the world, there have been a wide variety of interpretations of the probative value of CGE, the determinations of its mitigating or aggravating effect on the sentencing procedure, with some jurisdictions roundly discounting its use overall. In a broad sense, North American jurisdictions such the USA and Canada maintain a positive correlative relationship between CGE and mitigated sentences, Australia and South Africa maintaining moderate and occasionally contested applications of CGE, progressive jurisdictions such as the UK introducing provisions of law denoting CGE as an aggravating factor in sentencing, and developing legal systems such as China only starting to grapple with the concept entirely. Each jurisdiction will be briefly summarised.

1.1 United States of America – Strong Positive Correlation

In the USA scholars such as Benjamin Sendor espouse that jury trials are essential based on character, and that the entire trial process stems on the evaluation of the accused character through admitted evidence to determine guilt.⁵¹⁹ It is seen under the U.S Federal Rule 404 denoting that "Evidence of a person's character or a trait of character ...may be offered for ...to prove motive, opportunity, intent, preparation, plan, identity, absence of mistake or accident."⁵²⁰ ss 3 dictates that once the defendant has opened the gateway by providing his own CGE, then cross-examination can introduce good and bad character evidence to more roundly shape the profile of the criminal, and such the propensity to commit crimes.⁵²¹ Reference letters are admissible to the judge prior to sentencing with potentially impactful results, which will be later analysed in the American case *People of the State of California v. Brock Allen Turner*.⁵²²

There continues to be debates in the U.S regarding the expansion of CGE to be used, with proponents citing Uniform Rule 48 which excludes the use of CGE in negligence cases.⁵²³ It further emphasizes that proper

⁵¹⁹ Benjamin Sendor, 'The Relevance of Conduct and Character to Guilt and Punishment' (1996) 10 *Notre Dame Journal Ethics & Public Policy* 99.

⁵²⁰ Michael Garaham, 'Introduction of Evidence of Character to Prove Conduct Pursuant to Federal Rules of Evidence 404 (A) and 405: Is It Worth the Candle to the Accused?' (2011) 47 *Criminal Law Bulletin* 751.

⁵²¹ Benjamin Sendor, 'The Relevance of Conduct and Character to Guilt and Punishment' (1996) 10 *Notre Dame Journal Ethics & Public Policy* 104.

⁵²² *People of the State of California v. Brock Allen Turner* (2015).

⁵²³ Michael Garaham, 'Introduction of Evidence of Character to Prove Conduct Pursuant to Federal Rules of Evidence 404 (A) and 405: Is It Worth the Candle to the Accused?' (2011) 47 *Criminal Law Bulletin* 747.

psychiatric testing coupled with expanded admissibility would improve the usefulness and credibility of medical examinations to determine guilt, a sentiment mirrored by the court in *Schlagenhauf v. Holder*.⁵²⁴

That said, it has also been acknowledged by scholars that character evidence may be of slight probative value and may be very prejudicial.⁵²⁵ It tends to distract the trier of fact from the main question of what actually happened on the particular occasion, and subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

1.2 Canada – Moderate Positive Correlation

In Canadian sentencing practice, good character is similarly used a mitigating factor, in a similar vein in the use in the admissibility of tendency and coincidence evidence. In Canada, judge's commonly request pre-sentence reports on the accused character and profile prior to sentencing.

Proportionality is also an important consideration upon the consideration of admitting GCE; section 718.1 of the criminal code dictates that a sentence must be proportionate to the gravity of the offence and responsibility of the offender,⁵²⁶ with 718.2 detailing a series of mitigating factors: GCE inclusive.⁵²⁷ It also provides discretion for the judge to decide as to what mitigating factors are considered, and as such many of the examples we will later analyse derive uniquely from Canadian case law.

1.3 Australia – Moderate Positive Correlation

Australia has a moderate and occasionally contested interpretation on the use and merit of GCE. Commonwealth sentencing legislation requires that consideration is given to evidence of an offender's prior record (if any) and his or her prior good character. This is outlined in s 69 of the commonwealth Evidence Act 1995,⁵²⁸ which signifies a low admissibility threshold but also explicitly denoting a low level of probative value. General and particular character evidence are also factored in, and such cases regarding sexual assault generally emphasise the seriousness and damage of the crime as opposed to the "good character" of the accused.⁵²⁹

This is seen in the Australian case *R v Gent*, where the counsel argued that the sentencing judge had only given limited weight to the applicant's good character, and while acknowledging its low probative value this did not extend to child pornography cases.⁵³⁰ The Crown's argument dictated that there was no "closed category" for such offences, and cited the statements from the Australian case *Ryan v The Queen*; where McHugh J asserted that the two-step process regarding CGE was to identify without reference to the crime of the accused's good character,⁵³¹ and then to gauge the weight given to this fact. This would all "vary according to the circumstances",⁵³² implicitly acknowledging the lack of set standard in its determination, an issue we will examine later.

⁵²⁴ *Schlagenhauf v. Holder* 379 U.S. 104 (1964) [4].

⁵²⁵ Josephine Ross. 'He looks guilty: Reforming good character evidence to undercut the presumption of guilt.' (2004) 65(2) *University of Pittsburgh Law Review* 231.

⁵²⁶ David Watt, 'Watt's Manual of Criminal Evidence' (2007) Thomson Carswell Publications 417.

⁵²⁷ Ibid 419.

⁵²⁸ Stephen Odgers 'Uniform evidence law' (2010) Thomson Reuters Australia 164.

⁵²⁹ Ibid 172.

⁵³⁰ *R v Gent* (2005) 162 A Crim R 29 [14].

⁵³¹ *Ryan v The Queen* (1967) 121 CLR 205 [21].

⁵³² Ibid [22].

1.4 England and Wales – Provisions of Negative Correlation

England and Wales have unique employments of the use and effect of GCE upon sentencing. Here, there is a clear distinction between "absolute" good character and "effective" good character. Additionally, uniquely in the sentencing procedure of sexual crimes, provisions exist where the "better" the apparent character of the accused, the harsher the sentence would be due.⁵³³ This is due to the assertion that the intentional grooming and building of trust in the accused's apparent "good character" has denoted a level of maliciousness and intent to cause harm.

Absolute and effective good character evidence is set out under s 101 of the Criminal Justice Act.⁵³⁴ Absolute good character means a defendant has no previous convictions or cautions and no other reprehensible conduct alleged and entitles the defendant to both the credibility and propensity limbs of the direction.⁵³⁵ Effective good character denotes the instance where a defendant has previous convictions or cautions recorded which are old, minor and have no relevance to the charge, the judge must decide whether or not to treat the defendant as a person of effective good character. It is seen that even these strongest limbs in the application of GCE have been eroded in their probative value over time, which will be analysed in the following chapter analysing specific case studies.

The trend in the increasing lesser consideration of GCE's in sexual crimes is exemplified in the English case of *R v Hunter*, where five conjoined appeals complained that the trial judges had given an inadequate direction of the good character of the defendants.⁵³⁶ At trial, the judge had admitted the evidence of the defendant's prior criminal history, but referred to the principles derived from the English case *R v Wye* to admit good character evidence in equal weighting to bad character evidence.⁵³⁷ This appeal was later dismissed.

1.5 South Africa – Provisions of Negative Correlation

Character evidence in South Africa has undergone profound changes over the history of the past three decades and continues to be a nation battling systemic sexual crimes and offences. Prior to 1989, s 227 of the Criminal Procedure Act provided that in cases of sexual offences, the admissibility of character evidence was determined solely by precedence seen in common law.⁵³⁸ The common law position at the time detailed little regulation on this issue, and was skewed in favour of the offender. It provided that evidence could be adduced regarding the complainant's "reputation for a lack of chastity",⁵³⁹ essentially blaming the victim for the crime. Although this was prohibited to be used as leading evidence, parties could adduce such evidence with a low admissibility threshold during cross-examination.

Since then, the South African Law Commission Report on Women and Sexual Offences from 1985 to 1995 raised significant problems with this interpretation, describing it as a "rape shield" law.⁵⁴⁰ Consequently, s 227

⁵³³ Alex Mills "Reforms to Judicial Review in the Criminal Justice and Courts Act 2015: Promoting Efficiency or Weakening the Rule of Law?" (2015) *Journal of Public Law*, 256.

⁵³⁴ Ibid 258.

⁵³⁵ David Leonard, 'In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character' (1997) 73 *Indiana University Journal of Law* 1161.

⁵³⁶ *R v Hunter* [2015] All ER (D) 196 [2].

⁵³⁷ *R. v. Wye*, 7 A. & E. 76, [14].

⁵³⁸ Ted Leggett, 'The sieve effect: South Africa's conviction rates in perspective.' (2016) 5 *South African Crime Quarterly* 24.

⁵³⁹ Norton Rose Fulbright (South Africa) Research Team 'Character Evidence in Rape Trials' (2015) *Bangladesh Legal Aid and Services Trust* 16.

⁵⁴⁰ Ibid 18.

of the Criminal Procedure Act was amended to require the accused to apply to the court for leave to adduce evidence of prior sexual history, or to question the complainant on her prior sexual history.⁵⁴¹ However, judges still had unfettered discretion to determine the admissibility of evidence. The importance of this discretion was seen in the South African case of *S v Zuma*, where the court once again prioritised the "sexual promiscuity" of the complainant as opposed to the character of the accused.⁵⁴²

1.6 China – Nominal Correlation

While China currently maintains no provisions for the inclusion of character evidence within its sentencing procedures, it has begun admitting some aspects of GCE in its common law.⁵⁴³ That said, it the national jurisdiction is generally to factor GCE as a relevant consideration in criminal sentencing procedures.⁵⁴⁴ This will be analysed further in Chapter D.

⁵⁴¹ Ted Leggett, 'The sieve effect: South Africa's conviction rates in perspective.' (2016) 5 *South African Crime Quarterly*, 25.

⁵⁴² *S v Zuma and Others* (CCT5/94) [1995] ZACC 1 [5].

⁵⁴³ Zhiyun Wu 'Examining Good Character as a Mitigating Factor in Canadian Sentencing' (2007), *Queen's University Journal of Law* 45.

⁵⁴⁴ Nanning Zhang and Douglas Walton, 'Recent trends in evidence law in China and the new evidence scholarship' (2010) 9(2) *Journal of Law, Probability and Risk* 117.

C FUNCTIONALITY AND CASE STUDIES

The different overarching frameworks of various jurisdictional approaches to CGE established, we will now examine the actual functionality of how such references are used in practice in the determination of sentencing. Various examples will be drawn from case studies, legislation and government programs present in the focused nations as above. As will be discussed, there are three main issues of analysis in the real-life functionality of CGE, firstly regarding the subjectivity of judges and their verdicts, the inconsistent criteria of evidence to support "good character", and finally the frequent overlap that is already covered in many other jurisdictions.

1 CHARACTER AND PERSONALITY

Character and personality are two terms of imperative importance in many statutes regarding CGR's. These terms are frequently used interchangeably in everyday life, but they carry different connotations in both psychological and legal lenses. It is espoused that a personality is used not only to judge people, but also an attempt to explain and predict future actions.⁵⁴⁵ The concept is also used to denote 'motivations and moral qualities... that are based on their psychological determination'.⁵⁴⁶ This is influenced by the person's upbringing, education, employment status amongst a whole other myriad of potential factors. The term 'character' on the other hand is arguably a broader definition, encompassing a person's response system, the formation of thought and decision-making process.⁵⁴⁷

The Australian case *Ryan v The Queen*, a case involving a paedophile priest, is a leading case discussing good character and personality. Here, McHugh J stated the two step process as outlined above, firstly in the good character of the accused divorced from the current crime, and secondly the importance and impact of taking this finding into account.⁵⁴⁸ The prisoner's "otherwise good character" and personality would be raised in a broader interpretation (signifying the definition of character over personality) to include the defendant's documented history, actions, achievements and past transgressions.⁵⁴⁹

Indeed, documentation of history is vital to the application of admitting character evidence. According to the court in *R v Kennedy*, less weight may be attributed to an offender's prior good character where:

- General deterrence is important and the particular offence before the court is serious and one frequently committed by persons of good character
- The prior good character of the offender has enabled the offender to gain a position where the particular offence can be committed⁵⁵⁰

⁵⁴⁵ Zhiyun Wu 'Examining Good Character as a Mitigating Factor in Canadian Sentencing' (2007) *Queen's University Journal of Law* 45.

⁵⁴⁶ Ibid 49.

⁵⁴⁷ Ibid 81.

⁵⁴⁸ *Ryan v The Queen* (1967) 121 CLR 205 [12].

⁵⁴⁹ Ibid [17].

⁵⁵⁰ *R v Kennedy* (No 2) [2008] 1 AC 269 [4].

- There is a pattern of repeat offending over a significant period of time.⁵⁵¹

Ultimately, it is seen that the larger definition and scope of character evidence allows parties to draw a lot of potential points to bolster their case, leading to the potential for skewed and biased evidence to be admitted.

2 SUBJECTIVITY OF JUDGEMENTS

While judges are by layman terms deemed to be objective standard bearers in the application of the law, in reality, they pass judgements with the level of biases endemic to the human condition. Many decisions have been passed down applying enshrined apparently non-discriminatory (as perceived as the societal norm at the time) and exploited through the discretion awarded to judges in different jurisdictions.

In the American case of *Portnoy v. Strasser* custody of the children was contested between the natural mother and the grandmother.⁵⁵² The court ultimately awarded custody to the grandmother on the grounds that the natural mother was of a questionable character having remarried a man of a different race. This perception was later changed when the U.S Supreme Court held that such prejudices should not creep into decision-making.⁵⁵³ Here we can see that even though race could not have had an impact on the welfare of the child, the judge's personal bias against a particular race made him perceive the woman to be of a bad character.

The English case of *Troninas Re EWCA* further denotes the danger of judicial bias. In this case, the offender had received glowing testimonials from his contacts and a stellar educational record. The court has to contend this with his "severely abhorrent behaviour" given the cases his crime.⁵⁵⁴ The judge ultimately handed down a sentence disregarding all such character evidence as the defendant did not exhibit adequate remorse for his crime, and discounted character evidence wholly. As psychological assessments are not essential,⁵⁵⁵ the findings of his character even without previous conditions expresses the wide gamut of judicial discretion afforded on weighing the merit of its admissibility, depending on the individual views of each judge.

3 SOURCES AND SUFFICIENCY OF EVIDENCE

This leads us to the second point of topic, regarding the sources of evidence that judges rely on to obtain GCE. Upon analysing all the nations mentioned in Chapter 2, no jurisdiction currently adopts a set standard of legal reasoning uniform. Since character evidence cannot be tangibly gauged, the court has to admit two types of evidence associated with GCE; the first of which is behavioural evidence, the second circumstantial evidence,

Behavioural evidence is deemed to be "facts and inferences drawn from a person's acts", where parties can draw conclusions about the person's internal character.⁵⁵⁶ Circumstantial evidence, on the other hand, contains

⁵⁵¹ Ibid [6].

⁵⁵² *Portnoy v. Strasser*, 303 NY 539 - 1952, [27].

⁵⁵³ Benjamin Sendor, 'The Relevance of Conduct and Character to Guilt and Punishment' (1996) 10 *Notre Dame Journal Ethics & Public Policy* 87.

⁵⁵⁴ *Troninas* [2011] EWCA Crim 1244 [21].

⁵⁵⁵ Anne-Marie McAlinden and Bronwyn Naylor. 'Reframing public inquiries as' procedural justice for victims of institutional child abuse: Towards a hybrid model of justice.' (2016), 38, *Sydney Law Review*, 283.

⁵⁵⁶ Josephine Ross, 'He looks guilty: Reforming good character evidence to undercut the presumption of guilt.' (2004) 65(2) *University of Pittsburgh Law Review* 240.

two stems of sources, stereotypical profiling and the analysis of cues.⁵⁵⁷ Drawing inferences based on a person's profile (wealth, age, social status, employment, education) will be seen to result in huge broad-brush statements as analysed in the actual effects in chapter C, and are problematic in and of themselves. The second type of circumstantial evidence includes both verbal and non-verbal cues, which are often used to infer a person's character. For example, a person's accent or choice of words may lead others to assume certain things about his or her character. Things like clothing, cars, or manners can be also non-verbal cues of a person's character.

Indeed both concepts contribute to the idea and danger of individual confirmation bias, any sort of "evidence" may potentially affect the culpability of a defendant in the eyes of a judge or jury. As Ekow states; the link between the actions and character, unfortunately, is intuitively assumed, and it is also difficult to determine whether an action is actually affected by the internal character of an individual. Indeed, there is "no guarantee that a person's actions are linked to [his or her] associated traits".⁵⁵⁸

4 OVERLAP IN CONCEPTS

There is also a many overlapping areas regarding various aspects character evidence already accounted for in many existing provisions provided in statutes and common law within legal jurisdictions around the world. These concepts include the sentencing procedures when dealing with first-time offenders, the voluntary surrender of the defendant, a defendant's worthy social contributions as well as an outline of admissible tendency and coincidence evidence.

4.1 "First time offender" and the offender's background

Being a first-time offender is widely accepted as an independently mitigating factor which affects sentencing. A first time offender is an offender who has no criminal record except for the present offence. It is asserted by Nicole Stevens that "In people's minds if a person is of good character, he or she certainly should not have a criminal record."⁵⁵⁹ This was seen in the Canadian case of *R. v. M.*, where Schuler J held that the sentence of the offender was reduced due to his lack of past criminal record.⁵⁶⁰

However, this is not the first instance of overlap, as the phenomena are quite common. It was again held in the Canadian case *R. v. Oliver*, that "the evidence supported the Crown's submission as to the appellant's previous good character".⁵⁶¹ He had no criminal record and it appears from the pre-sentence report that he had no previous involvement with the police or authority." Indeed the offender's character is already usually incorporated into the introduction of his or her background information, such as employment, education, family ties, and reputation, without the explicit admission of character evidence and references.⁵⁶²

⁵⁵⁷ Ibid 243.

⁵⁵⁸ James Whitman 'Equality in Criminal Law: The Two Divergent Western Roads' (2009) 1(1) *Journal of Legal Analysis* 137.

⁵⁵⁹ Nicole Stevens and Sarah Wendt 'The 'good' Child Sex Offender: Constructions of Defendants in Child Sexual Abuse Sentencing' (Thomson Reuters, 2013) 170.

⁵⁶⁰ *Major J. R v M (MR)*, [1998] 3 S.C.R. 393 [21].

⁵⁶¹ *R v Oliver* [2003] 1 Cr App R 28 [13].

⁵⁶² Josephine Ross, 'He looks guilty: Reforming good character evidence to undercut the presumption of guilt.' (2004) 65(2) *University of Pittsburgh Law Review* 224.

This is illustrated in the Australian case *R. v. Clarke*, where Higgin J referred to the offender's good character, he said: "He is described as a good and responsible father and comes from a supportive family. He had a good employment record and has been involved in volunteer work in the community."⁵⁶³

4.2 "Voluntary surrender"

Voluntary surrender is often thought of as evidence of the offender's self-reflection and regret. It is noted by Zhiyun Wu that if a defendant has surrendered and cooperated with police upon arrest, while it is seen as an admission of guilt it also signifies a level of remorse and support of character as a mitigating factor during sentencing.⁵⁶⁴ While no explicit provision for GCE currently exists, this is especially impactful under Chinese Civil law, with Article 67 of the Criminal Law of the PRC civil code severely reducing the imposed sentence of the defendant who has voluntarily surrendered to police.⁵⁶⁵ Whether this provision remains for political or restrictive purposes remains to be seen, but it is important to understand that such provisions appear to be effective in China in the absence of set GCE provisions.

Conversely, this mechanism also works in an opposing fashion; as specified in the English case in Chapter 2, *Troninas Re EWCA*, the lack of voluntary surrender and remorse expressed by the defendant lead to the dismissal of admission of character evidence to be factored into the sentencing procedure entirely.

4.3 "Worthy social contributions"

The concept of "social accounting" espoused by Zhiyun Wu also carries some considerations towards GCE in different jurisdictions. The reasoning denotes that allowing worthy social contributions to be a mitigating factor encourages offenders' contributions, to offset some part of the sentencing procedure with perceived societal contributions.⁵⁶⁶

In my opinion, this factor should be easily differentiated from good character, since it does not matter whether it is a good person or a bad person who contributes to society. Even though the offender is bad, if he or she has made any worthy social contributions, his or her sentence can be mitigated.

5 ULTIMATE EFFECT ON SENTENCING

5.1 Good Character Evidence as an Aggravating factor upon sentencing

English and Welsh law have lead the way in enacting a progressive interpretation of GCE uniquely upon sentencing defendants in criminal sexual trials. In 2013, following the national Saville inquiry detailing the instances of child-grooming commissioned by the Cameron government, wide-scale reforms of the Sexual

⁵⁶³ *R v Clarke* (1927) 40 CLR 227 [12].

⁵⁶⁴ Zhiyun Wu 'Examining Good Character as a Mitigating Factor in Canadian Sentencing' (2007) *Queen's University Journal of Law* 52.

⁵⁶⁵ Nanning Zhang and Douglas Walton, 'Recent trends in evidence law in China and the new evidence scholarship' (2010), 9, 2, *Journal of Law, Probability and Risk* 114.

⁵⁶⁶ Zhiyun Wu, 'Examining Good Character as a Mitigating Factor in Canadian Sentencing' (2007) *Queen's University Journal of Law* 45.

Offences Sentencing guidelines were amended.⁵⁶⁷ The primary focus was a shift away from the physical harm caused by the offenders towards the long term psychological impacts, with GCE as one of the main areas of reform.⁵⁶⁸

In particular, the report demonstrated the potential for an abuse of trust regarding someone with influence over their victims. While this has always been an aggravating factor for sexual offences, GCE has always been a mitigating factor regarding sentencing.⁵⁶⁹ The reformed guidelines dictate that evidence of wide-scale generation of trust, societal "contributions" to raise reputation and proven abuse from a position of trust will now lengthen the sentence of the offender.

5.2 Good Character Evidence as contested factor upon sentencing

The importance and merit of using GCE as a moderately correlative mitigating factor have been contested in recent judicial history. This can be seen in the seminal Australian case *Melbourne v The Queen*, with the majority and minority judgements differing on the very concept of "good" and "bad" character and the requirement to consider this in sentencing procedure.⁵⁷⁰ The case grappled with aspects of modern psychological understandings of "character" as well as its fundamental relevance of an offender's past conduct towards the facts of the case.⁵⁷¹ It ultimately mandated that GCE should be factored in as an overarching mitigating factor, but not without fierce debate.

The Majority Position

McHugh J held that there was adequate evidence for the defendant's good character in any relation to the asserted facts in a given trial, the sentencing judge was obliged to take this into account. The extent in which this was considered however, would be at the judge's discretion.⁵⁷² With regard to this specific case, the majority found that it was appropriate for the offender to be sentenced in the context of previously having been of good character. The factors taken into account include the offender's history of similar crimes over a number of years, his position as a religious figure of authority, as well as his noted "good deeds" from this authority to provide a more rounded character of the offender (incorporating both good and bad character evidence).⁵⁷³

The Minority Position

In the minority decision Gummow J held that "good character" was relevant to a number of contexts, and appreciated the inherent value in a select number of circumstances to ascertain an offender's propensity to commit further crimes.⁵⁷⁴ However, he dictated that it should not be presumed to automatically be admitted and indeed should be deemed inadmissible. The overarching points raised asserted that sentencing was not a

⁵⁶⁷ Anne-Marie McAlinden and Bronwyn Naylor, 'Reframing public inquiries as' procedural justice for victims of institutional child abuse: Towards a hybrid model of justice.' (2016) 38 *Sydney Law Review* 283.

⁵⁶⁸ Ibid 287.

⁵⁶⁹ Ibid 293.

⁵⁷⁰ *Melbourne v R* (1999) 198 CLR 1 [14].

⁵⁷¹ Pierrette Mizzi, Tom Gotsis, and Patrizia Poletti. 'Sentencing offenders convicted of child pornography and child abuse material offences.' (2010) *Judicial Commission of New South Wales Report*, 97.

⁵⁷² *Melbourne v R* (1999) 198 CLR 1 [13].

⁵⁷³ Ibid [15].

⁵⁷⁴ Ibid [14].

"mathematical process and metaphorical terms such as 'credit' and 'discount' should not be taken literally and that a 'one-dimensional view of character' should not be accepted without qualification.⁵⁷⁵

Ultimately, the Australian jurisdiction continues to allow character evidence in trials maintaining a low admissibility threshold, but proportionately holding a low level of probative value.

5.3 Good Character Evidence as a mitigating factor upon sentencing

As specified in the international jurisdictional summaries in chapter 2, criminal trials are viewed to inherently be about the determination of character and as such intrinsically require the consideration of GCE throughout the trial, inclusive of sentencing.⁵⁷⁶

The mentality follows that: from the opening statement where the prosecutor sets forth his accusation, to the closing argument where the prosecutor tries to make the criminal charge stick, the accused is being labeled a criminal. Indeed, while there is a huge range in style and aggressiveness on the part of prosecutors, the force of the accusation itself can counteract the presumption of innocence.⁵⁷⁷ Despite the judge's caution to the jury that the defendant is presumed to be innocent, there is always a danger that the jury will assume that the state would not have brought an indictment or complaint unless the defendant was probably guilty.

As such the importance of good character evidence should be understood as a critical defensive tool, designed to offset the inevitable damage caused by the initial indictment and opening statement.

That said, its actual effects on sentencing may be seen with select illustrative cases, such as the American case *People of the State of California v. Brock Allen Turner*. Here, Persky J allowed for public submissions to refer to the character of the offender during the pre-sentencing procedure following his conviction for three counts of felony assault.⁵⁷⁸ A total of thirty-nine documents were submitted, painting the picture of the offender as a model student, athlete and community role model.⁵⁷⁹ Despite facing a maximum of fourteen years imprisonment (and the prosecution pleading for ten years), the offender was sentenced to six months with three years probation.⁵⁸⁰ While it is impossible to denote exactly how much consideration the judge afforded to the offenders GCE, it is apparent that submitted documents had some level of sway in the decision-making process of the trial judge.

5.4 Good Character Evidence as a disregarded factor upon sentencing

As opposed to many jurisdictions analysed throughout the report in the previous chapters, the Chinese judiciary has been reluctant to introduce GCE as a mitigating factor during criminal sentencing procedures.

One of the first and to date few cases incorporating GCE was seen in the Chinese case *Lao Wang v Province of Hebei*, where evidence of the defendant's behaviour under ordinary circumstances was admitted, and in a

⁵⁷⁵ Ibid [13].

⁵⁷⁶ Chris William Sanchirico, 'Character evidence and the object of trial' (2001) *Columbia Law Review*, 1229.

⁵⁷⁷ Benjamin Sendor, 'The Relevance of Conduct and Character to Guilt and Punishment' (1996) 10 *Notre Dame Journal Ethics & Public Policy* 87.

⁵⁷⁸ *People of the State of California v. Brock Allen Turner* (2015) [35].

⁵⁷⁹ Shaheen Shariff and Alyssa Wiseman, 'Supporting survivors: A strategic model to address rape culture in universities.' (2016), 5, *Journal of Psychotherapy and Counselling Psychology Reflections* 45.

⁵⁸⁰ Ibid 52.

landmark phenomena was used as the judge's foundation upon sentencing.⁵⁸¹ Here, the defense submitted a "social investigation report" was obtained through extensive interviews with Lao's counterpart, with documents submitted by his colleagues, friends, and family.⁵⁸²

Ultimately, it is seen that GCE still remains to be incorporated directly into Chinese civil law. Recent reforms made to the UPEPC (Uniform Provisions of Evidence of the People's Court) have begun to include set legal mechanisms for character evidence (excluding proof of fault)⁵⁸³ but have yet to be fully adopted by other branches of the local and national judiciaries and participating legal parties.⁵⁸⁴ With its lesser reliance on common law, it is seen that GCE under Chinese jurisdictions will continue to be employed in fewer circumstances compared to Western judicial counterparts.

⁵⁸¹ Zhiyun Wu 'Examining Good Character as a Mitigating Factor in Canadian Sentencing' (2007) *Queen's University Journal of Law* 52.

⁵⁸² Ibid 60.

⁵⁸³ Nanning Zhang and Douglas Walton, 'Recent trends in evidence law in China and the new evidence scholarship' (2010) 9(2) *Journal of Law, Probability and Risk* 121.

⁵⁸⁴ Ibid 140.

D THE DUTY OF THE STATE

In this chapter, we will analyse the overarching obligation of the state towards its citizens with regard to sentencing, deterrence, and government support programs. Firstly, we will briefly analyse the theory behind a state's duty to sentence fairly. Secondly, we will analyse model examples of government programs to better understand offenders with good character towards crime prevention through workshops and scientific research.

1 THE DUTY OF THE STATE TO SENTENCE JUSTLY

Fair punishment and sentencing are one of a state's responsibility to its people. Indeed, to pass a just sentence, citizens should stand vis-a-vis with each other and the courts, and be placed in front of a backdrop of equality.⁵⁸⁵ However, it is asserted that it is also a state's responsibility to enact proper social programs not only in the deterrence of crime, but also to legitimately support and assist members of the community who may have the propensity to commit crimes, but are of otherwise "good character". Two international examples from Germany and Canada will be viewed below.

2 THE DUTY OF THE STATE TO MITIGATE CRIME

The Prevention Project Dunkelfeld is a landmark government program founded in Germany, aiming to provide clinical support to individuals who are sexually attracted to children but have otherwise "good character" and personal censure to have yet committed crimes.⁵⁸⁶ It targeted paedophiles and hebephiles who were seeking help for clinicians and maintained medical confidentiality clauses to maintain privacy for patients.⁵⁸⁷

The Sexual Behaviours Clinic at the Centre for Addiction and Mental Health in Canada is a government-backed initiative which supports the reform and intervention of to-be criminals with otherwise good character prior to committing crimes.⁵⁸⁸ The centre undertakes a mixture of both qualitative research methods including interviews, patient profiles, and character assessments, as well as scientific psychological methods (brain stimuli, analysis of blood flow to sexual organs and other physiological diagnosis).⁵⁸⁹ Through this, the centre regularly produces reports based on the understanding of paedophiles to affect government policy, social programs, and campaigns.

⁵⁸⁵ Norton Rose Fulbright (South Africa) Research Team 'Character Evidence in Rape Trials' (2015) *Bangladesh Legal Aid and Services Trust* 16.

⁵⁸⁶ Klaus Beier 'Can pedophiles be reached for primary prevention of child sexual abuse? First results of the Berlin Prevention Project Dunkelfeld (PPD).' (2009) 20(6) *The Journal of Forensic Psychiatry & Psychology* 859.

⁵⁸⁷ Ibid 860.

⁵⁸⁸ Karl Hanson, and Kelly Morton-Bourgon, 'The characteristics of persistent sexual offenders: a meta-analysis of recidivism studies' (2005) 73(6) *Journal of consulting and clinical psychology* 1156.

⁵⁸⁹ Ibid 1160.

E EQUALITY BEFORE THE LAW IN THE SENTENCING PROCESS

This chapter will analyse the actual results of the continued use of GCE's in sentencing procedure. It will first discuss the universal concept of equality before the law, before going further to depict instances where GCE's have actually lead to the entrenchment of status-based discrimination, based on the grounds of age, racial origin, employment status, education and social standing.

1 EQUALITY BEFORE THE LAW

Equality before the law is the principle denoting that all people are subject to the same laws of justice which seeks to safeguard two fundamental concepts; non-discrimination and equal treatment.⁵⁹⁰ The first principle requires that all people are not discriminated against on the grounds of religion, sexual orientation, racial origin or wealth. Equal treatment recognises the inherent disparity of certain groups of people but aims to ensure that substantive equality is achieved.⁵⁹¹ It is summarily outlined under Article 7 of the Universal Declaration of Human Rights, asserting that "All are equal before the law and are entitled without any discrimination to equal protection of the law."⁵⁹²

In application, there are slight differences in how this is established in various jurisdictions around the world. Where jurisdictions in North America (USA and Canada) interpret this concept to have all citizens face an equal threat of punishment, European law (UK and Germany) espouse this to mean that all citizens face the equal threat of investigation and prosecution. As will be analysed through statistical analysis below, substantive equality has yet to be achieved in many jurisdictions, and the question remains as to whether the employment of GCE serves to remedy or exacerbate the issue.

1.1 Status-based discrimination

Discrimination is defined to have two forms: direct and indirect.⁵⁹³ Direct discrimination pertains to the explicit decision to exclude or treat differently a group in reference to their race, gender, employment status or other characteristic.⁵⁹⁴ Indirect discrimination occurs when a regulation is prime facie termed as general but in reality, applies inconsistently to particular groups of people.⁵⁹⁵ In relation to GCE, it will be discussed through the lens of the latter form, where profound differences lie in its application to people of certain age ranges, racial origins, wealth brackets, and other attributes.

Educational Status: Under English law, educational status is seen as one of the hallmarks of "good character", as seen in the English case *Troninas Re EWCA* the offenders "stellar" educational record was termed as a

⁵⁹⁰ James Whitman 'Equality in Criminal Law: The Two Divergent Western Roads' (2009) 1(1) *Journal of Legal Analysis*, 141.

⁵⁹¹ Ibid 129.

⁵⁹² Jack Donelley, '*Universal human rights in theory and practice*' (Cornell University Press, 2013) 51.

⁵⁹³ James Whitman 'Equality in Criminal Law: The Two Divergent Western Roads' (2009) 1(1) *Journal of Legal Analysis* 144.

⁵⁹⁴ Ibid 149.

⁵⁹⁵ James Whitman 'Equality in Criminal Law: The Two Divergent Western Roads' (2009) 1(1) *Journal of Legal Analysis* 152.

factor for consideration building a case for his character evidence.⁵⁹⁶ While "equal opportunity" for education certainly exists, socio-economic factors and place of birth, as opposed to pure grit, have a much higher correlative factor.

Employment status: The offender's place of employment is commonly referred to when citing GCE. As seen in the Australian case *Ryan v The Queen*, the offender's role as a spiritual figure of authority was central to the defence's GCE admission, and while ultimately deemed to be of poor probative value was still considered by the majority decision.⁵⁹⁷

Volunteer work: In creating the character profile of the defendant, volunteer work is commonly cited to espouse an offender's selflessness and contribution to society. This was further affirmed in the Canadian case *R v T (M)*.⁵⁹⁸ In reality, generally speaking individuals require a level of financial support to be able to afford the time to volunteer; and as such may favour members of the middle-class and above disproportionately.

Racial Origin: Racial origin continues to be a contentious issue throughout various criminal justice systems. From a sociological view, research has shown that much of the American population often sees race as a "predictor of bad behaviour".⁵⁹⁹ While the mere fact of this cannot be avoided as the defendant is present in court, GCE's may serve to entrench such stereotypes should the jury find certain attributes distasteful.

Religious biases: Religion has also operated as a bias. The seminal American case is illustrating this is *A.B v. C.B*, where the court looked at the "religious sensibilities" of the parties to determine their character.⁶⁰⁰ It was determined that the mother of the child was not a practicing catholic and was an illegitimate child at birth. The adoptive parents, on the other hand, were practicing Christians, and this was cited in the judge's reasoning when affording the latter part custody. Religious bias was also present in the English case *Helen Skinner v Sophia Evelina*, where the wife's sudden conversion to a religion to meet the cultural requirements of her husband coloured the views of a judge to award custody of a child away from her.⁶⁰¹

These discriminatory attributes may be summed up in an American study completed by Columbia University Law and Philosophy Research Fellowship. Here, it was summarily found that persons who were young, white, middle-class, of educated status and working were given the greatest levels of benefit from the use of GCE provisions.⁶⁰²

1.2 Disproportionate representation in prison

It is difficult to determine the pronounced statistical effects that GCE has on the actual sentences between different groups of people to truly evaluate its discriminatory nature. This is primarily due to the discretionary nature of its consideration, as well as the vast array of other factors considered upon sentencing an offender. However, through a statistical analysis at two overarching instances of the Aboriginal Canadian and African-American populations we will attempt to draw conclusions regarding their different treatments under their respective criminal justice systems.

⁵⁹⁶ *Troninas* [2011] EWCA Crim 1244 [16].

⁵⁹⁷ *Ryan v The Queen* (1967) 121 CLR 205 [18].

⁵⁹⁸ *R v T(M)* [1990] Crim LR 256 [4].

⁵⁹⁹ Benjamin Sendor, 'The Relevance of Conduct and Character to Guilt and Punishment' (1996) 10 *Notre Dame Journal Ethics & Public Policy* 104.

⁶⁰⁰ *AB v CB* [2014] EWHC 2998 (Fam), [6].

⁶⁰¹ *Helen Skinner Vs. Sophie Evelina Orde* (1871) 14 Moo Ind. 309 [2].

⁶⁰² Christina Mancini and Daniel Mears 'US Supreme Court decisions and sex offender legislation: Evidence of evidence-based policy' (2013) 103 *Journal of Law and Criminology* 1115.

In Canada, a 2013 study found that Aboriginal people (First nation, metis or inuit) comprise of 4% of the national population but comprise of 23.2% of the inmate population. While this proportion has been gradually increasing, its over-representation continues to be concerning for policy makers in addressing this group's inequality.⁶⁰³ In Saskatchewan alone, 5.2% of Aboriginal adults were involved in correctional services compared to 0.3% of non-Aboriginal adults.⁶⁰⁴

This disproportionate representation of Aboriginal Canadians in custody may be attributed to many things: but historically systemic and entrenched disadvantage has been documented, and continues to have far reaching effects even today. As such, many Aboriginal Canadians continue to carry fewer indications of "good character" under its legal system. Attainment of educational achievements continues to elude many in the Aboriginal community. It is reported that only 50% of the Aboriginal population in Nova Scotia and New Brunswick had an education above a high school diploma, as opposed to over 65% of the general population.⁶⁰⁵ Aboriginal Canadians were also less likely to be married (57% of the population were surveyed to be married; over 15% higher than the national average), which has been proven to be a consideration used in GCE to prove "commitment and family support". Finally, employment rates arguably carry the largest negatively geared stereotype, with only 42% of adults involved in previous criminal corrections employed prior to repeat sentencing.⁶⁰⁶

Similar statistics have found that in the United States only 12-13% of the American population is African-American yet make up 35% of all jail inmates.⁶⁰⁷ With the documented prevalence of GCE in this jurisdiction, it can be inferred that the reasons for this phenomena are similar in preferring certain characteristics less likely to be found in certain populations.

While it would be unfair to claim that these statistics support GCE as the sole culprit, it may be seen that extrinsic, systemic and societal causes result in objectively poorer attributes that offenders from such groups may rely on upon submitting character evidence. There are strong enough implications that GCE entrench the existing level of status-based discrimination present in many nations, (most profoundly in wealth status) without an over-riding feature to enable substantive equality.

⁶⁰³ Samuel Parreault, 'Police-reported crime statistics in Canada' (2012) 1 *Canadian Centre for Justice Statistics*, 12.

⁶⁰⁴ Ibid 13

⁶⁰⁵ Ibid.

⁶⁰⁶ Samuel Parreault, 'Police-reported crime statistics in Canada' (2012) 1 *Canadian Centre for Justice Statistics*, 12.

⁶⁰⁷ Per-Olof Wikstrom, *Urban crime, criminals, and victims: The Swedish experience in an Anglo-American comparative perspective* (Springer Science & Business Media, 2012) 126.

SUMMARY AND CONCLUSION

In conclusion, there continues to be a discussion on the merits for the continued use (or introduction) of GCE within the sentencing process.

Proponents for the continued use of character evidence assert that criminal trials are all about character and that it would be a mistake to deem the evidence submitted in trials by both the prosecution and the defence to attack or strengthen the character of the defendant before passing judgement. Indeed, from the opening statement to the closing arguments, mere accusations will already affect an assumed presumption of innocence. Scholars will also assert that the admission of GCE should be viewed as a defensive tool, designed to offset the damage caused by the criminal charge.⁶⁰⁸

There also exist reasons for its abandonment. As raised in this report, various scholars have points against its use. Primarily, there exists a problem where there is lack of set general rules in the application; and personal factors have increasingly been assessed as stringent indicators such as age, employment, and education with varying levels of importance and application.⁶⁰⁹ There also exists the dire problem where poor use of GCE may in effect lead to status-based discrimination and entrench already disadvantageous circumstances and situations.⁶¹⁰

It is ultimately up to the jurisdiction to view how they consider and apply GCE (if at all), but upon the results of this report, it may be espoused that caution should be employed in relying too heavily upon this inconsistent and potentially damaging admission of evidence upon the sentencing procedure.

⁶⁰⁸ Chris William Sanchirico, ‘Character evidence and the object of trial’ (2001) *Columbia Law Review*, 1241.

⁶⁰⁹ Zhiyun Wu, ‘Examining Good Character as a Mitigating Factor in Canadian Sentencing’ (2007) *Queen’s University Journal of Law* 52.

⁶¹⁰ Ibid 61.