

Instinctive synthesis: Exploring and explaining the Australian model of sentencing



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ABSTRACT

The instinctive synthesis [IS] model of sentencing applied by Australian courts is a deliberately unstructured approach. It requires sentencers to consider all of the relevant factors in a single step to arrive at the appropriate sentence. There is no common decision-making process or methodology to which sentencers must adhere. Instead, IS is designed to allow sentencers maximum judicial discretion and flexibility so that they may deliver individualised justice with each sentence.

Using doctrinal analysis and data from interviews with judges from the Victorian County Court, Supreme Court and Court of Appeal, this thesis examines how the unstructured IS model is applied in practice. Interview responses suggest that the majority of sentencers are willing to be guided in general ways, for example through the application of sentencing principles, but are opposed to hard limits on their discretion. Many are willing to overlook issues of transparency and consistency surrounding IS in order to preserve their very broad discretion.

Sentencing judges in Victoria appear to have developed their own informal means of structuring sentencing decision-making. Addressing relevant factors under wide headings such as 'objective seriousness of the offence' and 'factors relating to the offender' suggests that judges are not opposed to approaching sentencing decision-making in a structured manner. In fact, the vast majority find it a useful means of organising the many different, at times competing, factors.

The informal process applied by many interviewees is broadly similar to that in sentencing guidelines applied in England and Wales and proposed in Victoria. Such guidelines bring clarity, order and transparency to sentencing decision making but are heavily opposed by many sentencers, often mistaking the guiding or structuring judicial discretion as imposing

strict limitations on discretion. This misunderstanding compromises the ability to secure judicial support for changes to the sentencing status quo.

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TABLE OF CONTENTS

INTRODUCTION	1
1. THE PURPOSE OF THE THESIS	4
2. THE STRUCTURE OF THE THESIS	6
3. CONCLUSION	9
CHAPTER 1 BACKGROUND	11
1. SENTENCING IN AUSTRALIA	12
1.1. STATUTE	12
1.2. THE ROLE OF THE COURTS	14
1.3. PRINCIPLES	15
1.4. INSTINCTIVE SYNTHESIS	16
2. STRUCTURING SENTENCING DISCRETION	18
2.1. STRUCTURED SENTENCING MODELS	18
2.2. UNSTRUCTURED SENTENCING MODELS	21
3. RULE OF LAW	25
3.1. CONSISTENCY	25
3.2. TRANSPARENCY	26
4. CONCLUSION	28
CHAPTER 2 METHODOLOGY	30
1. PREVIOUS STUDIES	31
1.1. JUDICIAL PARTICIPATION IN QUALITATIVE STUDIES	31
1.2. SIMILAR STUDIES	35
2. RESEARCH METHODS	36
2.1. CASE LAW	36
2.2. INTERVIEWS	38
2.3. VIGNETTES	40
3. CURRENT STUDY	40
3.1. JURISDICTION	41
3.2. APPROACH	42
3.3. DEMOGRAPHICS	44
3.4. INTERVIEWS	44
3.5. ANONYMITY	46
3.6. JUDICIAL ATTITUDES	47
4. CONCLUSION	49
CHAPTER 3 THE DEVELOPMENT AND CONTENT OF THE INSTINCTIVE SYNTHESIS MODEL	51
1. HISTORICAL DEVELOPMENT	52
1.1. THE POSITION WITHIN THE STATES	52
1.2. "GUIDANCE" FROM THE HIGH COURT	54
1.3. <i>MARKARIAN V THE QUEEN</i>	57
1.4. POST-MARKARIAN	61

1.5. EVOLUTION FROM <i>WILLISCROFT</i>	64
2. ESSENTIAL FEATURES OF IS	65
2.1. ABSENCE OF METHODOLOGY AND WEIGHING OF FACTORS	66
2.2. OPPOSITION TO TWO-TIERED SENTENCING	67
2.3. OPPOSITION TO STRUCTURED SENTENCING	70
3. PRINCIPLES UNDERLYING INSTINCTIVE SYNTHESIS	78
3.1. INDIVIDUALISED JUSTICE AND BROAD DISCRETION	78
3.2. THE INTERWEAVING OF SENTENCING PRINCIPLES AND SENTENCING MODEL	80
4. CONCLUSION	82

CHAPTER 4 JUDICIAL APPLICATION OF INSTINCTIVE SYNTHESIS 85

1. JUDGES' CONCEPTION OF IS	86
1.1. INSTINCT AND EXPERIENCE	89
1.2. EXPERIENCE	92
1.3. JUDICIAL ATTITUDES TO THE TERM 'INSTINCTIVE SYNTHESIS'	99
2. HOW DO JUDGES SENTENCE?	103
2.1. HOW DO JUDGES APPROACH THE SENTENCING TASK?	103
2.2. THE DECISION-MAKING PROCESS	106
3. CONCLUSION	124

CHAPTER 5 INSTINCTIVE SYNTHESIS AND TRANSPARENCY 126

1. 'INSTINCT'	127
2. TRANSPARENCY	129
2.1. TREATMENT OF INDIVIDUAL SENTENCING FACTORS	131
2.2. TRANSPARENCY AND APPEALS	134
2.3. JUDICIAL ATTITUDES TO TRANSPARENCY	136
2.4. SENTENCING REMARKS	137
3. DO SENTENCING REMARKS ACCURATELY REFLECT THE DECISION-MAKING PROCESS?	143
3.1. A SENTENCING FORMULA	145
3.2. REVERSE ENGINEERING AND THE GUILTY PLEA DISCOUNT	148
4. APPEAL PROOFING	151
4.1. DEFENSIVE WRITING	154
5. CONCLUSION	158

CHAPTER 6 INSTINCTIVE SYNTHESIS AND CONSISTENCY 160

1. CONSISTENCY AND DISPARITY	161
1.1. DISCRETION	161
1.2. CONSISTENCY AND EQUAL JUSTICE	162
1.3. DISPARITY	164
2. CONSISTENCY, INDIVIDUALISATION AND IS	166
2.1. CONSISTENCY OF APPROACH	169
3. METHODS FOR PROMOTING CONSISTENCY	175
3.1. COMPARABLE CASES	176
3.2. SENTENCING STATISTICS	177
3.3. CURRENT SENTENCING PRACTICES (CSP)	178
3.4. RANGE	181

3.5. THE APPELLATE COURT	185
3.6. TALKING TO COLLEAGUES	186
4. JUDGES' ATTITUDE TO CONSISTENCY	190
5. CONCLUSION	193
CHAPTER 7 GUIDING SENTENCING DECISION-MAKING	195
1. JUDICIAL ATTITUDES TO SENTENCING GUIDANCE AND REFORM	196
1.1. DISCRETION AND INDIVIDUALISED JUSTICE	196
1.2. RECOGNISING THE POTENTIAL FOR IMPROVEMENT	198
1.3. JUDICIAL ATTITUDES TO REFORM	201
2. LEGISLATIVE ATTEMPTS TO INTRODUCE STRUCTURE	203
2.1. JUDICIAL REACTION TO LEGISLATIVE CHANGES	204
2.2. BASELINE SENTENCING	206
2.3. RELATIONSHIP BETWEEN THE LEGISLATURE AND THE COURTS	207
3. THE COURT'S ATTEMPTS TO RETAIN CONTROL OVER SENTENCING	208
3.1. APPELLATE GUIDANCE	209
3.2. THE VICTORIAN COURT OF APPEAL	212
3.3. RELATIONSHIP BETWEEN THE COURTS	216
3.4. THE HIGH COURT	220
4. STANDARD SENTENCING	225
5. CONCLUSION	226
CHAPTER 8 BRINGING GREATER STRUCTURE TO SENTENCING	229
1. THE SENTENCING GUIDELINES MODEL	230
1.1. GUIDELINES IN ENGLAND AND WALES	232
2. THE POSSIBILITY OF GUIDELINES IN AUSTRALIA	238
2.1. SIMILARITY TO CURRENT APPROACH	242
3. JUDICIAL ATTITUDES TO SENTENCING GUIDELINES	245
3.1. HOSTILITY	247
4. JURISDICTIONAL DIFFERENCES	250
4.1. COUNCIL MEMBERSHIP	251
4.2. OTHER DIFFERENCES	254
5. THE LIKELIHOOD OF REFORM	256
6. CONCLUSION	259
CONCLUSION	261
1. INSTINCTIVE SYNTHESIS	261
1.1. RULE OF LAW	262
1.2. STRUCTURE AND GUIDANCE	265
2. GUIDELINES	266
2.1. RESPONDING TO OBJECTIONS TO SENTENCING GUIDELINES	268
3. ONGOING RESISTANCE TO CHANGE	270
APPENDICES	274
A – SCHEDULE OF QUESTIONS	274

TABLE OF AUTHORITIES

CASES

<i>AB v The Queen</i> (1999) 198 CLR 111	14, 55, 68, 70, 72, 73, 76, 81, 82, 126, 134, 169, 175, 220
<i>AG's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002</i> (2002) 56 NSWLR 146	222
<i>Attorney General's Reference (R v Kahar); R v Ziamani</i> [2016] EWCA Crim 568; [2016] 2 Cr App R (S) 32 210, 234	
<i>Attorney General's Reference No 11 of 2007</i> [2007] EWCA Crim 1523, [2008] 1 Cr App R (S) 26.....	235
<i>Attorney General's References (Nos 15, 16, 17 of 2012)</i> [2012] EWCA Crim 1414; [2013] 1 Cr App R (S) 52, [17]	235
<i>Attorney General's References (Nos 7, 8 and 9 of 2009)</i> [2009] EWCA Crim 1490; [2010] 1 Cr App R (S) 67, [39]	235
<i>Australian Communist Party v The Commonwealth</i> (1951) 83 CLR 1	129
<i>Australian Competition and Consumer Commission v Cement Australia Pty Ltd</i> [2016] FCA 453.....	90
<i>Azzopardi v The Queen</i> (2011) 219 A Crim R 369	15, 210
<i>Barbaro v The Queen</i> (2014) 253 CLR 58	3, 62, 63, 66, 81, 176, 181, 183, 220
<i>Bell v The Queen</i> (2016) 77 MVR 336	210
<i>Billam</i> (1986) 82 Cr App R 347.....	222
<i>Blair Alick McMillan v Police</i> [2014] NZHC 150.....	15
<i>Boulton v The Queen</i> (2014) 248 A Crim R 153.....	222, 223
<i>Bowen v The Queen</i> [2011] VSCA 67	78
<i>Briggs v The Queen</i> [2010] VSCA 279	211
<i>Brown v The Queen</i> [2019] VSCA 286	150, 225
<i>Budget Nursery Pty Ltd v FCT</i> (1989) 42 A Crim R 81.....	16
<i>Bugmy v The Queen</i> (2013) 249 CLR 571.....	13, 16, 109, 112, 137, 272
<i>Cameron v The Queen</i> (2002) 209 CLR 339	13, 57, 66, 74, 76, 77, 82, 133, 149, 242, 264
<i>Carroll v The Queen</i> (2009) 83 ALJR 579	135
<i>Chester v The Queen</i> (1988) 165 CLR 61.....	71
<i>Chivers v Western Australia</i> [2005] WASCA 97	66, 82
<i>Clarkson v The Queen</i> (2011) 32 VR 361.....	186, 214
<i>CMB v Attorney-General (NSW)</i> (2015) 256 CLR 346.....	272
<i>Cottee v The Queen</i> [2010] VSCA 285.....	66
<i>CW v The Queen</i> [2011] NSWCCA 45.....	173
<i>Dalgliesh v The Queen</i> (2017) 262 CLR 428	3, 17, 62, 103, 180, 181, 223, 224, 263
<i>Davy v The Queen</i> (2011) 207 A Crim R 266	178
<i>Dennison v Tasmania</i> [2005] TASSC 54	61
<i>Dinsdale v The Queen</i> (2000) 202 CLR 321	134, 186, 214
<i>Dole</i> [1975] VR 754	135
<i>DPP (Cth) v Besim; Same v MHK (No 2)</i> (2017) 52 VR 296.....	207
<i>DPP (Cth) v De La Rosa</i> (2010) 273 ALR 324	112, 175, 176, 181, 183, 263
<i>DPP (Cth) v Gregory</i> (2011) 83 ATR 336.....	69, 239
<i>DPP (Cth) v Thomas</i> (2016) 53 546.....	178
<i>DPP (Vic) v Drake</i> [2019] VSCA 293	135
<i>DPP (Vic) v Jones</i> (2013) 40 VR 267	210
<i>DPP (Vic) v OJA</i> (2007) 172 A Crim R 181.....	174, 175
<i>DPP v Adajian</i> [1999] VSCA 105.....	78, 173
<i>DPP v Akeno</i> [2018] VCC 1816.....	146
<i>DPP v Arney</i> [2007] VSCA 126.....	78, 174, 186
<i>DPP v Arvanitidis</i> (2008) 202 A Crim R 300.....	135
<i>DPP v Bright</i> (2006) 163 A Crim R 538.....	80
<i>DPP v Brown</i> [2009] VSCA 314.....	80
<i>DPP v Cooper</i> [2018] VSCA 21.....	243
<i>DPP v Cowton & Anor</i> [2019] VCC 1818	155
<i>DPP v CPD</i> (2009) 196 A Crim R 1	175, 176, 178, 183, 209
<i>DPP v Dalgliesh</i> (2017) 271 A Crim R 1	224

<i>DPP v Dalglish</i> [2016] VSCA 148	176, 179, 180, 209, 211, 223
<i>DPP v Edge</i> [2012] VSCA 289	186
<i>DPP v England</i> [1999] 2 VR 258	88
<i>DPP v Hammond & Ors</i> [2020] VCC 807	155
<i>DPP v Hughes-Firgaria & Ors</i> [2019] VCC 1870	155
<i>DPP v Johnson</i> [2004] VSCA 150	186
<i>DPP v Karazisis</i> (2010) 206 A Crim R 14.....	186, 214
<i>DPP v Le</i> [2018] VCC 12	133
<i>DPP v Martin</i> [2009] VSCA 316.....	181
<i>DPP v Maynard</i> [2009] VSCA 129	178
<i>DPP v McMaster</i> (2008) 185 A Crim R 247	166
<i>DPP v Perry & Anor</i> [2017] VCC 1383	155
<i>DPP v Ross</i> (2006) 166 A Crim R 97.....	183, 212
<i>DPP v Rule</i> [2015] VCC 387	107
<i>DPP v Ryan</i> [2014] IECCA 11	20, 210
<i>DPP v Sharp</i> [2016] VCC 923.....	146
<i>DPP v Stoodley</i> [2015] VCC 12	146
<i>DPP v Terrick; DPP v Marks; DPP v Stewart</i> (2009) 197 A Crim R 474	17, 66, 81, 91, 131, 134, 181
<i>DPP v Walters</i> (2015) 255 A Crim R 375	206
<i>DPP v Zhuang</i> (2015) 250 A Crim R 282.....	176
<i>Du Plooy v HM Advocate</i> 2005 1 JC 1	210
<i>Elias v The Queen</i> (2013) 248 CLR 483.....	16, 78, 103
<i>Everett v The Queen</i> (1994) 181 CLR 295	186
<i>FD v The Queen</i> [2011] VSCA 8	176, 178
<i>Foster v Procurator Fiscal Edinburgh</i> [2019] SAC (Crim) 16.....	210
<i>Gilligan v Ireland</i> [2013] IESC 45.....	15
<i>Giordano v The Queen</i> [2010] VSCA 101	148, 149
<i>Greatorex v The Queen</i> [2016] VSCA 136	210
<i>Green v The Queen</i> (2011) 244 CLR 462	15, 163, 164, 272
<i>Griffiths v The Queen</i> (1977) 137 CLR 293	14
<i>Griffiths v The Queen</i> (1989) 167 CLR 372	14
<i>Guden v The Queen</i> (2010) 28 VR 288.....	210
<i>Hall v The Queen</i> [2010] VSCA 349	178
<i>Hanks v The Queen</i> [2011] VSCA 7	80, 186
<i>Hessell v R</i> [2011] 1 NZLR 607.....	21, 22
<i>Hili v R; Jones v R</i> (2010) 242 CLR 520	3, 26, 62, 79, 169, 172, 173, 176, 178, 181, 186, 191, 211, 266, 272
<i>Hoare v The Queen</i> (1989) 167 CLR 348	15, 181, 210
<i>Hogarth v R</i> (2012) 37 VR 658	209, 216
<i>Honeysett v R</i> (2018) 56 VR 375	211
<i>House v The King</i> (1936) 55 CLR 499	78, 134, 135, 169
<i>Hudson v The Queen</i> (2010) 30 VR 610	17, 80, 81, 170, 173, 174, 176, 182, 186, 193, 210, 212, 263
<i>Inge v The Queen</i> (1999) 199 CLR 295	81
<i>Jago v District Court (NSW)</i> (1989) 168 CLR 23	137
<i>Jimmy v The Queen</i> (2010) 77 NSWLR 540.....	174
<i>Johnson v The Queen</i> (2004) 78 ALJR 616.....	7, 16, 169
<i>Joseph McKnight v Her Majesty's Advocate</i> [2008] HCJAC 62.....	15
<i>Kable v DPP</i> (1995) 36 NSWLR 374.....	78
<i>Kane v The Queen</i> [2010] VSCA 213	78, 173
<i>Karim v The Queen</i> (2013) 227 A Crim R 1.....	80
<i>Kepu v R</i> [2011] NZCA 104	22
<i>Kertai v R</i> [2013] NSWCCA 252.....	132
<i>Kumar v R</i> [2015] NZCA	14
<i>Lacey v Attorney-General (Qld)</i> (2011) 242 CLR 573	185
<i>Leech v McCall</i> (1986) 41 SASR 96	137
<i>Leeth v The Commonwealth</i> (1992) 174 CLR 455	163
<i>Lowe v The Queen</i> (1984) 154 CLR 606.....	15, 26, 160, 163, 170, 174, 220, 263
<i>Lowndes v The Queen</i> (1999) 195 CLR 665	16, 80, 210

<i>Lugo v The Queen</i> [2020] VSCA 75.....	150, 225
<i>MacDonnell</i> (2002) 128 A Crim R 44.....	58
<i>Magaming v The Queen</i> (2013) 252 CLR 381	80
<i>Markarian v The Queen</i> (2005) 228 CLR 357 .2, 3, 12, 17, 26, 51, 53, 55, 58, 59, 60, 61, 65, 66, 68, 70, 71, 73, 74, 75, 76, 77, 80, 82, 86, 89, 94, 101, 112, 117, 126, 127, 128, 129, 131, 133, 134, 149, 158, 170, 175, 187, 200, 210, 211, 220, 239, 240, 241, 263, 264, 269, 273	
<i>Markovic v The Queen</i> (2010) 200 A Crim R 510	210
<i>Martin</i> [2006] EWCA Crim 1035; [2007] 1 Cr App R (S) 3	241
<i>Maxwell v The Queen</i> (1996) 184 CLR 501	220
<i>McKenna v The Queen</i> (1992) 63 A Crim R 452	54
<i>McLaren v R</i> [2012] NSWCCA 284	109
<i>McPhee v The Queen</i> [2014] VSCA 156	186
<i>McPherson v R</i> [2014] VSCA 59	69, 239
<i>Middleton v The Queen</i> [2018] VSCA 23	243
<i>Mill v The Queen</i> (1988) 166 CLR 59	15, 81, 210, 220
<i>Miller v R</i> (1989) 44 A Crim R 185	137
<i>Minister for Immigration and Border Protection v Eden</i> (2016) 240 FCR 158	181
<i>Minister for Immigration and Citizenship v Li</i> (2013) 249 CLR 332	134, 181
<i>MLP v R</i> (2006) 164 A Crim R 93	239
<i>Moore v The Queen</i> [2005] NSWCCA 407.....	61
<i>Morrison v The Queen</i> (2009) 197 A Crim R 103	176
<i>Mulato v The Queen</i> [2006] NSWCCA 282.....	14
<i>Muldrock v The Queen</i> (2011) 244 CLR 120.....	3, 13, 62, 65, 175, 241, 266
<i>Nannup v Western Australia</i> [2011] WASCA 257	61
<i>Nash v The Queen</i> [2013] VSCA 172	166
<i>Nevermann v R</i> (1989) 43 A Crim R 347	137
<i>Nguyen v The Queen</i> [2011] 31 VR 673	183
<i>NOM v DPP</i> (2012) 38 VR 618.....	210
<i>Norbis v Norbis</i> (1986) 161 CLR 513	112, 196, 210, 229, 239
<i>Palling v Corfield</i> (1970) 123 CLR 52	80
<i>Pavlic v The Queen</i> (1995) 5 Tas R 186	53, 54
<i>Pearce v The Queen</i> (1998) 194 CLR 610	15, 17, 66, 82, 112, 131, 169, 170
<i>Pesa v The Queen</i> [2012] VSCA 109.....	135
<i>Pettitt v Dunkley</i> [1971] 1 NSWLR 376	137
<i>Plaintiff S 157/2002 v The Commonwealth</i> (2003) 211 CLR 476	129
<i>Postiglione v The Queen</i> (1997) 189 CLR 295	14, 81, 160, 163, 164, 169, 174, 210, 220
<i>Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment</i> (2012) 250 CLR 343.....	252
<i>R v Abbott</i> (2007) 170 A Crim R 306	186
<i>R v AD</i> (2008) 191 A Crim R 409	214
<i>R v Allinson</i> (1987) 49 NTR 38.....	209
<i>R v AM</i> [2010] 2 NZLR 750	22
<i>R v Bangard</i> (2005) 159 A Crim R 145	178
<i>R v Bartel</i> [2008] SASC 289	74
<i>R v Beary</i> (2004) 151 A Crim R 388.....	135
<i>R v Beavan</i> (NSWCCA, Hunt CJ at CL, 22 July 1991).....	67, 72, 117, 131
<i>R v Blackshaw</i> [2011] EWCA Crim 2312, [2012] 1 Cr App R (S) 114	235
<i>R v Boaza</i> [1999] VSCA 126.....	80, 186, 210
<i>R v Brown</i> [2018] VSC 742	225, 226
<i>R v Caley & Ors</i> [2012] EWCA Crim 2821, [2013] 2 Cr App R (S) 47	234
<i>R v Campillo Vaquere</i> [2004] NSWCCA 271	176
<i>R v Caplikas</i> [2002] 134 A Crim R 544.....	57
<i>R v Cartwright</i> (1989) 17 NSWLR 243	66
<i>R v Connell</i> (1995) 83 A Crim R 249	15
<i>R v Crowdey</i> [1999] NSWCCA 24	81
<i>R v Cuthbert</i> [1967] 2 NSWLR 329	54
<i>R v Dashti</i> [2016] NSWCCA 251	66

<i>R v De Simoni</i> (1981) 147 CLR 383	220
<i>R v Djukic</i> [2001] VSCA 226.....	163
<i>R v Ellis</i> (1993) 68 A Crim R 449	78
<i>R v Engert</i> (1995) 84 A Crim R 67.....	78
<i>R v Eruera</i> [2005] NZCA 63	22
<i>R v Flaherty (No 2)</i> (2008) 186 A Crim R 338	117, 149
<i>R v Gallagher</i> (1991) 23 NSWLR 220.....	66, 74, 82, 117, 131
<i>R v Garforth</i> (NSWCCA, Gleeson CJ, McInerney and Mathews JJ, 23 May 1994)	68
<i>R v Gauvreau</i> , 2017 ABCA 74.....	24
<i>R v Geddes</i> (1936) 36 SR (NSW) 554	15, 17, 193, 263
<i>R v Gent</i> (2005) 162 A Crim R 29	13
<i>R v George</i> (2004) 149 A Crim R 38	176
<i>R v Giordano</i> [1998] 1 VR 544.....	176
<i>R v Gladue</i> [1999] 1 SCR 688	78
<i>R v Godfrey</i> , 2018 ABCA 369.....	24
<i>R v Golding</i> (1980) 24 SASR 161	53
<i>R v Green</i> (1986) 22 A Crim R 196	209
<i>R v Hajar</i> , 2016 ABCA 222.....	24
<i>R v Hamilton</i> [2005] 2 SCR 432	38
<i>R v Hasan</i> (2010) 31 VR 28	26, 164, 174, 181, 182
<i>R v Hayes</i> (1987) 29 A Crim R 452	78, 176
<i>R v Ipeelee</i> 2012 SCC 13.....	23
<i>R v Jones; R v Hili</i> (2010) 76 ATR 249	134
<i>R v Jurisic</i> (1998) 45 NSWLR 209.....	25, 164, 174
<i>R v King</i> (1988) 48 SASR 555	112
<i>R v King</i> (2004) 150 A Crim R 409	193, 263
<i>R v King</i> [2009] NSWCCA 117	239
<i>R v Kirby; Ex parte Boilermakers' Society of Australia</i> (1956) 94 CLR 254	252
<i>R v Koloamatangi</i> [2011] NSWCCA 288.....	14
<i>R v Koumis</i> (2008) 184 A Crim R 421	109, 135, 137, 141, 146
<i>R v KSH</i> , 2015 ABCA 370	24
<i>R v Lacasse</i> , 2018 SCC 34, [2015] 3 SCR 1089.....	24
<i>R v Lawson</i> (1997) 98 A Crim R 463	54
<i>R v Lett</i> (1995) NSWCCA 9	72, 74, 131, 263
<i>R v Lowe</i> [2009] VSCA 268	144
<i>R v M (CA)</i> [1996] 1 SCR 500.....	14, 24, 78
<i>R v MacNeil-Brown; R v Piggott</i> (2008) 20 VR 677	62, 79, 112, 130, 170, 177, 181, 183, 212, 220, 263
<i>R v Majors</i> (1991) 54 A Crim R 334.....	135
<i>R v Mako</i> [2000] 2 NZLR 170	22
<i>R v Markarian</i> (2003) 137 A Crim R 497	57, 58, 105, 130, 133, 134
<i>R v McEachran</i> (2006) 15 VR 615	163
<i>R v McNaughton</i> (2006) 66 NSWLR 566	13, 15, 181
<i>R v Mills</i> (2005) 154 A Crim R 40.....	135
<i>R v Mills</i> [1998] 4 VR 235	211
<i>R v Monardo</i> [2005] VSCA 115	170, 263
<i>R v Morgan</i> (1993) 70 A Crim R 368	182
<i>R v Morton</i> (1986) 23 A Crim R 433	52
<i>R v Mulholland</i> (1991) 102 FLR 465	54, 242
<i>R v Nagy</i> (1991) 57 A Crim R 64.....	54, 77, 205
<i>R v Nasogalvak</i> , 2010 SCC 6, [2010] 1 SCR 206	23, 24, 26
<i>R v Ngui</i> (2000) 111 A Crim R 593.....	175, 179
<i>R v O'Connor</i> [1987] VR 496	210
<i>R v Olbrich</i> (1999) 199 CLR 270.....	174, 185, 220
<i>R v Oliver</i> (1980) 7 A Crim R 174.....	174
<i>R v Page</i> [1977] 2 NSWLR 173	137
<i>R v PES</i> , 2018 MBCA 124.....	24
<i>R v Pham</i> (2015) 256 CLR 550.....	169, 176, 263

<i>R v Place</i> (2002) 81 SASR 395	57, 83, 149, 269
<i>R v Powell</i> (2001) 126 A Crim R 137.....	57
<i>R v Punch</i> (1993) 67 A Crim R 46	53, 54, 77
<i>R v Raggett</i> (1990) 50 A Crim R 41	54, 186
<i>R v Randall-Smith; R v Davi</i> (2008) 184 A Crim R 46.....	134
<i>R v RGB</i> , 2017 ABCA 359.....	24
<i>R v Robertson</i> [2019] VSC 145	226
<i>R v Rossi</i> , 2016 ABCA 43	24
<i>R v Rushby</i> [1977] 1 NSWLR 594.....	128
<i>R v Sahari</i> (2007) 177 A Crim R 1	75
<i>R v Salameh</i> (1991) 55 A Crim R 384	135
<i>R v Shannon</i> (1979) 21 SASR 442	53
<i>R v Sharma</i> (2002) 54 NSWLR 300	56, 68
<i>R v Shropshire</i> [1995] 4 SCR 227	14
<i>R v Sladic</i> (2005) 92 SASR 36.....	61
<i>R v SLW</i> , 2018 ABCA 235	24
<i>R v Smith</i> (2003) 86 SASR 132.....	129, 143, 154
<i>R v Smith (Christopher)</i> [2015] EWCA Crim 1482	210
<i>R v Snell</i> [2017] VSC 394	107
<i>R v Stuttard</i> [2006] VSCA 112	135
<i>R v Suter</i> 2018 SCC 34, [2018] 2 SCR 496.....	24
<i>R v Taueki</i> [2005] NZCA 174	22
<i>R v Taylor</i> [2012] EWCA Crim 630; [2012] 2 Cr App R (S) 98	78
<i>R v Thomson</i> (2000) 49 NSWLR	54, 56, 68, 69, 72, 76, 82, 149, 222
<i>R v Tierney</i> (1990) 51 A Crim R 446	77
<i>R v Valera</i> [2002] NSWCCA 50	54, 77
<i>R v Verdins; R v Buckley; R v Vo</i> (2007) 169 A Crim R 581	13, 110, 137, 210, 211
<i>R v Way</i> (2004) 60 NSWLR 168	68, 123
<i>R v Whyte</i> (2002) 55 NSWLR 252.....	15, 55, 56, 57, 71, 80, 97, 174, 178, 222, 240
<i>R v Wilkes</i> (1770) 4 Burr 2527	261
<i>R v Willaert</i> (1953) 105 CCC 172	24
<i>R v Williamson</i> (2009) 21 VR 330.....	214
<i>R v Williscroft</i> [1975] VR 292	41, 52, 53, 64, 65, 83, 193, 263
<i>R v Yellowknee</i> , 2017 ABCA 60	24
<i>R v Young, Dickenson and West</i> (1990) 45 A Crim R 147.....	52, 53, 54, 59, 72, 133, 151
<i>Radenkovic v The Queen</i> (1990) 170 CLR 623.....	14
<i>Rees v R</i> [2012] NSWCCA 47	169
<i>Roger Kingsley Dean v R</i> [2015] NSWCCA 307.....	75
<i>Russell v The Queen</i> [2011] 212 A Crim R 57	78, 173, 183
<i>Ryan v The Queen</i> (2001) 206 CLR.....	13, 14, 71, 72, 103, 211
<i>Saab</i> [2012] VSCA 165	76
<i>Scerri v R</i> (2010) 206 A Crim R 1	76, 148, 149
<i>Scott v The Queen</i> [2010] VSCA 290	144
<i>Sharp v Wakefield</i> (1891) AC 173	196
<i>Shrestha v R</i> [2017] VSCA 364	179
<i>Shrubsole v Rodriguez</i> (1978) 18 SASR 233	137
<i>Sinkovich v The Queen</i> [2011] NSWCCA 90	186
<i>Skinner v The King</i> (1913) 16 CLR 336.....	186
<i>Stewart</i> (1987) 9 Cr App R (S) 135	222
<i>Tahuri v R</i> [2013] NZCA 254.....	14
<i>Taikato</i> [1966] 186 CLR 454.....	162
<i>Tame v Fingleton</i> (1974) 8 SASR 507	137
<i>Tognolini v The Queen</i> (2011) 32 VR 104.....	176
<i>Trajkovski v R</i> [2011] 32 VR 587	69, 70, 73, 76
<i>Tran v The Queen</i> [2017] VSCA 346.....	73
<i>US v Pitera</i> 795 F Supp 546 (1992)	78
<i>Valayamkandathil v The Queen</i> [2010] VSCA 260	135

<i>Veen v The Queen (No 1)</i> (1979) 143 CLR 458	14, 15, 71, 173, 266
<i>Veen v The Queen (No 2)</i> (1988) 164 CLR 465	15, 54, 78, 166, 181, 210
<i>Verschuren</i> (1996) 91 A Crim R 1	53, 54, 76, 149
<i>Wainohu</i> (2011) 243 CLR 181	252, 253
<i>Warner (AKA Jeremy Pachenko) v R</i> [2013] NSWCCA 10	159
<i>Watson v Anderson</i> (1976) 13 SASR 329	137
<i>WCB v The Queen</i> (2010) 29 VR 483	186
<i>Webb v O'Sullivan</i> [1952] SASR 65	16, 78
<i>Western Australia v Akizuki</i> (2008) 192 A Crim R 373	174
<i>Western Australia v Munda</i> (2012) 43 WAR 137	172
<i>Whittaker v The King</i> (1928) 41 CLR 230	14
<i>Williams v R</i> [2012] NSWCCA 172	72, 109
<i>Wilson v Ministers for Aboriginal and Torres Strait Islander Affairs</i> (1996) 189 CLR 1	253
<i>Winch v The Queen</i> (2010) 27 VR 658	163, 176
<i>Wong v The Queen</i> (2001) 207 CLR 584 3, 17, 26, 55, 56, 57, 72, 74, 75, 76, 78, 80, 114, 125, 126, 131, 134, 159, 160, 163, 166, 167, 169, 172, 173, 174, 175, 176, 178, 183, 210, 211, 220, 222, 241, 242, 261, 266	
<i>Yang v R; DPP v Yang</i> [2011] VSCA 161	76, 149
<i>York v The Queen</i> (2005) 225 CLR 466	14, 220
<i>Zakaria v The Queen</i> (1984) 12 A Crim R 386	173, 174
<i>Zhang v R</i> [2019] NZCA 507	22
<i>Zogheib v R</i> [2015] VSCA 334	76

STATUTES

18 United States Code § 3742 Review of a sentence	14
<i>Australian Constitution</i> Chapters I, II and III	252
<i>Australian Constitution</i> s 51	12
<i>Australian Constitution</i> s 61	12
<i>Australian Constitution</i> s 77(iii)	12
Code pénal (France), Art 132-1	78
<i>Constitution Act 1975</i> (Vic) s 75(1)(b)	44
<i>Constitution Act 1975</i> (Vic) s 77(3)	44
<i>Coroners and Justice Act 2009</i> s 120(11)	237
<i>Coroners and Justice Act 2009</i> s 120(11)(b)	26
<i>Coroners and Justice Act 2009</i> s 120(2)	232
<i>Coroners and Justice Act 2009</i> s 124(8)	250
<i>Coroners and Justice Act 2009</i> s 127	237
<i>Coroners and Justice Act 2009</i> ss 125(1)	19
<i>Coroners and Justice Act 2009</i> ss 125(1)-(3)	19, 235
<i>Crimes (Administration of Sentences) Act 1999</i> (NSW)	12
<i>Crimes (Sentencing and Restorative Justice) Amendment Act 2016</i> (ACT)	203
<i>Crimes (Sentencing Procedure) Act 1999</i> (NSW)	12
<i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) Pt 3 Div 4	222
<i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) s 21A	12
<i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) s 22(2)	75
<i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) s 3A	21
<i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) s 61(1)	75
<i>Crimes (Sentencing) Act 2005</i> (ACT)	12
<i>Crimes (Sentencing) Act 2005</i> (ACT) s 3(za)	160
<i>Crimes (Sentencing) Act 2005</i> (ACT) s 6(b)	12
<i>Crimes (Sentencing) Act 2005</i> (ACT) s 7	12
<i>Crimes (Sentencing) Act 2005</i> (ACT) ss 81-84	137
<i>Crimes Act 1914</i> (Cth) s 16A	75
<i>Crimes Act 1914</i> (Cth) s 16A(2)	12
<i>Crimes Act 1914</i> (Cth) s 16A(2)(k)	15
<i>Crimes Act 1914</i> (Cth) s 16F	137
<i>Crimes Act 1914</i> (Cth) s 21E	149

<i>Crimes Act 1958 (Vic) ss 79 and 79A</i>	204
<i>Crimes Amendment (Carjacking and Home Invasion) Act 2016 (Vic)</i>	203
Criminal Code, RSC 1985, c C-46, s 718.1	15, 21, 23
Criminal Code, RSC 1985, c C-46, s 718.2(b).....	15
Criminal Justice Act 2003, s 172 (repealed).....	235
Judicial Council Act 2019 (Ireland).....	20
<i>Judicial Officers Act 1986 (NSW) s 8</i>	160
<i>Judiciary Act 1903 (Cth) s 35A</i>	14
<i>Judiciary Act 1903 (Cth) s 39(2)</i>	12
<i>Judiciary Act 1903 (Cth) s 68</i>	12
<i>Magistrates' Court Act 1989 (Vic) s 7(3)(b)</i>	44, 254
<i>Magistrates' Court Act 1989 (Vic) s 7(4)</i>	44
<i>Penalties and Sentences Act 1992 (Qld) s 13(3)</i>	75
<i>Penalties and Sentences Act 1992 (Qld) s 15</i>	220
<i>Penalties and Sentences Act 1992 (Qld) s 163</i>	15
<i>Penalties and Sentences Act 1992 (Qld) s 3</i>	12
<i>Penalties and Sentences Act 1992 (Qld) s 3(b)</i>	12
<i>Penalties and Sentences Act 1992 (Qld) s 9</i>	160
<i>Penalties and Sentences Act 1992 (Qld) s 9(1)(a)</i>	15
<i>Penalties and Sentences Act 1992 (Qld) s 9(2)</i>	12
<i>Penalties and Sentences Act 1992 (Qld) ss 15AC-AI</i>	222
<i>Sentence Administration Act 2003 (WA)</i>	12
<i>Sentencing Act 1991 (Vic) Pt 2AA</i>	222
<i>Sentencing Act 1991 (Vic) Pt 2B</i>	203
<i>Sentencing Act 1991 (Vic) s 1</i>	21
<i>Sentencing Act 1991 (Vic) s 1(a)</i>	26, 160
<i>Sentencing Act 1991 (Vic) s 10</i>	203
<i>Sentencing Act 1991 (Vic) s 10A</i>	205
<i>Sentencing Act 1991 (Vic) s 10AA</i>	203
<i>Sentencing Act 1991 (Vic) s 10AB</i>	203
<i>Sentencing Act 1991 (Vic) s 10AC</i>	203, 205
<i>Sentencing Act 1991 (Vic) s 10AD</i>	203
<i>Sentencing Act 1991 (Vic) s 18G</i>	137
<i>Sentencing Act 1991 (Vic) s 5(1)</i>	3, 12
<i>Sentencing Act 1991 (Vic) s 5(1)(a)</i>	15
<i>Sentencing Act 1991 (Vic) s 5(1)(c)</i>	15
<i>Sentencing Act 1991 (Vic) s 5(1)(d)</i>	15
<i>Sentencing Act 1991 (Vic) s 5(2)</i>	12, 242
<i>Sentencing Act 1991 (Vic) s 5(2)(b)</i>	178
<i>Sentencing Act 1991 (Vic) s 5(2)(c)</i>	13
<i>Sentencing Act 1991 (Vic) s 5(2)(d)</i>	13, 108
<i>Sentencing Act 1991 (Vic) s 5(2)(e)</i>	75, 270
<i>Sentencing Act 1991 (Vic) s 5(2)(f)</i>	13
<i>Sentencing Act 1991 (Vic) s 5(2AB)</i>	149
<i>Sentencing Act 1991 (Vic) s 5A(1)(a)</i>	150
<i>Sentencing Act 1991 (Vic) s 5A(1)(b)</i>	225
<i>Sentencing Act 1991 (Vic) s 5B(2)</i>	225
<i>Sentencing Act 1991 (Vic) s 5B(2)(a)</i>	225
<i>Sentencing Act 1991 (Vic) s 5B(2)(b)</i>	226
<i>Sentencing Act 1991 (Vic) s 5B(5)</i>	137
<i>Sentencing Act 1991 (Vic) s 6AAA</i>	54, 75, 149
<i>Sentencing Act 1991 (Vic) s 6AC(1)(eb)</i>	224
<i>Sentencing Act 1991 (Vic) s 6D(b)</i>	15
<i>Sentencing Act 1991 (Vic) s 9(3)(a)</i>	137
<i>Sentencing Act 1991 (Vic) s 9C</i>	203
<i>Sentencing Act 1991 (Vic) ss 113-113B</i>	41
<i>Sentencing Act 1991 (Vic) ss 18A-P</i>	15

<i>Sentencing Act 1991</i> (Vic) ss 9B-10AE	15
<i>Sentencing Act 1995</i> (NT)	12
<i>Sentencing Act 1995</i> (NT) s 5(1)(a)	15
<i>Sentencing Act 1995</i> (NT) s 5(2)	12
<i>Sentencing Act 1995</i> (NT) s 65	15
<i>Sentencing Act 1995</i> (WA)	12
<i>Sentencing Act 1995</i> (WA) s 143	222
<i>Sentencing Act 1995</i> (WA) s 6(1)(a)	15
<i>Sentencing Act 1995</i> (WA) s 6(5)	160
<i>Sentencing Act 1995</i> (WA) s 98	15
<i>Sentencing Act 1997</i> (Tas)	12
<i>Sentencing Act 1997</i> (Tas) s 3	12
<i>Sentencing Act 2002</i> (NZ) s 8(e)	26
<i>Sentencing Act 2002</i> (NZ) ss 7-8	21
<i>Sentencing Act 2017</i> (SA)	12
<i>Sentencing Act 2017</i> (SA) s 3	15
<i>Sentencing Act 2017</i> (SA) ss 11(1) and 11(6)	13
<i>Sentencing Amendment (Baseline Sentences) Act 2014</i> (Vic)	206
<i>Sentencing Amendment (Baseline Sentences) Act 2014</i> (Vic) s 12	206
<i>Sentencing Amendment (Baseline Sentences) Act 2014</i> (Vic) s13	206
<i>Sentencing Amendment (Sentencing Standards) Act 2017</i> (Vic) ss 25-35	225
<i>Sentencing Council Act 2007</i> (NZ)	22
<i>Sentencing Council Act 2007</i> (NZ) ss 17-19	23
<i>Straffeloven</i> (Criminal Code of Denmark) §80	21
The Criminal Code of Finland (39/1889) (FPC) Ch 6.4	21

OTHER AUTHORITIES

Legislative Assembly (Victoria), Parliamentary Debates, 3 April 2014, Sentencing Amendment (Baseline Sentences) Bill 2014 Second Reading	206
Victorian Court of Appeal, Court of Appeal Practice Statement No 1 of 2000	135

Introduction

Sentencing is an integral part of the criminal justice process, it contributes to the maintenance of peace, order and security and performs an expressive function, censuring those who have infringed societal rules.¹ All findings of guilt, whether through trial or plea of guilty, culminate in the imposition of a sentence which is itself the product of decision-making by a judge or magistrate. This process has been described as the 'single most burdensome task undertaken by trial judges'.² Sentencing is also a highly visible task, leading to scrutiny and criticism by the public, media and politicians, and is often the target of reform agendas and law and order campaigns.³ Yet for all of its visibility and all of the criticism of outcomes, the sentencing process is one of the least understood functions of the criminal court. As a result, public and political discussions of the topic are often hampered by a lack of understanding of how sentencing decisions are actually made.⁴ Similarly, lack of detail in terms of how judges and magistrates approach the task of sentencing, how they identify and balance the relevant factors, apply the appropriate sentencing principles and arrive at an appropriate penalty can impede the ability to evaluate and compare sentencing models and practices.

This is particularly true in Australia where the sentencing model has evolved, not through a careful consultation and development process by a dedicated sentencing council or commission, as in England and Wales or the USA,⁵ but purely through judicial practice. There is no externally determined procedure that sentencers are required to follow or grid to which they must adhere. Instead, Australian sentencers apply an approach called 'instinctive

¹ Lord Thomas Bingham, 'The Sentence of the Court', *The Business of Judging* (OUP 2000) 301.

² Justice Grant Hammond, 'Sentencing: Intuitive Synthesis or Structured Discretion?' (2007) *New Zealand Law Review* 219. See similar comments by interviewees in this study in Chapter 4.

³ See e.g. Julian Roberts, Dave Indermaur, Mike Hough and Loretta Stalans, *Penal Populism and Public Opinion. Lessons from Five Countries* (OUP 2003).

⁴ See e.g. Nicola Marsh, Emma McKay, Clara Pelly and Simon Cereda, *Public Knowledge of and Confidence in the Criminal Justice System and Sentencing: A Report for the Sentencing Council* (Sentencing Council of England and Wales 2019).

⁵ See discussion in Chapter 8.

synthesis' (IS). The Australia High Court explains the process of IS as:

...the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.⁶

In several common law jurisdictions there has been a move towards greater structure at sentencing.⁷ Others, however, such as Canada and New Zealand, resist this shift and remain committed to broad judicial discretion. On a continuum of sentencing models, Australia's IS approach is located at the opposite end of the scale to the structured approach.⁸ It is an extreme example of an unstructured sentencing model, focused instead, as the name suggests, on the instinctive nature of the process,⁹ rather than offering a series of prescriptive rules or procedures. Australian IS involves the sentencer identifying and considering all of the relevant factors in a single step to arrive at an appropriate sentence. There is no established or common methodology and, while guided by sentencing principles, there are no sentencing grids or guidelines to inform the process. The IS model eschews formal guidance in favour of prioritising two fundamental and interconnected sentencing principles: broad judicial discretion and individualised justice.

The absence of a common decision-making process or framework further complicates attempts to understand how judges and magistrates approach the sentencing task. Some insight into sentencers' processes can be gained through the analysis of sentencing remarks.

⁶ *Markarian v The Queen* (2005) 228 CLR 357, 378 [51] (McHugh J) (*Markarian*).

⁷ See, for example, England and Wales and Scotland. Further discussion in Chapters 1 and 8.

⁸ Virginia Bell, 'Sentencing and Judicial Discretion' (The Blackburn Lecture, 17 May 2011)

<<https://www.actlawsociety.asn.au/documents/item/89>> accessed 14 July 2020 23 citing Arie Freiberg, 'Twenty Years of Changes in the Sentencing Environment and Courts' Responses' (Sentencing: Principles, Perspectives and Possibilities Conference, Canberra 10-12 February 2006) 9.

⁹ Tom O'Malley, 'Living without Guidelines' in Andrew Ashworth and Julian V Roberts (eds) *Sentencing Guidelines: Exploring the English Model* (OUP 2013).

These remarks, however, are not always a true reflection of the balancing and reasoning undertaken by judges, as the IS model discourages judges from identifying specific discounts or quantifying the weight given individual sentencing factors.¹⁰

The strength with which the judiciary defend IS sets it apart from unstructured models in other jurisdictions. Australian courts have consistently resisted attempts by the legislature to diminish or influence the exercise of discretion. The High Court, for example, has classified sentencing ranges,¹¹ current sentencing practices,¹² maximum penalties and standard non-parole periods¹³ as merely ‘legislative guidelines’ that do not constrain discretion. It has also prohibited the prosecution from providing information about appropriate sentencing ranges, deeming it an infringement on judicial responsibility.¹⁴ Instead, the emphasis is on maximising judicial discretion and flexibility so that sentencers can tailor an outcome specific to the individual offender and circumstances.

The IS model has attracted some academic attention.¹⁵ Most commentary concerning IS, however, predates the High Court’s judgment in *Markarian*. In that decision, the Court confirmed that IS, and not a two-stage approach, is the sentencing model to be applied in all Australian courts. Following *Markarian*, academic interest in the IS model diminished, despite the decision requiring many states, previously in favour of the two-stage model, to adopt a new sentencing approach. IS seems to have been accepted as the model of sentencing to be applied throughout Australia without any real investigation into what IS involves and whether it is effective in achieving the purposes of sentencing.¹⁶

¹⁰ See e.g. *Wong v The Queen* (2001) 207 CLR 584, 611-612 [75]-[76] (Gaudron, Gummow and Hayne JJ) (*Wong*).

¹¹ *Hili v R; Jones v R* (2010) 242 CLR 520 (*Hili*).

¹² *Dalgliesh v The Queen* (2017) 262 CLR 428 (*Dalgliesh* HC).

¹³ *Muldrock v The Queen* (2011) 244 CLR 120 (*Muldrock*).

¹⁴ *Barbaro v The Queen* (2014) 253 CLR 58 (*Barbaro*).

¹⁵ See e.g. Sally Traynor and Ivan Potas, ‘Sentencing Methodology: Two-tiered or Instinctive Synthesis?’ (2002) *Sentencing Trends and Issues* 25; Mirko Bagaric and Richard Edney, ‘“What’s Instinct Got to Do with It? A Blueprint for a Coherent Approach to Punishing Criminals’ (2003) 27 *Criminal Law Journal* 119; Mirko Bagaric, ‘Sentencing: From Vagueness to Arbitrariness: The Need To Abolish The Stain That Is The Instinctive Synthesis’ (2015) 38(1) *UNSW Law Journal* 76.

¹⁶ See e.g. *Sentencing Act 1991* (Vic) s 5(1).

1. The purpose of the thesis

There are three broad purposes of this thesis: to examine the IS sentencing model, how it has developed and how it is applied; and to evaluate that model according to rule of law values; and examine potential avenues for reform within Australian sentencing.

In comparison to other aspects of the criminal justice process, judicial methodology in sentencing has received limited attention from researchers.¹⁷ Though the sentencing framework is often set out in statute and common law and, in some jurisdictions, external sources such as guidelines, relatively little is known 'about the moment of decision, and the process through which [judges'] minds go to reach and resolve the challenge of that moment.'¹⁸ A greater understanding of this decision-making process and the exercise of discretion would promote more productive and informed sentencing debates, increase accountability and improve legitimacy and public confidence.¹⁹ It also facilitates the evaluation of sentencing models and current practices and can thus inform policy decisions and reforms.

The thesis looks, in particular, at how judges in Victoria and Australia approach the sentencing task. In addition to judgments and sentencing remarks, it draws upon explanations by sentencers themselves using data from interviews conducted with 32 judges from the Victorian County Court, Supreme Court and Court of Appeal. With first-hand experience of sentencing, the comments of these judges provide valuable insights into the thought processes behind the sentencing decision, judicial attitudes to sentencing and their experiences applying IS. The interview responses allow for a more detailed understanding and analysis of IS as a

¹⁷ Geraldine Mackenzie, *How Judges Sentence* (The Federation Press 2005) 5.

¹⁸ Justice Michael Kirby, 'Judging: Reflections on the Moment of Decision' (Fifth National Conference on Reasoning and Decision-Making, Charles Sturt University, Wagga Wagga, 4 December 1998) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_charles.htm> (accessed 5 February 2018).

¹⁹ Andrew Ashworth, Elaine Genders, Graham Mansfield, Jill Peay and Elaine Player, *Sentencing in the Crown Court: Report of an Exploratory Study* (Occasional Paper No 10, Centre for Criminological Research, University of Oxford 1984) 3; Julian Roberts, Public Confidence in Criminal Justice: A Review of Recent Trends 2004–2005 (Public Safety and Emergency Preparedness Canada 2004) 16.

sentencing model. Improved knowledge about the details and practicalities of the process facilitates the evaluation of IS as a sentencing model in the second half of the thesis.

The qualitative interview data is used in combination with case law, statute and academic commentary to investigate three issues: the appeal of IS sentencing; how it is applied in practice; and whether it is fundamentally inconsistent with structured sentencing. The following research questions are examined:

1. What is meant by the term 'instinctive synthesis'?
 - a. How, if at all, does IS differ from a structured approach?
2. How does IS operate in practice?
3. What is the appeal of IS to the Australian judiciary?
 - a. Is their support merely a defence of judicial discretion or is there a more refined defence of the IS approach?
4. If IS is not inherently incompatible with structured sentencing, what kinds of mechanisms or reform might bring structure to the sentencing process in Australia?
 - a. Are any potential alternatives to IS likely to prove acceptable to the judiciary?

The intention behind these questions and this thesis is to improve knowledge of IS and to bring greater transparency to the process. Given the significant degree of power exercised by judges applying IS and the potential to curtail fundamental freedoms, the model requires real scrutiny. The assessments and the findings of the thesis will help to improve understanding of how unstructured sentencing operates, in Australia and more widely, and what motivates the commitment to this type of approach to sentencing.

2. The structure of the thesis

The thesis is divided into four parts. The first establishes context for the analysis of IS and unstructured sentencing. Chapter 1 provides an overview of the sentencing landscape within Australia and in which IS has developed and operates. It explains the sentencing arrangements in Australia, including differences in state, territory and national legislation and the role of the High Court in creating a singular Australian model. It outlines some of the principles underpinning the Australian approach to sentencing, specifically retributive sentencing, broad judicial discretion and individualised justice. The chapter also locates the unstructured Australian approach within the international setting. Chapter 2 will provide context for the data used in this study through explaining the research methodology and selection of Victorian trial and appellate courts as the basis of the research.

The second part of the thesis examines what is meant by 'instinctive synthesis'. IS is considered first as a doctrinal concept. The analysis in Chapter 3 traces the development of the term from a descriptive phrase in the Victorian Supreme Court to the High Court's confirmation that IS is the sentencing model to be applied throughout Australia. The chapter examines the key features of IS: the lack of common methodology; prohibition against assigning specific weights or values to individual sentencing factors; and the requirement that the decision be made in a single step. IS is also often conceived of as the antithesis of structured sentencing and particularly of two-tiered sentencing. As this thesis demonstrates, that characterisation is not necessarily accurate, instead it reflects and perpetuates a very simple, narrow understanding of both models.

The abstract doctrinal concept of IS, or how IS operates 'on paper', is contrasted with IS as it is applied in practice by sentencing judges. IS is considered as a point of practice, examined through qualitative analysis of interview data, in order to explore how IS is understood and applied by the Australian judiciary. The term 'instinctive synthesis', perhaps deliberately, reveals very little about sentencing decision-making. In order to properly understand the

process it is therefore necessary to look beyond the phrase itself. Judges, engaged in sentencing on a regular basis, are able to provide a more detailed and accurate account of how the task is approached. Drawing on interview responses, the thesis explores the role that experience plays in judges' concept of 'instinctive synthesis' and the way in which it informs the decision-making process. Rather than being purely instinctive, interview data suggests that sentencing decisions often involve sequential reasoning, a period of reflection and the subsequent adjustment of the provisional sentence. This informal structuring of the decision-making process is common to many sentencers but not acknowledged in the formal, doctrinal understanding of IS.

The operation of the IS model is assessed according to rule of law values in the third part of this thesis. In particular, the focus is on transparency and consistency, values which, though recognised as important by sentencers, are often side lined during IS in order to prioritise individualised justice and broad discretion. The thesis examines the extent to which IS is consistent with these aspects of the rule of law and how judges and the courts respond to the potential conflict. It asks to what extent transparency can be achieved using a sentencing model which precludes sentencers from fully articulating their decision-making process or the value attributed to sentencing factors. Many interviewees suggested that the sentencing remarks produced by Victorian judges provide sufficient transparency. An examination of sentencing remarks, however, suggests that there is often an artificiality or fiction to the remarks such that they do not always accurately reflect the sentencer's thought process.

Similarly, while Australian courts purport to uphold consistency in the form of consistency of approach,²⁰ this is not always achieved in practice. This is especially so when applying IS, a model which, by design, contains no common decision-making approach and prohibits the structuring of the decision. Instead, it promotes broad judicial discretion through the

²⁰ *Johnson v The Queen* (2004) 78 ALJR 616, 624 [26] (Gummow, Callinan and Heydon JJ) (*Johnson*).

understanding that reasonable minds can differ and acceptance of variation within a sentencing range. IS also prioritises the individualisation of sentences, which can lead sentencers to emphasise the unique elements of each individual case rather than the common features.

In examining how IS is applied by the courts, the thesis considers several of the attempts that have been made to improve consistency, including the use of comparable cases, sentencing statistics, current sentencing practices (CSP) and sentencing ranges. Responses to these attempts reflect a common theme identified throughout Australian sentencing, that is a resistance to measures perceived as encroaching upon judicial discretion. Correspondingly, there is also a willingness to overlook compromises to the rule of law in order to maximise that discretion.

The final part of the thesis concerns possible reforms to the Australian sentencing regime, judicial attitudes to those reforms and whether there is any realistic prospect of change. It examines the possibility of improving transparency and consistency, and application of the rule of law more broadly, through the introduction of structure to the sentencing process.

Several types of structured sentencing are discussed but the primary focus is on sentencing guidelines, particularly those used in England and Wales. As well as being the most developed and extensive, the guidelines applied in England and Wales have also directly influenced sentencing reforms in other common law jurisdictions, including the sentencing guideline arrangements proposed by the Victorian Sentencing Advisory Council (SAC).²¹ The step-by-step approach set out in sentencing guidelines stands in contrast to the unstructured IS model. There are, however, significant similarities between the process established in the proposed guidelines and the informal structure and approach applied by sentencing judges in Victoria.

²¹ Sentencing Advisory Council, *Sentencing Guidelines Council Report* (2018).

Greater structure and formal guidance can assist in bringing clarity and certainty to the sentencing process, but a significant majority within the Australian judiciary have repeatedly resisted such reforms. The High Court in particular has consistently neutralised or read down attempts to introduce structure or guidance to the IS process, instead reinforcing the primary importance of flexibility at sentencing and broad judicial discretion. Judicial attitudes to sentencing guidelines and broader reform, both among interviewees and the Australian judiciary more widely, are examined in order to determine whether the introduction of structure to the sentencing process would be workable within Australia.

3. Conclusion

The findings of this study will have implications for Victoria as that is the jurisdiction in which interviews were conducted and it is Victorian legislation, case law and sentencing practices which provide the basis for the examination of IS in this thesis. The findings will also be relevant to other Australian state, territory and national jurisdictions as the sentencing legislation in those jurisdictions are very similar and all Australian courts apply the IS model at sentencing and follow the decisions of the High Court. While Australia demonstrates perhaps the strongest commitment to an unstructured, instinctive approach to sentencing, as discussed above, there are other common law jurisdictions that continue to adopt unstructured approaches which, like IS, focus upon broad judicial discretion. Much of the discussion in this thesis will also be relevant to those jurisdictions.

As more common law jurisdictions move towards structured sentencing, those that continue to apply unstructured, highly discretionary sentencing models become increasingly anomalous. The commitment to these unstructured models and the merits of the models require examination. This thesis critically examines the development and application of the IS sentencing model in order to understand how it operates and to what extent it differs from structured sentencing. It also interrogates the appeal of the model to the judiciary, an appeal

which is firmly rooted in the drive to prioritise individualised justice and broad judicial discretion. It is the commitment to these principles that underpins IS, the active rejection of structured sentencing and the resistance to sentencing reform.

Chapter 1 Background

Overview

The purpose of this thesis is to improve understanding of and to evaluate the Australian model of sentencing. This chapter examines the context within which IS has developed and now operates. First, it outlines the combination of state, territory and federal statutes and case law that provide the framework for sentencing in Australia. It introduces the principles underpinning Australian sentencing, in particular proportionality, broad judicial discretion and individualised justice, and the ways in which IS is designed to protect those principles.

The chapter then considers the IS model in an international context. The Australian approach of wide, unstructured discretion has increasingly become an outlier in the common law world. Structured sentencing is well established in jurisdictions such as England and Wales and the USA and, increasingly, jurisdictions previously opposed to structure are making the transition to sentencing guidelines. This shift is not universal. Parallels may be drawn between Australia, New Zealand and Canada, all jurisdictions without formal sentencing guidance and applying wide, unstructured discretion. Though focusing on the Australian model, the findings in this research are also relevant to jurisdictions adopting similar approaches to sentencing and will help to explain which aspects of the unstructured model sentencers are so keen to protect and why.

Finally, the chapter offers a brief outline of the rule of law considerations that form the basis of the analyses in Chapters 5 and 6. The values of transparency and consistency, while recognised by the Australian courts, appear to be secondary considerations in a sentencing model which is deliberately unstructured and designed to maximise judicial discretion.

1. Sentencing in Australia

1.1. Statute

Australia operates a traditional common law model, applying a combination of statute and case law. According to the Australian Constitution, criminal justice is primarily a matter for the states. As such, each state and territory possesses its own body of criminal and sentencing law.²² Commonwealth offences are governed by a federal *Crimes Act 1914* (Cth)²³ and tried in state courts invested with federal jurisdiction.²⁴ In each jurisdiction, legislation sets out the basic sentencing framework and though the jurisdictions operate separately, the sentencing, criminal procedural and substantive offence statutes are similar in many respects. In addition to practical arrangements, statutes also outline the purposes and aims of sentencing,²⁵ aggravating and mitigating factors (taken mostly from common law)²⁶ and the range of sentencing options.²⁷

The way in which aggravating and mitigating factors are addressed provides a useful example of how sentencing law is developed and operates across Australia. There has been a growing movement by federal and state legislatures to specify considerations to be taken into account during sentencing.²⁸ This includes factors already identified in common law as aggravating or mitigating, now incorporated into statute as matters to which the sentencer must have regard.²⁹ The extent to which the factors are included and explained varies across the states and territories. For example, NSW legislation lists approximately 30 relevant considerations, divided into aggravating and mitigating factors,³⁰ whereas South Australia lists only eight and

²² *Crimes (Sentencing) Act 2005* (ACT); *Crimes (Sentencing Procedure) Act 1999* (NSW) and *Crimes (Administration of Sentences) Act 1999* (NSW); *Sentencing Act 1995* (NT); *Penalties and Sentences Act 1992* (Qld); *Sentencing Act 2017* (SA); *Sentencing Act 1997* (Tas); *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA) and *Sentence Administration Act 2003* (WA).

²³ According to the federal Government's power under ss 51 and 61 *Australian Constitution*. Despite the recommendations of the Australian Law Reform Commission, there is no separate Commonwealth sentencing statute: Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC 2006) [2.1].

²⁴ s 77(iii) *Australian Constitution*; *Judiciary Act 1903* (Cth) ss 39(2) and 68.

²⁵ See e.g. *Sentencing Act 1991* (Vic) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 3; *Sentencing Act 1997* (Tas) s 3.

²⁶ See e.g. *Sentencing Act 1991* (Vic) s 5(2); *Crimes (Sentencing) Act 2005* (ACT) s 7; *Crimes Act 1914* (Cth) s 16A(2).

²⁷ See e.g. *Crimes (Sentencing) Act 2005* (ACT) s 6(b); *Penalties and Sentences Act 1992* (Qld) s 3(b).

²⁸ *Markarian* (n 6) 402 [125] (Kirby J).

²⁹ See e.g. *Sentencing Act 1991* (Vic) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9(2); *Sentencing Act 1995* (NT) s 5(2).

³⁰ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.

makes no such distinction.³¹ Variations in the factors included across jurisdictions do not, however, produce significantly different results as no statutory list is intended to be exhaustive. Aggravating and mitigating factors are explained primarily in common law, which continues to operate alongside statute.³² Courts may also draw upon case law from other jurisdictions and the decisions of the High Court apply across the states and territories.³³ In contrast, differences in offence classifications, maximum penalties, mandatory minimums and standard penalties across the statutes can result in notable differences in the way in which aggravating and mitigating considerations are applied within jurisdictions.

The aggravating and mitigating factors outlined in statute are described in general terms, providing little practical guidance. Judges in Victoria, for example, are required to have regard to factors such as the nature and gravity of the offence,³⁴ the offender's culpability³⁵ and the offender's previous character.³⁶ How these factors are to be taken into consideration is not explained in legislation, but guidance is provided in case law. The statute itself affords significant flexibility and 'ample residual discretion in relation to the type and quantum of penalty'.³⁷ The list of factors to which judges must have regard often concludes with 'any other objective or subjective factor that affects the relative seriousness of the offence',³⁸ preserving judicially developed sentencing principles at common law and granting judges considerable discretion.

³¹ *Sentencing Act 2017* (SA) ss 11(1) and 11(6).

³² Claire Farmer, Ian Parsons and Mirko Bagaric, 'Inconsistencies in sentencing of theft offenders in Victoria: Implications for the 'instinctive synthesis'' (2017) 44 *Australian Bar Review* 318, 321. See e.g. *Bugmy v The Queen* (2013) 249 CLR 571 (*Bugmy*); *R v McNaughton* (2006) 66 NSWLR 566 (*McNaughton*); *R v Gent* (2005) 162 A Crim R 29.

³³ See e.g. *Cameron v The Queen* (2002) 209 CLR 339 (*Cameron*); *Muldock* (n 13); *R v Verdins*; *R v Buckley*; *R v Vo* (2007) 169 A Crim R 581 (*Verdins*); *Ryan v The Queen* (2001) 206 CLR (*Ryan*).

³⁴ *Sentencing Act 1991* (Vic) s 5(2)(c).

³⁵ *Sentencing Act 1991* (Vic) s 5(2)(d).

³⁶ *Sentencing Act 1991* (Vic) s 5(2)(f).

³⁷ Arie Freiberg, *Fox & Freiberg's Sentencing – State and Federal Law in Victoria* (3rd edn, Thomson Reuters 2014) 7-8.

³⁸ *Muldock* (n 13) 128 [18].

1.2. The role of the courts

Sentencing in Australia is regulated primarily through appellate oversight. Courts of appeal are responsible for laying down principles and guidance for sentencing courts³⁹ and, in doing so, may assess the validity of a sentencing order, its merits (including type and quantum of sentence) and may correct the order based on irrelevant or erroneous facts or incorrect application of principle.⁴⁰ The High Court of Australia sits at the top of the court hierarchy. It is the superior court in both federal and state jurisdictions and hears appeals from state and territory courts of appeal. It is not, however, a general court of appeal from those courts.⁴¹ Special leave to appeal must be sought⁴² and is seldom granted,⁴³ particularly in sentencing matters.⁴⁴ The Court's involvement in sentencing is a relatively recent development⁴⁵ and while the number of sentencing appeals heard has increased,⁴⁶ sentencing does not comprise a large proportion of its work.⁴⁷ The High Court remains reluctant to consider appeals concerning the adequacy of a sentence.⁴⁸ It defers to state and territory courts of appeal in relation to sentencing standards on the basis that they have a better understanding of local conditions and sentencing practices.⁴⁹ There is also a convention in those intermediate appellate courts of deferring to the sentencing judge's decision and a presumption of correctness in relation to the primary sentence.⁵⁰ Though the involvement of appellate courts in sentencing matters is increasing, there remains a reluctance to interfere with a sentencing judge's exercise of discretion.

³⁹ *Griffiths v The Queen* (1977) 137 CLR 293, 310 (Barwick CJ).

⁴⁰ Freiberg (n 37) 965.

⁴¹ *Griffiths v The Queen* (1989) 167 CLR 372, 396 (Gaudron and McHugh JJ). See also Justice Michael Kirby, 'Maximising Special Leave Performance in the High Court of Australia' (2007) 30 University of New South Wales Law Journal 731.

⁴² *Judiciary Act 1903* (Cth) s 35A.

⁴³ During November 2019 for example, 43 special leave applications were heard. Three were granted, one was referred to the Full Court of the High Court for consideration and 39 were refused: High Court of Australia, 'Special Leave Application Results 2019' <<https://www.hcourt.gov.au/registry/special-leave-applications-results-2019>> accessed 13 February 2020.

⁴⁴ *York v The Queen* (2005) 225 CLR 466 (York), 479 [40] (Hayne J); *Postiglione v The Queen* (1997) 189 CLR 295, 337 (Kirby J); *Radenkovic v The Queen* (1990) 170 CLR 623, 634 (Mason CJ and McHugh J), 640 (Dawson J), 646 (Toohey and Gaudron JJ).

⁴⁵ Richard Edney, 'In Spite of Itself? The High Court and the Development of Australian Sentencing Principles' (2005) 2(2) University of New England Law Journal 1, 3–4, 20–29.

⁴⁶ Justice Michael Kirby, 'Why the High Court Has Become More Involved in Criminal Appeals' (2002) 23 Australian Bar Review 4.

⁴⁷ Freiberg (n 37) 57–8.

⁴⁸ Freiberg (n 37) 1026; *Ryan* (n 33) 294 [89]–[90] (Kirby J); *AB v The Queen* (1999) 198 CLR 111, 126 [30] (McHugh J) (*AB*).

⁴⁹ *York* (n 44) 479 [40] (Hayne J); *Veen v The Queen (No 1)* (1979) 143 CLR 458, 497 [3] (Aickin J) (*Veen (No 1)*). Deference to trial courts can be seen in other common law jurisdictions, see e.g. *R v Shropshire* [1995] 4 SCR 227; *R v M (CA)* [1996] 1 SCR 500; 18 United States Code § 3742 Review of a sentence; *Kumar v R* [2015] NZCA 460 [81]; *Tahuri v R* [2013] NZCA 254 [43].

⁵⁰ *Whittaker v The King* (1928) 41 CLR 230, 249; *Mulato v The Queen* [2006] NSWCCA 282 [37] (Spigelman CJ); *R v Koloamatangi* [2011] NSWCCA 288 [51] (Basten JA).

1.3. Principles

In addition to statutory provisions, Australian judges are guided by ‘sentencing principles of the broadest kind’.⁵¹ As in many common law jurisdictions, these include parity,⁵² totality⁵³ and, importantly, proportionality. Proportionality is listed in state and territory legislation as one of the principles of sentencing but with no indication as to which should be given priority.⁵⁴ It was the High Court that identified proportionality as the ‘primary aim of sentencing’ in Australia.⁵⁵ Though statutory exceptions exist,⁵⁶ they are rare⁵⁷ and the courts have made clear that, even when applying those provisions, proportionality remains ‘a very important consideration’.⁵⁸

Proportionality as applied by the Australian courts dictates that the sentence applied ‘should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances’.⁵⁹ It defines the lower and upper reaches of punishment⁶⁰ and it is within these limits that other principles operate.⁶¹ Consistent with the court’s stance that there is no single correct sentence,⁶² proportionality establishes a

⁵¹ *R v Geddes* (1936) 36 SR (NSW) 554, 555 (Jordan CJ) (*Geddes*).

⁵² See e.g. *Green v The Queen* (2011) 244 CLR 462 (*Green*); *Lowe v The Queen* (1984) 154 CLR 606 (*Lowe*); *Blair Alick McMillan v Police* [2014] NZHC 150; Criminal Code, RSC 1985, c C-46, s 718.2(b) (Canadian Criminal Code).

⁵³ See e.g. *Mill v The Queen* (1988) 166 CLR 59 (*Mill*); *Azzopardi v The Queen* (2011) 219 A Crim R 369 (*Azzopardi*); *Joseph McKnight v Her Majesty's Advocate* [2008] HCJAC 62; Sentencing Council of England and Wales, *Offences Taken Into Consideration and Totality: Definitive Guideline* (2012).

⁵⁴ See e.g. *Sentencing Act 1991* (Vic) ss 5(1)(a), (c), (d); *Sentencing Act 1995* (WA) s 6(1)(a); *Sentencing Act 1995* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Crimes Act 1914* (Cth) s 16A(2)(k). The exception is South Australia which prioritises the protection of public safety (*Sentencing Act 2017* (SA) s 3).

⁵⁵ *Veen (No 1)* (n 49) 467 (Mason J). In prioritising proportionality Australia is consistent with other common law jurisdictions such as Canada (Criminal Code (n 52) s 718.1), Ireland (*Gilligan v Ireland* [2013] IESC 45 [34]–[35]) and Scotland (Scottish Sentencing Council, *Principles and purposes of sentencing: Sentencing guideline* (2018)).

⁵⁶ See e.g. *Sentencing Act 1991* (Vic) s 6D(b) which provides that when imprisoning a ‘serious offender’ community protection is the principal purpose of sentencing and the sentencer may impose a sentence ‘longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances’. See also indefinite sentences (eg *Sentencing Act 1991* (Vic) ss 18A-P; *Penalties and Sentences Act 1992* (Qld) s 163; *Sentencing Act 1995* (NT) s 65; *Sentencing Act 1995* (WA) s 98) and mandatory minimum sentences (eg *Sentencing Act 1991* (Vic) ss 9B–10AE).

⁵⁷ Arie Freiberg and Elizabeth Richardson, ‘Protecting the Dangerous from the Community: The Application of Protective Sentencing Laws in Victoria (2004) 4 Criminal Justice 81.

⁵⁸ *R v Connell* (1995) 83 A Crim R 249, 256 (Charles JA).

⁵⁹ *Hoare v The Queen* (1989) 167 CLR 348, 354 (*Hoare*).

⁶⁰ *Veen v The Queen (No 2)* (1988) 164 CLR 465 (*Veen (No 2)*); *R v Whyte* (2002) 55 NSWLR 252, 277 [156] (Spigelman CJ) (*Whyte*); *McNaughton* (n 32) 572 [15] (Spigelman CJ). On limiting retributivism see: Norval Morris, *The Future of Imprisonment* (University of Chicago Press 1974); Richard S Frase, ‘Sentencing Principles in Theory and Practice’ (1997) 22 Crime and Justice 363; Richard S Frase, ‘Limiting Retributivism: The Consensus Model of Criminal Punishment’ in Michael Tonry (ed) *The Future of Imprisonment in the 21st Century* (OUP 2003).

⁶¹ The principle of totality, for example, holds that the total sentence for multiple offences must be proportionate to and no more than is necessary to reflect the offender’s overall criminality: *Azzopardi* (n 53) 386–390 [54]–[68] (Redlich JA). See also Kate Warner, Julia Davis and Helen Cockburn, ‘The Purposes of Punishment: How Do Judges Apply a Legislative Statement of Sentencing Purposes?’ (2017) 41 Criminal Law Journal 69, 84; *AB* (n 48).

⁶² See e.g. *Pearce v The Queen* (1998) 194 CLR 610, 624 [46] (McHugh J, Hayne J and Callinan J) (*Pearce*) and discussion in Chapter 6.

range of sentences that are 'not wrong'.⁶³ This allows for individualisation of the sentence as the relevant sentencing factors determine where within the range it falls.

Principles such as proportionality are deliberately widely construed to enable judges to retain broad judicial discretion, a fundamental feature of Australian sentencing. This is reflected in the drafting of statutes, as demonstrated above, and reinforced consistently in case law.⁶⁴ It is also evident in the lack of sentencing grids, guidelines or other forms of practical guidance for sentencers. Judicial discretion is considered to be of 'vital importance'⁶⁵ as it enables the judge to impose a sentence which is just and appropriate to the particular case.⁶⁶ It is said to be necessary for the delivery of individualised justice, another key feature of Australian sentencing,⁶⁷ according to which the court aims 'to make the punishment fit the crime, and the circumstances of the offender, as nearly as may be'.⁶⁸ There is a strongly held belief that proportionate, individualised and therefore fairer sentences are more likely to be achieved in a flexible sentencing system with minimal restrictions on sentencers' discretion.⁶⁹

1.4. Instinctive synthesis

According to the Australian courts, the sentencing model which best promotes broad discretion and individualised justice is IS. The details of IS will be examined in Chapter 3. To briefly summarise, IS requires that all of the relevant sentencing factors and principles be considered by the sentencing judge in a single step.⁷⁰ The court has recognised that 'the factors that must be taken into account are incommensurable, and indeed, in many respects,

⁶³ Norval Morris, *Punishment, Desert and Rehabilitation in Equal Justice Under the Law* (US Government Printing Office 1977), 158; Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Manchester University Press 1986), 38. See Chapter 6 [3.4] for a discussion of sentencing range.

⁶⁴ See discussion in Chapter 3.

⁶⁵ *Lowndes v The Queen* (1999) 195 CLR 665, 672 [15] (*Lowndes*).

⁶⁶ ALRC (n 23) [5.21]; Arie Freiberg and Sarah Krasnostein, 'Statistics, Damn Statistics and Sentencing' (2011) 21 *Journal of Judicial Administration* 73; *Whyte* (n 60) 275 [147] (Spigelman CJ).

⁶⁷ *Elias v The Queen* (2013) 248 CLR 483, 494–5 [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (*Elias*). See also *Bugmy* (n 32) 592 [36], 594 [41].

⁶⁸ *Webb v O'Sullivan* [1952] SASR 65, 66 (Napier CJ) (*Webb v O'Sullivan*); see also *Budget Nursery Pty Ltd v FCT* (1989) 42 A Crim R 81, 85.

⁶⁹ Arie Freiberg, 'Australia: Exercising Discretion in Sentencing Policy and Practice' (2010) 22(4) *Federal Sentencing Reporter* 204, 210.

⁷⁰ See e.g. *Markarian* (n 6) 407 [137] (Kirby J).

inconsistent'.⁷¹ IS, however, does not establish any order or process by which sentencers are to consider those factors or provide any indication as to how they are to be balanced. The absence of a fixed or detailed sentencing methodology and, more notably, the strict opposition to structure, distinguishes IS from other sentencing models. Not only does IS offer no guidance in terms of how to approach the sentencing task, sentencers applying IS are discouraged from detailing the particular decision-making process they apply.⁷² They are also unable to identify the weight given to individual factors as part of the decision-making.⁷³

The oft repeated phrase in Australian sentencing is that 'the only golden rule is that there is no golden rule',⁷⁴ reinforcing the broad and unguided nature of the discretion granted to sentencing judges. So too does the understanding that 'instinctive synthesis will by definition produce outcomes upon which reasonable minds will differ'.⁷⁵ The belief underpinning IS that there is no single, objective, correct sentence⁷⁶ means that courts may impose any of a number of different sentences which are within an available range of severity.⁷⁷ The suggestion that IS 'removes constraints on judicial discretion entirely'⁷⁸ is an overstatement as sentencers are required to observe all positive rules of law and principle, as explained above. It is, however, a model designed to provide sentencers with maximum flexibility and discretion.

The absence of a common methodology within IS has led to confusion about what IS means.⁷⁹ Sentencing remarks can provide some indication of which purposes of sentencing, circumstances of the case and the aggravating or mitigating factors deemed relevant but, as

⁷¹ *Dalgliesh* (HC) (n 12) 433 [4] (Kiefel CJ, Bell and Keane JJ). See also *Wong* (n 10) 611 [75] (Gaudron, Gummow and Hayne JJ).

⁷² See Chapter 5 for a discussion of sentencing remarks and transparency.

⁷³ Sentencing Advisory Council, *Sentence Appeals in Victoria Statistical Research Report* (2012), 13; *DPP v Terrick*; *DPP v Marks*; *DPP v Stewart* (2009) 197 A Crim R 474, 480 [5]; *Markarian* (n 6) 380-381 [56]-[58] (McHugh J).

⁷⁴ *Geddes* (n 51), 555 (Jordan CJ).

⁷⁵ *Hudson v The Queen* (2010) 30 VR 610, 617 (*Hudson*).

⁷⁶ *Pearce* (n 62) 624 [46] (McHugh, Hayne and Callinan JJ).

⁷⁷ For further discussion of the sentencing range see Chapter 6 [3.4].

⁷⁸ Sean J Mallett, 'Judicial discretion in sentencing: a justice system that is no longer just?' (2015) 46 *Victoria University of Wellington Law Review* 533, 534-5.

⁷⁹ Traynor and Potas (n 15) 1.

IS discourages the identification of separate strands of reasoning, these can be difficult to discern. There has been limited research into understanding the sentencing decision-making process and even less into the IS process and judicial perceptions of sentencing.⁸⁰ In jurisdictions where judges retain a high degree of discretion understanding their processes is particularly important.⁸¹

2. Structuring sentencing discretion

2.1. Structured sentencing models

Recently there has been a movement in several jurisdictions to introduce formal structure to the sentencing exercise. Structured sentencing will be considered in greater detail in Chapter 7 but a brief summary is warranted here. One example of a structured model is the sentencing grid, applied in various forms federally and in individual states across America.⁸² The grids use offence severity and the offender's criminal history score to determine sentencing range.⁸³ They do so by limiting, to varying degrees, sentencers' discretion, for example through restricted sentencing ranges or provisions which prohibit departure from the grid.⁸⁴ While the grids are intended to reduce disparity,⁸⁵ the more restrictive examples have been criticised as placing too great a restriction on discretion and requiring judges to impose sentences of 'excessive uniformity'.⁸⁶

England and Wales also employ a structured sentencing system, adopting sentencing guidelines as a means of promoting consistency but with greater scope for discretion than

⁸⁰ Andrew Ashworth, 'Reflections on the Role of the Sentencing Scholar' in Chris Clarkson and Rod Morgan (eds) *The Politics of Sentencing Reform* (Clarendon Press 1995) 263-4; Andrew Ashworth, 'European Sentencing Traditions' in Cyrus Tata and Neil Hutton (eds) *Sentencing and Society – International Perspectives* (Ashgate 2002) 232. See Chapter 2 for further discussion.

⁸¹ Mackenzie (n 17) 288.

⁸² Richard Frase, 'State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues' (2005) 105 *Columbia Law Review* 1191.

⁸³ See e.g. Minnesota Sentencing Guidelines Commission, *Standard Sentencing Guidelines Grid* (2019) <<https://mn.gov/sentencing-guidelines/guidelines/>> accessed 2 February 2020.

⁸⁴ Kelly Lyn Mitchell, 'State Sentencing Guidelines: A Garden Full of Variety' (2017) 81(2) *Federal Probation Journal* 28, 34-36.

⁸⁵ See e.g. Kate Stith and José A Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (University of Chicago Press 1998).

⁸⁶ Kevin R Reitz, 'Comparing Sentencing Guidelines: Do US Systems Have Anything Worthwhile to Offer England and Wales?' in Ashworth and Roberts (n 9) 191.

grids tend to allow.⁸⁷ The guidelines, discussed in Chapter 8, step sentencers through the consideration of harm, culpability, aggravating and mitigating factors and considerations such as totality. They offer a less rigid approach and more guidance than simply stating numerical sentencing ranges.⁸⁸ The sentencing ranges outlined are often wide⁸⁹ and may be departed from where necessary.⁹⁰ The list of relevant factors at each stage brings structure to the exercise of discretion whilst allowing for flexibility in the weighing and balancing of the factors.

The most recent jurisdiction to move toward a structured sentencing model is Scotland. Scottish courts have long favoured individualised justice and enjoyed wide sentencing discretion.⁹¹ Appellate review has been the primary means of issuing sentencing guidance and promoting consistency. Though initially reluctant,⁹² the Appeal Court has shown an increasing willingness to consider questions involving sentencing principles and issue guideline judgments.⁹³ Through these arrangements, the Scottish courts have regulated their own sentencing practices within boundaries set by legislation.⁹⁴ Tata suggests that rather than directly confronting judicial ‘ownership’ of sentencing, indirect measures, such as promotion of non-custodial sanctions, have been used to encourage sentencers to adjust their decision-making.⁹⁵

This approach has recently changed. In 2015, following concerns about consistency and public confidence,⁹⁶ the Scottish Sentencing Council was created, providing a mechanism for

⁸⁷ See Chapter 8 for detailed discussion.

⁸⁸ Julian V Roberts, ‘Points of Departure: Reflections on Sentencing Outside the Definitive Guideline Ranges’ (2012) Crim LR 439, 445.

⁸⁹ For example, the offence range for a preparation of terrorist acts offence is 3 years’ custody to life imprisonment (minimum term 40 years). Category ranges include 12–20 years’ custody (Category 3A) and Life imprisonment (minimum term 10–20 years’ custody) (Category 1C): Sentencing Council of England and Wales, *Terrorism offences: Definitive Guideline* (2018).

⁹⁰ Coroners and Justice Act 2009 ss 125(1)–125(3).

⁹¹ Graeme Brown, *Criminal Sentencing as Practical Wisdom* (Hart 2017); Neil Hutton, ‘Sentencing in Scotland’ in Peter Duff and Neil Hutton (eds) *Criminal Justice in Scotland* (Dartmouth 1999) 173.

⁹² See Neil Hutton, ‘The Sentencing Commission for Scotland’ in Arie Freiberg and Karen Gelb (eds) *Populism: Sentencing Councils and Sentencing Policy* (Routledge 2008).

⁹³ Brown (n 91) 116. See Chapter 7 for discussion of guidance from courts and guideline judgments.

⁹⁴ Andrew Ashworth, ‘Techniques for Reducing Sentencing Disparity’ in Andrew von Hirsch, Andrew Ashworth and Julian V Roberts (eds) *Principled Sentencing – Readings on Theory and Policy* (Hart 2009) 243.

⁹⁵ Cyrus Tata, ‘The Struggle for Sentencing Reform’ in Ashworth and Roberts (n 9).

⁹⁶ Sentencing Commission for Scotland, *The Scope to Improve Sentencing in Scotland* (2006) <<http://www.scotland.gov.uk/resource/doc/925/0116783.pdf>> accessed 7 February 2020.

producing sentencing guidelines on a systematic basis.⁹⁷ The Council has produced only one guideline thus far,⁹⁸ which appears to merely confirm principles and purposes already applied, rather than making changes to sentencing practices.⁹⁹ It would appear that the Scottish Council is intending to follow the same step-by-step format to offence-specific guidelines applied by the Sentencing Council of England and Wales.¹⁰⁰ If this is the case, the more structured approach to sentencing is likely to challenge the existing model of unstructured, broad discretion that is strongly supported by the judiciary.¹⁰¹ The way in which these two approaches are reconciled could provide a template for other jurisdictions seeking to transition towards a more structured model.

Ireland too provides an example of a common law jurisdiction taking steps towards a structured sentencing approach. Judges in that jurisdiction have traditionally exercised wide discretion at sentencing and have resisted the introduction of sentencing guidelines.¹⁰² It was not until 2014 that the Court of Appeal began to issue guideline judgments and even then it did so cautiously, making clear that sentencing judges retain a great deal of discretion.¹⁰³ In an even more significant reform, with the creation of the Judicial Council in 2019,¹⁰⁴ including a Sentencing Guidelines and Information Committee and a mandate to create sentencing guidelines, Ireland is set to join the increasing number of jurisdictions using guidelines to bring structure to the sentencing process.¹⁰⁵

⁹⁷ Neil Hutton, 'Scottish Sentencing Council: a new era' (2016) 1 Sentencing News 2016, 10.

⁹⁸ Scottish Sentencing Council (n 55).

⁹⁹ Graeme Brown, 'Some observations on the Scottish Sentencing Council's guideline on the "Principles and Purposes of Sentencing"' (2018) 156 Crim Law Bulletin 6, 7; Lyndon Harris, Rory Kelly, Julian Roberts and Leila Tai, 'A response to Scottish Sentencing Council's consultation on the Principles and Purposes of Sentencing Draft Guideline' (2017) 3 Sentencing News 9.

¹⁰⁰ Julian Roberts, 'Sentencing guidelines: regional round-up' (2019) 3 Sentencing News 6, 7.

¹⁰¹ Brown (n 91) 46, 120, 151.

¹⁰² See e.g. Tom O'Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016); Liz Campbell, 'Reconstituting Sentencing Policy in the Republic of Ireland' (2008) 59(3) Northern Ireland Law Quarterly 291, 291-2.

¹⁰³ See e.g. *DPP v Ryan* [2014] IECCA 11 at 2.3 (*Ryan*).

¹⁰⁴ Judicial Council Act 2019 (Ireland).

¹⁰⁵ Roberts (n 100) 6.

2.2. Unstructured sentencing models

The shift towards structured sentencing is not universal. In many European jurisdictions, for example, sentencing judges exercise wide discretion, unconstrained by detailed guidelines or rules,¹⁰⁶ and prioritise the individualisation of sentences.¹⁰⁷ Several Nordic jurisdictions apply a principled model, with statutes identifying proportionality, predictability and equality as the principles governing sentencing, rather than adopting formal sentencing guidelines.¹⁰⁸ Amongst common law jurisdictions, New Zealand and Canada, like Australia, remain free from sentencing guidelines and formal structured sentencing. They rely instead upon a traditional common law model under which legislation prescribes maximum penalties and the types of sentences available while judges retain broad discretion to determine the appropriate sentence in the individual case. Discretion is guided and limited by principles and precedents laid down by appellate courts. Statutes outline the relevant principles but, unlike the Nordic model, the provisions provide little substantive assistance to sentencers.¹⁰⁹ Often the statutes simply list existing common law principles, many of which may contradict each other.¹¹⁰ Without identifying any main principle or purpose of sentencing or any indication of appropriate quantum of punishment, the provisions make little practical difference in terms of guiding or constraining discretion.¹¹¹

Like their Australian counterparts, judges in New Zealand possess broad sentencing discretion which is used to deliver individualised sentences.¹¹² In contrast to Australian IS,

¹⁰⁶ Michael Tonry, 'Differences in National Sentencing Systems and the Differences They Make' in Michael Tonry (ed) *Sentencing Policies and Practices in Western Countries: Comparative and Cross-National Perspectives* (University of Chicago Press 2017) 5.

¹⁰⁷ See e.g. Jacqueline Hodgson and Laurene Soubise, 'Understanding the Sentencing Process in France' in Tonry (n 106) 240.

¹⁰⁸ See e.g. The Criminal Code of Finland (39/1889) (FPC) Ch 6.4; *Straffeloven* (Criminal Code of Denmark) §80; Jørn Jacobsen and Vilde Hallgren Sandvik, 'An Outline of the New Norwegian Criminal Code' (2015) 3(2) *Bergen Journal of Criminal Law and Criminal Justice* 162, 180; Ville Hinkkanen and Tapio Lappi-Seppälä, 'Sentencing Theory, Policy, and Research in the Nordic Countries' (2011) 40 *Crime and Justice* 349, 350.

¹⁰⁹ See e.g. *Sentencing Act 1991* (Vic) s 1; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; Canadian Criminal Code (n 52) s 718; *Sentencing Act 2002* (NZ) ss 7-8.

¹¹⁰ See Lord Igor Judge, 'The Sentencing Decision, *The Safest Shield—Lectures, Speeches and Essays* (Hart 2015), 263.

¹¹¹ For example, the New Zealand Law Commission reported that ss 7 and 8 'provide little or no assistance in determining the 'tariff' custody threshold or sentence length appropriate for the average case of each type coming before the courts': New Zealand Law Commission, *Sentencing Guidelines and Parole Reform* (Report 94, 2006); Julian Roberts, 'Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002' (2003) *Australia and New Zealand Journal of Criminology* 256. Doob has made similar observations in the Canadian context, noting that the Criminal Code 'essentially codified the then current law. Said differently, nothing changed': Anthony N Doob, 'The Unfinished Work of the Canadian Sentencing Commission' (2011) 53 *Canadian Journal Criminology and Criminal Justice* 279, 287.

¹¹² *Hessell v R* [2011] 1 NZLR 607, [38] (*Hessell*).

however, the exercise of discretion is structured through the use of a tiered decision-making approach.¹¹³ Judges apply a three-step starting point process.¹¹⁴ First, a starting point is identified based on an objective evaluation of the gravity of the offending. Second, the sentence is adjusted by reference to aggravating and mitigating factors relating to the offender.¹¹⁵ And third, a discrete discount is made for a guilty plea.¹¹⁶ The court also sets out sentencing ‘bands’ or ranges to guide decisions as to quantum and promote consistency.¹¹⁷ These bands can be adjusted by the court to encourage a change in sentencing practices.¹¹⁸

Sentencing guidance in New Zealand comes largely from the courts and the development of systematic, detailed appellate decisions has led to a comprehensive body of sentencing law. As in the UK, the Court of Appeal have accepted responsibility for helping to develop sentencing principles and practice.¹¹⁹ This is reflected in the practice of issuing guideline judgments. These judgments provide guidance in relation to specific category offences, for example by setting starting points or ranges and collating penalties imposed in previous decisions of the Court. Guideline judgments can also explain how the courts should consider certain aggravating and mitigating factors.¹²⁰

Attempts have been made to implement formal sentencing guidelines in New Zealand. Following a recommendation by the Law Commission,¹²¹ legislation was passed in 2007 allowing for the establishment of a Sentencing Council.¹²² The system envisaged drew heavily on the arrangements in England and Wales. The Sentencing Council would comprise a mixture of judicial and non-judicial members and have a wide remit to develop sentencing

¹¹³ *Hessell* (n 112) [55]. The supposed incompatibility between IS and a tiered approach is discussed in greater detail in Chapter 3.

¹¹⁴ *Zhang v R* [2019] NZCA 507, [54], [134] (*Zhang*); *R v Eruera* [2005] NZCA 63, [33].

¹¹⁵ *R v Taueki* [2005] NZCA 174, [8], [28] and [42]–[44] (*Taueki*).

¹¹⁶ *Hessell* (n 112).

¹¹⁷ This can be contrasted with the Australian courts’ aversion to formally setting sentencing ranges, as demonstrated in *Hili* (n 11) 537 [54]. See Chapters 3 and 7 for further discussion.

¹¹⁸ See e.g. *Zhang* (n 114) [123].

¹¹⁹ *Hammond* (n 2) 218.

¹²⁰ See e.g. *R v Mako* [2000] 2 NZLR 170 (CA) (aggravated robbery); *R v AM* [2010] 2 NZLR 750 (sexual violation); *Taueki* (n 115) (grievous bodily harm); *Kepu v R* [2011] NZCA 104 (single punch manslaughter).

¹²¹ NZLR (n 111) [5], [8] and [74].

¹²² Sentencing Council Act 2007 (NZ).

guidelines and perform important educative functions.¹²³ It would differ, however, in relation to the role played by Parliament and the test for departure from the offence range.¹²⁴ Yet despite the statutory framework having been passed, no government has taken steps to establish a council. This decision appears to be motivated by two contradictory concerns; that the development of a Sentencing Council would undermine both judicial independence and the role of parliament.¹²⁵ While judges themselves do not consider that their independence would be so undermined,¹²⁶ and parliament would retain the power to scrutinize and disallow any sentencing guidelines,¹²⁷ there now appears to be little interest in the development of a Sentencing Council. Instead, sentencing in New Zealand will continue to be guided by the courts.

Sentencing guidelines were proposed in Canada in the 1980s in response to concerns about disparity.¹²⁸ Given the lack of political interest then or since, they have never been adopted. Instead, as in New Zealand and Australia, sentencing is guided by case law and the principles and objectives enshrined in statute.¹²⁹ Amendments to the *Criminal Code* have been described as 'chaotic, piecemeal and idiosyncratic...with no apparent beneficial effect in terms of more rational or principled sentencing'.¹³⁰ Again, in parallel with other common law jurisdictions, it falls to the courts to develop sentencing principles and explain how they apply in practice. Recently, the appellate courts have heard a greater number of sentencing matters, though the judgments offer limited practical guidance.¹³¹

¹²³ Warren Young and Andrea King, 'The Origins and Evolution of Sentencing Guidelines: A Comparison of England and Wales and New Zealand' in Ashworth and Roberts (n 9) 202.

¹²⁴ Young and King (n 123) 217.

¹²⁵ Mallett (n 78) 561; Young and King (n 123) 203.

¹²⁶ Justice Graham Pankhurst, 'A Sentencing Council: Enlightened or Folly?' (2008) 14 Canterbury Law Review 191, 200.

¹²⁷ Sentencing Council Act 2007 (NZ) ss 17-19.

¹²⁸ Julian V Roberts, 'Structuring Sentencing in Canada, England and Wales: A Tale of Two Jurisdictions' (2012) 23 Criminal Law Forum 319, 323; Ted Palys and Stan Divorski, 'Explaining Sentence Disparity' (1986) 28 Canadian Journal of Criminology 347.

¹²⁹ Canadian Criminal Code (n 52) s 718; *R v Nasogalvak*, 2010 SCC 6, [2010] 1 SCR 206 (*Nasogalvak*).

¹³⁰ Roberts (n 119) 330-1.

¹³¹ See e.g. *R v Ipeelee* 2012 SCC 13 (*Ipeelee*).

Sentencing in Canada is regarded as ‘a highly individualized process’¹³² and in this sense shares many common features with the IS model, though without adopting that label. As in Australia, sentencing in Canada does not follow any set decision-making method or approach. It does not involve mathematical precision,¹³³ nor is there any single correct sentence for an offence.¹³⁴ It is said to be ‘impossible to lay down hard and fast and permanent rules’.¹³⁵ Instead, what is required is ‘the exercise of a broad discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing’.¹³⁶ The prioritising of broad discretion in order to promote flexibility and individualisation of sentences results in great deference by the appeal courts towards trial judges and their exercise of discretion.¹³⁷ Some individual judges¹³⁸ and provisional courts have attempted to bring a degree of structure to the sentencing process through the introduction of sentencing ranges, starting points¹³⁹ and guideline judgments.¹⁴⁰ Appellate courts, however, have not endorsed these approaches and maintain that, while not wrong in principle,¹⁴¹ they merely constitute guidance, therefore departure does not render a sentence unfit.¹⁴²

Broad judicial discretion, deference to trial judges and lack of formal structure are features of sentencing strongly guarded by the courts in Canada and Australia. With New Zealand, these jurisdictions share an approach to sentencing which shuns sentencing guidelines and prioritises wide discretion for judges in order to deliver sentences which are highly individualised. Given the similarities between these jurisdictions, the relevance of the findings

¹³² *Ipeelee* (n 131) at para 38; *R v Suter* 2018 SCC 34, [2018] 2 SCR 496 [4] (*Suter*); Patrick Healy, ‘Sentencing from There to Here and from Then to Now’ (2013) 17(3) Canadian Criminal Law Review 291.

¹³³ *R v Lacasse*, 2018 SCC 34, [2015] 3 SCR 1089 [58] (*Lacasse*).

¹³⁴ *R v M (CA)* [1996] 1 SCR 500 [92].

¹³⁵ *R v Willaert* (1953) 105 CCC 172, 176.

¹³⁶ *Lacasse* (n 133).

¹³⁷ See e.g. *Suter* (n 132) [27]; *Nasogalvak* (n 129).

¹³⁸ See e.g. Wakeling J’s repeated call for a more ‘analytical framework’ similar to sentencing guidelines in *R v KSH*, 2015 ABCA 370 [60], *R v Rossi*, 2016 ABCA 43 [56], *R v Vignon*, 2016 ABCA 75 [45] (*Vignon*), *R v Yellowknee*, 2017 ABCA 60 [52] and *R v SLW*, 2018 ABCA 235. The suggestion has been repeatedly dismissed as an ‘unnecessarily limit the discretion of the sentencing judge’; *R v PES*, 2018 MBCA 124. See also *R v Gauvreau*, 2017 ABCA 74 and *R v RGB*, 2017 ABCA 359.

¹³⁹ See e.g. *Vignon* (n 138); *R v Arcand*, 2010 ABCA 363; *R v Hajar*, 2016 ABCA 222; *R v Godfrey*, 2018 ABCA 369.

¹⁴⁰ See e.g. court practices in Saskatchewan, Manitoba, Ontario and Prince Edward Island discussed in Paul Moreau, ‘In Defence of Starting Point Sentencing’ (2016) 63 Criminal Law Quarterly 346.

¹⁴¹ See e.g. *Suter* (n 132); *Lacasse* (n 133).

¹⁴² *Suter* (n 132) [24].

of this research will extend beyond the Australian jurisdiction to others that apply similar unstructured approaches and may also be used in comparison to those that have adopted, or are in the process of adopting, a structured model.

3. Rule of Law

This thesis will use rule of law principles to assess the IS model and discuss unstructured and structured models more generally. The rule of law principles comprise several elements, including accessibility, legal certainty and predictability.¹⁴³ The Law Council of Australia has identified eight key rule of principles to be promoted within Australia, the most relevant for this thesis being: that the law must be both readily known and available, and certain and clear; and that it should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds.¹⁴⁴ As 'one of the strongest powers given to the courts in a free and democratic society',¹⁴⁵ one which involves public censure and the potential loss of liberty and other fundamental rights, the rule of law should be applied as far as possible throughout sentencing.¹⁴⁶ This means not just in the content of sentencing laws but their application by judges, as the rule of law includes a procedural aspect which requires the impartial administration of the law;¹⁴⁷ no person should have a penalty or stigma imposed upon them by the state as a result of a process which is arbitrary, unfair or unclear.

3.1. Consistency

This thesis will consider IS as a sentencing model and the ways in which it is applied by the judiciary. In particular, it will examine the extent to which IS is compatible with the rule of law values of consistency and transparency. These are values emphasised in Australian and other

¹⁴³ Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43(1) *Georgia Law Review* 1, 6; Lon Fuller, *The Morality of Law* (Yale University Press 1969) 39; Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) 214-19.

¹⁴⁴ Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011) <<https://www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf>> accessed 20 May 2020, 2.

¹⁴⁵ *R v Jurisic* (1998) 45 NSWLR 209, 254 (Adams J) (*Jurisic*).

¹⁴⁶ Andrew Ashworth, *Sentencing and Criminal Justice* (6th edn, CUP 2015) 448.

¹⁴⁷ Waldron (n 143) 7.

common law jurisdictions.¹⁴⁸ In Australia, the High Court has recognised that ‘consistency in sentencing...underpins the rule of law’.¹⁴⁹ As such, unjustified disparity is said to be contrary to the rule of law.¹⁵⁰ It undermines predictability and erodes legitimacy and public confidence.¹⁵¹ Difficulty arises, however, in determining when disparity is unjustified. The form of consistency applied in Australia is consistency of approach.¹⁵² The broad, unstructured nature of IS, however, means that sentencers may address the sentencing decision in a myriad of different ways whilst still technically applying the same approach of IS. The failure to identify uniform aims of sentencing¹⁵³ and the wide, unguided discretion afforded to judges means that there is scope for significant variation within IS.¹⁵⁴ For those who advocate maximum judicial discretion, this flexibility is celebrated for enabling individualisation of sentences and the resulting disparity is regarded as justified.¹⁵⁵ Yet individualised justice cannot be used to excuse the fact that fundamental differences in judges’ application of their sentencing powers can compromise consistency, of approach and outcome, thus undermining the rule of law.¹⁵⁶

3.2. Transparency

A failure to apply authoritative standards correctly and consistently or to explain why, in the circumstances, departure is justified renders the process illegitimate.¹⁵⁷ In this sense there is an overlap between transparency and consistency as transparency is necessary to understand the standards governing sentencing, why they are or are not being applied, and therefore whether disparity is justified. Even in jurisdictions applying an unstructured model

¹⁴⁸ See e.g. *Nasogalvak* (n 129) [39]; Sentencing Act 2002 (NZ) s 8(e); Coroners and Justice Act 2009 s 120(11)(b).

¹⁴⁹ *Markarian* (n 6) 390 [84] (McHugh J).

¹⁵⁰ *R v Hasan* (2010) 31 VR 28, 39 [48] (*Hasan*).

¹⁵¹ See Sentencing Commission for Scotland (n 96) 24; *Lowe* (n 52) 610-11 (Mason J); *Wong* (n 10) 591 [6] (Gleeson CJ).

¹⁵² See e.g. *Sentencing Act 1991* (Vic) s 1(a); *Hili* (n 11) 527 [18], 535 [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See Chapter 6 for further discussion.

¹⁵³ Richard Edney and Mirko Bagaric, *Australian Sentencing – Principles and Practice* (CUP 2007) 3; Ashworth (n 146) 81.

¹⁵⁴ The extent of variation will be examined further in Chapter 4.

¹⁵⁵ See e.g. Brown (n 91) 57-8. See also comments by judges in Chapter 6.

¹⁵⁶ Neil Hutton, ‘Sentencing as Social Practice’ in Sarah Armstrong and Leslie McAra (eds) *Perspectives on Punishment – The Contours of Control* (OUP 2006); Mirko Bagaric and Athula Pathinayake, ‘The Paradox of Parity of Sentencing in Australia: The Pursuit of Equal Justice that Highlights the Futility of Consistency in Sentencing’ (2013) 77(5) *The Journal of Criminal Law* 399, 411; Edney and Bagaric (n 153).

¹⁵⁷ Trevor RS Allan, ‘Procedural Fairness and the Duty of Respect’ (1998) 18 *Oxford Journal of Legal Studies* 497, 505; Denis J Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press 1996) 411.

and affording great judicial discretion, discretion is never completely unrestricted,¹⁵⁸ it will be exercised within a framework of law, principles and standards. When that framework is set out in advance, ‘reasonably clear and non-contradictory, duly published or promulgated’,¹⁵⁹ it is possible for citizens to comply with the law and to ensure that decision-makers are doing the same. The difficulty with the loose IS framework is that it may encourage sentencers to adopt approaches which are not clear to the wider community or even the rest of the judiciary.¹⁶⁰

Transparency within sentencing is required in relation to the framework itself and the exercise of sentencing powers within that framework. Clearly demonstrating compliance with the relevant standards and authorities is an important aspect of treating the offender with respect¹⁶¹ and promotes acceptance of the court’s decision.¹⁶² Exposing decision-making and reasoning also facilitates accountability. The rule of law aims to reduce the exercise of arbitrary power,¹⁶³ to shield individuals from bias, prejudice, error, ignorance or whim.¹⁶⁴ This is particularly important in relation to the exercise of the punitive powers of the State and potential deprivation of liberty.¹⁶⁵ Open, accessible reasoning helps to ensure that those making the sentencing decisions are adhering to the stated principles, rather than their own preferences, ideology or individual sense of right and wrong.¹⁶⁶ Further, where framework or structure is limited and sentencers are granted wide discretion, as in IS, explanations of the decision-making process and reasons for decision help to identify how specific factors influence the decision. In discouraging these detailed explanations, however, IS may be said to be discouraging such understanding and scrutiny, compromising the rule of law.

¹⁵⁸ Antony Duff, ‘Theories and Policies Underlying Guidelines Systems’ (2005) 105 *Columbia Law Review*, 1162.

¹⁵⁹ Trevor RS Allan, ‘The Rule of Law’ in David Dyzenhaus and Malcolm Thorburn (eds) *Philosophical Foundations of Constitutional Law* (OUP 2016) 202. In contrast, where it is ‘unpublished or contradictory or retrospective or subject to unpredictable change or rarely applied in particular cases’ individual freedom and independence is compromised (206). See also Raz (n 143) 213-4.

¹⁶⁰ See Chapter 4.

¹⁶¹ Allan (n 157) 514-15.

¹⁶² Allan (n 157) 500 citing John Randolph Lucas, *On Justice* (Clarendon Press 1980).

¹⁶³ Martin Krygier, ‘Rule of Law’ in Michel Rosenfeld and András Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 242.

¹⁶⁴ Brian Z Tamanaha, *On the Rule of Law – History, Politics, Theory* (CUP 2004), 122.

¹⁶⁵ Traynor and Potas (n 15) 1.

¹⁶⁶ Waldron (n 143) 6.

The rule of law cannot be upheld or applied without the involvement of human decision-makers.¹⁶⁷ In sentencing an offender, the judge acts on their own legal and moral judgment, founded on reasons that must be open to detailed scrutiny.¹⁶⁸ In unstructured models with no set decision-making path, sentencers wield a great amount of discretion and thus power. It is therefore particularly important to examine how those decisions are made. Using first-hand accounts from sentencing judges, this thesis offers an insight into the decision-making processes applied using IS. This allows for a more detailed examination of the IS model itself and the ways in which it upholds and challenges the rule of law. In doing so, the thesis considers the conflict between the values of broad discretion and individualised justice underpinning IS and the rule of law and asks whether it is possible to achieve a more even balance between the two.

4. Conclusion

The basic foundation of sentencing in Australia is similar to many other common law jurisdictions; a combination of statutory provisions and case law. The statutes set out the purposes of sentencing and factors to be considered but offer little in terms of practical guidance. It is case law that gives meaning to the provisions and principles governing sentencing. The principles emphasised by Australian courts are also common to many other sentencing systems, proportionality being the primary aim of the sentencing process. What is unusual is the way in which two particular principles have been used to shape and defend the Australian IS model of sentencing; it is a model designed to safeguard broad judicial discretion, allowing judges the greatest possible flexibility to formulate an individualised sentence.

The reliance on appellate courts and the absence of structure and a common methodology (both deliberate omissions so as not to constrain discretion) afford the Australian judiciary a great deal of control over sentencing, at first instance and on appeal. Yet little is known about

¹⁶⁷ Tamanaha (n 164), 123.

¹⁶⁸ Trevor RS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003) 148.

how the decisions are made. IS as a model remains an ‘inscrutable idea’¹⁶⁹ and the decision-making process remains opaque. This thesis aims to shed light on the IS process. It examines not just what IS means as an abstract example of unstructured sentencing but how it is applied in practice, how judges use IS to approach sentencing decision-making and arrive at a final sentence.

With greater understanding of how IS operates it is possible to properly evaluate the model. There is tension between a model which prioritises unstructured decision-making and broad judicial discretion and the rule of law, which advocates clarity, certainty and accessibility. This tension will be examined through an assessment of IS’s compatibility with the rule of law values of transparency and consistency. Sentencing can involve the imposition of punitive measures by the State, it is therefore vital that the rule of law is respected. As the second half of this thesis will demonstrate, there are several aspects of the IS model, and of the way in which it is applied by the courts, which have the effect of undermining, rather than promoting, the rule of law.

¹⁶⁹ Ashworth (n 146) 63.

Chapter 2 Methodology

Chapter 2 sets out the research methodology used in this study: semi-structured interviews with members of the Victorian County Court, Supreme Court and Court of Appeal judiciaries. It explains how interview data was collected and analysed and the decision to supplement interview material with analysis of case law to inform the examination of IS and sentencing decision-making.

There has traditionally been a reluctance amongst the judiciary, particularly in England and Wales, to participate in empirical research. As a result, few studies involving detailed interviews with judges exist and researchers have had to make use of alternate methodologies. A small number of studies featuring judicial interviews have been conducted in other common law jurisdictions but very few have focused on the sentencing process. Studies that do employ semi-structured interviews with the judiciary and examine sentencing have been conducted by Mackenzie in Queensland and Brown in Scotland. This thesis draws upon those studies, applying the same methodology to understand the attitudes and approaches of judges in a new jurisdiction and to look more particularly at how the IS sentencing process is structured.

The interviews in this study provide an insight into the specific decision-making processes of sentencing judges. The semi-structured nature of the interviews and the deliberately broad questions encouraged judges to speak freely about the subject. Interviewees provided details and introduced topics for consideration which may not have arisen using other research methods. The responses given were well considered and articulated and judges were generally open in their discussion. As a result, the interview data gathered provides a detailed picture of how judges approach the sentencing task, which improves understanding of how the IS model operates.

1. Previous studies

1.1. Judicial participation in qualitative studies

Judges have generally been reluctant to participate in academic research, particularly research into judicial working practices, decision-making and sentencing. There is an internal group pressure and desire to close ranks 'to protect the mysteries of their craft',¹⁷⁰ as well as a wish by individuals to protect themselves from scrutiny and potential criticism. Judges may also feel constrained by conventions of judicial independence from entering into matters of public debate.¹⁷¹ The resulting unwillingness by the judiciary to participate in research has made it difficult for academics to gain access. As a result, there are few interview-based analyses of judges and sentencing decision-making.¹⁷²

In England and Wales, attempts by researchers to engage with the judiciary have been repeatedly frustrated, not necessarily by individual judges but by gatekeepers who discourage or refuse involvement by the judiciary.¹⁷³ The experiences of Ashworth et al during their 1981 Crown Court study highlight the difficulties faced.¹⁷⁴ The pilot study, supported by the Home Office, involved court observations, analysis of 96 cases and interviews with 25 judges. The interview sample was intended to be randomly selected but was ultimately controlled as researchers were not permitted to approach circuit judges in the South East. Instead, they were provided with a list of names of judges and advised to interview the senior judge at each court.¹⁷⁵ Researchers were 'struck by the enthusiastic co-operation of the great majority [of interviewees]...and by the expressed interest in the project.'¹⁷⁶ Despite this, and the identification of several areas for further investigation, the Lord Chief Justice refused permission to expand the research beyond the pilot. His belief that neither the press, the

¹⁷⁰ David Pannick, *Judges* (OUP 1987) 10.

¹⁷¹ Kirby (n 18) 2; Andrew Ashworth, 'Sentencing and Sensitivity: A Challenge for Criminological Research' in Lucia Zedner and Andrew Ashworth (eds) *The Criminological Foundations of Penal Policy – Essays in Honour of Roger Hood* (OUP 2003) 327.

¹⁷² Mackenzie (n 17) 6.

¹⁷³ Wing Hong Chui, 'Quantitative Legal Research' in Michael McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh University Press 2017) 60.

¹⁷⁴ Ashworth et al (n 19).

¹⁷⁵ Ashworth et al (n 19) 10.

¹⁷⁶ Ashworth et al (n 19) 10.

public, nor politicians would take any notice of the research findings was criticised as 'self-satisfied complacency...characteristic of the legal world'.¹⁷⁷

This decision had long lasting repercussions for empirical court research. The judiciary established its own procedure for managing applications for access to the Crown Court. Requests were regarded as almost an impertinence¹⁷⁸ and very few researchers were granted permission to interview judges.¹⁷⁹ Hood, for example, was told that judges had been 'instructed 'by the powers that be' in the judiciary not to co-operate with his 1992 study of race as a sentencing factor.¹⁸⁰ Whether due to access being sought and denied, being actively discouraged from making such requests or simply feeling unwelcome, researchers confined their methodologies to examining court records, observing from the public gallery¹⁸¹ or interviewing retired members of the judiciary.¹⁸² As a result of the hostility and the subsequent access difficulties, there are few sentencing studies involving direct contributions from judges. Instead, studies were conducted in an anonymous, statistical manner or in experimental settings.¹⁸³

There is some indication, however, that the judiciary may be becoming more amenable to involvement in empirical studies. Dhimi's sentencing guidelines study, for example, included judicial participation through the use of self-administered surveys.¹⁸⁴ Drewry et al¹⁸⁵ and Darbyshire,¹⁸⁶ the latter with the assistance of former Lord Chief Justice of England and Wales Sir Igor Judge, conducted interviews with serving members of the court, though neither study

¹⁷⁷ Tony Gifford, *Where's the Justice – A Manifesto for Law Reform?* (Penguin 1986) 32.

¹⁷⁸ John Baldwin, 'Research on the Criminal Courts' in Roy D King and Emma Wincup (eds) *Doing Research on Crime and Justice* (2nd edn, OUP 2008) 385.

¹⁷⁹ Ashworth (n 171) 322. One of the reasons Paterson hypothesises he was able to obtain interviews with the Law Lords for his study (not specifically sentencing related) was that he was able to approach the Lords directly and did not need to seek permission from anyone else but the Lords themselves; Alan Paterson, 'The Law Lords' in Simon Halliday and Patrick Schmidt (eds) *Conducting Law and Society Research Reflections on Methods and Practices* (CUP 2009) 77.

¹⁸⁰ Roger Hood, *Race and Sentencing* (Clarendon Press 1992) 37.

¹⁸¹ Ashworth (n 171) 323.

¹⁸² Kate Malleon, *The New Judiciary – The Effects of Expansion and Activism* (Ashgate 1999) 23.

¹⁸³ Baldwin (n 178) 86.

¹⁸⁴ Mandeep K Dhimi, 'Sentencing Guidelines in England and Wales: Missed Opportunities?' (2013) 76(1) *Law and Contemporary Problems* 289, 298.

¹⁸⁵ Gavin Drewry, Louis Blom-Cooper and Charles Blake, *The Court of Appeal* (Hart 2007).

¹⁸⁶ Brown (n 91) 6.

related to sentencing or judicial decision-making. These topics were, however, explored by Hough et al¹⁸⁷ and Jacobson and Hough¹⁸⁸ in research that involved interviews with magistrates, Crown Court judges, recorders and district judges.

These studies suggest that access to the judiciary may slowly be improving, but it remains relatively limited compared to other common law jurisdictions. In Canada, Hogarth's¹⁸⁹ detailed study of sentencing behaviour included interviews with 71 magistrates, while McCormick and Greene¹⁹⁰ conducted interviews with 91 judges in Alberta and Ontario and collected basic biographical data for 277 judges across Canada. Levels of involvement by Canadian judges are also relatively high in terms of rates of participation¹⁹¹ and degree of engagement.¹⁹² In Scotland, judges themselves have been the instigators of academic research, approaching academics for assistance in developing a Sentencing Information System¹⁹³ and later in proposing the study of consistency and disparity in sentencing.¹⁹⁴ Other notable engagement by the Scottish judiciary in empirical sentencing research includes Tata et al's¹⁹⁵ four year qualitative study on the preparation and use of pre-sentence reports, Tomb's¹⁹⁶ 2004 study of judicial methodology in sentencing and Brown's interviews with sheriffs and judges.¹⁹⁷ Notwithstanding early hesitation in some states,¹⁹⁸ and a general reluctance to contribute

¹⁸⁷ Mike Hough, Jessica Jacobson and Andrew Millie, *The Decision to Imprison – Sentencing and the Prison Population* (Prison Reform Trust 2003).

¹⁸⁸ Jessica Jacobson and Mike Hough, *Mitigation: The Role of Personal Factors in Sentencing* (Prison Reform Trust 2007).

¹⁸⁹ John Hogarth, *Sentencing as a Human Process* (University of Toronto Press 1971).

¹⁹⁰ Peter McCormick and Ian Greene, *Judges and Judging* (James Lorimer and Company 1990).

¹⁹¹ For example, completed questionnaires were returned by 72% of youth court judges approached by Doob and Beaulieu: Antony Doob and Lucien Beaulieu, 'Variation in the Exercise of Judicial Discretion with Young Offenders' (1992) *Canadian Journal of Criminology* 35.

¹⁹² See e.g. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Canadian Sentencing Commission 1987) 281.

¹⁹³ Neil Hutton, 'From Intuition to Database: Translating Justice' (2013) 17(1) *Theoretical Criminology* 109; Neil Hutton, 'Towards a Sentencing Policy for the Use of Short Prison Sentences in Scotland' (2003) *Judicial Review* 313; Neil Hutton and Cyrus Tata, 'A Sentencing Exception? Changing Sentencing Policy in Scotland' (2000) 22(4) *Federal Sentencing Reporter* 272; Tata (n 95) and Cyrus Tata, 'Sentencing and Penal Decision-Making: Is Scotland Losing its Distinctive Character?' in Hazel Croall, Gerry Mooney and Mary Munro (eds) *Criminal Justice in Scotland* (Willan Publishing 2010) 210. Though, as Ashworth ((n 171) 326) notes, the better understanding of judicial decision making was not the primary focus of this research.

¹⁹⁴ Cyrus Tata and Neil Hutton, 'What "Rules" in Sentencing? Consistency and Disparity in the Absence of "Rules"' (1998) 26 *International Journal of the Sociology of Law* 339.

¹⁹⁵ Cyrus Tata, Nicola Burns, Simon Halliday, Neil Hutton and Fergus McNeill, 'Assisting and Advising the Sentencing Decision Process – The Pursuit of "Quality" in Pre-Sentence Reports' (2008) 48 *British Journal of Criminology* 835.

¹⁹⁶ Jacqueline Tombs, *A Unique Punishment – Sentencing and the Prison Population in Scotland* (Consortium on Crime & Criminal Justice 2005).

¹⁹⁷ Brown (n 91).

¹⁹⁸ See e.g. the Victorian judiciary's criticism of the Australian Law Reform Commission's 1970s sentencing reference: Peter Cashman, *Sentencing Reform: A National Survey of Judges and Magistrates: Preliminary Report* (Law Foundation of New South Wales 1979) 305-9.

directly to the scholarly debate on sentencing,¹⁹⁹ Australian judges have been broadly supportive of empirical sentencing research and generally willing to grant access to researchers. This includes participation in interviews,²⁰⁰ support for court-based sentencing research such as the jury projects²⁰¹ and in-depth research into the judicial officers themselves.²⁰²

It is ironic that judges in England and Wales, the common law jurisdiction that has promoted transparency through the creation of sentencing guidelines, are reluctant to discuss the process. In contrast, judges in Australia, where much of sentencing remains an obscured exercise of judicial discretion, are broadly willing to engage in academic research and will candidly discuss their sentencing process.²⁰³ It may be that participation in such research is of greater value to Australian judges as it presents an opportunity to explain and defend the sentencing model and maintain an additional degree of control over it. In England and Wales, the benefit to the judiciary of explaining the sentencing process is reduced as the process is broadly explained in readily accessible sentencing guidelines. Although judges could provide useful additional details and insights into the specific process, they may also risk exposure to criticism if their process deviates from the guidelines or that of their peers. The value to judges in England and Wales in discussing their decision-making is thus reduced and the potential cost increased.

¹⁹⁹ Kirby (n 171) 2.

²⁰⁰ See e.g. Seifman's interviews with 22 County Court judges and 16 Supreme Court judges in Victoria in relation to plea bargaining (Robert Seifman, 'Plea Bargaining in Victoria – Getting the Judges' Views' (1982) 6 *Criminal Law Journal* 64) and Bartel's research on suspended sentencing, including interviews with all six Supreme Court of Tasmania judges and 10 of the 12 magistrates (Lorana Bartels, *Sword or Feather – The Use and Utility of Suspended Sentences in Tasmania* (PhD thesis, University of Tasmania 2008); Lorana Bartels, 'Suspended Sentences – A Judicial Perspective' (2009) 9(1) *Queensland University of Technology Law and Justice Journal* 44).

²⁰¹ See e.g. 'Considerable support was provided by the Courts' during the Tasmanian and Victorian Jury Projects: 'The Jury Projects' (University of Tasmania 15 May 2019) <<https://www.utas.edu.au/law/research/the-jury-projects>> accessed 3 January 2020.

²⁰² Carly Schrever, Carol Hulbert and Tania Sourdin, 'The Psychological Impact of Judicial Work: Australia's First Empirical Research Measuring Judicial Stress and Wellbeing' (2019) 28 *Journal of Judicial Administration* 141.

²⁰³ See Chapter 4.

1.2. Similar studies

There are two studies in particular that this research builds upon, both involve an examination of sentencing practices through interviews with judges. In 1998 Mackenzie examined judicial perceptions of and attitudes to sentencing by conducting interviews with 21 judges of the District Court of Queensland and 10 judges from the Supreme Court of Queensland for her PhD thesis.²⁰⁴ Judges were asked to discuss several different aspects of sentencing including how they saw the sentencing function and their role in the process; judicial discretion; the aims and purposes of sentencing; public opinion; and the media. Mackenzie found that judges regard sentencing as an adjudicative balancing of the relevant factors including the legal principles and the interests of all the parties.²⁰⁵ Perhaps unsurprisingly, judges considered that they were best placed to make such decisions and were opposed to any further regulation of their discretion. As Mackenzie noted, despite the differences in culture, jurisdiction and time, the results of the study were similar to those of the Ashworth et al Crown Court Study.²⁰⁶

Mackenzie's work remains the most detailed study into judicial attitudes towards sentencing and judges' sentencing methodology in Australia. It was also a significant influence on Brown's doctoral research in Scotland in 2009 and 2010. That study also utilised interviews with the judiciary, specifically 17 sheriffs and eight judges, though Brown adopted a narrower focus. In particular, he examined judges' sentencing decision-making processes. As in Ashworth et al and Mackenzie's work, judges in Brown's study approached sentencing as a discretionary exercise based upon sentencers' experience, intuition and judgement. The process adopted by Scottish sentencing judges was found to be akin to Australian IS but was conceptualised by Brown as the phronetic synthesis of the relevant facts and circumstances of the individual case.

²⁰⁴ Geraldine Mackenzie, 'A Question of Balance: A Study of Judicial Methodology, Perceptions and Attitudes in Sentencing' (PhD thesis, University of New South Wales 2001). Also the basis for her monograph (Mackenzie (n 17)).

²⁰⁵ Mackenzie (n 204) viii.

²⁰⁶ Ashworth et al (n 19).

The current study develops the work by Mackenzie and Brown, applying the same methodology – semi-structured interviews conducted with sitting members of the judiciary – in a new jurisdictional setting. Rather than considering sentencing generally, as in Mackenzie’s study, the focus is on the decision-making process used by judges when determining sentence, more in line with Brown’s study. However, unlike Brown, the purpose of this research is not to reconfigure the model but to better understand the process, any forms of structure applied by judges during decision-making and whether this is compatible with a formal sentencing structure. Just as Mackenzie and Brown found parallels between their research and previous studies, similarities also arise in this study in terms of fieldwork practicalities and findings in relation to judicial attitudes and practices.

2. Research Methods

2.1. Case law

This study of Australian sentencing practices and the IS model involves detailed analysis of sentencing case law. It focuses primarily on Victorian and Australian case law but also draws on sentencing jurisprudence from England and other common law jurisdictions, particularly those that apply broad judicial discretion at sentencing such as New Zealand and Canada. Case law analysis is recognised as one of the primary ways of understanding sentencing practices²⁰⁷ and has been used in numerous sentencing studies.²⁰⁸ Written judgments and the giving of reasons provide reassurance that decisions are not idiosyncratic, arbitrary, or irrational.²⁰⁹ They can also offer insight into matters which judges may not be conscious of,

²⁰⁷ Julian V Roberts and Carol La Prairie, *Conditional Sentencing in Canada: An Overview of Research Findings* (Department of Justice, 2000).

²⁰⁸ See e.g. See Lynne A Barnes and Patrizia Poletti, *Sentencing Robbery Offenders Since the Henry Guideline Judgment* (Research Monograph No 30, Judicial Commission of New South Wales, 2007); Joe Clare and Sarah Krasnostein, *Community Correction Orders in the Higher Courts: Imposition, Duration and Conditions* (Sentencing Advisory Council, 2014); Michelle Edgely, ‘Common Law Sentencing of Mentally Impaired Offenders in Australian Courts: A Call for Coherence and Consistency’ (2009) 16 *Psychiatry, Psychology and Law* 240.

²⁰⁹ Hammond (n 2) 225.

such as sentencing patterns or unconscious bias, or may be reluctant to discuss in an interview situation²¹⁰ and can sometimes reveal more about judges than about offenders.²¹¹

There are, however, limitations to case law analysis. As Roberts et al²¹² recognise, only a small percentage of sentences will be captured by reporting services. In Victoria, sentencing remarks from the Magistrate's Court are not reported. In the County Court, individual judges decide whether their remarks are made publicly available on the court website²¹³ or published on Austlii.²¹⁴ Should the judge decide not to publish their reasons, the only other route by which the reasoning might be exposed is on appeal, during which the transcript of the sentencing remarks may be relied upon. Judgments and sentences from the Supreme Court and Court of Appeal are published on Austlii and are increasingly available via webcast.²¹⁵ Even where the reasons of the court are published, the written judgment is usually not comprehensive enough to explain all the reasons giving rise to the sanction.²¹⁶ It may be a symptom of lack of time,²¹⁷ flaws in the IS methodology²¹⁸ or simply of the difficulty of the sentencing task that judges can be 'reduced to saying, "on these facts this offending is just too bad for this offender not to be incarcerated".'²¹⁹ Given these limitations, other forms of data will be used in this study to give insight into the context and 'underlying reality'²²⁰ in which the case law is produced.

²¹⁰ Sarah Krasnostein, 'Pursuing Consistency: The effect of different reforms on unjustified disparity in individualised sentencing frameworks' (PhD thesis, Monash University 2015) 66-7; Darrell Steffensmeier, Jeffrey Ulmer and John Kramer, 'The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male' (1998) 36 *Criminology* 763; Amy L Anderson and Cassia Spohn, 'Lawlessness in the Federal Sentencing Process: A Test for Uniformity and Consistency in Sentence Outcomes' (2010) 27 *Justice Quarterly* 362.

²¹¹ Michael Tonry, *Sentencing Matters* (OUP 1996) 177.

²¹² Brown (n 91) 5.

²¹³ 'Court decisions' (County Court of Victoria) <<https://www.countycourt.vic.gov.au/court-decisions>> accessed 7 February 2020.

²¹⁴ 'Australasian Legal Information Institute' (UTS and UNSW Faculties of Law) <<http://www8.austlii.edu.au/>> accessed 7 February 2020.

²¹⁵ 'Supreme Court Sentences and Judgments Video Portal' (Supreme Court of Victoria) <<http://scvwebcast.com/sentences/>> accessed 7 February 2020.

²¹⁶ Kirby (n 18) 4.

²¹⁷ Julian V Roberts, Antony N Doob and Voula Marinos, *Judicial Attitudes to the Conditional Terms of Imprisonment: Results of a National Survey* (Department of Justice 2000).

²¹⁸ The IS model discourages sentencers from expressing the particular weighting and balancing of sentencing factors. See Chapter 3 for further discussion.

²¹⁹ Hammond (n 2) 225.

²²⁰ Alan Bryman, *Social Research Methods* (OUP 2012) 555.

2.2. Interviews

According to Doherty J, '[m]ost attempts to describe the proper judicial approach to sentence are as close to the actual process as paint-by-numbers landscape is to the real thing.'²²¹ Sentencing decision-making is a complex process involving multiple considerations and value judgements. These complexities and the reasoning underlying the decision can be difficult to capture through surveys or questionnaires²²² and through doctrinal analysis where motivations and reasoning may need to be inferred. Interviewing is a well-recognised means of gaining understanding of the operation of the law²²³ and offers an opportunity for in-depth discussion of the sentencing process. There is no one better placed to provide explanations of the process and underlying reasoning than the judges who perform the sentencing task. Their expertise is a valuable resource and interviewing allows direct insight into their experiences, motivations and attitudes, as well as providing a 'human face' to judging and sentencing.²²⁴

The interviews undertaken in this study were semi-structured. A schedule of questions²²⁵ was prepared to ensure that the same topics were discussed with all interviewees, in many instances, however, the topics came up naturally during the discussion without the need for specific questions or prompts. The semi-structured nature allowed for the inclusion of both direct and open-ended questions. This permitted comparative analysis of responses whilst providing sufficient flexibility to seek elaboration and clarification.²²⁶

While interviews with sentencers can be 'extremely effective at garnering data on individuals' perceptions or views and on the reasoning underlying the responses', the responses can be

²²¹ *R v Hamilton* [2005] 2 SCR 432 at [87] cited in Brown (n 91) 28.

²²² Paul Roberts, 'Interdisciplinarity in Legal Research' in McConville and Wing Hong Chui (n 173) 115.

²²³ Brown (n 91) 14.

²²⁴ Mackenzie (n 17) 37; Kate Fitz-Gibbon, 'Overcoming Barriers in the Criminal Justice System: Examining the Value and Challenges of Interviewing Legal Practitioners' in Karen Lumsden and Aaron Winter (eds) *Reflexivity in Criminological Research – Experiences with the Powerful and the Powerless* (Palgrave MacMillan 2014) 249.

²²⁵ Appendix A.

²²⁶ Brown (n 91) 17; William Foddy, *Constructing Questions for Interviews and Questionnaires* (CUP 1993) 127–28; Clive Seale and Paul Filmer, 'Doing Social Surveys' in Clive Seale (ed) *Researching Society and Culture* (2nd edn, Sage 2004) 130.

affected by problems of memory and selective recall.²²⁷ Interviews also depend on interviewees' self-reflexive capacities and ability to explain what they do. This can involve a degree of justification or rationalisation which may be selective, self-serving or influenced by suggestion.²²⁸ In general, interviewees in this study did not appear to be editing their responses to protect their position. While some were careful in their responses, this appeared to be based on the judicial tradition of abstaining from commenting on political matters, rather than personal defensiveness.²²⁹ The majority gave comprehensive, often very candid, responses. Where they disagreed with questions or criticisms, or sought to justify their position, they did so openly.

In interviewing judges in Magistrates' courts in the Netherlands about their decision-making, van Oorschot and Mascini²³⁰ found that 'open-ended questions about "how you typically deal with cases" fell flat'. Judges offered cognitive justifications and philosophical reflections on how work is done rather than descriptions of their 'typical' work process. That was occasionally the case in this study, with judges discussing their general attitude towards sentencing rather than the specific decision-making process. However, these broader comments were equally valuable and the flexible semi-structured format allowed for more targeted follow up questions. In some instances, the rationale for decision-making may not be apparent to the decision maker but can be uncovered through self-reflection, prompted by questioning and discussion during an interview.²³¹ Some judges in this study who had 'never thought about it before' used the discussion as an opportunity to ponder and unpack what exactly IS means and involves. Again, their answers were expansive and thoughtful. Nevertheless, as it remains dependent upon interviewees' memories, interpretations and willingness to share, interview data in this

²²⁷ Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 928.

²²⁸ Roberts (n 222) 115.

²²⁹ See 'Judicial attitudes' below at [3.6].

²³⁰ Irene van Oorschot and Peter Mascini, 'Cases under construction' in William H van Boom, Pieter Desmet, Peter Mascini (eds) *Empirical Legal Research in Action: Reflections on Methods and Their Applications* (Edward Elgar Publishing 2018) 207-8.

²³¹ Roberts (n 222) 115.

study will be supplemented by analysis of case law. This will allow for comparison and will build a more accurate picture of sentencing decision-making and IS in practice.

2.3. Vignettes

Vignettes were considered for inclusion in the research methodology for this study. They can be particularly useful in measuring consistency²³² and encouraging sentencers to articulate their thought processes in relation to a specific case, rather than generalising.²³³ There is a degree of artificiality to the process however, as sentencers are asked to make a decision on hypothetical facts and exclusively on the papers.²³⁴ Ultimately, given the limited time for discussion with the judges, vignettes were not included in the interview. Vignettes could have been presented as a separate element and distributed as a survey. This would, however, have involved asking already busy judges to complete an additional task which, if it were to be done properly, would involve lengthy answers and a significant time commitment. It would also have been difficult to prepare case scenarios that would be relevant across all court levels as County Court and Supreme Court judges sentence different offences. Hypothetical cases could have been devised for each court but that would have made cross-court comparison and analysis of the whole interviewee cohort difficult. For these reasons, sentencing vignettes were not included in this study.

3. Current study

The study involved semi-structured interviews with 32 serving members of the judiciary in Victoria, specifically 19 judges from the County Court, five from the Supreme Court and eight from the Court of Appeal, over five weeks.

²³² Niamh Maguire 'Consistency in Sentencing' (2010) 2 *Judicial Studies Institute Journal* 14; Palys and Divorski (n 128) 347.

²³³ Ashworth et al (n 19) 10.

²³⁴ Ashworth et al (n 19) 10.

3.1. Jurisdiction

The purpose of this research is to investigate the Australian model of sentencing. Due to time and resource limitations it was not possible to interview members of all Australian courts. Qualitative work on sentencing has already been performed in Queensland by Mackenzie, this research is intended to build upon rather than revisit that work. Conducting interviews in a different state allows for contrasts between the jurisdictions to be drawn and common practices to be identified. Victoria was selected as the jurisdiction for the research as the term 'instinctive synthesis' originated in the Victorian Supreme Court in 1975²³⁵ and courts in the state have applied that model of sentencing consistently since then. While all Australian jurisdictions now apply IS, the ACT, Northern Territory, South Australia, Tasmania and Western Australia were considered too small for this study. Victoria was selected in preference to New South Wales as it is my home state and familiarity with the court system, statutes and case law would facilitate more detailed conversations with interviewees.

Again, limitations in terms of time and resources meant that it was not possible to interview all Victorian judicial officers. Research was restricted to the County Court, Supreme Court and Court of Appeal on the basis that the judgments and sentencing remarks of these courts are published as formal records of the sentencing process. The published remarks could be compared to judges' descriptions of the process given during interview. This decision was reinforced by practical considerations. Logistically, it would not have been possible to interview 115 magistrates across 51 sites throughout the state.²³⁶ While the bulk of criminal offences committed in Victoria are sentenced in the Magistrates' Court, these are relatively minor offences and can result in a total sentence of no more than two years imprisonment for a single offence (five years for multiple offences) and/or fines of up to 500 penalty units.²³⁷ These

²³⁵ *R v Williscroft* [1975] VR 292 (*Williscroft*).

²³⁶ 'Judicial Officers' (Magistrates' Court of Victoria, 10 January 2020) <<https://www.mcv.vic.gov.au/judicial-officers>> accessed 15 January 2020.

²³⁷ *Sentencing Act 1991* (Vic) ss 113-113B.

restrictions do not exist in higher courts therefore the range of sentences is likely to be greater and provide more scope for differences in approach and outcome.

3.2. Approach

As Paterson notes, the subjects of elite interviews often come from a limited pool of people, therefore each interviewee is valuable and must be approached with care.²³⁸ Requests for permission to approach the judges with invitations to interview were made to the Chief Justice of the Supreme Court, President of the Court of Appeal and Chief Judge of the County Court. Permission was immediately granted by the President and Chief Judge. The Chief Justice initially refused the request. Following further email correspondence explaining the research and measures for anonymising data and discussions between the Chief Justice and the President of the Court of Appeal, the Chief Justice granted permission to approach members of the Court of Appeal and the Criminal Division of the Supreme Court. I understand that the Chief Justice advised those judges that choosing to participate in the research was their personal decision. The Chief Justice's initial refusal does not appear to have discouraged other members of the Court from contributing, as rates of participation were significantly higher from Court of Appeal and Supreme Court judges than County Court judges.

Brown²³⁹ reports that when arranging interviews, a senior member of the judiciary suggested that certain members should not participate and provided the names of those who might be willing to be involved. Ashworth et al,²⁴⁰ intending to randomly select judges for interview, were instead presented with a pre-approved list of experienced circuit judges and recorders to approach. There were no such attempts to restrict access or to suggest or influence which judges should be approached in this study. The two groups of judges approved for invitation by the Chief Justice were those I had intended to approach, therefore while part of the

²³⁸ Paterson (n 179) 72.

²³⁹ Brown (n 91) 16.

²⁴⁰ Ashworth et al (n 19) 9.

interviewee cohort was in a sense 'controlled' by a senior member of the judiciary, there was ultimately no change to the original research plan.

All members of the County Court Criminal Division, Supreme Court Criminal Division and Court of Appeal, including the heads of the courts, were invited to participate in the research. A total of 62 judges were approached: 42 judges from the County Court; six from the Supreme Court; and 14 from the Court of Appeal. A letter inviting the judge to participate in an interview and attaching a 2-page summary of the research, interviewer, arrangements for interview and anonymisation of responses was emailed to the judge via their Associate. 52% of judges approached agreed to participate: 40% of County Court judges, 83% of Supreme Court judges and 57% of Court of Appeal judges. The rate of response from County Court judges was noticeably lower than the other courts. 24% of County Court judges declined to participate. 43% did not respond to the initial request. A second email was sent to all those who had not responded, this resulted in a further five judges agreeing to participate. Two County Court judges agreed to participate but later had to withdraw. All Supreme Court and Court of Appeal judges responded to the request. 17% Supreme Court and 43% Court of Appeal judges declined or were unable to participate. Three judges (across the three courts) replied to say that they were on leave during the interview period and therefore unable to participate.

These levels of participation are lower than those of Mackenzie and Brown which were 60%²⁴¹ and 68% respectively.²⁴² Those studies were conducted over longer periods of time and a smaller number of judges were approached.²⁴³ In addition, both researchers suggested that their being personally known to a number of the interviewees greatly assisted in securing the involvement of the judges.²⁴⁴ Brown, for example, tended to approach judges who were known

²⁴¹ Mackenzie (n 17) 112.

²⁴² Brown (n 91) 15.

²⁴³ Brown ((n 91) 15) invited 41 judges to participate and conducted interviews over 12 months. Mackenzie ((n 17) 7-8) approached 52 judges and conducted interviews between late 1998 and early 1999.

²⁴⁴ Brown (n 91) 17.

to him or with whom he had previously discussed the research.²⁴⁵ This was not the case in the current study. Only one of the judges interviewed was previously known to me and I made a decision not to discuss the research or publish on the topic prior to conducting the interviews. Victorian judges follow sentencing research closely²⁴⁶ and I did not wish to influence the direction of the conversation by having already declared a position in relation to IS or structuring discretion or to discourage participation by judges who might disagree with my position.

3.3. Demographics

Of the 32 judges interviewed, six were women and 26 were men. All of the judges interviewed appeared to be white. As required by statute, all had been admitted as an Australian lawyer,²⁴⁷ all with significant experience in practice at the Bar. Judges of all levels of experience were interviewed, ranging from newly appointed to those who have been on the bench for several years and some who were soon to retire.²⁴⁸

3.4. Interviews

The interviews took place in the judge's chambers either in Melbourne or on circuit. The one exception was a telephone interview conducted after I had returned to the UK. Permission was sought to record the interviews and, though there was initially some hesitation from one judge, all agreed. Detailed notes were also made during the interviews. Interviews lasted between 38 minutes and 1 hour 26 minutes. Recordings of the interviews were transcribed and analysed by me. Transcription by the interviewer establishes a more detailed 'feel' for the data²⁴⁹ and assists in the identification of themes, similarities and differences between responses.²⁵⁰ Interviews were transcribed verbatim to ensure that no data was lost. Having

²⁴⁵ Brown (n 91) 16-7.

²⁴⁶ See 'Judicial attitudes' below at [3.6].

²⁴⁷ *Constitution Act 1975* (Vic) s 75(1)(b); *County Court Act 1958* (Vic) s 8(1A)(b); *Magistrates' Court Act 1989* (Vic) s 7(3)(b).

²⁴⁸ Judges and Magistrates in Victorian Courts are required to retire from the bench at age 70: *Constitution Act 1975* (Vic) s 77(3); *County Court Act 1958* (Vic) s 8(3); *Magistrates' Court Act 1989* (Vic) s 7(4).

²⁴⁹ Roy D King and Emma Wincup, 'The Process of Criminological Research' in King and Wincup (n 178) 36.

²⁵⁰ Rebecca Barnes, 'The Advantages of Transcribing Your Own Interviews' in Bryman (n 220).

complete transcripts also meant that it was possible to go back and examine themes that only emerged upon examining the entire data set.²⁵¹ I coded the data according to topics of significance that emerged during analysis of the responses.²⁵² These codes were used to assist in the separation and organisation of the data. Should this research be published, all interviewees will be informed. Where a judge is quoted directly, they will be provided with a copy of the relevant page so that they are aware of the use of the quote and context in which it features.²⁵³

As noted by Mackenzie²⁵⁴ and Brown,²⁵⁵ given the nature of the interviews, caution is required in interpreting and using interview material. The topics in the schedule of questions were addressed in every interview, though sometimes in different orders. Often the topics arose unprompted during the conversation, this means the context in which they were discussed differed. Judges also raised new topics which had not been discussed in previous interviews. It should not be assumed, therefore, that because there were not many comments on a particular issue that other judges might have held an opposite or even no view on the issue, as the issue may not have been discussed with all interviewees. It is also not possible, in these circumstances, to conduct a quantitative analysis of such responses. Reading the transcripts and quotations, the language used by the judges can seem quite casual, particularly in comparison to formality of judgments and sentencing remarks. This is to be expected during personal interviews in which the judge is encouraged to speak freely and present their own opinions outside of the official court setting.²⁵⁶

²⁵¹ Nigel Fielding and Hilary Thomas, 'Qualitative Interviewing' in Nigel Gilbert (ed) *Researching Social Life* (3rd edn Sage 2008) 257.

²⁵² Natasha Semmens, 'Methodological Approaches to Criminological Research' in Pamela Davies, Peter Francis and Victor Jupp (eds) *Doing Criminological Research* (2nd edn, Sage 2011) 67.

²⁵³ This is consistent with other research involving interviews with the judiciary, for example Mackenzie (n 17) and Paterson (n 179) 78.

²⁵⁴ Mackenzie (n 17) 10; Mackenzie (n 204) 124.

²⁵⁵ Brown (n 91) 21.

²⁵⁶ Brown (n 91) 21; Mackenzie (n 17) 11.

3.5. Anonymity

Interviewees participated in this study on the understanding that their responses would be anonymised. Anonymity was granted in order to encourage participation and to enable judges to speak freely without fear of personal or professional criticism.²⁵⁷ This condition was important to many participants. In addition to being explained in the research fact sheet and the consent form, several judges confirmed the anonymity arrangements again before the interview.

As many judges made similar comments on particular issues, assumptions as to identity should not be made based on the content of the quotes or comments. In this thesis, judges are not identified by name or given numbers.²⁵⁸ This is to minimise the possibility of any one judge being identified from individual comments or their comments as a whole. Given the small number of women who participated in the research, use of gendered pronouns when combined with other details in their responses may potentially identify the individual, therefore gender-neutral language is used when referring to interviewees. In general, no reference is made to the court in which the judge sits. A small number of exceptions are made where the particular court is necessary to give context to the comments. In these instances, particular care is taken to ensure that no other identifying details are included. Reference to a particular type of offence or court should not be taken as an indication that the interviewee is from that court. For example, some members of the Court of Appeal make reference to the experiences of trial judges, judges from the Supreme Court may sit on the Court of Appeal and thus can offer insight into those decisions and County Court judges discuss offences traditionally dealt with in the Magistrates' Court which they see on appeal.

²⁵⁷ Kari Lancaster, 'Confidentiality, anonymity and power relations in elite interviewing: conducting qualitative policy research in a politicised domain' (2017) 20(1) *International Journal of Social Research Methodology* 93, 103.

²⁵⁸ Contrast, for example, Brown (n 91).

3.6. Judicial attitudes

During the interviews, judges were generally very willing to share their knowledge and experience, with several expressing support for the project. They stated that it was a topic they had often contemplated and thought warranted further research:

I've been dying for someone to write this publicly because I think it's an untold story and I think someone needs to...expose the value of what we've been trying to do and that it's principled and that it's about good process...

It is perhaps not surprising that the judges interviewed would be interested in the research, as those who were not are likely to have declined to participate. Sentencing was an important issue to many of those interviewed, a task that makes up a lot of their work, particularly in the County Court, and generates a deal of attention and public comment. Several judges appreciated the opportunity to discuss the topic with one describing it as 'therapeutic' and some becoming quite animated in their discussion:

[Discussing those who criticise the IS model]: [Yelling] ...What do they think we are, fuckwits? I mean for God's...Sorry, I'm going to lose my temper. I'm so sick of this! I've been doing this for-fucking-ever! It's like we have no expertise.

Initially some judges were rather reserved. They gave short, direct answers,²⁵⁹ a contrast to the expansive responses given by other interviewees to the deliberately broad questions. As the interviews progressed, however, the responses became more detailed and the exchange became a discussion,²⁶⁰ rather than a more formal question and answer interview. This was especially so when judges were discussing their own cases and when asked how they had seen sentencing change during their time in practice and on the bench.

²⁵⁹ Paterson (n 179) 80.

²⁶⁰ Roberts (n 222) 113.

Several judges had prepared in advance for the interviews. One provided material for reading via email prior to the interview, others offered copies of judgments or articles they had seen or remembered and thought might be of interest. A number of judges took time before the interview to revise some of the relevant authorities or their own recent sentences. Many judges were also familiar with recent sentencing research. In particular, the Tasmanian Jury Project²⁶¹ was mentioned, unprompted, by 10 judges. Judges also discussed recent changes to sentencing and imprisonment policy in Texas,²⁶² the Nordic sentencing model²⁶³ and several made reference, in dismissive tones, to a recent article about the use of AI in sentencing.²⁶⁴

Three judges were particularly well informed about sentencing guidelines, with one displaying a very detailed understanding of their use in England and Wales. Those who were less familiar with the system were interested in knowing more; eight interviewees asked further questions about the sentencing model in England and Wales, including questions about totality, the use of lay magistrates and sentencing guidelines.

While they were generally very open in their responses and willing to give their personal opinions, judges were mindful of what they were able to say in relation to cases currently before them but more often due to the politically sensitive nature of the topic.

...sentencing, as I'm sure you appreciate, is a hot potato. We're now in an election year, any cheap shot that either political party or the media will have at judges they'll do so. So I'm perfectly happy for the purposes of serious academic debate to talk freely and frankly...[but] they're not things I would publicly state outside of the court and I wouldn't want them attributed to me or described in a way.

²⁶¹ See 'The Jury Projects' (n 201); See e.g. Kate Warner, Julia Davis, Caroline Spiranovic and Arie Freiberg, 'Why Sentence? Comparing the Views of Judges, Jurors and the Legislature on the Purposes of Sentencing in Victoria, Australia' (2019) 19(1) *Criminology & Criminal Justice* 26.

²⁶² See e.g. Derek M Cohen, 'Justice, Not Jailbreak: The Context and Consequence of the First Step Act' (2019) (14) *Victims & Offenders* 1084.

²⁶³ See e.g. Hinkkanen and Lappi-Seppälä (n 108).

²⁶⁴ Mirko Bagaric, 'Give criminals their just deserts in sentencing' *The Australian* (2 February 2018).

I know you're not going to be attributing this to me anyway, but still I need to be a little bit cautious...I'll keep it very broad and just say this...

In two instances, judges asked that the recorder be turned off for a brief period while a particular matter was discussed. Notes were made of the conversations but the details are not included in this study in any way which would identify or compromise the individual judges or judiciary as a whole. In most instances, however, judges' awareness of the sensitive nature of the topic did not stop them from commenting and their acknowledgment of the fact indicated that they were being candid in their discussion. For example, judges made comments such as: 'I probably shouldn't say this but...'; 'You know, I'll get into trouble saying this now'; 'I'm probably saying too much'; and, jokingly, 'Of course I'm only joking, better take that out!'.

These comments reflect the tone of the majority of interviews; judges gave real consideration to the questions and were willing to discuss sentencing in a detailed and open way. They shared their personal experiences and opinions in a friendly manner. Judges at all court levels encouraged me to contact them with any further questions and made a point of saying that they were happy to speak again or continue the discussion via email. Those judges who were retiring before completion of the research made sure that I had a means of contacting them and asked for any publications to be passed on to them as they were interested to see the finished research. This level of engagement and support not only made for a more pleasant interview experience but also encouraged a more free flowing discussion and frank exchange of ideas.

4. Conclusion

The chapter has outlined the research methods used in this study, specifically semi-structured interviews with members of the County Court, Supreme Court and Court of Appeal judiciary in Victoria. Gaining access to members of the judiciary was notably easier in this study than in past research projects, particularly in England where access has been limited, if not denied,

by gatekeepers. There is some indication that this position may slowly be softening, however it remains difficult to negotiate. In jurisdictions outside England and Wales, such as Canada, Scotland and Australia, judicial involvement in empirical studies appears to be easier to obtain. The experience of this study suggests that the heads of the Victorian courts do not regard themselves as gatekeepers who can dictate the involvement of individual judges in academic studies and that the judges themselves are willing, and in some cases eager, to contribute to such research.

Interviews were selected as the primary research method as they are a means of hearing directly from the judges who perform the sentencing tasks. As sentencing attracts a great deal of attention and comment from the public, media and politicians, many judges welcomed the opportunity to discuss the process and to present their own experiences. Their open and detailed responses provided an insight into a decision-making process that is often closed and not easily understood. These responses will be considered alongside case law in order to understand how IS operates. Judges' explanations of the sentencing process will be used to give context to what is said in court and written in sentencing remarks and judgments. Interview data and case law will also be compared to determine whether IS as described by judges is consistent with what is being applied in practice.

Chapter 3 The Development and Content of the Instinctive Synthesis Model

The Australian judiciary possess very broad discretion at sentencing but how that discretion should be exercised has been a source of disagreement. While some advocate for a structured approach, whereby processes of reasoning are guided and clearly articulated,²⁶⁵ the High Court has repeatedly endorsed the model of instinctive synthesis. Over a series of cases, the Court sought to ensure the widest possible discretion for sentencers, culminating in *Markarian*,²⁶⁶ which confirmed IS as the sole sentencing approach in Australia. The High Court also clarified the content of IS; sentencers are required to consider all factors relevant to the decision in a single step. This is in contrast to more structured approaches, particularly those involving a two-tiered decision-making process or step-by-step methodology.

Overview

This chapter explores IS as a doctrinal concept using case law and academic commentary. It traces the development of IS from descriptive term to sentencing model. Beginning with the introduction of the term in Victoria, it outlines the cautious application and reservations expressed in other Australian jurisdictions and the eventual endorsement of IS by the High Court. The chapter then examines the features of IS as a sentencing approach, specifically the absence of a common methodology and the prohibition on assigning specific weights to individual factors. Finally, this chapter demonstrates that, while IS is often regarded as a sentencing method, it is more than simply a decision-making procedure. IS has become a means of implementing principles that shape sentencing on a larger scale: broad judicial discretion and individualised justice.

²⁶⁵ Freiberg (n 70) 204-5.

²⁶⁶ *Markarian* (n 6).

1. Historical development

1.1. The position within the states

The term 'instinctive synthesis' originated in a now oft cited passage by Adam and Crockett JJ from the 1975 Victorian Supreme Court judgment in *Williscroft*:

...ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process.²⁶⁷

Their Honours recognised that their finding that insufficient weight had been given to the seriousness of the offence was 'essentially a subjective judgment largely intuitively reached by an appellate judge as to what punishment is appropriate'.²⁶⁸ This was taken as confirmation that the subjective judgment of the sentencer is an acceptable basis for determining the correct sentence.²⁶⁹ Their Honours also held that 'it is profitless...to attempt to allot to the various considerations their proper part in the assessment of the particular punishments',²⁷⁰ a feature that would become a key component of modern IS.

Williscroft was interpreted as a 'categorical rejection of two-tier or two-stage sentencing'²⁷¹ and strongly affirmed in *R v Morton*,²⁷² then again in *R v Young, Dickenson and West*.²⁷³ *Young* concerned the use of a two-stage approach, first determining an objectively proportionate sentence before making adjustments to that sentence. The appellate court made its position clear; such an approach is 'an artificial process...which unnecessarily limits further the discretion of a sentencing judge...[and] calculated to lead to error and injustice'.²⁷⁴ It also objected that a staged approach would expose the sentencing judge's reasoning process and

²⁶⁷ *Williscroft* (n 235) 300 (Adam and Crockett JJ).

²⁶⁸ *Williscroft* (n 235).

²⁶⁹ Brown (n 91) 31; Bagaric and Edney (n 15) 123; Neil Hutton, 'Sentencing, Inequality and Justice' in Tata and Hutton (n 80) 553.

²⁷⁰ *Williscroft* (n 235).

²⁷¹ Kate Warner, 'Sentencing review 2004-2005' (2005) 29 Criminal Law Journal 355, 360.

²⁷² *R v Morton* (1986) 23 A Crim R 433, 438.

²⁷³ *R v Young, Dickenson and West* (1990) 45 A Crim R 147 (*Young*).

²⁷⁴ *Young* (n 273) 157-158.

thereby facilitate appeals,²⁷⁵ reasoning that directly contradicted *Williscroft*.²⁷⁶ Bypassing issues of transparency and accountability, the court in *Young* fully embraced IS and stated expressly that two-stage sentencing should not be adopted in Victoria.²⁷⁷

Revealing the depth of their opposition to a staged approach, the court refused to engage with arguments that there was significant support for such an approach in English case law and commentary.²⁷⁸ It instead suggested that IS was widely accepted in Australia (a questionable claim, as demonstrated below) and that there was no authority requiring the use of a two-stage approach. That is not the same, however, as binding authority that the approach is impermissible.²⁷⁹ Similarly, identifying cases in which the High Court had the opportunity to challenge the decision in *Williscroft* but did not do so is not the equivalent of the High Court endorsing IS and prohibiting the use of other approaches, as was claimed.²⁸⁰ *Young* is an unambiguous statement by the court championing IS and rejecting the use of a two-stage sentencing process in Victoria. Yet some of the claims underpinning the decision, presented as unassailable, are far from it.²⁸¹

Other Australian jurisdictions were not as vehement in their attitudes towards IS or two-tiered sentencing. No other state or territory court of appeal so readily or repeatedly condemned the two-stage approach. In fact, some judges ‘highly experienced in sentencing at trial and on appeal’²⁸² supported the use of a stepped approach for the purpose of exposing the reasoning process for reasons of ‘social utility and public policy’.²⁸³ Even courts in South Australia,²⁸⁴ Western Australia²⁸⁵ and New South Wales, where two-tiered sentencing was not actively

²⁷⁵ *Markarian* (n 6).

²⁷⁶ *Williscroft* (n 235). See below at [1.5] for discussion of that contradiction.

²⁷⁷ *Young* (n 273) 157–158.

²⁷⁸ *Young* (n 273) 158.

²⁷⁹ Traynor and Potas (n 15).

²⁸⁰ *Young* (n 273) 152.

²⁸¹ See e.g. Chris Corns, ‘Deconstructing sentencing decision-making in Victoria’ (1990) 23 Australian and New Zealand Journal of Criminology 145.

²⁸² *Markarian* (n 6) 400 [117] (Kirby J).

²⁸³ *Pavlic v The Queen* (1995) 5 Tas R 186, 206 (Slicer J) (*Pavlic*). See also *Verschuren* (1996) 91 A Crim R 1, 5–7 (Malcolm CJ) (*Verschuren*).

²⁸⁴ See e.g. *R v Shannon* (1979) 21 SASR 442 (King CJ); *R v Golding* (1980) 24 SASR 161.

²⁸⁵ *R v Punch* (1993) 67 A Crim R 46, 63 (Anderson J) (*Punch*).

advocated,²⁸⁶ recognised that the practice had long been accepted and applied.²⁸⁷ While some considered the differences between the two approaches a matter of semantics,²⁸⁸ the more common approach was to regard sentencing as an instinctive process and a stepped process not as a requirement but not as an error either.²⁸⁹ As such, it was permissible to consider objective and subjective factors at separate stages²⁹⁰ and to use a starting point when calculating a sentence.²⁹¹ Many cases considering IS and the two-tier approach related to the identification of discounts to sentence.²⁹² The position was clarified through legislation²⁹³ but confusion and inconsistencies relating to the use of IS and staged sentencing remained.

1.2. “Guidance” from the High Court

Traditionally there has been limited High Court involvement in sentencing matters and the Court has refrained from commenting on the mechanics of sentencing.²⁹⁴ Any guidance it did offer failed to adequately clarify the IS/two-tier debate. This left state and territory courts to attempt to find a balance suitable for their jurisdiction. It was not until 2005 that the High Court resolved the issue in favour of IS.

*Veen v The Queen (No 2)*²⁹⁵ provides an example of the general sentencing guidance from the High Court, advice that was of limited assistance in establishing a methodology. The decision confirmed proportionality as the primary aim of sentencing and provided guidance in that it prioritised one amongst the many purposes of sentencing. The Victorian Court of Appeal held that this was not suggesting the use of a structured approach.²⁹⁶ Conversely, Kirby J

²⁸⁶ See e.g. *R v Cuthbert* [1967] 2 NSW 329; *R v Valera* [2002] NSWCCA 50, [7]-[8] (Meagher JA, Wood CJ at CL and Bell J agreeing) (*Valera*).

²⁸⁷ *R v Lawson* (1997) 98 A Crim R 463.

²⁸⁸ *Valera* (n 286) [9] (Meagher JA); *Punch* (n 285) 54 (Anderson J); *R v Mulholland* (1991) 102 FLR 465, 474 (Gallop J) (*Mulholland*).

²⁸⁹ See e.g. *R v Thomson* (2000) 49 NSWLR (Thomson); *R v Raggett* (1990) 50 A Crim R 41 (*Raggett*).

²⁹⁰ *Thomson* (n 289) 396 [57].

²⁹¹ *McKenna v The Queen* (1992) 63 A Crim R 452.

²⁹² For example for pleas of guilty (*Pavlic* (n 283); *Verschuren* (n 283) and assisting authorities (eg *R v Nagy* (1991) 57 A Crim R 64).

²⁹³ E.g. *Sentencing Act 1991* (Vic) s 6AAA. For further discussion of reconciling quantifying discounts with the use of IS see below at [2.3.1].

²⁹⁴ Richard Fox, ‘Sentencing in the Garden of Eden’ (2006) 32 Monash University Law Review 4; Ian Leader-Elliot, ‘Instinctive Synthesisers in the High Court’ (2002) 26(5) Criminal Law Journal 5, 8.

²⁹⁵ *Veen (No 2)* (n 60).

²⁹⁶ *Young* (n 273) 157.

stated with equal confidence that the same judgment 'clearly envisaged such a "two-stage" or "two-tiered" approach' determining the outer limit then applying mitigating factors.²⁹⁷ Similarly, Spigelman CJ in *NSW* turned to the principle of proportionality as set out in *Veen (No 2)* to illustrate the long tradition of two-tiered sentencing and how an objective, proportionate sentence can be used to set upper and lower sentencing limits.²⁹⁸ Further clarification by the High Court as to the appropriate methodology was clearly needed as state practices continued to diverge.

Justice McHugh was the first member of that Court to address the conflict. In his dissenting judgment in *AB v The Queen*²⁹⁹ his Honour held that the use of an objectively determined sentence adjusted according to the offender's circumstances risks placing too much weight on the objective offence and 'almost always invites error.'³⁰⁰ It was not until *Wong v The Queen*,³⁰¹ however, that the matter was considered in any great detail. In a discussion of guideline judgments, Gaudron, Gummow and Hayne JJ engaged directly with the concept of IS, which was explained for the first time by the court as 'the task of the sentencer...to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all.'³⁰² The intermediate appellate courts of Australia were said to be 'clearly against adopting two-stage sentencing and favour [of] the instinctive synthesis approach.'³⁰³ As the above cases demonstrate, this was not necessarily accurate and the claim was a 'highly unstable foundation of judicial reasoning'.³⁰⁴

In spite of this, their Honours supported IS and held that a two-stage approach that attributes specific numerical or proportionate value to individual factors constitutes a departure from

²⁹⁷ *Markarian* (n 6) 398 [111] (Kirby J) (citations omitted). See discussion of proportionality as a limiting factor in Chapter 1.

²⁹⁸ *Whyte* (n 60).

²⁹⁹ *AB* (n 48).

³⁰⁰ *AB* (n 48) 121 [16].

³⁰¹ *Wong* (n 10).

³⁰² *Wong* (n 10) 611 [75].

³⁰³ *Wong* (n 10) 611 [76] (citations omitted).

³⁰⁴ *Markarian* (n 6) 400 [118].

principle and should not be adopted.³⁰⁵ It is important to note, however, that their Honours were careful to state that the two-tiered process ‘*may be quite wrong*’,³⁰⁶ suggesting that a structured approach is not inherently inconsistent with IS and could be appropriate in some circumstances. The comments should also be understood within the context of the judgment. The High Court held that the guideline judgment in question extended beyond the jurisdiction of the NSW Court of Criminal Appeal (NSW CCA) to become quasi-legislative and was thus unconstitutional. The Court was critical of the prescriptive nature of the sentencing categories, ranges and the focus on results rather than a process of reasoning or principle.³⁰⁷ It was concerned about the imposition of structure and mathematics, but, above all, it was keen to emphasise the importance of broad judicial discretion at sentencing. Discretion and flexibility were the priorities and it may be for these reasons that the Court did not wish to completely exclude any form of decision-making from the judicial repertoire, even sequential reasoning.

Despite the statements in favour of IS and opposing two-stage sentencing, confusion continued. As Gleeson CJ and Callinan J in *Wong* did not address the controversy and Kirby J indicated support for a stepped process,³⁰⁸ there remained no definitive statement by a High Court majority. The states were forced to continue their attempts to reconcile the methodologies, a task made all the more difficult given the diverging views revealed progressively by the High Court. The NSW CCA accepted IS as the ‘correct general approach’, though the separate consideration of objective circumstances could also be justified.³⁰⁹ The SA CCA refused to find error with a staged approach and continued to require the identification

³⁰⁵ *Wong* (n 10) 611 [74].

³⁰⁶ *Wong* (n 10) 611 [75] (emphasis added).

³⁰⁷ *Wong* (n 10) 612-614 [78]-[80].

³⁰⁸ *Wong* (n 10) 622 [102].

³⁰⁹ *Thomson* (n 289) 396 [57] (Spigelman CJ); *R v Sharma* (2002) 54 NSWLR 300, 305 [24] (*Sharma*); See also *Whyte* (n 60).

of sentencing discounts, thereby applying a two-tier process.³¹⁰ Crucially, it noted:

The practice does not give rise to any distortion of the sentencing process or invite error...The fears expressed by McHugh J in *AB* and in the joint judgment in *Wong* have not come to fruition in the 10 years that the practice has existed in this State.³¹¹

The intermediate appellate courts found ways to balance the two approaches that did not compromise proportionality or result in any factors being unfairly weighted or overlooked. They,³¹² and members of the High Court,³¹³ recognised though that it was for the High Court to resolve any inconsistencies between IS and a two-stage approach in an appropriate case that allowed for a full debate. That case arrived in the form of *Markarian v The Queen*.

1.3. *Markarian v The Queen*

In *Markarian* the High Court considered directly the question of whether staged sentencing or IS should be applied by Australian courts. The NSW CCA³¹⁴ had applied a two-tier process when re-sentencing an offender. First, a starting point was determined using a single factor related to the relative seriousness of the offence (the quantity of drug trafficked), with reference to the maximum penalty. The sentence was then adjusted according to aggravating and mitigating factors. The decision highlighted the challenges that first instance and appellate courts face when attempting to apply IS. Justice Hulme, with whom Heydon JA and Carruthers AJ agreed, highlighted the difficulty in understanding the reasoning process of the sentencing judge, observing that 'No reasons were advanced in support of the 3½ years figure or to explain why it was not 5, or 7 or 10 years.'³¹⁵ He suggested that the figures, as in many other

³¹⁰ *R v Powell* (2001) 126 A Crim R 137, 140 (Prior J) (*Powell*); See also *R v Place* (2002) 81 SASR 395, 424-425 [80]-[83] (Doyle CJ, Prior, Lander and Martin JJ) (*Place*).

³¹¹ *Place* (n 310) 424-5 [80] (citations omitted); *R v Caplikas* [2002] 134 A Crim R 544, 548-9 [19] (Perry J).

³¹² *Whyte* (n 60) 277 [159] (Spigelman CJ); *Powell* (n 310) 140 (Prior J).

³¹³ *Wong* (n 10) 622 [102] (Kirby J); *Cameron* (n 33) 351 [41] (McHugh J).

³¹⁴ *R v Markarian* (2003) 137 A Crim R 497 (*Markarian NSWCCA*).

³¹⁵ *Markarian NSWCCA* (n 314) 505 [34] (Hulme J).

sentencing appeals, appeared to have been ‘plucked out of the air’.³¹⁶ His Honour instead spoke strongly in favour of exposing the decision-making behind the sentence and ‘reasoning to a conclusion’.³¹⁷ It is not sufficient ‘simply to say ‘His Honour’s instinctive synthesis was manifestly wrong. My instinctive synthesis leads to the view his starting point should have been 5 (or 7 or 10) years.’³¹⁸

The judgment of the NSW CCA demonstrates not only a lack of universal support for IS within the Australian jurisdictions, but that, as Hulme J admitted, some judges found it difficult to understand how IS was to be applied.³¹⁹ IS is often said to be a skill arrived at through experience.³²⁰ Justice Hulme’s comments, however, reveal that even senior members of the judiciary, very experienced in both first instance and appellate sentencing, can and do still struggle to make sense and practical use of IS.

1.3.1. The High Court decision

The decision of the High Court in *Markarian* has been described as the ‘high water mark of judicial examination of sentencing methodology’.³²¹ The majority held that the NSW CCA had placed too much weight on a single factor, which had resulted in an excessive starting point. In doing so, the High Court affirmed and refined the notion of IS.

Five of the six sitting judges supported the use of IS but refrained from declaring it a universal rule.³²² While the joint judgment of Gleeson CJ, Gummow, Hayne and Callinan JJ did not explore exactly what is meant by IS, McHugh J used cognitive psychology and jurisprudential

³¹⁶ *Markarian* NSWCCA (n 314) 505 [33] (Hulme J).

³¹⁷ *Markarian* NSWCCA (n 314) 505 [33]-[36] (Hulme J).

³¹⁸ *Markarian* NSWCCA (n 314) 505 [35] (Hulme J).

³¹⁹ See *Markarian* (n 6) 401 [122] (Kirby J citing *MacDonnell* (2002) 128 A Crim R 44, 54 [59] (Wood CJ at CL for the Court); Howie, ‘Criminal Law Update 2004’ (2004) 7 Judicial Review 89, 103–104.

³²⁰ See discussion in Chapter 4.

³²¹ Terry Hewton, ‘Instinctive Synthesis, Structured Reasoning, and Punishment Guidelines: Judicial Discretion in the Modern Sentencing Process’ (2010) 31(1) The Adelaide Law Review 79, 84.

³²² *Markarian* (n 6) 373 [36] (Gleeson CJ, Gummow, Hayne and Callinan JJ), see also 378 [53] (McHugh J).

history to examine and mount an extensive argument in favour of the model.³²³ Both judgments drew a distinction between IS and a two-stage approach. The joint judgment opposed a two-step approach that would ‘add and subtract item by item from some apparently subliminally derived figure’ and thereby reduce the sentencing process to a mathematical exercise.³²⁴ Justice McHugh’s consideration of staged sentencing was more detailed and centred around three criticisms.³²⁵ Briefly, the first was that the use of a starting point based on objective factors gives weight to only some sentencing purposes, such as retribution and deterrence, and therefore does not allow sufficient individualisation. There is a notable lack of empirical evidence to support this claim.³²⁶ It also stands in direct opposition to the comments of the SA CCA in *Place* outlined above and prior concerns that the two-stage approach produces sentences that are too lenient.³²⁷

Second, McHugh J suggested that the appearance of ‘objectivity and unfolding reason’ within a two-tier approach is illusory.³²⁸ A two-tiered approach was said to involve value judgments in relation to the starting point and quantification of increments and decrements. Each of these judgments was regarded as a potential source of error. Justice McHugh, however, failed to acknowledge that the same value judgments are made during IS, albeit in a less transparent manner. Finally, it was suggested that it is difficult, if not impossible, to reconcile a two-tier approach, particularly the ‘additions and subtractions’, with the principle of proportionality.³²⁹

The proportionality criticism, and all of the above criticisms, reflect a very narrow understanding of structured sentencing. Justice McHugh’s judgment, and to a lesser extent the joint judgment, seem to address only one particular two-tier approach, one that involves a

³²³ Richard Edney, ‘Still Plucking Figures Out of the Air?: Markarian and the Affirmation of the Instinctive Synthesis’ (2005) 1(2) High Court Quarterly Review 50, 54.

³²⁴ *Markarian* (n 6) 375 [39].

³²⁵ These will be addressed in detail below at [2.3].

³²⁶ Edney and Bagaric (n 153); Brown (n 91) 37.

³²⁷ *Young* (n 273).

³²⁸ *Markarian* (n 6) 380-1 [56]-[58].

³²⁹ *Markarian* (n 6) 386 [69]. This argument is explored in greater detail below at [2.3].

starting point.³³⁰ The judgment has been described as ‘unconvincing hyperbole’.³³¹ It fails to recognise what will be demonstrated below and in Chapters 7 and 8; that structured sentencing need not involve a series of mathematical calculations. When applied to a wider understanding of structured sentencing, many of the criticisms are no longer valid.

The discussion of two-tiered sentencing in the joint judgment was more measured. As in *Wong*, the judges refrained from absolutely prohibiting a structured approach. In fact, though IS is the preferred approach,

[t]hat is not to say that in a simple case in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden...The law strongly favours transparency...There may be occasions when some indulgence in an arithmetical process will better serve these ends.³³²

The majority continued to recognise that there may be instances when a stepped process is appropriate. The position in *Wong* was ‘watered down’³³³ so that sequential reasoning and quantification of discounts are no longer an error.³³⁴ The majority were not, however, as Anderson³³⁵ suggests, searching for a middle ground or flexible approach which may be either sequential or instinctive. They remained heavily in favour of IS, with arithmetical or stepped processes to apply only in exceptional circumstances. Precisely when these exceptional circumstances arise is not clear. According to McHugh J, discounts can be quantified where the factor relates to the administration of justice and not to a sentencing purpose.³³⁶ The joint judgment instead refers to the complexity of the case but offers no guidance as to what an

³³⁰ See below at [2.2.1] for a discussion of a starting point approach.

³³¹ Ashworth (n 146) 450.

³³² *Markarian* (n 6) 375 [39].

³³³ Warner (n 271) 360.

³³⁴ *Markarian* (n 6) 307 [24] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

³³⁵ John Anderson, ‘Standard Minimum Sentencing and Guideline Judgments: An Uneasy Alliance in the Way of the Future’ (2006) 30 *Criminal Law Journal* 203, 212.

³³⁶ *Markarian* (n 6) 387 [74]

appropriate 'simple' case may be, other than to say that *Markarian* was not such a case.³³⁷ The lack of clarification means that the judgment offers little methodological guidance.³³⁸ It is, however, 'a powerful restatement of the wide discretion',³³⁹ confirming that judges retain the relative freedom of IS, as well as the scope to adopt some structure, though only in exceptional circumstances. Still, nothing is completely off limits.

Not all members of the court were as supportive of IS. Justice Kirby delivered a comprehensive critique of the model, advocating instead greater exposure of the reasoning process. Transparency was the central concern of the judgment and is explored in more detail in Chapter 5. Briefly, Kirby J's view was that IS discourages the examination of the logic and rationality of sentencing decisions and impedes accountability in judicial decision-making.³⁴⁰ Though carefully explained and powerfully argued, Kirby J's call for more detailed explanations of reasoning went largely unheard and *Markarian* is understood as the High Court's endorsement of IS over structured sentencing. It effectively put an end to any methodological debate and IS was adopted as the preferred method across state and territory courts. Occasional sentences arrived at using a two-stage approach have, however, been held not to constitute error, even when involving a starting point and quantified reductions for factors such as guilty plea, age, possibility of reform and entrapment.³⁴¹ This suggests that some judges at least continue to find value in a structured approach.

1.4. Post-Markarian

Following *Markarian*, the High Court has continued to affirm the primacy of IS and preserve the widest possible judicial discretion at sentencing, even in cases that do not directly concern sentencing methodology. As a result, IS has become almost synonymous with broad discretion and minimal restrictions.

³³⁷ *Markarian* (n 6) 375 [39].

³³⁸ Ross Abbs, 'Markarian v The Queen (2005) 228 CLR 357' [2008] *The Newcastle Law Review* 135, 142.

³³⁹ *Moore v The Queen* [2005] NSWCCA 407 [39].

³⁴⁰ Fox (n 294) 19; *Markarian* (n 6) 403-4 [129]-[131].

³⁴¹ See e.g. *Nannup v Western Australia* [2011] WASCA 257, *Dennison v Tasmania* [2005] TASSC 54, *R v Sladic* (2005) 92 SASR 36.

The High Court's approach has been to read down or dismiss any mechanism that might impose structure upon the IS process or limitations on discretion. In *Hili v R*,³⁴² for example, sentencing ranges were characterised as 'no more than yardsticks' that 'do not fix the upper or lower limits of sentencing discretion'.³⁴³ Similarly, in *Muldrock v The Queen* maximum penalties and statutory standard non-parole periods were held to be merely 'legislative guideposts'. They are not of 'primary, let alone determinative, significance' and therefore do not require or permit a two-staged approach.³⁴⁴ Then again in *Dalgliesh v The Queen*³⁴⁵ the court held that current sentencing practices do not limit available sentences or judicial discretion. The court in these cases was simultaneously championing IS as the best means of delivering individualised justice and defending the broad space within which it operates.

The High Court's commitment to IS and wide judicial discretion influenced not only sentencing methodology but appeals and the conduct of sentencing hearings. In addition to restricting the significance of sentencing ranges, the judgment in *Hili* reinforced the overlap between IS and manifest excess and inadequacy. Denying that manifest error is 'fundamentally intuitive', the court nevertheless adopted the language of IS when stating that '[W]hat reveals manifest excess, or inadequacy, of sentence is consideration of all of the matters that are relevant to fixing the sentence'.³⁴⁶ It also held that it was not necessary or possible to provide extensive reasons when finding manifest error and that failing to catalogue reasons for increasing a sentence does not constitute error.³⁴⁷

The neutralising of approaches that may restrict IS or broad discretion has resulted in changes to practice. The case of *Barbaro v The Queen*³⁴⁸ provides an example. Overturning the Victorian case of *R v MacNeil-Brown*,³⁴⁹ the High Court ruled that submissions by the

³⁴² *Hili* (n 11).

³⁴³ *Hili* (n 11) 537 [54] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³⁴⁴ *Muldrock* (n 13) 131-2 [26]-[27].

³⁴⁵ *Dalgliesh* HC (n 12) (further discussion in Chapter 7).

³⁴⁶ *Hili* (n 11) 539 [60] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³⁴⁷ *Hili* (n 11) 538-9 [59]-[61]; *Barbaro* (n 14) 71 [28] (French CJ, Hayne, Kiefel and Bell JJ).

³⁴⁸ *Barbaro* (n 14).

³⁴⁹ *R v MacNeil-Brown*; *R v Piggott* (2008) 20 VR 677 (*MacNeil-Brown*).

prosecution as to the range of available sentences were wrong in law. Attempting to fix the bounds of an appropriate sentence was held to wrongly suggest that sentencing is a mathematical exercise. This reinforced the disapproval and perceived constraint of numerical guidance first conveyed in *Wong*. Even the suggestion that an appellate court could determine the limits of an appropriate sentencing range was dismissed. Just the mention of an 'available range' was said to be apt to mislead.³⁵⁰

As in *Hili*, the judgment in *Barbaro* enables sentencers to simply deploy the terms 'manifestly excessive' and 'manifestly inadequate' in place of giving a more complete explanation of their decision-making. Bagaric suggests that the 'obscurity of sentencing outcomes and opaqueness of the instinctive synthesis'³⁵¹ are key to the court's reasoning here, an example of the principles underlying IS spreading beyond methodology. Excusing sentencers from exposing their reasoning process is consistent with both IS and protection against the fettering of judicial discretion.³⁵² The Court's judgment ensures that any decisions as to range remain within the judge's control and that the sentence is the sole responsibility of the judge.³⁵³

On a practical level, the result has been an end to discussions between the prosecution and defence about the appropriate range and thus a reduction in guilty pleas.³⁵⁴ There is also the possibility, raised by an interviewee in this study, that these changes may contribute to the forming of unrealistic expectations by victims about possible sentences. As they no longer hear the prosecution outline the available range, victims may experience greater disappointment in the ultimate outcome.

³⁵⁰ *Barbaro* (n 14) 71 [28] (French CJ, Hayne, Kiefel and Bell JJ).

³⁵¹ Bagaric (n 15) 98.

³⁵² See Kate Warner, 'Sentencing Review 2013-2014' (2014) 38 Criminal Law Journal 364, 366 and 371.

³⁵³ Arie Freiberg, 'The Road Well Traveled in Australia: Ignoring the Past, Condemning the Future' in Tonry (n 106) 433; *Barbaro* (n 14) 74 [41] (French CJ, Hayne, Kiefel and Bell JJ).

³⁵⁴ Bagaric (n 351) 98.

1.5. Evolution from *Williscroft*

According to Warner,³⁵⁵ *Hili* and *Barbaro* reflect the High Court's conservative approach to sentencing, favouring individualism over consistency and prioritising broad, unfettered discretion. As Krasnostein³⁵⁶ observes though, IS as understood by the court in *Williscroft* may not have been intended to support such high individualism. Justices Adam and Crockett recognised that their own decision was 'essentially a subjective judgment largely intuitively reached by an appellate judge as to what punishment is appropriate'.³⁵⁷ Some have suggested that this means that sentencing cannot be undertaken in systematic manner and is the result of subjective judgment.³⁵⁸ Such an interpretation, however, and many of the interpretations of IS employed by the courts in the cases above, involves a selective reading of the judgment.

As Fox observes of the interpretation of IS in *Young*:

The opaqueness produced by this 'instinctive synthesis' technique of arriving at a sentence was intended to deter the bringing of sentencing appeals by those who sought to attack the penalty by unravelling the individual threads of reasoning which supported it and challenging the weight applied to particular factors.³⁵⁹

This understanding of IS stands in direct contradiction to the comments by Adam and Crockett JJ that

it is not sufficient for a sentence to avoid subsequent review that it can be said of it that it is the product of what is admittedly a wide discretion conferred upon a judge who can be shown to have given some consideration to all relevant elements.³⁶⁰

³⁵⁵ Warner (n 352) 371.

³⁵⁶ Krasnostein (n 210) 39 citing *AB* (n 48).

³⁵⁷ *Williscroft* (n 235) 300 (Adam and Crockett JJ).

³⁵⁸ Brown (n 91) 31; Bagaric and Edney (n 269) 123; Hutton (n 269) 553.

³⁵⁹ Fox (n 294) 16.

³⁶⁰ *Williscroft* (n 235) 300 (Adam and Crockett JJ).

The *Williscroft* judgment and understanding of IS have also been (mis)interpreted as precluding guidance on the exercise of discretion. The court in *Williscroft* endorsed the use of guidance from several sources: appellate guidance as to when general deterrence should be given particular importance;³⁶¹ 'statistical data' relating to sentences for similar offences;³⁶² and judges' 'knowledge of sentences for the same or similar offences which is derived from personal experience or any other source.'³⁶³

Williscroft should not be understood as promoting completely unconstrained discretion, yet this is how IS has been employed. As the state, territory and High Court cases above demonstrate, there has been a departure from IS as originally conceived and applied. It is now consistently associated with the need for wide discretion and is understood as discouraging, if not precluding, any use of structure, the comprehensive exposure of reasons and any suggestion of numbers except in the final sentence. IS has become more than simply a means of describing the sentencing process. What began as a descriptive statement in *Williscroft* has become a methodology, transformed into the embodiment of principles of judicial discretion and individualisation.

2. Essential features of IS

IS involves the consideration of all relevant factors and the making of a value judgment as to the appropriate sentence in a single step.³⁶⁴ This description offers little guidance as to the actual process to be used in determining a sentence. It would appear that the use of open and general descriptions of IS are a deliberate means of maintaining broad judicial discretion. Instead of addressing what judges may or even should do, IS is instead described predominantly in the negative. It does not involve a common methodology. It does not allow for the allocation of specific values to individual factors. And, most importantly, it is regularly

³⁶¹ *Williscroft* (n 235) 299 (Adam and Crockett JJ).

³⁶² *Williscroft* (n 235) 301 (Adam and Crockett JJ).

³⁶³ *Williscroft* (n 235) 300-1 (Adam and Crockett JJ).

³⁶⁴ *Muldrock* (n 13) 131-2 [26] (adopting McHugh J in *Markarian* (n 6)).

defined in opposition to two-tiered sentencing; it does not involve a stepped or structured approach.

2.1. Absence of methodology and weighing of factors

IS involves not only the absence of a specific approach but also the prohibition of a systematic process. As the cases above demonstrate, the sentencing decision cannot be broken down into component parts,³⁶⁵ is not a 'process admitting of mathematical precision'³⁶⁶ and does not involve addition and subtraction for each factor.³⁶⁷ IS does not allow for the identification or allocation of a particular value to individual sentencing factors.³⁶⁸ Sentencers are encouraged to state the factors taken into consideration but any weighting is prohibited.³⁶⁹ Though attributing weight to individual factors does not constitute a specific sentencing error, it is considered as part of the broader grounds of appeal; manifest excess or manifest inadequacy.³⁷⁰

As noted above, exceptions to this prohibition have been created through statute and have been recognised by the courts, for example in relation to reductions for guilty pleas,³⁷¹ assistance to authorities³⁷² and in 'simple' cases where some degree of quantification may be permitted.³⁷³ Specifying a reduction based on a lesser role in offending or the length of the period of offending, however, is not permissible.³⁷⁴ The difficulty in knowing when it is or is not

³⁶⁵ *Barbaro* (n 14) 72 [34] (French CJ, Hayne, Kiefel and Bell JJ).

³⁶⁶ *Pearce* (n 62) 624 [46] (McHugh J, Hayne J and Callinan J).

³⁶⁷ *Markarian* (n 6) 385-6 [69] (McHugh J).

³⁶⁸ Sentencing Advisory Council (n 73) 13.

³⁶⁹ *Terrick* (n 73) 480 [5]; *Markarian* (n 6) 380-381 [56]-[58] (McHugh J).

³⁷⁰ Sentencing Advisory Council, *Sentence Appeals in Victoria: Summary Paper* (2012) 10.

³⁷¹ See e.g. *Markarian* (n 6) 370 [23] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Cameron* (n 33) 60-61 [66]-[68] (Kirby J). See further discussion of guilty plea discount below.

³⁷² See e.g. *Markarian* (n 6) 370 [24] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *R v Gallagher* (1991) 23 NSWLR 220, 230 (Gleeson CJ) (*Gallagher*); *R v Cartwright* (1989) 17 NSWLR 243; *Cottee v The Queen* [2010] VSCA 285, [25].

³⁷³ *Markarian* (n 6) 407 [138] (Kirby J); 370 [23] and 373 [32] (Gleeson CJ, Gummow, Hayne and Callinan JJ) [23]; *Gallagher* (n 372) 230 (Gleeson CJ); *Chivers v Western Australia* [2005] WASCA 97 [27] (Steytler P (McLure JA agreeing)) (*Chivers*). What constitutes a 'simple' case remains unclear, courts tend to discuss the matter in the negative, stating that the case before them is not simple, see e.g. *R v Dashti* [2016] NSWCCA 251 [43].

³⁷⁴ *Markarian* (n 6) 388 [75] (McHugh J).

appropriate to articulate or attribute value means that sentencers generally refrain from doing so.³⁷⁵ Instead, it is simply accepted that

the influences of the different factors to be taken into account in each case are infinitely various...in many cases, the different factors overlap, and it would be almost impossible for a judge to identify the precise influence which any one factor has had upon the sentence ultimately imposed.³⁷⁶

The result is a model which, rather than encouraging transparency and consistency of approach, may conceal and normalise disparity.³⁷⁷

2.2. Opposition to two-tiered sentencing

Not only does IS exclude a common methodology, a defining feature of the model is the absence of structure.³⁷⁸ Australian sentencing has been characterised as a conflict between IS and a two-stage, or structured, approach.³⁷⁹ It is often unclear though exactly what a two-tier approach involves. The interchangeability of terms and the tendency to group all forms of structured sentencing together obscures the significant variation among the approaches. It also means that more subtle and flexible forms of guidance are often equated with a rigid mathematical approach and thus automatically dismissed by those seeking to defend broad discretion.³⁸⁰

³⁷⁵ Peter McClellan, 'Sentencing in the 21st Century' (Crown Prosecutor's Conference, Hunter Valley, 10 April 2013) 17.

³⁷⁶ *R v Beavan* (NSWCCA, Hunt CJ at CL, 22 July 1991) [14] (*Beavan*).

³⁷⁷ Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualist Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76 *Law and Contemporary Problems* 265, 269. See discussion of disparity and consistency in Chapter 6.

³⁷⁸ See e.g. Farmer, Parsons and Bagaric's definition of IS as involving 'the making of a global judgment without recourse to a step-wise process that demarcates precisely how any given factor has influenced the judgment'; Farmer et al (n 32) 322.

³⁷⁹ Bell (n 8) citing Arie Freiberg, 'Twenty Years of Changes in the Sentencing Environment and Courts' Responses' (Sentencing: Principles, Perspectives and Possibilities Conference, Canberra 10-12 February 2006) 9.

³⁸⁰ See responses reactions from interviewees to the possibility of a structured approach in Chapter 8.

2.2.1 What is meant by two-tiered sentencing?

'Two-tier', 'two-stage', 'two-step', 'sequential', 'structured', 'stepped' and 'staged' are all terms that have been used to describe approaches to sentencing which contravene IS. These terms appear to have been used loosely and interchangeably by the courts³⁸¹ and commentators.³⁸² This practice has led to definitional difficulties as the terms are used in a number of different contexts to refer to different processes.³⁸³ It also masks the variations that exist between the models, making criticism of structured sentencing easier as the details and nuances are lost.

The terms 'two-tier', 'two-step' and 'two-stage' sentencing appear to refer to the same process. For simplicity, the term 'two-tier' will be used throughout this thesis as it is the most commonly used of the three expressions. Yet even within the two-tier category, there are variations which have not been adequately recognised. Traynor and Potas³⁸⁴ identify three different forms of two-tier sentencing. In the first, the sentencer considers the objective circumstances of the offence and uses this as the basis for a sentence proportionate to the seriousness of the offence (tier one). They then consider the individual circumstances of the offender, making adjustments according to aggravating and mitigating factors, in order to arrive at a suitable sentence (tier two).³⁸⁵ This process accords with McHugh J's understanding of two-tier sentencing, as outlined in *AB*³⁸⁶ and *Markarian*,³⁸⁷ and may be referred to as 'objective two-tier' sentencing.³⁸⁸

The second method operates in a similar manner, specifying a proportionate sentence and then adjusting that sentence. However, the sentence at tier one is to be proportionate to both the circumstances of the offence *and offender*. At tier two, a single adjustment is made with

³⁸¹ *Markarian* (n 6) 401 [122] (Kirby J citing *R v Garforth* (NSWCCA, Gleeson CJ, McInerney and Mathews JJ, 23 May 1994) 6; *R v Way* (2004) 60 NSWLR 168, 190 [112] (*Way*); cf *Thomson* (n 289) 396 [57]; *Sharma* (n 309) at 305 [24], 307 [31].

³⁸² Brown (n 91) 30.

³⁸³ See examples outlined in *Thomson* (n 289) 397 [59] Spigelman CJ; Traynor and Potas (n 15).

³⁸⁴ Traynor and Potas (n 15).

³⁸⁵ See e.g. Brown (n 91) 30 and 32; Corns (n 281); Dean Mildren, 'Intuitive Synthesis or the Structured Approach?' (2006) 2(1) International Journal of Punishment and Sentencing 1, 2; Bagaric and Pathinayake (n 156) 407.

³⁸⁶ *AB* (n 48) 121 [16].

³⁸⁷ *Markarian* (n 6) 377-8 [51].

³⁸⁸ Referred to by Traynor and Potas (n 15) as 'broad two tier' approach.

reference to one particular factor. The most common example is a discount applied in recognition of a guilty plea. Specific discounts have also been applied for assisting authorities and forfeiting privileges such as extradition rights.³⁸⁹ This ‘discount two-tier’ process necessarily involves the assignment of a valuation to an individual factor and is therefore more overtly mathematical than the objective two-tier approach.³⁹⁰ The latter need not involve the articulation of a value for each factor as adjustments can be made collectively rather than for each factor.

Finally, the ‘starting point two-tier’ process involves the articulation at tier one of a notional starting point, reflecting the seriousness of the offence. Increments and decrements are applied at tier two according to the aggravating and mitigating factors in operation.³⁹¹ The courts have held that it constitutes a legal error to begin using an objective starting point such as the maximum penalty, amount of a drug, number and seriousness of prior offences, a numerical guideline, co-offender’s sentence, statutory non-parole period or presumption that a particular sanction must be imposed.³⁹² Opposition to the starting point process has been extended to preclude the use of a sentencing tariff, range or set of comparable sentences as the basis for the sentencing decision.³⁹³

All of these approaches fall under ‘two-tier sentencing’. The uniting feature is the process of sequential reasoning used to move from one provisional preliminary sentence, incrementally or in one further step, to the final sentence. This contrasts with the process of IS in which all of the relevant factors and their relative weights are assessed and balanced in a single step. Two-tier approaches can be regarded as a form of ‘staged’ sentencing but staged approaches, as a broader category, may be less prescriptive in terms of process and do not necessarily

³⁸⁹ See review of authorities in *Thomson* (n 289) 397 [59] (Spigelman CJ).

³⁹⁰ *Traynor and Potas* (n 15).

³⁹¹ *Bell* (n 8).

³⁹² *Freiberg* (n 353) 433. See also *McPherson v R* [2014] VSCA 59 [33]-[34] (Maxwell PJ) (*McPherson*); *DPP (Cth) v Gregory* (2011) 83 ATR 336, 345-6 [32]-[36] (*Gregory*).

³⁹³ See e.g. *Trajkovski v R* [2011] 32 VR 587, 597 [62]-[65] (Weinberg JA) (*Trajkovski*). See discussion of ranges in Chapter 6.

involve to a two-tiered approach.³⁹⁴ As the High Court has recognised, a staged approach ‘may mean no more than that the reasoning adopted by the sentencer can be seen to have proceeded sequentially’³⁹⁵ and does not constitute legal error. Collectively these more flexible staged approaches, and the two-tier processes, can be categorised as ‘structured sentencing’ as they involve the consideration of relevant sentencing factors and principles in a systematic manner, rather than all at once.

2.3. Opposition to structured sentencing

IS is regularly explained in opposition to structured sentencing. The criticism of structured sentencing used in these explanations, however, often overlooks the diversity of structured sentencing approaches.³⁹⁶ Instead, it tends to be based on the assumption that structure is synonymous with the two-tier process. In examining the criticisms, it becomes apparent that many can be answered or simply do not apply when the broader understanding of structured sentencing is employed. It may be the case, as the courts have said, that IS is incompatible with a specific two-tiered approach, but not necessarily with other forms of structure.

The most common objections to structured sentencing were outlined by McHugh J in *Markarian*, as explained above. The objective two-tier approach is opposed on the basis that it is incompatible with the principle of proportionality. According to McHugh J, it is an error to attempt to fashion a notional sentence based on only some of the circumstances and without reference to the offender’s criminality.³⁹⁷ Beginning with an objective sentence supposedly places too much emphasis on the objective gravity of the offence,³⁹⁸ prioritising retributive and deterrent theories of sentencing at the expense of mitigation and rehabilitation.³⁹⁹ It is also

³⁹⁴ See e.g. *Trajkovski* (n 393) 598 [68] and 600 [82] (Weinberg JA); *Markarian* (n 6) 373-5 [36]-[39] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

³⁹⁵ *Markarian* (n 6) 370 [24] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

³⁹⁶ See Chapter 7 for discussion of structured sentencing models.

³⁹⁷ *Markarian* (n 6) 378-9 [53] (McHugh J). This situation has now been altered in Victoria with the introduction of standard sentencing, (see discussion in Chapter 7).

³⁹⁸ *AB* (n 48) 135 [65].

³⁹⁹ *AB* (n 48) 131-2 [54]; *Markarian* (n 6) 378-9 [53]-[54].

said to be an artificial process and one which is prone to error. Justice McHugh suggests that a sentencer applying an objective two-tier approach is unlikely to arrive at a proportionate sentence and asks:

What happens if the judge concludes that the result is not proportionate to the offence? It would be almost a miracle if it was. If the judge tinkers with the quantum of each component in the sentence to achieve a result compatible with the concept of proportionality, the two-tier structure is meaningless, if not a charade.⁴⁰⁰

As explained in Chapter 1, proportionality is the 'fundamental principle' underpinning sentencing in Australia.⁴⁰¹ It has been interpreted as involving an assessment of the harm caused by the offence and culpability of the offender.⁴⁰² Currently there is no formal guidance as to how these are to be assessed and a number of additional factors, such as the offender's upbringing and previous convictions, have also been considered when evaluating the seriousness of the offence.⁴⁰³ Though relevant to the sentence, such individual factors do not relate to the objective seriousness of the offence and their inclusion in that part of the assessment is said to distort the principle of proportionality.⁴⁰⁴

The claim that a structured approach is irreconcilable with proportionality has been well answered by Kirby J.⁴⁰⁵ Rather than being compromised, proportionality may be used to determine the upper limits of the sentence, based on the objective circumstances.⁴⁰⁶ Adjustments may be made at step two, the purpose of which is to recognise subjective objectives such as reform and rehabilitation. The limits established in step one, however,

⁴⁰⁰ *Markarian* (n 6) 386 [69].

⁴⁰¹ *Chester v The Queen* (1988) 165 CLR 61, 168; *Ryan* (n 33) 283 [48] (McHugh J); *Veen (No 1)* (n 49) 478 (Jacobs J).

⁴⁰² Freiberg (n 37) 24, 34.

⁴⁰³ Mirko Bagaric, Richard Edney, Theo Alexander, *Sentencing in Australia* (5th edn, Thomson Reuters 2017) 176 and 192.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ See discussion below at p 74.

⁴⁰⁶ Freiberg (n 37) 53-54; *Whyte* (n 60) 227 [156] (Spigelman CJ).

cannot be exceeded, therefore proportionality cannot be infringed.⁴⁰⁷ In this way, proportionality is addressed and other purposes of sentencing, far from being overlooked, are specifically considered. Such structure, like that used in sentencing guidelines in England and Wales,⁴⁰⁸ would bring greater clarity to the process, identifying those considerations relating to objective offence seriousness. It would also promote greater consistency and avoid the confusion of the all-in-one approach outlined above.

The comments about tinkering suggest that such actions are exclusive to a structured approach and absent from IS. As will be seen in Chapter 4, however, judges applying IS often 'step back' to consider the final sentence and make adjustments to ensure proportionality, as McHugh J himself recognises.⁴⁰⁹ The term 'charade' is arguably more applicable to the IS process, as judges are prevented from explaining the weight given to each factor and the reasoning is more likely to be hidden from view.

Opponents of two-tier sentencing models often argue that the circumstances of the offence and offender are 'infinitely various' and intertwined, making it impossible to identify the effect of an individual factor.⁴¹⁰ Any attempt to assign proportionate value to a single factor is said to distort the balancing process. Doing so for every factor risks multiplying the possibility of error and injustice.⁴¹¹ Again, this assumes that structured sentencing requires valuations to be articulated for each individual factor which, as shown above, is not the case. There is some force behind the related argument that separating objective and subjective factors can be difficult.⁴¹² Traynor and Potas suggest that there need not be absolute precision in categorisation, provided that each factor is given proper consideration.⁴¹³ While mis-categorisation of a factor may not itself be a fatal error, this position overlooks the wider

⁴⁰⁷ Warner (n 271) 359-60.

⁴⁰⁸ See Chapter 8.

⁴⁰⁹ *AB* (n 48) 122 [18]: 'a judge at the end of the IS process 'will check the sentence against other comparable sentences and may feel compelled to adjust the sentence up or down.'

⁴¹⁰ See e.g. *Young* (n 273) 151; *Beavan* (n 376) 14-15 [74]-[75] (Hunt J); *R v Lett* (1995) NSWCCA 9, 9 (Hunt J) (*Lett*).

⁴¹¹ *Wong* (n 10) 611-612 [74]-[76] (Gaudron, Gummow and Hayne JJ); *Thomson* (n 289) [74]-[75].

⁴¹² E.g. *Ryan* (n 33) 310 [145] (Hayne J).

⁴¹³ Traynor and Potas (n 15); see also *Williams v R* [2012] NSWCCA 172 [43] (Price J) (*Williams*).

potential adverse impact. For example, if a factor was wrongly included at tier one this may affect the upper proportionality limit discussed above.⁴¹⁴ Though it may be difficult to detangle factors and assign them to particular stages of consideration, a staged approach has the benefit of encouraging sentencers to approach and articulate factors in a methodical way. This encourages proper consideration of each factor and increases the likelihood that incorrect categorisations will be identified.

Regardless of categorisation, the valuation of factors is a difficult task as sentencing factors do not easily lend themselves to numerical valuation.⁴¹⁵ This is a difficulty common to structured and unstructured models of sentencing. There is no evidence to support the claim that errors in relation to the weight or significance assigned to individual factors increases using a two-tier approach.⁴¹⁶ The task may actually be more difficult and prone to error when attempting to apportion the correct weight to multiple factors simultaneously in one all-encompassing decision. Yet structured sentencing approaches, in particular the two-tier methods, are criticised as imposing a 'degree of exactness'⁴¹⁷ that is ill suited to the sentencing process. They are said to transform sentencing into a mechanical or mathematical process.⁴¹⁸ This is a narrow and inaccurate interpretation of both structured and two-tiered approaches as not all involve numerical valuation of individual factors. Nor is the use of an arithmetic process necessarily a legal error.⁴¹⁹ The discount two-tier approach involves an express reduction to sentence. Other two-tiered approaches, however, may simply involve a process of reasoning, beginning with the determination of a ceiling or starting point and followed by adjustments, during which no specific values are assigned or articulated. Failure to look

⁴¹⁴ A similar criticism could be made of sentencing guidelines in England and Wales where the consideration of factors at Step 1 that should rightly or otherwise be considered at Step 2 can have an impact on the category and thus sentencing range selected. See further discussion of guidelines in Chapter 8.

⁴¹⁵ *Markarian* (n 6) 378 [52] (McHugh J); See also discussion of giving valuation to individual factors such as remorse and medical conditions in *Tran v The Queen* [2017] VSCA 346 [45]-[47] (Ashley JA, Osborn JA agreeing) (*Tran*); See also *Weininger v The Queen* (2003) 212 CLR 629, 638 [24] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁴¹⁶ *Markarian* (n 6) 379 [54] (McHugh J).

⁴¹⁷ *AB* (n 48) 120 [13] (McHugh J).

⁴¹⁸ *Tran* (n 415) [24]-[25].

⁴¹⁹ *Trajkovski* (n 393) 601-2 [83] (Weinberg JA citing *Markarian* (n 6)).

beyond two-tiered sentencing means those subtleties go unappreciated and the possibility of structure *within* IS is overlooked.

Within Australia, sentencing is presented by the courts as a largely intuitive process which involves the balancing of all sentencing considerations and not generally suited to an analytical approach.⁴²⁰ It is conceived of as a product of discretionary, human judgement.⁴²¹ Despite suggestions to the contrary, this does not preclude a structured approach. Understood in the broad sense as explained by Kirby J, structured sentencing does ‘no more than to put on paper a logical process of human reasoning’.⁴²² A two-tier approach, for example, could simply involve using proportionality to set the upper limit, as outlined above, then making adjustments at the second step that cannot exceed this limit. This approach is not a scientific or mathematical exercise. The focus of Kirby J’s interpretation is attempting to make the reasoning process, inevitably one involving matters of judgement, more explicit.⁴²³ Such an approach not only reduces the likelihood of error as compared with a more rigid two-tier process,⁴²⁴ but benefits the public, parties and appellate process through increased transparency.⁴²⁵ It involves exposing judicial reasoning and identifying those factors which the sentencer regards as most important.⁴²⁶ As will be shown in Chapter 4, many sentencers approach their task in a logical, ordered manner; they test, interrogate and refine their position. Merely exposing the structure and logic of the decision-making process does not compromise that process.

Justice Kirby’s broad conception of structured sentencing demonstrates that structure can be incorporated within IS. The court, however, fearing limitations on unfettered discretion, continues to distinguish IS from a two-tier approach. The ongoing use of a narrow

⁴²⁰ See, for example, the warning given in *R v Bartel* [2008] SASC 289 [14]; See also *Gallagher* (n 372) 233 (Hunt J); *Lett* (n 410) McClellan (n 375) 16; *Wong* (n 10) 611-13 [76]-[78] (Gaudron, Gummow and Hayne JJ).

⁴²¹ *Markarian* (n 6) 378 [52] (McHugh J).

⁴²² *Markarian* (n 6) 398 [112] (Kirby J).

⁴²³ *Warner* (n 271) 359-60.

⁴²⁴ *Warner* (n 271) 359.

⁴²⁵ *Cameron* (n 33) 363 [73] (Kirby J).

⁴²⁶ See Chapter 5 for more detailed discussion.

understanding of structure, upon which many criticisms are founded, precludes a more nuanced understanding of both structured sentencing and IS and fuels the (mistaken) belief that the two are diametrically opposed.

2.3.1. Structured sentencing in practice

Even McHugh J, a long-standing champion of IS, recognises that IS is not synonymous with unrestricted discretion. It is influenced by judicial practice, appellate review, legislative indicators, public opinion, statute, legal principle, community values, guidelines, trends and statistics.⁴²⁷ While it continues to rigorously defend IS, the court has also been required to make concessions: confirming that a staged or sequential approach is not necessarily an error;⁴²⁸ refraining from prohibiting the attribution of a specific weight to a factor;⁴²⁹ applying a structured approach as required by statute⁴³⁰ and even when it is not a requirement.⁴³¹

2.3.1.1. *Guilty plea discount*

The clearest example of the application of structured sentencing is the guilty plea discount. Judges are often required by statute to 'have regard to' a plea of guilty and the stage at which it was made.⁴³² They may also be required to specify any corresponding reduction in sentence.⁴³³ This is a two-tier approach. Yet despite the supposed fundamental conceptual inconsistency between IS and plea-based sentencing reductions and the articulation of a discount,⁴³⁴ the courts have held that the legislative requirements do not preclude an IS

⁴²⁷ *Markarian* (n 6) 386 [71], 388 [76] and 390 [84] (McHugh J).

⁴²⁸ *Markarian* (n 6) 370 [24] (Gleeson CJ, Gummow, Hayne and Callinan JJ); 407 [139] (Kirby J).

⁴²⁹ *Wong* (n 10) 611 [75] (Gaudron, Gummow and Hayne JJ).

⁴³⁰ See e.g. *Roger Kingsley Dean v R* [2015] NSWCCA 307 [96]. The NSW CCA endorsed a two-stage approach when imposing a life sentence under *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1).

⁴³¹ See *R v Sahari* (2007) 177 A Crim R 1, 9-10 [19]-[21]. The VCA held that although the specification of the precise sentencing discount for assisting authorities might be said to be uncommon, it did not amount to error in the circumstances of the particular case. See Bagaric (n 351) 94-5 for further discussion of discounts for assisting authorities.

⁴³² See e.g. *Sentencing Act 1991* (Vic) s 5(2)(e); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(2); *Penalties and Sentences Act 1992* (Qld) s 13(3), *Crimes Act 1914* (Cth) s 16A.

⁴³³ See e.g. *Sentencing Act 1991* (Vic) s 6AAA.

⁴³⁴ Bagaric (n 351) 95; See also Freiberg (n 37) 233-34 and 385; Stephen Odgers and Stanley Yeo, 'Sentencing Discounts for Pleas of Guilty' (2005) 29 Criminal Law Journal 69, 69.

approach.⁴³⁵ By implication, IS then must permit a staged, structured approach and the assignment of value to an individual sentencing factor.

The courts have acknowledged some difficulties with the discount, specifically that there is 'an inherent artificiality in the requirement' as it requires judges to revisit sentences arrived at via IS.⁴³⁶ They have drawn attention to the difficulty of the task, emphasising that pleas of guilty are often necessarily intertwined with other sentencing factors such as remorse, prospects for rehabilitation and cooperation with authorities.⁴³⁷ Attempts to separate out any of which 'will not only be artificial and contrived, but will also be illogical.'⁴³⁸ Despite this, judges have 'out of necessity...bowed to the requirement to proceed in a staged way'⁴³⁹ as required by legislation but resist suggestions of a general tariff such as the sliding scale.⁴⁴⁰

The courts do not acknowledge any inconsistency with IS. Instead the guilty plea discount is portrayed as an exception or anomaly. According to the courts, there are simply 'cases in which a specific element can be the subject of quantification, without turning the process into a mechanical or mathematical exercise.'⁴⁴¹ It is transparency of the reasoning process, however, that is said to justify the quantification.⁴⁴² Articulation of the specific discount can enable offenders to understand the value of their plea, may encourage others to plead guilty and can assist in the assessment of parity.⁴⁴³ What remains unclear is why this degree of transparency is only regarded as necessary in relation to guilty pleas. Offenders may also

⁴³⁵ *Saab* [2012] VSCA 165.

⁴³⁶ *Scerri v R* (2010) 206 A Crim R 1, 6 [23] (Maxwell P and Buchanan JA) cited with approval in *Yang v R; DPP v Yang* [2011] VSCA 161 [30] (*Yang*) and *Trajkovski* (n 393) 604 [87] (Weinberg JA).

⁴³⁷ *Zogheib v R* [2015] VSCA 334 [60]-[64].

⁴³⁸ *Wong* (n 10) 611-12 [76] (Gaudron, Gummow and Hayne JJ).

⁴³⁹ *Markarian* (n 6) 399 [114] (Kirby J).

⁴⁴⁰ *Brown* (n 91) 153; Paul Marcus, Carol Brook, Bruno Fiannaca, David John Harvey, Jenny McEwan and Renee Pomerance, 'A Comparative Look at Plea Bargaining in Australia, Canada, England and New Zealand, and the United States' (2016) 57(4) *William & Mary Law Review* 1147, 1213-14; Edney and Bagaric (n 61) 207; Freiberg (n 37) 382; Geraldine Mackenzie, 'Consistency in Sentencing and Discounts for Guilty Pleas' (International Conference of the International Society for the Reform of Criminal Law, 2-6 July 2006, Brisbane) 2; Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (The Federation Press 2010) 91; Kathy Mack and Sharyn Roach Anleu, 'Sentence Discount for a Guilty Plea: Time for a New Look' (1997) 1(2) *Flinders Journal of Law Reform* 123, 126-7; *Cameron* (n 33) 362 [71] (Kirby J); See also ALRC (n 23) 316.

⁴⁴¹ *Thomson* (n 289).

⁴⁴² *Thomson* (n 289); *Cameron* (n 33) 362 [70] (Kirby J citing *AB* (n 48) 148-149 [99]-[100]; *Wong* (n 10) 621-622 [101]-[103]).

⁴⁴³ *Thomson* (n 289) 383 [127], *Verschuren* (n 283) 14-15 (Murray J summarising Malcolm CJ).

benefit, for example, from the court explaining how their use of a weapon led to an increased sentence or the mitigatory effects of their attempts at rehabilitation. As currently applied, the guilty plea discount involves the arbitrary allocation of value to one sentencing consideration while obscuring the impact of others.⁴⁴⁴

In light of the operation of the guilty plea discount, to describe IS as incompatible with structure would be a misrepresentation. In fact, Kirby J points particularly to the valuation of a guilty plea discount to demonstrate that the original elements of *Williscroft* IS, such as a prohibition on mathematical adjustments, are no longer operative.⁴⁴⁵ The discount also demonstrates that a two-step approach is workable and does not compromise any fundamental principles of sentencing or the delivery of individualised justice. Ultimately, however, the distinction between IS and a structured approach may be no more than semantic.⁴⁴⁶ Both centre upon value judgements made by the sentencer, though the order in which the judgements are made and the depth with which they are explained will vary. Justice McHugh claims that, in most cases, a two-tier approach cannot be applied in practice and doubts that many judges consider an objective sentence and then make adjustments.⁴⁴⁷ The interview responses in Chapter 4 will demonstrate that not only is the claim inaccurate but there is overlap between the 'instinctive' processes applied by judges in Victoria and structured approaches. When considered broadly, structured processes are not necessarily as restrictive or at odds with IS as critics would seek to believe.

⁴⁴⁴ Bagaric (n 351) 95.

⁴⁴⁵ *Markarian* (n 6) 407 [138] (Kirby J).

⁴⁴⁶ *Valera* (n 286) [9] (Meagher JA); *Hewton* (n 321) 79; *Cameron* (n 33) 362 [71] (Kirby J citing *R v Tierney* (1990) 51 A Crim R 446, 448; *Nagy* (n 292) 645-646; *Punch* (n 285) 494; *Markarian* (n 6) 405 [132] and 406 [136] (Kirby J).

⁴⁴⁷ *Markarian* (n 6) 385-6 [60].

3. Principles underlying instinctive synthesis

Factors relevant to sentencing can conflict,⁴⁴⁸ defy categorisation⁴⁴⁹ and vary infinitely.⁴⁵⁰

Australian legislators recognise that '[n]o matter how long and detailed, no matter how many exceptions...no set of rules can do justice to every case'⁴⁵¹ so do not attempt to create legislation covering every possible relevant factor that may arise. Instead, judges are entrusted with very wide discretion that affords them the flexibility to craft a sentence which is just according to the circumstances of the particular case and offender.⁴⁵²

3.1. Individualised justice and broad discretion

Individualised justice is the paramount duty of the court in Australia.⁴⁵³ While this principle is recognised in many jurisdictions,⁴⁵⁴ its veneration by the Australian courts has led to the description of the IS model as an 'extreme version of 'individualization thesis''.⁴⁵⁵ The belief that '[i]f justice is not individual, it is nothing'⁴⁵⁶ influences sentencing at first instance, appellate decision-making and decision-making structure.

According to Australian courts, individualised justice can be only attained through broad sentencing discretion.⁴⁵⁷ The need for individualisation can therefore be used to justify the granting of discretion to sentencing judges on the widest possible terms (within the bounds of

⁴⁴⁸ *Veen (No 2)* (n 60) 476. See NSW Law Reform Commission, *Sentencing* (Report No 79 1996), 6.

⁴⁴⁹ For example, factors such as diminished responsibility, intoxication, addiction and the public interest may be either aggravating, mitigating or irrelevant. Bagaric and Pathinayake (n 156) 411.

⁴⁵⁰ Cases can vary infinitely (*R v Hayes* (1987) 29 A Crim R 452, 466 (Kirby P) (*Hayes*)) as can the influences of the different factors to be taken into account (*R v Ellis* (1993) 68 A Crim R 449, 460 (Hunt CJ at CL) (*Ellis*)); See also *DPP v Arney* [2007] VSCA 126 (*Arney*); *Russell v The Queen* [2011] 212 A Crim R 57 [57]–[58] (Kaye AJA); *Kane v The Queen* [2010] VSCA 213 [25] (Nettle JA).

⁴⁵¹ Lawrence B Solum, 'Virtue Jurisprudence – A Virtue Centred Theory of Judging' (2003) 34(1-2) *Metaphilosophy* 178, 206 cited in Brown (n 91) 120.

⁴⁵² *House v The King* (1936) 55 CLR 499, 503 (Starke J) (*House*); *Webb v O'Sullivan* (n 68) 66 (Napier CJ); *Wong* (n 10) 612 [77] (Gaudron, Gummow and Hayne JJ); *Bowen v The Queen* [2011] VSCA 67 [73]; HLA Hart, *The Concept of Law* (Clarendon Press, 1961) 120-32.

⁴⁵³ *DPP v Adajian* [1999] VSCA 105 [28] (Callaway JA) (*Adajian*); Chief Justice Murray Gleeson, 'Individualised Justice – The Holy Grail' (1995) 69 *Australian Law Journal* 421.

⁴⁵⁴ See e.g. Canada (*R v M (CA)* [1996] 1 SCR 500, 567 (Lamer CJ); *R v Gladue* [1999] 1 SCR 688, 706 [33]; Allan Manson, *The Law of Sentencing* (Irwin Law 2001) 81) Scotland (Brown (n 91) 53; Hutton (n 91) 173; Tata (n 193) 197), New Zealand (Christine French, 'The Role of the Judge in Sentencing: From Port-Soaked Reactionary to Latte Liberal' (2015) 14 *Otago LR* 33; NZLR (n 111) [44]), England and Wales (*R v Taylor* [2012] EWCA Crim 630; [2012] 2 Cr App R (S) 98 at [13] per Gross LJ); USA (*US v Pitera* 795 F Supp 546 (1992), p 564) and France (Art 132-1, Code pénal).

⁴⁵⁵ Ashworth (n 331).

⁴⁵⁶ *Kable v DPP* (1995) 36 NSWLR 374, 394 (Mahoney J).

⁴⁵⁷ ALRC (n 23) [5.21]. See also *Elias* (n 67) 494-5 [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *R v Engert* (1995) 84 A Crim R 67, 68 (Gleeson CJ).

maximum penalties, proportionality and statutory constraints).⁴⁵⁸ Judges exercise both overt discretion, for example selecting the type and length of sentence, and covert discretion, including evaluations of culpability, remorse and harm.⁴⁵⁹ The lack of guidance as to the ranking or weighting of sentencing factors means that overt discretion decisions often involve covert discretions.⁴⁶⁰

The breadth of the discretion signals a confidence in the judiciary. It reflects a preference that discretion be exercised by courts rather than by other authorities, such as prosecutors.⁴⁶¹ This translates on a practical level, for example, to judges not being bound by recommendations made by prosecutors or plea agreements.⁴⁶² The sentence remains purely the domain of the judge. This has fostered a sense of judicial ownership over sentencing⁴⁶³ and a cultural resistance within the judiciary and wider legal profession to the restriction of judicial discretion.⁴⁶⁴ The fierce judicial defence of sentencing judges' discretion, Freiberg notes, distinguishes Australia from jurisdictions such as the US and England and Wales.⁴⁶⁵ Attempts to limit, guide or inform judges' sentencing discretion have been vigorously opposed by the High Court.⁴⁶⁶ Provisions have been read down or interpreted so as to minimise interference with judicial discretion, on the basis that undue constriction of sentencers' powers must lead to unjust sentences.⁴⁶⁷ Though it may lead to tension with other principles, such as equal justice⁴⁶⁸ and consistency, the courts, in their judgments and extracurially,⁴⁶⁹ and individual

⁴⁵⁸ See *Hili* (n 11); *MacNeil-Brown* (n 349) 680 [8] (Maxwell P, Vincent and Redlich JJA); Sir Gerard Brennan, 'The High Court and the Sentencing Environment' (National Judicial College of Australia Conference: Sentencing: Principles, Perspectives and Possibilities, Canberra, February 10-12 2006) 3; Freiberg (n 353) 428; Brown (n 91) 46.

⁴⁵⁹ Krasnostein (n 210) 23; Rosemary Pattenden, *Judicial Discretion and Criminal Litigation* (Clarendon Press 1990) 2.

⁴⁶⁰ Krasnostein (n 210) 24.

⁴⁶¹ Freiberg (n 69) 210.

⁴⁶² Freiberg (n 353) 427.

⁴⁶³ Tonry (n 211) 178.

⁴⁶⁴ Krasnostein (n 210) 18; Australian Law Reform Commission, *Sentencing of Federal Offenders* (Interim Report No 15, 1980) 399; George Zdenkowski, 'Limiting Sentencing Discretion: Has There Been a Paradigm Shift?' (2000) 12 *Current Issues in Criminal Justice* 58, 59; NSWLRC (n 448) [1.7].

⁴⁶⁵ Freiberg (n 353) 427.

⁴⁶⁶ Freiberg (n 353) 428.

⁴⁶⁷ Warner (n 271) 365; Bingham (n 1) 310.

⁴⁶⁸ Bell (n 8) 6.

⁴⁶⁹ Chief Magistrate Peter Lauristen, 'Submission for a Sentencing Guidelines Council for Victoria' (29 January 2018) <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Submission_26_Chief_Magistrate_of_the_Magistrates_Court_of_Victoria.pdf> accessed 14 June 2019.

judges in the current⁴⁷⁰ and previous studies,⁴⁷¹ maintain a zealous commitment to broad judicial discretion. Other principles will be accommodated '[w]ithin whatever tolerance is required by the necessary scope for individual discretion.'⁴⁷²

The protection of discretion dominates court responses to legislative interventions such as mandatory and presumptive sentences⁴⁷³ or guideline judgments⁴⁷⁴ and influences the standards applied in sentencing appeals. Judges at first instance are permitted 'as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime'.⁴⁷⁵ A presumption of correctness operates to preserve that discretion, therefore appellate courts will be slow to interfere.⁴⁷⁶ It must also be more than merely arguable that a sentence is manifestly excessive or inadequate; inadequacy must be 'clear and egregious'⁴⁷⁷ and excess 'unmistakable'.⁴⁷⁸ These high standards reflect the level of respect given to the exercise of judicial discretion by sentencing judges.

3.2. The interweaving of sentencing principles and sentencing model

The judiciary defend their wide sentencing powers by reinforcing IS, the model that allows the courts the greatest scope for decision-making. IS has been fashioned to be unstructured and operate without a common methodology in order to provide a vast, unrestricted space within which discretion can operate. It provides a sentencing framework that is shaped by, and also facilitates delivery of, individualised justice and broad discretion. IS and these fundamental sentencing principles are united in 'a circular, mutually-reinforcing relationship';⁴⁷⁹ a just

⁴⁷⁰ See Chapter 6.

⁴⁷¹ Mackenzie (n 17) 43-4.

⁴⁷² *Wong* (n 10) 591 [7] (Gleeson CJ).

⁴⁷³ *Palling v Corfield* (1970) 123 CLR 52, 58 (Barwick CJ); *Karim v The Queen* (2013) 227 A Crim R 1; *Magaming v The Queen* (2013) 252 CLR 381; Freiberg (n 353) 423.

⁴⁷⁴ Arie Freiberg, 'Three Strikes and You're Out – It's Not Cricket: Colonization and Resistance in Australian Sentencing' in Michael Tonry and Richard S Frase (eds) *Sentencing and Sanctions in Western Countries* (OUP 2001) 36; See e.g. *Wong* (n 10); *Whyte* (n 60).

⁴⁷⁵ *Markarian* (n 6) 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

⁴⁷⁶ *Markarian* (n 6) 405-6 [133] (Kirby J); *Lowndes* (n 65) 671-2 [15]; *Hudson* (n 75) 615 [24]; *R v Boaza* [1999] VSCA 126 [42] (Winneke P) (*Boaza*).

⁴⁷⁷ *DPP v Brown* [2009] VSCA 314 [23]; *DPP v Bright* (2006) 163 A Crim R 538, 542 [10] (Redlich JA).

⁴⁷⁸ *Hanks v The Queen* [2011] VSCA 7 [22].

⁴⁷⁹ Krasnostein (n 210) 37.

sentence is said to necessitate individualisation, which is said to be dependent upon the flexibility afforded by broad discretion, that is built into and safeguarded by IS.

Protection of broad discretion and individualised justice are the reasons IS is defended so vigorously. Any practice perceived as encroaching upon judicial discretion is automatically considered a threat to individualised justice and readily dismissed as undermining the synthesis. As seen above in relation to structured sentencing, this dismissal can occur without stopping to ask whether the underlying principles are actually being compromised. Even attempts by judges themselves to guide the exercise of discretion are treated as potential threats. Sequential reasoning, case comparison, sentencing ranges and sentencing statistics are all judge-developed practices that have been criticised as introducing a mathematical component that restricts judicial discretion.⁴⁸⁰ The irony is that by declining to provide or recognise guidance as to the exercise of discretion, the High Court has created a void that legislatures have attempted to fill using mandatory, presumptive and baseline sentences and standard non-parole periods.⁴⁸¹ These regimes have the effect of restricting discretion and narrowing sentencing ranges, exactly the sort of intrusions into judicial discretion the High Court seeks to resist.⁴⁸²

Wide judicial discretion and individualised justice constitute the foundational pillars of Australian sentencing.⁴⁸³ The respect and deference applied to those principles is extended to IS through their interconnected, reinforcing relationship and in this way the influence of IS also extends beyond decision-making methodology. IS is invoked alongside discretion and individualised justice to inform the conduct of sentencing hearings, legislation and reform. Through its relationship with sentencing principles, fierce defence by the judiciary and

⁴⁸⁰ See Chapter 6 Part 3. See e.g. *Hudson* (n 75) 617-18; *Barbaro* (n 14) 72 [34] (French CJ, Hayne, Kiefel and Bell JJ); *Mill* (n 53) 63; *Postiglione* (n 44) 339 (Kirby J); *Inge v The Queen* (1999) 199 CLR 295, 310-11 [39], 313-4 [51] (Kirby J); *R v Crowdey* [1999] NSWCCA 24 [19]; *Terrick* (n 73) 475; *AB* (n 48) 156 [115] (Hayne J).

⁴⁸¹ See further discussion in Chapter 7.

⁴⁸² Freiberg and Krasnostein (n 66) 77; Warner (n 352) 37. See further discussion in Chapter 8.

⁴⁸³ Freiberg (n 474) 35-36; Freiberg (n 353) 427.

application beyond formal sentence decision-making, IS has become embedded in the Australian sentencing landscape.

4. Conclusion

This chapter has examined the concept of IS from a doctrinal perspective. Beginning as a descriptive statement, IS has, through some at times tenuous logic and interpretation, become Australia's primary sentencing model. It involves the consideration and balancing of all relevant sentencing factors in single step but its key features are often expressed in the negative; the absence of common methodology and antithesis of structure. However, elements of IS and the structured sentencing models against which it is cast are often misconstrued.

A degree of structure during the reasoning process is not necessarily an error in Australian law. Sequential reasoning in the form of sentencing discounts, for example, may be permissible and has in fact become a legislative requirement in some instances. There has been no suggestion that the statutory imposition of a discount two-tier approach has fundamentally compromised IS. The two are not inherently incompatible. Similarly, while mathematical approaches are generally regarded as inconsistent with the sentencing process,⁴⁸⁴ the High Court has recognised that some quantification may be permitted in 'simple' cases.⁴⁸⁵ Lack of explanation as to what constitutes a simple case, however, has led to the avoidance of quantification in almost all cases. This feeds the belief that IS precludes structure, a belief often based upon the assumption that structured sentencing necessarily involves a rigid, objective two-tier process.

⁴⁸⁴ *Pearce* (n 62) 624 [46] (McHugh, Hayne and Callinan JJ); *AB* (n 48) 156 [115] (Hayne J); *Cameron* (n 33) 358 [65] (Kirby J).

⁴⁸⁵ *Markarian* (n 6) 407 [138] (Kirby J); 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Gallagher* (n 372) 230 (Gleeson CJ) cited in *Thomson* (n 289) 399-400 [66]-[67] (Spigelman J); *Chivers* (n 373) [27] (Steytler P (McLure JA agreeing)).

The difficulty with this very narrow understanding of structured sentencing is that it does not recognise that structured sentencing can assume multiple forms, some of which are compatible with IS. The differences between the models are obscured when only one of those models is ever compared to the purely discretionary alternative. Subtleties are overlooked and complexities simplified, making it easier to treat all forms of guidance and structure as a collective and dismiss them as conflicting with IS. The courts have consistently sought to defend IS against perceived encroachments. In this sense, current approaches to sentencing are even more restrictive than those applied by the *Willisroft* court which accepted guidance in the form of statistics and sentences for comparable cases,⁴⁸⁶ practices that are now approached with caution.

The dominant belief within Australian courts is that proportionate, fairer sentences are more likely to be achieved using a flexible, discretionary sentencing regime,⁴⁸⁷ which is best delivered through an unstructured IS approach. The imposition of structure is perceived as restricting judicial discretion which, in turn, compromises the synthesis and the delivery of individualised justice. This is in spite of the fact that no distortion of the sentencing process or inherent error eventuated when applying sequential reasoning prior to the endorsement of IS.⁴⁸⁸

Through the judiciary's defence of broad discretion and promotion of individualised justice, IS has evolved to become more than just decision-making procedure; it now sits at the core of Australian sentencing. Being intertwined with those fundamental sentencing principles has made IS almost unassailable. The IS being applied on a daily basis, however, is not necessarily as clean cut as the abstract doctrinal model. The next task of this thesis is to examine how IS is applied in practice and the many different interpretations and approaches

⁴⁸⁶ *Willisroft* (n 235) 300-1 (Adam and Crockett JJ).

⁴⁸⁷ *Freiberg* (n 69) 210.

⁴⁸⁸ *Place* (n 310).

to which it gives rise.

Chapter 4 Judicial Application of Instinctive Synthesis

In Chapter 3, case law and commentary were used to evaluate IS as a doctrinal concept. The focus will now shift as, over the next three chapters, IS is considered as a point of practice, examined through qualitative analysis of interview data. The purpose of this chapter is to explore how IS is understood and applied by the Australian judiciary. 'Instinctive synthesis' as a phrase and as a sentencing model offers very little insight into the decision-making process. It is difficult to know how judges approach the sentencing task as IS is often discussed in general terms and detailed descriptions of the process are discouraged. Explanations by sentencers themselves can help to fill these gaps, providing information which would otherwise have to be inferred or remain hidden. Judges' responses reveal not only their personal opinions and approaches but patterns and commonalities across courts. Through the discussion it is possible to determine whether the IS approaches employed in practice are consistent with the doctrinal explanations of IS detailed in the previous chapter.

Overview

Judges' application of IS is examined in two sections. The first explores what judges understand by IS. Perhaps unsurprisingly, interviewees' descriptions often mirrored the language and characterisation of IS in the judgments outlined in the previous chapter. Instinct and experience, however, two elements of IS not often addressed in case law, were considered by many to be fundamental components of sentencing.

The second section focuses on how judges arrive at a sentence. There are similarities in how judges approach the task, the factors they deem important and the order in which those factors are considered. While IS is often described as the antithesis of structure, judges' descriptions suggest several informal methods for bringing order to decision-making, with broad consistency across sentencers and courts.

1. Judges' conception of IS

The first question asked of all interviewees was 'What does 'instinctive synthesis' mean?', a question which is, as one judge observed, 'simple enough to ask, not that easy to answer'. As this response implies, even among the judiciary, many of whom engage in sentencing on a daily basis, IS has no single fixed meaning. The concept is fluid and is interpreted in several different ways. For some judges the answer was, in fact, simple, as they adopted the standard description from *Markarian*.⁴⁸⁹ The conventional definition provides a degree of security. By using the words of the High Court, the interviewee would not be saying anything controversial. Such a succinct response may also have been intended to deflect the question and discourage further scrutiny of the concept.

The opposite approach was adopted by the majority of interviewees. Most used the deliberately broad question to interrogate the concept of IS and reflect upon their own understanding. Yet even those who were confident in their interpretation of the concept and in the IS model found it difficult to articulate precisely what it involves. Some regarded the difficulty of description as an intrinsic part of IS, suggesting that 'we shouldn't be able to explain it really...If it's instinctive, it's inexplicable.'⁴⁹⁰ Such comments reflect a general acceptance of the lack of clarity and belief that it is not problematic.

Some judges gave relatively imprecise descriptions of the process, for example the sentencing factors 'all going into a big sort of swirling mass and out comes a figure'. Another described it as throwing the relevant factors into the mix and saying: 'What do you think's a fair thing?'. Simplified language and emphasis on the straightforward nature of the exercise makes IS seem more accessible. It dispels the impression that it is an overly complicated or technical

⁴⁸⁹ *Markarian* (n 6).

⁴⁹⁰ The Victorian Sentencing Manual, for example, claims that 'the process cannot be defined': Judicial College of Victoria, *Victorian Sentencing Manual* (3rd edn, Judicial College of Victoria 2019) 16 [1.2].

exercise or a secret judicial process. Yet as these descriptions do little to explain how IS actually operates, the uncertainty remains.

The most common description of IS was as a weighing or balancing exercise, with judges attempting to work out how all of the relevant factors interact and how to reconcile them 'without being too precise about it but doing the best you can'. There was a tendency to merely describe the factors to be considered, rather than explain how they would be assessed and balanced. Judges generally avoided discussing IS as a methodology until asked specifically to outline their decision-making process (see Part 2).

Consistent with the assessment in Chapter 3, several judges discussed IS as being more than merely procedural, emphasising the overlap with principles like individualised justice:

...the starting point is that our sentencing justice is individualised justice...[IS]'s really just an acknowledgment that every case is different and warrants an appropriate sentence tailored to the individual circumstances of that case...

Judges also equated IS to the exercise of judicial discretion, for example as 'discretionary but it's not an unbounded discretion...sort of guided discretion'. The three were considered by many judges to be inherently linked as 'part of a [sentencing] philosophy'.

In general, the descriptions offered by the interviewees reflected IS as explained in case law. The majority of judges emphasised that IS was 'not an analytical, scientific, statistical analysis'. Though they may have struggled to articulate exactly what IS involves, they were

clear about what it did not involve. For example:

It is a synthesis because it's not done mathematically and, heaven forbid, ought never to be done mathematically because it would ultimately result in injustice as it takes out the human issues.

As they do in sentencing remarks, many judges explained IS in the negative, as the absence of structure and assigning valuations to relevant factors.

Judges were keen to emphasise that they do not engage in a step-by-step analysis. Rather, IS is 'a process that enables an overall sense of what is appropriate and just, rather than seeking to arrive at that result by individual analysis of every consideration that might bear on sentence.' Judges though seemed particularly to resent the suggestion that because IS lacks formal structure it is not based on rational decision-making:

It's not that we just go through all this process and come up with a number at the end like bloody magic, it just doesn't happen like that. Anyone that tells you it does, it's rubbish...

It's not me going: 'Tell me great universe, what it is I must sentence?!'

Instead, several judges suggested that sentencing and the weighing of relevant factors was broadly common sense.⁴⁹¹ This is consistent with the use of casual language and generalised descriptions, all of which contribute to the painting of IS as a straightforward, uncontroversial process. Any sense of intricacy or mystery is minimised. That is not to suggest that the

⁴⁹¹ *DPP v England* [1999] 2 VR 258, [18] (Brooking JA).

interviewees were deliberately attempting to misrepresent the complexity of the IS process. Some judges did appear to find sentencing quite a straightforward task. As will be seen in Part 2, however, while IS may be relatively simple to describe, the application can be much more challenging.

1.1. Instinct and Experience

While they used the same language to explain IS as found in sentencing remarks and judgments, many interviewees emphasised two elements of IS not commonly addressed in case law, specifically instinct and experience.

1.1.1. Instinct

Consistent with academic commentary and case law, interviewees concentrated predominantly on the 'instinctive' element of IS.⁴⁹² Those who discussed 'synthesis' generally did so in passing and usually in contrast to a structured approach. For example:

I don't know what it is that makes it a synthesis exactly...I suppose the synthesis is in a sense you put it all into the equation of the decision. But it's not mathematical so I guess you could say it's a synthesis.

As explained below, the bringing together and reconciling of sentencing factors was discussed by many of the interviewees. Yet few used the language of 'synthesis', instead preferring to apply their own descriptions of the process.

The court has focused its attention on the notion of 'instinct', though its role is not settled. Justice Kirby, for example, suggests the term adds nothing but distraction.⁴⁹³ The Federal Court, surveying IS case law, claims IS 'certainly does not mean "informed gut reaction"' and

⁴⁹² *Markarian* (n 6) 387 [73] (McHugh J).

⁴⁹³ *Markarian* (n 6) 407 [137] (Kirby J).

may actually not be a matter of instinct at all.⁴⁹⁴ Many interviewees held the opposite view. Far from adding nothing, instinct was regarded as an intrinsic part of IS. Several judges described an 'almost visceral response to where the right sentence fits'. Several judges, ranging from recently appointed to some of the most experienced, described a 'gut feeling' about a sentence:

...the previous President of the Court of Appeal, Jack Winneke, he had done a hell of a lot of crime, so he had a gut instinct. Instinct, you see it's about knowing all the relevant factors and saying: 'That's about right for this'.

...you get it in your gut, six [years] with a four [year non-parole period], or whatever it might be.

...a good example's playing sport, facing a fast bowler. You don't think about it, everything just reacts to what's happening and you end up with a result without breaking it up into component parts. And it's just being able to do that.

These comments are consistent with findings from studies across common law jurisdictions. The majority of judges interviewed as part of Ashworth et al's Crown Court study, prior to the introduction of guidelines, described sentencing as an intuitive process, using such terms as 'instinct', 'experience', 'hunch' and 'feeling'.⁴⁹⁵ Similarly, judges in a study by Jacobson and Hough referred to 'gut feeling rather than careful calculation'.⁴⁹⁶

Fourteen of the 32 judges interviewed as part of this study described instinct as part of the sentencing process.⁴⁹⁷ One judge noted that they were prevented from using such

⁴⁹⁴ *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2016] FCA 453, [87].

⁴⁹⁵ Ashworth et al (n 19) 50.

⁴⁹⁶ Jacobson and Hough (n 188) 48.

⁴⁹⁷ Though, as in Mackenzie's study, not all judges used the term 'instinct': Mackenzie (n 17).

descriptions in sentencing remarks, in spite of that being the way they conceived of the process:

You can't sit back and say 'Well this is my visceral response to it' because that's not being judicial. Can you say, 'Well my waters tell me this'? That's not being judicial... Sometimes that's what it's about, an instinctive synthesis. Is that really just what your waters are telling you? And do we then have to intellectualise what our initial response is?

The point in the decision-making process at which instinct comes into play varies. For some judges the instinctive element is an initial reaction to the facts or circumstances of the case that then has to be teased out and explained.

The instinctive aspect of it is that I don't sit here consciously and start ticking off all of the factors. Instinctively, I have a response to them... I then break that down into all the established sentencing principles which have already instinctively formed part of my instinctive response to what's before me.

The approach of Victorian judges appears similar to the 'intuitive override' process explained by Brown and discussed below in Part 2.⁴⁹⁸ This involves tempering first impressions with an analysis of the statutory provisions, principles, facts of the case and sentencing guidance.

In the appeal context, applying a process akin to IS in order to determine whether a sentence manifestly excessive or inadequate,⁴⁹⁹ the initial instinctive response has become an unofficial test. The test, mentioned by four judges from different courts, was described as the blasphemy

⁴⁹⁸ Brown (n 91) 128.

⁴⁹⁹ See e.g. *Terrick* (n 73) 480 [5].

or theological test:

The test for manifest excess or manifest inadequacy is a religious one. If you read the whole of the reasons and after seeing the sentence you involuntarily utter 'Oh Jesus!' it has failed the religious test and therefore is manifestly excessive or inadequate.

This immediate, unguarded response is consistent with comments made by Tasmanian judges: 'Sometimes you go through an intellectual process, but mostly I think it just hits you. You hear the facts, the circumstances of the offence, and the offender, and it hits you.'⁵⁰⁰ For some judges though this instinctive element of IS manifests not as an initial response but at the end of the decision-making process. A moment of clarity and certainty in which all the relevant factors come together when deciding upon the final figure.

Whether an initial response or final reflection, judges were keen to stress that the instinct involved in IS was an informed response. As one judge noted, 'by 'instinctive' I don't think we mean unintelligent or ill considered'. Nor is it unconstrained instinct. Rather 'it's a gut feeling based upon established legal principles', as well as the facts of the case, statute and, importantly, experience of the world and criminal justice system.

1.2. Experience

The experience of the judiciary, as individuals and as a collective, is said to be the rationale for vesting broad discretionary sentencing power in judges, rather than implementing strict rules.⁵⁰¹ It is experience which stems from time on the bench and in practice, the professional culture of both and the training that judges receive⁵⁰² that is said to encourage judges to think and work in a particular judicial manner.⁵⁰³

⁵⁰⁰ Bartels (2009) (n 200) 45.

⁵⁰¹ Sir Guy Green, 'The Concept of Uniformity in Sentencing' (1996) 70 Australian Law Journal 112, 119-120.

⁵⁰² Neil Hutton, 'Sentencing Reform' (7th Public Lecture in Memory of Professor Derrick McClintock, University of Edinburgh 2000).

⁵⁰³ Though the impact of this culture is not always positive. See Chapter 7 [1.3] for a discussion of the culture of the Criminal Bar.

According to Sully J, sentencing decisions involve the application of 'professional learning refined by relevant professional experience',⁵⁰⁴ but more than professional experience is involved. Judges draw upon their knowledge of the law, including a view as to the meaning of particular offences and sanctions, but also their experience of society and their own beliefs and attitudes.⁵⁰⁵ Given this, the lack of diversity within the judiciary is particularly problematic. Research and statistical data relating to judicial diversity in Australia is limited and tends to focus on gender.⁵⁰⁶ It reveals that across Australia, women remain in the minority on the bench in all jurisdictions.⁵⁰⁷ Within Victoria they make up 33% of Supreme Court/Court of Appeal judges and 41% of County Court judges.⁵⁰⁸ Of those interviewed, 26 were male and 6 female, all appeared to be white. This would appear to be broadly reflective of the composition of Victorian courts.

The Victorian judiciary, and presumably their experiences, are not reflective of the diverse community within which the courts operate.⁵⁰⁹ This is not to say judges may only hear matters of which they have personal experience. This would not only be impractical but doing a disservice to the judiciary and their ability to apply an impartial mind to an unfamiliar situation. While experience can be an asset when it comes to knowledge and application of the law, the limitations of an individual's personal experience can also be a potential source of unconscious bias.⁵¹⁰ All judicial decisions rely upon the experience of the decision-maker but the potential for bias is greater where experience is a central component of system lacking

⁵⁰⁴ Justice Brian Sully, 'Trends in guideline judgments' (2001) 20 Australian Bar Review 249, 251.

⁵⁰⁵ Ashworth et al (n 19) 21.

⁵⁰⁶ Cf Leslie Moran, 'Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings' (2006) 28(4) Sydney Law Review 565; Asian Australian Lawyers Association, 'The Asian Legal Profession: A snapshot of Asian Australian diversity in 2015' <<http://www.aala.org.au/resources/Documents/AALA%20Report%20Final.pdf>> accessed 5 August 2019, 8.

⁵⁰⁷ Australian Institute of Judicial Administration, 'Judicial Gender Statistics - Judges and Magistrates (% of Women) June 2020' <<https://aija.org.au/research/judicial-gender-statistics/>> accessed 5 December 2020.

⁵⁰⁸ AIJA (n 507).

⁵⁰⁹ Kathy Mack and Sharyn Roach Anleu, 'The National Survey of Australian Judges: An Overview of Findings' (2008) 18(1) Journal of Judicial Administration 5.

⁵¹⁰ See e.g. Chris Cunneen, 'Judicial Racism' (Aboriginal Law Bulletin, Australian Institute of Criminology 1992) <<https://aic.gov.au/sites/default/files/publications/proceedings/downloads/21-cunneen.pdf>> accessed 14 June 2019; Sir Anthony Mason, 'Unconscious Judicial Prejudice' (2001) 13(8) Judicial Officers' Bulletin 57; David Wood, 'Judicial Fairness and Systemic Bias' in Stephen Parker and Charles Sampford (eds) *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon Press 1995).

structure and guidance and is a particular concern where decisions involve possible deprivation of liberty.

1.2.1. Experience and IS

The potential for bias and disparity is discussed further in Chapter 6, for now the focus will return to the role of professional experience as discussed by interviewees. The ALRC report that 'Judges...frequently confess that the longer they perform the task of sentencing, the less confidence they have that they know what they are doing.'⁵¹¹ This has not been the case for judges in the current study. Rather than becoming more difficult, professional experience was said to make the task of sentencing easier to understand and perform, increasing confidence in decision-making.

The accumulation of knowledge through practice and as a judge informs and facilitates IS. Interviewees of every level of court and time on the bench regarded experience as an asset and integral to the application of IS. It provides a legal and practical framework within which judges operate. The 'product of a lifetime practising criminal law' is a greater awareness and 'comprehensive understanding of the myriad of factors which come into play in the exercise of sentencing discretion'.⁵¹² Experience is said to improve understanding of the relative gravity of offences and circumstances of offenders, as well as the ability to weigh different factors and translate them into numerical outcomes.⁵¹³ It also gives judges the confidence to depart from such framework when necessary. One judge explained this by way of analogy to cooking and the ability of an experienced cook to diverge from a recipe to produce a dish better suited to individual tastes. Experience in sentencing grants judges a similar confidence and flexibility to tailor a sentence to the particular offence and offender, thereby promoting individualised justice.

⁵¹¹ ALRC (n 464) xxiii.

⁵¹² Similar comments were made by judges in Brown's study: Brown (n 91) 126.

⁵¹³ *Markarian* (n 6) 388 [77]-[78] (McHugh J).

Fourteen of the judges interviewed explained that experience allows them to know roughly what the appropriate sentence or range is without active consideration. It is said to give sentencers knowledge of 'the market', 'the going rate' and 'what the case is worth', all of which inform IS and make the sentencing task easier. As several interviewees explained, the sheer volume of sentences, often for similar offences, handled by judges is likely to produce a familiarity and detailed knowledge of the offence and sentencing practices.

If you've done enough of it, you know what it's worth. Now I probably sentence...between 100-200 people a year and it's all for the same stuff, either for sex or gross violence or thieving and you sort of know roughly what it's worth.

...you do at least have an instinctive reaction about the kind of range you're in...if you sit in the Magistrates Court and you've dealt with 200 of a particular sort of case in the previous 6 months, of course you'll have an instinctive reaction.

Hammond observes that some experienced judges are simply seen as having 'a "good eye" for a case, and they are rarely wrong as to result.'⁵¹⁴ That appears to be the case for some judges in Victoria:

I think the people with criminal experience who come here after 25 years at the Bar doing nothing but crime would say: 'I've long forgotten how I did this, just that's how you do it, you just know what a figure is'.

Five judges, all with significant time on the bench, suggested that experience can enable a judge to arrive at a sentence almost without thinking: 'you can assimilate a whole lot of different concepts virtually without even consciously deliberating on each one' and 'without having to

⁵¹⁴ Hammond (n 2) 225.

turn to comparative cases or statistics.’ From the descriptions given by the judges it would appear that experience allows them to take shortcuts through, or at least expedite, the decision-making process.⁵¹⁵

As will be explained below, many judges then engage in a process of critical reflection. This is valuable as the use of mental shortcuts, can often result in insufficient weighting and interrogation of information.⁵¹⁶ Despite this, decision-makers remain confident in, for example, the automatic knowledge of sentencing range or the apportioning of weight to relevant factors. It is possible and, given the descriptions by some interviewees, perhaps likely that these mental shortcuts inform both the initial response and the subsequent analysis. In this way the decisions comprising the synthesis could be said to become instinctive, and subsequently the synthesis itself becomes instinctive, rather than a series of individual deliberations.⁵¹⁷

The problems with such mental shortcuts and inconsistent weighting are not limited to the IS model or judges in criminal cases.⁵¹⁸ They are, however, an example of the dangers of relying upon a wholly instinctive model of decision-making. The systematic approach adopted by many judges, as explained below, and the requirement to give reasons⁵¹⁹ may encourage an examination of the decisions and assumptions comprising the synthesis. Yet in a system which values efficiency and where judges are experiencing increasingly heavy workloads, it is unsurprising that the ability to quickly synthesise a sentence is appreciated.

⁵¹⁵ In contrast to the extra-legal experience referred to by Holmes, the experience relied upon by IS sentencers is of criminal cases and of the sentencing task itself. Rather than being the determinative influence, this experience provides a framework and means of processing the relevant factors, principles and rules. See e.g. Max Lerner, *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions* (Random House 1943) 51–4; Wilfred E Rumble, *American Legal Realism: Skepticism, Reform and the Judicial Process* (Cornell University Press 1968) 39–40.

⁵¹⁶ See for further discussion Mandeep K Dhimi, ‘A ‘Decision Science’ Perspective on the Old and New Sentencing Guidelines in England and Wales’ in Ashworth and Roberts (n 9) 168.

⁵¹⁷ This is consistent with Dworkin’s suggestion that, even in applying integrity in adjudication and seeking to impart coherence to the legal system as a whole, ‘Any judge will develop... a fairly individualized working conception of law on which he will rely... in making... judgments... and the judgments will then be, for him, a matter of feel or instinct rather than analysis.’ That does not mean, however, that the beliefs they apply are necessarily highly idiosyncratic. Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986) 256.

⁵¹⁸ Dhimi (n 516) 168.

⁵¹⁹ Examined in more detail in Chapter 5.

1.2.2. *Developing experience*

The further difficulty with relying heavily upon instinct and experience is that these take time to develop. It is naïve to assume that every person arriving on the bench becomes suddenly possessed of all of the knowledge required to sentence instinctively.⁵²⁰ The structure of the modern legal profession demands specialisation by practitioners. As a result, many judges appropriately appointed to judicial office but from outside criminal law may have limited or no experience of the sentencing process before coming to the bench.⁵²¹ Australian sentencing draws upon collective experience through the use of comparative cases, current sentencing practices and discussions with fellow judges⁵²² but still relies heavily on individual evaluations.

Interviewees accepted that sentencing comes more easily to judges who have practised in criminal law. One judge estimated that of the approximately 60 trial judges in the County Court roughly one third to one half will not have had any experience of criminal practice. That judge was, however, also quick to note that experience in criminal law does not prevent judges from making sentencing errors. Some judges from commercial or public law backgrounds felt relatively confident in sentencing, having maintained an interest, though not practice, in criminal law before their appointment. More commonly, judges from non-criminal practice reported experiencing a 'very steep learning curve' in relation to sentencing. This included navigating a wide range of unfamiliar offences and quickly learning 'that some of your layman's instincts don't apply' because a superior court or parliament has directed a contrary approach or position.⁵²³

⁵²⁰ Tom O'Malley, *Sentencing – Towards a Coherent System* (Round Hall 2011) 32.

⁵²¹ *Whyte* (n 60) 291 [264] McClellan J.

⁵²² See further discussion in Chapter 6.

⁵²³ For example, one judge spoke about having to set aside thoughts about the effect of different types of drugs on the individual and community because the High Court has said, in relation to commercial or trafficable quantities, if Parliament has chosen not to distinguish drugs by their content then it is not open to a judge to do so.

One judge candidly described how exclusionary the language and practice of IS can be to outsiders:

I came across the expression 'instinctive synthesis' only when I became a judge...and I had to look up what it meant. Everybody in this court was using it the whole time without need to examine its meaning...[I had to look it up] so I would know what it was that I was deploying when I was deploying it...It doesn't take long to work out what's going on but when you go there in the beginning I found the barristers...were all speaking in a lexicon which completely excluded me. I didn't know what they were talking about, I mean '9 on the top and 6 on the bottom'? What on earth?

Another judge spoke of sitting on an appeal in which it was submitted that sentence was outside the acceptable range. The judge asked the Crown what they said the range was, only to be told by a colleague: 'You can't ask that'.

These anecdotes suggest serious deficiencies in relation to the accessibility and transparency of IS and the sentencing process. If a judge, whose job it is to make decisions in these proceedings, is unable to follow the proceedings themselves what hope do lay participants, such as offenders, victims or the community more widely have in understanding? And what faith can they have that the outcome will be just? The comments suggest that those who are appointed as decision-makers are, at least for a time at the beginning of their judicial career, unable to contribute fully. Two Court of Appeal judges stated that it was only recently, after years on the bench, that they felt comfortable in sentencing. One has only just started feeling able to propose alternative figures when discussing re-sentencing options with colleagues.

This is not to suggest that judges are neglecting their duties. Several Court of Appeal judges explained that they receive guidance from colleagues and that the bench always includes an experienced criminal judge. Judges also appeared to make significant efforts to develop their

understanding of sentencing. For example, rather than relying upon the submissions of counsel or indications given by fellow judges, new judges researched current sentencing practices and ranges independently:

...there'll be 20 cases referred to [in submissions] and you go away and look at those and that gives you a range.

If I got an armed robbery case, I would go and look at sentences for armed robbery for the last 3 years, not at sentencing statistics. I would print the judgments on armed robbery, on sentencing, and I'd read them. And if I got an intentionally causing serious injury I'd do the same thing...I paid particular attention to what Parliament had provided.

This very thorough preparation is the judges compensating for deficiencies in judicial training⁵²⁴ and flaws within the sentencing model. The judges' comments make clear that IS is a complicated system which is difficult to comprehend and relies too heavily upon the experience and instinct of the sentencer.

1.3. Judicial attitudes to the term 'instinctive synthesis'

As one of the interviewees observed, '[l]abels can be unhelpful, by not disclosing the content of the description. It is true of the label "instinctive synthesis", and it is true of ["two-tier" sentencing].' This same concern was voiced by many interviewees who expressed reservations about whether IS is a true description of the process they apply.

⁵²⁴ One interviewee said of the training upon being appointed as a judge: 'No one handed me a book, it's [the Sentencing Manual] all online of course now...Does someone teach you how to sentence? Well, look, I'm sure the Judicial College at some stage will hold sessions...but for new judges...[you] don't get sent to new judge school.'

As explained above, there were slightly different interpretations of the term. Six interviewees supported the use of 'instinctive synthesis' explaining that it reflects the subjectivity of the decision and lack of formal structure. Significantly more judges though had misgivings, the most common concern being that IS is 'descriptively inaccurate' and does not reflect what sentencing judges actually do:

[I]t's untruth, as a matter of description, in that it encourages an anti-intellectual view of sentencing and sentencing jurisprudence.

While some judges believed that IS 'does at least signal that the process is...complex', they also accepted that 'it's not a very helpful term, it doesn't mean anything'. And worse, that it could be argued that the term 'is a way of disguising potential non-transparent processes.' Where the term or process is not clear there is the possibility of misinterpretation:

I think it's an unfortunate term on one level because it does invite criticism for simply being a gut reaction, for being not a particularly structured or systematic approach to sending somebody to jail, let alone for a particular period of time...[IS] suggests that it doesn't involve the application of principle or guidance.

As the experiences of judges new to criminal law demonstrate, 'instinctive synthesis' as a term carries with it an inaccessibility and corresponding lack of transparency, recognised by one interviewee:

...[criminal law] is bedevilled by linguistic peculiarity, which contributes to an opaqueness and to a sense of insider knowledge, inaccessible to people who don't know the field.

This concern has been voiced by other members of the judiciary:

The phrase "instinctive synthesis" sends quite the wrong signals for the law of sentencing in Australia. Who are those who have the "instincts" in question? Only the judges. This is therefore a formula that risks endorsement of the deployment of purely personal legal power...Talk of "instinctive synthesis" is like the breath of a bygone legal age. It resonates with a claim, effectively, to unexplainable and unreviewable power.⁵²⁵

No satisfactory response to these criticisms has been offered by the courts or individual interviewees. According to the Court of Appeal to treat 'instinctive synthesis' as 'describing an arcane process, the mysteries of which are forever locked away in the mind of the sentencing judge' is a misunderstanding.⁵²⁶ Yet that is precisely the impression the term conveys and with no substance or structure to the model and a lack of transparency in relation to the reasoning process, there is little the court can point to in order to combat that impression. Instead, the matter is often evaded by directing attention to the experience and skills of judges and explaining how that makes them best placed to exercise broad sentencing discretion.

Suggestions that the meaning of the term is unclear produce a similar reaction. Judges recognise that 'instinctive synthesis' is not a term that would be understood by the public. As a result, one interviewee avoids using the phrase when delivering a sentencing. Rather than provide clearer explanation, the common response seems to be to simply trust the judges to

⁵²⁵ *Markarian* (n 6) 404 [129] (Kirby J).

⁵²⁶ *Ashdown v R* [2011] 37 VR 340 [151] (3) (Ashley JA) (*Ashdown*); *Markarian* (n 6) 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

understand the process. The attitude of many interviewees appeared to be:

Well we understand it here, I think that's probably the main thing...We have some sort of vague notion amongst ourselves and between ourselves as to exactly what IS is. And the law specifically allows for that.

Though, as will be demonstrated in later chapters, a vague shared understanding and approach to a model as unstructured IS can still result in inconsistencies.

It has been suggested that terms such as 'judicial wisdom' or 'judicial experience' would be preferable to describe the sentencing approach.⁵²⁷ These comments were echoed by some interviewees though, as one judge observed, '[i]t's so entrenched in High Court jurisprudence that there's nothing [we] can do about it and we recite it as a ritual incantation.' Another described IS as one of the 'articles of faith' upheld by criminal lawyers and judges. These comments suggest a reverence which can have the effect of deflecting scrutiny and means that IS has become almost unassailable. The result is that IS, with its many interpretations and coupled with broad discretion and individualised justice, can be used to justify, and potentially mask, a host of different sentencing practices. As one interviewee noted, however, 'labels are always conclusory and frequently they obscure more than they reveal. But they're only labels.' To properly understand IS, the decision-making processes of sentencing judges must be examined in order to determine how it operates in practice.

⁵²⁷ See e.g. Ian Leader-Elliot, 'Editorial' (2002) 26 (2) Criminal Law Journal 5; Brown (n 91).

2. How do judges sentence?

2.1. How do judges approach the sentencing task?

Consistent with case law,⁵²⁸ sentencing manuals⁵²⁹ and comments by judges in the studies of Mackenzie⁵³⁰ and Brown,⁵³¹ interviewees often explained sentencing as a matter of balancing. 'Weighing' was a very commonly used description, alongside 'a chemical reaction' and 'a juggling exercise'. Three of the judges employed a cooking analogy. This captured the instinctive elements of IS, the flexibility and individualisation, as dishes can be flavoured and recipes altered according to individual tastes:

...you've looked at all the ingredients and know instinctively what you're going to make.

Rather than getting out the cookbook...[T]hat is discouraged, indeed that's contrary.

While descriptions of sentencing could be quite abstract, judges' explanations of the particular decision-making process revealed a largely pragmatic and procedural approach. Theoretical justifications did not feature heavily. This is consistent with the responses in Mackenzie's study⁵³² and Freiberg's observation that 'no factor is less predictive of the ultimate sentencing order than the court's general theoretical rationale'.⁵³³ According to Hogarth:

...as an abstract question, penal philosophy has very little meaning to a busy magistrate. He does not have the time for, nor does he necessarily see the relevance of, abstract doctrine. At the same time he must establish in his daily work some general guidelines which serve to direct him in the proper exercise of discretion. These

⁵²⁸ See e.g. *Ryan* (n 33) 306 [133] (Hayne J); *Elias* (n 67) 494 [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *Dalglish* (HC) (n 12) 434 [5] (Kiefel CJ, Bell and Keane JJ).

⁵²⁹ Judicial College of Victoria (n 490) [2.1]; Chief Justice James Spigelman, *Sentencing Bench Book* (Update 45, Judicial Commission of New South Wales 2019) Foreword, I (NSW Sentencing Bench Book).

⁵³⁰ Mackenzie (n 17) 14.

⁵³¹ Brown (n 91) 105.

⁵³² Mackenzie (n 17) 20.

⁵³³ Freiberg (n 37) 234.

guidelines may be more or less articulated, specific, or general in application, strong or weak...shared to a greater or lesser extent by his colleagues.⁵³⁴

IS requires sentencers to consider all of the relevant factors in a single step. Interviewees, however, tended to regard sentencing as 'a whole lot of individual judgements, value judgements if you like, on a whole series of relevant factors'. '[A]ll the matters required either at [common] law or under our Sentencing Act...each of those must be separately considered.' It is hardly surprising that sentencers are not identifying, weighing and balancing all of the relevant factors simultaneously and, in fact, approach the task with order. It is evident from the sentencing remarks produced by the courts and the descriptions of the interviewees below. A serious defect of IS is that this organisational approach and the assessment of individual factors cannot be fully articulated and that the pretence of the 'all in one' approach must be maintained.⁵³⁵

Justice Kirby acknowledges that some judicial decision-making is puzzling to judges themselves and can therefore result in a lack of authentic explanations about how the functions are actually discharged.⁵³⁶ In some instances, interviewees appeared not to have thought about or explained their process in much depth before. There was a sense that they were seeking to solidify their understanding of the approach as they explained it. Despite this, all responses were well articulated and appeared to be an honest reflection of the judge's conception of their process, with several providing very thorough explanations. Their responses revealed that there is an informal structure adopted when applying IS and that it is similar across sentencers and courts, suggesting a degree of consistency of approach.

⁵³⁴ Hogarth (n 189) 69.

⁵³⁵ See Chapter 5.

⁵³⁶ Kirby (n 18). This is supported by evidence that decision-makers may lack insight into their cognitive processes or may lack the ability to articulate it (Dhami (n 184) 304 citing Mandeep K Dhami and Peter Ayton, 'Bailing and Jailing the Fast and Frugal Way' (2001) 14 *Journal of Behavioural Decision Making* 141; Richard E Nisbett and Timothy Wilson, 'Telling More Than We Can Know: Verbal Reports on Mental Processes' (1977) 84 *Psychology Review* 231).

In spite of the construction of IS as incompatible with structured sentencing, many interviewees regard sentencing as 'a reasoned process' and 'very structured'. Suggestions that judges are simply 'plucking figures out of the air'⁵³⁷ or sentencing 'on a whim'⁵³⁸ were regarded as ill-informed and 'astonishing': 'I consider it to be a very disciplined process and whatever else IS means it doesn't mean an ill-considered seat of the pants exercise.' This sentiment was echoed by a number of judges of all levels of court and experience. Ten of the judges interviewed spoke specifically about using steps or structure when coming to a decision on sentence. Surprisingly though, some judges described processes which would generally be considered to be inconsistent with IS. One of the models used, for example, was a starting point approach:

I probably do actually do something that's not dissimilar to starting from a central point and adding and subtracting. We just don't describe it as that, we don't attribute particular numbers to it.

Other judges spoke of breaking their decision down into 'structured steps' or a staged approach:

Two or three stage sentencing is more or less mathematical, where you start with a presumed number and you start subtracting and adding and that's what we don't do. But do we engage in notional thinking? And do we have to start somewhere? And are we notionally moving around? The answer is yes. There's just no other way. Especially when you come to issues such as totality. Or parity... You have to say 'Well, I'd be up around here but because of parity I've got to make some adjustments. How much

⁵³⁷ *Markarian* NSWCCA (n 314); *Edney* (n 323).

⁵³⁸ *Bagaric* (n 264).

adjustment should I make?' I still don't think that's two or three stage sentencing but it's two or three stage thinking.

In both examples, it is the absence of numbers, not the absence of structure, that is said to make the process instinctive (as opposed to mathematical and thus impermissible). One judge went further, suggesting that the ordered nature of the process be emphasised through the label of 'analytical' rather than 'instinctive' synthesis, to reflect the use of comparable cases, ranges, sentencing statistics and current sentencing practices to guide decision-making.

Finally, but significantly, one judge described their reaction to a presentation about the sentencing guidelines used in England and Wales as follows:

I'm sitting there thinking 'That's exactly what I do'. That's exactly what we do...our sentencing process, it's called instinctive synthesis, but it's actually structured in a sense, before you get there.

Judges' comments demonstrate that, even without involving figures, sentencers are applying structure to their decision-making process. The irony of IS is that while it permits these structured approaches, it does not permit sentencers to fully explain them and so invites criticism for being 'sentencing on a whim'.

2.2. The decision-making process

Even those judges who did not speak specifically about a stepped or structured style usually approach the relevant factors in a particular order. That order is broadly the same within and across the courts.

Justice Goldring suggests that the most useful checklist for a sentencing judge is the *Crimes Act* (Cth) s 16A(2), even in relation to state matters.⁵³⁹ Only one interviewee, however, described using statute (s 5 of the *Sentencing Act* (Vic)) as a checklist. Several others explained that statutes define the limits of their discretion and set out relevant considerations but do not provide much guidance as to approach: 'The factors are very precise, it's the process, it's the putting it together which is a bit looser.'

Previously, the Judicial College of Victoria Sentencing Manual⁵⁴⁰ suggested that sentencers should consider factors in the following order: offence gravity; circumstances of the offender; policy considerations (e.g. guilty plea, delay, extra-curial punishment); sentencing purposes (e.g. just punishment, deterrence); and finally sentencing principles (e.g. proportionality, parsimony, totality, parity). This suggested approach was in operation at the time of interviewing, though none of the 32 judges mentioned the Sentencing Manual. Judges referred to case law, submissions, comparable cases, current sentencing practices and Sentencing Advisory Council statistics but not to the Manual, suggesting that it played little role in guiding their decisions. Perhaps appropriately then, the suggested approach has been removed following a recent update of the Manual. The Manual now groups factors under broad headings, such as 'Sentencing Principles', and 'Circumstances and Gravity of the Offence' but it is unclear whether the order in which these topics appear is also a suggested order of consideration. In spite of the lack of formal guidance through statute, guidelines or, to a lesser degree, the Sentencing Manual, the majority of the judges interviewed apply the same informal approach. Judges consider the relevant factors in four broad categories and in the same order: objective seriousness of the offence; factors relating to the offender; principles and purposes; sentencing range.⁵⁴¹

⁵³⁹ Justice John Goldring, 'Facts and statistics in the sentencing process' (2009) 32 Australian Bar Review 281, 285.

⁵⁴⁰ Judicial College of Victoria (n 490) [Part A, Section 2].

⁵⁴¹ This informal structure is demonstrated in sentencing remarks, see e.g. *DPP v Rule* [2015] VCC 387; *R v Snell* [2017] VSC 394.

2.2.1. Gravity of the offence

Almost all interviewees begin their process with a consideration of the offence: '[T]he objective gravity is what first drives you and gives you that starting point.' Judges spoke about trying to 'get a feeling for the actual level of offending' and, in particular, 'the circumstances of the offence that make this either more or less serious than the run of the mill'. Determining where on a scale of seriousness the offence falls appears to ground many of the judges' thinking:

...we end up having to use the language...saying it's [a] high, medium or low example [of the offence]...We do end up either mostly with express words but sometimes more subtly picking out the features that make it more or less serious: the premeditation or the spontaneity; in company or alone; night time/day time; the place; the vulnerability of the victim; the various things that, mostly case law tells us, are relevant.

The assessment of objective gravity is an example of where experience of criminal law and sentencing can be valuable. As the quote above indicates, few of the relevant considerations are set out in statute. A knowledge of case law and comparable cases is necessary to understand what a 'run of the mill' case looks like, how it is sentenced and how various factors affect an evaluation of seriousness.

The seriousness of the offence is said to include the degree of harm and extent of offender's culpability.⁵⁴² Only one judge made specific reference to culpability as part of the discussion of approaches to decision-making. The judge emphasised the importance of understanding the level of culpability and 'role played by the individual, in order to assess the gravity of the offending'. This suggests that culpability is generally regarded as part of the assessment of objective gravity, not as a separate assessment of its own. Culpability is a factor to which the court must have regard⁵⁴³ but there is little formal guidance as to when and how it is to be

⁵⁴² Freiberg (n 37) 240.

⁵⁴³ *Sentencing Act 1991* (Vic) s 5(2)(d).

assessed. It can be considered in relation to the seriousness of the offence. The Victorian Sentencing Manual, for example, makes reference to culpability under offence topics such as planning and scale, intention and knowledge, role of the offender and hate crimes.⁵⁴⁴ An assessment of culpability may though also involve consideration of individual factors,⁵⁴⁵ blurring any separation between evaluation of objective seriousness and personal circumstances of the offender.⁵⁴⁶ Alternatively, culpability can be considered as its own distinct issue.⁵⁴⁷ Given the many contexts in which it may arise, lack of specific reference to culpability by interviewees is less surprising as it may be that judges are incorporating it into wider assessments.

In this context, the flexibility of IS may be regarded as a strength. There being no set steps, judges can consider individual factors, such as culpability, in detail, at any point they deem appropriate.⁵⁴⁸ This flexibility may, however, have serious implications for consistency of approach, as discussed in Chapter 6. Whether this translates to inconsistency of outcome is unclear as, unlike sentencing guidelines in England and Wales, an assessment of offence gravity and culpability does not translate into an offence category, starting point or range.⁵⁴⁹

2.2.2. Circumstances of the offender and Principles and Purposes

As with the gravity of the offence, factors relevant to the circumstances of the offender are largely set out in case law. Those which featured most often in judges' comments were:

⁵⁴⁴ Confusingly, the Manual places the assessment of motive, which may increase or reduce culpability, amongst individual sentencing factors alongside character, personal history and remorse.

⁵⁴⁵ For example, where the first limb of *Verdins* (n 33) is enlivened. See also *Bugmy* (n 32) 595 [44]–[45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (deprived background); and *R v Koumis* (2008) 184 A Crim R 421, 435 [54] (*Koumis*) (addiction); Freiberg (n 37) 241–2.

⁵⁴⁶ As McCallum J notes in *McLaren v R* [2012] NSWCCA 284, [29]: ‘That this assessment [of moral culpability] is also sometimes referred to as the “objective seriousness” of the offence perhaps contributes to the misconception.’

⁵⁴⁷ NSW Sentencing Bench Book (n 529) [7–920].

⁵⁴⁸ See e.g. *Williams* (n 413) [43] (Price J).

⁵⁴⁹ See further discussion in Chapter 6.

criminal history;

...your priors will be very important either making things worse or better, depending on both the number but more important the nature of prior convictions and what they're demonstrating.

addiction and related attempts at rehabilitation; and mental health.

...mental illness looms heavily in any sentence...and you've got to be quite nuanced and careful in your description of that.

Then you get into your intellectual disability and your *Verdins*, *Verdins*, *Verdins*.⁵⁵⁰ I think somebody's actually done an analysis of how many cases in this court refer to *Verdins*.

Verdins...everybody tells us that their client deserves to be dealt with under limbs 4, 5, and 6 of *Verdins*.

Judges often simply listed the circumstances which may be relevant, without explaining how they were balanced against other sentencing considerations:

...he's young, he's got no priors, he's done nothing since, he's got good family, his prospects of rehabilitation are very good, he's not a danger to the community, general deterrence...

⁵⁵⁰ The Court in *Verdins* (n 33) set out six ways in which mental impairment may influence sentencing.

It was apparent though that the circumstances of the offender are used to inform decisions as to the appropriate purpose(s) of sentencing.

...in order to apply the principle you have to find all the facts, both the aggravating, the offence seriousness, the victim impact, the personal circumstances. You've got to find all that first. It's a bit like building a wall, you've got to have all the bricks down the bottom before you start putting the bricks on top.

Three judges spoke about how a particularly important personal factor might form the 'theme' of the sentence, influencing the purposes of sentencing and thus the ultimate outcome:

The offender's got prior [criminal] history...11 pages of priors, including theft, unlawful assault, recklessly causing injury...committing offences on bail, affray, damaging property...attempted armed robbery when he was a kid, when he was 16. So there's not much that can really be said by way of mitigation...I'll be able to determine the appropriate sentence on that fairly readily I think and I think largely instinctively.

...you look at the person's character, their antecedents, their prospects of rehabilitation. I'm always very interested, because it's 18 months to two years before an offender comes up [for sentence], [in] what they've done in the meantime, whether they've got family support. All those sorts of things.

Only one judge went into detail about how principles and purposes apply and interact with other sentencing factors. The majority of judges, when describing their decision-making process, did not refer to specific purposes of sentencing or sentencing principles, though these often came up in other parts of the conversation.

2.2.2.1. *Variations*

Not all judges described a process which followed the pattern of offence seriousness; circumstances of the offender; principles; sentencing range. One, for example, considers criminal history separately after offence seriousness, in advance of the victim impact and offender's personal circumstances. Another begins by considering any plea of guilty and the offender's criminal history. Therefore, while there may be a broad consistency as to the order in which Victorian judges approach the relevant sentencing factors, it is not absolute. As discussed above, there being no set IS methodology none of the approaches explained by the judges are incorrect. Judges remain free to consider sentencing factors in (almost) any manner they deem appropriate.

2.2.3. Range

It is a central feature of Australian sentencing that there is no single, correct sentence.⁵⁵¹ Instead there is a sentencing range, an area of decisional freedom within which reasonable minds may differ.⁵⁵² The range encompasses every decision to which a reasonable decision-maker could have come, having proper regard to the statutory framework and relevant features of the case.⁵⁵³ It may be used as a guide or 'yardstick'⁵⁵⁴ against which to measure proposed sentences.⁵⁵⁵

Interviewees describe the range as influenced primarily by comparable cases, in addition to the gravity of the offence and maximum penalty. The majority of judges upon reading the material before the sentencing hearing appear to form a general opinion about the

⁵⁵¹ *Pearce* (n 62) 624 [46] (McHugh, Hayne and Callinan JJ); *Markarian* (n 6) 383-4 [65]–[66] (McHugh J); *Bugmy* (n 32) 588 [24] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

⁵⁵² *MacNeil-Brown* (n 349) 679-680 [7]–[8] (Maxwell P, Vincent and Redlich JJA); *Norbis v Norbis* (1986) 161 CLR 513, 518 (Mason and Deane JJ), 540 (Brennan J) (*Norbis*).

⁵⁵³ President Chris Maxwell, 'The Statutory Implication of Reasonableness and the Scope of Wednesbury Unreasonableness' (2017) 28(3) Public Law Review 16, 21.

⁵⁵⁴ *DPP (Cth) v De La Rosa* (2010) 273 ALR 324, 387 [304] (Simpson J) (*De La Rosa*).

⁵⁵⁵ *R v King* (1988) 48 SASR 555, 557 (Cox J).

appropriate range or what the act is 'worth':

...for cannabis cultivation at a commercial level, we know, generally speaking, people are getting somewhere between 18 months and five years. I've even expanded that range because, to tell you the truth, it's probably even narrower than that, it's probably sort of two to four years.

...you don't even really think, where might be edges of the range be. You might say to yourself 'I think it's worth 10-12' but you don't say to yourself 'How low could I go?' or 'How high could I go?'.

Only one judge said they avoid thinking about figures before going on to the bench or immediately after they leave, for fear of confirmation bias. For the majority of interviewees, thinking of a range seems to occur almost automatically, as a manifestation of instinct and experience.⁵⁵⁶

The first thing I do when I have a sentencing matter that I have to deal with is to read all of the material in as open-minded way as I can. And, having read it, I will instinctively think of a range but that's simply something that comes naturally.

I suspect most judges go in with some sort of preconceived notion of where this is heading. If only because we know what the sentencing ranges are and you can't put that out of your mind...But always of course you have this open mind.

⁵⁵⁶ For further discussion of knowledge of sentencing ranges see Chapter 6 [3.4].

This final comment was repeated by several judges. Judges do not consider themselves in any way bound by their initial thoughts on range. It appears to be, like the assessment of seriousness, a way of locating the offending within a broader context. It is expected that thoughts about range will evolve in response to submissions and each of the relevant factors:

...you've got to remember all the time that there are so many individual variables that the case will move up or down within the range...It just depends on the individual circumstances of the case.

I read all of the material, hopefully with an open mind, and then, whilst I will have a sense of a range, I will just allow the parties to argue this out. I certainly wouldn't want to let myself be too close-minded about what might be the appropriate sentence before I hear from the parties and hear the evidence in particular...Victim Impact Statements and witnesses called on a plea can have an enormous effect, aside from anything else.

Judges appear to move up and down within the range, and even outside their initial range, in response to various sentencing factors. Interviewees emphasised though that they were careful not to fix exact numbers and risk introducing a mathematical element, giving rise to appealable error:⁵⁵⁷

I consider the act and then I have a notion of what that act is worth...[O]f course to articulate that would be contrary to the instinctive synthesis and the High Court say: 'No you can't do that'.

⁵⁵⁷ *Wong* (n 10) 611 [74] (Gaudron, Gummow and Hayne JJ).

The court has recognised sentencing range as a relevant consideration⁵⁵⁸ but again, sentencers are unable to be open about how they make use of it. The prohibition against explaining exactly how decisions are approached and thoughts are organised does not prevent those practices, it simply means they are never expressed and the specifics of decision-making are obscured by IS.

As in the Crown Court study, most judges stated that the submissions advanced by counsel were generally sensible.⁵⁵⁹ This suggests that most practitioners are aware of and work within the same ranges as the judges and that the ranges are not a judicial secret. They are discernible to those with appropriate experience of criminal law and access to the same case materials, though perhaps not beyond this limited group. Few judges spoke about how they translate submissions, evidence and evaluations of seriousness, offender circumstances and sentencing purpose into a specific figure within the range. Interestingly, judges from the same court appeared to have opposing techniques with some using the midpoint of the range as the basis for the head sentence whilst others specifically stating that 'you don't just pick the midpoint' but instead try to tailor the figure more precisely.⁵⁶⁰

This indicates that approaches are not strictly consistent and is particularly concerning given that the inconsistency appears to impact directly upon the ultimate sentence. A more common response, however, was to remark upon the difficulty of quantifying factors. The inability to explain precisely how this is done is perhaps reflective of the 'instinctive' nature of the exercise. Judges appeared to take comfort in the fact that IS recognises a range of acceptable sentences and that there is no single correct sentence that they must identify.

⁵⁵⁸ See Chapter 6 [3.4].

⁵⁵⁹ Ashworth et al (n 19) 43.

⁵⁶⁰ See further discussion at p 171.

2.2.4. Sentencing as routine

Several experienced judges explained that they had a fairly formulaic approach to the sentencing exercise. As one judge explained, '[t]he same factors and issues come up every single time, they are extremely familiar.' The result is that sentencing follows a very well-known routine for many judges and focuses on a limited number of relevant factors. This led more experienced judges to describe the process in quite an informal manner:

Some factors are relevant in some cases, some are not. But everyone knows what they are. So there's a list...general deterrence; protection of the community; just punishment; denunciation; youth; rehabilitation; support in the community; expert evidence...The same factors always appear. So there's no message, no sort of mystery in it. It's all very well known.

...if you look at the limited range of matters that you're actually dealing with: Right, he pleaded guilty? What stage? Early or late? Remorse? Yes/no. Rehabilitation? Yes/no. Any custodial hardship? Any mental health issues? They're not massive issues.

For all the myriad of factors which may be relevant, judges appear to have developed their own set of informal questions that guide and simplify their decision-making:

Justice Vincent got this right, years and years ago he told me this: the first question is 'Who is he? What's he done? Has he done it before? And what do you expect me to do about it?'. And that's realistically what sentencing's all about.

Sentencing is not that hard if you break it down to its basics and you put out some of the ridiculous complexities that have emerged. It's not that difficult: Where does the crime rank? How old's the accused? What sort of background's he got? What are his

prospects in so far as you can ascertain the impact of the crime? Consequences of it.
The maximum penalty...What's he or she worth? That's not that hard.

Though expressed differently, these questions are concerned with the same matters. Questions such as 'Who is he?' and 'What sort of background's he got?' are broad enough to encompass a range of relevant factors. They demonstrate that judges are not necessarily considering those factors in isolation. This holistic approach allows for the fact that they often intersect⁵⁶¹ and is facilitated by the IS model.

This may give the impression that sentencing is a straightforward task which requires little effort. All of the judges interviewed though described sentencing as a careful, considered process. They strongly refuted suggestions that judges 'pluck figures out of thin air'⁵⁶² or sentence 'on a whim':⁵⁶³

No one sentences on a whim. And I think that's the unfortunate thing about instinctive synthesis is that the phrase itself, especially to a lay person, suggests that we are, and that's just not the case.

I can't believe that any fair-minded person would read the judgments of this court and think that we're acting on a whim... if I were to sentence on a whim, first my colleagues would isolate me, secondly the High Court would overturn me.

The concept of a judge sentencing on a whim, I've got to say, after 40 years, I've never seen that happen...People just don't sentence on a whim. They might get it wrong from time to time, they might misapply a fact or give the wrong weight to some factor but to

⁵⁶¹ See e.g. *Gallagher* (n 372) 227 (Gleeson CJ); *Beavan* (n 376) [14]; *R v Flaherty (No 2)* (2008) 186 A Crim R 338, 342 [11], 343 [14] (Kaye J) (*Flaherty (No 2)*).

⁵⁶² *Markarian* (n 6).

⁵⁶³ *Bagaric* (n 538).

be whimsical? That just doesn't happen really... Judges do work in a very principled way, never seen anything different.

The difficulty of the sentencing task and the care with which judges approach that task was a consistent theme throughout the interviews. In keeping with findings in Australian,⁵⁶⁴ UK⁵⁶⁵ and Canadian⁵⁶⁶ studies, judges at all levels of court and of all ranges of experience on the bench identified sentencing as the hardest part of their job:

[I]t's not a part of my job that I feel really satisfied with...It's not like I finish passing sentence and come back and say [claps hands] 'Let's do another one!'

It's the hardest thing we do, I think...the hardest thing I've ever done as a judge is sentence people because of all the emotional threads pulling every which way, because of the devastation that the sort of cases we hear involve, dead people, destroyed families at both ends and it's very, very hard.

It's really hard sentencing, I know people have said it, it sounds like a cliché, but sentencing *is* one of the hardest things that we have to do and we do our best. And sometimes we get it right and sometimes we get it wrong but we always do our best. We agonise over it, we truly do.

Many judges used the same language, describing sentencing as 'agonising' and 'worrying', and the same experience of 'wak[ing] up the night before a sentence still wondering if I've done the wrong thing'. Their comments hint at internal conflicts and the emotionally draining

⁵⁶⁴ Mackenzie (n 17) 29-30.

⁵⁶⁵ Ashworth et al (n 19) 55.

⁵⁶⁶ McCormick and Greene (n 190).

nature of the task. Judges often spoke about being worn out or worn down by seeing the effects of offending and of sentences on people's lives and the worry about whether they have arrived at the right decision.

Several interviewees suggested that the sentencing task is becoming increasingly complicated. They explained that, prior to the introduction of the *Sentencing Act*, sentencing was 'a more free-range exercise'. Now judges feel increased pressure due to heavy workloads, the push for efficiency and as a result of sentencing becoming more technical. The availability of material, such as statistics and comparable cases, and the introduction of legislative requirements are becoming additional complications for judges. Attention is increasingly being given to protecting judicial wellbeing,⁵⁶⁷ yet sentencing remains a major source of stress that may have ongoing personal and professional consequences:

This job burns you out, sentencing people. It's very hard work and I don't know terribly many judges who have been doing it for a while who are happy to keep doing it forever.

It's a thankless task for the most part...[and] in terms of people realising the complexity and challenges of the work, no one out there really cares and that's, I think, regrettable.

2.2.5. Instinctive override

To manage the increasingly complex requirements of sentencing, many of those interviewed reported applying a systematic approach. They take time to reflect upon first impressions and to examine the case thoroughly in a manner similar to instinctive override model applied by judges in Brown's study.⁵⁶⁸ The initial instinctive response is sometimes altered as the result of deliberation and analysis.

⁵⁶⁷ See e.g. Schrever, Hubert and Sourdin (n 202); Chief Justice Anne Ferguson, 'Making Wellness Core Business' Wellness for Law Forum 2019, Melbourne, 15 February 2019) <<https://www.supremecourt.vic.gov.au/about-the-court/speeches/making-wellness-core-business>> accessed 14 July 2019; Judicial College of Victoria, 'Judicial Wellbeing Resources' (Judicial College of Victoria 2019) <<https://www.judicialcollege.vic.edu.au/judicial-wellbeing>> accessed 14 July 2019.

⁵⁶⁸ Brown (n 91) 127-8.

Unlike the judges who spoke to Mackenzie,⁵⁶⁹ all of the judges in this study read the case material in advance of the sentencing hearing. Informed by this material, the majority also form impressions about the appropriate sentencing range, as discussed above. Interviewees were clear, however, that these initial thoughts were not settled:

...it'll [IS] be happening from the time you read the material, before you've gone on the bench. You're already thinking about it. You then might have a preliminary view and you go on the bench and your preliminary view may be confirmed or it might be altered by what you hear.

Judges explained that their evaluations change as they gain a fuller understanding of the circumstances. They spoke about the way in which further information, for example about an offender's mental health, can reframe their thoughts about other factors, such as rehabilitation, and impact the provisional sentence or non-parole period.

The process of revising initial impressions is more nuanced than indicated by Brown's summary. Responses by Victorian judges suggest that it is a multi-stage exercise. Having revised their first impressions following the sentencing hearing, some judges begin dictating or drafting their sentencing remarks as soon as they leave court. Their synthesis is then refined through re-reading and re-drafting. Several interviewees spoke about writing as the process

⁵⁶⁹ Mackenzie (n 17) 39.

which ‘causes things to crystalise’:

I think it was Owen Dixon who said this; the great tradition of the common law is sometimes you can start a judgment not knowing what the answer is but, as you write it, it sort of falls off the page, it sort of becomes more and more obvious. And I can’t tell you how many judgments I’ve written that way.

Multiple judges spoke about the way in which the discipline of articulating the relevant factors helps them to refine their thoughts: ‘you really then focus very heavily on your factual findings and how you apply them.’ Two judges said that their ideas in relation to seriousness and the relevant sentence generally do not change. The majority, however, described re-evaluating thoughts about the case and appropriate sentence during a process of reflection that accompanies writing because

you’re slowing down your thought processes, you’re thinking more about it. Things which occurred to you at the plea hearing but perhaps not to the same extent, start to have a greater impact upon you.

Writing ‘brings it all into sharper focus’ through the careful selection of words. Sachs draws a distinction between intuitive thought or the ‘logic of discovery’ and the ‘logic of justification’ that dictates formal reasoning.⁵⁷⁰ These thoughts were echoed by interviewees who explained that judgment writing is a ‘very concentrated form of reasoning...you express yourself in the most precise terms. When you’ve got to, orally or in writing, express yourself, your logic becomes a lot tighter.’

⁵⁷⁰ Judge Albie Sachs, *The Strange Alchemy of Life and Law* (OUP 2011) 52-3.

Posner suggests that a written opinion 'will often turn out to be a rationalisation of the result reached on inarticulate grounds'.⁵⁷¹ Interview responses suggest though that for the vast majority of judges in this study the opposite is true: 'I find when I write, whether it's judgments or sentences, it does amaze you, you think 'Good God, I've ended up there!'" Not only do many change their minds about the appropriate sentence while drafting, they also seem to regard this as an important and positive element of the sentencing process.

Changes to the weighting of factors and principles generally mean changes to the ultimate sentence. Several judges spoke of going through multiple drafts of sentencing remarks, making adjustments to the synthesis of factors each time. Six judges observed that, as a result of their adjustments and more detailed consideration of the circumstances, the sentence being considered is usually reduced:

[M]y first instinctive response probably plays too much, gives too much weight to the objective gravity and then when I start to hear about the personal circumstances and all the, the personal factors and the explanation for the offending I tend to pull back a bit. That means the system's working doesn't it?

As one judge phrased it, 'you'd rarely add on, but you might take off'.

⁵⁷¹ Richard A Posner, *How Judges Think* (Harvard University Press 2008) 63 cited in Brown (n 91) 132.

In general, it is often the figure that is the last part of the sentence to be completed:

I listen to the plea, I grab hold of the Dictaphone and blurt it all out but I don't ever put a sentence on it. I never put a sentence on it. Then I read it, have a think about it... That doesn't mean I haven't somehow had some brackets of 'could be worth about that' but I just don't put a figure on it. I like to calmly have a think about it.

I may have virtually completed my sentencing reasons and still be thinking about the numbers.

It is also the element over which interviewees agonise the most. Even having reflected upon the sentence while drafting, most take time to consider the matter again. Many spoke about 'stepping back'⁵⁷² from the sentencing remarks, setting them aside overnight or for a few days and reviewing the number 'in the cold light of day'. Even allowing time for reflection the final sentence is still a source of consternation:

You lie awake at night thinking about it, you sit around at home thinking about it... you play it over and over and over.

I'll wake up the night before a sentence still wondering if I've done the wrong thing; 'It's 20, that's too light. 21? Now, a year is a long time in a person's life. It's a bit steep.'

⁵⁷² See also *Way* (n 381): 'The desirability of a judge adopting the practice of standing back after reaching a provisional sentence, and of reviewing it so as to be sure that it is appropriate for the offence at hand...cannot be understated...'

And in spite of all of the re-reading and reconsidering, some judges are still prone to making last minute changes:

I have been known in the lift going to court to change it before I go in and deliver it and then I get to the end when I'm trying to read 'What is that figure?' I've crossed it out so many times.

Often I change my mind in reading it out.

These comments in isolation might suggest that judges are simply picking numbers in a panic. Read in light of the descriptions of the sentencing decision-making process as a whole, however, it is clear that it is a complex task and that judges take their sentencing responsibilities seriously. Even those experienced judges who find the process relatively easy to navigate still take a great deal of care over the decision and their sentencing remarks. Though they could approach the task as a single step instinctive decision, the majority of judges interviewed take multiple opportunities to consider their position: before the sentencing hearing, during and after; while drafting their remarks; upon re-reading and editing their remarks; and when deciding upon a figure for the final sentence. Any doubt and uncertainty about the sentence reflects the difficulty of the task rather than a lack of effort or interest by the sentencers: 'there are a lot of factors to be taken into account and all you can do is your best.'

3. Conclusion

According to the High Court, IS requires the sentencer to use an unstructured approach 'to take account of all of the relevant factors and to arrive at a single result which takes due

account of them all.⁵⁷³ It is evident from interviewees' explanations that in practice, applying IS actually involves making a series of decisions as to the relevance, weighing and balancing of the factors. These evaluations are managed in a methodical way, with many judges following the same broad approach: objective seriousness of the offence; factors relating to the offender; principles; sentencing range. While there is still scope for overlap and inconsistency in the treatment of sentencing factors, this common approach demonstrates an informal structuring of the decision-making process and a degree of consistency across interviewees.

Instinct and experience allow sentencing judges to process the series of decisions efficiently. Experience gives judges an understanding of what the particular offence is 'worth' and enables them to weigh and balance relevant considerations without having to engage in detailed analysis or comparison. Using these short-cuts, sentencing decision-making can become instinctive as judges progress through the synthesis without having to actively deliberate over each element.

The IS applied by judges is not inconsistent with the broad doctrinal definition but it is more detailed. That definition though, and the term 'instinctive synthesis', conceal the structure and effort that goes into the sentencing decision and are open to misunderstanding as a gut reaction or a decision made on a whim. Though IS was discussed by some in casual language or characterised as straightforward, overwhelmingly interviewees described a process of continuous evaluation and adjustment. Yet the informal structure and the detailed considerations undertaken by judges remain hidden behind the veil of 'instinctive synthesis', preventing the sentencing process from being properly understood and scrutinised.

⁵⁷³ *Wong* (n 10) 611 [75] (Gaudron, Gummow and Hayne JJ).

Chapter 5 Instinctive Synthesis and Transparency

As Chapters 3 and 4 have demonstrated, central to the IS model is maximising judicial discretion. Broad judicial discretion and the absence of a common sentencing methodology allows for a variety of different approaches and outcomes. The previous chapter has shown that many interviewees adopt a similar informal approach to the sentencing task. Being informal and loosely defined, however, it still allows for significant variation in the identification and treatment of sentencing factors and the ultimate outcome. In the absence of external sentencing guidance or structure within the IS model, sentencing remarks and judgments provide the only insight into how the task is approached. The High Court has recognised that 'The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public.'⁵⁷⁴ The IS model though does little to promote transparency. Instead, it obfuscates the decision-making process by preventing comprehensive explanation of the approach applied and by providing a veil behind which sentencers may avoid scrutiny.

Overview

To encourage understanding and acceptance by parties and the public and to enable effective review by appellate courts, the sentencing decision must be clearly explained. Yet rather than facilitating this task, elements of the IS model can act as impediments. Broad judicial discretion and characterising sentencing as an instinctive exercise, in which all of the relevant factors are considered as part of a single step, can excuse a sentencer from providing a proper account of their decision-making. In prohibiting the explanation of how the relevant factors are weighed and balanced, IS also inhibits the identification of the threads of reasoning that lead to the sentence.⁵⁷⁵

⁵⁷⁴ *Markarian* (n 6) 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

⁵⁷⁵ See Kirby J in *AB* (n 48) 149-151 [101]–[103]; *Markarian* (n 6) 406 [135]; see also *Wong* (n 10) 611-2 [74]–[76] (Gaudron, Gummow and Hayne JJ); *Ashdown* (n 526) 373 [151](5) (Ashley JA).

The reasons for sentence given by judges go some way to overcoming the IS barriers to transparency. Within Victoria, there is a practice of producing lengthy reasons for sentence, but long reasons are not evidence that the IS model itself is transparent. They are an attempt to compensate for defects in the model and bring transparency to a process that is otherwise opaque. Length is also no guarantee that the reasons themselves will be clear or that they actually reflect the decision-making process used by the judge.

By virtue of the number of sentences judges deliver, sentencing remarks can become formulaic as judges adopt a format and language that they know is consistent with IS and unlikely to attract appellate criticism. This formula can also mask the true decision-making process. Reasons for sentence have the potential to bring greater transparency to the IS sentencing model. Yet the degree of transparency depends almost entirely on the individual judge and how much they choose to reveal, as the unstructured IS model does little to promote openness in decision-making. Instead, it acts as a term to hide behind and allows for a myriad of different approaches to determining sentence whilst also discouraging proper explanation of those approaches and the underlying reasoning.

1. 'Instinct'

The term 'instinctive synthesis' is itself opaque and does little to explain how sentences are determined. As Kirby J observes in *Markarian*, the courts 'should not be encouraging the thought that there descends upon a judicial officer, following appointment, a mystical 'instinct' or 'intuition' that ensures that he or she will get the sentence right 'instinctively'.⁵⁷⁶ In addition to discouraging the explanation of the logical and rational process that led to the sentence, it signals that sentencing in Australia is the exercise of purely personal legal power by the judiciary.⁵⁷⁷ Were judges' instincts reliable and infallible they would be relied upon throughout

⁵⁷⁶ (n 574) 404 [130].

⁵⁷⁷ (n 574) 404 [130].

the legal system,⁵⁷⁸ yet in no other discipline are the decisions of the court said to be based on instinct.⁵⁷⁹

Instinct or intuition may refer to implicit knowledge or a learned emotional response, a form of reasoning so entrenched that it operates subconsciously.⁵⁸⁰ While enabling faster decision-making, acting at a subconscious level can mean the influence of unrecognised biases and assumptions. There is no basis for testing the accuracy of such intuitive ‘truths’, which vary between sentencers.⁵⁸¹ These subjective interpretations are normalised through the emphasis on intuition which, being difficult to explain, can also feed the impression that sentencing is based upon ‘gut reaction’. This is at odds with the ‘cool reason’ required in sentencing⁵⁸² and signals that the use of empirical data, such as sentencing statistics, and structured decision-making are of limited importance.

As will be shown in Chapter 6, sentencers do make use of sentencing information. They also apply an informal structure to their decision-making and rely heavily on knowledge and experience, rather than pure instinct, as discussed in Chapter 4. Continued use of the term ‘instinctive synthesis’, however, does not encourage any further examination of these details. It conceals them and encourages what one interviewee described as an ‘anti-intellectual view of sentencing’ that enables courts ‘to skirt around really important issues about how and why particular sentences are imposed’. Rather than promoting the explanation of the rational process that led to the sentence,⁵⁸³ IS provides a phrase behind which sentencers may hide. A subjective, instinctive response cannot be subject to logical evaluation. The assumptions

⁵⁷⁸ Andrew von Hirsch, ‘The Project of Sentencing Reform’ in Michael Tonry and Richard Frase (eds) *Sentencing and Sanctions in Western Countries* (OUP 2001) 411.

⁵⁷⁹ The most obvious comparison would be between sentencing and the calculation of damages in a civil context. Far from relying on instinct, the latter is subject to a comprehensive series of legislation and guidance. See e.g. *Wrongs Act 1958* (Vic); *Workplace Injury Rehabilitation and Compensation Act (2013)* (Vic); *Transport Accident Act (1986)* (Vic), Judicial College of Victoria, *Serious Injury Manual* (Judicial College of Victoria 2015) <<https://www.judicialcollege.vic.edu.au/eManuals/SIM/indexpage.htm#53962.htm>> accessed 4 September 2020, see in particular Part 13 ‘Rules relating to damages’.

⁵⁸⁰ Traynor and Potas (n 15) 4.2.

⁵⁸¹ Mirko Bargaric, ‘Sentencing: The Road to Nowhere’ (1999) 21 (4) *Sydney Law Review* 597, 609.

⁵⁸² *R v Rushby* [1977] 1 NSWLR 594, 597 (Street CJ).

⁵⁸³ *Markarian* (n 6) 404 [130] (Kirby J).

and attitudes informing the reaction cannot be interrogated and there can be no guarantees of objectivity, fairness and consistency as the decision-making processes are unclear.⁵⁸⁴ In this way, IS discourages examination of the rationality of the decisions and impedes transparency and accountability in judicial decision-making.⁵⁸⁵

2. Transparency

Given the complexity of the sentencing exercise,⁵⁸⁶ the reasoning process should be set out as clearly as possible to promote consistency and confidence in the administration of justice. There has been a shift in sentencing in the United Kingdom, United States, Canada and New Zealand,⁵⁸⁷ and also within Australian administrative law,⁵⁸⁸ towards a rule of law ideology and the exposure of decision-making to greater scrutiny. IS runs contrary to this movement; '[t]alk of 'instinctive synthesis' is like the breath of a bygone legal age. It resonates with a claim, effectively, to unexplainable and unreviewable power'.⁵⁸⁹ As a consequence, it provides a disincentive to jurisprudential and doctrinal development of sentencing law.

In any other area of law, such a wide scope for unexamined discretion and personal sentiment would give rise to complaints about the lack of predictability, certainty and transparency.⁵⁹⁰ In sentencing, however, judicial independence, broad discretion and the notion that sentencing is an instinctive art have created an 'inscrutable'⁵⁹¹ sentencing model. Yet it is in sentencing, where the state exercises its punitive powers, that transparency is most needed. Persuasive and clear reasons are necessary to explain and justify the imposition of punishment.⁵⁹² The sentence is one of the few means the community, victim and offender have to gauge whether

⁵⁸⁴ Mackenzie (n 17) 19.

⁵⁸⁵ Fox (n 294) 19.

⁵⁸⁶ Kirby (n 18) 11.

⁵⁸⁷ Andrew Ashworth, 'Sentencing Reform Structures' (1992) 16 *Crime and Justice* 181, 188; Krasnostein (n 210) 40.

⁵⁸⁸ *R v Smith* (2003) 86 SASR 132, 148 [109] (Gray J) (*Smith*); *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); *Plaintiff S 157/2002 v The Commonwealth* (2003) 211 CLR 476, 513–514 [103]–[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

⁵⁸⁹ *Markarian* (n 6) 404 [129] (Kirby J).

⁵⁹⁰ Bagaric (n 15) 77–8 and 104–8.

⁵⁹¹ Ashworth (n 146) 81.

⁵⁹² Bagaric and Pathinayake (n 156) 416.

justice has been done in a criminal case.⁵⁹³ Transparency in this process therefore has the potential to improve public confidence and legitimacy. In contrast, where explanations of the process and reasons for sentence are inadequate there is significant scope for misunderstanding. This in turn can mean that debates about sentencing policy are conducted on the basis of inaccurate or limited information. Unless it is seen, observers and participants may suspect that justice is not being done and the system may be brought into disrepute.⁵⁹⁴

As discussed in Chapter 4, interviewees explained that their ultimate decision comprises ‘a whole lot of individual judgements, value judgements if you like, on a whole series of relevant factors.’ Though IS involves considering all of the relevant factors in one step, that is evidently not how the task is approached in practice. Instead, sentencers make a series of smaller decisions. For example, as one judge explained:

Each of those [purposes of sentencing] must be separately considered: What is an appropriate sentence that will achieve the requirements of retribution? What sentence will work to ensure that other members of the community aren't tempted to behave in this fashion? What sentence will work to deter this individual from doing it again? How long must this individual remain in jail before arrangements can be made for him to be introduced back into the community in a rehabilitation? So each of those matters must, as I understand it, be separately considered.

If sentencers are breaking the decision down into a series of sub-decisions, each component decision should be identified and explained in order to properly understand the process and assess the suitability of the final sentence. This is particularly appropriate in a system centred upon the understanding that there is no one correct sentence.⁵⁹⁵ Given the possibility of

⁵⁹³ Traynor and Potas (n 15) 1; *Markarian* NSWCCA (n 314) 504 [31] (Hulme J).

⁵⁹⁴ Allan (n 157) 506; Galligan (n 157) 411, 422.

⁵⁹⁵ *MacNeil-Brown* (n 349) 680 [8] (Maxwell P, Vincent and Redlich JJA); *Markarian* (n 6) 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

multiple valid outcomes, proper articulation of the reasons for imposing the particular sentence is all the more important.

2.1. Treatment of individual sentencing factors

Judicial decision-making power ought to be exercised in a way which the people governed by it understand and generally accept, not one which conceals the processes.⁵⁹⁶ IS has been criticised as being vague and inconsistent as it does not require judges to systematically explain how they arrived at a particular sentence.⁵⁹⁷ The arrangement is supposedly justified by reference to the complex and intuitive nature of sentencing decision-making: ‘the art of sentencing is such that it is usually simply not possible for judges to describe the often difficult process by which the ultimate sentence is determined.’⁵⁹⁸ Sentencing factors are said to be so interrelated that an attempt to address them separately would not only be ‘artificial and contrived’⁵⁹⁹ but also multiply the possibility of error.⁶⁰⁰ Justice McHugh suggests that making individual value judgements about the relative weight of each factor carries the risk of over or under emphasising variables.⁶⁰¹ As a result, sentencers are effectively prevented from explaining in any detail the value they attribute to the various individual factors.⁶⁰²

Sentencing judges are permitted to indicate the critical sentencing factors though, as will be demonstrated below, it is not always the ‘full and transparent articulation’ encouraged by the High Court.⁶⁰³ They may suggest the relative weight given to those factors but are unable to identify the specific weight given to any individual factor.⁶⁰⁴ Instead sentencers are forced to use generalised descriptions. For example, interviewees used phrases such as: ‘I accept that

⁵⁹⁶ Kirby (n 586) 2; *Pearce* (n 62) 622 [39] (McHugh, Hayne and Callinan JJ).

⁵⁹⁷ See e.g. Farmer et al (n 32) 318.

⁵⁹⁸ *Beavan* (n 376).

⁵⁹⁹ *Gallagher* (n 372) 228; *Wong* (n 10) 611 [76] (Gaudron, Gummow and Hayne JJ); *Beavan* (n 376) [14]-[15] (Hunt CJ at CL).

⁶⁰⁰ *Lett* (n 410) [74]-[75] (Hunt J); *Markarian* (n 6) 379-80 [55] (McHugh J).

⁶⁰¹ *Markarian* (n 6) 379 [54] (McHugh J).

⁶⁰² According to the court in *Wong* (n 10) 611-12 [74]-[76] (Gaudron, Gummow and Hayne JJ), later endorsed in *Markarian* (n 6) 373-375 [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ): ‘So long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform.’

⁶⁰³ *Markarian* (n 6) 390 [84] (McHugh J).

⁶⁰⁴ Sentencing Advisory Council (n 73) 13; *Terrick* (n 73) 480 [5]; *Markarian* (n 6) 380-381 [56]-[58] (McHugh J).

there is some weight to be given to this but moderate weight only'.⁶⁰⁵ As one interviewee explained, the objective seriousness of the offence must also be suggested in broad terms:⁶⁰⁶

...we end up having to use the language, generally that offends members of the community, saying it's a high, medium or low example...We do end up either mostly with express words but sometimes more subtly picking out the features that make it more or less serious: the premeditation or the spontaneity; in company or alone; night time/day time; the place; the vulnerability of the victim. The various things that, mostly case law tells us, are relevant.

The result is not that sentencers refrain from attributing value to relevant factors, these values simply go unexplained, hidden behind the guise of considering all relevant sentencing factors at once. Sentencers must consider each factor and assign it weight in order to determine which considerations are the most important and which purposes of sentencing are most relevant in the circumstances. That does not necessarily have to involve assigning numerical values to each factor. In some instances, broad understanding of the relative weights of each factor may be sufficient, in which case the generalised descriptions above may be appropriate. Where a judge determines, however, that a factor warrants a specific increase or decrease to sentence, they should have the freedom to explain those precise alterations. Transparency requires that they be permitted to explain their process, including any structure they apply, the weighing of sentencing factors they do or the adjustments they make. The elements of the decision must be exposed in order to identify errors and to facilitate understanding and acceptance of the decision. IS does not achieve this.

⁶⁰⁵ See also *Mildren* (n 385) 6.

⁶⁰⁶ See also *Kertai v R* [2013] NSWCCA 252.

The IS model leads to confusion and uncertainty as to how individual sentencing factors have influenced the final sentence. It permits the production of sentencing reasons in which the sentencer simply lists the factors they have taken into consideration but without any explanation of how.⁶⁰⁷ This confusion led to Hulme J's suggestion that figures have 'just been plucked out of the air'.⁶⁰⁸ The sentencing judge in that case referred to objective and subjective features, such as rehabilitation and parity, but did not explain how they resulted in a sentence of two and a half years imprisonment.⁶⁰⁹ This IS practice of referring to relevant factors but not explaining the effect, and the pretence of considering all factors at once, makes it difficult to identify error. As Kirby J observed in *Cameron*, the appeal under consideration would not have been possible had the sentencing judge merely described generally that he had taken the plea of guilty into account and announced the sentence he had instinctively synthesized.⁶¹⁰ By explaining his decision-making, specifically the adjustment made on the basis of the guilty plea, the judge also revealed an error that would otherwise have gone unidentified and uncorrected.⁶¹¹ There is a concern that the exposure of the reasoning process will increase arguable appeal points.⁶¹² That may be so, but to reveal error can be no bad thing. To continue to apply IS means that mistakes and miscarriages of justice which ought to be remedied remain irreparably masked.⁶¹³

Some of the judges interviewed recognised the limitations of IS on transparency: 'In terms of public accountability and transparency we ought to be doing better than just saying 'I've had regard to all relevant factors and the number is X'. It's heresy.' Justice Kirby in *Markarian* suggested simply that sentencing judges should expose their reasoning process and specifically identify those considerations they deemed important in their decision making.⁶¹⁴

⁶⁰⁷ See e.g. *DPP v Le* [2018] VCC 12.

⁶⁰⁸ *Markarian* NSWCCA (n 314) 505 [33] (Hulme J).

⁶⁰⁹ *Markarian* NSWCCA (n 314) 505 [33]-[35] (Hulme J).

⁶¹⁰ *Cameron* (n 33) 363 [72] (Kirby J).

⁶¹¹ Similarly, in *Markarian*, it was through the efforts of Hulme J to be transparent in re-sentencing that the error was identified and able to be corrected upon appeal. But for the 'ironic disclosure of error' the appeal would probably never have been heard: *Markarian* (n 6) 393-4 [97]-[98], 407-8 [140] (Kirby J).

⁶¹² *Young* (n 273) 157; *Lett* (n 410) 9 [74]-[75] (Hunt J).

⁶¹³ *Cameron* (n 33) 363 [72] (Kirby J).

⁶¹⁴ *Markarian* (n 6) 404-406 [130]-[135] (Kirby J).

Transparency and accessible reasoning, as endorsed by the majority, are more likely to be achieved by the method proposed by Kirby J. Yet despite this and despite being supported by other members of the judiciary⁶¹⁵ and commentators,⁶¹⁶ Kirby J's suggestion of displaying the reasons behind the sentence was overshadowed by the majority endorsement of IS.

2.2. Transparency and appeals

Lack of transparency can impede the appellate court's task as without a proper explanation of the underlying reasoning or approach it can be difficult to evaluate the sentence. As explained above, the nature of IS means that even where an explanation is given it can still be difficult to identify how a sentence has been determined.⁶¹⁷ This is reflected in the fact that the most common ground of appeal in a sentencing matter is non-specific error.⁶¹⁸ A non-specific error involves a flaw in the exercise of discretion which may be inferred from the manifest excess or manifest inadequacy of the sentence.⁶¹⁹ It may be made out even where it is not possible to identify the precise source of the error.⁶²⁰ The focus on the outcome, as opposed to the reasoning,⁶²¹ and the acceptance that error need only be inferred⁶²² indicates that whether reasons for sentence comprehensively explain the decision-making process is of limited importance. Like IS, identifying a manifest error is said to be 'fundamentally intuitive'.⁶²³ This provides no objective grounds or evidentiary basis for identifying an error,⁶²⁴ yet the majority of sentencing appeals are decided on the basis of a 'hidden'⁶²⁵ error which is not explained or clearly justified.⁶²⁶

⁶¹⁵ See e.g. *Markarian* NSWCCA (n 314) 505 [33]-[35] per Hulme J; *R v Randall-Smith*; *R v Davi* (2008) 184 A Crim R 46, 53-4 [31] (Doyle CJ).

⁶¹⁶ See e.g. *Warner* (n 271) 359.

⁶¹⁷ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ) (*Li*).

⁶¹⁸ Sentencing Advisory Council (n 73) 92, 94. This includes appeals relating to the weight given to specific sentencing factors or principles, such as a guilty plea or prior convictions. As IS prevents judges from attributing a precise weight to any individual sentencing factor or principle, these are not specific sources of sentencing error but are considered particulars of the broader grounds of manifest excess or manifest inadequacy.

⁶¹⁹ *AB* (n 48) 160 [130] (Hayne J); *Wong* (n 10) 605 [58] (Gaudron, Gummow and Hayne JJ).

⁶²⁰ *House* (n 452) 505 (Dixon, Evatt and McTiernan JJ).

⁶²¹ See also *Dinsdale v The Queen* (2000) 202 CLR 321, 325-6 [6] (Gleeson CJ and Hayne J) (*Dinsdale*).

⁶²² *Terrick* (n 73) 480 [5].

⁶²³ See e.g. *R v Jones*; *R v Hili* (2010) 76 ATR 249 [41].

⁶²⁴ *Freiberg and Krasnostein* (n 53) 87.

⁶²⁵ *Markarian* (n 6) 389-390 [83] (McHugh J).

⁶²⁶ *Freiberg and Krasnostein* (n 66) 87.

A more detailed explanation in sentencing remarks of the reasoning process applied, the weight attributed to the various factors or the adjustments made could help to identify specific errors. The court has specifically recognised that '[t]he inability of an appellate court to discern the weight given to individual sentencing factors necessarily limits the scope of appellate review of a sentencing decision.'⁶²⁷ Yet rather than attempting to make sentencing decisions more transparent in order to aid review, the appellate system works around the lack of transparency. For example, the courts have held that judges cannot be expected to refer in detail to every piece of evidence or sentencing principle. As a consequence, implied consideration of the relevant factors is sufficient.⁶²⁸ Similarly, failure to mention a sentencing factor does not mean a failure to consider that factor⁶²⁹ and will not necessarily vitiate the decision or provide a ground for review.⁶³⁰

Recently there has been a movement towards particularising grounds of manifest error and the factors or principles supposedly given undue or inadequate emphasis.⁶³¹ Greater particularisation in the grounds of appeal (as a form of specific error, not manifest error⁶³²) would improve transparency but depends upon those specifics being identifiable amongst the reasons of the sentencing judge. So long as reasons can be generalised, specific errors in the application of principle or the weighing of factors are likely to remain concealed among a sea of factors to which the sentencing judge has broadly 'had regard'.

⁶²⁷ *Pesa v The Queen* [2012] VSCA 109 [10]-[12].

⁶²⁸ See *R v Stuttard* [2006] VSCA 112 [26] (Maxwell P).

⁶²⁹ *Dole* [1975] VR 754, 767; *R v Salameh* (1991) 55 A Crim R 384, 394 (Lee CJ); *R v Majors* (1991) 54 A Crim R 334, 338 (McInerney J); *R v Giakis* [1988] VR 973, 977.

⁶³⁰ *Koumis* (n 545) 438 [64]; *R v Mills* (2005) 154 A Crim R 40, 48 [51] (Wood CJ at CL); *R v Beary* (2004) 151 A Crim R 388, 395-396 [17]-[21] (Callaway JA); *DPP (Vic) v Drake* [2019] VSCA 293, [14]-[17]. Where a factor is unusual and may carry weight, the failure to explain how, if at all, it has been taken into account may amount to sentencing error: *Valayamkandathil v The Queen* [2010] VSCA 260, [27] (Neave JA).

⁶³¹ Freiberg (n 37) 1002-4; Victorian Court of Appeal, Court of Appeal Practice Statement No 1 of 2000. See e.g. *DPP v Arvanitidis* (2008) 202 A Crim R 300, 305 [13], 306 [15]-[16], 307 [18] (Redlich JA).

⁶³² Particularising manifest error conflates manifest error with specific error and conflicts with statements by the court that manifest error involves no identifiable error other than the sentence itself; *House* (n 452) 505 (Dixon, Evatt and McTiernan JJ); *Carroll v The Queen* (2009) 83 ALJR 579, 581 [8] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

2.3. Judicial attitudes to transparency

A small number of interviewees were open in their criticism of IS, for example describing the model as ‘incredibly opaque’. More than lacking transparency, they recognised that IS can operate as a term to hide behind or, worse still, one ‘calculated to discourage scrutiny...[T]he very notion of it suggests that it’s incapable of explanation or justification and further that it’s, at a very significant and therefore unreviewable level, subjective’. As one judge observed, this excuses sentencers from performing a rigorous analysis and can disguise unexamined values and improper weighting of sentencing factors.

The majority of interviewees though were not concerned about the level of transparency under the current model. Some dismissed the criticism swiftly, commenting that judges’ decisions were appropriately set out in their reasons for sentence. Even those who allowed that IS is ‘not as transparent as could be’ and that it is ‘very hard to argue’ with concerns about lack of transparency were generally of the opinion that ‘that doesn’t mean that it invalidates the IS’. Several supported this position by drawing a distinction between internal and external transparency. It was accepted that IS is not particularly transparent to ‘the uninitiated’ or an ‘outsider’ but is understandable to practitioners and the judiciary and therefore sufficiently transparent. As with the reliance on instinct and experience, the position seemed to be simply to trust sentencers to understand and get it right. Most supporting arguments bypassed the IS model itself, instead judges noted that cases are argued and reasons delivered in open court and subject to appellate review. As above, judges also pointed to sentencers’ use of language, particularly adjectives, to indicate relative seriousness or weight. The most common response though, when asked about the transparency of IS, was to refer to the sentencing remarks produced by the court. The vast majority of interviewees maintained that the reasons for sentence are sufficient to explain the decision and therefore bring transparency to the process.⁶³³

⁶³³ Bell (n 8) 27-8.

2.4. Sentencing remarks

Judges are obliged under statute⁶³⁴ and common law⁶³⁵ to give reasons for the sentence imposed during which ‘the primary factors that have influenced the instinctive synthesis should be exposed’.⁶³⁶ The public statement of reasons is intended to convey to the offender,⁶³⁷ victim⁶³⁸ and the public⁶³⁹ the factual and legal basis for the sentence. Interviewees explained that they are aware of the need to show the offender that they have understood the case and the offender’s situation. This enables the offender to judge whether the exercise of authority over them is justified.⁶⁴⁰ Having seen that the case has been given careful consideration, offenders may be more likely to accept the outcome as reasonable.⁶⁴¹ The giving of reasons for sentence also facilitates the appeals process, allowing parties to challenge the decision and assisting appellate courts in identifying errors.⁶⁴²

Reasons for sentence should expose the primary factors that have influenced the sentencing synthesis and are generally expected to include: the relevant facts; findings on the circumstances of the offence and aggravating and mitigating circumstances; the impact upon victims; personal circumstances of the offender that materially bear upon sentence; and the conclusion reached on any primary arguments.⁶⁴³ Several interviewees explained that they take care to lay out their reasoning, particularly when moderating a sentence based on the principles in *Bugmy*⁶⁴⁴ or *Verdins*.⁶⁴⁵ Interviewees also observed that it is very rare that judges in Victoria are criticised for not providing adequate reasons and that they seldom have trouble

⁶³⁴ See e.g. *Sentencing Act 1991* (Vic) ss 5B(5), 9(3)(a), 18G; *Crimes Act 1914* (Cth) s 16F; *Crimes (Sentencing) Act 2005* (ACT) ss 81-84.

⁶³⁵ *Pettitt v Dunkley* [1971] 1 NSWLR 376, 387-8 (Moffitt JA) (*Pettitt v Dunkley*); *Shrubsole v Rodriguez* (1978) 18 SASR 233, 236;

Nevermann v R (1989) 43 A Crim R 347, 349-50 (Malcolm CJ) (*Nevermann*); *Miller v R* (1989) 44 A Crim R 185, 187 (Wallace J).

⁶³⁶ *Koumis* (n 545) 437 [63].

⁶³⁷ *Tame v Fingleton* (1974) 8 SASR 507, 510 (Walters J); *Nevermann* (n 635) 350 (Malcolm CJ).

⁶³⁸ *Jago v District Court (NSW)* (1989) 168 CLR 23, 50 (Brennan J).

⁶³⁹ *R v Page* [1977] 2 NSWLR 173, 175 (Street CJ); *Leech v McCall* (1986) 41 SASR 96, 99 (Cox J).

⁶⁴⁰ *Galligan* (n 157) 431-2.

⁶⁴¹ See Allan (n 157) 500-1. See also Gerry Maher, ‘Natural Justice as Fairness’ in Neil MacCormick and Peter Birks (eds) *The Legal Mind: Essays for Tony Honoré* (OUP 1986).

⁶⁴² *Watson v Anderson* (1976) 13 SASR 329; *Pettitt v Dunkley* (n 635) 388 (Moffitt JA); *Nevermann* (n 635) 350 (Malcolm CJ).

⁶⁴³ *Koumis* (n 545) 437 [63].

⁶⁴⁴ *Bugmy* (n 32).

⁶⁴⁵ *Verdins* (n 33).

understanding the process of the sentencing judge: 'More often than not when I read the sentences, whether I think they've come to the right conclusion or not, you can understand the pathway or reasoning.'

2.4.1. Audience

Like the judges in Ashworth et al's study,⁶⁴⁶ interviewees base the content of their sentencing remarks on the intended audience which, for most, is the offender. Judges make an effort to communicate their understanding of the offender's personal circumstances. Several interviewees noted that this section of the reasons is often when offenders pay most the attention. Judges attempt to engage offenders by making the sentencing a personal matter. Many mentioned that referring to the offender in the second person assists in that regard. They also endeavour to ensure that the offender understands how the sentence has been reached: 'it's not fair if they don't know why they have been slotted the way they were'.

Several interviewees spoke about explaining 'this is what I'm doing, this is why I'm doing it' in language that the offender can understand:

...you keep it very, very simple and try and keep it as short as you can. I don't cite authority when I'm sentencing somebody, they're not interested in what the High Court said in *Dalgleish's* case or whatever. And you use language that is clear and understandable, you're not delivering an equity judgment.

⁶⁴⁶ Ashworth et al (n 19) 54.

Others mentioned that they take care to explain specific terms, to make the reasons more accessible:

The offender, when you're talking about general deterrence and specific deterrence, has no idea what you're talking about and I try and explain it in general terms, what it means: general deterrence, try and stop other people from committing the same crimes; specific deterrence, try and stop you committing it again.

I don't just say 'I take into account this, this and this', you know. You say that 'general deterrence means that like-minded people must be deterred by the sentence I impose on you from contemplating committing the same type of offending'.

As some judges observed though, this is not always possible 'because quite often you do have to refer to precedent and case law and higher principles and policy and so on.' In those instances, interviewees stated that they rely on counsel to explain the legal complexities to their clients.

In spite of these efforts to make the process and decision understandable, the majority of interviewees believed that the offenders paid little attention to the reasons for sentence:

...he's not really interested in knowing the reasons, he just wants to know the bottom line.

I don't think they're remotely interested. The punter's only interested in the last few lines: 'how long am I going to do?'...They wouldn't understand or even want to know [about the details]...I hope they pick up on the odd phrase.

He doesn't care about any of this, he's had to sit there and listen for half an hour while I rabbited on and all he wants to know is that [sentence] at the end. If I really like the person I'll tell him: 'I'm about to impose a sentence of 8 with a 5 and I'll give you the reasons why' and I go round and do it the other way, so he can forget about all the other rubbish.

Judges were also very aware of the many different parties to be addressed: 'It's not just one individual...you're addressing the victims, you're addressing the community, you're addressing other judges.' They viewed sentencing as a public exercise in which judges perform the duty of articulating community sentiment. Part of this duty involves explaining the decision in a way that the parties and the public can follow. This was particularly important to a number of interviewees who stressed the need for sentencing to be better understood by the general public. Yet the majority of judges felt that sentencing reasons could only go so far in improving public understanding.

2.4.2. Length and content

Victorian sentencing remarks in particular are often lengthy and many interviewees pointed to this as evidence of transparency. The practice has become part of the sentencing culture in Victoria with one judge describing long reasons for sentence as 'just what I'm used to seeing'. Several judges associated the increase in length with the establishment of the Court of Appeal and the development of sentencing jurisprudence in the state. There is, rightfully, 'an expectation that all the relevant matters generally will be mentioned, will be carefully analysed'. This has translated to judges, faced with the 'willingness of our lawyers to be fairly proactive in appealing decisions and the Court of Appeal being fairly proactive in reviewing our decisions', seeking to 'cover bases'.

Interviewees saw the length and comprehensiveness as a positive development: 'it means that we give more thought and care to the process'. '[Y]ou can genuinely look at [the] sentencing reasons and the sentence passed by a Victorian judge and see the path of reasoning'. Several judges pointed to other states, particularly Queensland, to demonstrate the problems of short sentencing remarks. Sentencing in the Queensland District and Supreme Courts is done quickly, and there is a lot of pressure to get through a number of sentences, commonly up to eight, in one day.⁶⁴⁷ The practice is to sentence immediately rather than reserving the decision. Several interviewees explained that they are reluctant to deliver ex-tempore reasons, not because they believed the practice was flawed but because sentencing in that way tends to invite appeal.⁶⁴⁸

Interviewees recognised the pressure that their counterparts in other states were under but remained critical of the remarks produced:

...have a look at some Queensland sentences, particularly have a look at some Queensland Court of Appeal judgments on sentence, many of them are just a paragraph...: 'This was a shocking crime, committed by a person with prior convictions, accordingly you are sentenced to...'. How transparent's that? What do you really know that the judge has taken into account?

In critiquing the brief sentencing remarks produced in other jurisdictions, the judges were indirectly acknowledging that there is a problem with IS in terms of lack of transparency. If there is greater transparency in Victorian sentencing it is not because those judges are applying a different or improved sentencing model. The problem is perhaps less apparent in Victoria because the courts have acted to mitigate the deficiency by requiring more detailed

⁶⁴⁷ Mackenzie (n 17) 28. Some interviewees drew similar comparison to the Court of Criminal Appeal of England and Wales. The practice of hearing multiple appeals a day and delivering brief judgments immediately after submissions was contrasted with the Victorian Court of Appeal practice of hearing one or two appeals a day, in most cases reserving the decision and delivering a longer and more detailed judgment.

⁶⁴⁸ *Koumis* (n 545) 437 [62].

explanations, but lack of transparency remains a fundamental problem with the IS sentencing model.

Judges vary in their writing habits with some estimating that their sentencing remarks are six to 10 pages long, whilst others from the same court reported writing between 20 to 30 pages. Several interviewees were of the belief that sentencing remarks in Victoria are too long and make a concerted effort to be brief in their remarks, focusing on the immediate and 'real' issues. An equal number, whilst being mindful that reasons for sentence can become overly lengthy or convoluted, were content with longer reasons for sentence as they allow for greater detail:

There being so many factors that can contribute, it's hard to do that very concisely...Sometimes they're longer than they need to be, that's for sure, but I think it would be harder if they were shorter because you've got so many factors that can bear on any one sentence that you might just be at a loss to know what they've done.

Sometimes I look back at my own reasons and...I think 'Oh, did I have to say all of that?' but then I think 'Well, yes, I did', because if I were involved in this case or if I were an interested member of the public I'd want to know why the judge possessing so much discretion did what he did.

No matter how long the reasons for sentence, there is no guarantee that they will actually improve transparency. As one interviewee observed, 'length does not ensure clarity'. Inevitably, reasons for sentence cannot disclose every single element of the decision-making.⁶⁴⁹ As noted above, no matter how long the sentencing reasons, the sentencer is also

⁶⁴⁹ Kirby (n 586) 11.

restricted from properly articulating some details. A sentencer may also simply choose not to disclose all of the details of their process.⁶⁵⁰ Therefore, while longer sentencing remarks can enable judges to explain their decision in detail, the length of the remarks alone is not enough to ensure transparency, the content of the remarks must also be examined.

3. Do sentencing remarks accurately reflect the decision-making process?

Speaking to interviewees, it was clear that sentencing reasons are carefully devised to reveal the necessary information, conceal elements of the decision not strictly in keeping with IS and guard against appeal. Judges are committed to imposing just sentences and making their reasoning understood but are aware that there can be an artificiality to the sentencing reasons: 'it's all a bit of a fiction actually. I'm probably not allowed to say that, but I'll say it.' They identified a number of ways in which reasons for sentence do not accurately reflect the decision-making, for example when a stepped or structured approach (such as that explained in Chapter 4) is used. One judge explained that they begin with an understanding of what offence is 'worth' based on objective seriousness but know that to articulate it would be contrary to IS so they do not include it in the sentencing reasons. Others deliberately mention factors for context or narrative, such as the offender's background and victim impact, but do not explain that they have limited substantive influence on the sentence.

Several judges pointed to sentencing based on an agreed set of facts as an example of the artificiality of the process. Fact bargaining, in which the prosecution and defence negotiate a set of facts to place before the court and a common position on sentence, allows the parties to influence the sentence.⁶⁵¹ The agreed facts may not accurately reflect the gravity of the offence as they may deliberately exclude inflammatory or aggravating features.⁶⁵² This can

⁶⁵⁰ *Smith* (n 588) 149 [111] (Gray J).

⁶⁵¹ Freiberg (n 37) 108-9; Warner (n 271) 355; Arie Freiberg and Robert Seifman, 'Plea-bargaining in Victoria: The Role of Counsel' (2001) 25 *Criminal Law Journal* 64.

⁶⁵² Rachel McPherson, 'The Rise of Agreed Narratives in Scottish Criminal Procedure' (2013) 2 *Judicial Review* 141, 145.

cause frustration amongst judges when they suspect that agreements have been made which they would not have approved.⁶⁵³

I think pleas without a trial are harder because very often there's been a deal done and the Crown and the defence rely upon an agreed set of facts which, if you read the depositions or sat through a trial, bear no resemblance to what actually happened. But I've got to sentence on this fiction.

...so when it comes on for a plea, because I've read the material I know all that [the details of the offence] but none of that will appear in any of the statement of facts, [so] none of it will appear in my sentencing remarks. Had I heard a trial it would be impossible for me to ignore it...There's all sorts of things go on that we have to effectively turn a blind eye to.

Agreements as to facts do not formally bind a judge⁶⁵⁴ and they may seek further facts from the parties.⁶⁵⁵ Comments by interviewees, however, suggest that they are reluctant to go behind the agreed facts:

[I] print out all the depositions, I always read them, I don't just look at the agreed summary, I don't think that's right. I read the full depositions but I'll act on the agreed summary...

I think the authorities make it clear that sentencing *is* an artificial process. That where the parties make an agreement, it's important that that be abided by. I mean if you're uncomfortable with that you can say that...it's artificial [but] as long as it's workable, in

⁶⁵³ Mackenzie (n 17) 39.

⁶⁵⁴ *Scott v The Queen* [2010] VSCA 290 [48].

⁶⁵⁵ *R v Lowe* [2009] VSCA 268 [16].

my view that's appropriate that you proceed in that way...I think our system really very much depends on the parties working diligently together, cooperating and arriving at a position so that the court can then deal with that position. To go outside that causes problems.

Sentencing on agreed facts is not unique to Australia or the IS model.⁶⁵⁶ It demonstrates though that judges are accepting of the need to be pragmatic in their role as sentencers and of the fact that sentencing does not always present a full picture of the offending or offender. These are attitudes that are carried over into their application of IS.

3.1. A sentencing formula

Brown suggests that a sentencer's assessment will involve a deep investigation into the case and the inner world of the offender.⁶⁵⁷ This is not the case in Victoria where sentencing process and remarks reflect a need for efficiency. Several interviewees explained that they apply a fairly formulaic approach to the decision and written reasons. Many described their process in broad strokes, for example:

I have a crib sheet: 'You've pleaded guilty to...The acts underlying your offending...The maximum penalty is...Your personal circumstances...The prosecution's submissions are that I deal with you this way...And here are the sentencing principles which have particular application...And the defence say I should sentence you this way...From my view the primary sentencing considerations are 'a', 'b' and 'c'...'

⁶⁵⁶ See e.g. William T Pizzi, 'Fact-Bargaining: An American Phenomenon' (1996) 8(6) Federal Sentencing Reporter 336; Kevin Kwok-Ying Cheng, 'Public Approval of Plea Bargaining in Hong Kong: The Effects of Offender Characteristics' (2015) 26(1) International Criminal Justice Review 31.

⁶⁵⁷ Brown (n 91) 55 citing Martha C Nussbaum, 'Equity and Mercy' (1993) 22(2) Philosophy & Public Affairs 83, 111.

Once again, structure is clearly evident in the approach to sentencing, relevant factors are being considered in an organised manner. In terms of transparency, there is no attempt to conceal the structure which is evident throughout judges' sentencing remarks.⁶⁵⁸ Judges explained that using a formula to organise their reasoning and sentencing remarks means they can be sure that they have addressed all of the relevant considerations. For some though it seemed that they had simply done so many sentences in their career that the process had become routine.

Applying a consistent structure to sentencing remarks has the additional benefit of improving efficiency. Three interviewees discussed preparing a skeleton sentence in advance of the sentencing hearing:

You've got pretty much the full package [in the written material] but you still haven't heard the plea. So I take that home and get a fair bit of it on paper actually, nothing binding in terms of numbers because you haven't heard the plea but these are not things that are going to change; 'The offence is X. You've pleaded guilty to X, it's got a maximum of Y'...You're getting a working template I guess.

...you've usually had the chance before the case, because of our procedures, to read the papers in advance, to know what the argument's going to be...You might even have prepared a draft of the judgment, short of the conclusion. I'd never put a conclusion in until I've heard the argument, but you might set out the history of the matter and what the main submissions are...

⁶⁵⁸ The content of the crib sheet above matches exactly with the Court of Appeal's description of the usual content of sentencing remarks: *Koumis* (n 545) 437 [63]. For examples of this structure applied in reasons for sentence see e.g. *DPP v Akeno* [2018] VCC 1816; *DPP v Stoodley* [2015] VCC 12; *DPP v Sharp* [2016] VCC 923.

Several judges explained that they often drew upon material submitted by the parties:

...facts, taken from the Crown opening, the victim impact, which is obviously taken from the victim impact statement, the personal circumstances which is usually taken from the psych report if there is one or what the defence counsel put up...And then there's very little analysis, maybe one or two paragraphs

Some have either inherited from other members of the court or developed for themselves folders full of sentencing material, principles and authorities that they use to formulate their reasons for sentence. Others use the same text from their own previous judgments:

If I pull down 10 of my sentences...you will see there are whole blocks of [text] cut and paste to fit this case. You'll look at it and you'll go 'that's exactly the same words you said in that Smith's case or Brown's case or Jones' case'. And I make no apology for that...[They] only relate to general sentencing principles...and things about a plea of guilty, youth, youthful offender, you know there's a set piece for that.

The descriptions above and the idea of cases each being processed according to a formula make the sentencing exercise seem routine rather than individualised. From speaking to the judges it was clear that they took care to accurately reflect the facts of the case and offender in each sentence but that these were processed according to a well-established structure. As in Mackenzie's study, interviewees were not seeking to import a mechanical element into the sentencing process but to ensure all relevant factors were considered.⁶⁵⁹ Use of a common formula and wording suggests a consistency of approach by individual judges across cases and, in line with discussions in Chapter 4, the structuring of the sentencing process. It is also

⁶⁵⁹ Mackenzie (n 17) 52.

further evidence that ‘instinctive’ is an inaccurate description of sentencing in Victoria, as recognised by Bell J, who has stated that reasons for sentence reassure members of the public that judges do not approach sentencing by following their intuition.⁶⁶⁰ Though there may be some use of instinctive, experienced based mental shortcuts, as interviewees have demonstrated, sentencing decision-making involves a regular, structured format.

3.2. Reverse engineering and the guilty plea discount

Being unstructured, IS does not require that sentencers follow the decision-making process outlined above. Adopting an established formula when writing sentencing remarks can, however, allow judges to obscure the true nature of the decision-making and, in doing so, contribute to false impression of sentencing. A small number of judges referred to the possibility of reverse engineering sentences whilst supposedly applying IS:

I think if you start with IS then you can work back to find reasons to justify it, rather than working forwards to do what I think is a more critical analysis of what are the factors and what weight should you give to them...I think [IS] was sort of a rationalisation for saying ‘it sounds right, it feels right so let’s not worry about the reasons, it’s ok’... but I think it’s become much more than that and can act as a disguise for either unexamined values or for improper weighting of particular factors.

Can you say ‘well my waters tell me this’? That’s not being judicial...[but] sometimes that’s what it’s about, an IS: Is that really just what your waters are telling you? And do we then have to intellectualise what our initial response is?

A common example of reverse engineering offered by several interviewees was the artificial nature of the s 6AAA guilty plea discount.⁶⁶¹ As discussed in Chapter 3, the claim that IS is

⁶⁶⁰ Bell (n 633) 35.

⁶⁶¹ *Scerri* (n 436) 5–6 [23]–[24] (Maxwell P and Buchanan JA); *Giordano v The Queen* [2010] VSCA 101, [45] (*Giordano*).

incompatible with all structure is proven false by statutory requirements that sentencers state any discounts applied for a plea of guilty⁶⁶² or co-operating with the authorities.⁶⁶³ The High Court appears to accept the use of two-stage sentencing for this purpose but maintain that it is still IS that is being applied.⁶⁶⁴ Though this begs the question why accept the articulation of a discrete valuation of this factor but not others.⁶⁶⁵ The reduction of sentence based on a single factor is clearly at odds with the prohibition against attributing value to individual factors yet it is somehow still said to be consistent with the IS model.

Several courts have recognised the artificiality of the exercise of revising sentences absent one factor.⁶⁶⁶ The task is made even more difficult by the fact that the legislation does not explain which facts are to be assumed. One judge explained the situation as follows:

Does that say my finding of remorse wouldn't be there either? I would have had to have given more weight to specific deterrence, because you haven't accepted responsibility, you don't have any insight into your offending conduct, and all sorts of other factors. In other words, you really have to go through a whole new IS in a hypothetical situation to come up with a s 6AAA. So, what do we do? We just say 'Oh well, it's 5 with a 3', 'I would have given him 6 with a 4'. Or '7 with a 5' if it was a particularly bad case or whatever. It's very arbitrary.

As many judges observed, sentencing after a trial is different to sentencing after a plea of guilty as there is a greater understanding of the offending, the offender and the impact on the victim. Not knowing what details would have emerged during a trial, judges admitted that they

⁶⁶² *Sentencing Act 1991* (Vic) s 6AAA; See also *Thomson* (n 289) [54]-[113] (Spigelman CJ); *Place* (n 310).

⁶⁶³ *Sentencing Act 1991* (Vic) s 5(2AB).

⁶⁶⁴ *Markarian* (n 6) 370 [24]: 'Neither the conclusion that a sentencer has reasoned sequentially, nor the observation that a sentencer has quantified the allowance made, for example, on account of the offender's plea of guilty, or the offender's assistance to authorities, of itself, reveals error. Indeed provisions like s 21E of the *Crimes Act 1914* (Cth) may require the sentencer, in some circumstances, to identify the amount by which a sentence has been reduced on some account.'

⁶⁶⁵ See discussions in, for example, *Thomson* (n 289) [54]-[113] (Spigelman CJ); *Verschuren* (n 283) 3-7 (Malcolm CJ); *Markarian* (n 6) 388 [74]-[75] (McHugh J); *Cameron* (n 33) 358-9 [65] (Kirby J).

⁶⁶⁶ See e.g. *Flaherty (No 2)* (n 561) 342 [10]-[11] (Kaye J); *Scerri* (n 436), 5-6 [23] (Maxwell P and Buchanan JA); *Giordano* (n 661) [45]; *Yang* (n 436) [30]-[31].

are really ‘just guessing’ at the sentence they would have imposed but for the guilty plea. A similarly artificial process occurs when sentencers are required to have regard to the standard sentence for an offence, that is the sentence for an offence ‘in the middle range of seriousness’, as assessed only according to objective factors.⁶⁶⁷ Though seriousness is only to be assessed in this way when hypothesising the mid-range offence and not when assessing the offence actually committed.⁶⁶⁸

The difficulty of identifying which factors to consider when assessing the s 6AAA discount is minimised, to a degree, by the fact that judges are not required to explain which factors they are taking into consideration when calculating the discount. This avoids the challenge of attempting to unravel interconnected considerations and is consistent with IS principles. Failure to do so, however, compromises the transparency of the exercise and may erode the explanatory value of the statement of the notional post-trial sentence.⁶⁶⁹

Though the High Court maintains the pretence that articulating sentencing discounts is consistent with IS, judges suggest that such requirements mean that IS is ‘not as pure as it once was’. Interviewees described the s 6AAA process as ‘a bit of a fiction’ and an indication that ‘we never apply a purely IS’ process. In theory, the calculation of the discount itself involves a synthesis as there is no set amount or scale, but the common understanding amongst interviewees was that the discount for an early plea is around 30%. Several judges admitted though that it is often an opportunity for reverse engineering: ‘I mean, the practice is almost artificial, you arrive at your sentence and then add up an extra third on top of it and say that’s what you would have got if you hadn’t pleaded’. It is essentially, as one judge explained, ‘a very mathematical calculation’ that courts and sentencers pretend is part of an instinctive process.

⁶⁶⁷ *Sentencing Act 1991* (Vic) s 5A(1)(a). See Chapter 7 [4] for a discussion of standard sentencing.

⁶⁶⁸ *Brown v The Queen* [2019] VSCA 286 [34]-[37] (*Brown* (2019)). See also *Lugo v The Queen* [2020] VSCA 75, [25]-[26] (*Lugo*).

⁶⁶⁹ Judicial College of Victoria, *Victorian Sentencing Manual* (4th edn, Judicial College of Victoria 2020) [7.1.4.1].

The articulation of a guilty plea discount is an example of the way in which the sentencing process presented via the reasons for sentence is a false construct, as is the doctrinal presentation of 'pure' IS. Sentencing based on agreed facts, the potential for concealing reverse engineering and the sentencing discounts have led interviewees to describe the IS presented in the reasons for sentence as a fiction. The formulaic, routine approach expressed in the reasons for sentence is a more accurate representation of the structured process applied by judges, yet the description of the process as an 'instinctive synthesis' endures.

4. Appeal proofing

As noted in Chapter 3, IS as interpreted in *Young*,⁶⁷⁰ and as applied since then, was intended to deter the bringing of appeals by those seeking to attack the penalty by unravelling the individual threads of reasoning.⁶⁷¹ Increasingly though, sentencers are being required to expose those threads in their reasons for sentence. The question is whether the reasons offered are truly reflective of the decision-making process applied or simply included to protect against appeal.

A small number of interviewees stated that they are not concerned about the possibility of appeal when sentencing. For some it was because they regard it not as a criticism but an opportunity to have any mistakes corrected and learn how best to approach matters. For others, acting without thought of appeal is a matter of independence; the sentencer is simply doing what they think is right in the circumstances, without regard for external considerations. These judges were in the minority. While few of the interviewees regarded the Court of Appeal as their primary sentencing audience,⁶⁷² the majority explained that they are always conscious of the Court and aware that their remarks must stand up to appellate scrutiny. Some described

⁶⁷⁰ *Young* (n 273) 960.

⁶⁷¹ *Fox* (n 294) 16.

⁶⁷² Cf Justice Kenneth Hayne, 'The Australian Judicial System: Causes for Dissatisfaction' (2018) 92 *Australian Law Journal* 32, 34.

being merely being aware of the possibility of appeal but for others it appeared to be a dominant concern. Judges spoke of being 'far too conscious' of the prospect of appeal, feeling that '[e]verything you say from the moment you walk into a plea until the time you're finished is relevant to what happens [in the Court of Appeal]'.

For those judges who write with the Court of Appeal in mind, the sentence imposed appears to be less of a cause for concern than explaining how they arrived at that sentence. Several judges mentioned that attempting to unpick their instinctive response was where they often come 'unstuck':

I would come up with a sentence and then think 'right, how do I show I've got to this?'

...you end up with a result without breaking it up into component parts...but the trouble

I have is breaking it down to an explanation that survives the Court of Appeal.

As well as being difficult, this kind of deconstruction is contrary to the notion of an unstructured, instinctive decision. If the decision is instinctive, reasons for sentence that break the decision down into component parts to justify it after the fact misrepresent how the decision was made. Alternatively, if the decision is the result of a more structured consideration of sentencing factors then to maintain that it is the result of a single instinctive decision is also a falsity. In both scenarios, there is an inconsistency between the process applied and reasons for sentence and therefore a lack of accuracy and transparency.

While many interviewees maintained that the Court of Appeal was not their primary audience, several judges suggested that 'you wouldn't say half the things you have to say [in the reasons for sentence] except you want to reduce appeal points'. One judge calculated that approximately two thirds of what they write is exclusively for the Court of Appeal. Often this 'appeal proofing' involves judges being especially detailed in their reasoning. Several spoke

of knowing that their reasons will be 'trawled over' and 'picked apart' by lawyers looking for a point of appeal. As a result, they feel the need to demonstrate that they have considered every relevant factor. It was a common belief that failure to do so leaves the sentence vulnerable to appeal. This is despite authorities stating that failure to refer to a relevant factor does not invalidate a sentence, as discussed above.

There remains an understanding amongst judges, often based on their own experience of having a sentence overturned, that 'if you haven't mentioned it, you'll be done'. This need to be thorough and to reference every relevant consideration led several judges to describe the exercise as 'box ticking'. This suggests that factors are being referred to out of a sense of obligation, rather than as a reflection of their importance in the decision-making process: 'it's very much a matter of 'have all the right things been said and the right boxes been ticked and the right considerations stated and irrelevant considerations not stated?''

Judges explained that they are also conscious of details they believe should not be included in the reasons for sentence. Interviewees gave examples of weighing or treating sentencing factors or principles in a particular way that they know would attract criticism from the Court of Appeal. One interviewee gave the example of a case in which they doubled the sentence they had in mind after hearing from the victim. They deliberately omitted that calculation from their reasons for sentence.

More often though, interviewees described being concerned not with actively concealing details but only revealing those that were necessary. A common attitude amongst interviewees seemed to be that '[s]mart judges don't put a lot of things in their sentences'. As Lord Mansfield observed, 'Your decisions may be right, but your reasons are sure to be wrong'.⁶⁷³ The worry

⁶⁷³ John Cordy Jeaffreson, *A Book About Lawyers* (Vol 1, New York (State) 1867) cited in Lord Neuberger, 'Some Thoughts on Judicial Reasoning Across Jurisdictions' (2016 Mitchell Lecture, Edinburgh, 11 November 2016) <<https://www.supremecourt.uk/docs/speech-161111.pdf>> accessed 6 September 2020, 6.

amongst judges is that in attempting to guard against appeals, they can include too much detail, opening themselves to additional scrutiny and inviting findings of error.⁶⁷⁴

...[in] a lot of these long decisions we are trying to dot every 'i' and cross every 't'. And the trouble is when you do that, if you happen to dot a 't' rather than cross it then you're exposed, more exposed than you would be than if there was just silence in an area. ...a lot of the judges who aren't experienced in crime get very anxious about it and go into way too much detail. If I'm going to go into detail in a sentencing process it'll only be where I'm doing something which I know is going to struggle [in the Court of Appeal]...but the less you say the better basically.

IS, with its only requirement being that all of the relevant factors be considered, makes it particularly easy to remain tactically silent or brief.

Several judges noted that 'whilst the IS is probably being pretty much always adhered to, the result of it is not being put down on paper... that doesn't mean [sentencers] haven't gone through the analysis.' While it is reassuring that a comprehensive analysis is being undertaken, the reassurance is lost if that analysis is hidden. This comment serves to reaffirm the lack of transparency within the IS model; it permits the production of reasons for sentence that are general, vague or silent in some areas and not reflective of the process applied by the sentence judge.

4.1. Defensive writing

Whether through producing overly detailed or deliberately sparse reasons for sentence, many judges attempt to pre-empt and fend off criticism by writing defensively. Some regard covering

⁶⁷⁴ *Smith* (n 588) 132 [111] (Gray J). This is consistent with judges' attitudes in Bartel's 2008 study: *Bartels* (n 200) 120.

all of the possible angles as simply being thorough and draw a distinction with defensive reasoning:

...all judges, when they're sentencing, want to get it right. They want to get it right and they don't want to get overturned. I'd say everybody's like that. And I don't think there's anything wrong with that, that's different from what I call 'excessively defensive judging'. Excessively defensive judging is when judges are just doing too much, spending too much time on issues which just aren't necessary, to guard against the remotest of possibilities of being overturned. Now no one wants to encourage that because that raises a productivity issue as well as delays.

The judge who made this comment suggested that excessively defensive judging is rare. Several other interviewees though admitted that judges can become particularly defensive 'if you feel that the Court of Appeal has not understood what you've said or has misstated what you've said or is unfairly or unduly critical or puts different value on stuff.' Two pointed to the increasing length of reasons for sentence, often between 20 to 30 pages, as evidence of a shift towards defensive writing. Several interviewees admitted that they make a concerted effort to cover every point in order to make their reasons, 'appeal proof', 'bullet proof' and 'unappealable'.

As part of sentencing defensively, judges spoke about using 'safe' phrases that allow them to make reference to a relevant consideration without giving a full explanation. As one judge described it: 'use the same expressions continuously, which say nothing really...Tell them nothing and take them nowhere'. Quoting the specific examples given in interview risks identifying individual judges but a commonly used example was giving a matter 'anxious consideration'.⁶⁷⁵ The term indicates that the sentencer has had regard to the issue but offers

⁶⁷⁵ See e.g. *DPP v Hughes-Firgaria & Ors* [2019] VCC 1870, [107]; *DPP v Hammond & Ors* [2020] VCC 807, [104] and [209]; *DPP v Perry & Anor* [2017] VCC 1383, [35] and [71]; *DPP v Cowton & Anor* [2019] VCC 1818, [96].

no indication of how much weight was given to it or how it was incorporated into the synthesis. Interviewees also gave examples of phrases which proactively counter potential criticism. Making reference to the need to ensure that the effects upon the victim do not dominate the sentencing process, for example, then allows the judge to discuss in detail the impact on the victim without being accused of giving it too much weight.

It seems that while the appellate process is designed to ensure proper consideration of sentencing factors, the prospect of appeal is discouraging judges from being candid about their decision-making. This reduces transparency and limits understanding of the sentencing process. Though from the discussions with judges it did not appear that they were seeking to deceitfully misrepresent the process. Decisions about what to include in sentencing remarks were generally driven by a desire to ensure that the sentence they regarded as appropriate remained in place.

The wish to avoid appeal is, to some degree, a matter of professional pride. As one judge explained: 'There's nothing worse than the Court of Appeal saying that the reasoning was muddy and unclear and whatever'. Many interviewees were acutely aware of the number of times their sentences had been successfully appealed. Judges spoke of the importance of accountability and review but still actively worked to avoid appeal because appeal would indicate an error in their work:

...all judges, when they're sentencing, want to get it 'right'. They want to hand down a proper and lawful sentence. They want to get it right in terms of the outcome, the numbers that they impose, and they want to make sure that the reasons are right...Now that clearly involves a component of not wanting to be overturned because if they get overturned they've been told that they've got part of it wrong...I'd say everybody's like that.

Several judges spoke about the responsibility they feel to the community: 'if I muck it up it all happens all over again, plus the appeal. And our community cannot afford gratuitous muck ups in the sense of repeating the same cases time and time again.' This sense of obligation appears to drive their defensive approach or decision to write long sentencing remarks touching on relatively minor details. Judges spoke in particular about wanting to spare victims and the parties the experience of an appeal. The following comment encapsulates well the sentiment expressed by many judges when discussing writing sentencing remarks and the possibility of appeal:

...we have sat there often for weeks, sometimes months, of trial and seen the grief and the pain of the witnesses, the family, the jury and we do not want this to go further, we want to bring some finality to it...So I write for the Court of Appeal not because of ego or a concern that they'll overturn me, but out of a sense of closure and trying to just let everyone move on. And so that's why the defensive writing goes in that needn't perhaps be in there.

This section has demonstrated that sentencers are keenly aware of the need to demonstrate the threads that make up their decision but are cautious in what they reveal and how that information is presented. For some, the possibility of appeal means writing more than they otherwise would, to demonstrate that every box is checked and relevant factor mentioned. Identifying the threads of reasoning conflicts with the IS characterisation of sentencing as an instinctive, singular decision. Conversely, some judges elect not to mention elements of the decision or do so in general language or safe phrases in order to defend against possible appellate criticism. This caution does not stem from a desire to protect sentencing decision-making as a judicial secret but, when combined with a model that obscures the reasoning process, does mean that transparency is compromised.

5. Conclusion

The wide discretion to impose punishment that IS affords sentencing judges must be accompanied by corresponding accountability.⁶⁷⁶ To be properly assessed, the exercise of discretion must be exposed and understood. Sentencing methodology cannot remain a secret known only to the sentencing judge. The ‘essential chain of reasoning’ must be displayed to the offender, those affected by the offence, the community and appellate court.⁶⁷⁷ Yet the IS model does little to promote transparency or understanding. ‘Instinct’, ‘intuition’ and acting on experience provide screens behind which sentencers may hide. Being an inherently subjective reaction, not based upon discernible rules or structure, a decision based on instinct is difficult to properly evaluate. It allows too great a scope for personal sentiment and bias and suggests ‘an arbitrary exercise of public power’, which is to be discouraged.⁶⁷⁸

IS legitimises outcomes that are ‘declared but inadequately explained’,⁶⁷⁹ a habit that has resulted in a reliance upon unspecified, inferred error and acceptance that the precise error cannot be identified. Greater detail in the reasons for sentence can facilitate the identification of error. This was evident most notably in *Markarian* and *Cameron*, where the errors made by sentencing judges would not have come to light had the judges not been open and expansive in their reasons for sentence and treatment of individual factors. The IS model does not require such detail but rather discourages it. The prohibition on explaining the weighting of relevant sentencing considerations, for example, can make it more difficult to understand how a sentencer arrived at the final sentence. In addition, the lack of structure within the IS model means that the decision-making processes sentencers may engage in are infinitely various (with the exception of a stepped or tiered approach). It offers no indication of the way in which the sentencing task should be approached and instead perpetuates the fiction that decision-making occurs in one all-encompassing instinctive step.

⁶⁷⁶ NSWLR (n 448) 12.

⁶⁷⁷ *Ashdown* (n 526) 373 [151](5) (Ashley JA).

⁶⁷⁸ *Markarian* (n 6) 404-5 [131] (Kirby J).

⁶⁷⁹ *Markarian* (n 6) 394 [98] (Kirby J).

The final sentence imposed reveals little about the reasons the court had for fixing that sentence,⁶⁸⁰ hence the need to rely on the judge's reasons for sentence for some indication of the process. Judges attempt to give a description of their process in the reasons for sentence, but it can be a formulaic, box ticking exercise. One which, despite identifying relevant considerations, does little to explain how they interact and contribute to the final sentence. Judges can experience a tension between wanting to explain every detail in order to make the reasoning appeal proof and not saying too much for fear of creating further opportunity for scrutiny and appeal. The length of sentencing remarks in Victoria suggest that the compromise position is to touch upon many different sentencing factors, to show that they have been considered, but not explain the specific impact upon the synthesis.

A focus on protecting against appeal, rather than optimising transparency, can mean the sentencer seeks to 'appeal proof' the reasons for sentence and write what they think the Court of Appeal needs to hear. A defensive approach can also result in judges being selective in what they include in their reasons for sentence and careful about the way in which they phrase their explanation. As a result, sentencing reasons can be long and superficially comprehensive without accurately reflecting the decision-making process. While they can give the appearance of transparency, reasons for sentence must be understood as having been curated by judges who want to show understanding and communicate with the parties but also minimise points of appeal. The rule of law requires transparency and accountability. The appellate process and Victorian practice of giving long reasons for sentence go some way to mitigating the deficiencies of a sentencing model that prioritises instinct and opposes structure and detail. They can also have the effect, however, of making judges overly cautious and thus reducing the likelihood that reasons for sentence will expose the true decision-making process.

⁶⁸⁰ *Wong* (n 10) 605 [57] (Gaudron, Gummow and Hayne JJ). See also *Warner (AKA Jeremy Pachenko) v R* [2013] NSWCCA 10.

Chapter 6 Instinctive Synthesis and Consistency

Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.⁶⁸¹

Consistency is recognised as an essential feature in Australian sentencing under both statute⁶⁸² and common law.⁶⁸³ Ensuring consistency within a sentencing model that emphasises individualisation can, however, be difficult. While all discretionary decisions carry some possibility of inconsistency,⁶⁸⁴ the granting of extensive, unstructured discretion to judges creates significant potential for inconsistent sentencing.⁶⁸⁵

Overview

Many of the central features of IS run counter to the promotion of consistency: broad judicial discretion; emphasis on individualisation; and the acceptance of a myriad of different approaches to sentencing. IS allows judges sentencing similar offenders for similar offences to prioritise different purposes of sentencing and assign different weight to sentencing factors or principles. While the Australian understanding of consistency includes a degree of permissible difference, IS's lack of transparency means these disparities may go unseen, making it difficult to identify when different treatment or weighting of factors is justified.

⁶⁸¹ *Lowe* (n 52) 610-11 (Mason J) (*Lowe*).

⁶⁸² See e.g. *Sentencing Act 1991* (Vic) s 1(a); *Crimes (Sentencing) Act 2005* (ACT) s 3(za); *Penalties and Sentences Act 1992* (Qld) s 9; *Sentencing Act 1995* (WA) s 6(5); *Judicial Officers Act 1986* (NSW) s 8.

⁶⁸³ See e.g. *Postiglione* (n 44); *Ashdown* (n 526) 345 [5] (Maxwell P), 406 [191] (Redlich JA).

⁶⁸⁴ *Wong* (n 10) 591 [6] (Gleeson CJ).

⁶⁸⁵ *Hutton* (n 502).

Disparity is viewed as an inevitable consequence of discretionary decision-making⁶⁸⁶ but the unstructured nature of IS means wider scope for variation amongst sentencers and for individual value judgements and biases to have a greater impact. Rather than attempting to minimise these disparities, the broad discretion of IS normalises and conceals them, frustrating attempts to improve accountability.

Australian courts pursue consistency of approach, but that concept is rendered meaningless by an IS model predicated on the absence of common methodology. Consistency is promoted through other means, including the use of comparative cases, current sentencing practice and sentencing range to guide the exercise of discretion. The effectiveness of these tools in promoting consistency is undermined through a focus on the individual nature of each case and a wariness amongst the judiciary fearing restriction of discretion. Further informal attempts are made to promote consistency through discussions of sentencing options with judicial colleagues. None of these tools, however, are sufficient to counteract the fact that, as a model devoid of structure or guidance, IS invites disparity more than it encourages consistency.

1. Consistency and disparity

1.1. Discretion

The definition of discretion is a contentious issue, notably being the source of disagreement between Hart and Dworkin in their broader discussion of theories of law and positivism. A detailed examination of those works is beyond the scope of this thesis but, from that debate, discretion can broadly be understood to denote an area of autonomy within which decisions require a degree of personal judgement.⁶⁸⁷ This is because discretion does not produce a

⁶⁸⁶ *Wong* (n 10) 591 [6] (Gleeson CJ).

⁶⁸⁷ Denis Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford 1986), 8. See also Lord Thomas Bingham, 'The Discretion of the Judge' (1990) 5 *Denning Law Journal* 27.

single, obviously correct result,⁶⁸⁸ reflecting the fact that reasonable people may differ on the matter.⁶⁸⁹

The law leaves space for the exercise of judicial discretion.⁶⁹⁰ In sentencing that is deliberate,⁶⁹¹ to allow decision makers to respond to the individual case. Within Australian sentencing, discretion exercised is very broad and guided by the application of principles. This is consistent with Dworkin's conception of discretion as being based on principles,⁶⁹² but stands in contrast to other areas of criminal law, such as liability, where the emphasis remains on certainty and the application of rules.⁶⁹³ As Chief Justice Allsop notes, in Australian sentencing 'certainty gives way to equality, humanity and a regard for the individual'.⁶⁹⁴ The difficulty is that the reliance on discretion and the absence of rules can also result in uncertainty and inconsistency.

1.2. Consistency and equal justice

Consistency in sentencing increases transparency and legitimacy and enables the provision of more accurate legal advice, leading to better informed decisions by the parties.⁶⁹⁵ It is, however, 'a fluid and slippery concept'⁶⁹⁶ that can refer to multiple aspects of sentencing, including approach, purpose and outcome.⁶⁹⁷ Like discretion, there is no universal definition of consistency but, in broad terms, it is often said to require that similar offenders who commit similar offences in similar circumstances receive similar treatment.⁶⁹⁸ In this thesis, 'treatment'

⁶⁸⁸ See e.g. Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) Ch 5; Joseph Raz, 'Legal Principles and the Limits of the Law' (1972) 81 *The Yale Law Journal* 823, 843 and 845.

⁶⁸⁹ E.g. HLA Hart, 'Discretion' (2013) 127 *Harvard Law Review* 652, 663.

⁶⁹⁰ Raz (n 688) 846.

⁶⁹¹ E.g. Hart (n 689) 655.

⁶⁹² Ronald Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14; Ronald Dworkin, 'Judicial discretion' (1963) 60(21) *The Journal of Philosophy* 624. See also Raz (n 688) 841-7.

⁶⁹³ See e.g. *Taikato* [1966] 186 CLR 454, 466 (Brennan CJ, Toohey, McHugh and Gummow JJ).

⁶⁹⁴ Chief Justice James Allsop, 'Values in public law' [2015] *Federal Judicial Scholarship* 21 [43].

⁶⁹⁵ Sentencing Commission for Scotland (n 96) 23.

⁶⁹⁶ Nicola Padfield, 'Exploring the Success of Sentencing Guidelines' in Ashworth and Roberts (n 9) 32.

⁶⁹⁷ Lynne A Barnes, Patrizia Poletti and Ivan Potas, *Sentencing Dangerous Drivers in New South Wales: Impact of the Jurisic Guidelines on Sentencing Practice*, Research Monograph 21 (Judicial Commission of New South Wales 2002) [3.1].

⁶⁹⁸ See e.g. Sentencing Council of England and Wales, *Analytical Note: The Resource Effects of Increased Consistency in Sentencing* (2011), [3.1]; David A Thomas, 'Sentencing – The Case for Reasoned Decisions' in Martin Wasik (ed) *The Sentencing Process* (Aldershot 1997) 105, 112; Patricia L Brantingham, 'Sentencing Disparity: An Analysis of Judicial Consistency' (1985) 1(3) *Journal of Quantitative Criminology* 281, 282; *Hili* (n 11) 535 [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

is taken to include both the sentencing decision-making approach and outcome. As discussed in Part 2, the two are related and to consider only one overlooks the complexity of the sentencing exercise. Consistency involves a common set of criteria applied across cases and, where cases are similar, the same sentencing factors and principles being regarded as significant and similar weight being attributed to those factors and principles.⁶⁹⁹

This understanding of consistency involves uncertainties. As consistency does not require uniformity, there is a permissible degree of difference. As will be seen below, identifying the extent of permissible difference with any precision is a difficult task, as is determining what constitutes a 'similar' or 'like' case. Within Australia, these uncertainties are resolved in a way which preserves the greatest judicial discretion, though often at the expense of certainty and consistency.

Closely connected to consistency is the concept of equal justice, so close in Australia that the definitions adopted are almost identical. While it cannot be expressed in absolute terms,⁷⁰⁰ equal justice requires similar treatment in cases that are relevantly similar and different treatment in cases that are different in some relevant respect.⁷⁰¹ This allows for consideration of differences which affect the impact of the sentence on the individual defendant.⁷⁰² This understanding of, and emphasis on, equal justice by Australian courts is consistent with their prioritising the individualisation of sentences rather than strict consistency of outcome.

⁶⁹⁹ New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Courts* (2004) <http://www.sentencingcouncil.justice.nsw.gov.au/Documents/report_how%20best%20to%20promote%20consistency%20in%20sentencing%20in%20the%20local%20court_jun%20202004.pdf> accessed 4 October 2019, 10; ALRC (n 23) [5.18].

Consistency in sentencing approach will be discussed in greater detail below. For a more comprehensive exploration of the meaning of consistency at sentencing and the importance of including consistency of approach, not just outcome. See Lyndon Harris, 'Consistency in sentencing: Is the current guidance in England and Wales adequate?' (DPhil thesis, University of Oxford 2019).

⁷⁰⁰ *Leeth v The Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).

⁷⁰¹ *Wong* (n 10) 608 [65] (Gaudron, Gummow and Hayne, JJ); *Lowe* (n 52) 610-11 (Mason J); *Postiglione* (n 44) 301-2 (Dawson and Gaudron JJ); *Ashdown* (n 526) 345 [5] (Maxwell P); *R v Djukic* [2001] VSCA 226, [25]-[26]; *Winch v The Queen* (2010) 27 VR 658, 663 [24] (Maxwell P and Redlich JA) (*Winch*); *Green* (n 52) 472-3 [28] (French CJ, Crennan and Kiefel JJ); *R v McEachran* (2006) 15 VR 615, 637 [55] (Redlich JA).

⁷⁰² *Lowe* (n 52) 610-11 (Mason J).

1.3. Disparity

Equal justice finds expression through consistency⁷⁰³ and is infringed where there is unjustifiable disparity.⁷⁰⁴ Identifying disparity between sentences requires a consideration of both the outcome and underlying reasoning. The term reflects the unfairness associated with the unjustifiable treatment;⁷⁰⁵ disparity occurs where the treatment of similar cases is unjustifiably different and where the treatment of different cases is unjustifiably similar.⁷⁰⁶ Differences in sentence type or quantum are justifiable when the result of legally relevant variations, such as offender culpability,⁷⁰⁷ therefore the imposition of different sentences for the same offence does not automatically constitute error or injustice.⁷⁰⁸ It is only where there are differences in sentences between relevantly similar cases (and vice versa) based on non-legally relevant factors there is disparity.⁷⁰⁹ These unjustified differences threaten the rule of law values of certainty and predictability and erode the legitimacy of sentencing.⁷¹⁰ As explained in Chapter 5, however, identifying when non-legally relevant factors have been considered and the effect they have had on the sentencing decision is particularly difficult to determine within the IS model.

Different perceptions of the causes of offending, purposes of punishment and notions of culpability can result in disparity in sentence type or quantum.⁷¹¹ So too can conscious or

⁷⁰³ See e.g. *Green* (n 52) 472- 473 [27]-[28] (French CJ, Crennan and Kiefel JJ); *Lowe* (n 52) 610-11 (Mason J); Lord Thomas Bingham, *The Rule of Law* (Allen Lane 2010) 55-9; Chief Justice James Spigelman, 'Consistency and Sentencing' (Keynote address to Sentencing Conference, National Judicial College of Australia, Canberra, 8 February 2008) 4.

⁷⁰⁴ *Green* (n 52) 475 [32] (French CJ, Crennan and Kiefel JJ); *Jurisc* (n 145) 216 (Spigelman CJ); *Hasan* (n 150) 39 [48].

⁷⁰⁵ Andrew Ashworth, 'Disentangling disparity' in Donald C Pennington and Sally Lloyd-Bostock (eds) *The Psychology of Sentencing: Approaches to consistency and disparity* (Centre for Socio-Legal Studies 1987) 24. It is for this reason that the term 'disparity' is used in this thesis, rather than 'inconsistency'. While there is overlap between the two (Harris (n 699) 28), 'inconsistency' does not carry the same sense of injustice or inequality.

⁷⁰⁶ Ashworth (n 94) 253. Unjustifiable disparity is therefore a tautology. The term will only be used in this thesis when included in direct quotes.

⁷⁰⁷ *Postiglione* (n 44) 301-2 (Dawson and Gaudron J).

⁷⁰⁸ See e.g. Farmer, Parsons and Bagaric (n 32) and Claire Farmer, Ian Parsons and Mirko Bagaric, 'An empirical analysis of sentencing outcomes for assault offences in Victoria and the implications for the sentencing methodology' (2018) 3 Crim LR 205. Whilst the data shows inconsistency in sentences between courts, no attempt is made to determine whether the difference is warranted. The authors recognise that there are numerous reasons that may explain the differences 'in a manner which is consistent with established sentencing principles' (2018, 337). This undermines their suggestions that the inconsistency identified is greater than is acceptable and calls into question the fairness of the sentencing methodology. Contrast Jose Pina-Sánchez and Diana C Grech, 'Location and Sentencing: To What Extent Do Contextual Factors Explain Between Court Disparities?' (2018) 58(3) *The British Journal of Criminology* 529.

⁷⁰⁹ *Jurisc* (n 145) 216 (Spigelman CJ); Bingham (n 1) 310.

⁷¹⁰ Loraine Gelsthorpe and Nicola Padfield, *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* (Willan 2003) 4.

⁷¹¹ For a more detailed consideration see Krasnostein (n 210) 49.

unconscious bias, the differential weighting of relevant factors and the consideration of irrelevant factors.⁷¹² These possibilities were recognised by numerous judges in this study. Interviewees accepted that ‘individuals are going to make different judgement calls’ about a range of matters: ‘people are not going to have the same starting points, they’re not going to have the same endpoints and they’re not going to be inputting the same factors or giving weight to the same factors’. This was brought home recently to one judge upon receiving submissions on sentence that they deemed irrelevant: ‘they’re made because I think they’re sometimes accepted...[T]here are probably some judges in the building that might have acceded to it.’ Extra legal considerations, for example workload, experience and normative assumptions about characteristics such as race, age, or gender, can also lead an individual to make inconsistent decisions about equally culpable offenders.⁷¹³ Interviewees recognised that this type of intra-judicial disparity (between sentences imposed by the same judge) can arise but were confident that their own sentences were consistent.

1.3.1. Measuring disparity

Identifying whether differences between sentences are justified can be difficult given the range of factors that can influence a sentencing decision and the subtlety of variations in attitudes and approaches.⁷¹⁴ As Freiberg observes, statistical analyses of sentencing outcomes, such as the Victorian Sentencing Advisory Council’s Sentencing Snapshots, can indicate wide variations in sentences for the same offence. These can be explained, however, by the large variations in factual circumstances of the offence and aggravating and mitigating circumstances.⁷¹⁵ The majority of empirical research in Australia and internationally focuses

⁷¹² See e.g. Hood (n 180); Marit ReHAVI and Sonja B Starr, ‘Racial Disparity in Federal Criminal Sentences’ (2014) 122(6) *Journal of Political Economy* 1320, 1349; Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, ‘Inside the Judicial Mind’ (2001) 86 *Cornell Law Review* 777.

⁷¹³ Cassia Spohn, *How do Judges Decide? The Search for Fairness and Justice in Punishment* (Sage 2009) 136.

⁷¹⁴ See e.g. Jose Pina-Sánchez, ‘Defining and Measuring Consistency in Sentencing’ in Julian V Roberts (ed) *Exploring Sentencing Practice in England and Wales* (Palgrave Macmillan 2015); Spohn (n 713) 136; Jose Pina-Sánchez, Ian Brunton-Smith and Guangquan Li, ‘Mind the Step: A More Insightful and Robust Analysis of the Sentencing Process in England and Wales under the New Sentencing Guidelines’ (2018) 3 *Criminology and Criminal Justice* 268.

⁷¹⁵ Freiberg (n 37) 439.

on systemic factors, such as race⁷¹⁶ and gender,⁷¹⁷ rather than inter-judge disparity.⁷¹⁸ Some studies have identified geographical⁷¹⁹ and inter-jurisdictional⁷²⁰ variation and there is anecdotal evidence that judges differ substantially when considering identical factors in hypothetical sentencing scenarios.⁷²¹ The courts themselves have also acknowledged sentencing variations that cannot be explained by differences in the facts of the case or offenders' personal circumstances.⁷²² Yet there is an absence of empirical evidence in Australia about the nature and degree of disparity and the effectiveness of the measures introduced to minimise disparity. Where evidence exists, it is often circumstantial and impressionistic.⁷²³ The deficiency of research limits monitoring and accountability and makes it difficult to challenge the ongoing scepticism towards the existence of disparity.⁷²⁴

2. Consistency, individualisation and IS

It is accepted by Australian courts that in a discretionary system differences in sentencing are inevitable.⁷²⁵ The 'unavoidable difficulty'⁷²⁶ in giving weight to different purposes of punishment and over 200 possible sentencing considerations⁷²⁷ mean that equally principled judges will impose different penalties on seemingly similar offenders.⁷²⁸ The challenge is to balance certainty and consistency with flexibility and individualisation. Interviewees suggested that this

⁷¹⁶ See e.g. Ojmarrh Mitchell, 'A Meta-analysis of Race and Sentencing Research: Explaining the Inconsistencies' (2005) 21 *Journal of Quantitative Criminology* 439; Samantha Jeffries and Christine Bond, 'Indigenous Disparity in Lower Court Imprisonment Decisions: A Study of Two Australian Jurisdictions, 1998–2008' (2012) *Trends & Issues in Criminal Justice* 447; Kathryn Hopkins, Noah Uhrig and Matthew Colahan, 'Associations between ethnic background and being sentenced to prison in the Crown Court in England and Wales in 2015' (Ministry of Justice Analytical Services).

⁷¹⁷ See e.g. Sentencing Advisory Council, *Gender Differences in Sentencing Outcomes* (2010); Samantha Jeffries and Christine Bond, 'Sex and Sentencing Disparity in South Australia's Higher Courts' (2010) 22 *Current Issues in Criminal Justice* 81; Stephanie Bontrager, Kelle Barrick and Elizabeth Stupi, 'Gender and Sentencing: A meta-analysis of contemporary research' (2013) 16(2) *The Journal of Gender, Race, and Justice*, 349.

⁷¹⁸ Freiberg (n 37) 440; Krasnostein and Freiberg (n 377) 272.

⁷¹⁹ See e.g. Jeffery T Ulmer and Brian Johnson, 'Sentencing in Context: A Multilevel Analysis' (2004) 42 *Criminology* 137–77; Wayne Goodall and Russil Durrant, 'Regional Variation in Sentencing: The Incarceration of Aggravated Drink Drivers in the New Zealand District Courts' (2013) 46 *Australian and New Zealand Journal of Criminology* 422; Farmer et al (n 32) and 2018 (n 708); But see also Jose Pina-Sánchez, Diana Grech, Ian Brunton-Smith, Dimitrios Sferopoulos, 'Exploring the origin of sentencing disparities in the Crown Court: Using text mining techniques to differentiate between court and judge disparities' (2019) 84 *Social Science Research* 102343.

⁷²⁰ ALRC (n 23).

⁷²¹ Freiberg (n 70) 206.

⁷²² See e.g. *Nash v The Queen* [2013] VSCA 172, [8] (Maxwell P).

⁷²³ NSW Law Reform Commission, Sentencing (Discussion Paper 33, 1995) 29.

⁷²⁴ Zdenkowski (n 464) 59.

⁷²⁵ *Wong* (n 10) 591 [6] (Gleeson CJ).

⁷²⁶ *Veen (No 2)* (n 60) 476 (Mason CJ, Brennan, Dawson and Toohey JJ).

⁷²⁷ Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Trade Cloth 1981) 55.

⁷²⁸ *Tonry* (n 211) 178; *Norbis* (n 552) 518 (Mason and Deane JJ); *DPP v McMaster* (2008) 185 A Crim R 247, 263 [63]–[64] (Ashley JA).

is an 'irreconcilable tension', but one potential solution is a common set of criteria applied across all cases and which allows for variation according to legally relevant factors provides a potential solution.⁷²⁹ IS, in contrast, establishes no set of common criteria, granting considerable flexibility but no meaningful consistency.

While recognising that 'reasonable consistency in sentencing is a requirement of justice' the High Court has held that it must operate '[w]ithin whatever tolerance is required by the necessary scope for individual discretion'.⁷³⁰ As discussed in previous chapters, IS affords judges substantial discretion to facilitate the individualisation of sentences, the consequence being a wide scope for variation and disparity.⁷³¹ This is compounded by the lack of structure and has led to suggestions that sentencing decisions are effectively subjective decisions governed by the personal sentiments, 'idiosyncratic intuitions' and normative schemas of individual judges.⁷³²

This criticism was acknowledged by a small number of interviewees who accepted that personal value judgements will influence sentencing decisions. Judges also acknowledged the possibility that individual biases may be expressed:

Each sentencing judge probably has some peculiar things about individual sentences...I probably am a firm sentencer about sex offending, particularly relating to children and very particularly relating to children of the offender. I know when I first started and I was sentencing in incest cases I was right at the outer end of those [sentencing] statistics...

⁷²⁹ Julian V Roberts, Jose Pina-Sánchez and Ian Marder, 'Individualisation at sentencing: the effects of guidelines and "preferred" numbers' (2018) Crim LR 123. See, for example, sentencing guidelines as discussed in Chapter 8.

⁷³⁰ *Wong* (n 10) 591 [7] (Gleeson CJ).

⁷³¹ Mirko Bagaric, 'Consistency and fairness in sentencing – the splendour of fixed penalties' (2000) 2 California Criminal Law Review 1; Gelsthorpe and Padfield (n 710) 5.

⁷³² Bagaric (n 581) 597; Krasnostein (n 210) 121.

...the downside of IS is that obviously different individuals will have different biases, different prejudices, different leanings and that will affect the way in which they exercise their discretion. If I'm frank with myself, I abhor violence, for example, and when I come to look at a sentence for violence, I put that at the forefront of my mind...so as not to permit my distaste for violence unconsciously influence the way in which I approach a sentence for a violent offence...I think most judges are pretty good at identifying what their prejudices are and factoring those in when they come to exercise their discretion.

While these sentencers are aware of some of their biases, disparity is often due less to overt bias than to variation in penal philosophy, normative understandings of harm and culpability and the effects of extra-legal offender characteristics.⁷³³ This is more difficult to counteract on an individual level, it requires a systematic response.

All sentencing models that involve judicial discretion include the possibility that sentencers will differ in their evaluation of factors and principles, whether knowingly or unknowingly. The unstructured and opaque nature of IS makes these variations more likely and less visible. Unregulated judicial discretion has been linked to higher rates of sentencing disparity⁷³⁴ and the lack of transparency means that disparate approaches, to individual factors or to the sentencing process as a whole, can be concealed. Even when they are discernible, differences may be permissible given IS's wide scope for different approaches, undermining certainty and predictability and normalising disparity.⁷³⁵

⁷³³ Steffensmeir, Ulmer and Kramer (n 210) 763.

⁷³⁴ See e.g. Hogarth (n 189); Palys and Divorski (n 128) 347.

⁷³⁵ Bagaric and Pathinayake (n 156) 411.

2.1. Consistency of approach

While consistency of outcome is important, Australian sentencing does not seek absolute numeric consistency.⁷³⁶ Greater emphasis is placed on the reasoning behind the sentence.⁷³⁷ The High Court has recognised that perfect consistency in sentencing is unattainable⁷³⁸ but reasonable consistency is required.⁷³⁹ This theme recurs across attempts to promote consistency in Australian sentencing; standards and principles are set but are secondary to protecting judicial discretion and individualisation.

The consistency required by Australian courts is consistency of approach.⁷⁴⁰ This includes the decision-making procedure, as well as the relevant sentencing principles, factors and legislation informing the decision.⁷⁴¹ Although referring to ‘approach’, there is ‘no sharp distinction between “ends” and “means” in this context.’⁷⁴² As the ALRC observes, ‘judicial officers are more likely to achieve consistent outcomes if they adopt a similar approach to sentencing.’⁷⁴³

Consistency of outcome is still a relevant consideration in Australian sentencing. This is demonstrated by the attention paid to sentencing ranges and current sentencing practices (CSP) discussed below and by the fact that an inconsistent outcome, for example outside the offence range, is said to be indicative of an error in the underlying approach.⁷⁴⁴ It is accepted by the courts though, and often repeated by interviewees, that reasonable minds may differ

⁷³⁶ *Hili* (n 11) 535 [48]–[49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Pearce* (n 62) 624 [46] (McHugh J, Hayne J and Callinan J).

⁷³⁷ *Wong* (n 10) 608 [65] (Gaurdon, Gummow and Hayne JJ).

⁷³⁸ *Postiglione* (n 44) 336 (Kirby J); *Rees v R* [2012] NSWCCA 47, [50](2) (Garling J); *AB* (n 48) 303 [13] (McHugh J).

⁷³⁹ *R v Pham* (2015) 256 CLR 550 (*Pham*); *Wong* (n 10) 591 [7] (Gleeson CJ); *Hili* (n 11) 535–6 [48]–[49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁷⁴⁰ *Johnson* (n 20) 624 [26] (Gummow, Callinan and Heydon JJ). See Krasnostein and Freiberg (n 377), 270–271.

⁷⁴¹ Freiberg (n 37) 438; Harris (n 699) 47.

⁷⁴² Antony Duff and Sandra Marshall, ‘Benefits, Burdens and Responsibilities: Some Ethical Dimensions of Situational Crime Prevention’ in Andrew von Hirsch, David Garland and Alison Wakefield (eds) *Ethical and Social Perspectives on Situational Crime Prevention* (Hart 2000) 19.

⁷⁴³ ALRC (n 23) [5.18].

⁷⁴⁴ *House* (n 452) 505 (Dixon, Evatt and McTiernan JJ).

as to the appropriate sentence⁷⁴⁵ and, therefore, there is no single correct sentence.⁷⁴⁶ Instead, there is a permissible range within which the sentence should fall.⁷⁴⁷

There is an obvious and inherent dissonance between the Australian court's support of consistency of approach and its championing of IS over structured sentencing. As discussed in Chapter 3, IS does not specify a sentencing methodology, there is no shared approach to apply, consistently or otherwise. There is a risk that rigid mechanisms for ensuring consistency of approach, such as strict sentencing grids, would unfairly restrict flexibility and individualisation, however IS goes too far in the opposite direction. With its 'wide-open discretion'⁷⁴⁸ and complete absence of structure, IS permits and legitimises a variety of sentencing approaches and outcomes. This compromises, rather than promotes, consistency.

2.1.1. Absence of structure and guidance

In contrast to the sentencing guidelines of England and Wales or stepped approach applied in New Zealand, minimal structure exists to guide sentencing decisions in Australia;⁷⁴⁹ 'Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path'.⁷⁵⁰ Several interviewees explained that sentencing is grounded in the *Sentencing Act*, particularly s 5 which outlines the purposes of sentencing and factors to which the court must have regard, but gives no indication as to how they are to be considered or balanced.

There being no structure to IS, judges can consider individual factors at any point. For example, culpability may be addressed as part of offence seriousness, circumstances of the

⁷⁴⁵ *MacNeil-Brown* (n 349) 681 [10](2) (Maxwell P, Vincent and Redlich JJA); *Hudson* (n 75) 616 [27].

⁷⁴⁶ *MacNeil-Brown* (n 349) 680 [8] (Maxwell P, Vincent and Redlich JJA); *R v Monardo* [2005] VSCA 115, [28] (Batt JA) (*Monardo*); *Markarian* (n 6) 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Pearce* (n 62) 624 [46] (McHugh J, Hayne J and Callinan J).

⁷⁴⁷ *Lowe* (n 52) 612 (Mason J); *Markarian* (n 6) 383-4 [65]-[66] (McHugh J); *MacNeil-Brown* (n 349) 681 [10](3) (Maxwell P, Vincent and Redlich JJA); *Monardo* (n 746) [28] (Batt JA).

⁷⁴⁸ An invitation for disparate sentences: Andrew von Hirsch, *Doing Justice* (Hill and Wang 1976), 29.

⁷⁴⁹ *Krasnostein* (n 210) 79.

⁷⁵⁰ *Markarian* (n 6) 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

offender or completely separately.⁷⁵¹ In contrast, across sentencing guidelines in England and Wales culpability is considered exclusively as part of the assessment of offence seriousness, which informs the offence category, starting point and range.⁷⁵² Comments by interviewees demonstrate that the absence of common approach in the IS model can result in significant variations, also leading to variations in outcome. The following comments are from three different judges describing how they arrive at a final sentence.⁷⁵³

You do get some idea from looking at a range of cases, just to get a feel for the range that it's in...and then when you start to try and develop that figure, say if this is between 18 and 23 years, *you don't just pick the midpoint*...that's where I agonise.

If you're sentencing at first instance, *you're trying to get something that's in the middle of the range* that's fair with respect to all the mitigating and aggravating circumstances.

Head sentence in the middle [of the range], non-parole period is at the bottom of the Crown range or even slightly lower than the bottom, but not enough for there to be a Director's appeal.

These comments demonstrate the inability of IS to ensure consistency of approach. Judges are applying completely opposing approaches which can result in significantly different sentences, yet all are valid under the IS model.

As discussed in Chapter 4, judges have developed an informal means of structuring sentencing decision-making. The task is approached in the following order: gravity of the offence; circumstances of the offender; principles and purposes; range. In doing so judges

⁷⁵¹ The Victorian Sentencing Manual, for example, discusses culpability under Principles of sentencing (eg parity) [3.6], Circumstances and gravity of the offence (eg planning, intent, role) [5.2.1-5.2.5], Aggravating and mitigating circumstances [5.2.8.4-5.2.6.5], Mental impairment [6.2.2], Addictions [6.2.3] and Motive [6.3.2]; Judicial College of Victoria (n 669). See discussion in Chapter 4 [2.2.1].

⁷⁵² See Chapter 8.

⁷⁵³ Emphasis added.

bring some order and consistency of approach to the synthesis. This approach, however, is not universal⁷⁵⁴ and the broad categories still allow for significant variation within each step. Instead of seeking to develop and formalise this structure Australian courts continue to emphasise unstructured discretion and a model that enables wide disparity. They err on the side of disparity in preference to greater structure for fear that it may produce unjustifiable parity.⁷⁵⁵

2.1.2. Consistent application of principles

There being no set IS approach, courts and interviewees often interpret consistency of approach to mean consistent application of relevant legal principles.⁷⁵⁶ In this context the term ‘principle’ extends beyond traditional sentencing principles, such as proportionality and parity, to include rules and doctrines, such as purposes of sentencing.⁷⁵⁷ When asked about the introduction of guidelines to Victoria, a common response was: ‘We do have guidelines, we have principles’. Interviewees may view sentencing principles as the main source of guidance but being incommensurable, sometimes conflicting and difficult to reconcile,⁷⁵⁸ it is difficult to ensure they are applied consistently.

Appellate courts⁷⁵⁹ can provide guidance in relation to applying principles and purposes but there is still considerable scope for disparity. Several interviewees accepted that judges would prioritise different purposes and give them different weight. Some were also openly sceptical about certain purposes of sentencing, such as general deterrence, which was described as ‘a fiction’, ‘a myth’ and ‘not much assistance, much utility’.⁷⁶⁰ Beyond prioritising

⁷⁵⁴ As noted in Chapter 4 [2.2.2.1], not all judges interviewed followed the same approach. Factors such as criminal history, guilty plea and culpability were addressed at different points in the decision-making process.

⁷⁵⁵ Freiberg (n 37) 210.

⁷⁵⁶ *Hili* (n 11) 527 [18] and 535-6 [48]-[50] (French CJ, Gummow, Hayne, Crennan, Kiefel JJ).

⁷⁵⁷ *Wong* (n 10) [124] (Kirby J); *Western Australia v Munda* (2012) 43 WAR 137, [30] (McLure P); Harris (n 699) 246. See e.g. Scottish Sentencing Council (n 55).

⁷⁵⁸ Padfield (n 696) 33; O’Malley (n 102) 44-45; Brown (n 91) 114.

⁷⁵⁹ See Chapter 7.

⁷⁶⁰ This is consistent with the comments made by judges interviewed by Mackenzie: Mackenzie (n 17) 21. On the application of general deterrence by sentencers see Warner et al (n 61) 76. See also Andrew Ashworth, ‘The common sense and complications of general deterrent sentencing’ (2019) 7 Crim LR 564.

proportionality,⁷⁶¹ there is no particular way principles of sentencing should be balanced. Sentencers may be guided by their own penal philosophies, which may vary significantly.⁷⁶² Appellate courts can correct misapplication of principle but only when it results in obvious error and, as Chapter 5 demonstrates, misapplication can be concealed within the synthesis. In these circumstances, it cannot be certain that there is consistent application of principle.

2.1.3. Like cases

Sentencing like cases alike can involve sentencing by analogy and drawing comparisons with similar cases⁷⁶³ or applying a common metric, such as a guideline or grid. Being opposed to structure, Australian courts adopt the former approach. Past sentences may inform the appropriate sentencing range but, consistent with the maintenance of broad judicial discretion, do not constitute binding precedents.⁷⁶⁴ Meaningful comparisons can also be difficult due to lack of transparency in the IS reasoning process and the range of sentencing factors that differ between cases.

One strict interpretation is that there are no identical cases as the facts and circumstances of each are unique.⁷⁶⁵ This is a common response to allegations of disparity⁷⁶⁶ and was the position taken by several interviewees. Questions about the potential for inconsistency within the IS model drew comments that ‘circumstances might not be identical’ and that ‘no two sentencing events are ever going to be the same because you have different offending, different offenders, different circumstances, so the search for exactness is a bit of a false one’. The notion that cases may be, to some degree, comparable is deprecated by a minority of interviewees as involving an unattainable degree of precision and requiring ‘artificial and

⁷⁶¹ *Yeen (No 1)* (n 49) 467 (Mason J).

⁷⁶² Ashworth (n 146) 81; Antony Duff, ‘Guidance and Guidelines’ (2005) 105 *Columbia Law Review* 1162, 1167-1168.

⁷⁶³ *Zakaria v The Queen* (1984) 12 A Crim R 386, 388 (Crockett J) (*Zakaria*).

⁷⁶⁴ *Wong* (n 10) 605 [57] (Gaudron, Gummow and Hayne JJ); *Hili* (n 11) 537 [54]-[55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Kane* (n 450) [25] (Kettle JA); *Hudson* (n 75) 617 [31]; *Adajian* (n 453) [28] (Callaway JA).

⁷⁶⁵ *Russell* (n 450) 69-70 [57]-[61] (Kaye AJA); *CW v The Queen* [2011] NSWCCA 45 [131] (Whealy JA).

⁷⁶⁶ NSWLRC (n 448) 8.

inappropriate comparisons'.⁷⁶⁷ It is also regarded as contrary to individualised justice. This highlights a key tension within Australian sentencing, between an individualist approach, in which no two cases are alike,⁷⁶⁸ and attempts to promote consistency and guide decision-making through a comparative approach.

While emphasising the unique nature of each case is in keeping with IS's individual focus, it overlooks the recurrent factors which exist within sentencing.⁷⁶⁹ Though not identical, it is possible to recognise similar features relating to offence and offender which allow for the identification of like cases.⁷⁷⁰ There are significant commonalities in most cases.⁷⁷¹ As several interviewees observed, '[t]he same factors and issues come up every single time, they are extremely familiar'.⁷⁷² Where those relevant similarities exist, there is an obligation to treat such cases consistently.⁷⁷³ Sentencing should not be a 'multiplicity of unconnected single instances'⁷⁷⁴ or 'purely idiosyncratic approach[es]'.⁷⁷⁵

Maintaining that no cases are alike rejects the value of collective judicial wisdom, the backbone of a system based on precedent.⁷⁷⁶ As Hood observes,

if this experience is to be of value, then all cases cannot be unique, they must be comparable at least in some respects; and even if it is agreed that all cases are unique in some sense, this cannot be decisive in the practice of sentencing, for frequently decisions are reached with the aid of 'experience'.⁷⁷⁷

⁷⁶⁷ *Jimmy v The Queen* (2010) 77 NSWLR 540, 598 [261] (Rothman JA).

⁷⁶⁸ *Hasan* (n 150) 40-41, [52]-[54]; *Arney* (n 450) [14]; *Western Australia v Akizuki* (2008) 192 A Crim R 373, 388 [68] (Steyler P, McLure JA agreeing).

⁷⁶⁹ *R v Olbrich* (1999) 199 CLR 270, 287 [44] (Kirby J) (*Olbrich*); *DPP (Vic) v OJA* (2007) 172 A Crim R 181, 196 [30] (Nettle JA) (*OJA*); von Hirsch (n 578) 411.

⁷⁷⁰ NSWLRC (n 448) 8.

⁷⁷¹ Hammond (n 2) 222.

⁷⁷² See Chapter 2 [2.2.4].

⁷⁷³ NSWLRC (n 448) 8.

⁷⁷⁴ *Wong* (n 10) 617 [6] (Gleeson CJ). See also *Lowe* (n 52) 610-11 (Mason J); *Postiglione* (n 44) 335 (Kirby J); *Jurisc* (n 145) 216 (Spigelman CJ); *Whyte* (n 60) 280 [175]-[180] (Spigelman CJ); *Hudson* (n 75) 617-618 [28]-[32].

⁷⁷⁵ *Zakaria* (n 763) 388 (Crockett J).

⁷⁷⁶ *R v Oliver* (1980) 7 A Crim R 174, 177 (Street CJ).

⁷⁷⁷ Roger Hood, *Sentencing in Magistrates' Courts: A Study of Variations of Policy* (Stevens and Sons 1962) 16; Ashworth (n 705) 25-6.

Insisting upon identifying small, individual differences, rather than recognising broader similarities compromises consistency of approach and is inconsistent with the great emphasis IS and judges place upon experience as a central feature in sentencing.

3. Methods for promoting consistency

In confirming IS as the Australian sentencing model, McHugh J recognised that sentencing discretion does not operate in a vacuum; in addition to legislation and sentencing principles '[t]he judicial air is thick with trends, statistics, appellate guidance,'⁷⁷⁸ enabling the comparison of cases and thereby improving consistency. The application of this material, however, has proved problematic. Using maximum penalties as guideposts is widely accepted⁷⁷⁹ but there has been reluctance to consider other non-statutory guidance.⁷⁸⁰ The courts have emphasised that IS is not a mathematical exercise⁷⁸¹ but have found a compromise position whereby sentencing tariffs, ranges and comparative cases may inform the synthesis or assessment of relative seriousness but are not determinative.⁷⁸² They act to guide the exercise of discretion but not as rules prescribing a definitive result and, importantly, do not restrict the sentencing options available.

'Sentencing information' can refer to a number of overlapping considerations, for example comparable cases and sentencing statistics which inform CSP and sentencing range. The underlying assumption is that knowledge of past decisions will enable sentencers to draw upon collective judicial experience.⁷⁸³ Consistency is compromised, however, where judges can simply disregard sentencing information and collective experience when their intuitions deem it appropriate⁷⁸⁴ and by the individualist focus on the 'unique' aspects of each case. As

⁷⁷⁸ *Markarian* (n 6) 388 [76] (McHugh J).

⁷⁷⁹ *Muldock* (n 13) 132 [27]; *DPP v CPD* (2009) 196 A Crim R 1, 19 [71] (*CPD*).

⁷⁸⁰ See e.g. *R v Ngui* (2000) 111 A Crim R 593, 598 [12]-[13] (Winneke P) (*Ngui*).

⁷⁸¹ *Wong* (n 10) 611 [74] (Gaudron, Gummow and Hayne JJ); *AB* (n 48) 156 [115] (Kirby J); *OJA* (n 769) 195 [29] (Nettle JA). See also Freiberg and Krasnostein (n 66) 74.

⁷⁸² *De La Rosa* (n 554) 72 [304] (Simpson J).

⁷⁸³ *Wong* (n 10) 591 [7] (Gleeson CJ); *De La Rosa* (n 554) 72 [303] (Simpson J).

⁷⁸⁴ Krasnostein (n 210) 124.

*Barbaro*⁷⁸⁵ demonstrates, sentencing information such as ranges will be applied only to the extent consistent with the individualisation of sentences. The court also consistently reiterates that while sentencers may be obligated to have regard to the material, they are not required to use it in any particular way and the material constitutes only one element of the decision and does not dictate or limit discretion. So, while the following measures can promote consistency, they are secondary to the court's protection of its discretion.

3.1. Comparable cases

An overview of sentences for similar offences can inform the instinctive reaction of sentencers,⁷⁸⁶ for example through guidance on the application of relevant principles, an indication of CSP or as a yardstick against which to examine the proposed sentence.⁷⁸⁷ There is a degree of caution in the discussion of comparative cases that reflects IS's emphasis on broad discretion.⁷⁸⁸ Examples include warnings that sentences are not binding precedents, do not determine the upper and lower limits of discretion⁷⁸⁹ and can provide only limited, general guidance.⁷⁹⁰

Despite these caveats, courts have held that it is right to examine what has happened in similar cases and 'essential that the prosecution provide comparable cases and other guidance as to the relevant sentencing standards'.⁷⁹¹ Reviews of comparable cases appear to be part of everyday sentencing practice.⁷⁹² This was echoed by interviewees, although most who discussed comparable cases appeared to approach them cautiously. Interviewees reported being frustrated by counsel submitting cases which favour their argument but do not

⁷⁸⁵ *Barbaro* (n 14).

⁷⁸⁶ *Hudson* (n 75) 617 [28]; *DPP v Zhuang* (2015) 250 A Crim R 282, 292-294 [30]-[34]; *R v Giordano* [1998] 1 VR 544, 549 (Winneke P).

⁷⁸⁷ *Pham* (n 739) 558-560 [27]-[29] (French CJ, Keane and Nettle J); *Hudson* (n 75); *De La Rosa* (n 554) 72 [304] (Simpson J).

⁷⁸⁸ *Hayes* (n 450) 465 (Kirby P); *Hili* (n 11) 537 [54]-[55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Hudson* (n 75) 617-618 [31]-[33]; *R v Campillo Vaquere* [2004] NSWCCA 271, [77]; *FD v The Queen* [2011] VSCA 8 (FD); *R v George* (2004) 149 A Crim R 38, 47 [48] (Wood CJ at CL).

⁷⁸⁹ *Pham* (n 739) 558 [27] (French CJ, Keane and Nettle J).

⁷⁹⁰ See e.g. *Hudson* (n 75) 617 [28]-[30].

⁷⁹¹ *DPP v Dalglish* [2016] VSCA 148, [26] (*Dalglish* 2016).

⁷⁹² *Wong* (n 10) 591 [7] (Gleeson CJ). See e.g. *De La Rosa* (n 554) 48-49 [193]-[196] (McClellan CJ at CL); *Tognolini v The Queen* (2011) 32 VR 104; *Morrison v The Queen* (2009) 197 A Crim R 103, 115-118 [52]-[63] (Hulme J); *Winch* (n 701) 662-663 [19]-[22] (Maxwell P and Redlich JA); *CPD* (n 779).

accurately reflect sentencing practices⁷⁹³ or that are not actually comparable. For example, a case where serious injuries were caused by a punch when the matter being sentenced involved a machete attack or where there are significant relevant differences in the offenders' criminal histories. These comments demonstrate that judges do not accept 'comparable' cases unthinkingly, they are aware of the need for scrutiny. They also discern important similarities and differences from comparison, undermining the claim that no two cases are the same. Yet the ability to draw meaningful comparisons remains dependent on the detail and accuracy of available sentencing remarks.⁷⁹⁴

While judges have regard to 'like' cases, it is difficult to know the exact effect they have on decision-making. Interviewees suggested that comparative cases are particularly useful in providing an indication of range for unfamiliar offences. More often though, it seems that the cases simply reinforce knowledge the sentencer already has. Many judges spoke about knowing 'what the run of the mill of most offences is' and appeared to prioritise their own experience above that offered by 'like' cases.

3.2. Sentencing statistics

Sentencing statistics, such as those produced by sentencing councils⁷⁹⁵ and judicial education bodies,⁷⁹⁶ did not feature heavily in interviewees' discussion. Like comparable cases, they can inform the synthesis but are not determinative. They were mentioned only in passing, as a means of understanding the range or as one of several factors to consider. One judge commented that most judges have regard to 'that kind of information' but did not explain how it was used. It is impossible for judges to keep abreast of every sentence imposed in the

⁷⁹³ *MacNeil-Brown* (n 349) 711 [128] (Buchanan JA).

⁷⁹⁴ See Chapter 5 [3].

⁷⁹⁵ See e.g. Sentencing Advisory Council, Database of Sentencing Statistics for the Magistrates', County and Supreme Courts of Victoria (31 October 2019) <<https://www.sentencingcouncil.vic.gov.au/sacstat/home.html>> accessed 23 June 2020; Sentencing Advisory Council, Sentencing Snapshot 241: Sentencing Trends for Causing Injury Recklessly in the Higher Courts of Victoria 2014-15 to 2018-19 (28 April 2020) <<https://www.sentencingcouncil.vic.gov.au/snapshots/241-causing-injury-recklessly>> accessed 23 June 2020.

⁷⁹⁶ See e.g. Judicial College of Victoria, Sentencing Manual – Case Summaries: Homicide offences' <<https://resources.judicialcollege.vic.edu.au/article/679560>> accessed 23 June 2020.

jurisdiction.⁷⁹⁷ Sentencing statistics provide a convenient summary, but interviewees were aware of the limitations:⁷⁹⁸

It's become a pretty awful part of the plea. You're sitting there and they throw up statistics and you say: 'Well they're just statistics, I'm not coming onto the bench as a statistician.' The statistics tell me nothing about any of the individual features or factors or aggravations or mitigatory features or even the timing of the plea. Nothing.

Bare statistics may be useful if seeking consistency of outcome but in order to promote consistency of approach further contextual information is needed. Sentencing statistics should be part of a more detailed consideration, used in combination with other sentencing information, such as range and CSP, to offset those limitations.

3.3. Current sentencing practices (CSP)

Sentencers are obliged to have regard to CSP,⁷⁹⁹ which has been held to include the approach and type of sentences imposed in similar cases.⁸⁰⁰ Interviewees used the term to include comparable cases, sentencing statistics and range.⁸⁰¹ More often the latter was referred to separately but there is significant overlap between the two and interviewees tended to frame CSP in terms of sentencing outcomes. Judges, particularly those with limited experience of criminal law,⁸⁰² described the information as useful but stressed that it was only one consideration.

⁷⁹⁷ *Whyte* (n 60) 292 [266] (Spigelman CJ).

⁷⁹⁸ See e.g. *Wong* (n 10) 606 [59] Gleeson CJ; *Hili* (n 11) 535 [48] (French CJ, Gummow, Hayne, Crennan, Kiefel JJ); *DPP (Cth) v Thomas* (2016) 53 546, 608 [179]; *FD* (n 788); *DPP v Maynard* [2009] VSCA 129 [35]-[36].

⁷⁹⁹ *Sentencing Act 1991* (Vic) s 5(2)(b).

⁸⁰⁰ *CPD* (n 779) 21-22 [77]-[78].

⁸⁰¹ *Davy v The Queen* (2011) 207 A Crim R 266, 277 [42]; *Hall v The Queen* [2010] VSCA 349, [17].

⁸⁰² See e.g. *R v Bangard* (2005) 159 A Crim R 145, 149 [12] (Buchanan J).

Recent changes to CSP indicate that courts are willing to use sentencing information to guide decision-making but will not allow it to intrude upon discretion.⁸⁰³ Many first instance judges felt that CSP had become determinative, the primary consideration and ‘a holy grail’ amongst part of the Court of Appeal. This led, in effect, to ‘artificial ceilings’⁸⁰⁴ as judges felt unable to sentence outside the CSP for fear that the sentence would be reduced on appeal. Many judges expressed frustration at feeling restricted by CSP. For example:

I gave him [redacted] years for the [offence], which I still regarded as ridiculously low but it was already higher than anyone else had already been given...I still gave as heavy as I could...[T]he Court of Appeal upheld my sentence and said that in fact the sentencing range was too low...but that was one of those classic cases where I felt constrained by CSP and I was giving it the highest end that anyone had given...I think there’d only ever been seven or eight [offence] cases, I was within a fairly artificial construct of CSP.⁸⁰⁵

I felt that the way the Court of Appeal had been elevating CSP into an overriding principle was imposing a wrong principle and it was imposing a strait jacket which was seriously and wrongly restricting the proper exercise of individual sentencing discretion. So I would say things often in my sentencing remarks, that I felt constrained by the principle of CSP to impose a sentence that was lower than I thought was proportionate to the offending and to the circumstances and ‘Were I not constrained by it I would have imposed X, but because of what the Court of Appeal had said I’d impose Y’.

[A fellow judge] at one stage specifically said: ‘I’d give you double figures but I can’t’.⁸⁰⁶

⁸⁰³ *Ngui* (n 780) 598 [12]-[13] (Winneke P).

⁸⁰⁴ *Dalglish* 2016 (n 791) [99].

⁸⁰⁵ Details of the sentence and offence have been redacted in order to prevent identification of the case and thus the sentencing judge.

⁸⁰⁶ See similar comments in *Shrestha v R* [2017] VSCA 364 [11]-[12].

Judges appeared willing to consider the additional information but were frustrated that it was restricting, not guiding, discretion. Overwhelmingly interviewee concerns were about being prevented from imposing proportionate sentences. They felt unable to exceed CSP, even in cases of serious offending, resulting in downward pressure on sentences for mid-category offending.⁸⁰⁷ It also led to what one judge described as the ‘atrophying’ of sentencing, based on past CSP and reflecting outdated notions of offending and harm. That judge gave the example of improved understanding of long-term harm to child victims of sexual abuse, which was not adequately reflected in CSP from 2005-2009 being applied in 2017.

The Court of Appeal in *Dalgleish* recognised that sentencing practices in relation to incest were so low as to demonstrate that sentencing principles were not being appropriately applied.⁸⁰⁸ The Court indicated that sentences should be increased in future but did not increase the immediate sentence. The decision was appealed and, six months before the interviews in this study, the High Court upheld the appeal, reiterating that CSP does not constitute a ‘band’ within which judges must sentence and is only one matter to which sentencers must have regard.⁸⁰⁹

The vast majority of interviewees regarded this judgment as freeing them from ‘unofficial restraint’:

...days after *Dalgleish* was handed down I increased a sentence for [offence] from, let’s say three years to six years...I think [another judge] did something very similar...We increased it quite significantly virtually the day after...But with a maximum of 25 years I hardly think six years for [offence] is terribly high. Three was outrageous.⁸¹⁰

⁸⁰⁷ *Dalgliesh* 2016 (n 791) [99].

⁸⁰⁸ *Dalgliesh* 2016 (n 791) [64].

⁸⁰⁹ *Dalgliesh* (HC) (n 12) 454 [82] (Gageler and Gordon JJ).

⁸¹⁰ Leave to appeal against sentence was refused by the Court of Appeal.

In this way, the High Court's decision has empowered not just the Court of Appeal to raise CSP but also individual judges, albeit indirectly by sentencing outside the current CSP. It reinforces fundamental elements of IS: broad judicial discretion with minimal restrictions and the tailoring of sentences proportionate to individual cases. This is reflective of the broader approach towards sentencing information, it may be used only to the extent that it does not interfere with IS. It is just another factor to be synthesised and does not set limits.

3.4. Range

The sentencing range refers to an 'area of decisional freedom within which reasonable minds may differ as to the correct conclusion'.⁸¹¹ It is intended to promote consistency by providing scope for variation whilst indicating limitations.⁸¹² Individualised justice relies upon the existence of a range of permissible sentences and the corresponding flexibility that brings. As one judge explained, the notion of a range also recognises

the incommensurability of years in jail with human conduct. It's a crude measure...and no one can say with confidence that five is enough and six years is too much...which is why the notion of sentencing range is fundamental.'

Proportionality is used to determine the limits of punishment.⁸¹³ In contrast, the court has made clear that the sentencing range does not fix upper or lower limits of discretion and is no more than a yardstick.⁸¹⁴ While informed by proportionality, the range of permissible sentences is also influenced by CSP, sentences imposed in like cases and appellate decisions.⁸¹⁵ It exists

⁸¹¹ Maxwell (n 553) 20; *DPP v Martin* [2009] VSCA 316 [20]; *MacNeil-Brown* (n 349) 680 [7]-[8] (Maxwell P, Vincent and Redlich JJA); *Li* (n 617) 350 [28] (French CJ), 363 [66] (Hayne, Kiefel and Bell JJ), 375 [105] (Gageler J); *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158, 171 [62].

⁸¹² *Terrick* (n 73) 496 [75]; *Hasan* (n 150) 41 [53].

⁸¹³ *Veen (No 2)* (n 60); *Hoare* (n 59) 354; *McNaughton* (n 32) 572 [15] (Spigelman CJ).

⁸¹⁴ *Hili* (n 11) 537 [54] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Barbaro* (n 14) 74 [41] (French CJ, Hayne, Kiefel and Bell JJ); *Dalglish* (HC) (n 12) 445 [50] (Kiefel CJ, Bell and Keane JJ); *De La Rosa* (n 554) 72 [304] (Simpson J).

⁸¹⁵ Sentencing Advisory Council (n 73) 14; *Hasan* (n 150) 41 [52] and [55]-[56].

as a non-binding subset within the hard boundaries set by proportionality. Having determined the range of permissible sentences, the sentencer must then determine where within that range the sentence should fall. Within the range there is no 'right' or 'wrong' sentence.⁸¹⁶ The question is not whether the sentence is more or less severe than that imposed in a comparable case, but whether it falls within the range of sentences appropriate to the gravity of the offence and circumstances of the offender.⁸¹⁷

While, in theory, the sentencing range does not impose limits on discretion, interviewees' comments suggest that the range operates as an unofficial cap on discretion. The general understanding was that sentences outside the range risk appeal. Interviewees appeared to be slightly more willing to depart from the range than from CSP prior to *Dalgleish* but understood that doing so was a risk. They also explained that, in some cases, the range is so wide as to offer no useful guidance.

Given its influential role in the determination of sentence, it is concerning that the range itself is never articulated. This is perhaps because, as indicated above, it cannot definitely be said, for example, that a sentence of 364 days is within the range but one of 365 days is not. The inability or unwillingness to precisely define the range may be one reason why the range is not articulated. Alternatively, and in keeping with the IS approach of not explaining the treatment of individual factors, to state the range may be seen as unnecessarily exposing a potential error, one which would go unnoticed if not articulated. Regardless of the reason, failure to identify the range severely undermines transparency and attempts to promote consistency. Judges apply their own understanding of the range informed by experience, submissions and comparable cases, but do not explain the range they are working within. As such, there is no way to determine whether their understanding of the range is correct or consistent with others', other than when it results in manifest error at the final sentence.

⁸¹⁶ *Hasan* (n 150) 41 [53].

⁸¹⁷ *Hudson* (n 75) 618 [35]; *R v Morgan* (1993) 70 A Crim R 368, 371 (Hunt CJ at CL).

Appellate judgments provide some indication of the scope of a particular range as a sentence that is manifestly inadequate or excessive is outside the range.⁸¹⁸ In some cases, tables of comparable cases were used to give an indication of the range.⁸¹⁹ Yet neither of these methods identifies the precise limits of the range. In addition, *Barbaro* made the identification of the range more difficult by prohibiting submissions by the Crown on the bounds of the range.⁸²⁰ Several judges interviewed indicated that these submissions had provided helpful guidance and reassurance that they were sentencing in line with other judges. According to interviewees, parties can and do still make suggestions as to range, but indirectly through comparable (or non-comparable) cases. What the *Barbaro* judgment confirms, though, in approving an exclusively judicial determination of the range, is that sentencing remains firmly within judicial control.

While sentencing ranges have been approached with caution,⁸²¹ the majority of judges interviewed found them useful informal guides and could articulate them easily, drawing upon their experience with similar cases in practice and on the bench:

If [my Associate] comes to me and says ‘We’ve got a commercial crop sitter tomorrow’ I just immediately [know], almost without looking at it, chances are...they’re going to get in that range of two to four years.

⁸¹⁸ ‘The contention on appeal that a sentence is ‘manifestly excessive’ (or, in a Crown appeal, ‘manifestly inadequate’) is almost always supported by the proposition that the sentence is ‘outside the range’’: *MacNeil-Brown* (n 349) 680 [9] (Maxwell P, Vincent and Redlich JJA). See also *Russell* (n 450) 66 [40] (Neave JA).

⁸¹⁹ See e.g. *CPD* (n 779); *Ashdown* (n 526); *Nguyen v The Queen* [2011] 31 VR 673. Note though the High Court’s criticism of the use of such tables: *Wong* (n 10) 601-2 [45], 608 [65] (Gaudron, Gummow and Hayne JJ).

⁸²⁰ *Barbaro* (n 14) 74 [39] (French CJ, Hayne, Kiefel and Bell JJ).

⁸²¹ See e.g. *De La Rosa* (n 554) 72 [303] Simpson J; *DPP v Ross* (2006) 166 A Crim R 97, 106-7 [38]-[40] (Buchanan JA) (*Ross*).

After explaining the fact scenario of a recent case, a judge described their thought process as follows:

He's going to jail, and he has to...but he's going for much less than I could give him. I *could* sentence him to three or four years on the top, with two or three years on the bottom but I'm giving him nine months and a community-based order on top of that, which I think's as light as I can go. Who knows? That's the range and I've snuck him into the bottom, I think...[I]f I gave him two with a one, the Court of Appeal wouldn't touch it. If I give him nine months suspended with a CCO they won't touch it either. They're all within range. I can probably even give him three with one and a half. Does that make a difference? It does for him, he'd rather do nine months than 18.

This is evidently not an instinctive process but a tactical calculation, one that highlights the wide sentencing range and the inconsistency that can result.

The rest of the judge's comments demonstrate how lack of structure and transparency make it difficult to determine whether differences in sentencing are justified. The judge described the factors that influenced their decision. There being no guidance within the IS model, they were entitled to weigh and balance them however they saw fit. The judge indicated that the factors below were influential in the decision to impose a low sentence, yet there is no way of knowing exactly how as they are not included in the sentencing reasons:

I'm probably worried about his wife and kid but the law says I can only worry about those in exceptional circumstances, so I don't mention [them] anywhere...because it's not exceptional.

Where the sentencing model allows for this sort of variation and concealment, consistency of approach is jeopardised. The IS model, lacking a common sentencing methodology and

permitting the production of sentencing reasons that do not properly reflect the decision-making process, allows for significant disparity of approach and outcome. The use of sentencing ranges is intended to limit disparity but as they are broad, unfixed and unarticulated, ranges cannot ensure meaningful consistency.

Individually these forms of sentencing information have limited capacity to encourage consistency. Their effectiveness is increased when used together, overlapping and informing each other, but, as the court repeatedly states, sentencing information is only one consideration in the exercise of discretion. Ranges and statistics are not sufficient to compensate for the vast disparity permitted by a sentencing model which allows (almost) any approach to decision-making. To effectively promote consistency, structural change is needed.

3.5. The appellate court

According to the High Court it is ‘both natural and desirable’ that appellate courts should issue guidance in relation to addressing identifiable recurring factors in sentencing cases.⁸²² In this vein, the Victorian Court of Appeal has been attempting to give greater guidance as to the application of sentencing principles.⁸²³ More commonly though, the ‘individualist conception of the sentencing discretion’ prevents appellate courts from ‘interfering’ with sentences by issuing general practical policy statements.⁸²⁴ Instead, they are more often concerned with correcting error in the case immediately before them.

As mentioned in Chapter 5, the majority of appeals concern manifest error. Disparity between sentences is not in and of itself an error. Marked disparity, however, may be reflective of errors

⁸²² *Olbrich* (n 769) 287 [44] (Kirby J). See also *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 595-596 [54] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁸²³ See Chapter 7.

⁸²⁴ *Krasnostein* (n 210) 113.

in approach⁸²⁵ and render a sentence vulnerable to appeal.⁸²⁶ The court attempts to address the causes of disparity but within a framework of IS principles. For example, preserving broad judicial discretion by requiring that the sentence be 'obviously',⁸²⁷ 'definitely',⁸²⁸ 'clearly and egregiously',⁸²⁹ 'unmistakeably',⁸³⁰ or 'wholly',⁸³¹ outside the range rather than just 'arguably'.⁸³² As explained above, the precise boundaries of the range are never articulated and the assessment applies an individual focus, asking whether the sentence is appropriate according to the objective gravity of the offence and matters personal to the offender, rather than in relation to other cases.⁸³³

Generally, appellate judgments focus on the immediate sentence and not on issuing broad guidance. While the court may comment on the severity of the offence, judgments will rarely identify the boundaries of the appropriate range.⁸³⁴ Interviewees saw the appellate court's primary role as acting as catching and rectifying mistakes, correcting "idiosyncratic views" of individual judges⁸³⁵ rather than establishing measures to improve consistency. As one judge described it: 'We're really only sort of knocking the outliers back into play...back into the range.' This improves consistency on a case-by-case basis but the focus on individual cases overlooks the opportunity to provide broader guidance and consistency.

3.6. Talking to colleagues

Just as they have responded to the absence of structure within IS by developing an informal decision-making structure, judges have established an informal practice relating to

⁸²⁵ ALRC (n 23).

⁸²⁶ *Hili* (n 11) 544 [77] (Heydon J).

⁸²⁷ *Hanks* (n 478) [22]; *Raggett* (n 289) 47 (Kearney J).

⁸²⁸ *Everett v The Queen* (1994) 181 CLR 295, 306-7 (McHugh J).

⁸²⁹ *DPP v Johnson* [2004] VSCA 150, [28]; *DPP v Edge* [2012] VSCA 289, [60] (Priest JA).

⁸³⁰ *Hanks* (n 478) [22].

⁸³¹ *Boaza* (n 476) [42] (Winneke P); *R v Abbott* (2007) 170 A Crim R 306, 309 [13] (Maxwell P) (*Abbott*).

⁸³² *Skinner v The King* (1913) 16 CLR 336, 340 (Barton ACJ). There has, however also been a recent shift towards looking at the reasonableness of the sentence: See e.g. *Clarkson v The Queen* (2011) 32 VR 361, 384 [89]; *Abbott* (n 831) 309 [13]-[14] (Maxwell P); *DPP v Karazisis* (2010) 206 A Crim R 14, 43 [127] (Ashley, Redlich and Weinberg JJA) (*Karazisis*); *McPhee v The Queen* [2014] VSCA 156 [10]-[11]; Maxwell (n 811).

⁸³³ *Freiberg and Krasnostein* (n 781) 87; *Hudson* (n 75) 618 [35]; *Sinkovich v The Queen* [2011] NSWCCA 90 [41]; *Ellis* (n 450) 461 (Hunt CJ at CL); *WCB v The Queen* (2010) 29 VR 483, 501 [14] (Warren CJ and Redlich JA).

⁸³⁴ See e.g. *Arney* (n 450) [12] (Nettle JA).

⁸³⁵ *Dinsdale* (n 621) 340 [60] (Kirby J) (citations omitted).

consistency. While they have regard to sentencing information, judges more often access collective judicial wisdom by discussing potential sentences with each other. This habit has been acknowledged by the courts⁸³⁶ but remains an unofficial, though common, method for encouraging consistency of approach and outcome. Judges in Ashworth et al's study maintained networks with colleagues but did not discuss particular sentencing patterns or problems.⁸³⁷ In contrast, judges in this study discuss such matters 'Constantly. Absolutely constantly. There would not be a day in which three or four judges don't talk to me about the sentence that they're considering...It's very rare that a sentence is imposed without that discussion.'

Interviewees noted the strong collegiality within the courts and that they 'are frequently in and out of each other's rooms' discussing cases, mirroring the open-door practice of the Bar.⁸³⁸ This was evident during the interviews as on four separate occasions colleagues entered the judge's chambers to discuss a case, ask for advice or for the name of a case. The discussions are 'a shorthand way of doing your research' about range, CSP and comparable cases and also provide a sense of reassurance: 'I trust myself, but I trust myself more when I've consulted with other people.'

Discussing sentences with colleagues is of particular assistance to newly appointed judges and those from non-criminal law backgrounds, though all interviewees agreed that it is common across the judiciary. Some more experienced judges were more likely to provide advice than seek it: 'I get four or five emails a day: 'Has anyone ever done this?'' but even one very experienced judge, whose advice other interviewees reported seeking, explained that 'I will never come to a conclusion about a sentence until I've spoken to a few people around the court whose views I respect.' Others consult colleagues only when faced with a difficult case,

⁸³⁶ *Markarian* (n 6) 388 [77] (McHugh J).

⁸³⁷ Ashworth et al (n 19) 35.

⁸³⁸ Justice Michael Kirby, 'Opening of Family Law Chambers, Sydney' (2005) 19 *Australian Journal of Family Law* 3, 8.

for example involving both Commonwealth and State offences where there are often difficulties with the structure or mechanics of the orders.

Judges discuss the contents of the orders, using fellow judges 'as a sounding board' to help think through their synthesis or bring attention to matters overlooked. In many instances, discussions with colleagues seemed to operate as 'a way of avoiding massive error' and 'to ensure that your views are not idiosyncratic'. This is judicial recognition not only of the impossibility of instinctively synthesising the whole sentencing process and the corresponding need to be systematic and consult, but also that judges often do not trust their synthesis alone. Again, IS is operating as a façade to keep power in the hands of the individual judge and the judiciary generally, as judges engage in these discussions without the knowledge or input of the parties.

Contrary to the court's emphasis on consistency of approach, discussions seem to focus on range and outcome. Following a brief explanation of the key facts, the advising judge offers a 'quote' or indication of the sentence or range they think appropriate. It is essentially a condensed IS with judges using the same descriptions, such as a 'gut reaction' and 'instinctive'. Interviewees reported that judges were generally within the same range and 'on the same page', suggesting a level of consistency. They were aware, however, of variation amongst the cohort and individual reputations as tough or easy sentencers, including where on that spectrum they themselves fall.⁸³⁹ Only a small number of interviewees seek opinions from judges whose sentencing practices differ from their own. More often judges consult a limited circle of trusted colleagues.⁸⁴⁰ With this selectivity and the potential for discussions to operate as judicial echo chambers, it is not surprising that interviewees would say that there is general consistency amongst judges.

⁸³⁹ However, as Ashworth et al explain, judges are not necessarily accurate in their assessment of their own sentencing patterns: (n 19) 50-1.

⁸⁴⁰ 'Trusted' was used to refer to judges who are likely to get the sentence 'right' (that is one that is unlikely to be successfully appealed), as well as those whose approach to sentencing is similar to the inquiring judge.

A very small minority of interviewees stated that they rarely sought advice from colleagues, preferring to rely on their own experience and independence: 'It's *my* job to do this and it's not a job you can share. It's as simple as that. This is not for sharing.' More broadly, though, there is an emphasis on collective experience:

One of the great aspects of the way we work here is really the ability to rely on more experienced people who have had the luxury of...hearing all of these things and applying IS, over a number of years.

...it's not just your own instinct, it's the instinct of others. It's that collegiate instinct which is, I think, crucial.

It is not that the judiciary are unwilling to be guided in their exercise of discretion but that they are unwilling to have such guidance forced upon them, especially from those outside the judiciary.⁸⁴¹ Ironically, given their opposition to sentencing councils,⁸⁴² judges are effectively creating shadow councils to discuss appropriate ranges. These decisions should not be made by judges behind closed doors, where some have had only cursory summaries of the facts. They must be transparent and be open to scrutiny, debate and challenge.

Judges were careful to explain that they make their own decisions, but several admitted that they often change sentences following conversations with fellow judges. The influence of colleagues on sentences was reported across all courts. Australian appellate courts do not require unanimous judgments but where the bench comprises multiple judges, the judge who produces the first draft opinion can often influence undecided colleagues.⁸⁴³ Even in cases

⁸⁴¹ See the judicial response to legislative guidance in Chapter 7 [2.1].

⁸⁴² See Chapter 8 [4.1].

⁸⁴³ Kirby (n 18). See also discussion in Chapter 5.

before single judges, interviewees suggested that ‘there would be many sentences that are delivered that aren’t just that individual judge’s thoughts.’ The freedom with which judges make such statements indicate that they see this informal influence and collective thinking as a strength. They recognise that it is ‘not in accordance with the strict notion of judicial independence but it tends to reduce the chance of an anomalous exercise’, though at the cost of transparency and accountability.

Like the decision-making structure discussed in Chapter 4, collective experience and unofficial discussions fill a gap created by the absence of formal sentencing guidance in the IS model. Given the frequency with which these discussions occur and the influence they can have, there is the potential to significantly impact levels of consistency. Being informal, however, they are not publicly explained and are thus not subject to oversight or scrutiny. In addition, there remains huge scope for variation in terms of the participants, content and effect on outcome. While reassuring to judges, it is not in keeping with the rule of law that these casual, non-transparent discussions should have the potential to so heavily influence individual sentences and sentencing as a discipline. They are an inappropriate basis for judicial decision-making and are reflective of the judiciary’s vast, unchecked control over sentencing under the current sentencing arrangements.

4. Judges’ attitude to consistency

The pursuit of consistency has resulted in significant sentencing reform in some jurisdictions⁸⁴⁴ but not those that prioritise individualisation and broad sentencing discretion. As Tonry observes, the association of disparity with unstructured discretion seems inevitable yet ‘that problem is not at all self-evident to many judges’ where the prevailing judicial ethos rejects the need to structure sentencing discretion.⁸⁴⁵ Within Australia, judges may be aware of the

⁸⁴⁴ Ashworth (n 762) 418-21; Andrew Ashworth and Julian V Roberts, ‘The Origins and Nature of the Sentencing Guidelines in England and Wales’ in Ashworth and Roberts (n 9) 3; Martin Wasik, ‘Going Round in Circles? Reflections on Fifty Years of Change in Sentencing’ (2004) Crim LR 253.

⁸⁴⁵ Tonry (n 211) 178.

association but view inconsistency as an acceptable consequence of discretionary decision making:

...it is possible for two courts, each acting on an identical legal principle, making no error of fact, omitting no relevant consideration and taking into account no irrelevant consideration, to arrive at different sentences without either of them being “wrong”...The circumstances of particular crimes and the “character, antecedents and conditions” of particular offenders are so various, the combinations in which they can occur are so numerous, and the relationship between these factors and the purposes which criminal sentences are to serve can be so impalpable, that the application to them of discretionary judgment permitting a range of legitimate outcomes is inevitable.⁸⁴⁶

Like the judges interviewed by Mackenzie,⁸⁴⁷ interviewees were pragmatic in their attitudes to sentencing, believing that using the appropriate method will deliver the appropriate result. They recognised that sentencing is a ‘human system and in a human system there are errors made’ but were confident in the appellate checks:

I don't think that we should aim for consistency [of outcome], just judge each case before you and if you're wrong you'll get appealed and they'll fix it up.

You're never going to get perfect consistency because there is no single correct sentence and people's views will differ. The safeguard where a judge goes badly wrong in sentencing at first instance is to have three judges review the matter.

⁸⁴⁶ *Hili* (n 11) 544 [74] (Heydon J) (citations omitted).

⁸⁴⁷ Mackenzie (n 17) 21.

If the Crown thinks the sentence is manifestly inadequate, they can appeal it and it can go all the way to the High Court. And likewise, if the accused thinks it's manifestly excessive, they've got the right to appeal. So I think there's pretty rigorous checks and balances already and they're a good reason for preserving sentencing discretion.

Some judges recognised a lack of consistency in the current sentencing arrangements:

I think consistency is important and we don't have it...There'd be people out at the prison, sharing cells and discussing their crimes and scratching their heads saying, "Well how did you get eight with a six when I got four with a two?"

Unlike those in Brown's study,⁸⁴⁸ however, the majority of interviewees believed that a reasonable degree of consistency in sentencing is possible and is currently being achieved. Judges explained that sentencers 'all pay a lot of attention to what other judges are doing with similar offending' and tend to converge. They also referred to the relatively low rate of successful appeals against sentence.⁸⁴⁹ The belief in a high level of consistency may also be a reflection of the individual's interpretation of consistency. One interviewee, noting that Victorian sentencers are 'almost always' in line with each other, explained:

It's very rare that I would, for example, think that a sentence would be 10 years and my colleagues would say four years, that kind of disparity one doesn't get. But we might get a situation where one of my colleagues says seven years and I say 10 or vice versa. That's understandable as well, it's part of the breadth of the discretion that is involved.

⁸⁴⁸ 22 of 25 judges interviewed considered that consistency in sentencing simply cannot be achieved: Brown (n 91) 104.

⁸⁴⁹ 97% of sentences imposed in Victoria's County and Supreme Courts are either not challenged or not changed on appeal. Less than 1% of sentences are increased and just over 2% decreased on appeal: Sentencing Advisory Council, *Sentence Appeals in Victoria: Second Statistical Research Report* (Sentencing Advisory Council 2018) 25.

This comment suggests that judicial understandings of consistency include an ‘acceptable’ degree of difference. It also reflects the attitude of the majority of interviewees that, ultimately, consistency is not a cause for concern in Victoria: ‘I can’t pretend that consistency wouldn’t be improved by something that was a little more rigorous than IS but I don’t think it’s a problem.’

Any concerns judges might have about consistency are not sufficient to translate to support for structuring sentencing. Instead, interviewees objected to the limited existing attempts to guide sentencing discretion through CSP and sentencing ranges. This response echoes the resistance in case law.⁸⁵⁰ It is the result of several factors addressed throughout this chapter. First, the emphasis on individualisation and broad judicial discretion and corresponding opposition to comparative approaches. Second, the desire to maintain judicial control over sentencing, as seen in *Barbaro*. And third, the development of informal structures, such as discussions with colleagues, which contribute to the belief that consistency is not a problem within the current system and formal structure is unnecessary. As will be demonstrated in the following chapter, these attitudes inform responses not just to consistency but to IS itself. They fuel the belief that any change will be worse than the problems of the current model.

5. Conclusion

Many of the core features of IS pose challenges to the pursuit of consistency. The understanding that reasonable minds may differ⁸⁵¹ and there are ‘no golden rules’,⁸⁵² the emphasis on the individual nature of cases, broad judicial discretion and the lack of structure all allow for significant variation, effectively legitimising and normalising disparity. Where the approach to sentencing is so nebulous and unstructured it renders any claim of consistency

⁸⁵⁰ See e.g. *Ashdown* (n 526) 398 [167] (Ashley JA).

⁸⁵¹ *Hudson* (n 75) 616 [24].

⁸⁵² *Geddes* (n 51) 555 (Jordan CJ); *Williscroft* (n 235) 299-300 (Adam and Crockett JJ); *R v King* (2004) 150 A Crim R 409, 434 [123] (McColl JA) (*King* (2004)).

of approach meaningless. Rather than amending the model or improving guidance, the understanding of what constitutes consistency has been adapted to suit the IS model.

A degree of disparity is accepted as inevitable in Australian sentencing. While it is a possibility in all discretionary sentencing systems, it is more likely where there is no formal sentencing structure. It is unclear how much disparity is acceptable in the Australian context. Attempts have been made to bring more clarity and consistency to the sentencing process through the use of statistics, comparable cases, CPS and sentencing ranges. These attempts, however, are frustrated when cases are treated as individual, rather than comparable and when courts are willing to use sentencing information to inform their synthesis but consistently emphasise that they are in no way bound by it.

The lack of structure and substantive guidance in the IS model has prompted the judiciary to develop their own practices, though neither are sufficient foundations for consistency. The decision-making structure outlined in Chapter 4 involves four general categories, but these categories are so broad that they allow significant variation in approach and have no formal weight. The same is true of judges' practice of discussing sentences with colleagues. There is scope for wide inconsistency in the use and content of these discussions and a risk that they will simply reinforce current practices. In addition, a lack of transparency and accountability in relation to both informal practices confirms that neither is an adequate safeguard for consistency. These practices have been developed in response to deficiencies in the IS model. Greater formal structure is needed to ensure a transparent approach to sentencing, one that is applied in the same way by all sentencers and provides practical guidance in the exercise of discretion. Only where there is a clear sentencing methodology can there be meaningful consistency of approach.

Chapter 7 Guiding sentencing decision-making

Previous chapters have demonstrated that the IS model allows for significant variation in sentencing approach and outcome, much of which is hidden or excused as part of the unique individual synthesis. The normalisation of these disparities compromises attempts to uphold the rule of law in Australian sentencing. As noted in Chapter 6, levels of transparency and consistency under the current sentencing model were not matters of concern to the majority of judges interviewed. Greater structure and formal guidance can assist in bringing clarity and certainty to sentencing but the Australian judiciary have repeatedly resisted such reforms, viewing them as needless threats to discretion.

Overview

The judiciary's focus on preserving its considerable sentencing discretion has fuelled resistance to formal sentencing guidance and reform more broadly. Judges are keen to defend their discretion, corresponding ability to deliver individualised justice and the considerable control they exercise over the sentencing approach and outcomes. Increased sentencing guidance is generally regarded as a threat to that discretion and thus opposed. Legislative reforms, for example, are often regarded as 'political, knee jerk reactions' that compromise fundamental sentencing principles and discretion.

This hostility extends even to guidance offered by the courts themselves. The Victorian Court of Appeal stands apart in actively seeking to improve consistency and guide discretion through promoting the use of case comparison and sentencing information. These attempts, however, have been met with resistance, both from within the Court and the High Court. In defending broad, unstructured judicial discretion, the High Court regularly neutralises attempts at structure or guidance. Importantly, many of these attempts do not diminish judicial discretion, they merely provide guidance without imposing limitations, but these details are overlooked in the quest to maintain the status quo.

1. Judicial attitudes to sentencing guidance and reform

In failing to specify an approach to sentencing, the IS model does little to provide practical guidance. Several measures have been introduced in Australia to address this gap, including appellate review, new legislative sentencing schemes, mandatory sentencing and guideline judgments. These measures have achieved varying degrees of success, often dictated by the level of judicial support they receive. Consistent with the focus on the individualisation of sentences and maximising judicial discretion, judges often resent the perceived intrusion of reforms into their discretion and sentencing space. They are more likely to seek to preserve the control IS affords them than to embrace reforms.

1.1. Discretion and individualised justice

1.1.1. Guiding and limiting discretion

Formal sentencing processes and structure are necessary to ensure that discretion is exercised 'according to the rules of reason and justice, not according to private opinion'⁸⁵³ and to promote consistency and reduce arbitrary and capricious decision-making.⁸⁵⁴ All methods of influencing the exercise of discretion operate to provide an element of structure to the decision-making process. While there is a tendency, including amongst interviewees, to assume that bringing structure to sentencing inevitably involves reducing discretion, this is not the case. Methods for structuring sentencing may limit or guide discretion. Discretion is limited by measures that are rules-based and produce a definitive result, such as maximum sentences and mandatory sentences.⁸⁵⁵ Whereas guiding measures, such as sentencing guidelines, case law and principles, inform the exercise of discretion without prescribing a result. The most common methods of influencing discretionary decisions guide the exercise of discretion and accommodate variations in the circumstances of each case without involving binding principles of law or mandating uniform outcomes.⁸⁵⁶

⁸⁵³ *Sharp v Wakefield* (1891) AC 173, 179.

⁸⁵⁴ *Norbis* (n 552) 519 (Mason and Deane JJ).

⁸⁵⁵ *Harris* (n 699) 168, 170-175.

⁸⁵⁶ *Krasnostein* (n 210) 30.

1.1.2. Individualised justice

Within Australia, there is a cultural resistance to change in the exercise of sentencing discretion.⁸⁵⁷ As explained in Chapter 6, interviewees generally did not view consistency in IS as a matter of concern and therefore saw no need for change.⁸⁵⁸ In keeping with judicial responses in several other studies, interviewees resisted what they perceived to be intrusions into their sentencing discretion.⁸⁵⁹ Several describing discretion as ‘being whittled away’ when it should be maximised: ‘I’m supportive of more discretion rather than less...I’d rather have a fuller discretion than have my hands tied. I think that gives me the potential to do justice in a particular case.’

The need for flexibility in order to tailor individual sentences was another common theme amongst interviewees. Broad sentencing discretion is considered ‘essential in order to do justice’⁸⁶⁰ but individualised justice does not mean the complete absence of guidance. Individualised justice has been characterised as the opposite of a rule-based approach, effectively allowing any measures or approach on the basis that they are necessary to respond to the facts of the individual case.⁸⁶¹ This concept of individualisation is used in an Australian context to justify an unstructured, instinctive approach to sentencing. However, such a characterisation misrepresents the nature of individualised justice. As Harris notes, individualised justice simply requires that the sentence be tailored to the individual offence and offender, with an emphasis on the individual’s characteristics.⁸⁶² This can occur within a system of sentencing guidance and principles and within a more formal sentencing structure. As such, individualised justice should not be taken as suggesting that individualisation is only

⁸⁵⁷ Zdenkowski (n 464) 59; NSWLR (n 448) [1.7].

⁸⁵⁸ Freiberg (n 474) 35; Sentencing Commission for Scotland (n 96) 3.

⁸⁵⁹ See e.g. Ashworth et al (n 19) 60; Mackenzie (n 17) 45 and 78; Brown (n 91) 151.

⁸⁶⁰ See e.g. Neil Hutton, ‘Visible and Invisible Sentencing’ in Annie Hondeghem, Xavier Rousseaux and Frédéric Schoenaers (eds) *Modernization of the Criminal Justice Chain and the Judicial System* (Springer 2016) 2.

⁸⁶¹ Hutton (n 860) 2; Anthony N Doob and Jean-Paul Brodeur, ‘Achieving Accountability in Sentencing’ in Phillip C Stenning (ed) *Accountability for Criminal Justice: Selected Essays* (University of Toronto Press 1995) 387.

⁸⁶² Harris (n 699) 117.

possible within a system of the widest possible discretion, unimpeded by legal constraints⁸⁶³ and thereby used to dismiss structured sentencing.⁸⁶⁴

Similarly, the challenge of establishing standards due to the variation within individual cases should not be used to avoid more concrete guidelines.⁸⁶⁵ Additional sentencing guidance could, in fact, help in identifying common elements between cases and navigating the synthesis of many different sentencing factors. Yet many judges continue to conceive of the sentencing factors in each case as matters unique to that case, requiring flexibility rather than guidance. One interviewee suggested that judges have been zealous in retaining their discretion. Overwhelmingly though, interviewees believed that a strong defence is appropriate as broad discretion is vital to ensuring that individual circumstances are recognised and justice done.

1.2. Recognising the potential for improvement

A small number of interviewees recognised some of the limitations of IS, though the majority of those judges continued to support the concept. Judges acknowledged that IS relies ‘too much on a judge’s sense of what is appropriate and perhaps turns too much on the experience of the individual judge’. They also recognised the potential for disparity and that IS can be ‘wildly inconsistent’: ‘[y]ou’d hate to be the one, I suppose, who’s struck the tough judge and gone in when you otherwise wouldn’t have’. The majority, though, did not believe that the flaws of IS require reform:

It’s very hard to argue with a criticism of that nature [the lack of transparency] but it doesn’t mean that it invalidates the IS. I mean, sentencing is an imperfect human process, as the administration of justice is generally.

⁸⁶³ von Hirsch (Hill n 748) 27.

⁸⁶⁴ Pattenden (n 459) 22.

⁸⁶⁵ Pattenden (n 459) 22.

I can't pretend that consistency wouldn't be improved by something that was a little more rigorous than IS but I don't think it's a problem.

I don't think it's consistent...but I don't think it's going to be cured by a different style of approach.

Any flaws were considered acceptable consequences of a necessarily wide discretion. The majority of judges simply accepted that 'you can make those criticisms but there is no perfect system.'

Many judges viewed sentencing reforms as unnecessarily complicating an already difficult task. While sentencing legislation in Australia generally does little more than list considerations to be taken into account, some interviewees regarded it as curtailing discretion and generally making their job more difficult:⁸⁶⁶

If we wanted to make sentencing easier we'd just abolish the *Sentencing Act*, get rid of it and just rely on the intuitive synthesis of judges. Because once we've got the *Sentencing Act*, Parliament says 'these are the things you must take into account' so if you don't tick every box that the *Sentencing Act* requires, couple of errors starting in.

Similarly, some judges found that 'highly developed, over developed, jurisprudence' also added to the complexity of the sentencing task. The result is that many interviewees felt that sentencing has become 'over-intellectualised': 'we've sort of had principles that have been distilled into rules that have been distilled into subrules and I think that's gone too far...I do find there's a lot of law there that I am applying.' The process was described as complicated,

⁸⁶⁶ See also Mackenzie (n 17) 56.

technical and ‘absurdly analytical’. These judges are, in effect, advocating for a more instinctive approach. They feel constrained by these obligations⁸⁶⁷ and fear that reforms will make the process more complicated.

As challenging as the current arrangements are, however, the vast majority of interviewees were in favour of IS, though sometimes simply because it is the least-worst option.⁸⁶⁸ ‘I remain convinced that it is a better system than the various alternative models.’⁸⁶⁹ Rather than properly evaluating IS, many interviewees drew comparisons to models which exclude discretion, such as mandatory sentencing, to downplay the flaws in IS. Minor faults in IS were not a concern because other models were thought to be worse. Notably, the alternative models considered were almost always extreme examples involving highly prescriptive, mathematical processes, measures limiting rather than guiding discretion. For example:

What’s the alternative? Numbers? Percentage discounts or percentage increases as the case may be? It would just become silly... Where would it all end? It would reduce an important task like sentencing to a matter of numbers that would be, I think, grotesque.

Again, there was concern amongst sentencers about the ability to respond to individual cases: ‘I don’t want to be just processing people, I think that would be quite soul destroying. ‘Can’t help you, sorry, you’ve had a shocking life, you’re going to prison for 10 years.’

The approach to alternative models or structures was similar to that taken to two-tier sentencing;⁸⁷⁰ to conceive of the alternative in very narrow terms and in the most extreme form. In order to productively discuss sentencing reform there must be a more nuanced

⁸⁶⁷ Ashworth et al (n 19) 53. See discussion of CSP in Chapter 6 [3.3].

⁸⁶⁸ Freiberg (n 70) 210.

⁸⁶⁹ Justice McHugh, for example, recognising some potential criticisms of IS described it as ‘the best we can do’: *Markarian* (n 6) 386-7 [72].

⁸⁷⁰ See Chapter 3 [2.3].

understanding of the options available for guiding and structuring sentencing, including those that do not restrict judicial discretion, such as guideline judgments and sentencing guidelines.

1.3. Judicial attitudes to reform

Like those in Mackenzie's study, interviewees regarded judges as best placed to make decisions about sentencing,⁸⁷¹ a belief reinforced by the IS emphasis on experience and suggestion that judges are uniquely qualified to determine sentences.⁸⁷² It is also consistent with the sense of judicial ownership over sentencing,⁸⁷³ described by one interviewee as a 'this is ours, keep out' attitude. Another explained that a small number of judges believe that 'you are appointed [to the bench] perfectly formed and able', though the idea that judges are omnipotent and omniscient is slowly changing.

The belief in judicial control over sentencing reflects longstanding attitudes amongst criminal barristers and judges. Interviewees spoke of having 'grown up with' IS, always accepting that '[t]he system is working fine'. The Criminal Bar, from which many sentencing judges are drawn, was said to preserve a traditional, conservative attitude to criminal justice issues, revering values such as broad judicial discretion 'with a passion that perhaps the commercial or the common lawyers don't necessarily feel for what they do'. This can result in a desire to protect traditional values from perceived attack by 'outsiders':

Dispiritingly, the practising legal profession is, by and large, I think, very resistant to change and very insular. Resistant to looking at innovations from other jurisdictions with an open mind. There's a sense of 'what we do is great and no one needs tell us...'

This attitude also was evident in descriptions of recent Court of Appeal decisions as 'dabbling in something they didn't really understand'. One interviewee spoke of an 'entrenched

⁸⁷¹ Mackenzie (n 17) 45.

⁸⁷² Tonry (n 211) 178.

⁸⁷³ Tonry (n 211) 178.

institutional resistance' to reform amongst criminal lawyers and judges. The resistance to even minor changes, discussed below, reinforces the idea of sentencing as 'some kind of sacred, inscrutable space... [that] there's something ideological about this, there is some deep sense that sentencing is sui generis and unique'.

A consequence of these conservative attitudes is that change is unlikely to come from within. A small number of interviewees saw limitations within the IS model and actively identified opportunities for reform. Interestingly, all but one of those judges had experience outside the Criminal Bar. Possibly this enabled them to consider IS more objectively:

It means that I don't come with the same set of sacred cows, beliefs that some people who have spent their whole professional lives in crime have and therefore some of what I say...is still regarded as heretical by some of my colleagues.

Those judges who sought change were clear that judicial discretion is of great importance but saw a role for increased guidance: 'There can't be any harm to it, it informs people and the more information the better the outcome will be in the end.' Some specifically advocated for 'a clearer articulation of the factors...within which the discretion has to operate, consistently applied through a statutory framework' rather than through extracting principle from individual decisions. Even a judge who 'generally believes in' IS acknowledged that the 'IS approach could be perhaps guided or constrained in different ways without losing the essence of it' but noted that it would be a difficult balance to strike. This willingness to consider alternatives was, however, not common amongst interviewees. Instead, the majority conceived of additional guidance in extreme terms, as discussed above, and regarded it as compromising IS.

2. Legislative attempts to introduce structure

Within Australia, parliament directs sentencing practice in two main ways. First, through the setting of maximum penalties. These provide a very broad steer as to the penalties that parliament regards as proportionate to the offence and fix a hard limit on judicial discretion. Second, statutes identify the purposes of sentencing and contain a non-exhaustive list of factors to which sentencers must have regard in determining the appropriate penalty. As discussed in the previous chapter, the relevant statutory provisions provide no indication of how the factors and purposes are to be treated. Leaving the details to be developed by the courts appears to be a deliberate choice, but the lack of detail within the provisions means they offer little substantive, practical guidance.

Though traditionally limited,⁸⁷⁴ the involvement of legislatures in sentencing has recently increased, often in response to punitive public sentiment and supposedly inadequate sentences.⁸⁷⁵ Within Australia, attempts to 'reclaim' sentencing law and policy have resulted in increases in maximum penalties,⁸⁷⁶ mandatory minimum sentences⁸⁷⁷ and the creation of new offences⁸⁷⁸ and sentence types.⁸⁷⁹ These ad hoc developments often involve placing limits on judicial discretion and thus have met with judicial hostility. Mandatory penalties, for example, were universally criticised by interviewees as 'harsh, unfair, disproportionate, discriminatory' measures that 'create levels of injustice and destroy people's lives'. This wariness was often carried over to other proposed forms of sentencing guidance.

⁸⁷⁴ Julian Roberts, 'Reducing the Use of Custody as a Sanction: A Review of Recent International Experiences' in Mike Hough, Rob Allen and Enver Solomon (eds) *Tackling Prison Overcrowding: Build More Prisons? Sentence Fewer Offenders?* (Bristol University Press 2008) 104.

⁸⁷⁵ See e.g. John Pratt, *Penal Populism* (Routledge 2007); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (OUP 2002).

⁸⁷⁶ See e.g. *Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001* (NSW). Including allowing maximum penalties to be doubled for particular offences when committed by a repeat offender, in effect permitting the imposition of disproportionate sentences: *Sentencing Act 1991* (Vic) Pt 2B.

⁸⁷⁷ *Sentencing Act 1991* (Vic) ss 9C, 10, 10AA, 10AB, 10AC, 10AD.

⁸⁷⁸ See e.g. *Crimes Amendment (Carjacking and Home Invasion) Act 2016* (Vic).

⁸⁷⁹ See e.g. *Crimes (Sentencing and Restorative Justice) Amendment Act 2016* (ACT).

2.1. Judicial reaction to legislative changes

Interviewees accepted the need for Parliamentary involvement in sentencing as a means of reflecting community sentiment but observed that legislative schemes can often be ‘heavy handed’ and risk disproportionate sentences. Several judges reported finding the continuous amendments difficult to manage.⁸⁸⁰

Sentencing is in fact not as hard as it’s made out to be. What makes it hard are the ridiculous number of rules and pieces of legislation that come into force...[We] get them sort of landing on our table every few weeks and every time you see one you think ‘Well, here we go again’.

The following encapsulates the attitude amongst interviewees:

...there’s an instinctive and well-informed response that anything government does about sentencing is trying to increase sentences and remove discretion for political purposes, to beat the law and order drum.

Judges tended to regard legislative involvement as bringing needless complications to the sentencing process: ‘we’re getting constant meddle at the moment’, ‘far too frequently and not sensibly in many cases’. For example, many judges viewed the new offences of carjacking and aggravated carjacking⁸⁸¹ as unnecessary given the substantial overlap with the existing offences of robbery and aggravated robbery and identical maximum penalties.⁸⁸² The result of legislative amendments is very often confusion and additional work for judges. Referring to finding special reasons for exemption from a mandatory minimum sentence for aggravated

⁸⁸⁰ For a summary of the changes to sentencing in the year of interview see Sentencing Advisory Council, *Changes to Sentencing Law in Victoria: An Overview of 2018* (2019).

⁸⁸¹ *Crimes Act 1958* (Vic) ss 79 and 79A.

⁸⁸² See e.g. Liberty Victoria, Submission on Crimes Amendment (Carjacking and Home Invasion) Bill 2016 (Liberty Victoria 14 September 2016) <<https://libertyvictoria.org.au/content/crimes-amendment-carjacking-and-home-invasion-bill-2016>> viewed 9 August 2020.

home invasion,⁸⁸³ one judge explained that sentencers 'have no idea what [the provision] means.'

Legislative changes to sentencing often involve restricting judicial discretion, narrowing the range of sentences and increasing the severity of sentencing.⁸⁸⁴ They also often undermine, rather than promote, principled sentencing.⁸⁸⁵ It is on these bases, with the restriction of discretion and subsequent threat to proportionate sentencing, that interviewees generally objected. Though the practice was denounced by some interviewees, others admitted that they would work around statutory changes where necessary to maintain proportionality.⁸⁸⁶

...you get the impression reading some of these judgments that they're just looking for a way to sort of circumvent the statute and go back to giving the result that they think was fair and appropriate.

We've just got to acknowledge them [the provisions] and work with them. As some might say, pay lip service to them. But I'd never say that of course, [laughs] I always take account of everything I'm supposed to and I ignore all the things I'm supposed to ignore.

[Re standard sentencing] We'll do exactly what we've always been doing.

As O'Malley observes, in addition to allowing adequate scope for discretion, sentencing reforms must be respectful of judicial skills and integrity.⁸⁸⁷ Where sentencers feel their

⁸⁸³ *Sentencing Act 1991* (Vic) ss 10A, 10AC.

⁸⁸⁴ Freiberg and Krasnostein (n 66) 91.

⁸⁸⁵ Roberts (n 128) 319.

⁸⁸⁶ This is in spite of the courts recognising that it is their duty to try to affect the social policy inherent in the legislation and that, if they fail to do so, 'experience overseas shows that legislation may convert sentencing discretions into sentencing obligations and inflexible sentencing is usually unfair sentencing': *Nagy* (n 292) 77 (McGarvie J).

⁸⁸⁷ O'Malley (n 9) 229.

expertise is being overlooked they are likely to resent and oppose the changes. Even more so when judges believe those implementing the changes have limited experience or understanding of sentencing. Many interviewees were critical of legislative ‘interference’ by ‘people that don’t have much idea about sentencing law’, who ‘just want to be seen to be doing something’. The majority denounced recent legislative changes as ‘political grandstanding’, ‘pandering to the tabloid headlines’ and point scoring in a law and order ‘race to the bottom’.

2.2. Baseline sentencing

Described as ‘a bit of a disaster’, ‘a complete catastrophe’ and ‘completely botched’ by interviewees, the introduction (and rapid demise) of baseline sentencing validates the judicial concerns outlined in this section. It demonstrates the legislative desire to intervene while failing to understand the practicalities of sentencing in Victoria.

Introduced in 2014, baseline sentences were a means of indirectly increasing sentences.⁸⁸⁸ Parliament set out baseline sentences that were intended to become the median sentence for offences including murder and incest.⁸⁸⁹ The legislation, however, was silent as to how sentencing judges were to comply with the legislative intention.⁸⁹⁰ One interviewee explained that ‘We looked at them [the provisions], [throws hands up in a shrug] no one had the slightest idea! We looked at it and nobody had any idea what you could possibly do there.’

The matter was quickly brought before the Court of Appeal. Failure to provide a mechanism by which the intended future median was to be achieved was held to be an ‘incurable defect’⁸⁹¹ and the legislation ‘incapable of being given any practical operation’.⁸⁹² For interviewees, this

⁸⁸⁸ *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic); Legislative Assembly (Victoria), Parliamentary Debates, 3 April 2014, Sentencing Amendment (Baseline Sentences) Bill 2014 Second Reading, 1276 (Robert Clark).

⁸⁸⁹ *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic), ss 12 and 13.

⁸⁹⁰ *DPP v Walters* (2015) 255 A Crim R 375, 389 [44] (Maxwell P, Redlich, Tate and Priest JJA) (*Walters*).

⁸⁹¹ *Walters* (n 890) 381 [8] (Maxwell P, Redlich, Tate and Priest JJA).

⁸⁹² *Walters* (n 890) 393 [60] (Maxwell P, Redlich, Tate and Priest JJA).

exposed Parliament's ignorance of the realities of sentencing:

Baseline's gone. The Court of Appeal got rid of that in a trice. And that's the problem, these policy people have got no idea what they're doing.

...it was just the impracticality, you just couldn't do it...It was just incredible. When I read it first in its draft form I thought 'Well what the hell's this?'...They just didn't understand, what they were asking people to do was impossible to do.

The baseline regime was introduced following a Sentencing Advisory Council (SAC) report. The Council was asked to outline *how* baseline sentences could be implemented but, crucially, not whether they *should* be implemented.⁸⁹³ Interviewees viewed this as another example of legislators prioritising their own agenda over those with experience. Interviewees' discussion of baseline sentencing indicated that the experience served only to reinforce distrust of legislative change and build resentment. By strengthening the judiciary's negative impressions and cynicism, the failed endeavour has made sentencing reform more difficult.

2.3. Relationship between the legislature and the courts

The dialogue between legislatures and the courts is continuous yet often tense.⁸⁹⁴ In addition to increasingly regular legislative changes, sentencers have been subject to public criticism by legislators.⁸⁹⁵ Several interviewees expressed regret that the Attorney General no longer acts as a spokesperson for the judiciary, explaining and defending their actions where

⁸⁹³ Sentencing Advisory Council, *Baseline Sentencing: Report* (May 2012) v.

⁸⁹⁴ Freiberg (n 353) 429.

⁸⁹⁵ See e.g. Matthew Doran, 'Federal ministers launch terror sentencing attack on Victorian judges; Opposition decries 'political interference'' *ABC News* (13 June 2017) <<https://www.abc.net.au/news/2017-06-13/federal-government-says-victoria-is-weak-on-terrorism/8612496>> accessed 9 August 2020; Stephanie Ferrier, 'Ministers retract some comments critical of Victorian judiciary over terror sentencing' *ABC News* (16 June 2017) <<https://www.abc.net.au/news/2017-06-16/ministers-retract-some-comments-critical-of-victorian-judiciary/8625040>> accessed 9 August 2020; *DPP (Cth) v Besim; Same v MHK (No 2)* (2017) 52 VR 296.

necessary.⁸⁹⁶ They suggested that greater support and trust is needed from Parliament, especially when judges are required to make unpopular decisions. Ultimately, though, it would appear that judges simply want to be left alone to apply their expertise:

Sentencing is not an area for amateurs. If I can put it that way, without wanting to sound hubristic. It's taken many, many years of working with the system and trying to work through the permutations to understand the nuances of the system and then we get Parliament blundering in with something that sounds populist and attractive to a law and order campaign.

Ironically, it is the court's conservative approach that has left the door open for increased legislative involvement.⁸⁹⁷ The unstructured nature of IS, reinforced by courts' reluctance to provide practical guidance or impose fetters on judicial discretion has created a policy void into which the legislature has stepped. Given the political motivations discussed above, it is unlikely that court activity would have completely prevented legislative reform, but a more rigorous sentencing methodology or greater direction from the court could perhaps have reduced the scope for legislative involvement.

3. The court's attempts to retain control over sentencing

Australian judges are not alone in believing that the judiciary should be responsible for determining appropriate sentences, without involvement by politicians.⁸⁹⁸ Unlike their English counterparts,⁸⁹⁹ however, Australian judges refrain from commenting publicly on legislation or

⁸⁹⁶ See e.g. 'Farewell ceremonial sitting for the Honourable David Norman Angel, Transcript of Proceedings' (18 January 2010) <https://supremecourt.nt.gov.au/__data/assets/pdf_file/0010/727075/remarks-at-the-retirement-of-justice-david-angel-2010.pdf> (accessed 20 August 2020).

⁸⁹⁷ Warner (n 354), 371.

⁸⁹⁸ See e.g. Ashworth et al (n 19) 60; Brown (n 91), 232.

⁸⁹⁹ See e.g. Andrew Ashworth, 'The Decline of English Sentencing and Other Stories' in Tonry and Frase (n 858) 80-81; Lord Peter Taylor, 'Continuity and Change in the Criminal Law' (1996) 5 King's College Law Journal 1; 'Chief judge calls for shorter murder sentences' *The Guardian* (London, 9 March 2007) <<https://www.theguardian.com/uk/2007/mar/09/prisonsandprobation.ukcrime>> accessed 13 August 2020.

policy.⁹⁰⁰ Their primary means of exercising control over sentencing is through the appellate process and sentencing jurisprudence. The High Court has used this process to issue strong statements reinforcing broad, unstructured judicial discretion. The Victorian Court of Appeal has attempted to bring additional clarity and structure to the sentencing process, for example by promoting the use of comparative sentencing information, but even these limited steps have been resisted by the High Court, intent on preserving unfettered discretion.

3.1. Appellate guidance

Many common law jurisdictions rely on appellate guidance to direct sentencing discretion.⁹⁰¹ Self-regulation through appellate review allows the courts to gradually develop sentencing jurisprudence and regulate disparities whilst preserving considerable discretion.⁹⁰² Individual cases can be used to provide sentencing guidance through the interpretation of legislation and formal guidelines, acting as a check on individual sentencers and issuing statements of policy or principle.⁹⁰³

The difficulties of relying on appellate review to direct sentencing practices have been well examined.⁹⁰⁴ Briefly, they include courts being limited in terms of time and resources and by the cases that come before them,⁹⁰⁵ often serious, atypical crimes, not summary offences. While it has its constraints, appellate review has proven to be a useful means of developing sentencing guidance in several jurisdictions. The Court of Appeal of England and Wales, for

⁹⁰⁰ This difference may stem from the strong conception of judicial independence arising from the Australian Constitution: Matthew Groves, 'Public comments by judges of their colleagues: an unhappy Australian episode' (2016) 8(1) *Journal of Media Law* 98, 104-8. See also Sir Anthony Mason, 'Judicial Independence and the Separation of Powers – Some Problems Old and New' (1990) 24 *University of British Columbia Law Review* 345, 352; The Council of Chief Justices of Australia and New Zealand, 'Guide to Judicial Conduct' (3rd edn, The Australasian Institute of Judicial Administration Incorporated 2017) [5.7].

⁹⁰¹ O'Malley (n 102) 57.

⁹⁰² *R v Allinson* (1987) 49 NTR 38, 39; *R v Green* (1986) 22 A Crim R 196, 199.

⁹⁰³ Brown (n 91) 159.

⁹⁰⁴ See e.g. Freiberg (n 37) 970; NSWLR (n 448); Ashworth (n 587); Warren Young and Andrea King, 'Sentencing Practice and Guidance in New Zealand' (2010) 22(4) *Federal Sentencing Reporter* 254.

⁹⁰⁵ Waiting for the appropriate case was a particular frustration to one appellate judge who explained that '...we started raising the same question about CSP in respect of a whole series of different offences saying: 'Current sentencing has to change, it's just not reflective of the gravity of the offence or the maximum set by parliament'. In every case, we initiated the review of current sentencing, that is the court, and the DPP came on board, as it were, by invitation, never taking the initiative.' See e.g. *Hogarth v R* (2012) 37 VR 658 (*Hogarth*), [37]-[38]; *Dalgliesh* 2016 (n 791) [87]-[88]; *CPD* (n 779) 4 [8]-[9].

example, continues to issue guideline judgments on the application of sentencing guidelines⁹⁰⁶ and matters not covered by guidelines.⁹⁰⁷ Similarly, the New Zealand Court of Appeal addresses principles, practice and sentencing ranges through guideline judgments.⁹⁰⁸ The Scottish Appeal Court, traditionally slow to offer sentencing guidance,⁹⁰⁹ has recently become more willing to issue guideline judgments,⁹¹⁰ as has the Irish Court of Appeal.⁹¹¹

In contrast, Australian and Canadian⁹¹² appellate courts adopt a deferential, non-interventionist approach, regulating sentencing but not proactively issuing guidance. The Australian High Court has repeatedly recognised the importance of appellate guidance.⁹¹³ The dominance of individualisation, however, and overriding emphasis on judicial discretion narrows the scope for appellate intervention. This has resulted in a ‘hands-off’ approach to error correction and the delivery of practical guidance as the presumption of correctness means courts will be slow to intervene,⁹¹⁴ doing so only in the face of egregious error.⁹¹⁵ Where they do act, the focus on individual cases and issues rather than the structure of sentencing as a whole means that guidance is often ‘less than expansive’.⁹¹⁶

Principles such as proportionality,⁹¹⁷ parsimony⁹¹⁸ and totality⁹¹⁹ have been broadly articulated. The Victorian Court of Appeal has also provided guidance in relation to other matters such as mental disorder,⁹²⁰ family hardship⁹²¹ and deportation.⁹²² Largely though,

⁹⁰⁶ See e.g. *R v Smith (Christopher)* [2015] EWCA Crim 1482; [2016] 1 Cr App R (S) 8.

⁹⁰⁷ See e.g. *Attorney General's Reference (R v Kahar)*; *R v Ziamani* [2016] EWCA Crim 568; [2016] 2 Cr App R (S) 32 (*Kahar*).

⁹⁰⁸ *Hammond* (n 2) 218; *Young and King* (n 904) 254.

⁹⁰⁹ The Sentencing Commission for Scotland (n 858) 15; *Tata* (n 95) 238.

⁹¹⁰ See e.g. *Du Plooy v HM Advocate* 2005 1 JC 1; *Foster v Procurator Fiscal Edinburgh* [2019] SAC (Crim) 16.

⁹¹¹ See e.g. *Ryan* (n 103).

⁹¹² *Brown* (n 91) 26, 114.

⁹¹³ See e.g. *Wong* (n 10) 592-3 [10] (Gleeson CJ); 629 [124] (Kirby J); *Postiglione* (n 44) 335-6 (Kirby J); *Norbis* (n 552) 519 (Mason and Deane JJ).

⁹¹⁴ *Markarian* (n 6) 405-6 [133] (Kirby J); *Lowndes* (n 65) 671-2 [15]; *Hudson* (n 75) 615 [24]; *Boaza* (n 476) [42] (Winneke P).

⁹¹⁵ See e.g. *Lowndes* (n 65) 671-672 [15]. See Chapter 3 [3.1] and Chapter 6 [3.5].

⁹¹⁶ Richard G Fox, ‘Controlling Sentencers’ (1987) 20 Australian and New Zealand Journal of Criminology 218, 226.

⁹¹⁷ See e.g. *Veen (No 2)* (n 60); *Hoare* (n 59) 354; *DPP (Vic) v Jones* (2013) 40 VR 267, 290 [100].

⁹¹⁸ See e.g. *R v O'Connor* [1987] VR 496, 501; *Greatorrex v The Queen* [2016] VSCA 136; *Bell v The Queen* (2016) 77 MVR 336; *NOM v DPP* (2012) 38 VR 618, [68].

⁹¹⁹ See e.g. *Postiglione* (n 44); *Mill* (n 53); *Azzopardi* (n 53).

⁹²⁰ *Verdins* (n 33).

⁹²¹ *Markovic v The Queen* (2010) 200 A Crim R 510.

⁹²² *Guden v The Queen* (2010) 28 VR 288.

appellate courts are reluctant to state principles of general application.⁹²³ It can be difficult to determine what guidance a court can offer without infringing High Court strictures that sentencing is an instinctive, individualistic exercise.⁹²⁴ As a result, any principles discussed tend to be narrowly confined and the guidance caveated. The court has emphasised that principles articulated in judgments do not carry the same weight as Acts of Parliament and are only likely to emerge from decisions in multiple, rather than single, cases.⁹²⁵ The Victorian Court of Appeal, having held that many decisions involve ‘no novel principle, nor the extension or qualification of established principle’,⁹²⁶ has also introduced a ‘no point of principle’ classification. Such cases may not be cited without leave, limiting any precedential value to the immediate decision.⁹²⁷

Guidance on the practical application of principles has also been limited. Little has been said, for example, about the application of proportionality, with the High Court simply indicating that it is ‘a value judgment’.⁹²⁸ The Victorian Court of Appeal has offered some practical direction, for example concerning the prioritising of sentencing purposes when sentencing youthful⁹²⁹ or mentally ill⁹³⁰ offenders. Interviewees also appreciated the explanation of the relevance at sentencing of Koori Court participation.⁹³¹ In endorsing the current sentencing arrangements, several interviewees emphasised the strength of the self-directed and self-correcting⁹³² appellate system. But they were also quick to criticise when they believed guidance was excessive, as discussed in the next section, or where guidance was thought to be lacking, for example in relation to the difference in sentences for culpable driving and dangerous driving causing death offences.

⁹²³ Freiberg (n 37) 968.

⁹²⁴ Freiberg (n 37) 971. See e.g. *Wong* (n 10), *Markarian* (n 6), *Hili* (n 11).

⁹²⁵ *Ryan* (n 33) 272 [15] (McHugh J).

⁹²⁶ *Briggs v The Queen* [2010] VSCA 279, [27].

⁹²⁷ Supreme Court of Victoria, *Supreme Court Practice Note No 8 of 2011: Decisions marked no point of principle*, 7 November 2011; Freiberg (n 37) 968-9.

⁹²⁸ *Markarian* (n 6) 385 [69] (McHugh J).

⁹²⁹ See e.g. *R v Mills* [1998] 4 VR 235.

⁹³⁰ See e.g. *Verdins* (n 33).

⁹³¹ *Honeysett v R* (2018) 56 VR 375.

⁹³² *Dalglish* 2016 (n 791) [128].

3.2. The Victorian Court of Appeal

As discussed in Chapter 6, the Victorian Court of Appeal has recently begun attempting to issue sentencing guidance and improve sentencing consistency through a more comparative approach involving statistics, like cases, sentencing range and CSP. These attempts have not always met with support from first instance judges, the High Court or even members of the Court of Appeal itself. Opponents often return to the traditional notions of sentencing discussed above and the importance of unfettered judicial discretion.

A court's ability to provide useful sentencing guidance depends upon judicial willingness to develop principles. Within Victoria, some judges and benches have been 'particularly receptive to arguments about operationalising consistency'.⁹³³ Yet Court of Appeal judgments reveal a distinct divide amongst the judiciary, with some judges rejecting the notion of acceptable sentencing ranges and comparable cases.⁹³⁴

The division between sentencing traditionalists and reformers was discussed openly by interviewees, with non-appellate judges also making their positions clear.⁹³⁵ Judges described their 'attempt to systematise consistency and...discharge the function of setting proper sentencing standards'. This included unpacking and trying to bring 'some linguistic content' to labels such as 'manifestly excessive'.⁹³⁶ Judges were aware that they were 'challeng[ing] some of the cherished notions of traditional criminal lawyers' but saw it as necessary in order to ensure that sentencing is 'principled...that it's about good process, fair decision making'. These changes were actively resisted by some members of the Court, resulting in practical

⁹³³ Krasnostein (n 210) 141.

⁹³⁴ See e.g. *Ross* (n 821); *MacNeil-Brown* (n 349); *Hudson* (n 75).

⁹³⁵ Judges' comments about their involvement in specific appellate decisions have been omitted in order to ensure anonymity.

⁹³⁶ See Chapter 6 [3.5].

consequences to this ideological split:

I won't say it's a lottery. We all know you can look at the composition of the bench and you can have some view about who's going to do what because of their personal philosophies on the appeal process.

...it depended which bench you got as to what the result would be.

The potential for disparity and the influence of individual sentencing philosophies detailed in the previous chapter is clearly realised here. These comments highlight the power residing in the courts where the sentencing model applied lacks any objective structure. They also speak to the benefit of the involvement of a dedicated sentencing body, such as a guidelines council, rather than relying on individual judges to create and consistently administer a comprehensive sentencing approach.

3.2.1. Reactions to the Court of Appeal

The Court's proactive approach to promoting consistency has been met with reactions ranging from caution to strict opposition. Some judges suggested that the increased use of comparative cases, sentencing ranges and CSP has resulted in a 'clunky, legalistic, mathematical approach'. Several judges felt that their work is heavily scrutinised by appellate lawyers and judges 'trawling through transcripts and finding what are often arcane or obscure problems'. They suggested that sentences are pulled apart and each element examined in a 'ridiculously technical', 'unrealistic and over analytical, massively over analytical' process, the 'absolute opposite of IS'.

The standard for appellate intervention on the basis of manifest error is high.⁹³⁷ The perception amongst interviewees, however, was that the Court of Appeal is increasingly willing to hear and uphold these appeals: 'Whilst they say it's a very high hurdle to cross. Manifest excess or inadequacy, they do seem to cross it fairly frequently. It's not as if it's that rare.' Many interviewees spoke of the Court's increasing willingness to make minor adjustments on the basis that the sentence is outside the range or CSP. The Court of Appeal takes a strong stance against 'tinkering'⁹³⁸ but several judges offered examples of adjustments they considered unwarranted, such as reducing a sentence from 19 to 18 years imprisonment or a six month reduction across 15 charges.⁹³⁹ Suggestions of tinkering were made across both trial courts but were rebutted by Court of Appeal judges who describe the Court as 'non-interventionist'.⁹⁴⁰ They explained that any sentence adjustments 'go beyond tinkering':

...we have to be persuaded that there's error...So if somebody comes along and can persuade me that a sentence of seven years was too high, that it ought to have been six or five, I'm not going to interfere with that particular sentence or unlikely to. Perhaps at five I might, but I'll just say: 'That's perhaps not the sentence I would have imposed but it's within range'.

Two appellate judges noted that it is rare for the Court to hear, let alone uphold, sentencing appeals: 'I think we only intervene in about 25-30% of sentence cases'. The Sentencing Advisory Council compiled data relating to cases sentenced in the higher courts in 2013–14, then appealed and finalised by 31 December 2016.⁹⁴¹ Of the 230 appeals relating to sentences involving immediate imprisonment, 4.25% were successful.⁹⁴² The average proportional

⁹³⁷ See Chapter 6 [3.5].

⁹³⁸ *R v Williamson* (2009) 21 VR 330, 336 fn 10. See also *Dinsdale* (n 621) 341 [62] (Kirby J); *R v AD* (2008) 191 A Crim R 409, 433 [78] (Harrison J).

⁹³⁹ There is no definition of 'tinkering', as such it becomes a useful catch all for any adjustment to sentence subjectively deemed unnecessary.

⁹⁴⁰ *Clarkson* (n 832) 384 [89]; *Karazisis* (n 832) 43 [127] (Ashley, Redlich and Weinberg JJA); *FAJ v R* [2011] VSCA 137, [23].

⁹⁴¹ While not immediately contemporaneous with the interview period, this data covers part of the period in which the Court of Appeal was emphasising the use of sentencing information.

⁹⁴² Sentencing Advisory Council (n 849) 19-23.

reduction in the total effective sentence was 20% and increase 70%.⁹⁴³ This suggests that, rather than regular tinkering, alterations to sentence are rare and, when imposed, significant.

Despite the statistical evidence, the belief that the Court of Appeal ‘will overturn you at the drop of a hat...they’re still very much into adjusting’ is commonly held by trial judges and shapes sentencing behaviour. There was a feeling amongst first instance judges that ‘anything that looked slightly harsh was going across the road [to the Court of Appeal] because if we [the appellant] get the right court it’ll be reduced...It became notorious that they were getting reduced.’ As a consequence, many judges sentence at the lower end of the range because ‘you [run] a risk of the Court of Appeal knocking you down if you did try higher’.

Appellate judges, however, explained that they often help to raise sentencing levels:

We upped it to 22 or 24 for the murder...[T]he day after we’d done it, I was walking the corridors of the trial divisions...[and] found a criminal division judge and I said ‘What are you doing? You’re in very early.’ And [they] said ‘I’m changing my sentence as a result of your judgment of yesterday.’

The 70% proportional increase to sentence cited above would appear to support this claim but, while demonstrating the ability of the appellate court to increase sentencing ranges, this comment also speaks to sentencers’ feeling constrained.⁹⁴⁴ The same occurs in relation to

⁹⁴³ Sentencing Advisory Council (n 849) 20-24.

⁹⁴⁴ See the discussion of constraint by CPS and range in Chapter 6 [3.3-3.4].

minimum sentences:

...There's a case called *Hogarth*⁹⁴⁵ for aggravated burglaries and it has stuck the floor, for want of a better way to describe it, in aggravated burglary sentences. I dare you to find an aggravated burglary sentence under three years since *Hogarth*'s case.

These comments demonstrate that Court of Appeal decisions are highly influential on sentencing practices, particularly in terms of sentence lengths. The belief in the Court of Appeal's willingness to adjust sentences, while contradicted by statistical evidence, has resulted in a cautious approach and the suppression of sentencing ranges until expanded by a subsequent appellate decision.

3.3. Relationship between the courts

The fact that many first instance judges continue to believe that the Court of Appeal is regularly making minor unwarranted adjustments to sentences reflects a broader tension between the courts.

Not all judges interviewed regarded the comparative approach and use of sentencing information as negative. Some were sympathetic to the pressures placed upon the Court of Appeal:

I can understand why the proponents of CSP...felt that they needed to protect the judiciary from executive interference but...the Court of Appeal became, not politicised in the sense of formal politics, but its role became politicised in the environment of the administration of justice becoming politicised. It was almost inevitable that the judiciary was going to get swept up into all of that.

⁹⁴⁵ *Hogarth* (n 905).

Others appreciated the guidance⁹⁴⁶ and understood the desire to bring some clarity and guidance to sentencing concepts:

[Some Court of Appeal judges] thought 'Look, how can we work this out a bit better? How do we have guidelines? How do we know what to give for an aggravated burglary or a rape or indecent assault?' So [they] then really hammered the concept of comparable cases and CSPs...If I was doing a libel or defamation case, I'd be wanting every case I could find ever since the bible was first printed to give me some idea of what the hell I'm meant to be doing.

More commonly though, judges at first instance, particularly from the County Court, appear to resent the imposition of strictures on IS and their discretion. Judicial self-regulation is said to allow for the development of principles that are sensitive to the practical problems of sentencers.⁹⁴⁷ In Victoria, however, many first instance sentencers feel that their judgement is being questioned by judges who do not understand the experience of conducting criminal trials and sentencing in busy courts:

Don't get me started on the Court of Appeal, they interfere in things they know nothing about.

I don't think they have a clue about the day to day realities.

They have no idea. They don't understand that this is a factory and the workload here is enormous. And you've got to get through it and give each individual case the time it

⁹⁴⁶ This is consistent with the attitudes expressed by some judges interviewed by Mackenzie (n 17) 61.

⁹⁴⁷ Brown (n 91) 162; Bingham (n 1) 46-7.

needs. But you've still got to finish it and get on to the next one. They say they understand it but their practice doesn't seem to indicate that.

Similar feelings of being misunderstood have been expressed by judges in Scotland⁹⁴⁸ and England.⁹⁴⁹ Several interviewees also noted that many appellate judges lacked experience in criminal law or had limited experience of criminal trials. For sentencers who have spent their entire career practising in criminal law, it is particularly difficult to be told that they have 'got it wrong' by those who have never been involved in a criminal trial. This attitude reflects the sense of ownership and the closed nature of the Criminal Bar discussed above.

In some instances, judges felt that comments in judgments went beyond appropriate professional criticism to become personal attacks.⁹⁵⁰ These caused particular offense:

There are some appeal judges who have been personally offensive and engage in gratuitous personal criticism that offends not only the individual judge but often many of the colleagues or creates a sort of belief in the lower court that the Court of Appeal doesn't get it or is against us.

[They] would say things like 'The charge by this judge was particularly insipid', that sort of, you know, quite personal language.

Judges made similar observations about the treatment of the Court of Appeal by the High Court: 'You sort of think 'really?' Did you need to put the boots in quite as hard as that?... Why would it offend you so much?' As in Ashworth et al's study,⁹⁵¹ frustration led interviewees to be 'openly disrespectful' towards court decisions, for example describing them as

⁹⁴⁸ Brown (n 91) 186.

⁹⁴⁹ Hough, Jacobson and Millie (n 187) 39.

⁹⁵⁰ See also Mackenzie (n 17); Justice Dyson Heydon, 'Does Political Criticism of Judges Damage Judicial Independence?' (Policy Exchange, February 2018) 4.

⁹⁵¹ Ashworth et al (n 19) 48.

‘grandstanding’. More than that, the frustration appears to take on a more personal element: ‘Our court hates the Court of Appeal, I’ve never known relations to be this bad... There’s been enormous tension, a lot of us have very little respect [for them].’

The feelings of resentment explored in this section have consequences beyond mere frustration at being overturned. They have a practical impact on the way in which judges sentence and their working environment:

...County Court judges were just quite demoralised when it came to sentencing. And some of them were even saying in open court ‘well this is my sentence until it’s overturned by the Court of Appeal’...I suspect that some judges who had the option of doing other things, stopped doing crime for that reason because they were just constantly being overturned on appeal. The moment they sentenced towards the upper end of a range or maybe even slightly over it, but not that much over that, it constitutes sentencing error, they’d be smacked down... So then that meant that the County Court judges here had two choices, they either stuck to their guns and said: ‘Well, I’m sorry, I’m sworn to uphold the law, this is how I see the law, I’m going to keep doing what I’m doing and if I keep getting smacked down then I keep getting smacked down’. Others said: ‘I don’t like getting my appeals upheld against me, that affects my self-esteem, so I’ll reduced my sentences now so that doesn’t happen anymore’.

Much like the reactions to legislative change, the hostility between the courts is a reflection of sentencing judges’ desire to have their professional judgement trusted and their discretion preserved. There is also additional tension stemming from the fact that the changes to sentencing practice are coming from within the judicial cohort, rather than being imposed from the outside, and within the context of identifying errors in decisions by individuals. Increased attention to CSP and sentencing range have led to the belief that minor changes are being

implemented as the result of a more technical, analytical approach. Such an approach is considered contrary to IS and respecting sentencer's exercise of discretion, hence the resulting changes are regarded as unnecessary.

3.4. The High Court

The High Court, citing distance from local conditions and sentencing practices,⁹⁵² has traditionally been reluctant to engage in debates surrounding sentencing methodology and principle.⁹⁵³ It has gradually engaged in these matters, issuing general guidance on procedural and evidentiary questions.⁹⁵⁴ More often though it has neutralised attempts to provide formal guidance and structure,⁹⁵⁵ including recent efforts by the Victorian Court of Appeal.⁹⁵⁶

The High Court has consistently rejected attempts to implement structure or promulgate rules that may impede the individual sentencing evaluation,⁹⁵⁷ seeking instead to maximise discretion. The decisions in *MacNeil-Brown*⁹⁵⁸ and *Barbaro*⁹⁵⁹ highlight the conflicting approaches. *MacNeil-Brown* required that, upon request by the sentencing court, the prosecution provide a submission about the range of available sentences. This position was opposed by members of the Court of Appeal⁹⁶⁰ and the majority in *Barbaro*, which held that making such statements is 'neither the role nor the duty' of the prosecution and intrudes upon judicial discretion.⁹⁶¹

⁹⁵² *York* (n 44) 479 [40] (Hayne J).

⁹⁵³ See Mackenzie and Stobbs (n 440) 2; Leader-Elliott (n 294) 8.

⁹⁵⁴ See e.g. *R v De Simoni* (1981) 147 CLR 383 (prohibition on sentencing for uncharged acts); *Lowe* (n 52) (parity); *Mill* (n 53) (totality); *Postiglione* (n 44); (relationship between parity and totality); *Maxwell v The Queen* (1996) 184 CLR 501 (guilty plea); *Olbrich* (n 769) (standard and onus of proof in sentencing).

⁹⁵⁵ *Krasnostein* (n 210) 115. See e.g. *AB* (n 48), 121-122 [15]-[18] (McHugh J); *Wong* (n 10) 613-14 [74]-[76] (Gadron, Gummow and Hayne JJ); *Markarian* (n 6) 383-4 [64]-[65] (McHugh J), 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ). For a more detailed discussion see Chapter 3 [1.4].

⁹⁵⁶ Gavin Silbert, 'The First 24 Years of the Victorian Court of Appeal in Crime' (2020) 94 Australian Law Journal 455.

⁹⁵⁷ Allsop (n 694) [46].

⁹⁵⁸ n (934).

⁹⁵⁹ *Barbaro* (n 14).

⁹⁶⁰ *MacNeil-Brown* (n 349) 713 (Kellam JA), 709 (Buchanan JA).

⁹⁶¹ *Barbaro* (n 14) 74 [39] (French CJ, Hayne, Kiefel and Bell JJ). In Queensland the effect of this decision has now been reversed in relation to sentencing for state offences: *Penalties and Sentences Act* 1992 (Qld) s 15.

The High Court's decision has been criticised for its conservative approach to sentencing method and appellate guidance and for prioritising individualism over consistency.⁹⁶² As one interviewee noted, the strength of the Court's response indicates their commitment to traditional sentencing arrangements:

You wouldn't have thought that these fairly modest attempts to put a bit of intellectual structure around these concepts...in order to reduce error rates, reduce inconsistency, would produce such ferocious antagonism...It goes a bit to the tenacity of these notions like IS.

Submissions on range do not limit sentencers' discretion, judges remain free to evaluate the submissions and make their own determination of range. The response in *Barbaro* is an overreaction that merely reinforces the 'self-perceived judicial ownership of sentencing'⁹⁶³ and reflects the Court's willingness to suppress any supposed intrusion into judicial discretion, even where discretion is not under threat.

3.4.1. Guideline judgments

The High Court's hostility towards any perceived encroachment on discretion extends even to guidance issued by the court, as evidenced in the High Court response to guideline judgments. These judgments enable a court to provide practical sentencing guidance beyond the facts of the particular case. They allow the development of guidance by the courts and can complement IS by making the process clearer and more intelligible.⁹⁶⁴ Guideline judgments have been embraced in England and Wales, New Zealand and, recently, Scotland and Ireland as a means of providing a common framework while preserving flexibility for individual cases.⁹⁶⁵ Australia, however, has moved in the opposite direction. Courts in several Australian

⁹⁶² Warner (n 352) 371.

⁹⁶³ Tonry (n 211) 184; Krasnostein (n 210) 133.

⁹⁶⁴ Brown (n 91) 42; Beth Crilly, 'Guideline Judgments in Victoria' (2005) 31(1) Monash University Law Review 37, 54.

⁹⁶⁵ Ashworth (n 94) 244. See Chapter 1 [2.1].

jurisdictions have the power to issue guideline judgments.⁹⁶⁶ Only the NSW Court of Criminal Appeal, however, seeking to improve consistency and ‘rein in the undermining by sentencers of the legislative sentencing scheme’,⁹⁶⁷ has regularly exercised that power.⁹⁶⁸

The High Court in *Wong* suggested that guideline judgments may be unconstitutional as courts cannot deal with points of law beyond the subject of the dispute. They also expressed concern about the inclusion of tariffs and numerical guidance⁹⁶⁹ and that, in identifying a range rather than a reasoning process, the court was exercising a legislative function.⁹⁷⁰ Even if this claim is correct,⁹⁷¹ guideline judgments need not include a numerical element. The Court chose not to emphasise the possibility that courts could issue non-numerical guidance, instead focusing on the improper inclusion of figures.

Importantly, the High Court did not prohibit the development of guideline judgments but, in light of the Court’s hostility towards such judgments, Supreme Courts have been reluctant to produce them. This is despite evidence that they can increase consistency⁹⁷² and do not automatically constrain the exercise of discretion.⁹⁷³ One guideline judgment has been issued since *Wong*, by the Victorian Court of Appeal,⁹⁷⁴ demonstrating that operating within the strictures of that judgment is possible, but it remains an underutilised tool.

The success of guideline judgments is entirely dependent upon the support of the court and will not succeed in the face of strong judicial opposition.⁹⁷⁵ Such opposition is present and

⁹⁶⁶ See e.g. *Sentencing Act 1995* (WA) s 143; *Sentencing Act 1991* (Vic) Pt 2AA; *Penalties and Sentences Act 1992* (Qld) ss 15AC-AI; *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 3 Div 4.

⁹⁶⁷ Kate Warner, ‘Sentencing review 2003-2004 Part 1’ (2004) 28 *Criminal Law Journal* 365, 365; Allsop (n 694) [44].

⁹⁶⁸ See e.g. *Whyte* (n 60); *Thomson* (n 289); *AG’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 *NSWLR* 146.

⁹⁶⁹ *Wong* (n 10) 610 [72], 611-613 [76]-[78] (Gaudron, Gummow and Hayne JJ).

⁹⁷⁰ *Wong* (n 10) 613-5 [80]-[83] (Gaudron, Gummow and Hayne JJ); *Whyte* (n 60) 270 [117] (Spigelman CJ).

⁹⁷¹ The strength of this suggestion has been challenged. Ashworth, for example, notes that guidelines lack the legislative character of other sentencing schemes, such as mandatory sentencing provision and that, accepting that courts are subordinate to legislature, they may exercise the judicial discretion left to them by the legislature: Ashworth (n 146) 55.

⁹⁷² Sarah Krasnostein, ‘Boulton v the Queen: The Resurrection of Guideline Judgments in Australia?’ (2015) 27(1) *Current Issues in Criminal Justice* 41; NSW Law Reform Commission *Sentencing* (Report 139 2013); Barnes, Poletti and Potas (n 697).

⁹⁷³ *Thomson* (n 289) 401-2 [72] (Spigelman CJ).

⁹⁷⁴ *Boulton v The Queen* (2014) 248 A Crim R 153 (*Boulton*).

⁹⁷⁵ See Ashworth (n 899) 74 citing *Billam* (1986) 82 Cr App R 347, *Stewart* (1987) 9 Cr App R (S) 135.

influential within Victorian courts.⁹⁷⁶ Several interviewees described the ‘political schism’ within the Court of Appeal regarding guideline judgments, another expression of the divide between sentencing conservatives and those open to reform. Few interviewees actively advocated for the use of guideline judgments. Though some were ‘not opposed’ to the practice, even those judges warned against the use of figures and creation of mandatory sentencing bands.

Opposition to guideline judgments was more openly expressed. Judges explained that there were ‘too many difficulties associated with it’ as the appellate court would have to act ‘with one eye over its shoulder to what the High Court might say’. Several members of the Court of Appeal confirmed that they will not be involved in guideline judgments: ‘I won’t sit on them because I regard them as legislative in nature. They’re not judicial, you’re not deciding a case’.⁹⁷⁷ Judges instead emphasised that ‘any sentence appeal can be the occasion for guidance’ and the judges ‘try to lay down principles and establish our own guidelines through judgments’.

Recently even the scope of general appellate guidance has been queried. In *Dalgliesh* the Court of Appeal concluded that sentences for mid-range incest offences must be incrementally increased to uplift and expand the sentencing range.⁹⁷⁸ It did not increase the sentence in the immediate case. Ensuring that sentencing standards are correctly applied was said to be a proper appellate court function, even where that guidance did not affect the sentence before the court.⁹⁷⁹ The High Court took the opportunity to reiterate its resistance to courts issuing broad guidance, expressing reservations about the capacity of courts to issue general guidance outside a guideline judgment.⁹⁸⁰ Upon resentencing, the Court of Appeal heeded that caution. It repeated the High Court’s warning that courts may issue general statements

⁹⁷⁶ And in Queensland: Mackenzie (n 17) 47.

⁹⁷⁷ The fact that the *Boulton* (n 974) guideline judgment was not appealed and is now widely applied suggests that this opinion is not universally shared.

⁹⁷⁸ *Dalgliesh* 2016 (n 791) [131].

⁹⁷⁹ *Dalgliesh* 2016 (n 791) [67], [69].

⁹⁸⁰ *Dalgliesh* (HC) (n 12) 450 [69] (Kiefel CJ, Bell and Keane JJ). See also *DPP v Dalgliesh* (2017) 271 A Crim R 1, 14-15 [62]-[65] (*Dalgliesh* (2017)).

relating to the adequacy of sentences only when directly related to the determination of the matter before the court.⁹⁸¹ It also noted that it is ‘far from clear’ that guideline judgments may be issued without giving effect to the guidelines propounded.⁹⁸² Through these cases, the courts are gradually narrowing the scope for courts to develop broad sentencing guidance, first to guideline judgments, then to guideline judgments in cases where the court gives effect to that guidance.

Recent legislative changes in Victoria have expanded the permissible content of guideline judgments to include guidance about sentencing levels or ranges.⁹⁸³ Following complaints about legislative interference and overcomplication it may be thought that courts would welcome this invitation to take more control over sentencing levels and practices. As several interviewees recognised, increased guidance from the court may have prevented some criticism in relation to sentencing practices and subsequent legislative involvement. Experience in Victoria and other states has shown, however, that it is unlikely that the additional power granted will be used. What is needed is judicial will but, given the attitudes examined above and the caution expressed in *Dalgliesh* (2017), it seems that that will is lacking amongst the majority of the Court of Appeal.

Without actually prohibiting guideline judgments, the High Court’s warnings have had the desired effect of putting a stop to their production. The High Court in *Wong*, and to a lesser extent *Dalgliesh*, chose to emphasise the limitations on courts issuing sentencing guidance, rather than the opportunities available. It focused on preventing any binding of future courts or alteration to judicial discretion. As a result, it failed to acknowledge that courts can provide, and in NSW and Victoria have provided, effective guidance without violating constitutional limitations or restricting discretion. This is consistent with the High Court’s approach of

⁹⁸¹ *Dalgliesh* (HC) (n 12) 450 [69] (Kiefel CJ, Bell and Keane JJ).

⁹⁸² *Dalgliesh* (HC) (n 12).

⁹⁸³ *Sentencing Act 1991* (Vic) s 6AC(1)(cb).

maximising judicial discretion at the expense of clarity and consistency. Ironically, it also means foregoing the opportunity to strengthen judicial control over sentencing and potentially prevent further legislative involvement.

4. Standard sentencing

The latest sentencing development in Victoria is the introduction of standard sentences for offences such as murder, rape and culpable driving causing death.⁹⁸⁴ Sentencers must take into account the standard sentence, that is 'the sentence for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness'.⁹⁸⁵ At the time of interviewing, cases covered by the scheme had not reached the courts but judges were sceptical about whether the provisions were workable within the context of IS: 'it's going to be a catastrophe', 'Standard sentencing's going to come unstuck, it's just silly. There's no way known that's going to work.' The concern was that standard sentences would operate like the failed baseline sentences or as a starting point.

These concerns, however, have not been borne out as the court has sought to limit the impact of standard sentencing. The Court of Appeal has confirmed that the scheme does not affect IS or permit 'two-stage sentencing'.⁹⁸⁶ Standard sentences merely act as legislative guideposts⁹⁸⁷ that may be departed from and are 'just another factor to consider'.⁹⁸⁸ Sentencing, including the assessment of offence seriousness, 'is to be done as it has always been done'.⁹⁸⁹ Judges suggested that the standard sentence would be an additional, unnecessary factor to incorporate, meaning more detailed reasons and spending longer on

⁹⁸⁴ *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic) ss 25-35.

⁹⁸⁵ *Sentencing Act 1991* (Vic) ss 5B(2)(a), 5A(1)(b).

⁹⁸⁶ *Sentencing Act 1991* (Vic) s 5B(2); *Brown* (2019) (n 668); *R v Brown* [2018] VSC 742, [58] (*Brown* (2018)).

⁹⁸⁷ *Brown* (2019) (n 668) [4], [44], [106].

⁹⁸⁸ Judicial College of Victoria (n 669) [2.1].

⁹⁸⁹ *Brown* (2019) (n 668) [37]. See also *Lugo* (n 668) [25]-[26].

sentencing. It was also suggested that standard sentences would simply raise the CSP,⁹⁹⁰ possibly for the purpose of spreading out sentencing ranges, but more likely to increase sentences. There may also be an uplift in sentences for a range of offences beyond those specified.⁹⁹¹ These predictions may yet be true, overall though standard sentences have not disrupted the sentencing process itself. It would seem that this is the extent of sentencing reform that will be tolerated, one that does not impact structure, process or the judiciary's significant discretion and power.

5. Conclusion

This chapter has examined different means of providing sentencing guidance and structure and the challenges of implementing them in an Australian context. Even within a system founded on judicial discretion there must be regulation of discretion. A balance must be struck between judicial independence and ensuring that discretion is exercised in a principled and consistent manner. Yet even relatively narrow attempts to introduce guidance have met with a lukewarm response, if not active resistance, from members of the Australian judiciary who equate the guidance of discretion with an unwelcome reduction in discretion.

Given the commitment to broad discretion and individualisation of sentences expressed during interviews and in judgments, it is unsurprising that judges would resist sentencing reform. The primary concern appears to be that these IS values would be compromised, resulting in injustice. There was a tendency amongst interviewees to consider only extreme examples of reform in which discretion is substantially curtailed. This contributes to an automatic hostility towards sentencing changes which must be addressed if reform is to be effective. Judges' concerns are reinforced by the experience of having legislative changes imposed upon them,

⁹⁹⁰ It would appear that the standard sentence effectively replaces the existing CSP for the relevant offence: *Sentencing Act 1991* (Vic) s 5B(2)(b); *Brown* (2018) (n 986) [107]-[111]; *R v Robertson* [2019] VSC 145, [77]-[79].

⁹⁹¹ See e.g. the effect of amendments to Schedule 21 in England and Wales; Andrew Ashworth, 'The Struggle for Supremacy in Sentencing' in Ashworth and Roberts (n 9) 20-2; Julian V Roberts and Sir John Saunders, 'Sentencing for murder: the adverse and unintended effects of Schedule 21 of the Criminal Justice Act 2003' (2020) 10 Crim LR 900.

often with unsatisfactory results, as in the case of baseline sentencing. The attitudes of the vast majority of interviewees can be summarised as follows:

...it seems to me that every time the legislature tinkers with the sentencing they either stuff it up...or they just simply increase the burden on already overworked judges to work around a blunt instrument, which is going to end up with unjust sentences.

There was a feeling of hostility amongst interviewees and a sense that their expertise was being overridden by those who do not understand the realities of sentencing.

A similar tension between increased guidance and the preservation of wide discretion exists within the courts. The Victorian Court of Appeal has been attempting to issue sentencing guidance, promoting the use of comparative sentencing material such as sentencing ranges. Those in favour explain that the new practices are attempts to improve certainty and consistency. Those opposed view them as needless complications intruding on an instinctive process. The number of critical comments made by interviewees, knowing that their responses were being recorded and may be published (albeit anonymously), indicates the depth of feeling in relation to this issue and the commitment to IS values and opposition to even minor reform amongst a sizable portion of the judiciary.

That same commitment is consistently demonstrated by the High Court. The Court is steadfast in preserving the broadest judicial discretion and resistant to any process that it perceives as limiting sentencers' discretion (even when that is not the effect). Even attempts by the courts themselves to guide the exercise of discretion are opposed, without any acknowledgment that guidance need not restrict discretion. The courts have had opportunities to develop sentencing guidance but have generally refused, leaving judicial discretion as unstructured as possible. This creates a void in sentencing guidance into which the legislature is willing to step. The risk

for the courts is that, in seeking to defend broad discretion, they leave themselves open to legislative measures which may reduce that discretion.

Chapter 8 Bringing Greater Structure to Sentencing

The difficulty in developing a sentencing regime is in providing practical sentencing guidance whilst maintaining sufficient flexibility to meet the individual case.⁹⁹² Too much flexibility jeopardises uniformity of approach and risks uncertainty and inconsistency. Too much constraint delivers uniformity of outcome without due consideration for the varying facts of each case.⁹⁹³ Increasingly, legislatures are seeking to resolve this difficulty by introducing sentencing guidelines as a means of structuring decision-making without diminishing judicial discretion. Such guidelines have been proposed in Victoria but opposition from a judiciary strongly resistant to change may prove insurmountable.

Overview

The sentencing guidelines model proposed by the Victorian Sentencing Advisory Council (SAC) and heavily influenced by arrangements in England and Wales presents an opportunity to increase understanding, transparency and consistency in Victorian sentencing. It introduces structure to the decision-making process, directing and guiding the exercise of discretion but, crucially, does not fetter discretion. Sentencing guidelines would be a departure from the unstructured IS model and a step-by-step approach is considered by many to be inconsistent with IS. Yet the process outlined in guidelines is notably similar to the broad informal structure already being applied by sentencers. Sentencing guidelines simply formalise this approach and, while adopting a different structure to IS, uphold the same fundamental sentencing values such as proportionality, discretion and individualisation.

These details are overlooked by many members of the judiciary who, in keeping with the resistance to change discussed in previous chapters, object almost automatically to the possibility of guidelines. A tendency to imagine extreme, restrictive examples and to perceive

⁹⁹² Anthony Bottoms, 'Five Puzzles in von Hirsch's Theory of Punishment' in Andrew Ashworth and Martin Wasik (eds) *Fundamentals of Sentencing Theory* (OUP 1998) 69; *Norbis* (n 552) 520 (Mason and Deane JJ).

⁹⁹³ Ashworth (n 991) 30.

the guiding of discretion as a threat to discretion contributes to the strong opposition to sentencing guidelines amongst many interviewees. Lack of judicial support for guidelines is one of the major differences between Victoria and England and Wales and could compromise the effectiveness of the guidelines scheme. Such is the strength of the judiciary's opposition that it seems to have overborne whatever political will there was to establish a sentencing guidelines system.

1. The sentencing guidelines model

Sentencing guidelines were first proposed by the SAC in 2016 as an 'aspirational model',⁹⁹⁴ prompting the Victorian Government the following year to announce its intention to establish a sentencing guidelines council. The SAC produced a report in 2018 detailing how a sentencing guidelines council and sentencing guidelines could best be implemented in Victoria.⁹⁹⁵ This plan reflects a global shift towards more structured sentencing, in particular towards sentencing guidelines. Having already been adopted in England and Wales, the United States, South Korea, Ethiopia and Scotland, guidelines are also being actively considered in Ireland, Canada, several Gulf states, Israel and several African jurisdictions.⁹⁹⁶

Sentencing guidelines inform the sentencing decision, producing a range or indication of appropriate sentence without prescribing a specific result. They vary in terms of content, format and the degree to which they bind sentencers. Guidelines may be narrative or grid based, offence-specific or overarching, presumptive or voluntary. The focus in this chapter will

⁹⁹⁴ Sentencing Advisory Council, *Sentencing Guidance in Victoria: Report* (2016) 197-219.

⁹⁹⁵ The Council was not asked to address the appropriateness or desirability of establishing a sentencing guidelines council: Sentencing Advisory Council (n 21) 4 [1.15].

⁹⁹⁶ Roberts, Pina-Sanchez and Marder (n 729) 126. See also Seong-Kyoon Kim, Bong-Joon Yoon and Jeungil Oh, 'A Study on the Decision-Making Behavior of Judge in the Criminal Trial: The Effect of Sentencing Guideline in South Korea' (2020) 34(4) *International Economic Journal* 599; Julian V Roberts and Oran Gazal-Ayal, 'Statutory Sentencing Reform in Israel: Exploring the Sentencing Law of 2012' (2013) 46(3) *Israel Law Review* 455; Kassahun Molla Yilma and Julian V Roberts, 'Out of Africa: Exploring the Ethiopian Sentencing Guidelines' (2019) 30 *Criminal Law Forum* 309; South African Journal of Criminal Justice (2020) 33 Special Issue: Sentencing Practice, Policy, and Reform in Southern and Eastern Africa.

be on narrative, rather than grid based,⁹⁹⁷ guidelines as this is the model proposed in Victoria and adopted most frequently in common law jurisdictions. Narrative guidelines can provide comprehensive sentencing guidance, clarifying and simplifying the sentencing task and, in doing so, they promote more consistent and transparent decision-making. Greater understanding of the process and certainty of outcome can also improve accountability, public confidence⁹⁹⁸ and decision making, for example promoting realistic expectations in victims as to the possible sentence, encouraging pleas and informing decisions to appeal.⁹⁹⁹

Sentencing guidelines also affect the process by which guidance is developed. Guidelines are produced by specific sentencing commissions or councils, generally comprised of members of the judiciary, criminal justice agencies, legal practitioners, academics and, often, lay members.¹⁰⁰⁰ Free from the time pressures faced by appellate courts, councils are able to engage in a more thorough development process including consultation and review of current practices. The potential for public engagement and community testing of guidelines also helps to address the 'democratic deficit' associated with guidance by an unelected judiciary.¹⁰⁰¹ The guidelines define a common approach and generally provide clear and practical advice. While many fear the curtailment of judicial discretion,¹⁰⁰² not all sentencing guidelines are intended to remove discretion. Sentencing guidelines structure the exercise of discretion in a logical and transparent way. While some guidelines are rigid and binding, many models deliberately incorporate space for judicial deliberation about fundamental principles and current practice and for the individualisation of sentences.¹⁰⁰³

⁹⁹⁷ Sentencing grids have been extensively evaluated elsewhere. See e.g.: Reitz (n 86); United States Sentencing Commission, 'Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving its Goals of Sentencing Reform' (2004) 17 Federal Sentencing Reporter 269; Richard S Frase, 'Forty Years of American Sentencing Guidelines: What Have We Learned?' (2019) 48 Crime & Justice 79.

⁹⁹⁸ Tom O'Malley, 'Judgment and Calculation in the Selection of Sentence' (2017) 28 Criminal Law Forum 361, 361.

⁹⁹⁹ Sentencing Commission for Scotland (n 96) 38.

¹⁰⁰⁰ See e.g. Sentencing Commission, *Commissioners* (Supreme Court of South Korea) <<https://sc.scourt.go.kr/sc/engsc/comm/comm.jsp>> accessed 18 September 2020; Scottish Sentencing Commission, *Membership* (Scottish Sentencing Commission) <<https://www.scottishsentencingcouncil.org.uk/about-us/membership/>> accessed 18 September 2020; Minnesota Sentencing Guidelines Commission, *How Commission Members Are Selected* (Minnesota Sentencing Guidelines Commission) <<https://mn.gov/sentencing-guidelines/about/membersselection/>> accessed 18 September 2020.

¹⁰⁰¹ Andrew Ashworth, *Sentencing and Criminal Justice* (4th edn, CUP 2005) 57.

¹⁰⁰² See Part 3 below.

¹⁰⁰³ O'Malley (n 998) 361.

1.1. Guidelines in England and Wales

For decades, England and Wales have been at the forefront of narrative sentencing guidelines.¹⁰⁰⁴ The sentencing guidelines model has influenced approaches in several other jurisdictions, including Victoria,¹⁰⁰⁵ and is largely mirrored in the SAC recommendations. The experience in England and Wales therefore provides a useful indication of how guidelines may operate in Victoria and the challenges which may need to be addressed.

Sentencing guidelines were introduced in England and Wales in order to improve predictability and consistency and thus maximise the application of the rule of law.¹⁰⁰⁶ They may be either offence-specific, setting out a step-by-step process for the determination of sentence, or overarching, addressing principles that apply across offence types.¹⁰⁰⁷ Offence-specific guidelines¹⁰⁰⁸ utilise a narrative style, in contrast to grid-based guidelines,¹⁰⁰⁹ to promote a more nuanced evaluation of key factors.¹⁰¹⁰ They outline a clear decision-making methodology, identifying factors to be taken into account and the stage at which they should be considered. There is also guidance in relation to outcome through the inclusion of a proportionate sentencing range.

¹⁰⁰⁴ On the development of sentencing guidelines in England and Wales see Sentencing Commission Working Group, *Sentencing Guidelines in England and Wales: an Evolutionary Approach* (2008) (the Gage Report); Ashworth (n 993); Julian Roberts and Andrew Ashworth, 'The Evolution of Sentencing Policy and Practice in England and Wales, 2003-2015' in Tonry (n 106) 307.

¹⁰⁰⁵ Sentencing Advisory Council (n 21) 2 [1.8].

¹⁰⁰⁶ Andrew Ashworth, *Sentencing and Criminal Justice* (5th edn, CUP 2010) 418-421.

¹⁰⁰⁷ Coroners and Justice Act 2009 s 120(2).

¹⁰⁰⁸ See e.g. Sentencing Council of England and Wales, *Sexual Offences Definitive Guideline* (2013).

¹⁰⁰⁹ See e.g. United States Sentencing Commission, *2018 Guidelines Manual* (United States Sentencing Commission 2018) Chapter 5, Part A – Sentencing Table.

¹⁰¹⁰ O'Malley (n 998) 377.

Generally, offence-specific guidelines involve the following:¹⁰¹¹

- (i) assessment of the harm and culpability of the offence according to an exhaustive list of factors set out in the guideline. This leads to placement of the offence in a table of categories of that offence type (Steps One and Two);
- (ii) identification of a 'starting point' and 'category range' of sentences within each of the categories (Step Two);
- (iii) consideration of further aggravating and mitigating factors and adjustment of the sentence up or down from the starting point (Step Two);
- (iv) possible reductions for assistance to the prosecution and guilty pleas (Steps Three and Four);
- (v) possible use of statutory dangerousness provisions (Step Five);
- (vi) where relevant, consideration of the possible use of the totality principle (Step Six); and
- (vii) consideration of compensation and/or other ancillary orders (Step Seven).

Overarching guidelines describe relevant sentencing principles using examples to explain the circumstances in which they apply and the approach to be used. Issues addressed include plea-based sentencing reductions,¹⁰¹² domestic abuse¹⁰¹³ and totality.¹⁰¹⁴ Like offence-specific guidelines, overarching guidelines emphasise sentencing approach rather than specific outcomes. Through the operation of both types of guidelines, justifiable differences in outcome will remain but unjustifiable differences will be reduced.¹⁰¹⁵

¹⁰¹¹ Anthony Bottoms and Jo Parsons, *The Sentencing Council in 2017: A Report on Research to Advise on how the Sentencing Council can best Exercise its Statutory Functions* (Sentencing Council of England and Wales 2018) 8.

¹⁰¹² Sentencing Council of England and Wales, *Reduction in Sentence for a Guilty Plea Definitive Guideline* (2017).

¹⁰¹³ Sentencing Council of England and Wales, *Domestic Abuse Definitive Guideline* (2018).

¹⁰¹⁴ Sentencing Council of England and Wales, *Offences Taken Into Consideration and Totality Definitive Guideline* (2012).

¹⁰¹⁵ Bottoms and Parsons (n 1011) 13.

The Sentencing Council has become the primary source of guidance on sentencing principles, its guidelines replacing any pre-existing court guidance on that topic.¹⁰¹⁶ The judiciary continues to play a role in sentencing guidance, contributing to the content of guidelines through judicial members of the Council, responding to consultations and ‘road testing’ draft guidelines.¹⁰¹⁷ Further, the Council’s approach when developing guidelines is generally to replicate court practice rather than to make policy changes. The Court of Appeal Criminal Division (CACD) remains responsible for regulating sentencing levels, conducting appellate review and providing direction on the application of guidelines.¹⁰¹⁸ It also continues to issue guideline judgments on a range of issues not covered by the guidelines.¹⁰¹⁹ The development of sentencing guidance and regulation of sentencing practice by the Sentencing Council and CACD working in tandem is said to eliminate the need for major remedial action by parliament.¹⁰²⁰

1.1.1. Evaluation of the guidelines

The Sentencing Council’s guidelines establish a coherent sentencing structure that can assist in promoting consistency, but structure must be balanced against the need for flexibility. Critics suggest that mandating a structure unduly restricts discretion, applying a ‘one size fits all’ approach to an individualised exercise.¹⁰²¹ This fails to recognise that guidelines allow for individualisation. They direct the exercise of discretion but do not dictate a result and are designed so as not to be heavily deterministic or prescriptive.¹⁰²² There is also significant flexibility built into the guidelines.¹⁰²³ For example, while the list of relevant factors at Step 1 of the offence-specific guidelines is exhaustive, the list at Step 2 is non-exhaustive, enabling

¹⁰¹⁶ See e.g. *Kahar* (n 907) 32.

¹⁰¹⁷ Julian V Roberts and Howard H Bebbington, ‘Sentencing Reform in Canada: Promoting a Return to Principles and Evidence-based Policy’ (2013) (17) *Canadian Criminal Law Review* 327, 342-3.

¹⁰¹⁸ Harris (n 699) 337-8.

¹⁰¹⁹ See e.g. *R v Caley & Ors* [2012] EWCA Crim 2821, [2013] 2 Cr App R (S) 47.

¹⁰²⁰ Harris (n 699) 340.

¹⁰²¹ See e.g. Brown (n 91) 122-3, 150-1; John Cooper, ‘The Sentencing Guidelines Council – A Practical Perspective’ (2013) 4 *Crim LR* 277, 279-80.

¹⁰²² Julian V Roberts, Mike Hough and Andrew Ashworth, ‘Personal Mitigation, Public Opinion and Sentencing Guidelines in England and Wales’ (2011) *Crim LR* 524, 528.

¹⁰²³ Ashworth (n 1006) 452.

sentencers to consider any factor deemed relevant to the aggravation or mitigation of seriousness of the offence. Step 1 also specifies a range of proportionate sentences for the offence and category. There is greater flexibility at Step 2, which facilitates movement away from the starting point. The ranges are also notably broad,¹⁰²⁴ allowing significant flexibility and individualisation.

Sentencers are not confined to the specified ranges. They are required to 'follow' the sentencing guidelines, except where doing so would be 'contrary to the interests of justice'.¹⁰²⁵ This is a high threshold, suggesting an intention that departures be rare and that compliance and consistency be promoted.¹⁰²⁶ Crucially though, this 'escape clause'¹⁰²⁷ preserves judicial discretion. The courts have repeatedly stressed the importance of doing 'justice in the circumstances of an individual case'.¹⁰²⁸ To this end, 'guidelines are never more than guidelines'¹⁰²⁹ and not tramlines.¹⁰³⁰ Guidelines have, in fact, been shown to improve individualisation through an increase in the number of sentencing factors taken into account and a reduction in the 'clustering' of sentences around particular number points.¹⁰³¹

Rather than being overly constraining, Ashworth suggests that guidelines allow for so much flexibility that they become an ineffective guarantee of the rule of law.¹⁰³² 'so long as there is an 'interests of justice' exception, can the constraint really be too great?'¹⁰³³ For example, in applying to such wide offence ranges, the duty to follow the guidelines has been described as 'diluted...to the point of meaninglessness'.¹⁰³⁴ Lack of substantive guidance, for example as

¹⁰²⁴ The offence range for street and less sophisticated commercial robberies, for example, is from a high level community order to 12 years custody: Sentencing Council of England and Wales, *Robbery: Definitive Guideline* (2016).

¹⁰²⁵ Coroners and Justice Act 2009 ss 125(1)-(3). This is a stricter requirement than the previous duty to 'have regard' to the guidelines (Criminal Justice Act 2003, s 172 (repealed)); Julian Roberts, 'Sentencing Guidelines and Judicial Discretion – Evolution of the Duty of Courts to Comply in England and Wales' (2011) 51(6) *British Journal of Criminology* 997.

¹⁰²⁶ Andrew Ashworth, 'Coroners and Justice Act 2009: sentencing guidelines and the Sentencing Council' (2010) *Crim LR* 389, 394.

¹⁰²⁷ David Thomas, 'Sentencing Guidelines – The New Law' (2010) 4 *Archbold Review* 7, 9.

¹⁰²⁸ *Attorney General's References (Nos 7, 8 and 9 of 2009)* [2009] EWCA Crim 1490; [2010] 1 Cr App R (S) 67, [39]; *Attorney General's References (Nos 15, 16, 17 of 2012)* [2012] EWCA Crim 1414; [2013] 1 Cr App R (S) 52, [17].

¹⁰²⁹ *Attorney General's Reference No 11 of 2007* [2007] EWCA Crim 1523, [2008] 1 Cr App R (S) 26, 29.

¹⁰³⁰ *R v Blackshaw* [2011] EWCA Crim 2312, [2012] 1 Cr App R (S) 114.

¹⁰³¹ Roberts, Pina-Sanchez and Marder (n 729).

¹⁰³² Ashworth (n 1006) 452.

¹⁰³³ Ashworth (n 993) 30.

¹⁰³⁴ Thomas (n 1027). See also Roberts and Ashworth (n 1004) 337.

to how culpability and harm factors are to be combined to judge seriousness,¹⁰³⁵ can also compromise consistency; two judges, both correctly applying the guidelines, may place the same offence/offender scenario in different categories, resulting in different starting points and sentences. The possibility of inconsistency is even greater at Step 2 given the non-exhaustive nature of the list of factors with no explanation of how to weigh those factors.¹⁰³⁶ In this sense, the guidelines offer no more guidance or encouragement of consistency than statutory lists of relevant factors.¹⁰³⁷ Where factors are specified, they are often undefined and open to subjective interpretation (for example 'serious injury'¹⁰³⁸), allowing further room for inconsistency and bias. The significant variation between sentencers in the application of mitigating factors highlights the importance of practical guidance in this area.¹⁰³⁹

These are, however, necessary flexibilities. It has been suggested, for example, that the list of factors at Step 2 be made exhaustive¹⁰⁴⁰ but doing so risks limiting the ability to impose a proportionate sentence where a relevant factor is omitted. The ability to impose proportionate sentences also requires that sentencers be allowed to depart from the guidelines where necessary. The requirement to give reasons for the decision allows for scrutiny of the decision.¹⁰⁴¹ Consistency could potentially be improved though (without compromising discretion) by requiring sentencers to follow the narrower category range and explain any decisions to move into the wider offence range or beyond.¹⁰⁴²

Guidelines have been described as 'increasingly complex'¹⁰⁴³ and, according to sentencers, are too long.¹⁰⁴⁴ Given this, providing further detailed instruction may be counterproductive as guidelines considered overly lengthy and complex may be underutilised. Overarching

¹⁰³⁵ Dhami (n 516) 168.

¹⁰³⁶ Harris (n 699) 290; Dhami (n 516) 174-5; Ashworth (n 1006) 452.

¹⁰³⁷ See e.g. Ashworth (n 1026) 395.

¹⁰³⁸ For a discussion in the Scottish context see Harris et al (n 99) 10.

¹⁰³⁹ Jacobson and Hough (n 188).

¹⁰⁴⁰ See for example Dhami (n 184) 294.

¹⁰⁴¹ The requirement has also proven more successful in improving consistency than advisory guidelines: Roberts (n 128) 340.

¹⁰⁴² Thomas (n 1027). See also Ashworth (n 1026) 395; Roberts and Ashworth (n 1004) 337.

¹⁰⁴³ Julian V Roberts and Mike Hough, 'Empirical Sentencing Research: Options and Opportunities' in Roberts (n 714) 13.

¹⁰⁴⁴ See Dhami (n 184) 289.

guidelines have gone some way to providing details of sentencing principles and their application. Further guidance, for example through illustrative examples,¹⁰⁴⁵ could assist in reducing the reliance on subjective interpretation and the possibility of inconsistency. Many sentencers, however, read overarching guidelines just once upon publication and rarely refer to them in judgments,¹⁰⁴⁶ therefore providing further detail in these guidelines may have limited effect.

Despite these limitations, sentencing guidelines are being followed across the courts¹⁰⁴⁷ and, in addition to improving individualisation, have also improved consistency.¹⁰⁴⁸ Further benefits stem from the involvement of a sentencing council specifically intended to develop and monitor guidelines. These include the opportunity for increased public involvement in sentencing guidance¹⁰⁴⁹ and for monitoring and research. The Council can, for example, consider the wider impact of the guidelines on victims, public confidence in the CJS and in terms of cost and relative effectiveness in preventing reoffending.¹⁰⁵⁰ It can also respond to changes in attitudes to and understanding of offences through the revision of guidelines, avoiding the atrophying of sentencing practice and ranges discussed in Chapter 6.¹⁰⁵¹ In addition, the Council's obligation to monitor the use of the guidelines¹⁰⁵² means that the impact can be properly assessed and unexpected consequences, such as unanticipated increases in sentences,¹⁰⁵³ can be identified and examined.

¹⁰⁴⁵ Harris (n 699) 321.

¹⁰⁴⁶ Bottoms and Parsons (n 1011) 14-15; Andrew Ashworth, 'The Evolution of English Sentencing Guidance in 2016' (2017) Crim LR 507.

¹⁰⁴⁷ Jose Pina-Sánchez and Robin Linacre, 'Enhancing Consistency in Sentencing: Exploring the Effects of Guidelines in England and Wales' (2014) 30 Journal of Quantitative Criminology 731; Keir Irwin-Rogers and Thomas Perry, 'Exploring the Impact of Sentencing Factors on Sentencing Domestic Burglary' in Roberts (n 714); Sentencing Council of England and Wales, *Crown Court Sentencing Survey Annual Publication 2011* (2012) 27.

¹⁰⁴⁸ Jose Pina-Sánchez and Robin Linacre, 'Sentence Consistency in England and Wales: Evidence from the Crown Court Sentencing Survey' (2013) 53 British Journal of Criminology 1118; Pina-Sánchez (n 714).

¹⁰⁴⁹ See Sentencing Council of England and Wales, 'Consultation' <<https://www.sentencingcouncil.org.uk/consultations/>> accessed 17 September 2020.

¹⁰⁵⁰ Coroners and Justice Act 2009 s 120(11).

¹⁰⁵¹ Chapter 6 [3.3].

¹⁰⁵² Coroners and Justice Act 2009 s 127.

¹⁰⁵³ Sentencing Council of England and Wales, *Assessing the impact and implementation of the Sentencing Council's Assault Definitive Guideline* (2015).

The use of guidelines means that sentencers in England and Wales benefit from a common, transparent approach to sentencing. The model strikes an effective balance between structure and flexibility; the duty to follow promotes consistency whilst the ability to depart from the guidelines ensures that sentencers are not unduly restricted. The guidelines operate to direct the exercise of discretion without compromising sentencers' ability to impose proportionate, individualised sentences.

Like Australian judges, the Scottish and Irish judiciary have traditionally been reluctant to consider structured sentencing¹⁰⁵⁴ but, as outlined in Chapter 1, this position has recently changed as both jurisdictions move to develop sentencing guidelines. The Scottish Sentencing Council appears to be adopting a similar approach to that in England and Wales¹⁰⁵⁵ and has produced its first guideline.¹⁰⁵⁶ As the narrative guideline model is adopted across other common law jurisdictions, highly discretionary systems as applied in Australia and Canada, and to a lesser extent New Zealand, are becoming increasingly anomalous. Sentencing guidelines demonstrate that it is possible to implement structured sentencing without undermining judicial discretion. Any decision to reject this model, which has been shown to improve transparency, consistency and individualisation in sentencing, requires strong justification.

2. The possibility of guidelines in Australia

The only compromise between idiosyncrasy in the exercise of the discretion and an impermissible limitation of the scope of the discretion is to be found in the development of guidelines from which a judge may depart when it is just and equitable to do so -

¹⁰⁵⁴ O'Malley (n 9); Tata (n 95) 236; Brown (n 91) 46, 120, 151.

¹⁰⁵⁵ Roberts (n 100) 6.

¹⁰⁵⁶ Scottish Sentencing Council (n 55).

guidelines which are not rules of universal application, but which are generally productive of just and equitable orders.¹⁰⁵⁷

Though made before *Markarian*,¹⁰⁵⁸ the above comment by Brennan J demonstrates that judges recognise the value in formal structure and guidance. Prior to *Markarian*, a staged decision-making approach was supported and applied across several Australian jurisdictions.¹⁰⁵⁹ While some elements of structure, such as the use of starting points, are now considered to be incompatible with IS,¹⁰⁶⁰ there is nothing fundamentally wrong in a structured approach. The High Court has acknowledged as much,¹⁰⁶¹ and has recognised that though IS remains the dominant sentencing methodology, other approaches can be appropriate.¹⁰⁶²

Opposition to staged sentencing in favour of IS, however, is now the dominant position within Australia. Justice McHugh in *Markarian* articulated several common objections to two-tier or staged sentencing. Amongst the criticisms was the suggestion that commencing with a notional sentence or starting point is inconsistent with proportionate sentencing¹⁰⁶³ and ‘downplays the importance of mitigation, reformation and rehabilitation’.¹⁰⁶⁴ These inaccurate generalisations overlook several key details. For example, guidelines as applied in England and Wales and recommended by the SAC specifically provide for the consideration of mitigating factors at Step 2 when sentencers may give the factors the weight they deem appropriate. While the aggravating factors listed outnumber the mitigating factors, this is

¹⁰⁵⁷ *Norbis* (n 552) 538 (Brennan J).

¹⁰⁵⁸ *Markarian* (n 6).

¹⁰⁵⁹ See Chapter 3 [1.1].

¹⁰⁶⁰ See e.g. *Gregory* (n 392) 158-9 [32]-[36]; *McPherson* (n 392) [33]-[34] (Maxwell P); *Markarian* (n 6) 378-9 [53] (McHugh J).

¹⁰⁶¹ *Markarian* (n 6) 370 [24] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

¹⁰⁶² The Court has, for example, recognised that some quantification may be permitted in ‘simple’ cases: *Markarian* (n 6) 407 [138] (Kirby J); 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ). Other courts have indicated their support of a staged calculation of objective seriousness. See e.g.: Patrizia Poletti and Hugh Donnelly, *The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing in New South Wales, Monograph 33* (Judicial Commission of New South Wales 2010) 10; *MLP v R* (2006) 164 A Crim R 93, 99-101 [30]-[34] (Kirby J); *R v King* [2009] NSWCCA 117 [31].

¹⁰⁶³ *Markarian* (n 6) 386 [69].

¹⁰⁶⁴ *Markarian* (n 6) 379 [54].

common across sentencing models.¹⁰⁶⁵ As IS does not indicate how mitigating factors are to be weighed or balanced it is impossible to say that sentencing guidelines downplay their importance in comparison. Enumerating factors as guidelines do may actually encourage sentencers to give them more attention.¹⁰⁶⁶ There is also nothing in the guidelines that prevents judges from tailoring sentences to reflect appropriate sentencing purposes, including rehabilitation.

Far from being inconsistent with proportionality, the proposed guidelines outline a range of sentences proportionate to the seriousness of the offence. The principle acts to define the upper and lower limits, as envisaged by Kirby J,¹⁰⁶⁷ and judges may also make adjustments, even moving beyond the range, to ensure that the sentence imposed is proportionate. Contrary to another of McHugh J's suggestions, such adjustments are not a 'charade'.¹⁰⁶⁸ As noted in Chapter 4,¹⁰⁶⁹ sentencers applying IS routinely make adjustments to sentence and make a point of stepping back to consider a provisional sentence before making further changes. The structured approach of sentencing guidelines offers greater transparency than the IS model in that it helps in identifying the factors that lead to an adjustment of sentence.¹⁰⁷⁰ The linear reasoning process also means that departures from that structure are more likely to be manifest,¹⁰⁷¹ promoting transparency and facilitating appeal.

Justice McHugh suggests that the correctness of a sentence derived using a two-tier approach depends upon the correctness of underlying value judgements.¹⁰⁷² This is equally true of IS. Under a step-by-step model the individual decisions are more easily identifiable. Such an

¹⁰⁶⁵ Kate Warner, Julia Davis, Caroline Spiranovic, Helen Cockburn and Arie Freiberg, 'Measuring Jurors' Views on Sentencing: Results From the Second Australian Jury Sentencing Study' (2017) 19 *Punishment and Society* 180. See also Julian V Roberts and Mike Hough 'Exploring Public Attitudes to Sentencing Factors in England and Wales' in Julian V Roberts (ed) *Mitigation and Aggravation at Sentencing* (CUP 2011).

¹⁰⁶⁶ Roberts, Pina-Sanchez and Marder (n 729) 136.

¹⁰⁶⁷ See Chapter 3 [2.3]. See also Freiberg (n 37) 53-54; *Whyte* (n 60) 227 [156] (Spigelman CJ).

¹⁰⁶⁸ *Markarian* (n 6) 386 [69].

¹⁰⁶⁹ [2.2.5].

¹⁰⁷⁰ Warner (n 271) 359-60.

¹⁰⁷¹ Harris (n 699) 292-3.

¹⁰⁷² *Markarian* (n 6) 380 [56] (McHugh J).

approach can be helpful to judges considering numerous sentencing factors. It breaks down complex sets of facts and principles into manageable components, assisting sentencers to organise and explain their decision-making.¹⁰⁷³ Staged sentencing is not, as some suggest, a mathematical exercise, but an attempt to make the reasoning process, inevitably involving matters of judgement, more explicit.¹⁰⁷⁴

The SAC has recognised that where a step-by-step sentencing guideline applies it is not possible to employ IS, which is purposefully unstructured.¹⁰⁷⁵ The High Court has, however, acknowledged that legislation may expressly permit approaches other than IS.¹⁰⁷⁶ Contrary to the concerns of judges, a change in approach does not automatically constitute a threat to judicial discretion and individualised justice. The SAC model upholds these principles by permitting sentencers to consider factors not specified, decide upon the weight assigned to factors and to depart from guidelines when in the interests of justice.¹⁰⁷⁷ These arrangements also answer the suggestion that structured sentencing is wrong in principle as it fails to recognise that sentencing factors can conflict.¹⁰⁷⁸ The flexibility afforded by the guidelines allows judges to balance conflicting factors just as IS does. As experience in England and Wales has shown, the introduction of sentencing guidelines and a structured model does not mean an end to judicial discretion:

...the sentencing decision requires the judge to balance all the ingredients of the case, whether aggravating or mitigating, in order to produce the appropriate sentence. There is no grid plan. There is no points system. Although consistency of approach is undoubtedly to be encouraged, guidelines...remain guidelines.¹⁰⁷⁹

¹⁰⁷³ Traynor and Potas (n 15); Bagaric (n 15) 111.

¹⁰⁷⁴ *Markarian* (n 6) 398 [112] (Kirby J); Warner (n 271) 359-60; Edney (n 323).

¹⁰⁷⁵ Sentencing Advisory Council (n 21) 151 [7.48].

¹⁰⁷⁶ *Muldock* (n 13); Sentencing Advisory Council (n 21) 113 [6.5].

¹⁰⁷⁷ Sentencing Advisory Council (n 21) 135 [7.10].

¹⁰⁷⁸ *Wong* (n 10) 611-12 [75]-[76] (Gaudron, Gummow and Hayne JJ).

¹⁰⁷⁹ *Martin* [2006] EWCA Crim 1035; [2007] 1 Cr App R (S) 3, 18.

The striking similarity between this explanation and descriptions of IS¹⁰⁸⁰ suggest that the essential principles are the same, though applied in a different format.

2.1. Similarity to current approach

Despite some construing IS and structured sentencing as fundamentally opposed, in practice the difference is more ‘one of semantics rather than of substance’.¹⁰⁸¹ The decision-making process outlined in guidelines is similar to that already used informally by sentencers in Victoria. As the SAC explains, the proposed guidelines simply codify factors that sentencers are already required to consider, in the order in which most courts currently apply them.¹⁰⁸² These factors include: CSP, culpability and degree of responsibility for the offence and the offender’s previous character.¹⁰⁸³ As one interviewee noted, ‘I’d be very surprised if there’s anything that we are required by law to consider that is not in the guidelines’.

In theory, what is unfamiliar is approaching the task in distinct steps; assessing harm and culpability to determine the relevant range and starting point, then considering aggravating and mitigating circumstances.¹⁰⁸⁴ This sequence is, however, consistent with the informal structure that many interviewees currently apply.¹⁰⁸⁵ Interviewees described assessing culpability and where on the scale of seriousness the offence sits before considering aggravating and mitigating factors. As one judge summarised: ‘...you look at obviously the maximum penalty, you look at CSP. You look at the gravity of the offending, relatively speaking, and you look at matters personal to the individual.’

Another judge explained that ‘It’s only if it [IS] is truly the gut feel approach that guidelines are incompatible. But not when it’s...an evaluative judgment within parameters, as it in fact is.’

¹⁰⁸⁰ See Chapter 4 [1] and *Wong* (n 10) 611 [75] (Gaudron, Gummow and Hayne JJ).

¹⁰⁸¹ *Cameron* (n 33) 362 [71] (Kirby J). See also *Mulholland* (n 288) 479-480 (Angel J).

¹⁰⁸² Sentencing Advisory Council (n 21) 46-47 [6.13]-[6.18].

¹⁰⁸³ *Sentencing Act 1991* (Vic) s 5(2).

¹⁰⁸⁴ Sentencing Advisory Council (n 21) 46 [6.13].

¹⁰⁸⁵ See Chapter 4 [2.2].

Several judges recognised the similarities in the approaches. Discussing their responses to a presentation by members of the Sentencing Council for England and Wales, Treacy LJ and Professor Roberts about the guidelines model, judges explained:

I'm sitting there thinking: 'That's exactly what I do'. That's exactly what we do... it's not much different from what this sentencing thing that they're talking about...It's very structured.

...we do that anyway, it's just we do it from a collection of common law cases rather than in a statutory framework.

We do that same intellectual process of assessing the seriousness and then working out what the good and the bad points are but we don't do it within quite a constrained manner in terms of the numbers.

This third comment identifies the main practical difference between sentencing guidelines and the current informal approach. The consideration of numerical boundaries is not foreign to sentencers in Victoria given the use of sentencing ranges,¹⁰⁸⁶ calculation of non-parole periods¹⁰⁸⁷ and sentencing discounts.¹⁰⁸⁸ As that same judge explained, however:

It's not different conceptually...I think most of us start with the seriousness of the offence...the difference is we don't have, at that point, a starting point range...What is new and radical is the giving of numbers at that initial stage and then the adding and the subtracting from that...That is radical in the sense of it's a constraint. At the

¹⁰⁸⁶ See Chapter 6 [3.4].

¹⁰⁸⁷ See e.g. *Middleton v The Queen* [2018] VSCA 23, [104].

¹⁰⁸⁸ See e.g. *DPP v Cooper* [2018] VSCA 21, [43]-[44].

moment, in theory, we're unfettered about where you're going to be...And that's the thing I think people will baulk at because although at the moment there's a loose concept of a range there's no prohibition on going outside it as long as you say why you're doing it.

The consideration of figures early in the decision-making process may be a new experience for some but many interviewees discussed their awareness of what an offence is 'worth' or having an idea of the sentencing range in mind whilst making their decision.¹⁰⁸⁹ What must be remembered and impressed upon sentencers is that the starting point and category range are not hard constraints on discretion. They may be departed from and do not prevent the individualising of the sentence according to Step 2 factors.

Given the significant overlap in approaches, several judges did not believe the introduction of guidelines would make much difference to the sentencing process:

It doesn't change what I do because I do it already in a way. All it'll do is it'll change the way it reads.

...it doesn't seem to me that, presented with guidelines, we would be doing things differently because the law itself throws up guidelines which a judge simply can't ignore, although they might not be called 'guidelines'.

The guidelines simply present a more unambiguous process,¹⁰⁹⁰ 'a more transparent process which is not that dissimilar to what we currently do'.

¹⁰⁸⁹ See Chapter 4 [1.2.1].

¹⁰⁹⁰ Greg Davies, 'A Sentencing Guidelines Council for Victoria: Victims of Crime Commissioner' (21 December 2017) <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Submission_12_Victims_of_Crime_Commissioner.pdf> accessed 2 September 2020, 6.

3. Judicial attitudes to sentencing guidelines

Judicial support is critical to the success of sentencing guidelines in Victoria. Resistance and adaptive behaviour, what Ashworth terms the 'drag coefficient', can slow change in sentencing law and blunt its effectiveness.¹⁰⁹¹ Attitudes towards sentencing guidelines amongst interviewees varied: 'Some of us were supportive broadly of the concept, others were vehemently opposed and some probably don't really understand', though often there was overlap between the latter two groups.

A small number of interviewees were actively in favour of sentencing guidelines. These judges were well informed about the guidelines model. Several spoke about being persuaded by the presentation by Treacy LJ and Professor Roberts and discussions with other academics such as Professors Ashworth and Freiberg. Judges were attracted to the clear and consistent approach offered by guidelines:

...that to me seems to be a sensible and rational attempt to identify what are the factors that properly can put something into high/middle/low range offending...[G]uidelines [are] a very sensible and balanced way of still allowing individual discretion but having a proper consistency of approach.

Much better to have a systematic process of developing guidelines which will list out the aggravating factors and mitigating factors and give you the sentencing ranges...I'm immediately drawn to having that sort of framework, let's make sure everybody's applying the same list.

... [for] busy County Court judges and magistrates, I would think this ought to be a blessing. Seriously. We all have sort of mental checklists but to actually have a physical

¹⁰⁹¹ Ashworth (n 80) 262; Mackenzie (n 17) 4.

checklist, particularly in higher volume [cases], you know if you've got 15 different armed robbery charges and a number of drug charges and stuff, I would have thought something like this should be manna from heaven.

Judges discussed the implications of a guidelines model beyond the immediate changes to sentencing methodology:

I think that particularly in the days of the modern judge bashing, which is just getting incrementally worse all the time, that the promise of transparency and...with judicial input but also community input through carefully selected people, it ought to give a legitimacy to the process.

The appeals process would be more satisfactory if it was subject to more rigour like guidelines.

[Guidelines] have the advantage of being out there and being examined. It is a difficult thing. I say our process is a disciplined thing but it's the discipline, like so much of the rest of the common law, which is not understood by lay people.

Discretion remained a primary concern: 'I'm a supporter of moving to something like guidelines as long as we still have a lot of discretion'. Several judges recognised though that, by offering an 'escape clause', guidelines did not pose a threat to discretion. Those in favour of guidelines were generally of the belief that 'it has all the virtues of transparency and promoting consistency without constraining discretion in the individual case. And that's ideal...'.

3.1. Hostility

Several judges commented that they were not familiar with the details of the guidelines model applied in England and Wales or proposed by the SAC. As a result, some were hesitant to comment on its suitability in Victoria. Fewer than a third of interviewees were interested in discussing how sentencing guidelines might work. One judge contacted the interviewer a week after the interview to request a copy of the Assault Definitive Guideline, but the majority were not as receptive towards the possibility of guidelines, often quickly dismissing the idea.

A significant amount of the antipathy towards guidelines appeared to be based on an imperfect understanding of the model. A widely held belief was that sentencing guidelines impose stringent restrictions on judicial discretion but this belief was often based upon a misunderstanding of the structure of the guidelines. Just as Scottish judges misdescribed guidelines as 'a table' and 'a tariff system',¹⁰⁹² several interviewees believed they involved a grid and immediately denounced such a rigid, one size fits all, structure.

Even amongst those who understood the nature of guidelines, the majority were hesitant to support their introduction. Often judges cited concerns about loss of flexibility, repeating the arguments outlined in Chapter 7: 'it's impossible to bring in a set of guidelines that can fit an infinite number of factual situations...every case is different.' Apprehensions about the loss of individualisation were generally broadly expressed. Only one judge was specific in their concern:

...it's a disgrace where you can't do justice in an individual case because you have to go through the charade of finding some sort of exceptional circumstance that takes you out of the place on the grid where the individual, through 'objective circumstances', belongs. I just find that revolting, quite frankly.

¹⁰⁹² Brown (n 91) 171-173.

The categorisation of offences based purely on objective circumstances was of concern to three other judges. They did not appear to be aware of the consideration of further factors at Step 2. Judges regarded the use of figures as the introduction of an unacceptable mathematical element and the step-by-step approach as too fixed and formulaic. Most interviewees believed that guidelines would cause additional complications without improving sentencing practices or outcomes.

A smaller but still sizable group of interviewees, larger than those in favour of guidelines, were automatically dismissive of guidelines and vehement in their criticism. The suggestion of guidelines generated emotional reactions, as seen in the quote immediately above. Judges regarded the measure as offensive and ill conceived:

I still think it's wrong headed, the whole idea...you can train monkeys too, I'm serious, you can train monkeys too or you can colour by numbers if that's what you want to do...Introduce some grid system where there's no discretion and all you've got to do is find whether it falls within. It's just, it's idiotic...

Several interviewees reported that judges will resist the perceived intrusion into their discretion:

...people will do their best to circumvent the guidelines if a guideline in a particular case is going to potentially wreak an injustice. They'll find a way around it, don't you worry about that.

Ain't gonna happen, I'm not going to do it. I'll give it away if I have to, or maybe I never will do it, they [the Court of Appeal] can just keep knocking me over.

This overt hostility is reflective of a broader resistance to change. As one judge observed, ‘The very fact that it’s *immediate* opposition shows you how deep this stuff is.’ As discussed in Chapter 7, the resistance is a combination of prioritising judicial experience, a sense of judicial ownership over sentencing, negative experiences of previous sentencing reforms and a cultural conservatism carried over from the Criminal Bar. The opposition to guidelines was also reflected in the Supreme Court’s response to the SAC’s guidelines consultation,¹⁰⁹³ the most recent example in the Court’s history of resisting structured discretion.¹⁰⁹⁴ The description of the Court’s response to a 1988 discussion paper still accurately reflects current attitudes: ‘a disappointing document...almost entirely negative in character. Read as a whole the Committee feels it amounts to little more than a spirited defence of the status quo’.¹⁰⁹⁵

von Hirsch notes that courts have not displayed the same opposition and concern for the preservation of judicial power in other areas of law.¹⁰⁹⁶ It may be that, given the punitive element and potential restriction of liberty, judges feel that discretion and flexibility are of greater importance at sentencing than in other areas. A broad approach may be seen as standing firm against a supposedly more prescriptive, punitive and less humane approaches.¹⁰⁹⁷ Alternatively, with the great freedom IS affords, sentencers may simply be unused to acting within constraints and therefore any structure or change looks overly oppressive and therefore should be opposed.

The tendency to imagine alternative models as extreme and restrictive contributes to the perceived threat to discretion. In this way, the ‘shadow of the grid’¹⁰⁹⁸ has contributed to judicial suspicion of structured sentencing. The belief that they are akin or precursors to sentencing

¹⁰⁹³ Supreme Court of Victoria, ‘Submission by the Supreme Court of Victoria’ (December 2017) <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Submission_11_Supreme_Court_of_Victoria.pdf> accessed 2 September 2020.

¹⁰⁹⁴ See Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee* (Attorney-General’s Department of Victoria, 1988) 219-21; Mackenzie (n 17) 80; ALRC (n 464) 399.

¹⁰⁹⁵ Victorian Sentencing Committee (n 1094) 36; Mackenzie (n 17) 79.

¹⁰⁹⁶ von Hirsch (n 578) 411.

¹⁰⁹⁷ Tata (n 95) 236.

¹⁰⁹⁸ Roberts (n 128) 342.

grids leading to fierce opposition to guidelines. The hostility towards sentencing guidelines demonstrated by many interviewees is the manifestation of an inherent and long-standing opposition to sentencing reform. The majority of the judiciary have forcefully resisted attempts to introduce elements of structure to the sentencing process, including invitations to the courts themselves to develop sentencing guidance.

4. Jurisdictional differences

Judicial resistance is one key difference in the experience of sentencing reform in Victoria and England and Wales. While judges in the latter jurisdiction have embraced structured sentencing, Victorian judges remain resolutely opposed. Initially, a significant number of sentencers in England expressed similar opposition.¹⁰⁹⁹ This resistance was reduced by ensuring ongoing judicial involvement in the guidelines and through judges themselves identifying the need for greater consistency of approach and guidance on controversial sentencing questions.¹¹⁰⁰ The judicial majority on the Sentencing Council enables judges to retain control over the development of guidelines and ensure that they respect the traditions of judicial sentencing.¹¹⁰¹ In contrast to Australia, appellate courts in England and Wales have been actively engaged in issuing sentencing guidance.¹¹⁰² This tradition has been preserved through the retention of the CACD's power to issue guideline judgments.¹¹⁰³

Ashworth notes that the judiciary did exert pressure during discussions of the departure test for Council guidelines.¹¹⁰⁴ Generally though, the judiciary recognised the inherent flexibility of the guidelines and the room for discretion, individualised justice and appellate control.¹¹⁰⁵ While initially few judges actively advocated for sentencing guidelines, most were prepared to

¹⁰⁹⁹ O'Malley (n 9) 229; Bottoms and Parsons (n 1011) 5.

¹¹⁰⁰ Sir Igor Judge, 'Review: Sentencing Guidelines: Exploring the English Model' (2014) 130 LQR 678, 679-80.

¹¹⁰¹ Ashworth (n 1006) 454.

¹¹⁰² See e.g. Martin Wasik, 'Sentencing Guidelines in England and Wales—State of the Art?' (2008) 4 Crim LR 253; Ashworth and Roberts (n 844) 13-14.

¹¹⁰³ Coroners and Justice Act 2009 s 124(8).

¹¹⁰⁴ Ashworth (n 1006) 454.

¹¹⁰⁵ Ashworth (n 1006) 454.

work with them and adapted quickly to the new model.¹¹⁰⁶ Guidelines are now widely accepted by sentencers in England and Wales¹¹⁰⁷ and practitioners make regular use of them in advising clients and in submissions to the court.¹¹⁰⁸

4.1. Council membership

Experience in England and Wales has shown that it is possible to develop a detailed and prescriptive guideline scheme in the face of judicial scepticism.¹¹⁰⁹ So too in Scotland, and more recently Ireland, jurisdictions in which, like Australia, judges traditionally showed little interest in structured sentencing. In Australia, however, sentencing guidelines face active judicial opposition, rather than mere scepticism, and additional constitutional challenges.

A judicial presence on the body that develops sentencing guidelines is often regarded as a necessary feature. Judges' sentencing expertise and experience enables them to advise on whether the guidance offered is workable for sentencers and identify potential unintended consequences.¹¹¹⁰ They may also act as a bridge to the judiciary for the purposes of ongoing consultation.¹¹¹¹ The involvement of judges grants legitimacy and authority to the guidelines body. Without it, judges may lack confidence in the guidelines produced and act to subvert them and guidelines may be perceived as impermissible interference with judicial discretion.¹¹¹² There is a risk, however, that a judicial majority may not appropriately remedy the democratic deficit, that judges may be reluctant to constrain discretion and unaccustomed to policy development.¹¹¹³

¹¹⁰⁶ Ashworth (n 993) 30.

¹¹⁰⁷ Bottoms and Parsons (n 1011) 14.

¹¹⁰⁸ O'Malley (n 9) 229.

¹¹⁰⁹ Roberts (n 128) 343.

¹¹¹⁰ Young and King (n 123) 205.

¹¹¹¹ Sentencing Advisory Council (n 21) 26 [4.29].

¹¹¹² Sentencing Advisory Council (n 21) 13 [2.34].

¹¹¹³ Young and King (n 123) 206; Michael Tonry, 'Setting sentencing policy through guidelines' in Sue Rex and Michael Tonry (eds) *Reform and Punishment: The Future of Sentencing* (Willan 2002) 80.

Within Victoria, the primary concern is not about a judicial majority but whether judges should sit on the sentencing guidelines body at all. The *Australian Constitution* mandates the separation of powers.¹¹¹⁴ In *Kable*,¹¹¹⁵ this was held to require that state courts, when exercising federal jurisdiction, must only exercise powers consistent with the essential and defining characteristics of a court of law. That is, they should not perform legislative functions. It also requires the maintenance of the reality and appearance of independence, impartiality and the fairness of the court's processes.¹¹¹⁶

The SAC was advised that the proposed guidelines model, including current members of the judiciary sitting on the sentencing guidelines council, was constitutionally permissible.¹¹¹⁷ The judiciary, however, disagrees. The one position upon which all interviewees were united and definitive was that sitting judges cannot be part of the body creating sentencing guidelines: 'That just can't happen'. This was made clear in interviews and the Supreme Court's submission to the SAC guidelines consultation.¹¹¹⁸ While there is strictly no separation of powers at state level,¹¹¹⁹ judges explained that

We've a long tradition in this state of members of the judiciary not taking on positions that are incompatible with the exercise of judicial power...It sounds precious I know, but it's an important principle. It's been around for a long time.

Judges regarded sitting on the council as acting extra-judicially as it would involve advising the government and creating delegated legislation: 'They're legislating. Guidelines are truly

¹¹¹⁴ Chapters I, II and III; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

¹¹¹⁵ *Kable v DPP (NSW)* (1996) 189 CLR 51 (*Kable*).

¹¹¹⁶ *Kable* (n 1115) 116 (McHugh J).

¹¹¹⁷ Peter Hanks and Graeme Hill, 'Memorandum of Advice: Constitutional Validity of Proposed Sentencing Guidelines Council' (November 2017) <<https://www.sentencingcouncil.vic.gov.au/publications/sentencing-guidelines-council-victoria-issues-paper>> accessed 17 August 2020.

¹¹¹⁸ Supreme Court of Victoria (n 1093).

¹¹¹⁹ *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343, 368 [57] (Hayne, Crennan, Kiefel and Bell JJ); *Kable* (n 1115) 189 CLR 51, 78–80 (Dawson J), 92–94 (Toohey J), 109, 118 (McHugh J); *Wainohu* (2011) 243 CLR 181, 212–3 [52] (French CJ and Kiefel J) (*Wainohu*).

legislative instruments.’ One also considered it to be a ‘confusion of function’ to require judges, who have no experience in policy making, to perform such a role. The court has held that, even when acting in an individual capacity, as members of the council would be, there is the potential to diminish public confidence in the independence and impartiality of the judiciary.¹¹²⁰ In addition, several interviewees objected to the possibility of other judges directing their decision-making:

...the idea that another judge is telling me what to do, who’s not the Court of Appeal, is telling me the way I should think about things, I don’t think that’s very wise.

I would feel annoyed if a couple of judges from our court were put on that council whose views in some way bound me. Why should their views be more centrally important than my views, for example? Who says they know better than I do about these things?

This would seem to be incongruous with the habit of discussing potential sentencing outcomes with judicial colleagues. Two differences, both related to judicial control and discretion, appear to be important. First, that the sentencer may choose whether or not to seek advice from colleagues and, if so, which judges to speak to. Second, and similarly, the sentencer is under no obligation to follow the advice of their colleagues and may elect to disregard it completely. This is not the case where guidelines are presumptively binding, judges do not decide whether or not the guideline applies or to what extent they will follow the guideline.

One solution proposed by several interviewees and the SAC is the inclusion of retired judicial officers as council members.¹¹²¹ This would bypass any constitutional issues and allow the

¹¹²⁰ *Wainohu* (n 1119) 225-6 [94] (Gummow, Hayne, Crennan and Bell JJ); *Wilson v Ministers for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 22 and 25-6 (Gaudron J); Chief Justice Robert French, ‘Essential and Defining Characteristics of Courts in an Age of Institutional Change’, Supreme and Federal Court Judges Conference (21 January 2013, Adelaide) <<https://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac>> accessed 24 August 2020.

¹¹²¹ Sentencing Advisory Council (n 21) 26 [4.26]-[4.29].

council to perform broader functions, such as producing advice for government and monitoring the effect of the guidelines.¹¹²² Extensive consultation with the courts could be arranged to foster judicial confidence in sentencing guidelines.¹¹²³

Despite this solution, the vast majority of interviewees continued to oppose the introduction of guidelines. Interviewees saw little benefit in the potential for the council to reduce the criticism directed at sentencing judges, which they regarded as an inescapable part of the job: 'it just goes with the territory that you're going to cop the flack and [you] put up with that'. Generally, an outside body delivering sentencing guidance was regarded as an unnecessary infringement on judicial independence: 'it will result in persons other than serving judges imposing a framework on serving judges.' The outsourcing of the setting of sentencing ranges was described as 'unnecessary' 'undesirable' and 'not appropriate', particularly where the majority of those setting the figures had no direct sentencing experience. Broadly, interviewees' attitudes to sentencing guidelines and a council were accurately captured in one comment: 'ultimately it's better that the courts have control and supervision over this issue.'

4.2. Other differences

Finally, it is worth noting two further differences between Victoria and England and Wales that may influence the need for sentencing guidelines. First, the use of lay magistrates. The majority of cases in both jurisdictions are heard in Magistrates' courts. Within Victoria, magistrates are employed members of the judiciary with at least 5 years' standing as a lawyer.¹¹²⁴ In Magistrates' courts in England and Wales the majority of sentencing decisions are made by a bench of three volunteer lay magistrates. Magistrates sit two to three days a month and are not legally trained but sit with a legal advisor.¹¹²⁵ In this context, there is perhaps greater need for step-by-step sentencing guidance specifying the factors to be considered.

¹¹²² Sentencing Advisory Council (n 21) 20 [3.31].

¹¹²³ Sentencing Advisory Council (n 21) 36 [5.27].

¹¹²⁴ *Magistrates' Court Act 1989* (Vic) s 7(3)(b).

¹¹²⁵ Ashworth and Roberts (n 1004) 311.

Lay magistrates had even been using a form of sentencing guideline before the introduction of definitive guidelines.¹¹²⁶ In contrast, where sentencing is done by judges with extensive legal experience and engaged in sentencing on a regular basis, formal sentencing guidance may not be as necessary.

A further consideration is the size of the jurisdiction. Some contend that guidelines are unnecessary in jurisdictions with relatively small numbers of sentencers.¹¹²⁷ In contrast to large jurisdictions, such as England and Wales, in which divergent practices can develop across different localities and groups of sentencers, judges in Victoria rotate between metropolitan and regional courts. They are drawn from the same pool of permanent, full time judicial members, rather than part time judges or recorders. A smaller judiciary¹¹²⁸ enables regular discussion and consultation between Victorian sentencers, as discussed in Chapter 6. This increases awareness of approaches to sentencing and recent sentencing decisions, fostering the development of an informal, more consistent, decision-making approach. This could be said to reduce the need for guidelines.

However, as previous chapters have shown, IS, as applied in Victoria and Australia, can be inconsistent and opaque. A relatively small, experienced and professional judiciary cannot compensate for the deficiencies of the sentencing model they are required to apply. Greater structure can help to remedy some of these faults but without judicial support substantive change is difficult.

¹¹²⁶ Roberts (n 1098) 341.

¹¹²⁷ See discussion in The Sentencing Commission for Scotland (n 999) 39 [8.34].

¹¹²⁸ Approximately 68 County Court judges (civil and criminal judges) and 6 judges in the Supreme Court Criminal Trial Division, in comparison to the 1,777 salaried and 1,171 full-time-equivalent fee-paid Crown Court judges in England in 2018/19: County Court of Victoria, 'Judicial Support' (2020) <<https://www.countycourt.vic.gov.au/contact-us/judicial-support>> accessed 29 September 2020; Supreme Court of Victoria, 'Judicial Organisational Chart' (29 July 2020) <<https://www.supremecourt.vic.gov.au/about-the-court/our-judiciary/judicial-organisational-chart>> accessed 29 September 2020; Institute for the Government 'Criminal Courts' (*Performance Tracker* 2019, 2019) <<https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/criminal-courts>> accessed 29 September 2020.

5. The likelihood of reform

Roberts¹¹²⁹ identifies three features necessary for the successful implementation of sentencing guidelines. First, the judiciary must be receptive to the concept of guidelines.¹¹³⁰ As this chapter has made clear, that is not the case amongst the majority of the Victorian judiciary. Interviewees demonstrated a reluctance to consider change, in some cases actively resisting. In defending the status quo, judges often failed to consider alternatives objectively, instead assuming discretion would be severely compromised. As Freiberg and Ross note, there is difficulty in changing judicial behaviour, particularly when altering long established patterns of behaviour.¹¹³¹ The few interviewees who were open to the possibility of sentencing guidelines saw the need for ‘a very informed, sensible, comprehensive debate’ about sentencing. But they also recognised that within the judiciary there is ‘too much emotion around the whole topic’ and that ‘it [guideline sentencing] is controversial and that in itself is an impediment to getting the kind of support that you’d need in this state’.

The second criteria, closely connected to the first, is a willingness amongst senior judiciary to contribute to the development of guidelines. Within England and Wales this occurs through judicial involvement in the Sentencing Council and the development of sentencing guidance in conjunction with the CACD. Again, as interviewees’ responses make clear, this requirement is not met in Victoria. Judges are unwilling (and possibly unable) to sit on a guidelines council. Many have also expressed opposition to the development of guidelines, with some even objecting to attempts within the court to provide additional sentencing guidance.¹¹³²

Finally, there must be political impetus for the introduction of guidelines. This may be triggered, for example, by dissatisfaction with sentencing practices or unjustified disparity.¹¹³³

¹¹²⁹ Roberts (n 1098) 341.

¹¹³⁰ See also Michael Tonry, *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy* (Willan 2004) 118.

¹¹³¹ Arie Freiberg and Stuart Ross, *Sentencing Reform and Penal Change: The Victorian Experience* (Federation Press 1999) 3.

¹¹³² See Chapter 7 [3.2.1].

¹¹³³ Sarah Krasnostein and Arie Freiberg, ‘Sentencing Guideline Schemes Across the United States and Beyond’ in *Oxford Handbooks Online: Criminology and Criminal Justice* (OUP 2014) 16.

Experience in New Zealand demonstrates how lack of political will can derail attempts to introduce guidelines.¹¹³⁴ Within Australia, governments have repeatedly proved willing to engage in sentencing reform. Some attempts, like baseline sentencing and three strikes policies, have proven unsuccessful and been repealed. Others, however, like standard sentencing and mandatory minimums, have endured and must be applied, despite judicial reservations.

The entrenched nature of IS, its vigorous defence by the courts and judicial resistance to change mean that any substantive reform to the Australian sentencing model requires legislative action. While the Victorian government initially seemed willing, it has now resiled from its intention to introduce sentencing guidelines, most likely in response to the judiciary's firm opposition. Judicial opposition to sentencing reforms is not unusual, but the refusal to sit on the guidelines council appears to have deterred the government from making significant changes, despite the SAC recommending a valid alternative configuration. The reversal is a strategic calculation rather than one based on principle:

Now what we've heard...is that without the judges it [guidelines] won't go ahead and that seems to me to be so pig headed of the government. If it's right in principle, do it...To say 'Oh well if you judges won't be involved we won't do it' betrays the politics of it.

¹¹³⁴ See Chapter 1 [2.2].

The government has previously made substantive changes to court practice despite judicial opposition. One judge drew the useful parallel with the reform to jury directions:¹¹³⁵

...[I]t took legislation in the form of the *Jury Directions Act*¹¹³⁶ to completely revolutionise what we do with jury directions...There was some resistance and some of the old guard, who've now left, vehemently refused to do it. They still gave exactly the same charges because it wasn't mandatory...I think most of the new judges who've come in the last five years just direct in accordance with the *Act*. So there will be, if we bring in change, there'll be a rocky period for the old guard before people come on board but that's not a reason not to do it. But there will be huge resistance in the early days.

This suggests that the introduction of guidelines may be possible even if the first two criteria are not immediately or wholly satisfied. In this instance, the judiciary could be represented on a guidelines council by retired members and while many would decline, there is a small number of sitting judges willing to develop structured sentencing. Those judges who oppose sentencing guidelines would still be required to act professionally and apply guidelines where required. As with the jury directions, there may be some who resist, for example by finding reasons to depart from the guidelines, but, with increasing use and familiarity and reassurance that they do not obliterate discretion, guidelines could gradually become part of everyday sentencing practice.

Forcing such a change, admittedly a significant one, would likely lead to tension which the government may wish to avoid. In declining to implement sentencing guidelines they sacrifice the opportunity to bring greater clarity and consistency to the process and the court's near

¹¹³⁵ See Victorian Law Reform Commission, *Jury Directions Final Report* (Report 17, 2009); Criminal Law Review Department of Justice, *Jury Directions: A Jury-Centric Approach* (2015); Chris Maxwell and Greg Byrne, 'Making trials work for juries: pathways to simplification' (2020) 11 Crim LR 1034.

¹¹³⁶ *Jury Directions Act 2015* (Vic).

total control over sentencing continues. The best hope for structured sentencing is that judges become more receptive over time or that legislatures become bolder in implementing the recommendations of the SAC. The risk, however, is that where judicial views are allowed to dominate, existing views and values are simply reproduced and there is little possibility of change.¹¹³⁷

6. Conclusion

Through sentencing guidelines, Victoria could transition from an IS model which permits and conceals idiosyncratic decision-making to one which more effectively promotes transparency and accountability and thus the rule of law. The step-by-step approach helps to bring order to the reasoning of the sentencer; it structures but does not replace judicial discretion. While not perfect, guidelines have been shown to improve sentencing consistency without diminishing individualisation. Yet, as Freiberg notes, sentencing policy in Australia is rarely driven by evidence.¹¹³⁸

To say, as one interviewee did, that the proposal of sentencing guidelines is ‘not being well received’ by the judiciary is somewhat of an understatement. The majority of interviewees immediately dismissed the suggestion of guidelines, though often with limited understanding of how guidelines operate and believing that they fetter judicial discretion. The model proposed by the SAC, however, is deliberately designed to preserve discretion, for example through non-exhaustive lists of relevant sentencing factors and permitting departure from the guidelines when in the interests of justice. The SAC also recommends that the preservation of judicial discretion be an express legislative purpose of the guidelines council.¹¹³⁹ Contrary to the fears of many judges, guidelines are intended to guide, not eliminate, discretion.

¹¹³⁷ Mackenzie (n 17) 165.

¹¹³⁸ Freiberg (n 353) 453.

¹¹³⁹ Sentencing Advisory Council (n 21) 14 [2.36].

Australia is often a late adopter of sentencing ideas formulated elsewhere.¹¹⁴⁰ It may still follow the example of England and Wales and now Scotland, the latter having demonstrated that it is possible to overcome ingrained judicial resistance to structured sentencing. Given the strength of the Victorian judiciary's commitment to IS, however, any changes to the sentencing approach must come from outside. For now at least, the Victorian government seems unwilling to force significant change in the face of direct opposition from the court. Instead, it resorts to indirectly influencing sentencing, for example through standard sentences. This may raise sentencing levels and help the government to appear 'tough on crime' but it does nothing to address the fundamental flaws in the IS model. Structured sentencing is a means of improving consistency and transparency, promoting better understanding of sentencing decision-making and opening it to greater scrutiny. Yet while the judiciary, fearing restriction of discretion, remain vigorously opposed to reform, and while legislatures defer to this opposition, the possibility of change is disappointingly low.

¹¹⁴⁰ Freiberg (n 353) 452.

Conclusion

In a system based on proportionality, discretion is an essential feature, but it has long been recognised that the court's discretion 'must be governed by rule, not by humour: it must not be arbitrary, vague and fanciful; but legal and regular.'¹¹⁴¹ This is particularly true in relation to the imposition of penalties.¹¹⁴² Within Australia there is a clear divide between those seeking to structure judicial discretion and those, including the majority of the judiciary, defending wide discretion. Both points of view have been defended for the same reasons of fairness and avoiding injustice. Advocates for regulating discretion have argued that fairness and justice require structure in order to avoid unwarranted disparity. The counterargument is that wide discretion is necessary to take into account the individual circumstances of each case and deliver just outcomes.¹¹⁴³

1. Instinctive synthesis

The IS model centres around very broad judicial discretion, imposing the fewest possible restrictions, though the term and model do little to explain how that discretion is exercised.¹¹⁴⁴ As a phrase, 'instinctive synthesis' belies the careful decision-making and balancing involved in sentencing and opens the door to mischaracterisations of acting on a gut reaction or whim. To those outside the sentencing world, it offers no useful explanation of the process, while within that world the term has become 'almost boastful of the absence of any conceptual framework'.¹¹⁴⁵ IS is generally understood in the negative, as the absence of structure, numerical calculation and step-by-step reasoning. Considering all of the relevant factors in a single step is said to be justified on the basis that it grants sentencers maximum flexibility. It enables them to ensure the delivery of individualised justice, unrestricted by artificial structure, by tailoring the approach and sentence to the particular circumstances of the offence and

¹¹⁴¹ *R v Wilkes* (1770) 4 Burr 2527, 2539 (Lord Mansfield).

¹¹⁴² O'Malley (n 998) 374.

¹¹⁴³ Mackenzie (n 17) 80.

¹¹⁴⁴ *Wong* (n 10) 622 [102] (Kirby J).

¹¹⁴⁵ Justice Frank Vincent, 'Forward' (1995) 13(2) *Law in Context* 1, 1.

offender. Rather than directing decision-making, the emphasis is on minimising restrictions on sentencers. The consequence is that judges are left with very broad discretion, little formal guidance and even less restriction.

Given the great deal of power sentencing judges exercise, it is unsurprising that they would seek to protect the status quo. A sentiment expressed by several interviewees was that, at its heart, sentencing is a relatively straightforward task. Several characterised the weighing of relevant factors as instinctive in the sense that years of experience allows them to make sentencing decisions without needing to think about individual component evaluations. Many interviewees therefore saw little need for the further examination of current sentencing arrangements or reforms, which were often thought to introduce unnecessary complications.

1.1. Rule of law

The significant discretion afforded to sentencers under IS comes at a cost to the rule of law. By its very nature, IS allows for a variety of different decision-making approaches and can prevent those differences being explained or even identified. While any system founded on discretion involves a degree of disparity, the risk is greater where discretion is unregulated.¹¹⁴⁶

The complete absence of a common sentencing methodology means that IS facilitates, rather than discourages, divergent approaches. This completely undermines the consistency of approach the court claims to uphold. It also allows sentencers to emphasise the individual nature of each case, focusing on differences between cases rather than common features. Not only is this contrary to the value the court purports to place on collective judicial wisdom and experience, but it enables sentencers to justify the use of differing approaches and outcomes.

¹¹⁴⁶ See Chapter 6 [2].

The disparity facilitated by the IS model is further supported by the court's continual promotion of broad judicial discretion. The lack of structure, for example, is reinforced by the mantra that there are 'no golden rules'.¹¹⁴⁷ The resulting disparity is normalised through repeated declarations that reasonable minds may differ¹¹⁴⁸ and that there is no single correct sentence¹¹⁴⁹ but instead a permissible range within which the sentence should fall.¹¹⁵⁰ The same desire to preserve broad discretion fuels antagonism towards attempts to improve consistency. The courts have made clear that material such as sentencing statistics, ranges, comparative cases and CSP constitute only one element of the decision, are not binding and do not dictate or limit the exercise of sentencers' discretion.¹¹⁵¹

It is evident that IS allows for and legitimises a variety of sentencing approaches and outcomes, but the extent of the unwarranted disparity that results is unclear. This is due, in part, to an absence of quantitative research, but it is also the result of the lack of transparency inherent in IS. Characterising sentencing as instinctive and intuitive obscures the true decision-making process and discourages explanation of the reasoning, weighing and balancing that led to the sentence.¹¹⁵² So too does the IS pretence that all of the relevant factors are considered as part of a single decision. Breaking the sentencing decision down into a series of smaller decisions which inform the ultimate choice of sentence has been denounced as artificial and increasing the risk of error.¹¹⁵³ The reality though is that it is not possible to consider all of the relevant factors simultaneously. As explained in Chapter 4, many sentencing judges structure their decision-making in order to properly consider a variety of relevant factors, many of which often conflict. They organise those factors into categories relating to the offence; offender; principles and purposes; and sentencing range.

¹¹⁴⁷ *Geddes* (n 51) 555 (Jordan CJ); *Williscroft* (n 235) 299-300 (Adam and Crockett JJ); *King* (2004) (n 852) 434 [123] (McColl JA).

¹¹⁴⁸ *Hudson* (n 75) 616 [24].

¹¹⁴⁹ *MacNeil-Brown* (n 349) 680 [8] (Maxwell P, Vincent and Redlich JJA); *Monardo* (n 746) [28] (Batt JA); *Markarian* (n 6) 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Pearce* (n 62) 624 [46] (McHugh J, Hayne J and Callinan J).

¹¹⁵⁰ *Lowe* (n 52) 612 (Mason J); *Markarian* (n 6) 383-4 [65]-[66] (McHugh J); *MacNeil-Brown* (n 349) 681 [10](3) (Maxwell P, Vincent and Redlich JJA); *Monardo* (n 746) [28] (Batt JA).

¹¹⁵¹ *Dalgliesh* (HC) (n 12); *Pham* (n 739) 558 [27] (French CJ, Keane and Nettle J); *Hudson* (n 75) 617 [28]-[30]; *De La Rosa* (n 554) 72 [304] (Simpson J).

¹¹⁵² *Markarian* (n 6) 404 [130] (Kirby J).

¹¹⁵³ *Lett* (n 410) [74]-[75] (Hunt J); *Markarian* (n 6) 379-80 [54]-[55] (McHugh J).

The fact that IS prohibits an explanation of the value attributed to the relevant factors means that sentencers are required to speak in generalised terms about ‘having regard to’ the various considerations. Discouraging sentencers from properly articulating their decision-making process, how they treat individual factors and how those factors are balanced makes it unnecessarily difficult to understand how a sentencer arrived at the sentence. It also buries potential errors. *Markarian*¹¹⁵⁴ and *Cameron*¹¹⁵⁵ provide clear examples of errors that would not have come to light had the sentencing judge not made the ‘mistake’ of describing their treatment of particular factors. The correct approach, according to IS, would have been not to expose the error by explaining the treatment of individual factors but to discuss the relevant factors broadly. This, of course, does not stop the sentencer giving improper consideration to a factor, it simply means that the error is glossed over. No sentencing model should prevent judges from explaining their decision-making and potentially exposing errors and instead encourage concealment of those errors.

The rule of law requires that any judicial ruling must be subject to critical scrutiny¹¹⁵⁶ but IS stands in the way of meaningful accountability in several ways. Prohibitions against structure and the valuing of sentencing factors mean that sentencers are unable to fully articulate their decision-making process and underlying reasons. In this way, opportunities for identifying and interrogating biases and improper weighting of sentencing factors are lost. Such disparities and errors are excused and justified as part of the unique synthesis for the particular case.

The sentencing range is another hidden aspect of IS decisions. The range occupies a central position within sentencers’ decision-making with many identifying, almost automatically upon reading the case papers, where the offence should fit and being careful not to exceed the range and risk appeal. Yet the sentencing range itself is never articulated. It is for the judge to

¹¹⁵⁴ Similarly, in *Markarian*, it was through the efforts of Hulme J to be transparent in re-sentencing that the error was identified and able to be corrected upon appeal. But for the ‘ironic disclosure of error’ the appeal would probably never have been heard: *Markarian* (n 6) 393-4 [97]-[98], 407-8 [140] (Kirby J).

¹¹⁵⁵ *Cameron* (n 33) 363 [72] (Kirby J).

¹¹⁵⁶ *Allan* (n 159) 212.

determine but never to express or explain. Often identification of the range relies on ‘instinct’, ‘intuition’ and sentencers’ experience, concepts that can be used to deflect legitimate scrutiny. Even the label ‘instinctive synthesis’ can become a term to hide behind, creating an air of inaccessibility and making review of the decision-making difficult. An instinctive decision, not based upon discernible rules or structure, is a difficult one to interrogate. In all of these ways, the IS model obscures rather than clarifies sentencing decision making.

1.2. Structure and guidance

The lack of data about inconsistent approaches and unjustified disparity can mean that some do not see any need to critically examine the IS model or consider possible improvements.¹¹⁵⁷ Rather than engage with the model itself, the understanding of what constitutes consistency is expanded to include an ‘acceptable’ degree of inconsistency. Where the boundary between acceptable and unacceptable inconsistency lies, however, and how it is calculated, is never properly articulated.¹¹⁵⁸ The development by sentencers of an informal decision-making approach may also contribute to the belief amongst members of the judiciary that there is sufficient consistency of approach. The structure and careful, deliberate decision-making explained by many interviewees suggests that these decisions are not necessarily ‘instinctive’. Interviewees described using sequential reasoning and a process of continuous evaluation, stepping back and making adjustments. Many spoke about breaking the decision down into separate categories or steps. Though there is the potential for overlap and inconsistency in the consideration of those categories and factors, it indicates that judges find value and utility in structuring the sentencing task. As Ashworth observes, ‘[i]n view of the dearth of guidance, it is hardly surprising that sentencers have improvised’.¹¹⁵⁹ Whether judges consciously recognise it, the judiciary’s reliance on their own form of structure is an indication of the deficiencies of the IS model, the lack of structure and guidance.

¹¹⁵⁷ Krasnostein and Freiberg (n 1133). See e.g. Victorian Sentencing Committee (n 1094) Appendix A, 6.

¹¹⁵⁸ Appellate decisions that sentences are or are not manifestly inadequate or excessive provide the best indication but still give no comprehensive explanation of acceptable sentencing ranges.

¹¹⁵⁹ Ashworth (n 705) 27.

Judges have shown that they are willing to accept some guidance in their sentencing decision-making, with several interviewees pointing to the operation of sentencing principles as a means of ensuring consistency of approach. Proportionality acts as a limiting factor on available sentences and discretion.¹¹⁶⁰ Other principles¹¹⁶¹ do not impose such hard limitations and may only operate to the extent that they are consistent with individualised justice.¹¹⁶² The lack of guidance as to the prioritising of these competing principles compromises the consistency with which they are applied by various judges.

It is perhaps because of the flexibility they afford that judges are willing to accept guidance in the form of sentencing principles. Sentencers are more resistant to formal guidance and structure, as seen through the wary attitude towards comparative tools such as statistics, like cases, sentencing range and CSP. Even greater hostility is directed towards legislative interventions which are read down where possible in order to minimise their effect on judicial discretion.¹¹⁶³ Interviewees tended to view legislative amendments as unnecessary interferences that risk compromising fundamental sentencing principles. They resented being dictated to by 'outsiders', particularly those with no direct experience of sentencing. This is consistent with the belief commonly held by judges that sentencing is broadly a matter of common sense grounded in experience that requires minimal interference with judicial discretion.

2. Guidelines

This longstanding resistance partly explains the opposition amongst the majority of the judiciary to sentencing guidelines. While guidelines follow a very similar process to that already applied by sentencers and do so without undermining judicial discretion, there are still

¹¹⁶⁰ *Veen (No 1)* (n 49) 467 (Mason J); Brennan (n 458).

¹¹⁶¹ For example, parity, but also purposes of sentencing such as rehabilitation.

¹¹⁶² *Wong* (n 10) 591 [7] (Gleeson CJ).

¹¹⁶³ See e.g. *Hili* (n 11); *Muldrock* (n 13).

significant hurdles to be overcome if they are to be accepted and implemented in Victoria or Australia.

There is a noticeable similarity between the process outlined in the proposed Victorian guidelines, which draw heavily upon the guidelines in England and Wales, and the structure adopted by many sentencing judges in Victoria. There are three broad categories: the objective seriousness of the offence; sentencing range; and factors relating to the offender. While imposing greater structure than IS currently requires, sentencing guidelines formalise an approach already being applied. The sentencing decision-making process is outlined in a structured and coherent manner, one that effectively balances the need for structure and flexibility. The duty to follow the guidelines promotes consistency of approach but this duty is not absolute as departure is expressly permitted. The guidelines allow sentencers to respond to the circumstances particular to individual cases, deciding upon the weight assigned to each factor and taking into account factors not listed in the guidelines. In this way, guidelines operate to direct decision-making without compromising judicial discretion or the ability to deliver individualised justice.

Where sentencing under IS is an opaque and potentially widely varied exercise, through guidelines the sentencing process and guidance are made clear and accessible.¹¹⁶⁴ Such transparency contributes to greater understanding of the exercise of sentencing discretion and accountability. In addition, guidelines have also been shown to improve consistency¹¹⁶⁵ and individualisation.¹¹⁶⁶ Despite these advantages, Victorian judges remain hostile to the possibility of sentencing guidelines. Reflecting the attitudes discussed in Chapters 6 and 7, many do not perceive there to be significant flaws in the IS model and, as such, the cure is generally regarded as being worse than the disease.¹¹⁶⁷

¹¹⁶⁴ Sentencing Commission for Scotland (n 96) 10.

¹¹⁶⁵ Pina-Sánchez and Linacre (n 1048); Pina-Sánchez (n 714).

¹¹⁶⁶ Roberts, Pina-Sánchez and Marder (n 729).

¹¹⁶⁷ Freiberg (n 353) 424.

2.1. Responding to objections to sentencing guidelines

All of the objections commonly made against guidelines can be answered. The greatest concern relates to the impact on discretion but, as demonstrated above, in Chapter 8 and through the experience in England and Wales, guidelines operate to structure the exercise of discretion without fettering or diminishing it. The Victorian SAC in fact proposed that the preservation of judicial discretion be one of the legislative purposes of the guidelines council.¹¹⁶⁸ The SAC also provided a solution to another common concern, specifically the constitutionality of judicial involvement on the council, by proposing the involvement of retired members of the judiciary.

As one interviewee noted, the most significant difference between IS and the process outlined in guidelines would be the introduction of numbers during the decision-making process in the form of defined offence and category ranges. Several objected on the basis that this would bring an unacceptable mathematical element into sentencing, but this overlooks the fact that figures are already a feature of IS sentencing. Many interviewees described sentencing with reference to the sentencing range, albeit an unofficial range that they themselves had identified with reference to previous cases. As in guidelines, this often occurs at the beginning of the process with many interviewees explaining that they start their decision-making knowing the 'going rate' for the offence, even if they do not decide upon a specific figure until the end of the process. Numbers also feature regularly in the calculation of non-parole periods and guilty plea discounts.

Similarly, though many object to the introduction of structure to the sentencing process, structure is already being applied by sentencers. As discussed in Chapter 4, structuring of the sentencing decision was described in interviewee responses and is evident in sentencing remarks. As in the guidelines, sentencers consider sequentially factors relating to the offence

¹¹⁶⁸ Sentencing Advisory Council (n 21) 14 [2.36].

and then aggravating and mitigating factors relating to the offender, those factors informing the relevant principles and purposes of sentencing. The idea that sentencers consider all of the relevant factors in one step and instinctively divine a sentence is one that exists in theory only, it is not how sentencers actually go about their decision-making. There is order to the exercise, as well as a place for stepping back and for adjusting the sentence where necessary. The introduction of guidelines would only clarify an approach that is already in place.

Structured, even two-tiered, decision making is also in operation. The application of a reduction for a guilty plea is an example of discount two-tier sentencing as explained in Chapter 3. Some have attempted to distinguish this calculation as an exception relating to the administration of justice.¹¹⁶⁹ Whatever the purpose behind the adjustment, it involves a two-stage approach to the determination of sentence and there has been no suggestion that the sentencing process has been fundamentally compromised by this application of staged reasoning. Prior to the endorsement of IS in *Markarian* courts, several Australian jurisdictions applied sequential reasoning or a two-tiered approach. These approaches were not found to have resulted in any distortion of the sentencing process or any inherent error.¹¹⁷⁰ The majority in *Markarian* itself recognised that '[n]either the conclusion that a sentencer has reasoned sequentially, nor the observation that a sentencer has quantified the allowance made...reveals error'.¹¹⁷¹

As Kirby J¹¹⁷² observes, none of the features of IS that traditionalist IS advocates hold sacred are now absolute: mathematical adjustment is not absolutely prohibited;¹¹⁷³ a staged or sequential approach is sometimes permissible;¹¹⁷⁴ adjustment of sentence in light of one sentencing consideration, for example for a guilty plea, and quantification of that adjustment,

¹¹⁶⁹ See e.g. *Markarian* (n 6) 387 [74] (McHugh J).

¹¹⁷⁰ *Place* (n 310), 424-425 [80]-[83] (Doyle CJ, Prior, Lander and Martin JJ) (citations omitted).

¹¹⁷¹ *Markarian* (n 6) 307 [24] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

¹¹⁷² *Markarian* (n 6) 407 [138] (Kirby J).

¹¹⁷³ *Markarian* (n 6) 407 [138] (Kirby J); 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

¹¹⁷⁴ *Markarian* (n 6) 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

is often required in statute.¹¹⁷⁵ Yet sentencers continue to defend IS with vigour and resist the formalising of a structure that is already in operation.

3. Ongoing resistance to change

Even though these arguments against guidelines can be answered, resistance to guidelines remains strong amongst the judiciary. This may, in part, be the result of widespread misunderstanding about the impact of guidelines on judicial discretion. Amongst interviewees, it was a common assumption that introducing structure to the sentencing process would automatically involve restricting discretion. This is a reflection of the very narrow understanding of structured sentencing that has developed alongside IS, one that involves a heavily prescriptive approach with no room for departure. It is also a result of the tendency to envisage only extreme, restrictive approaches when considering reforms. As IS and judicial discretion have become so intertwined with the concept of individualised justice, changes to IS and the supposed threat to judicial discretion are perceived as a threat to this fundamental principle of Australian sentencing.

To some extent it is true that discretion will be altered with the introduction of guidelines. When operating within a sentencing model that allows practically any approach by the sentencer (other than a structured approach, in theory at least), asking sentencers to follow a particular step-by-step approach may feel like a restriction. Upon examining the details of the guidelines, however, it is clear that discretion is being *guided*, not limited; there is significant flexibility within the sentencing range and at each step. There is also scope for departure from the guidelines when necessary. These important details are regularly overlooked. Such misunderstanding fuels hostility towards guidelines and other reforms.

¹¹⁷⁵ See e.g. *Sentencing Act 1991* (Vic) s 5(2)(e).

Yet it appears that opposition to sentencing guidelines runs deeper than these principled objections. There is an element of defensiveness underlying the hostility. The proposal of reform implies a criticism of IS, this is extrapolated to become criticism of the sentences produced under that model and of the work done by the judges who produce them. Even more so when the criticism relates to IS, a model under which judges exercise a great deal of discretion and power over the sentence.

Judicial defensiveness may also be related to the resistance to change within the Criminal Bar discussed in Chapter 7. There is a feeling of ownership over sentencing based on expertise and experience, built up over years of practice in criminal law, and the sense that sentencing is a judicially controlled sacred space. One interviewee described the attitude conveyed by traditionalist IS sentencers as acting ‘ex-cathedra: “We will say that this is what sentencing is and you can’t contradict us”.’ Guidelines and other reforms constitute a challenge to this control and status quo. The strength with which the Australian judiciary defend their position and discretion is notable, even amongst jurisdictions that apply unstructured sentencing.¹¹⁷⁶ Opposition to the introduction of guidelines would seem to be simply the most recent expression of a long-standing resistance to change and reluctance to objectively assess the IS model and potential reforms.

Amongst those interviewed there were a minority, often those with experience outside the Criminal Bar, who were open to the possibility of sentencing reform. Many within that group acknowledged the potential benefits of structured sentencing, some recognising parallels between the proposed guidelines and their current approach to sentencing. The majority of interviewees, however, remained resistant to the idea of reforms to sentencing in Victoria.

¹¹⁷⁶ Tonry (n 106) 1; Freiberg (n 353) 420. See Chapter 3 [3.1].

Experience in other jurisdictions, such as Scotland, demonstrates that attitudes amongst the judiciary are not necessarily fixed and that acceptance of structured sentencing can develop over time. Presently in Australia, however, there would seem to be little appetite for such change. This was made clear in interview responses and is also evident in numerous decisions by the High Court in which the Court seeks to defend the broadest possible judicial discretion at sentencing. The Court has used sentencing appeals to emphasise the need to have regard to individual circumstances and to reject structured approaches or rules, whether judicial or statutory, even where the appeals do not involve the imposition of limitations on discretion.¹¹⁷⁷ As the treatment of guideline judgments in *Wong* demonstrates, even when courts themselves are invited by the legislature to issue sentencing guidance, and thereby retain control of the sentencing process, the High Court will not support such measures. Any development seen as having the potential to limit judicial discretion is regarded as a threat.

The decisions of the High Court are an indication of the efforts necessary to reform sentencing in Australia. They make clear that such efforts will have to come from the legislature. Momentarily in Victoria, it seemed as though there was the necessary interest in substantive reform. The introduction of sentencing guidelines and a sentencing guidelines council would have been ‘one of the most significant changes to sentencing in Australia in recent memory...a unique opportunity to better achieve the necessary balance between consistency, transparency and discretion in sentencing’.¹¹⁷⁸ It seems that opportunity is now lost, scuppered by a judicial majority intent on preserving the status quo and a legislature unwilling to push forward against resistance.

As Roberts, Hough and Ashworth observe, ‘the whole ethos of sentencing reform in common law jurisdictions over the past 30 years has involved moving away from intuitive, “gut-feeling” sentencing.’ Increasingly, in moving away from intuitive decision-making, common law

¹¹⁷⁷ Allsop (n 694) [46]. See e.g. *Hili* (n 11); *Green* (n 52); *Bugmy* (n 32); *CMB v Attorney-General (NSW)* (2015) 256 CLR 346.

¹¹⁷⁸ Sentencing Advisory Council (n 21) v.

jurisdictions are moving towards structured sentencing. Experiences in those jurisdictions, most particularly England and Wales, show that it is possible to balance structure with ample judicial discretion, to deliver sentences that are proportionate and tailored to the particular circumstances of the case. More than that, they show that introducing structure to sentencing also improves the transparency, consistency and the individualisation of sentences.

In this context, it becomes increasingly difficult to justify a sentencing model that purports to rely on judicial instinct. In no other area of law are the decisions of the court said to be based upon instinct and nor should they be. The exercise of discretion should be governed by clear and consistent guidelines and rules. Judicial discretion at sentencing should be no different. A sentencing model should promote the rule of law and 'should encourage revelation at least of the important adjustments that are made by a sentencing judge'.¹¹⁷⁹ The IS model does not do so. Instead, IS normalises disparity, conceals error and impedes scrutiny. Other jurisdictions and the SAC have provided a means of addressing these defects and a way forward for Australian sentencing in the form of structured sentencing but, for now at least, that opportunity goes unappreciated.

¹¹⁷⁹ *Markarian* (n 6) 404 [130] (Kirby J).

APPENDICES

A – Schedule of questions

- What do you understand the term 'instinctive synthesis' to mean?
 - Is IS an accurate description of the process used in Australia?
- How do you apply the IS model of sentencing in practice?
- Explain the decision-making process you use when formulating a sentence.
- What role does the concept of sentencing range play in your decision-making?
 - Non-criminal background?
 - Do most practitioners know the ranges/going rates?
- Do you discuss potential sentences with colleagues?
- Explain the process of writing sentencing remarks.
- How often do you change your mind about the final sentence?
- Can IS be reconciled with consistency?
 - If the emphasis is on consistency of approach why not adopt a structured approach?
- Can IS be reconciled with transparency?
 - Transparency (eg *Cameron*, wouldn't have known mistake was made unless process explained)
- Explain how totality is applied. How do you determine the extent to which sentences are cumulative or concurrent?
- How has the judiciary responded to recent legislative changes (eg baseline sentencing, standard sentences)?
- How have standard sentencing provisions impacted sentencing? Was there any discussion amongst judges about how to apply the provisions?
- What are your thoughts on sentencing guidelines? If introduced in Victoria are they likely to be supported by judges?
- How will sentencing in Victoria change following *Dalgleish*?
- How, if at all, do you think sentencing in Victoria should be reformed?
- What more can be done to make sentencing decisions and reasoning more accessible to offenders/victims/the public?
- How has sentencing changed over your time in practice and on the bench?

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