

**PUNISHING PARENTS:  
A STUDY OF FAMILY HARDSHIP  
IN AUSTRALIAN SENTENCING**

A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF  
PHILOSOPHY OF THE AUSTRALIAN NATIONAL UNIVERSITY  
AUGUST 2018

**Wendy Ann Kukulies-Smith  
(u3109764)**

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## **DECLARATION OF ORIGINAL WORK**

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I declare that, except where otherwise stated, the work contained in this thesis and submitted for the Doctor of Philosophy, is my original work and not the work of any other person.

Signed: Wendy Kukulies-Smith

Date: 19 August 2018

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## ABSTRACT

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Historically, sentencing courts have found it appropriate to take into account the impact of an offender's sentence upon their dependants. This mitigating factor in sentencing has been described as 'family hardship'. However, in Australia family hardship is a controversial sentencing factor with some sentencing judges denying that it is a mitigating factor at all. This dissertation is a study of the family hardship as a mitigating sentencing factor and a study of the sentencing principle that has developed in respect to this sentencing factor up to the landmark decision in *Markovic v The Queen* (2010) 200 A Crim R 510. The overall purpose of this dissertation has been to trace the way that courts have approached family hardship and to contribute to current knowledge. The research for this dissertation involved a study of the case law on family hardship within Australia. This consisted of a series of jurisdictionally based studies of sentencing remarks and appellate judgments to reveal how judicial officers have approached family hardship at sentencing.

Drawing upon an extensive and systematic analysis of the case law, this dissertation sheds light upon the practical operation of common law, including where there has been legislative enactment of sentencing factors, and presents a critical analysis of the operation and development of Australian sentencing principles. The dissertation first outlines the Australian sentencing landscape before looking at the tensions that have arisen in respect to this contentious sentencing factor. In addition to an extensive and unique review of Australian state and territory jurisprudence on family hardship the dissertation also draws upon secondary research literature to contextualise these tensions. This dissertation also presents the results of a study into federal sentencing practices on family hardship. These results are examined alongside state and territory sentencing practices and the original research conducted for this dissertation. The findings presented define and develop a new agenda for research on mitigating factors, sentencing principles and Australian federal sentencing laws and practice.

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## ABBREVIATIONS

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ABS	Australian Bureau of Statistics
ALRC	Australian Law Reform Commission
AustLII	Australasian Legal Information Institute
CDPP	Commonwealth Director of Public Prosecutions
CSD	Commonwealth Sentencing Database
NJCA	National Judicial College of Australia
NSWLRC	New South Wales Law Reform Commission
UK	United Kingdom
USA	United States of America

# 1. PUNISHING PARENTS

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## I INTRODUCTION

In Australia, there are currently no official statistics kept on the number of children affected by the imprisonment of a parent.<sup>1</sup> The Australian Bureau of Statistics ('ABS') does not collect these data nor do Australian prisons. In Australia, since the 1980s attention was drawn to the difficulty of estimating the number of children affected by the incarceration of a parent.<sup>2</sup> Over the years, Standing Committees and numerous reports to government have recommended data collection.<sup>3</sup> However in 30 years, no change has occurred in recording such information. For example, Susan Dennison was awarded an Australian Research Council Future Fellowship to *estimate* the number of children affected by an imprisoned parent.<sup>4</sup>

A failure to keep official statistical information on the number of children affected by incarcerated parents is not unique to Australia. For example, Renny Golden has

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<sup>1</sup> The data which is available from surveys and academic studies will be discussed below.

<sup>2</sup> Betty Hounslow, Annie Stephenson, Julie Stewart and Jane Crancher, *Children of Imprisoned Parents* (The Family and Children's Services Agency, Ministry of Youth and Community Services of New South Wales, 1982) 1; Gloria Larman and Ann Aungles, 'Children of Prisoners and their Outside Carers: The Invisible Population' (Paper presented at the Women and the Law, Canberra, 24-26 September 1991) 263; Ann Aungles, *The Prison and the Home: A Study of the Relationship Between Domesticity and Penalty*, The Institute of Criminology Monograph Series No 5 (1994) 86; Anti-Discrimination Commission (Qld), *Women in Prison* (Report, Anti-Discrimination Commission Queensland, 2006) 30.

<sup>3</sup> See Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *A Report into Children of Imprisoned Parents*, Report No 12 (1997) iii (Key Conclusions); Women's Legal Service (SA) Inc, *Taken In, When Women with Dependent Children Are Taken Into Custody: Implications for Justice and Welfare* (2000) 2, 28-29 (recommendation 6); South Australian Government Attorney-General's Department, *Children of Prisoners Project*, (Steering Committee's Report to the Justice Cabinet Committee, Justice Strategy Division, July 2005) 9-10; Simon Quilty et al, 'Children of Prisoners: A Growing Public Health Problem' (2004) 28(4) *Australian and New Zealand Journal of Public Health* 339; Legislative Assembly Standing Committee on Community Services and Social Equity, Parliament of the Australian Capital Territory, *The Forgotten Victims of Crime: Families of Offenders and their Silent Sentence*, Report 6 (2004) xv-xvi (recommendation 16), 65-66; Rosemary Woodward, 'Families of Prisoners: Literature Review on Issues and Difficulties' (Occasional Paper No 10, Australian Government Department of Family and Community Services, 2003) vii-viii, 6; Nicola Tudball, *Doing it Hard: A Study of the Needs of Children and Families of Prisoners in Victoria* (Victorian Association for the Care and Resettlement of Offenders, 2000) xii and 78; Anti-Discrimination Commission (Qld), *Women in Prison* (Report, Anti-Discrimination Commission Queensland, 2006) 123 (Recommendation 56); Terry Hannon, *Children: Unintended Victims of Legal Process* (Action Paper, Victorian Association for the Care and Resettlement of Offenders, March 2007) 27.

<sup>4</sup> Jill Rowbotham, *Unlocking Lives of Prisoners' Children* (16 September 2009) The Australian <<http://www.theaustralian.news.com.au/story/0,25197,26078249-27703,00.html>>; Australian Government, *Welcome to the ARC's Archive Website*, Australian Research Council <[archive.arc.gov.au](http://archive.arc.gov.au)>.

noted that in the United States of America ('USA'), 'most prisons do not even request information about a woman's children when she is sent through classification'.<sup>5</sup> In Australian and overseas research literature the families of offenders have been branded as the: 'hidden victims', 'invisible victims' or 'forgotten victims' of crime.<sup>6</sup> In recent years, the work of researchers such as Pat Carlen, Helen Codd, Susan Easton, Renny Golden, and Christine Piper have stressed that the impact of imprisonment upon offender's dependants remains a serious problem for criminal justice systems.<sup>7</sup>

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<sup>5</sup> Renny Golden, *War on the Family: Mothers in Prison and the Families They Leave Behind* (Routledge, 2005) 29.

<sup>6</sup> *Australia*: Gloria Larman and Ann Aungles, 'Children of Prisoners and their Outside Carers: The Invisible Population' (Paper presented at the Women and the Law, Canberra, 24-26 September 1991); Ann Aungles, *The Prison and the Home: A Study of the Relationship Between Domesticity and Penalty*, The Institute of Criminology Monograph Series No 5 (1994); Ann Cunningham, 'Forgotten Families: The Impacts of Imprisonment' (2001) 59 *Family Matters* 35; Simon Quilty et al, 'Children of Prisoners: A Growing Public Health Problem' (2004) 28(4) *Australian and New Zealand Journal of Public Health* 339; Betty Hounslow, Annie Stephenson, Julie Stewart and Jane Crancher, 'Children of Imprisoned Parents' (Report, Ministry of Youth and Community Services of New South Wales, 1982) 1; Legislative Assembly Standing Committee on Community Services and Social Equity, Parliament of the Australian Capital Territory, *The Forgotten Victims of Crime: Families of Offenders and their Silent Sentence*, Report 6 (2004); Dot Goulding, *Severed Connections: An Exploration of the Impact of Imprisonment on Women's Familial and Social Connectedness* (Murdoch University, 2004) 12; Shine for Kids Co-operative Ltd, *Putting Your Child First, A survival guide for carers of children of prisoners, their families and workers* (SHINE for Kids, 2007); South Australian Government Attorney-General's Department, *Children of Prisoners Project*, (Steering Committee's Report to the Justice Cabinet Committee, Justice Strategy Division, July 2005); Catherine Flynn, Bronwyn Naylor and Paula Fernandez Arias, 'Responding to the Needs of Children of Parents Arrested in Victoria, Australia. The Role of the Adult Criminal Justice System' (2016) 49(3) *Australia and New Zealand Journal of Criminology* 351. *International*: Roger Shaw, *Children of Imprisoned Fathers* (Hodder and Stoughton, 1987); Roger Shaw, 'Prisoners' Children and Politics: An Aetiology of Victimisation' (1990) 4(3) *Children & Society* 315, 351; Roger Shaw (ed), *Prisoner's Children: What Are the Issues* (Routledge, 1992) xiii-xvi; Helen Codd, 'Prisoners' Families: The "Forgotten Victims"' (1998) 45(3) *Probation Journal* 148; Helen Codd, 'Prisoners' Families: Issues in Law and Policy' (2004) 55 *Amicus Curiae* 2, 3; Helen Codd, *In the Shadow of Prison: Families, Imprisonment and Criminal Justice* (Willan Publishing, 2008) 12-16, 169, 172-173; Brenda McGowan and Karen Blumenthal, 'Children of Women Prisoner: A Forgotten Minority' in Laura Crites (ed), *The Female Offender* (Lexington Books, 1978) 121; Karen Mason, 'They Do Time Too: The Effects Of Imprisonment On The Families Of White-Collar Offenders' in G.L. Fox and M.L. Benson (eds), *Contemporary Perspectives In Family Research Volume 2: Families, Crime and Criminal Justice* (Elsevier Science, 2000) 325, 325; Jacquelyn Sandifer and Suzanne Kurth, 'The Invisible Children of Incarcerated Mothers' in G.L. Fox and M.L. Benson (eds), *Contemporary Perspectives In Family Research Volume 2: Families, Crime and Criminal Justice* (Elsevier Science, 2000) 361, 361; Roger Shaw (ed), *Prisoner's Children: What Are the Issues* (Routledge, 1992); Nigel Walker, *Why Punish?* (Oxford University Press, 1991) 106; Janet Walker, 'Silent, Forgotten and Vulnerable: Examining the Risks for Children with a Parent in Prison' (2007) 69 *Amicus Curiae* 10, 12; Gwyneth Boswell and Peter Wedge, *Imprisoned Fathers and Their Children* (Jessica Kingsley Publishers, 2002) 11; Joseph Murray and David Farrington, 'The Effects of Parental Imprisonment on Children' (2008) 37 *Crime & Justice* 133, 133.

<sup>7</sup> Renny Golden, *War on the Family: Mothers in Prison and the Families They Leave Behind* (Routledge, 2005); Pat Carlen (ed), *Women and Punishment: The Struggle for Justice* (Willan Publishing, 2002); Pat Carlen and Anne Worrall, *Analysing Women's Imprisonment* (Willan Publishing, 2004); Helen Codd, 'Prisoners' Families: Issues in Law and Policy' (2004) 55 *Amicus Curiae* 2; Helen Codd, 'Through the Looking Glass? Prisoners' Children and Penal Policy' (2007) 69 *Amicus Curiae* 3; Helen Codd, *In the Shadow of Prison: Families, Imprisonment and Criminal Justice* (Willan Publishing, 2008); Susan

### A. Rising Imprisonment Rates in Australia

Consistent with worldwide trends, prison populations within Australia are increasing. For example, from 1991 to 2001, the Australian prison population increased by 50%.<sup>8</sup> The most recent statistics report further growth in 2016 the number of sentenced prisoners in 'adult corrective services custody'<sup>9</sup> in Australia was 38,845 prisoners.<sup>10</sup> In 2017, this figure had grown by 6% to be 41,202 prisoners.<sup>11</sup> The highest distribution of sentenced prisoners within Australia are in the eastern states. These states hold 70% of the country's prisoners: New South Wales (32% or 13,149), Queensland (20% or 8,476) and Victoria (17% or 7,149).<sup>12</sup>

Rising rates of imprisonment within Australia also includes rising rates of imprisonment for female offenders. In 1991, just under 5% of the Australian prison population were female.<sup>13</sup> By 2013, the female prison population had increased to 8%<sup>14</sup> (where it currently sits<sup>15</sup>). A dramatic shift in the imprisonment rates for women within Australia was highlighted by the ABS in the *Australian Social Trends Report* for 2004.<sup>16</sup> What was unique about this reporting series was that it specifically examined the issue of women in prison.<sup>17</sup> It reported that

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Easton, 'Dangerous Waters: Taking Account of Impact in Sentencing' (2008) 2 *Criminal Law Review* 105; Christine Piper, 'Should Impact Constitute Mitigation?: Structured Discretion Versus Mercy' (2007) 2 *Criminal Law Review* 141; Christine Piper, 'Safeguarding and the Sentencing Courts' (2007) 37 *Family Law* 337; Susan Easton and Christine Piper, 'What's Sentencing Got to Do with It?' Understanding the Prison Crisis' (2006) 8(4) *Contemporary Issues in Law* 356; Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (Oxford University Press, 2<sup>nd</sup> ed, 2008) 348-349; Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (Oxford University Press, 3<sup>rd</sup> ed, 2012) 302.

<sup>8</sup> See Australian Bureau of Statistics 2002, *Prisoners in Australia, 2001*, cat. no. 4517.0, ABS, Canberra.

<sup>9</sup> Australian Bureau of Statistics 2016, *Prisoners in Australia, 2016*, cat. no. 4517.0, ABS, Canberra.

<sup>10</sup> These statistics are from 30 June 2016, see Australian Bureau of Statistics 2016, *Prisoners in Australia, 2016*, cat. no. 4517.0, ABS, Canberra.

<sup>11</sup> Australian Bureau of Statistics 2017, *Prisoners in Australia, 2017*, cat. no. 4517.0, ABS, Canberra.

<sup>12</sup> *Ibid.*

<sup>13</sup> Australian Bureau of Statistics, *Media Release: Over half of Australia's prisoners are 20-35-year-old males*, 20 February 2003, Australian Bureau of Statistics

<[<sup>14</sup> Australian Bureau of Statistics 2014, \*Prisoners in Australia, 2013\*, cat. no. 4517.0, ABS, Canberra.](http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/4517.0Media%20Release12002?opendocument&tabname=Summary&prodno=4517.0&issue=2002&num=&view=2002,></a></p></div><div data-bbox=)

<sup>15</sup> Australian Bureau of Statistics 2017, *Prisoners in Australia, 2017*, cat. no. 4517.0, ABS, Canberra.

<sup>16</sup> Australian Bureau of Statistics 2004, *Australian Social Trends, Other areas of social concern, Women in Prison 2004*, cat. no. 4102.0, ABS, Canberra.

<sup>17</sup> *Ibid.*

'[b]etween 1995 and 2002, there was a 58% increase in the imprisonment rate for women in Australia.'<sup>18</sup> This highlighted significant change, but it was also noteworthy because the rate of imprisonment for male offenders in the same period revealed only a 15% increase.<sup>19</sup> This showed that the rising imprisonment rate for women almost quadrupled the rate for men. In 2012, the ABS reported that female imprisonment rates in Australia were still increasing at a faster rate than male imprisonment rates.<sup>20</sup>

The statistical changes in female imprisonment rates presented in the 2004 'Women in Prison' report was even more alarming in respect to female indigenous offenders. In this period, the ABS reported that 'the number of indigenous women prisoners increased by 124%.'<sup>21</sup> The overall indigenous imprisonment rates in Australia are shocking. Recent ABS statistics show that the Aboriginal and Torres Strait imprisonment rate is '13 times greater than the age standardized imprisonment rate for non-Indigenous person[s].'<sup>22</sup> In terms of the impact on children of offenders, it is estimated that one in four indigenous children are affected by parental imprisonment before they reach 16 years of age.<sup>23</sup>

The change in the official number of female offenders being dealt with by courts in Australia is being felt at all levels of the court hierarchy. For example, Patrizia Poletti's study of sentencing of female offenders New South Wales courts found that from 1995-1998 there was a 16.3% growth in the sentencing of women in

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Australian Bureau of Statistics, *Media Release: Women Prisoners Increasing at a Faster Rate Than Men* (6 December 2012), Australian Bureau of Statistics <  
<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/4517.0Media%20Release12012?opendocument&tabname=Summary&prodno=4517.0&issue=2012&num=&view=>>

<sup>21</sup> Ibid.

<sup>22</sup> Australian Bureau of Statistics 2016, *Prisoners in Australia, 2016*, cat. no. 4517.0, ABS, Canberra.

<sup>23</sup> See, eg, Shine for Kids Co-operative Ltd, *Putting Your Child First, A survival guide for carers of children of prisoners, their families and workers* (SHINE for Kids, 2007) 4. See also Betty Hounslow, Annie Stephenson, Julie Stewart and Jane Crancher, *Children of Imprisoned Parents* (The Family and Children's Services Agency, Ministry of Youth and Community Services of New South Wales, 1982) 111-117; Susan Dennison, Anna Stewart and Kate Freiberg, 'A Prevalence Study of Children with Imprisoned Fathers: Annual and Lifetime Estimates' (2013) 48(3) *Australian Journal of Social Issues* 339, 341; Susan Dennison et al, "'My Life is Separated": An Examination of the Challenges and Barriers to Parenting for Indigenous Fathers in Prison' (2014) 54(6) *British Journal of Criminology* 1089, 1090.

local courts.<sup>24</sup> During the same period the growth in sentencing for male offenders in the local courts was only 7.6%.<sup>25</sup>

All of this data indicates that rising rates in female imprisonment is part of a changing landscape rather than a one-off anomaly. Importantly, rising female incarceration rates in Australia suggests an underlying social problem with respect to the effect of the incarceration of primary caregivers upon dependent children. Rising female incarceration rates also means we are at a time when greater attention must be paid to sentencing law and principles as they apply to female offenders.

### *B. Unknown Numbers of Affected Dependent Children*

It is not known how many imprisoned women in Australia have dependent children. In its 2004 Report, the ABS identified that '67% of female prisoners were aged 18-35 years at June 2002'.<sup>26</sup> The Report then posited that many of these women will have dependent children. It stated:

This age distribution means that many women in prison have dependent children at the time of entering prison: around 60% of women in prison had children aged less than 16 years of age according to recent state surveys.<sup>27</sup>

This statement in a report on 'Women in Prison' is illustrative of the paucity of information within Australia on this important social phenomenon. It is based upon an inference that women who are of child-bearing age are *likely* to have dependent children and then, the estimated numbers were sourced from state surveys.<sup>28</sup>

In Australia, because of the limited data, it is common for surveys and projections to be the source of information. For example, in 2006 the Legislative Council Standing Committee on Law and Justice in its report on Community Based

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<sup>24</sup> This study looked at sentencing across local, district and supreme courts see Patrizia Poletti, 'Sentencing Female Offenders in New South Wales' (Sentencing Trends No 20, Judicial Commission of New South Wales, May 2000).

<sup>25</sup> Ibid.

<sup>26</sup> Australian Bureau of Statistics 2004, *Australian Social Trends, Other Areas of Social Concern, Women in Prison 2004*, cat. no. 4102.0, ABS, Canberra.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

Sentencing Options,<sup>29</sup> cited figures from community based organisations (Uniting Care and Beyond Bars) when addressing the problems faced by female offenders.<sup>30</sup> The Report stated, 'around 60% of women in prison are parents, with 30-40% being sole carers.'<sup>31</sup> Research literature from the United Kingdom ('UK') and the USA has reported that generally 65% to 80% of incarcerated female offenders have dependent children.<sup>32</sup> The spread of these figures suggests a wide margin of error in the estimates.

Ann Farrell has predicted that the percentage of incarcerated women in Australia with dependent children is actually closer to 85%;<sup>33</sup> drawing upon data from a Queensland combined community agencies report (1990) and the New South Wales Women's Action Plan (1994).<sup>34</sup> Patricia Easteal also accepts the 85% figure for imprisoned women with dependent children (in Victoria, New South Wales and Queensland).<sup>35</sup> The most recent figures available on women serving a term of imprisonment in Australia are set out in the ABS Publication 'Prisoners in Australia, 2017'.<sup>36</sup> On 30 June 2017 there were 3, 299 women serving a term of imprisonment within an Australian prison.<sup>37</sup> This would mean that 1, 979 – 2, 804

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<sup>29</sup> Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report 30 (2006).

<sup>30</sup> *Ibid* 57-59.

<sup>31</sup> *Ibid* 58.

<sup>32</sup> *United Kingdom*: Vanessa Munro, 'From Mothering Behind Bars to Parenting Beyond Barriers? The Right of Family Life and the Politics of Imprisonment' (2007) 69 *Amicus Curiae* 6, 6; Belinda Brooks-Gordon and Andrew Bainham, 'Prisoners' Families and the Regulation of Contact' (2004) 26(3) *Journal of Social Welfare and Family Law* 263, 264; Helen Codd, *In the Shadow of Prison: Families, Imprisonment and Criminal Justice* (Willan Publishing, 2008) 61-62.

*United States of America*: Renny Golden, *War on the Family: Mothers in Prison and the Families They Leave Behind* (Routledge, 2005) 1; Karen Casey-Acevedo, Tim Bakken and Adria Karle, 'Children Visiting Mothers in Prison: The Effects on Mothers' Behaviour and Disciplinary Adjustment' (2004) 37 *The Australian and New Zealand Journal of Criminology* 418, 418; Merry Morash, Timothy Bynum, and Barbara Koons, 'Women Offenders: Programming Needs and Promising Approaches' (Research In Brief, US Department of Justice National Institute of Justice, August 1998) 1; Brenda McGowan and Karen Blumenthal, 'Children of Women Prisoner: A Forgotten Minority' in Laura Crites (ed), *The Female Offender* (Lexington Books, 1978) 121, 125; Susan Sharp and Susan Marcus-Mendoza, 'It's a Family Affair: Incarcerated Women and Their Families' (2001) 12(4) *Women & Criminal Justice* 21, 29; Barbara Myers, et al, 'Children of Incarcerated Mothers' (1999) 8(1) *Journal of Child and Family Studies* 11, 12.

<sup>33</sup> Ann Farrell, 'Mothers Offending Against Their Role: An Australian Experience' (1998) 9(4) *Women & Criminal Justice* 47, 56. Cf. Sheehan estimates it at closer to 75%, see Rosemary, Sheehan, 'Parental Imprisonment and Child Protection: A Study of Children Presented to the Melbourne Children's Court' (2010) 63(2) *Australian Social Work* 164, 165.

<sup>34</sup> See New South Wales Department of Corrective Services, *Women's Action Plan Report* (Planning Unit, 1994).

<sup>35</sup> Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (Butterworths, 2001) 90.

<sup>36</sup> Australian Bureau of Statistics 2017, *Prisoners in Australia, 2017*, cat. no. 4517.0, ABS, Canberra.

<sup>37</sup> *Ibid*.

of these female incarcerated prisoners were likely to have dependent children. Dennison estimates that '5 per cent of non-Indigenous and 20 per cent of Indigenous children would experience parental *imprisonment* in their lifetime.'<sup>38</sup> This is a serious social issue for Australia.

### *C. Impact of Parental Incarceration upon Offender's Children*

The limited available data also have ramifications for understanding and appropriately addressing the impact of parental incarceration. For example, it is not known where children are housed prior to and for the duration of the primary care giver's sentence. In 2012, the New South Wales Department of Family and Community Services reported that:

... the children of male prisoners are most likely to be cared for by their mother (84 percent). By contrast, only 28 percent of children of female prisoners are likely to be cared for by their father while their mother is in prison. A greater percentage is cared for by grandparents (34 percent), and 12 percent are cared for by other relatives.<sup>39</sup>

Other Australian research literature also suggests that where the mother is the primary caregiver of dependent children the children are likely to be displaced from the family home by her incarceration.<sup>40</sup> Whereas when the father of dependent children is incarcerated, the children are likely to remain in the family home and be cared for by their mother.<sup>41</sup>

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<sup>38</sup> Predicted figures based on Quilty's et al research and Dennison et al's research, see Susan Dennison, Anna Stewart and Kate Freiberg, 'A Prevalence Study of Children with Imprisoned Fathers: Annual and Lifetime Estimates' (2013) 48(3) *Australian Journal of Social Issues* 339, 354; Simon Quilty et al, 'Children of Prisoners: A Growing Public Health Problem' (2004) 28(4) *Australian and New Zealand Journal of Public Health* 339.

<sup>39</sup> NSW Government, *4.2 Women in Prison* (2012) Family & Community Services Women NSW <[http://www.women.nsw.gov.au/women\\_in\\_nsw/current\\_report/safety\\_and\\_access\\_to\\_justice/topic\\_4\\_ending/4.2\\_women\\_in\\_prison](http://www.women.nsw.gov.au/women_in_nsw/current_report/safety_and_access_to_justice/topic_4_ending/4.2_women_in_prison)>.

<sup>40</sup> See Maureen Miner and Angela Gorta, *Changing Conditions in a Women's Prison 1972-1984*, Research Publication No 11 (NSW Department of Corrective Services, 1986) 25; Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *A Report into Children of Imprisoned Parents*, Report No 12 (1997) 98; Ann Farrell, 'Mothers Offending Against Their Role: An Australian Experience' (1998) 9(4) *Women & Criminal Justice* 47, 59, 62; Karen Casey-Acevedo, Tim Bakken and Adria Karle, 'Children Visiting Mothers in Prison: The Effects on Mothers' Behaviour and Disciplinary Adjustment' (2004) 37 *The Australian and New Zealand Journal of Criminology* 418, 423; Legislative Assembly Standing Committee on Community Services and Social Equity, Parliament of the Australian Capital Territory, *The Forgotten Victims of Crime: Families of Offenders and their Silent Sentence*, Report 6 (2004) 38-39.

<sup>41</sup> See also Susan Dennison, Anna Stewart and Kate Freiberg, 'A Prevalence Study of Children with Imprisoned Fathers: Annual and Lifetime Estimates' (2013) 48(3) *Australian Journal of Social Issues* 339, 350-351.



Research literature in the UK and the USA has reported similar findings. For example, research from the US Department of Justice has found that children of a female offender were living with the other parent (post the mother's imprisonment) in only 25% of matters, compared with children of male offenders who lived with their mother in 90% of matters (post the father's incarceration).<sup>42</sup> In the UK, the Corston Report stated 'only 9% of children are cared for by their fathers while their mothers are in prison ... 80% of women in prison lose the support of their partner while in prison.'<sup>43</sup> Therefore, there is a gendered dimension to the imprisonment of women and the impact upon children.

Rising female incarceration rates have resulted in greater interest in the impact of parental imprisonment upon children in the fields of criminology, sociology, psychology and public health.<sup>44</sup> However, there is currently no research (in Australia, nor internationally) that can 'confirm [a] direct influence of parental imprisonment on [a] child (emphasis added)'<sup>45</sup>. There are patterns in the data

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<sup>42</sup> Merry Morash, Timothy Bynum, and Barbara Koons, 'Women Offenders: Programming Needs and Promising Approaches' (Research in Brief, US Department of Justice National Institute of Justice, August 1998) 1. See also Christopher Mumola, 'Incarcerated Parents and their Children' (Bureau of Justice Statistics Special Report, US Department of Justice National Office of Justice Programs, August 2000) 1; Renny Golden, *War on the Family: Mothers in Prison and the Families They Leave Behind* (Routledge, 2005) 34-44.

<sup>43</sup> Baroness Jean Corston, *The Corston Report: A Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System* (Home Office, 2007) 20. See also Liza Catan, 'Infants with Mothers in Prison' in Roger Shaw (ed), *Prisoner's Children: What Are the Issues* (Routledge, 1992) 13; Jane Woodrow, 'Mothers Inside, Children Outside: What Happens To The Dependent Children of Female Inmates?' in Roger Shaw (ed), *Prisoner's Children: What Are the Issues* (Routledge, 1992) 29; Janet Walker, 'Silent, Forgotten and Vulnerable: Examining the Risks for Children with a Parent in Prison' (2007) 69 *Amicus Curiae* 10, 11; Vanessa Munro, 'The Emerging Rights of Imprisoned Mothers and Their Children' (2002) 14(3) *Child and Family Law Quarterly* 303, 304; Helen Codd, *In the Shadow of Prison: Families, Imprisonment and Criminal Justice* (Willan Publishing, 2008) 19-20, 120-121, 124.

<sup>44</sup> Susan Sharp and Susan Marcus-Mendoza, 'It's a Family Affair: Incarcerated Women and Their Families' (2001) 12(4) *Women & Criminal Justice* 21, 22; John Hagan and Holly Forster, 'Children of the American Prison Generation: Student and School Spillover Effects of Incarcerating Mothers' (2012) 46(1) *Law & Society Review* 37, 38; Pat Carlen and Anne Worrall, *Analysing Women's Imprisonment* (Willan Publishing, 2004) ix-x.

*Australia:* Kirsten Besemer and Susan Dennison, 'Social Exclusion in Families Affected by Paternal Imprisonment' (2018) 5(2) *Australia and New Zealand Journal of Criminology* 221; Ann Farrell, 'Mothers Offending Against Their Role: An Australian Experience' (1998) 9(4) *Women & Criminal Justice* 47; Rosemary Sheehan, 'Parental Imprisonment and Child Protection: A Study of Children Presented to the Melbourne Children's Court' (2010) 63(2) *Australian Social Work* 164; Simon Quilty et al, 'Children of Prisoners: A Growing Public Health Problem' (2004) 28(4) *Australian and New Zealand Journal of Public Health* 339.

<sup>45</sup> Stefan Suhling and Werner Greve, 'The consequences of legal punishment' in ME Oswald, S Bieneck and J Hupfeld-Heinemann (eds), *Social Psychology of Punishment of Crime* (Wiley-Blackwell, 2009)

which support common difficulties experienced by these children and causal links with the incarceration of a primary caregiver. For example, financial hardship is widely identified in the research literature as a consequence of the imprisonment of a parent.<sup>46</sup> Behavioural difficulties in children are another widely-recognised risk factor when a child's primary caregiver is imprisoned.<sup>47</sup>

Stefen Shuling and Werner Greve have reviewed the psychological research and identified a list of documented impacts of parental imprisonment upon children.<sup>48</sup> Their analysis identified that economic problems within the family unit and behavioural problem in children were accepted and well-known consequences of parental imprisonment. Other identifiable impacts in the literature included:

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405, 420. See also Helen Codd, *In the Shadow of Prison: Families, Imprisonment and Criminal Justice* (Willan Publishing, 2008) 62-65; Barbara Myers, et al, 'Children of Incarcerated Mothers' (1999) 8(1) *Journal of Child and Family Studies* 11, 20; Danielle Dallaire, 'Incarcerated Mothers and Fathers: A Comparison of Risks for Children and Families' (2007) 56(5) *Family Relations* 440, 440; Joseph Murray and David Farrington, 'The Effects of Parental Imprisonment on Children' (2008) 37 *Crime & Justice* 133, 134-135.

<sup>46</sup> See, eg, Stefan Suhling and Werner Greve, 'The consequences of legal punishment' in ME Oswald, S Bieneck and J Hupfeld-Heinemann (eds), *Social Psychology of Punishment of Crime* (Wiley-Blackwell, 2009) 405, 418; Johnna Christian and Leslie Kennedy, 'Secondary narratives in the aftermath of crime: Defining family members' relationships with prisoners' (2011) 13(4) *Punishment & Society* 379, 398; Gloria Larman and Ann Aungles, 'Children of Prisoners and their Outside Carers: The Invisible Population' (Paper presented at the Women and the Law, Canberra, 24-26 September 1991); Legislative Assembly Standing Committee on Community Services and Social Equity, Parliament of the Australian Capital Territory, *The Forgotten Victims of Crime: Families of Offenders and their Silent Sentence*, Report 6 (2004) 11; Susan Sharp and Susan Marcus-Mendoza, 'It's a Family Affair: Incarcerated Women and Their Families' (2001) 12(4) *Women & Criminal Justice* 21, 25, 31-34; Myers, Barbara, et al, 'Children of Incarcerated Mothers' (1999) 8(1) *Journal of Child and Family Studies* 11, 11.

<sup>47</sup> See, eg, Johnna Christian and Leslie Kennedy, 'Secondary narratives in the aftermath of crime: Defining family members' relationships with prisoners' (2011) 13(4) *Punishment & Society* 379, 398; Stefan Suhling and Werner Greve, 'The consequences of legal punishment' in ME Oswald, S Bieneck and J Hupfeld-Heinemann (eds), *Social Psychology of Punishment of Crime* (Wiley-Blackwell, 2009) 405, 418; Ann Cunningham, 'Forgotten Families: The Impacts of Imprisonment' (2001) 59 *Family Matters* 35, 37; Rosemary Sheehan, 'Parental Imprisonment and Child Protection: A Study of Children Presented to the Melbourne Children's Court' (2010) 63(2) *Australian Social Work* 164, 172-174; Brenda McGowan and Karen Blumenthal, 'Children of Women Prisoner: A Forgotten Minority' in Laura Crites (ed), *The Female Offender* (Lexington Books, 1978) 121, 127; Susan Dennison, Anna Stewart and Kate Freiberg, 'A Prevalence Study of Children with Imprisoned Fathers: Annual and Lifetime Estimates' (2013) 48(3) *Australian Journal of Social Issues* 339, 340; Rebecca Wallis and Susan Dennison, 'Out of the Shadows: Republican Criminology and the Children of Prisoners' (2015) 32 *Law in Context: A Socio-Legal Journal* 86, 93; Legislative Assembly Standing Committee on Community Services and Social Equity, Parliament of the Australian Capital Territory, *The Forgotten Victims of Crime: Families of Offenders and their Silent Sentence*, Report 6 (2004) 12; Susan Sharp and Susan Marcus-Mendoza, 'It's a Family Affair: Incarcerated Women and Their Families' (2001) 12(4) *Women & Criminal Justice* 21, 25, 39-42.

<sup>48</sup> Stefan Suhling and Werner Greve, 'The consequences of legal punishment' in ME Oswald, S Bieneck and J Hupfeld-Heinemann (eds), *Social Psychology of Punishment of Crime* (Wiley-Blackwell, 2009) 405, 417-420.

- health problems both mental and physical (ie. post-traumatic stress disorder);<sup>49</sup>
- displacement and instability;<sup>50</sup>
- educational failures;<sup>51</sup>
- older children assuming parental responsibilities (ie. child rearing, employment);<sup>52</sup>
- less support and supervision in the family unit and missing role models;<sup>53</sup>
- a turning point in life for these children that may lead to other negative consequences (ie. criminal activity) and lead to a less happy life.<sup>54</sup>

These significant societal impacts are widely supported by the research literature; they are a potential justification to take these matters into account at sentencing. They are also the types of impact that might be expected to be reported in the cases raising family hardship as a mitigating factor.

#### *D. Family Hardship as a Mitigating Sentencing Factor*

As this dissertation reveals sentencing courts have found it appropriate to take into account the impact of an offender's sentence upon their dependents. This mitigating factor in sentencing has been described as 'family hardship'. In some Australian jurisdictions, family hardship has even been recognised in sentencing legislation. It is a gender-neutral sentencing factor under both statute and common law constructions; it is potentially applicable to male or female offenders. However, as this dissertation will highlight it is a highly-gendered sentencing factor in its application and acceptance.

This dissertation is the first comprehensive Australian study of 'family hardship' and its operation as a mitigating factor in sentencing throughout Australia. It will

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<sup>49</sup> Stefan Suhling and Werner Greve, 'The consequences of legal punishment' in ME Oswald, S Bieneck and J Hupfeld-Heinemann (eds), *Social Psychology of Punishment of Crime* (Wiley-Blackwell, 2009) 405, 418-419.

<sup>50</sup> Ibid 419.

<sup>51</sup> Ibid 418.

<sup>52</sup> Ibid 419.

<sup>53</sup> Ibid 418.

<sup>54</sup> Ibid.

identify Australian sentencing principles and Australian sentencing practices that have emerged in respect to this factor. It will explain that legal scholars need to become more versed in sentencing jurisprudence, the role of sentencing factors and study of sentencing principles.

## II BACKGROUND TO THE RESEARCH

In 2007, I was lead researcher at the National Judicial College of Australia on the development of the Commonwealth Sentencing Database ('CSD').<sup>55</sup> This work was the impetus for this dissertation research. My role at the National Judicial College of Australia ('NJCA') was to develop a concise online text for judicial officers and practitioners on the federal legislative provisions set out in pt 1B of the *Crimes Act 1914* (Cth). This text makes up the 'Principles and Practice' component of the CSD.<sup>56</sup>

### *A. The Commonwealth Sentencing Database*

The 'Principles and Practice' component of the CSD accompanies the other part of the database which is the 'Statistics' component. The Statistics component is maintained by the NSW Judicial Commission and is the publication of federal statistics, provided by the Office of the Commonwealth Director of Public Prosecutions ('CDPP'), on federal sentencing outcomes. The purpose of the 'Principles and Practice' component of the CSD is to promote federal sentencing

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<sup>55</sup> The Federal Government of Australia funds this sentencing information system. The Commonwealth Sentencing Database is housed on the website for the National Judicial College of Australia at <http://njca.com.au/sentencing/>.

<sup>56</sup> There are two components to the CSD. The first component is the 'principles and practice' developed by the National Judicial College of Australia (with support from the ANU College of Law) and is maintained and updated by the National Judicial College of Australia. The second component of the CSD is the federal sentencing statistics. The office of the Commonwealth Director of Public Prosecutions and the Judicial Commission of New South Wales develops the statistics component. The office of the Commonwealth Director of Public Prosecutions provide the data and the Judicial Commission of New South Wales provide the software, technological expertise in presenting the statistics and they also maintain the statistics component of the CSD.

law.<sup>57</sup> This component describes the federal provisions and draws attention to unique features of the federal sentencing regime.

The CSD project and funding arose because of the Australian Law Reform Commission ('ALRC') inquiry into federal sentencing and the publication of the *Same Crime, Same Time: Sentencing of Federal Offenders* ('*Same Crime, Same Time*').<sup>58</sup> The ALRC expressly noted that a significant problem it faced in conducting its inquiry (2004-2006) was a lack of public information and data on federal sentencing.<sup>59</sup> This included a lack of academic research into federal sentencing laws and practice.<sup>60</sup> The establishment of a 'publicly accessible'<sup>61</sup> resource on federal sentencing law developed by the NJCA was one of the recommendations in the ALRC's *Same Crime, Same Time* Report (Recommendation 19-5).<sup>62</sup>

The CSD was therefore one of the first steps taken in Australia to begin to address a lack of resources in the field of federal sentencing. The CSD was developed by the NJCA, CDPP and the New South Wales Judicial Commission.<sup>63</sup> It has been wholly funded by the Commonwealth Government and is currently operating under a short-term grant from the Commonwealth Attorney-General's Department.

### *B. Inconsistencies in Federal Sentencing*

Inconsistent treatment of federal offenders throughout Australia is a long-standing problem which has been recognised by the Government.<sup>64</sup> One of the principal

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<sup>57</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 47.

<sup>58</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006).

<sup>59</sup> *Ibid* 14.

<sup>60</sup> The ALRC had to commission its own reports. See, eg, the study carried out by the Australian Institute of Criminology, 'An Analysis of Federal Fraud and Drug Cases, 2000–2004' in ALRC, *Same Crime, Same Time*, Report No. 103 (2006) Appendix 2, 801.

<sup>61</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 48 (Recommendation 19-5).

<sup>62</sup> *Ibid* 48.

<sup>63</sup> The role each body played is explained in footnote 45 above.

<sup>64</sup> See Philip Ruddock, 'Terms of Reference Review of Part IB of the *Crimes Act 1914*' in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 9-10; Peter Drew Durack, 'Terms of Reference' in Law Reform Commission, *Sentencing of Federal Offenders*, Interim Report, Report No 15 (1980) xvii.

aims of the CSD was to promote consistency in the sentencing of federal offenders by providing greater guidance to judicial officers on federal sentencing laws, principles and practice.<sup>65</sup> The 'Principles and Practice' component aids in this process by providing judicial officers and practitioners with quick links to relevant case law. This component also identifies, via academic commentary, developing principles, established federal sentencing practices and inconsistent federal sentencing practices across Australia.

Inconsistent practices in federal sentencing had also been recognised as a problem by the judiciary. In 2001, in *Wong v The Queen* ('Wong'),<sup>66</sup> Gaudron, Gummow and Hayne JJ identified that to achieve consistency in federal sentencing throughout Australia, all courts sentencing federal offenders needed to ensure that they applied the federal sentencing provisions in pt 1B of the *Crimes Act 1914* (Cth).<sup>67</sup> Judicial officers giving effect to the legislative command of the *Crimes Act 1914* (Cth) sounds uncomplicated, but, it had proved to be challenging in practice. One reason for this was that federal sentencing law in Australia was still in its infancy.<sup>68</sup>

### 1. *The Emergence of a Federal Sentencing System*

In the keynote address to the Federal Crime and Sentencing Conference 2011, Justice Weinberg,<sup>69</sup> who was the Director of Public Prosecutions for the Commonwealth at the time pt 1B of the *Crimes Act 1914* (Cth) was introduced in 1990,<sup>70</sup> reflected on his experiences. He stated:

It is a curious feature of our federal system, that for the first 90 years after federation, it was never thought necessary to develop any separate body of federal sentencing law. That all changed on 17 July 1990, when Pt 1B of the *Crimes Act 1914* (Cth) came into force. Before that date, all federal offenders were sentenced in accordance with the law that applied in the particular state or territory where their offences were committed. Given that there existed almost no state or territory sentencing legislation of general application, or indeed of any real importance, federal offenders were, for the most part,

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<sup>65</sup> See, for e.g., National Judicial College of Australia, *User Guide* (23 October 2013) Commonwealth Sentencing Database <<http://njca.com.au/sentencing/principals-practice/user-guide/>>. A deeper discussion of the concept of consistency in sentencing will occur in Chapter Two.

<sup>66</sup> (2001) 207 CLR 584.

<sup>67</sup> *Wong* (2001) 207 CLR 584, 609-610.

<sup>68</sup> This claim is justified in the proceeding paragraphs and is discussed further in Chapter Two.

<sup>69</sup> Judge of the Victorian Court of Appeal.

<sup>70</sup> In his keynote address, Weinberg J stated, 'I remember the events leading up to the introduction of Pt 1B quite well. I happened to be the Commonwealth Director of Public Prosecutions at the time.' See Justice Mark Weinberg, 'The Labyrinthine Nature of Federal Sentencing' (Keynote address presented at Federal Crime and Sentencing Conference 2011, Canberra, 11 February 2011).

sentenced in accordance with the common law principles that governed sentencing in that particular locale.<sup>71</sup>

There are two aspects to Weinberg J's comments (above) that deserve greater consideration. First, a separate body of federal sentencing law emerged in Australia only in 1990. Second, there have been localised differences in sentencing practices. The Australian federal sentencing regime is a little over twenty-five years old. Prior to the introduction of pt 1B, judicial officers applied the law in the state or territory in which the offender was being sentenced.<sup>72</sup> These early sentencing processes of drawing upon common law and local sentencing practices are firmly entrenched within Australia.

In conducting my research of the case law for the CSD it was not uncommon to find sentencing courts post 1990 relying on state and territory sentencing provisions in the sentencing of federal offenders in apparent naivety to the existence of a separate and distinct body of federal sentencing provisions. A lack of attention to federal sentencing law is one of the of the key explanations behind inconsistencies in federal sentencing. Another reason why the consistent application of the law in pt 1B had proved challenging was because of the complexity of its provisions. Justice Weinberg also identified this problem in his keynote address on federal sentencing in Australia. He stated:

Most judges that I have spoken to, and almost every barrister who practices in the criminal law, has at some point been highly critical of the drafting of Pt 1B. The provisions contained therein are complex, and unnecessarily so. A number of them are also internally inconsistent.

Even normally mild-mannered judges have been known to fly into fits of incandescent rage when required to sentence offenders under this sentencing regime. Some examples will suffice.

In *R v Paull*, [(1990) 20 NSWLR 427] Hunt J first attacked the very notion of codifying<sup>73</sup> sentencing principles. His Honour then went on to say of Pt 1B:

It is to be hoped that the Federal Parliament will quickly come to realise the difficulties caused by this unnecessarily complicated and opaque legislation and that it will give urgent reconsideration to its provisions. At the present time, the question of sentence will take

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<sup>71</sup> Ibid.

<sup>72</sup> See, eg, *R v Paull* (1990) 20 NSWLR 427, 429 (Hunt J).

<sup>73</sup> The use of the term 'codifying' in these judicial comments is used in a colloquial sense. As discussed in Chapter Two, the federal sentencing provisions have not been codified in the true sense.

longer to deal with in the average trial than the question of guilt itself.<sup>74</sup>

The widespread criticism of pt 1B by the profession has also been emphasised by the ALRC in *Same Crime, Same Time*.<sup>75</sup>

Consistency in federal sentencing is also difficult to achieve across Australia because of a lack of proficiency in federal sentencing. An opportunity to develop expertise in this area has been limited for judicial officers as historically there were a very small number of federal offenders that came before state or territory courts.<sup>76</sup> Even today, after the landscape of federal sentencing has changed due to a rapid expansion of federal offences,<sup>77</sup> judicial officers are still predominantly engaged in the application of their local sentencing regime to offenders convicted under local (ie. state or territory) laws. Therefore, very few judicial officers in Australia are experienced at federal sentencing. Specialised lists for federal offences, for example, have only begun to emerge in some of the larger jurisdictions.<sup>78</sup> Overall, throughout Australia, knowledge and expertise in the field of federal sentencing is still emerging.

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<sup>74</sup> Justice Mark Weinberg, 'The Labyrinthine Nature of Federal Sentencing' (Keynote address presented at Federal Crime and Sentencing Conference 2011, Canberra, 11 February 2011) 6. For further critiques of pt 1B see judicial comments made in *El Karhani* (1990) 51 A Crim R 123, 124 (Kirby P, Campbell and Newman JJ); *R v Muanchukingkan* (1990) 52 A Crim R 354, *R v Carroll* [1991] 2 VR 509, *R v Bibaoui* [1997] 2 VR 600, *Putland v The Queen* (2004) 218 CLR 174, 181. See also comments from former Chief Justice of Tasmania, Sir Guy Green, 'The Concept of Uniformity in Sentencing' (1996) 70 *Australian Law Journal* 112, 120. See generally Brian Opeskin, 'Sentencing of Federal Offenders' (Paper presented at Sentencing: Principles, Perspectives and Possibilities, Canberra, 10-12 February 2006) 1; Justice Peter Johnson, 'Consistency in Sentencing for Federal Offences – Challenges for Sentencing Courts in an Evolving Landscape' (Paper presented at Federal Crime and Sentencing Conference 2012, Canberra, 11 February 2012) 6.

<sup>75</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 107.

<sup>76</sup> See, eg, the small number of federal offenders compared with state and territory offenders noted as one of the 'Terms of Reference' for Report No 103 see Philip Ruddock, 'Terms of Reference Review of Part IB of the *Crimes Act 1914*' in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 9. See also *Hili v The Queen* (2010) 242 CLR 520, 535 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). The Australian Institute of Criminology estimated that federal prisoners make up 'less than three per cent of the total prison population' see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 760.

<sup>77</sup> The Australian Bureau of Statistics only began collating data on federal defendants in 2008. The introduction of the Federal Defendants collection came about because of the expansion of Commonwealth offences and the resulting increasing number of federal offenders. See Australian Bureau of Statistics, *Federal Defendants, Selected States and Territories* (7 August 2012) Australian Bureau of Statistics <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DOSSbyTopic/0022CA88BFEACBE8CA25787600817E25>>. The increase in the number of federal offences is discussed further in Chapter Two.

<sup>78</sup> See, especially, Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 22 and 470.



## 2. *The Importance of the CDPP*

The CDPP is the body prosecuting federal offences around Australia and it is the single biggest resource on federal sentencing law and practice.<sup>79</sup> Prior to the implementation of the CSD, the statistics and data on federal sentencing that this body collected was kept in-house. The CSD captures the CDPP's statistics on federal sentencing enabling judicial officers and legal practitioners' access to data on federal sentencing outcomes across Australia. The CDPP also share resources on federal sentencing with the NJCA.

The statistics component of the CSD and the availability of quantitative data on federal sentencing enabling users to access a 'pattern of sentences imposed by courts'<sup>80</sup> for federal criminal offences is a significant development in this field.<sup>81</sup> Comparisons of federal sentencing outcomes can now be made using the federal sentencing statistics. However, due to differences in individual cases, to assess whether there is consistency in federal sentencing and in the application of federal sentencing principles, systematic qualitative studies of the federal sentencing provisions and their application by state and territory courts are still required.

## III THE RESEARCH QUESTIONS AND RESEARCH DESIGN

As described above, the research topic for this dissertation was identified and arose out my work on the CSD. I was particularly interested in the sentencing principles that applied to federal sentencing. Research for the CSD involved examination of the federal sentencing provisions set out in pt 1B of the *Crimes Act 1914* (Cth). Within pt 1B is s16A(2) of the *Crimes Act 1914* (Cth). Section 16A(2) contains a list of sentencing matters 'the court must take into account... as are

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<sup>79</sup> This point is discussed further in Chapter Two.

<sup>80</sup> Judicial Commission of New South Wales, *Sentencing Statistics*, Judicial Information Research System <http://jirs.judcom.nsw.gov.au/menus/pens.php>. The federal statistics are maintained by the Judicial Commission of New South Wales see <http://njca.com.au/sentencing/statistics/>.

<sup>81</sup> But see recent statements from the High Court of Australia on the role and usefulness of statistics: *Hili v The Queen* (2010) 242 CLR 520, 535 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *R v Pham* (2015) 256 CLR 550, 559 and 561 (French CJ, Keane and Nettle JJ) and 565 (Bell and Gageler JJ).

relevant and known to the court'.<sup>82</sup> Contained within this provision were conventional sentencing matters that one would expect to find located within such a provision. For example, the first listed matter under s 16A(2) was 'the nature and circumstances of the offence'.<sup>83</sup> Other listed matters included the fact that the offender has entered a guilty plea,<sup>84</sup> the offender's prospects of rehabilitation,<sup>85</sup> and a number of matters relevant to the offender such as 'character, antecedents, age, means, physical or mental condition'.<sup>86</sup>

Listed in s 16A(2) at paragraph (p) was a sentencing matter that had not received much scholarly attention. Section 16A(2)(p) of the *Crimes Act 1914* (Cth) listed:

the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.<sup>87</sup>

This federal section provided unqualified recognition of hardship to third parties as a sentencing factor for consideration in federal sentencing. In developing the commentary for the CSD, I found that some courts saw s 16A(2)(p) as a 'novel' sentencing matter.<sup>88</sup> I discovered that both 'on the record' (in the form of judicial dicta) and 'off the record' (in informal conversations) judicial officers were hesitant about the legitimacy of this matter as a sentencing factor despite its appearance as a listed legislative sentencing factor.

Despite the apparent legislative intent to give prominence to this matter in federal sentencing,<sup>89</sup> the courts have read down paragraph (p) so that it did not expand upon what was said to be the existing common law doctrine of family hardship.<sup>90</sup> Therefore, a court could consider the potential impact of the sentence upon a federal offender's family or dependants only where 'exceptional circumstances' had been established.<sup>91</sup> The result was that family hardship was seen as a matter

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<sup>82</sup> *Crimes Act 1914* (Cth) s 16A(2).

<sup>83</sup> *Crimes Act 1914* (Cth) s 16A(2)(a).

<sup>84</sup> See *Crimes Act 1914* (Cth) s 16A(2)(g).

<sup>85</sup> See *Crimes Act 1914* (Cth) s 16A(2)(n).

<sup>86</sup> *Crimes Act 1914* (Cth) s 16A(2)(m).

<sup>87</sup> *Crimes Act 1914* (Cth) s 16A(2)(p).

<sup>88</sup> See, eg, *El Karhani* (1990) 51 A Crim R 123, 135.

<sup>89</sup> How this matter came to be listed in the *Crimes Act 1914* (Cth) is examined in Chapter Three.

<sup>90</sup> The traditional common law practice will be examined in Chapter Three. Judicial practices throughout Australia will be set out in Chapters Four and Five.

<sup>91</sup> See, eg, *R v Togiias* [2001] 127 A Crim R 23; *R v Carmody* (1998) 100 A Crim R 41; *R v Matthews* (1996) 130 FLR 230; *R v Sinclair* (1990) 51 A Crim R 418.

that would rarely be taken into account as a mitigating factor. While this was the end of my research in terms of the commentary for the CSD it was the beginning of my research into this controversial sentencing factor.

#### *A. Literature Review: Identification of the Problem*

In one of the earliest Australian legislative catalogues of sentencing factors, 'character, antecedents, age, health, or mental condition of the person charged'<sup>92</sup> were listed. These factors are archetypal examples of widely accepted mitigating sentencing factors and today they routinely appear in legislative lists of sentencing considerations and in jurisprudence on sentencing factors. Unlike these sentencing factors, family hardship (ie. the potential impact of a sentence upon an offender's dependants) has an unstable history and it has not consistently been recognised as a mitigating sentencing factor in the research literature.

This dissertation will draw attention to the fact that the impact of a sentence upon an offender's dependants is not a modern, nor rare, sentencing consideration within the common law legal system. Family hardship and the impact of a sentence upon innocent others is something the criminal justice system has accommodated in a variety of practices.<sup>93</sup> This dissertation maintains that family hardship is a valid sentencing factor and that historically judicial officers *have* had a practice of taking family hardship into consideration when passing sentence. A weakness of mainstream discourse has been the marginalisation of such sentencing practice, and in some cases the mere ignorance of family hardship as a sentencing factor.

This dissertation will suggest that one of the reasons behind the marginalisation of family hardship is that sentencing models, such as 'just deserts',<sup>94</sup> have constructed a framework that does not recognise hardship to anyone other than the offender and does not favour recognition of potential future harm. Australian criminal law professor David Brown has described this phenomenon stating:

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<sup>92</sup> *Offenders Probation Act 1913-1963* (SA) s 4(1).

<sup>93</sup> See Chapter Three.

<sup>94</sup> Andrew von Hirsch, Andrew Ashworth and J Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3<sup>rd</sup> ed, 2009) 102-109.

...just deserts sentencing policies attempt to restrict the issues to those of culpability and prior record there is little recognition that punishment does not only affect the offender.<sup>95</sup>

It is important to remember that such theories or sentencing frameworks are not ahistorical. They are also normative constructions of the system.<sup>96</sup> In light of the current rates of imprisonment and rising rates in female imprisonment, it is essential that more attention is paid to family hardship as a mitigating factor in sentencing.

Within the discipline of sentencing there has actually been little scholarly attention given to aggravating and mitigating factors. Taking into account sentencing factors is an essential part of the process of determining an appropriate sentence. In both Australia and overseas, this role has been significantly under-researched.<sup>97</sup> A leading scholar of sentencing in the UK, Andrew von Hirsch observed that, in common law legal systems:

... curiously, little attention has been paid to aggravating and mitigating circumstances affecting the sentence.<sup>98</sup>

He noted further, that '[s]entencing theorists and scholars have... been... neglectful of the subject',<sup>99</sup> with 'the first major book devoted to the topic'<sup>100</sup> only published in 2011.<sup>101</sup> Ashworth has observed that aggravating and mitigating factors have

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<sup>95</sup> David Brown et al, *Criminal Laws Materials and Commentary on Criminal Law and Process of New South Wales* (The Federation Press, 5<sup>th</sup> ed, 2011) 1105.

<sup>96</sup> Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4<sup>th</sup> ed, 2017) 8-32.

<sup>97</sup> See, eg, Julian Roberts, 'Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application' (2008) 4 *Criminal Law Review* 264, 265; Julian Roberts 'Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 1,1; Austin Lovegrove, 'Putting the Offender Back into Sentencing: An Empirical Study of the Public's Understanding of Personal Mitigation' (2011) 11 *Criminology and Criminal Justice* 37, 38; Jessica Jacobson and Mike Hough, *Mitigation: The Role of Personal Factors in Sentencing* (Prison Reform Trust, 2007) 1; Jessica Jacobson and Mike Hough, 'Personal Mitigation: An Empirical Analysis in England and Wales' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 146, 146; Joanna Shapland, 'Personal Mitigation and Assumptions about Offending and Desistance' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 60, 60, 62; Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4<sup>th</sup> ed, 2005) 151; Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6<sup>th</sup> ed, 2015) 163; Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 3<sup>rd</sup> ed, 2016) 462.

<sup>98</sup> Andrew von Hirsch, 'Foreward' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) xiii, xiii.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> This book was Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011).

'often been thought to be uncomplicated and uncontroversial'.<sup>102</sup> This dissertation highlights that this mainstream view of sentencing factors is not accurate.

Julian Roberts, the editor of the first text devoted to sentencing factors, said that one of the reasons for a lack of attention to these factors is that aggravating factors and mitigating factors are often taken for granted by the public and the legal profession.<sup>103</sup> Jessica Jacobson and Mike Hough's research has found that there have been only a few empirical studies that have focused on the role of mitigating factors in sentencing.<sup>104</sup> Jacobson and Hough identified studies by Shapland; Flood-Page and Mackie; Hedderman and Gelsthorpe; and Parker et al.<sup>105</sup> Their own work can now be added to this list<sup>106</sup> and the pioneering work of David Thomas<sup>107</sup> (in the 1970s) should be included.

In part due to this lack of scholarly attention, there is no well-defined explanation of what a sentencing factor is. Australian sentencing scholar, Kate Warner has observed that 'general considerations'<sup>108</sup> at sentencing were traditionally categorised as 'mitigating' or 'aggravating' but that court practice was unsystematic and contradictory.<sup>109</sup> As their name implies, aggravating factors and mitigating factors are simply 'circumstances that may justify imposition of a harsher or more lenient sentence.'<sup>110</sup> Moreover, under the common law hundreds

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<sup>102</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6<sup>th</sup> ed, 2015) 163.

<sup>103</sup> Julian Roberts 'Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 1,1.

<sup>104</sup> Jessica Jacobson and Mike Hough, *Mitigation: The Role of Personal Factors in Sentencing* (Prison Reform Trust, 2007).

<sup>105</sup> Jessica Jacobson and Mike Hough, 'Personal Mitigation: An Empirical Analysis in England and Wales' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 146, 146.

<sup>106</sup> Jessica Jacobson and Mike Hough, *Mitigation: The Role of Personal Factors in Sentencing* (Prison Reform Trust, 2007).

<sup>107</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 1970); David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979).

<sup>108</sup> Kate Warner, *Sentencing in Tasmania* (The Federation Press, 2<sup>nd</sup> ed, 2002) 62.

<sup>109</sup> *Ibid.*

<sup>110</sup> Julian Roberts 'Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 1,1. See also Jessica Jacobson and Mike Hough, *Mitigation: The Role of Personal Factors in Sentencing* (Prison Reform Trust, 2007) 1; Jessica Jacobson and Mike Hough, 'Personal Mitigation: An Empirical Analysis in England and Wales' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 146, 147. In the most recent edition of Fox & Freiberg's *Sentencing*, Freiberg has taken a much more expansive consideration of sentencing factors see Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3<sup>rd</sup> ed, 2014) 219-222.

of aggravating and mitigating factors have been identified in the research literature.<sup>111</sup>

In the most recent edition of *Fox & Freiberg's Sentencing*,<sup>112</sup> Arie Freiberg has taken an expansive consideration of sentencing factors.<sup>113</sup> Freiberg has observed:

Historically, these factors have been regarded as matters of “common sense”, as Brooking JA explained:

Long before the *Sentencing Act* rose above the horizon judges drew on their common sense and their moral sense, as representing that of the community, in deciding what things about a crime could be said to make it more or less serious. They still do; nothing in the Act stops them doing this. Common sense and moral sense... are and must ever be the essential foundation of sentencing principles and practices...<sup>114</sup>

Importantly, Freiberg has observed that sentencing factors encompass considerations of harm caused by the offence, culpability of the offender and ‘pragmatic reasons’ which have a bearing upon the operation of the criminal justice system.<sup>115</sup>

### *1. Denial of family hardship*

A review of the field shows that the denial of family hardship as a sentencing factor is not uncommon in the research literature. For example, Richard Volger, a legal contributor to one of the leading texts on the impact of punishment on offenders’ families, opined:

Historically, the parents of children have been given no special treatment by sentencing courts... At best, the impact of a sentence on a child of the defendant is a peripheral consideration. It is a ‘matter of mercy’ (*Laurie*, [1980]) within the discretion of the court, but to be exercised only in extreme cases.<sup>116</sup>

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<sup>111</sup> See, eg, Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Kegan Paul, 1981) 55.

<sup>112</sup> Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3<sup>rd</sup> ed, 2014).

<sup>113</sup> *Ibid* 219-224.

<sup>114</sup> *Ibid* 222.

<sup>115</sup> *Ibid* 223.

<sup>116</sup> Richard Vogler, ‘The Child, the Imprisoned Parent and the Law’ in Roger Shaw (ed), *Prisoner's Children: What Are the Issues* (Routledge, 1992) 101,102.

In his commentary, he reviewed several cases from the UK (such as *Ingham*<sup>117</sup>, *R v Haleth*<sup>118</sup> and *R v Vaughan*<sup>119</sup>) and found that:

In all cases it is apparent that issues of deterrence and retribution outweigh all other considerations. Since the children are not party to the proceedings, may well not appear at court, and feature only in the small print of social enquiry reports, their future and welfare assume an insignificant role in sentencing policy.<sup>120</sup>

Volger contended in his piece that family hardship has played an insignificant role in sentencing.

### **(a) Hardship to third parties**

There is a deep-rooted claim in the literature that hardship to third parties falls outside of appropriate sentencing considerations. Volger draws attention to family members not being party to proceedings in his commentary. Furthermore, the influential just deserts sentencing discourse<sup>121</sup> has endorsed a narrow focus of judicial attention in sentencing to matters related to the offender or the offence. The argument that family hardship falls outside the scope of 'legitimate' sentencing considerations will be discussed further in Chapter Four and Chapter Five.

### **(b) An act of mercy not a mitigating factor**

Volger's comments, set out above, also highlight another common justification for the rejection of family hardship as a sentencing factor. This is that family hardship is a merciful consideration (ie. an act of mercy) rather than a proper sentencing consideration.<sup>122</sup> The relationship between family hardship and mercy is an important one and it will be explored further in Chapters Four, Five and Six.

## *2. Family Hardship as a Routine Sentencing Consideration*

A close review of the literature on sentencing and sentencing practices, however, reveals that other sources such as Judge Marvin Frankel's well-known scathing

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<sup>117</sup> Cited in David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 211.

<sup>118</sup> (1982) 4 Cr App R (S) 178.

<sup>119</sup> (1982) 4 Cr App R (S) 83.

<sup>120</sup> *Ibid* 104.

<sup>121</sup> See Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 1-7.

<sup>122</sup> See further Chapter Six.

comments on the scope of judicial discretion in the 1970s, stress that ‘family circumstances’ have been a routine consideration at sentencing.<sup>123</sup> Judge Frankel stated:

... guilty pleas, prior record, defendant’s age and family circumstances – are considered every day by sentencing judges, but in accordance with uncontrolled and divergent individual views of what is, after all, the “law” each time it applies. Every factor of this kind calls for a judgement of policy, suited exactly for legislative action and surely not suited for random variation from case to case.<sup>124</sup>

While Frankel J’s point in this piece was that discretion leads to inconsistent sentencing, his comment inadvertently highlights the ‘every day’<sup>125</sup> consideration of family circumstances in the act of passing sentence upon an offender.

Empirical studies have also identified family hardship as a type of mitigation routinely considered by sentencing courts. For example, Jacobson and Hough’s study of personal mitigating factors in the UK identified that family hardship was a mitigating factor that courts ‘paid particular attention to’<sup>126</sup> when sentencing.<sup>127</sup> While not convinced of the appropriateness of taking family hardship into account as a mitigating factor, Andrew Ashworth acknowledges its role as a mitigating factor in the United Kingdom’s ‘Court of Appeal’s precedents’.<sup>128</sup> Loraine Gelsthorpe and Nancy Louck’s 1995 study (interviewing 200 magistrates in the UK) found that 80% of the magistrates interviewed believed primary responsibility for the care of children was a mitigating sentencing factor.<sup>129</sup> Gelsthorpe and Louck reported that the ‘powerfulness’ of family hardship ‘as a mitigating factor was unmistakable’.<sup>130</sup> Looking beyond the research literature in the field of law, the presence of judicial consideration for family circumstances at

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<sup>123</sup> Marvin Frankel, ‘Lawlessness in Sentencing’ in Andreas von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3<sup>rd</sup> ed, 2009) 237, 239.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> Jessica Jacobson and Mike Hough, *Mitigation: The Role of Personal Factors in Sentencing* (Prison Reform Trust, 2007) 33.

<sup>127</sup> In the Australian literature see Samantha Jeffries and Christine Bond, ‘Sex and Sentencing Disparity in South Australia’s Higher Courts’ (2010) 22(1) *Current Issues in Criminal Justice* 81, 93; Samantha Jeffries and Christine Bond, ‘Gender, Indigeneity, and the Criminal Courts: A Narrative Exploration of Women’s Sentencing in Western Australia’ (2013) 23(1) *Women & Criminal Justice* 19, 33-34, 38.

<sup>128</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4<sup>th</sup> ed, 2005) 174. His current position on this sentencing factor is discussed in Chapter Six.

<sup>129</sup> Carol Hedderman and Loraine Gelsthorpe (eds), *Understanding the Sentencing of Women* (Home Office Research Study No 170, A Research and Statistics Directorate Report, Home Office, 1997) 45.

<sup>130</sup> *Ibid.* 46.



sentencing has been identified in empirical studies in the fields of sociology, psychology and criminology. This research literature will be explored further in Chapter Six.

### *B. The Research Questions*

My aim was to conduct a detailed study of the role of family hardship in Australian sentencing. Therefore, this dissertation examines the operation of a single mitigating factor in Australian sentencing. A detailed study of this nature had not been undertaken before in Australia. At the outset of this study my research questions were:

- a) How have courts historically dealt with family hardship under the common law?
- b) Was the listing of family hardship as a sentencing factor in legislation deliberate and intended to change judicial sentencing practice?
- c) Has legislative recognition of this factor affected judicial sentencing practice?
- d) What are the influential cases on family hardship in Australia and what influence have these had on sentencing principles or practice?
- e) Is there a consistent approach to family hardship under s16A(2)(p) of the *Crimes Act 1914* (Cth) in the sentencing of federal offenders?

### *C. Development of the Research Framework*

This dissertation presents a holistic picture of the role of family hardship in Australian sentencing. Influenced by my work on the CSD, the scope of my research was to identify and document, not only, the use and development of sentencing principles on family hardship within state and territory sentencing jurisprudence, but also, to understand emerging federal sentencing jurisprudence and the inter-relationship between these frameworks. As this study has not been conducted before in Australia, this dissertation presents highly original research into family hardship as a mitigating factor.

Sharyn Roach Anleu and Kathy Mack have described that, '[s]entencing studies often rely on official statistics to compare sentencing outcomes across different

offence categories... This is a very large literature.<sup>131</sup> The sentencing research for this dissertation takes a different approach and focus. The methodology adopted by this dissertation is a multi-method approach.<sup>132</sup> This study draws upon traditional doctrinal legal analysis, legal history research techniques and socio-legal analysis.

Doctrinal legal analysis is often employed by legal researchers but not frequently explained. Jan Smits describes:

[i]t is surprising that, while the nature of comparative, economic and empirical research in law is widely discussed, this is not the case for doctrinal work. Although any jurist has some idea of what legal doctrine is about, it is more difficult to define it... It is probably best described as research that aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in existing law. This doctrinal approach is largely identical among the various subfields of the law.<sup>133</sup>

This dissertation involves a systematic exposition of family hardship as a mitigating factor in sentencing.

The research conducted for this dissertation seeks to address a gap in the field of research on sentencing principles in relation to family hardship as a sentencing factor. However, this dissertation addresses more than just what the law *is* in respect to taking into account an impact upon dependants at the sentencing stage. It is concerned with the *reality* of current sentencing practices. For example, with respect to the study of federal sentencing case law, it explores whether courts throughout Australia adopt a common approach to the sentencing of federal offenders. The method developed for the study of the case law in the Australian states and territories and study of the case law for courts sentencing federal offenders is explained below.

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<sup>131</sup> Sharyn Roach Anleu and Kathy Mack, 'Trial Courts and Adjudication' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford, 2010) 545, 554.

<sup>132</sup> See Laura Nielsen, 'The Need for Multi-Method Approaches in Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford, 2010) 951.

<sup>133</sup> Jan Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' (Maastricht European Private Law Institute Working Paper No 2015/06, Maastricht University, September 2015) 5. See also Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 85.

Another issue identified by the study is the problematic alignment of family hardship as a sentencing factor with gender bias. This point of tension is analysed via a socio-legal lens in Chapters Six drawing on the research literature in the fields of criminology, feminist legal research and legal philosophy. Therefore, my research observes and explains the derogations between ‘law in books’ and ‘law in action’.<sup>134</sup>

In conducting the study of family hardship in Australia, the limitations of the primary resources (ie. the sentencing remarks and judgments) was an important consideration. Because of this contextual landscape, this study is not premised on the assumption<sup>135</sup> that the weight attached to a discrete sentencing factor can be measured. In Australia, the ‘individualization of sentencing’<sup>136</sup> continues to operate and, as will be explained further in Chapter Two, the instinctive synthesis approach to sentencing expressly acknowledges that sentencing factors rarely have measurable discrete properties. The process of arriving at an appropriate sentence is an intuitive ‘synthesis’<sup>137</sup> of *all* relevant sentencing factors.<sup>138</sup>

The study of the case law *could not* address research questions such as:

- How much weight does family hardship carry in sentencing decisions?
- How is family hardship generally balanced against other sentencing considerations?

These questions are impossible to address for studies conducted only on sentencing remarks and judgments because judicial officers do not reveal, due to the instinctive synthesis method, how they have balanced particular sentencing factors against others. Nor does the study of the case law seek to track the relative

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<sup>134</sup> See further Stephen Bottomley and Simon Bronitt, *Law in Context* (The Federation Press, 3<sup>rd</sup> ed, 2006) 81; Cyrus Tata ‘Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process’ (2007) 16(3) *Social & Legal Studies* 425, 429; Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice* (MacMillan, 1981) 156.

<sup>135</sup> Tata has strongly critiqued mainstream sentencing scholarship’s peripheral engagement with sentencing factors and assumptions that have been drawn in respect to them. See Cyrus Tata ‘Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process’ (2007) 16(3) *Social & Legal Studies* 425, 435.

<sup>136</sup> Ralph Henham, *Sentencing: Time for a Paradigm Shift* (Routledge, 2014) 50.

<sup>137</sup> *Markarian v The Queen* (2005) 228 CLR 357, 387 (McHugh J). The ‘instinctive synthesis’ approach to sentencing is explained in Chapter Two. See generally Arie Freiberg, *Fox & Freiberg’s Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3<sup>rd</sup> ed, 2014) 223.

<sup>138</sup> See *Wong* (2001) 207 CLR 584, 611 (Gaudron, Gummow and Hayne JJ); *Barbaro v The Queen* (2014) 253 CLR 58, 72 (French CJ, Hayne, Kiefel and Bell JJ).

impact of family hardship, compared to other factors, upon the overall sentence imposed upon the offender. However, this study of the case law *is* premised on the position that acknowledgement of sentencing factors can be identified in cases. Further, it is argued that sentencing principles and practices in respect to individual sentencing factors can be analysed.

As will be seen in Chapters Four and Five, in the consideration of family hardship's place within sentencing, courts have frequently imposed various requirements based around a threshold test of 'exceptional circumstances'. Whilst this dissertation looks at the role of exceptional circumstances in the treatment of family hardship within sentencing, it is not an analysis of the types of matters courts have found to be 'exceptional'. Nor does this dissertation engage in a detailed discussion of what the courts across Australia have considered to be 'exceptional circumstances'.<sup>139</sup>

Additional limitations of the primary materials were that a study of the sentencing remarks and judgments do not reveal whether family hardship was, in fact, raised before the court in a plea of mitigation. For example, when it has been raised before the court and considered by a judicial officer, this may not always be recorded within sentencing remarks. The evidence put before a court in respect to family hardship is also not required to be set out in sentencing remarks and judgments. Occasionally the sentencing remarks and judgments will disclose evidence put before the court or highlight problems the judicial officer has identified with the evidence put before the court, but in Australia there is no requirement for sentencing remarks to acknowledge or describe all material put before the court in a sentencing hearing.

The Scottish sentencing scholar, Cyrus Tata has noted that '[s]cholars of legal doctrine have been concerned to describe and explain the use of sentencing

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<sup>139</sup> For a recent analysis of what Australian courts have seen as 'exceptional circumstances' see Tamara Walsh and Heather Douglas, 'Sentencing Parents: The Consideration of Dependent Children' (2016) 37 *Adelaide Law Review* 135, 146-157. See also Stephen Odgers, *Sentencing: The Law of Sentencing in NSW Courts for State and Federal Offences* (Longueville Books, 2<sup>nd</sup> ed, 2013) 365-366.

discretion by analysing Appeal Court Judgments.’<sup>140</sup> Tata has identified limitations to the traditional doctrinal method’s ability to ‘explain and enhance the structure of sentencing discretion’.<sup>141</sup> The first limitation he has identified is the ‘weak impact of Appeal Court judgements on first instance sentencing’.<sup>142</sup> The second limitation was a ‘deficiency of principled coherence of Appeal Court behaviour’.<sup>143</sup>

The research conducted for this study, does not engage with the first limitation; to do so would require the observation of lower court proceedings and/or review of court transcripts. The gap between the operation of the law in higher courts to first instance sentencing courts is not the focus of this research. Therefore, this study does not examine how family hardship is taken into account in the lower and intermediate courts of Australia. The study is premised on the position that exploration of sentencing principles and policy, exposed in sentencing decisions of superior courts and courts of appeal is relevant and valuable research. The advancement of the understanding of sentencing principles, in the context of individualised justice, is assisted by an understanding of the reasons for decisions rather than how the facts of an individual case impacted upon an individual reasoning process.

The critical review of the case law in Chapter Four and Chapter Five exposes the range of ideas and assumptions at work in current sentencing practices. Further research in this field should explore Tata’s claim and study the impact of superior court judgments on courts lower in the court hierarchy. Although, within the current instinctive synthesis approach to sentencing, it would be difficult to establish an objective measure of the compliance or non-compliance with sentencing principles in first instance sentencing remarks.

In respect of the second limitation, this study *does address* the question of the ‘deficiency of principled coherence of Appeal Court behaviour’.<sup>144</sup> The study of the

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<sup>140</sup> Cyrus Tata, ‘Institutional Consistency: Appeal Court Judgements’ in Andrew Von Hirsch, Andrew Ashworth and J Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3<sup>rd</sup> ed, 2009) 276, 276.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

Australian case law seeks to isolate sentencing principles and identify if there is diversity in sentencing practices. Tata contends that one key difficulty in respect to this second limitation is the 'inherent interpretability of legal 'facts''.<sup>145</sup> He has observed that:

Appeal Courts in common law jurisdictions have tended to stress the limits of extrapolation of the judgment to other cases. Either it is argued that the judgement cannot be compared with other cases; or, in 'leading' or 'guideline' judgements the court has said that a tariff can be established but that it can only apply when cases share the specific combination of 'facts'.<sup>146</sup>

This is true, if one is referring to the transferability of *sentencing outcomes*. However, this dissertation posits that it is possible to analyse sentencing remarks and judgments and extrapolate common law (and statute-based) sentencing principles.

This study advocates for greater attention towards and increased study of Australian sentencing principles. It is important to shift the focus in sentencing jurisprudence away from sentencing outcomes to the sentencing principles which are applied by sentencing judges to determine those outcomes.<sup>147</sup> It is suggested by this research that greater judicial and academic attention to sentencing principles in Australia should occur. Moreover, in Australia, a focus upon principles rather than outcomes, best accommodates individualised justice and instinctive synthesis which the High Court has consistently emphasised to be the cornerstones of sentencing in Australia.<sup>148</sup>

This dissertation will explore the emergence of 'family hardship' as a mitigating factor within the common law legal tradition. This study makes an important contribution to scholarship in sentencing. Reflecting upon the deficiencies in sentencing scholarship identified by von Hirsh, Roberts and Tata, this study begins to remedy significant gaps in the field by undertaking a substantive analysis of the use and significance attached to family hardship as a sentencing factor within Australia. Through an original study of the case law, it will examine the way that

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<sup>145</sup> Ibid 277.

<sup>146</sup> Ibid.

<sup>147</sup> See also Barbara Hudson, 'Doing Justice to Difference' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Oxford University Press, 1998) 224, 229.

<sup>148</sup> See further discussion of this in Chapter Two.

Australian courts have approached this sentencing factor and will engage closely with the role of family hardship in federal sentencing.

#### *D. Terminology*

##### *1. 'Sentencing Principles'*

Sentencing jurisprudence has adopted the terms 'sentencing principles' or 'principles of sentencing' to describe rules which guide the exercise of judicial discretion in determining an appropriate sentence. Sentencing principles under the common law have emerged as a result of appeals against sentence in superior courts.<sup>149</sup> Sentencing principles can be identified in appellate court judgments. Sentencing principles can also be identified in the reasons for sentence. These reasons are called 'sentencing remarks' (see below). There is a common law duty to provide reasons for sentence,<sup>150</sup> and often a statutory duty arises to provide reasons for specific decisions.<sup>151</sup> This dissertation adopts the term sentencing principles.

##### *2. 'Family Hardship'*

There are legislative provisions in Australia that direct a court to have regard to 'the probable effect that any sentence or order under consideration would have on any of the person's family or dependants'.<sup>152</sup> This sentencing factor has been described in numerous ways. Common descriptions include:

- Hardship to others;<sup>153</sup>
- Collateral consequences;<sup>154</sup> and
- Third party hardship.<sup>155</sup>

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<sup>149</sup> Ralph Henham, *Criminal Justice and Sentencing Policy* (Dartmouth, 1996) 1.

<sup>150</sup> *R v Duffy* [1999] NSWCCA 321 (13 October 1999) [11].

<sup>151</sup> See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 5(2), 45(2)

<sup>152</sup> See, *Crimes Act 1914* (Cth) s 16A(2)(p); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(o).

<sup>153</sup> See, eg, Mirko Bagaric and Richard Edney, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 301; Kate Warner, *Sentencing in Tasmania* (Federation Press, 2<sup>nd</sup> ed, 2002) 115; Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2<sup>nd</sup> ed, 1999) 342; Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3<sup>rd</sup> ed, 2014) 420.

<sup>154</sup> See, eg, Mirko Bagaric and Richard Edney, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 301; Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6<sup>th</sup> ed, 2015) 194.

<sup>155</sup> See, eg, Stephen Odgers, *Sentencing: The Law of Sentencing in NSW Courts for State and Federal Offences* (Longueville Books, 2<sup>nd</sup> ed, 2013) 364-368.

This dissertation adopts the term 'family hardship' as a shorthand to cover all three dimensions in reference to this sentencing factor.

Under the common law and statute (where applicable) the hardship raised in mitigation of sentence need not only affect a 'family' member before it can be taken into account in sentencing. The study of the case law revealed that the principle has rarely been applied to third parties who are not family members of the defendant. This dissertation acknowledges that the legislative statement of the principle has the potential for broader application, but such potential has not been the focus of this study which is focused upon on sentencing 'parents'.

### 3. 'Court', 'Sentencing Court'; 'Judge', 'Sentencing Judge' and 'Judicial Officer'

The terms 'court' and 'sentencing court' are used to refer to the body responsible for imposing a sentence upon the offender. Some authors working in this field have adopted the term 'sentencer' to accommodate that it may be a magistrate or judge who is responsible for imposing a sentence.<sup>156</sup> This practice has not been adopted in this study. Throughout this dissertation, the terms 'judge', 'sentencing judge' and 'judicial officer' are used interchangeably.

### 4. 'Sentencing Remarks' and 'Judgments'

This dissertation looks at both 'sentencing remarks' and 'judgments'. Some scholars may use these terms interchangeably, but they can also be understood as defining two distinct processes. 'Sentencing remarks' are the remarks of the judicial officer made on sentencing the offender for an offence. Samantha Jeffries and Christine Bond provide:

Sentencing remarks are *verbatim* transcriptions of the comments made by the judge at the time of sentencing. In general, the remarks have a three-part structure: a summation of the context of the offence, a discussion of the different factors of mitigation or aggravation, and the imposition of a sentence.<sup>157</sup>

Therefore 'sentencing remarks' are first instance sentencing decisions

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<sup>156</sup> See, eg, Walker's critique in footnote 5 in Nigel Walker, 'The English Sentencing System\*' [1971] *Criminal Law Review* 576, 579.

<sup>157</sup> Samantha Jeffries and Christine Bond 'Narratives of Mitigation: Sentencing Indigenous Criminal Defendants in South Australia's Higher Courts' (2010) 46(3) *Journal of Sociology* 219, 224.



In contrast, 'judgments' can represent appellate court decisions on sentence where appellate courts may be making findings on principles of law and on the appropriateness of the sentence imposed at first instance. As described by George Zdenkowski in this role the appellate judge is 'a reviewer of sentences and a reviewer of sentencing.'<sup>158</sup> In some circumstances the appellate judge is permitted to make a new ruling on the sentence to be imposed upon an offender. Therefore, an appellate court can make a decision on sentencing and hand down its 'judgment' and there may be 'sentencing remarks' captured within the judgment.

#### IV METHOD FOR STUDY OF THE CASE LAW

As outlined above, this study does not examine the extent to which family hardship is raised in pleas of mitigation throughout Australia. The study acknowledges that in some matters the sentencing factor may have been raised in a plea in mitigation of sentence and may have been the subject of some discussion between the parties in the courtroom, but the sentencing factor is not recorded in the sentencing remarks.<sup>159</sup> This study is not a study based on court transcripts. The primary source materials are the sentencing remarks and judgments. Therefore, if the sentencing judge in the sentencing remarks or appellate judge in the judgment does not discuss the factor then this case would not be considered by this study.

In conducting the research for this study, rather than simply accepting and then analysing the purported 'leading cases', which tends to marginalize 'outlying' cases, a unique quantitative and qualitative method of tracking cases has been adopted (discussed below). The purpose of the examination of the case law was to identify and trace the changing way that Australian courts have approached family hardship. Through a legal research practice of 'chaining'<sup>160</sup> the legal principle on

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<sup>158</sup> George Zdenkowski, 'Sentencing' in Freckleton, I and Selby, H (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Thomas Reuters, 2009) 751, 751.

<sup>159</sup> This feature was clearly born out in the study of the case law where the sentencing factor was raised for discussion in the sentencing remarks of an individual judge but not mentioned at all by other members of the bench.

<sup>160</sup> See David Ellis, 'A Behavioural Approach to Information Retrieval System Design' (1989) 45(3) *Journal of Documentation* 171, 182.

family hardship was pursued from its earliest identified formation through its 'growth'<sup>161</sup> in 'case-by-case common law method'<sup>162</sup>. This study also considers the impact of the legislative consolidation of sentencing principles in the late 1980s upon sentencing practice.

The study of the case law on family hardship conducted for this dissertation spanned from the earliest identifiable case law through to 31 December 2011. This end date was selected to capture the case law surrounding the landmark case of *Markovic v The Queen* (2010) 200 A Crim R 510.<sup>163</sup> The end point was selected because of the special significance accorded to the 'final' determination of the issue within Victoria by the convening of a Full Court of five justices to determine when family hardship could be taken into account. Whilst, the exhaustive shepardizing of the case law ended at this point, subsequent significant cases reopening the question of the role and place of family hardship in sentencing have been discussed. It is now apparent that following *Markovic* the differences in position are now entrenched within intermediate appellate courts. As will be seen in Chapter Five, at the time of submission of this dissertation, these differences remain to be determined by the High Court. Only a decision of the High Court could provide binding authority on the applicable principles to the approach of family hardship.

The research for this dissertation surveyed sentencing remarks and judgments handed down by superior courts in Australia. Decisions from inferior courts were not included in this study. Therefore, study of the case law examines sentencing remarks and appellant decisions from state and territory supreme courts, the Federal Court of Australia (in the context of the early case law for the Australian Capital Territory) and the High Court of Australia. The research revealed that there has been very minimal engagement with the sentencing principles surrounding family hardship by the High Court. As mentioned above, case law in 2017 has

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<sup>161</sup> Samuel Linn, *An Analytical Index of Parallel Reference to the Cases Adjudged in the Several Courts of Pennsylvania, With an Appendix Containing a Collection of Cases Overruled, Denied, Doubted or Limited in their Application* (1857) 'Preface' cited in Patti Ogden, "'Mastering the Lawless Science of Our Law": A Story of Legal Citation Indexes' (1993) 85(1) *Law Library Journal* 1, 22.

<sup>162</sup> Warner describes how Australian courts have 'evol[v]ed sentencing principles through the case-by-case common law method' see Kate Warner, *Sentencing in Tasmania* (Federation Press, 2<sup>nd</sup> ed, 2002) 1.

<sup>163</sup> The case and its significance are discussed in Chapter Four and Chapter Six.

identified the judicial interpretations of family hardship under s 16A(2)(p) as a 'live issue'<sup>164</sup> and a recent line of cases suggest the issue is likely to come before the High Court.<sup>165</sup>

#### *A. Sentencing Principles as Authoritative Precedent*

There has been ongoing deliberation about whether sentencing principles have precedential value.<sup>166</sup> Eminent sentencing scholar Thomas, writing in the 1970s, described the judicial practice of shaping the discretion exercised by sentencing judges as 'sentencing policy'.<sup>167</sup> Thomas found that the development of sentencing policy, in England and Wales in the 1970s, was entrusted to the judiciary and was made up of 'authoritative determinations of principle and policy'<sup>168</sup>. He observed that the Court of Appeal (Criminal Division) 'treated its own previous decisions on matters of general sentencing principle as authoritative precedents.'<sup>169</sup> These sentencing principles were treated as binding upon courts lower in the court hierarchy.<sup>170</sup> Moreover, Thomas identified that earlier case law setting out sentencing principles had continuing relevance until an overruled by a full court of the Court of Appeal.<sup>171</sup>

As explained further in Chapter Two (and then explored in greater detail in the study of the case law in Chapter Four and Chapter Five), modern Australian courts have been prepared to identify appealable error when a sentencing judge has erred in the application of sentencing principles. This dissertation, therefore,

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<sup>164</sup> *Kaveh v The Queen* [2017] NSWCCA 52 (24 March 2017) [6]. This will be discussed further in Chapter Five.

<sup>165</sup> *R v Zerafa* [2013] NSWCCA 222 (4 October 2013); *Elshani v The Queen* (2015) 255 A Crim R 488; *DPP (Cth) v Pratten (No 2)* [2017] NSWCCA 42 (17 March 2017); *Kaveh v The Queen* [2017] NSWCCA 52 (24 March 2017).

<sup>166</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 4; Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2<sup>nd</sup> ed, 1999) 31-32; Martin Wasik, 'Going Around in Circles? Reflections on Fifty Years of Change in Sentencing' (2004) Apr *Criminal Law Review* 253, 259; Mary Daunt-Fear, *Sentencing in Western Australia* (The University of Queensland Press in association with the Australian Institute of Criminology, 1977) 88; Ralph Henham, *Criminal Justice and Sentencing Policy* (Dartmouth, 1996) 4.

<sup>167</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 3.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid* 4.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid* 4-6.

proceeds on the basis that sentencing principles can be identified and extracted from sentencing remarks and judgments and that these principles are binding.

### *B. Chaining*

The concept of chaining emerged in 1989 through the work of David Ellis. Ellis conducted a study of the 'information seeking patterns'<sup>172</sup> of social scientists and scientists and he developed a behavioural model of their research patterns.<sup>173</sup> One of the processes he identified as 'chaining'.<sup>174</sup> Ellis defined 'chaining' as 'characteristics of patterns of searching for information which involve following citation connections between material'.<sup>175</sup>

Within this process, he identified a practice of 'backward chaining' which involved the researcher 'following up references or footnotes'<sup>176</sup> within a text. He identified that this was the predominate information seeking pattern adopted by social scientists. Ellis also identified a practice of 'forward chaining', which was widely used in the law, and involved checking to see 'whether further work had been done which cited material already known'.<sup>177</sup> These terms are very useful for describing the processes involved in legal research.

#### *1. Legal Research Patterns of 'Chaining'*

Stuart Sutton has mapped Ellis' behavioural models of research patterns to legal research.<sup>178</sup> He found that in legal research 'chaining' is a 'context sensitive exploration'.<sup>179</sup> Sutton described the operation of chaining in the law as the lawyer 'armed with one or more seed cases'<sup>180</sup> working both through a process of forward chaining and backward chaining until 'satisfied that all cases useful to modelling

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<sup>172</sup> David Ellis, 'A Behavioural Approach to Information Retrieval System Design' (1989) 45(3) *Journal of Documentation* 171.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid* 182.

<sup>175</sup> *Ibid* 183.

<sup>176</sup> *Ibid* 183.

<sup>177</sup> *Ibid* 183.

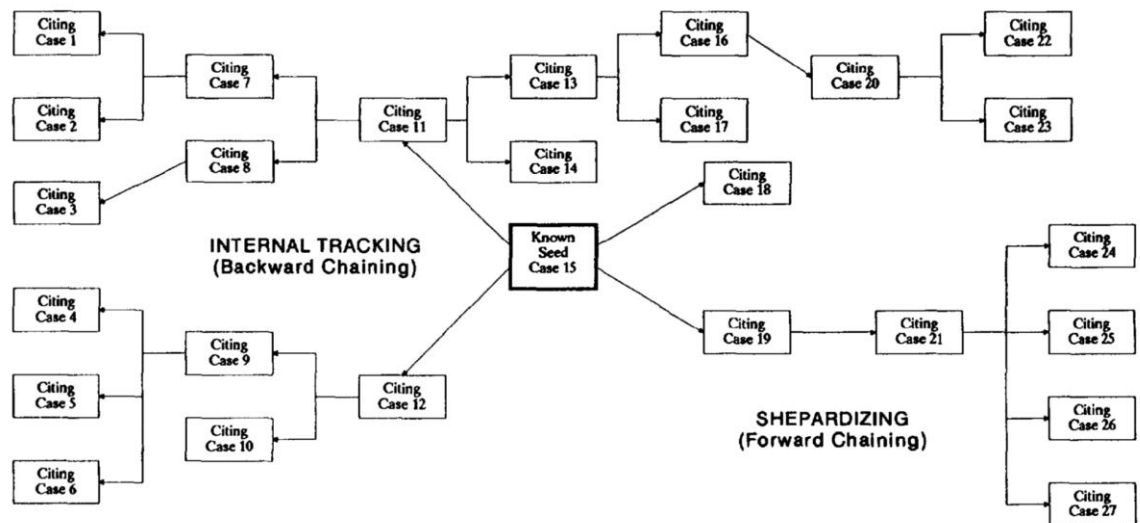
<sup>178</sup> See Stuart Sutton, 'The Role of Attorney Mental Models of Law in Case Relevance Determinations: An Exploratory Analysis' (1994) 45(3) *Journal of the American Society for Information Science* 186.

<sup>179</sup> *Ibid* 193 (see Figure 8).

<sup>180</sup> Stuart Sutton, 'The Role of Attorney Mental Models of Law in Case Relevance Determinations: An Exploratory Analysis' (1994) 45(3) *Journal of the American Society for Information Science* 186, 194.

the subsector have been found.<sup>181</sup> Sutton offered the following figure (Figure 1) to illustrate the process of chaining in legal research:

**Figure 1: Citation Tracking**



Source: Stuart Sutton, 'The Role of Attorney Mental Models of Law in Case Relevance Determinations: An Exploratory Analysis' (1994) 45(3) *Journal of the American Society for Information Science* 186, 195.

In Figure 1, Sutton has marked the forward chaining process as 'shepardizing'. 'Shepardizing' is a term employed in the USA research literature to describe the use of a legal citation index (developed by Frank Shepard).<sup>182</sup> 'Shepards citators' are employed by Lexis Nexis and Westlaw. Sutton explained that his figure (see Figure 1 above) represents:

...twenty-seven cases in a citation network. The passage of time is denoted by movement from the left to right. The numbering of the cases represents the chronological order in which they were decided and reported by the courts. The arrows represent the direction of the searcher's chaining.<sup>183</sup>

The research process of shepardizing is not currently available on commercial legal databases for tracing family hardship as a sentencing factor.

## 2. A Research Process of 'Exhaustive Shepardizing'

<sup>181</sup> Ibid.

<sup>182</sup> Patti Ogden, "'Mastering the Lawless Science of Our Law": A Story of Legal Citation Indexes' (1993) 85(1) *Law Library Journal* 1, 27-36.

<sup>183</sup> Stuart Sutton, 'The Role of Attorney Mental Models of Law in Case Relevance Determinations: An Exploratory Analysis' (1994) 45(3) *Journal of the American Society for Information Science* 186, 194.

There is a research process called 'exhaustive shepardizing'<sup>184</sup>. Stephen Marx has described this, in respect to legal research practices, as follows:

Exhaustive shepardizing is the process of (a) selecting a case relevant to the legal problem which faces the lawyer and designating that case as the root case; (b) selecting all cases which cite the root case; (c) selecting all cases which cite the cases in (b), etc. until no more citations can be found; (d) selecting all cases which are cited in the cases collected in steps (a), (b), and (c); and (e) repeating steps numbered (b), (c), and (d) until no more cases are found.<sup>185</sup>

He commented that,

the process...is so time-consuming that most lawyers do not follow it to its logical conclusion...a lawyer will often only do a partial shepardization rather than follow all of the possible cross-citations to their logical end.<sup>186</sup>

The study of the Australian case law on family hardship conducted for this dissertation used the process of 'exhaustive shepardizing'.

For this study of family hardship, initially a 'seed' list of cases was identified for analysis based on researching the secondary research literature and general searches of legal databases: Casebase (LexisNexis)('Casebase'), Westlaw International (Thomson Reuters)('Westlaw'), Legal Online (Thomson Reuters)('Legal Online') and the Australasian Legal Information Institute ('AustLII'). This resulted in the compilation of an index of cases for each jurisdiction. All the cases collated via this process were read and any further cases identified in the judgments as relevant to the principle of family hardship were located and included into the compilation of cases for each jurisdiction (backward chaining). 'Note up' processes available within the databases were also used to identify any new or previously unidentified case law (forward chaining). This process took several cycles and the end result was a body of case law where no gaps were identified by the researcher.

This process of exhaustive shepardizing was conducted to identify cases with a high juristic status on family hardship as a sentencing principle. 'Juristic status' is a term used by Sutton and explained in Figure 2 below.

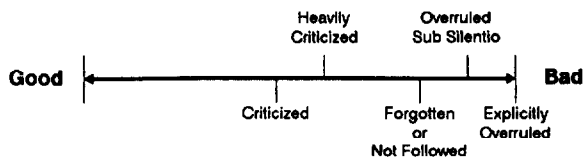
## Figure 2: Juristic Status

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<sup>184</sup> Stephen Marx, 'Citation Networks in the Law' (1970) 4 *Jurimetrics Journal* 121, 124.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid 122.



Source: Stuart Sutton, 'The Role of Attorney Mental Models of Law in Case Relevance Determinations: An Exploratory Analysis' (1994) 45(3) *Journal of the American Society for Information Science* 186, 192.

Cases with a 'high juristic status in the ... jurisdiction...[are] more likely to influence the outcome...than would a case with a lesser juristic status'.<sup>187</sup> This is useful terminology to adopt for this study of sentencing principles as it is not associated with the doctrine of *stare decisis*.<sup>188</sup> The research process of shepardizing is not concerned with whether a 'judge has erroneously cited a case'<sup>189</sup> but is focused upon identifying highly cited cases (cases with high juristic status) and any cases which are irrelevant or which have little or no precedential value are removed from the research.<sup>190</sup> Sutton has described cases with low juristic status which get dropped from the research process as 'noise' cases.<sup>191</sup>

In this study, the case analysis conducted for each jurisdiction examined cases on family hardship identified through the research process of exhaustive shepardizing. Cases that significantly addressed the issue of family hardship as a sentencing factor, where the judicial officers expressly addressed the probable impact of the sentence upon the offender's dependants in a meaningful way in their sentencing remarks or judgment, were included in the study. Cases that had been identified through the research process but that did not meaningfully engage at all with family hardship, such as those which simply noted that family hardship was taken into account but did not set out judicial reasons or any reference to sentencing principles, were classified as 'noise' cases and were dropped from the study.

### *C. The Study of the Australian Case Law*

<sup>187</sup> Stuart Sutton, 'The Role of Attorney Mental Models of Law in Case Relevance Determinations: An Exploratory Analysis' (1994) 45(3) *Journal of the American Society for Information Science* 186, 187.

<sup>188</sup> As explained by Marx, see Stephen Marx, 'Citation Networks in the Law' (1970) 4 *Jurimetrics Journal* 121, 122.

<sup>189</sup> *Ibid.*

<sup>190</sup> Stuart Sutton, 'The Role of Attorney Mental Models of Law in Case Relevance Determinations: An Exploratory Analysis' (1994) 45(3) *Journal of the American Society for Information Science* 186, 192.

<sup>191</sup> *Ibid.*

### 1. State and Territory Jurisdictions

The study of the case law focused upon identifying current sentencing principles and the prevailing practice, as expressed by superior courts, in each Australian jurisdiction in respect of family hardship. Using the process of exhaustive shepardizing (described above) the state and territory study located 295 cases. Table 1 sets out the number of cases that were examined for each Australian jurisdiction and identified whether they were first instance or appellant court matters.

The study focused upon the work of superior court or 'higher courts'<sup>192</sup>. Lower court sentencing remarks (ie. district court and magistrates court) have not been included in this study. The decision to exclude sentencing decisions by lower courts was made to contain the parameters of the study and because, throughout Australia, lower courts should give effect to sentencing policies and sentencing principles expressed by superior courts in their court hierarchy.<sup>193</sup> First instance supreme court decisions and appellate decisions were surveyed. The decision to include first instance superior court decisions (picked up by chaining) was made because of the weight those decisions can carry.<sup>194</sup> There were not many first instance supreme court decisions identified by the process of exhaustive shepardizing (see Table 1 below).

**Table 1: State and Territory Case Analysis**

Jurisdiction	Total Number of Cases	%	Sentencing Court (First instance)	Appeal Court
Australian Capital Territory	12	4%	2	10
New South Wales	70	24%	7	63

<sup>192</sup> Further described in Chapter Two.

<sup>193</sup> See *R v Jackson* (1972) 4 SASR 81, 91-92.

<sup>194</sup> See discussion of precedent and the binding statements of sentencing principles in *Wong v The Queen* (2001) 207 CLR 584, 605 (Gaudron, Gummow and Hayne JJ).



Northern Territory	<b>16</b>	5%	1	15
Queensland	<b>23</b>	8%	1	22
South Australia	<b>52</b>	18%	0	52
Tasmania	<b>13</b>	4%	3	10
Victoria	<b>55</b>	19%	4	51
Western Australia	<b>54</b>	18%	0	54

The collation process undertaken for the state and territory study can be divided into two phases:

**(a) Detailed case analysis**

A detailed case analysis of each case within the study was conducted. For each case within the study, the sentencing remarks were read carefully, and information collected and recorded in customised tables. For each case examined ten features of the case were recorded. These were:

- case name and court (i.e. case citation);
- judicial officers;
- offence and sentence;
- offender’s gender;
- whether the sentencing factor was favourably received (ie. whether family hardship was recognised in this case as a relevant sentencing consideration that carried weight in the act of sentencing. Here the information recorded was based on the ultimate finding of the court.);
- classification of the sentencing factor (i.e. how the factor was described by the court in sentencing remarks);
- evidence noted by the court in respect of the sentencing factor;
- precedent trail;
- purposes of sentencing where noted in the sentencing remarks as relevant;
- and
- any relevant broader issues raised in the sentencing remarks that provided important context to the findings of the court.

This extensive examination of the identified case law made up the first phase of data collection. Cases with little or no meaningful engagement with family

hardship as a sentencing factor ('noise cases' as described above) were removed from the study in the second phase. If a case was cited as being relevant to family hardship it was included into the study (provided it fulfilled the criteria of meaningfully engaging with the factor) and any cases cited within it, were picked up and included (if they had not already been captured by the chaining process).

### **(b) Identification of cases with a high juristic status**

The second phase of data collection was to record the number of citations for each case. Information collected from the sentencing remarks under the precedent trail was used during this phase. The 'precedent trail' is a list of all the cases cited as relevant authorities within each case in respect of this sentencing factor.

Information was recorded based on the sentencing remarks or judgments for each case identified.

Dissenting judgments were included in this phase of data collection. The decision to include these judgments and record the references to case law within them was because this study was interested in identifying influential cases, those with a high juristic status, on family hardship as a sentencing principle; identifying which earlier judicial statements of principle were the most influential by a process of forward and backward chaining. Dissenting remarks are also sometimes influential in subsequent cases. In this respect, the study departs from classical doctrinal analysis, which would privilege formally binding case law.

LawCite<sup>195</sup> (an international legal case citation) identifies influential cases for its readers by placing stars next to some cases. A case will get one star on LawCite for each 50 citations.<sup>196</sup> The stars, therefore, highlight the frequency of citation (or popularity of the case). Features such as these on legal databases can measure how frequently a case is cited overall by other cases but they cannot drill down to the level of measuring how frequently a case is cited by other cases on the principle of family hardship. In focusing solely on one sentencing factor and by the manual collection of case citations (ie. a process of exhaustive shepardizing

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<sup>195</sup> AustLII, *LawCite* (December 2008) Australasian Legal Information Institute <[http://www.austlii.edu.au/austlii/help/lawcite\\_announce.html](http://www.austlii.edu.au/austlii/help/lawcite_announce.html)>.

<sup>196</sup> AustLII, *LawCite Search Results Help* (December 2008) Australasian Legal Information Institute <<http://www.austlii.edu.au/LawCite/doc/results.html>>.

conducted only on the issue of family hardship) the study identified cases of high juristic status for this mitigating factor.

This study identifies cases with a high juristic status (influential cases) as distinguished from authoritative cases (ie. precedential cases). As explained above, my intention in undertaking this collation of data was not to measure the formally binding status of a case. My concern was to identify and document how the law in this area has developed (in practice) and to reveal *what* sentencing courts regarded as sentencing principles within each jurisdiction. Chapter Four, therefore, demonstrates how judicial consensus has been forged. Appendix A provides a table with the number of hits for each case within the study.

## *2. Federal Jurisdiction*

The study of the federal case law ('the federal study') traced the development of the principle and judicial practice in the sentencing of federal offenders. The outcomes of the study (presented in Chapter Five) reveal how the principle has developed and highlights what matters have influenced the courts in their approach to taking into account the potential impact of the sentence upon dependants. This research demonstrates that there is no consistent approach to sentencing federal offenders in respect of the use and operation of this sentencing factor. Drawing on the conclusions in Chapter Four, I show that there is a strong correlation between state and territory practice and the sentencing of federal offenders by courts in a particular jurisdiction.

The federal study located 92 cases. Table 2 (below) provides an overview of the number of federal cases arising from each jurisdiction. In contrast to the state and territory study, in the federal study only appellate decisions of superior courts were included in the study.<sup>197</sup> The reason for the different in approach taken between the two studies of the case law was because a central purpose of the state and territory study was to map out jurisdictionally-localised sentencing practices in respect of family hardship (see Chapter Four). The federal study was a narrower study as each jurisdiction's sentencing practices had already been identified. The

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<sup>197</sup> First instance sentencing remarks were not included.

primary purpose of the federal study was to identify if there was a national consistency gap in federal sentencing. Therefore, this study was concerned with what the superior courts thought were the principles guiding consideration of family hardship in federal sentencing. A comparison of what appellate courts in each Australian jurisdiction found were governing principles were then examined in light of their localised sentencing practices (which was set out in Chapter Four).

**Table 2: Federal Case Analysis**

<b>Jurisdiction (State and Territory Courts exercising federal jurisdiction)</b>	<b>Number of Cases</b>	<b>%</b>
Australian Capital Territory	2	2.17%
Northern Territory	2	2.17%
Queensland	9	9.78%
New South Wales	33	35.87%
Tasmania	5	5.43%
Victoria	19	20.65%
South Australia	6	6.52%
Western Australia	16	17.39%
<b>Total</b>	<b>92</b>	

Table 2 demonstrates that much of the case law arises from New South Wales and Victoria. This corresponds with the relative size of these jurisdictions and their dominance in the hearing of federal offences. Within this body of case law there were four cases that dealt with both federal offences and state or territory offences in the sentencing process. These four cases had already been subject to detailed case analysis in the state and territory study and are identified in Table 3 (below).

**Table 3: Combined Cases Within Study**

<b>Case</b>	<b>Jurisdiction</b>
<i>Tan Hai Huat</i> (1990) 49 A Crim R 378	WA + CTH
<i>Carmody</i> (1998) 100 A Crim R 41	VIC + CTH

<i>Markovic v The Queen</i> (2010) 200 A Crim R 510	VIC + CTH
<i>R v Hancock</i> [2011] NTCCA 14	NT + CTH

The compilation of the federal cases mirrored the process adopted for the state and territory study. The seed list of cases was created by searching the legal databases for cases citing the federal provision or 'hardship'. The legal databases consulted were Casebase (LexisNexis), Legal Online (Thomson Reuters) and AustLII. Federal cases were also been identified from citations within the state and territory study. 'Note up' processes available within the databases, were utilised for the leading federal cases addressing this sentencing factor. Once an index of cases had been identified and all relevant cases collated via this process, all of the cases were then read, and any further federal cases identified in the judgments as relevant to the principle of family hardship were located and included into the compilation of cases. Once again, this process took several cycles and the end result was a body of federal case law where the researcher identified no gaps (ie. exhaustive shepardizing was employed).

A detailed case analysis was undertaken for each of the 92 cases mirroring the practice undertaken for the first collation phase of the state and territory study. The second phase of the data collation was also conducted (based on the methodology set out above). Consistent with the state and territory study, the purpose was to determine the cases that were the most frequently referenced by judicial officers (ie. cases with a high juristic status) rather than measuring formally binding case law. The results of this study of the federal case law are presented in Chapter Five. Appendix A provides a table with the number of hits for each case within the federal jurisdiction.

## V OUTLINE OF CHAPTERS TWO TO SEVEN

This study of family hardship as a mitigating factor explores how the principle came to be embedded within sentencing law and practice in Australia. Chapter Two will set the scene for the study of family hardship in sentencing by providing

an overview of the Australian criminal justice system and the Australian sentencing landscape. Chapter Two will also build on the context provided in this chapter to elucidate how this research is the product of a period of growing recognition of federal sentencing law and practice within Australia.

Chapter Two will describe how sentencing factors sit within a system of broad judicial discretion. It will describe the prevailing 'instinctive synthesis' approach to sentencing in Australia and the nature of sentencing appeals. Chapter Two outlines the state and territory sentencing frameworks and will provide an overview of the sentencing regime in operation in each jurisdiction which necessarily precedes the study of the case law (in Chapter Four and Chapter Five).

Chapter Three will explore the evolution of the principle of family hardship in the common law. It will then look closely at its recognition in sentencing legislation within Australia. This chapter will demonstrate that the inclusion of family hardship into a list of sentencing factors was a deliberate and a clear articulation that the effect of a sentence upon third parties was to be a legitimate consideration in sentencing.

Chapter Four sets out the findings of the study of the case law on family hardship. It traces the development of family hardship as a sentencing factor across the Australian states and territories. The study identifies the tensions that exist and discusses the influence of cases with a high juristic status. The chapter engages with the concept of a unified common law in Australia as set out by the High Court in *Lipohar*.<sup>198</sup> This chapter will examine whether there was a perceivable sentencing pattern within or across jurisdictions.

Chapter Five then examines how family hardship and, in particular, its legislative expression in s 16A(2)(p) of the *Crimes Act 1914* (Cth) has been taken into account in federal sentencing. It will reveal that localised practices of taking family hardship into account, uncovered in Chapter Four, influence federal sentencing practices. This chapter draws together the findings from the study of the state and

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<sup>198</sup> *Lipohar v The Queen* (1999) 200 CLR 485, 505.

territory cases and federal cases to comment on the Australian landscape as a whole.

Chapter Six explores the ongoing concern that a consideration of family hardship imports gender bias into sentencing. The analysis of the case law shows that family hardship as a mitigating factor can operate to the advantage of female offenders. This chapter looks more closely at those findings alongside the broader research literature and challenges the claim that taking family hardship into account in sentencing is gender-biased leniency. This chapter will engage with the problems of incorporating experiences outside the male norm. Chapter Six rejects both the claim that mothers are being granted too much leniency in sentencing, and the claim that taking family hardship into account at sentencing is an act of judicial mercy. The relationship between family hardship and gender is reinterpreted in this chapter.

Chapter Seven draws the dissertation and highly original study of family hardship in Australia together and provides concluding remarks. It explains the significance of this study and the value of its findings for judicial practice and for further research into the role of sentencing factors, the development of sentencing principles and jurisprudence in Australia and also into federal sentencing law within Australia.

## VI CONCLUSION

This introductory chapter has explained how and why this study came about. This chapter has set out the research questions and emphasised the significance of the research conducted for this dissertation. The research methodology designed for the detailed study of family hardship is highly original. This study makes an important contribution to Australian sentencing scholarship in two fields. First, this dissertation presents a critical analysis of the operation and development of a single mitigating factor in Australia. This detailed study of a single mitigating factor drawing upon an extensive and systematic analysis of the case law, sheds light

upon the practical operation of common law, including where there has been legislative enactment of sentencing factors, and upon the role of Australian sentencing principles. Second, as a study on federal sentencing practices examined alongside state and territory sentencing practices the research conducted for this dissertation and the findings presented define and develop a new agenda for research on Australian federal sentencing laws and practices.



## 2. THE AUSTRALIAN SENTENCING LANDSCAPE

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### I INTRODUCTION

This background chapter provides a general overview of Australian sentencing law and its key components. Throughout the 1980s and 90s textbooks on Australian sentencing were rare and the topic of sentencing was generally addressed as a single chapter within mainstream criminal law textbooks (if at all<sup>199</sup>). The works of Mary Daunton-Fear,<sup>200</sup> Richard Fox and Arie Freiberg<sup>201</sup> and Kate Warner<sup>202</sup> represented the few specialized texts on sentencing. The field was so limited that even though Fox and Freiberg and Warner's textbooks were localized,<sup>203</sup> they were widely read and referenced.

In 2007, Mirko Bagaric and Richard Edney published *Australian Sentencing: Principles and Practice*.<sup>204</sup> This was the first textbook on Australian sentencing law covering all jurisdictions, and it led to a loose-leaf service.<sup>205</sup> Bagaric and Edney's original text was only the fifth textbook on sentencing written in Australia but it heralded the beginning of a wave of publications in this field. In the last five years, the landscape has changed and there is now a variety of textbooks addressing

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<sup>199</sup> See, eg, Colin Howard, *Criminal Law* (The Law Book Company, 4<sup>th</sup> ed, 1982).

<sup>200</sup> Mary Daunton-Fear, *Sentencing in Western Australia* (The University of Queensland Press in association with the Australian Institute of Criminology, 1977); Mary Daunton-Fear, *Sentencing in South Australia* (The Lawbook Company in association with the Australian Institute of Criminology, 1980).

<sup>201</sup> Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 1985).

<sup>202</sup> Kate Warner, *Sentencing in Tasmania* (Federation Press, 1991).

<sup>203</sup> Fox and Freiberg's text addressed federal and Victorian sentencing law and practices see Richard Fox, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 1985); Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2<sup>nd</sup> Ed, 1999); Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3<sup>rd</sup> ed, 2014). Warner's text addressed federal and Tasmanian sentencing law and practices see Kate Warner, *Sentencing in Tasmania* (Federation Press, 1991); Kate Warner, *Sentencing in Tasmania* (Federation Press, 2<sup>nd</sup> ed, 2002). Note that Daunton-Fear's texts did not attract significant judicial attention.

<sup>204</sup> Mirko Bagaric and Richard Edney, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007).

<sup>205</sup> Mirko Bagaric and Richard Edney, Mirko Bagaric and Richard Edney, *Australian Sentencing Online*, vol 1 (25 November 2011, Thomson Reuters <<https://legal.thomsonreuters.com.au/australian-sentencing-online/productdetail/112062>>).

sentencing.<sup>206</sup> The material set out in this chapter builds on this body of work and contributes to scholarship on Australian sentencing principles and practices.

This chapter outlines the Australian criminal justice system. The Australian criminal justice system is made up of nine jurisdictions; these are the six states, two territories and the federal jurisdiction. Each jurisdiction is unique. This chapter describes the legislative frameworks that have been established throughout Australia and explains the role of mitigating factors in each; attention is placed on the scope for consideration of family hardship as a sentencing factor within each jurisdiction. This material provides essential background context for Chapters Three, Four and Five.

The importance of judicial discretion in Australian sentencing is explained in this chapter. Concepts introduced in Chapter One will be revisited and this chapter will describe the 'instinctive synthesis' approach to sentencing. This chapter also explains the practice of individualised justice which operates throughout Australia, and discusses the tensions present between broad judicial discretion and the desire for consistency in sentencing. Important aspects of Australian sentencing jurisprudence are addressed in this chapter and this material is important context for the examination of the case law in Chapters Four and Five.

## II CRIMINAL JUSTICE IN AUSTRALIA

There is no single body of criminal law governing Australia, but rather, nine separate bodies of criminal law based upon the Commonwealth, states and territories. New South Wales ('NSW'), South Australia ('SA') and Victoria ('Vic') are

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<sup>206</sup> Melissa Bull, *Punishment & Sentencing: Risk, Rehabilitation and Restitution* (Oxford University Press, 2010); Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (The Federation Press, 2010); Stephen Odgers, *Sentencing: The Law of Sentencing in NSW Courts for State and Federal Offences* (Longueville Books, 2<sup>nd</sup> ed, 2013); Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 2014). Alongside these publications there has been recent editions of Kate Warner, et al, *Sentencing in Tasmania* (Federation Press, 2<sup>nd</sup> ed, 2002) and Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3<sup>rd</sup> ed, 2014). Bagaric and Edney's text is now in its fifth edition see Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 5<sup>th</sup> ed, 2017).

known as 'common law jurisdictions'.<sup>207</sup> This means that criminal offences in these jurisdictions are creatures of the common law or are created by state or territory parliaments through statute.<sup>208</sup> In these jurisdictions statutes generally 'build upon the common law'<sup>209</sup> and, accordingly are often 'interpreted in light of settled common law principles.'<sup>210</sup>

The remaining jurisdictions within Australia are known as 'code jurisdictions':<sup>211</sup> these are the Australian Capital Territory ('ACT'), Northern Territory ('NT'), Queensland ('Qld'), Tasmania ('Tas'), Western Australia ('WA') and the federal jurisdiction. Criminal offences within code jurisdictions are set out in Criminal codes.<sup>212</sup> Criminal codes are read on their 'own terms'<sup>213</sup> and are not interpreted under the presumption that they 're-state pre-existing common law.'<sup>214</sup> The ACT is not a fully codified jurisdiction as the code is in partial operation.<sup>215</sup> This means that the ACT is currently a blended, or hybrid, system where there are some codified offences and some common law offences.<sup>216</sup>

In the federal jurisdiction, the range of criminal acts that may be subject to Commonwealth law is limited in scope by constitutional heads of power<sup>217</sup> and subject to the incidental power set out in s 51(xxxix) of the *Australian*

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<sup>207</sup> Kenneth Arenson, Mirko Bagaric and Peter Gilles, *Australian Criminal Law in the Common Law Jurisdictions Cases and Materials* (Oxford University Press, 4<sup>th</sup> ed, 2014) 2; Simon Bronitt, 'The Criminal Law of Australia' in Kevin Jon Heller and Markus Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press, 2011) 49, 50.

<sup>208</sup> Updated by W Kukulies-Smith, LexisNexis Butterworths, *Halsbury's Laws of Australia*, vol 9 (2 November 2010) 130 Criminal Law, 'I Principles of Criminal Liability' [130-5]. See also Simon Bronitt, 'The Criminal Law of Australia' in Kevin Jon Heller and Markus Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press, 2011) 49, 50.

<sup>209</sup> Updated by W Kukulies-Smith, LexisNexis Butterworths, *Halsbury's Laws of Australia*, vol 9 (2 November 2010) 130 Criminal Law, 'I Principles of Criminal Liability' [130-5].

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*

<sup>212</sup> *Ibid.*

<sup>213</sup> *Stevens v The Queen* (2005) 227 CLR 319, 340.

<sup>214</sup> *Ibid.*

<sup>215</sup> *Criminal Code 2002* (ACT) ss 5, 8, 10(1).

<sup>216</sup> See Updated by W Kukulies-Smith, LexisNexis Butterworths, *Halsbury's Laws of Australia*, vol 9 (2 November 2010) 130 Criminal Law, 'I Principles of Criminal Liability' [130-5].

<sup>217</sup> See, eg, Fox and Freiberg point out that unlike the Canadian model, in Australia there is no express power for the Commonwealth to legislate with respect to criminal law. For more on the Commonwealth jurisdiction with respect to criminal law see Fox and Freiberg, *Sentencing State and Federal Law in Victoria* (Oxford University Press, 2<sup>nd</sup> ed, 1999) 42-44. See also Simon Bronitt, 'The Criminal Law of Australia' in Kevin Jon Heller and Markus Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press, 2011) 49, 51.

*Constitution*.<sup>218</sup> Criminal offences against the Commonwealth are found not only within the *Criminal Code* (Cth), but also, within a wide range of other Commonwealth statutes.<sup>219</sup> Indeed, in its latest enquiry into federal sentencing the ALRC observed that ‘there are now over 500 Commonwealth statutes containing criminal offences.’<sup>220</sup>

The Annual Report 2011-2012 of the CDPP describes tax and social security fraud, drug importation and commercial prosecutions as the traditional ‘backbone of CDPP prosecution practice.’<sup>221</sup> However, in recent years, Australia has seen substantial growth in the federal arena. The CDPP now prosecute across a broad range of crimes including cybercrime, environmental crimes, terrorism, people trafficking, serious and organised crime, and identity and fraud offences.<sup>222</sup> The number of federal offences being committed within Australia is also increasing.<sup>223</sup>

#### *A. Criminal Court Hierarchies*

The Australian criminal court hierarchy also consists of nine court hierarchies. There are the six state court hierarchies, two territorial court hierarchies and a federal court hierarchy. There is a consistent basic structure to the state and territory court hierarchies which is depicted below.

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<sup>218</sup> Section 51 (xxxix) of the *Australian Constitution* provides ‘Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.’

<sup>219</sup> See, eg, ‘Table 1: Legislation under which charges were dealt with in 2012-2013’ in Commonwealth, *The Commonwealth Director of Public Prosecutions Annual Report 2012-2013* (2013) 34-36.

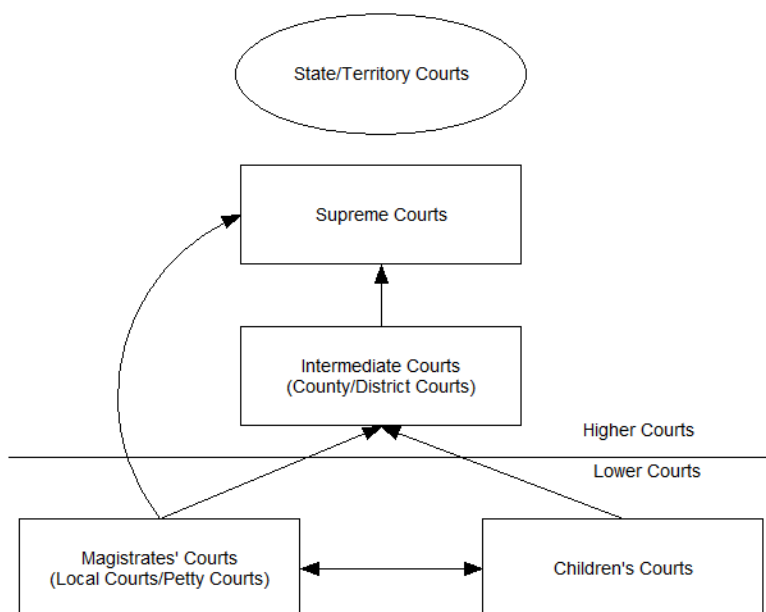
<sup>220</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 95.

<sup>221</sup> Commonwealth, *The Commonwealth Director of Public Prosecutions Annual Report 2011-2012* (2012) 3.

<sup>222</sup> *Ibid.* See also discussion of the expansion in federal criminal offences by the ALRC in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 94-97.

<sup>223</sup> See, eg, Australian Bureau of Statistics 2011, *Federal Defendants, Selected States and Territories, 2009-2010*, cat. no. 4515.0, ABS, Canberra.

**Figure 3: Australian State and Territory Court Hierarchy**



Source: Australian Bureau of Statistics 2013, 'Criminal Courts in Australia' figure, *Criminal Courts, Australia, 2011-12*, cat. no. 4513.0, ABS, Canberra.

The structure represented in Figure 3 operates in each state and territory in Australia, except for the smaller jurisdictions that do not have intermediate courts.<sup>224</sup> This figure depicts the court hierarchy with two tiers. These are identified on the figure as 'Higher Courts' which include intermediate courts and supreme courts and 'Lower Courts' which include magistrate's courts (and their equivalents) and children's courts. Specialist courts, such as drug courts and family violence courts, do exist within Australia and generally operate within the 'Lower Court' tier.<sup>225</sup> The study of case law on family hardship conducted for this dissertation has engaged only with the work of 'Higher Courts'.<sup>226</sup>

### *1. Autochthonous Expedient*

Australia has not established a federal criminal court. Section 80 of the *Australian Constitution* provides that federal offenders are to be tried in the state or territory 'where the offence was committed, and if the offence was not committed within

<sup>224</sup> For example, the Australian Capital Territory court hierarchy consists of a Magistrates Court and Supreme Court.

<sup>225</sup> Family violence courts throughout Australia are all local or magistrates' courts see Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010) [32.33]; Drug courts in Victoria for example are magistrate's courts see, *Magistrates' Court Act 1989* (Vic) s 4A Cf. *Drug Court Act 1998* (NSW) s 24.

<sup>226</sup> see Chapter One.

any state the trial shall be held at such place or places as the Parliament prescribes.<sup>227</sup> The result has been that '[s]ince 1903 the Commonwealth has relied heavily on state courts to exercise federal jurisdiction, and continues to do so in both civil and criminal matters.'<sup>228</sup> This has been called the 'autochthonous expedient'.<sup>229</sup> The ALRC states:

Under what has been described as the 'autochthonous expedient' of the Australian Federal system the Commonwealth Parliament clothed State courts with power to adjudicate and determine cases involving federal criminal laws.<sup>230</sup>

Therefore, within Australia, the majority of federal criminal offences are heard in state and territory courts and federal offenders are sentenced in state and territory courts.

Judicial power of the Commonwealth is vested in state and territory courts under s 77(iii) of the *Australian Constitution*. Australian state and territory courts have been vested with federal jurisdiction in criminal matters by s 68(2) of the *Judiciary Act 1903* (Cth). Thus, the federal jurisdiction is made up of state and territory courts throughout Australia hearing federal matters and imposing federal sentences upon federal offenders. As explained later in this chapter,<sup>231</sup> the law governing sentencing in each state and territory varies. The sentencing of federal offenders in state and territory courts therefore raises the issue of consistency in the sentencing of federal offenders and the issue of whether unique federal sentencing principles are to apply in federal cases heard in state and territory courts.

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<sup>227</sup> *Australian Constitution* s 80. See also Commonwealth Director of Public Prosecutions, *Federal Sentencing in Victoria* (22 January 2014) Commonwealth Director of Public Prosecutions Publications and Policies <<http://www.cdpp.gov.au/publications/>>.

<sup>228</sup> Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, Report No 92 (2001) 19.

<sup>229</sup> *R v Kirby; ex parte Boilermakers Society of Australia* (1956) 94 CLR 254, 268 (Dixon J).

<sup>230</sup> Law Reform Commission, *Sentencing of Federal Offenders*, Interim Report, Report No 15 (1980) 5.

<sup>231</sup> See below 'Sentencing Legislation'.

## 2. *The High Court of Australia*

Australia is a unified common law legal system<sup>232</sup> and the High Court of Australia ('High Court') sits at the top of the Australian court hierarchy.<sup>233</sup> Section 73 of the Constitution grants it jurisdiction 'to hear and determine appeals from all judgments... and sentences.'<sup>234</sup> The section expressly states that 'the judgment of the High Court in all such cases shall be final and conclusive.'<sup>235</sup> Appeals from the High Court to the Privy Council were abolished by the *Privy Council (Appeals from High Court) Act 1975* (Cth).<sup>236</sup> And all appeals from an Australian court to the Privy Council were abolished with the enactment of the *Australia Acts 1986* (Cth).<sup>237</sup>

The High Court will only hear appeals from a Supreme Court of an Australian state or territory where special leave is granted by the High Court.<sup>238</sup> In the context of a system with nine separate court hierarchies and sentencing frameworks, the role played by the High Court is very important in achieving consistency. Justice Rares has observed,

the role of the High Court, at the apex of the Australian judiciary, is to provide uniform interpretation and to espouse, authoritatively, the unwritten law of Australia.<sup>239</sup>

Special leave to appeal to the High Court is generally only available from Supreme Courts, but, where judgment has been 'given or pronounced in the exercise of federal jurisdiction',<sup>240</sup> the High Court may grant special leave to other courts (lower in the court hierarchy).

The High Court has pronounced many times that a '...sentence itself gives rise to no binding precedent.'<sup>241</sup> What this means is that the sentencing outcome does not

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<sup>232</sup> *Lipohar v The Queen* (1999) 200 CLR 485, 508-509 (Gaudron, Gummow and Hayne JJ) and 551 (Kirby J).

<sup>233</sup> *Ibid* 507.

<sup>234</sup> *Australian Constitution* s 73.

<sup>235</sup> *Ibid*.

<sup>236</sup> James Stellios, *The Federal Judicature: Chapter III of the Constitution* (Lexis Nexis Butterworths, 2010) 49.

<sup>237</sup> *Ibid*.

<sup>238</sup> *Judiciary Act 1903* (Cth) ss 35 and 35AA.

<sup>239</sup> Justice Steven Rares, 'Role of the Intermediate Appellant Court after Farah Constructions' (Paper presented at the 4<sup>th</sup> Appellate Judges Conference of the Australasian Institute of Judicial Administration, Melbourne, 7 November 2008).

<sup>240</sup> *Judiciary Act 1903* (Cth) s 35(1)(b).

<sup>241</sup> *Wong* (2001) 207 CLR 584, 605 (Gaudron, Gummow and Hayne JJ); *Hili v The Queen* (2010) 242 CLR 520, 545 (Heydon J); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 596 (French CJ,

give rise to binding precedent, as stated by Gaudron, Gummow and Hayne JJ, in *Wong*, in sentencing decisions:

[w]hat may give rise to precedent is a statement of principles which affect how the sentencing discretion should be exercised, either generally or in particular kinds of case.<sup>242</sup>

The High Court, therefore, does play an important role in developing sentencing principles which 'bind *all* courts in the country'.<sup>243</sup> The importance attached to 'principles of sentencing' in Australia in achieving consistency in sentencing is a central focus of this dissertation.

The High Court did not traditionally take an active role in sentencing appeals. For example, Bagaric and Edney have found that, '[a]n examination of the decisions of the High Court from 1936 until 1976 reveals a limited involvement in the development of sentencing principle.'<sup>244</sup> They pinpoint 1977 as the beginning of the 'first wave' of development of Australian sentencing principles by the High Court and have identified a significant increase in the caseload of the High Court on sentencing matters in this period.<sup>245</sup> The second wave of High Court sentencing jurisprudence was identified during the years of 1990-2006,<sup>246</sup> and 'in aggregate...[these periods] have provided a coherent body of Australian sentencing principles.'<sup>247</sup> The Annual Reports show the High Court in the current era frequently grants special leave to hear sentencing matters.<sup>248</sup> During this period of active engagement in sentencing matters, the High Court has developed a robust jurisprudence on principles of sentencing.<sup>249</sup>

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Gummow, Hayne, Crennan, Kiefel and Bell JJ); *R v Pham* (2015) 256 CLR 550, 560 (French CJ, Keane and Nettle JJ).

<sup>242</sup> *Wong* (2001) 207 CLR 584, 605.

<sup>243</sup> *Lipohar v The Queen* (1999) 200 CLR 485, 507.

<sup>244</sup> Mirko Bagaric and Richard Edney, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 73.

<sup>245</sup> See Mirko Bagaric and Richard Edney, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 73, 86 – 92; Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters LawBook Co, 2014) 120-136.

<sup>246</sup> Mirko Bagaric and Richard Edney, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 88.

<sup>247</sup> *Ibid.*

<sup>248</sup> See, eg, High Court of Australia, *Annual Report 2011-2012* (2012) 10; High Court of Australia, *Annual Report 2010- 2011* (2011) 9.

<sup>249</sup> See generally Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters LawBook Co, 2014) 120-136; Mirko Bagaric and Richard Edney, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 4, 73 – 92. See also Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (The Federation Press, 2010) 274- 275; Kate Warner, *Sentencing in Tasmania* (Federation Press, 2<sup>nd</sup> ed, 2002) 8.



## B. The Office of the Director of Public Prosecutions

Throughout Australia, police and public prosecutors generally prosecute criminal offences. The Office of the Director of Public Prosecutions in each state and territory routinely institute and conduct the prosecution of indictable criminal offences against state and territory laws.<sup>250</sup> Offences heard in summary jurisdictions in all Australian jurisdictions, except for the ACT and the federal jurisdiction, are prosecuted by police prosecutors.<sup>251</sup> The Offices of the Director of Public Prosecutions in all Australian jurisdictions are independent agencies created by statute.<sup>252</sup>

While it is generally police and public prosecutors who prosecute criminal offences within Australia, other bodies are vested with prosecutorial powers such as the RSPCA<sup>253</sup> and the Roads and Maritime Service.<sup>254</sup> However, the Commonwealth Director of Public Prosecutions, 'may take over a proceeding that was instituted or is being carried on by another person ...'<sup>255</sup> for proceedings dealing with summary or indictable offences against the Commonwealth. In respect of federal criminal offences, it is the CDPP who is generally responsible for the prosecution of federal offences.<sup>256</sup>

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<sup>250</sup> Christopher Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (Lawbook Co, 2014) 85.

<sup>251</sup> See generally, Christopher Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (Lawbook Co, 2014) 224. See, eg, NSW where 'Police Prosecutors prosecute about 95% of criminal cases on behalf of the NSW Police Force and various other government agencies in court of summary jurisdiction, enjoying a success rate of 90% or above' New South Wales Government, *Police Prosecutions Command* (12 January 2015) New South Wales Police Force <[http://www.police.nsw.gov.au/about\\_us/structure/specialist\\_operations/police\\_prosecutions\\_command](http://www.police.nsw.gov.au/about_us/structure/specialist_operations/police_prosecutions_command)>. For more on police prosecutors see, generally, Christopher Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (Lawbook Co, 2014) 223-244.

<sup>252</sup> See *Director of Public Prosecutions Act 1983* (Cth); *Director of Public Prosecutions Act 1990* (ACT); *Director of Public Prosecutions Act 1986* (NSW); *Director of Public Prosecutions Act 1991* (NT); *Director of Public Prosecutions Act 1984* (Qld); *Director of Public Prosecutions Act 1991* (SA); *Director of Public Prosecutions Act 1973* (Tas); *Public Prosecutions Act 1994* (Vic); *Director of Public Prosecutions Act 1991* (WA).

<sup>253</sup> An organisation for the protection of animals which also investigates allegations of animal cruelty see <http://www.rspca-act.org.au>.

<sup>254</sup> See, eg, *Prevention of Cruelty to Animals Act 1979* (NSW) s 34AA; *Marine Safety Act 1998* (NSW) s 129.

<sup>255</sup> *Director of Public Prosecutions Act 1983* (Cth) s 9(5).

<sup>256</sup> Commonwealth, *The Commonwealth Director of Public Prosecutions Annual Report 2011-2012* (2012) 3; Christopher Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (Lawbook Co, 2014) 229; Law Reform Commission, *Sentencing: Procedure*, Discussion Paper No 29 (1987) 5.

The growth in the number of federal offences has meant that there is greater potential overlap between state or territory offences and federal offences.<sup>257</sup> The consequences of this was subject to some discussion in the Judicial Commission of New South Wales's 2014 report on sentencing federal drug offenders.<sup>258</sup> The Report stated that:

...now a number of Code offences, including those involving the trafficking or manufacture of controlled drugs or precursors, do not require proof of a connection with an importation. While previously such conduct was solely dealt with as a State or Territory offence, prosecuting authorities now have a broader range of options in terms of available charges and may choose between Commonwealth and State or Territory offences prohibiting such conduct.<sup>259</sup>

There is emerging judicial consideration of the possible consequences of the prosecutorial election of charging, for example there may be significant differences between the sentencing regimes and the penalties attached.<sup>260</sup>

### *C. Sentencing Legislation*

The consolidation of sentencing provisions into a single statute was first adopted in Australia in the state of Victoria in 1985.<sup>261</sup> Currently each state and territory of Australia has its own sentencing statute.<sup>262</sup> Prior to this, sentencing laws and procedures could be located within local Crimes Acts, Court Acts, Administrative Acts and in a number of other statutes dealing with procedural matters.<sup>263</sup>

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<sup>257</sup> Judicial Commission of New South Wales, *Sentencing Commonwealth Drug Offenders*, Research monograph 38 (June 2014) 19.

<sup>258</sup> Judicial Commission of New South Wales, *Sentencing Commonwealth Drug Offenders*, Research monograph 38 (June 2014).

<sup>259</sup> *Ibid* 19.

<sup>260</sup> See, eg, *R v Cheung* (2010) 203 A Crim R 398. See also Judicial Commission of New South Wales, *Sentencing Commonwealth Drug Offenders*, Research monograph 38 (June 2014) 19-21.

<sup>261</sup> *Penalties and Sentences Act 1985* (Vic).

<sup>262</sup> *Crimes (Sentencing) Act 2005* (ACT), *Crimes (Sentencing Procedure) 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). The ACT, NSW and WA have also enacted separate statutes dealing with the administration of sentences within their respective jurisdictions. See *Crimes (Sentence Administration) Act 2005* (ACT); *Crimes (Administration of Sentences) Act 1999* (NSW); *Administration Act 1995* (WA).

<sup>263</sup> See, eg, *New South Wales- Judicial Commission of New South Wales, Sentencing Bench Book* (7 March 2008) Judicial Information Research System <[http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/application\\_of\\_the\\_act.html](http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/application_of_the_act.html)>; *Queensland- Queensland, Parliamentary Debates*, Legislative Assembly, 5 November 1992, 150 (D M Wells, Minister for Justice and Attorney-General); *Victoria - Arie Freiberg and Stuart Ross, Sentencing Reform and Penal Change: The Victorian Experience* (Federation Press, 1999) 21.

When specific separate statutes on sentencing were enacted throughout Australia (in the mid 80s to the early 90s) they were recognised as consolidating Acts. The process was one of collecting all provisions dealing with the sentencing powers of courts and then housing them within a single stand-alone statute.<sup>264</sup> In doing so, this shift was to facilitate the process of sentencing, promote understanding of the sentencing laws and, in some cases, reform the sentencing provisions themselves.<sup>265</sup>

Importantly, the process was not one of codifying the law of sentencing. Therefore, the legislative provisions set out in these sentencing statutes consolidating the law, operate concurrently with common law sentencing principles. Sentencing law throughout Australia can be described as being underpinned by the common law and overlaid by legislation, with the proviso that the legislature by express intention, can repeal and effectively codify, all or some of those principles.

Overall the Australian sentencing landscape is growing increasingly more complex. The principles and practices of sentencing do vary across Australia. Remarkably, how the jurisdictions converge or diverge on various sentencing matters has not been the subject of detailed analysis either in empirical or doctrinal research. This dissertation begins to address this gap in the field.

### *1. Sentencing Models*

A review of the sentencing statutes, in operation in all the states and territories of Australia,<sup>266</sup> demonstrates that it is common for the legislature to enunciate sentencing policies, purposes, guidelines and principles. State and territory parliaments have adopted varying approaches to sentencing and unfortunately inconsistent terminology is used throughout Australia. But while each sentencing statute is unique, there are broadly two sentencing models in operation.

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<sup>264</sup> See, eg, *Crimes (Sentencing) Act 2005* (ACT) s 6, *Penalties and Sentences Act 1992* (Qld) s 3(a), *Sentencing Act 1997* (Tas) ss 3(a) and 6, *Sentencing Act 1991* (Vic) s 1.

<sup>265</sup> See, eg, *Crimes (Sentencing) Act 2005* (ACT) s 6, *Penalties and Sentences Act 1992* (Qld) s 3, *Sentencing Act 1997* (Tas) s 3, *Sentencing Act 1991* (Vic) s 1.

<sup>266</sup> The federal jurisdiction does not have a dedicated Sentencing Act (see Chapter One).

The first type of model can be described as the ‘traditional minimalist model’. This term describes legislative frameworks which may set out localised procedural powers and processes but have limited legislative guidance and continue to rely primarily on the common law. Early sentencing legislation in Australia can be described as falling into this model. Tasmania remains the only jurisdiction within Australia to maintain a traditional minimalist model.<sup>267</sup>

The second type of model is the ‘guiding model’. Jurisdictions which have legislated more extensively providing within their statutes detailed sentencing frameworks that include clearly expressed sentencing policies, sentencing principles and nuanced sentencing laws can be described as employing a ‘guiding model’. This approach operates in all Australian jurisdictions, other than Tasmania. In the guiding model the common law remains as a source from which sentencing principles may be identified. This model retains a large role for judges to fashion new principles or extend or adapt sentencing principles when the statute is silent.

In the federal jurisdiction, the principal body of law governing sentencing is found in pt 1B of the *Crimes Act 1914* (Cth). The federal parliament has not enacted a single stand-alone sentencing statute.<sup>268</sup> Despite this, the federal provisions do set out a detailed sentencing framework including clearly expressed sentencing policies, sentencing principles and nuanced federal sentencing laws. Therefore, the federal provisions, rejecting the traditional minimalist approach, fall within a guiding model of sentencing. As an added complexity, the federal sentencing provisions are not complete. In the sense that local sentencing law does govern federal sentencing where the federal provision expressly picks up the law in the state and territory in which the offender is being sentenced.<sup>269</sup> However, this

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<sup>267</sup> See *Sentencing Act 1997* (Tas).

<sup>268</sup> The ALRC has repeatedly recommended that the Federal Government review the provisions in Part 1B and enact consolidating legislation to locate all federal sentencing provisions within a single statute. See Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report No. 15 (Interim) (1980), Rec 39; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No. 103 (2006), Rec 2.

<sup>269</sup> See, eg, *Crimes Act 1914* (Cth) s 16E(2). Section 16E(2) of the *Crimes Act 1914* (Cth) provides that where the law of a State or Territory enables a sentence or non-parole period to be ‘reduced by the period that the person has been in custody for the offence’ or the date of commencement to be fixed as ‘...the day on which the person was taken into custody for the offence’ then ‘the law applies in the same way to a federal sentence imposed on a person in that State or Territory or to a non-parole period fixed in respect of that sentence.’ This means that the law governing the commencement of federal sentences differs

characteristic does not detract from the overall operation of a guiding model in the federal jurisdiction.

Some jurisdictions such as New South Wales have highly-regulated frameworks. In New South Wales, the legislature has, via statute, created a sentencing council,<sup>270</sup> a system of guideline judgments<sup>271</sup> and mandatory minimum penalties.<sup>272</sup> These processes have sought to constrain judicial discretion appreciably, however, it has not reached the point where it could be identified as operating under a different model. New South Wales could be seen as pushing towards a 'prescriptive model' where the role for judges to develop new sentencing principles is curtailed. The High Court has been resistant to legislative efforts to restrain judicial sentencing discretion.<sup>273</sup> Currently, New South Wales sentencing courts and appellate courts continue to play a vital role in developing common law sentencing principles.

## *2. Purposes of Sentencing*

The purposes of sentencing are recognised in Australian sentencing statutes. The practice of providing a discrete legislative list of purposes for which a court may impose a sentence has been adopted in the ACT, NSW, NT, Qld, SA, Tas and Vic.<sup>274</sup> The federal jurisdiction also lists the purposes of sentencing but these have been incorporated within a provision addressing sentencing factors.<sup>275</sup> Western Australia is unique in that it does not have a dedicated purposes section, nor are the purposes of sentencing located with sections of the Act that deal with 'principles of sentencing',<sup>276</sup> 'aggravating factors',<sup>277</sup> and 'mitigating factors'.<sup>278</sup>

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depending upon which jurisdiction the offender is being sentenced. Importantly the federal provision, s 16E(2), does not provide an approach that applies to all federal offenders but rather permits a court to pick up and apply local sentencing provisions where they fall within the two categories outlined in s 16AE(2).

<sup>270</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 8B.

<sup>271</sup> *Ibid* pt 3, div 4.

<sup>272</sup> See *Crimes Act 1900* (NSW) ss19B and 25B. The move towards mandatory minimum penalties commenced with the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).

<sup>273</sup> See, eg, *Wong* (2001) 207 CLR 584.

<sup>274</sup> *Crimes (Sentencing) Act 2005* (ACT) s 7, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A, *Sentencing Act 1995* (NT) s 5(1), *Penalties and Sentences Act 1992* (Qld) ss 3 and 9, *Sentencing Act 2017* (SA) ss 3 and 4; *Sentencing Act 1997* (Tas) s 3, *Sentencing Act 1991* (Vic) ss 1 and 5, *Sentencing Act 1995* (WA) s 6.

<sup>275</sup> *Crimes Act 1914* (Cth) s 16A(2).

<sup>276</sup> *Sentencing Act 1995* (WA) s 6.

<sup>277</sup> *Ibid* s 7.

<sup>278</sup> *Ibid* s 8.

The current formulation of legislative lists of sentencing purposes has been subject to significant criticism because they ‘incorporate a mix of utilitarian and retributive sentencing objectives.’<sup>279</sup> As a result the listed purposes of sentencing conflict with each other; a practice which has been described by Andrew Ashworth as a ‘cafeteria style’<sup>280</sup> or ‘pick-and-mix’<sup>281</sup> approach to sentencing.<sup>282</sup> Table 4, below, shows the purposes of sentencing and their recognition in the Australian states and territories.

**Table 4: Purposes of Sentencing in Australian Legislation**

Purposes	ACT	CTH	NSW	NT	QLD	SA	TAS	VIC
<i>Adequately punished in a way that is just</i>	Y	Y*	Y*	Y	Y	N	N	Y
<i>Deterrence (both specific and general recognised)</i>	Y	Y	Y	Y	Y	Y	Y	Y
<i>Rehabilitation</i>	Y	Y	Y	Y	Y	Y	Y	Y
<i>Denunciation</i>	Y	N	Y	Y	Y	Y	Y	Y
<i>Make the offender accountable</i>	Y	N	Y	N	N	Y	N	N
<i>Incapacitation (expressed as protect the community from the offender)</i>	Y	N	Y	Y	Y	Y	Y	Y
<i>Recognise harm done to the victim of the crime and community</i>	Y	Y**	Y	N	N	Y	Y	N

\* The provision states that there is a need to ensure that the defendant is adequately punished for the offence, however, there is no express mention that this be ‘in a way that is just’ which is the language adopted in elsewhere in Australia.

\*\* Section 16A(2)(ea) of the *Crimes Act 1914* (Cth) requires recognition of the harm suffered as a result of the offence upon any individual who tenders a victim impact statement however there is no broader recognition of harm done to the community within s 16A(2).

<sup>279</sup> Kenneth J Arenson, Mirko Bagaric and Peter Gilles, *Australian Criminal Law in the Common Law Jurisdictions Cases and Materials* (Oxford University Press, 3<sup>rd</sup> ed, 2011) 11.

<sup>280</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (Butterworths, 2<sup>nd</sup> ed, 1995) 331.

<sup>281</sup> See Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4<sup>th</sup> ed, 2005) 74; Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5<sup>th</sup> ed, 2010) 77.

<sup>282</sup> Other prominent and outspoken critics of conflicting purposes of sentencing include: Mirko Bagaric, ‘Sentencing: The Road to Nowhere’ (1999) 21(4) *The Sydney Law Review* 597; 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; Marvin Frankel, ‘Lawlessness in Sentencing’ in Andreas von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3<sup>rd</sup> ed, 2009) 237; Cyrus Tata, ‘Institutional Consistency: Appeal Court Judgements’ in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3<sup>rd</sup> ed, 2009) 276, 278.

The High Court has acknowledged that sentencing purposes do point in different directions, however, it has endorsed their role in the process of determining an appropriate sentence. In *Veen v The Queen [No 2]*, Mason CJ, Brennan, Dawson and Toohey JJ stated:

The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.<sup>283</sup>

Generally, the purposes of sentencing are located in Australian statutes within division of the Act dealing with general principles.

In the Northern Territory, Queensland and Victoria the statutes expressly provide that a court may impose a sentence upon an offender *only* for the purposes listed within the statute.<sup>284</sup> The Victorian statute further proscriptively ties the listed purposes of sentencing into the process of determining an appropriate sentence via the operation of s 5(3) of the *Sentencing Act 1991* (Vic). This section provides that 'A court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.'<sup>285</sup>

The Australian Capital Territory and New South Wales provisions are not expressed in this restrictive manner. Section 7(1) of the *Crimes (Sentencing) Act 2005* (ACT) states that 'A court may impose a sentence on an offender for 1 or more of the following purposes...'. Similarly, in New South Wales section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) states 'The purposes for which a court may impose a sentence on an offender are as follows...'. The language adopted in these legislative provisions does not constrain the courts to only those

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<sup>283</sup> *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476.

<sup>284</sup> See *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Sentencing Act 1991* (Vic) s 5(1).

<sup>285</sup> *Sentencing Act 1991* (Vic) s 5(3).

purposes of sentencing listed as it adopts permissive language (ie. *may* impose);<sup>286</sup> there is an absence of an express legislative restriction to the listed purposes.

Unlike the other Australian jurisdictions, in Tasmania, the listed purposes of sentencing are captured under a provision dealing with the 'Purposes of the Act'.<sup>287</sup> This may permit resort to other purposes of sentencing beyond those recognised in the Act. But the placement of the purposes of sentencing within the purposes of the Act is an interesting approach. This placement and its potential for statutory interpretation analysis has not been addressed before the courts. It is unknown whether it would restrict courts sentencing Tasmanian offenders to these purposes only. Warner is of the view that courts would regard the list as non-exhaustive.<sup>288</sup>

The protection of the community could be classified as a purpose of sentencing encapsulating the purpose of 'incapacitation'. As shown in Table 1 above it is widely recognised in this context in legislation throughout Australia. A noticeable shift in sentencing policy is the explicit articulation of 'protection of the community' as a primary consideration in sentencing. For example, in Tasmania, the protection of the community is expressed as a 'primary consideration'.<sup>289</sup> In Queensland the legislation provides that the 'protection of the Queensland community is a paramount consideration'.<sup>290</sup>

In 2007, the South Australian Parliament passed the *Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act 2007* (SA) which introduced paragraph (1b) into s 10 of the *Criminal Law (Sentencing) Act 1988* (SA). The new paragraph stated: 'A primary policy of the criminal law is to protect the safety of the community.'<sup>291</sup> This 'policy' of the criminal law was placed within s 10 which placed it alongside other sentencing factors (and purposes of sentencing).

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<sup>286</sup> DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2011) 348-349.

<sup>287</sup> *Sentencing Act 1997* (Tas) s 3.

<sup>288</sup> Kate Warner et al, *Sentencing in Tasmania* (Federation Press, 2<sup>nd</sup> ed, 2002) 65.

<sup>289</sup> *Sentencing Act 1997* (Tas) s 3(b).

<sup>290</sup> *Penalties and Sentences Act 1992* (Qld) s 3(b).

<sup>291</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 10(1b).



In December 2012, s 10 of the *Criminal Law (Sentencing) Act 1988* (SA) was amended by the *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* (SA).<sup>292</sup> This revision of the statute meant that while the protection of the community received legislative recognition in South Australia it was no longer articulated as a 'primary policy'. However, this was expressly changed with the introduction of the *Sentencing Act 2017* (SA). Section 3 now provides 'the primary purpose for sentencing a defendant for an offence is to protect the safety of the community (whether as individuals or in general).'

As described above, WA does not list purposes of sentencing. However, s 6(4)(b) of the *Sentencing Act 1995* (WA) does provide that a court must not impose a sentence of imprisonment unless 'the protection of the community requires it'. Protection of the community is also granted legislative recognition in Div 2A which was introduced in 2012.<sup>293</sup> Div 2A sets out what are labelled as the 'principal objectives' of sentencing where declared criminal organisations are involved. These principal objectives include denunciation and protection of the community.<sup>294</sup> While the protection of the community is not listed as a primary purpose in Western Australia, it is still clearly granted a privileged position.

There is widespread recognition of the protection of the community in sentencing statutes in Australia. It is also being granted significance as a primary policy of sentencing. This is a developing area to watch in respect of sentencing practices within Australia. The effect of privileging some purposes of sentencing is an important field for future research studies.

### *3. Principle of Last Resort*

An important inclusion in sentencing legislation is the legislative recognition of the common law principle of last resort. The common law principle of last resort requires imprisonment to be imposed only when no other penalty can achieve the objectives of the law; where no other sanction is appropriate in the

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<sup>292</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 10(2)(a) 'In determining the sentence for an offence, a court must give proper effect to the following: (a) the need to protect the safety of the community...'

<sup>293</sup> See *Criminal Organisations Control Act 2012* (WA) which received assent 29 November 2012.

<sup>294</sup> *Sentencing Act 1995* (WA) s 9C(2).

circumstances.<sup>295</sup> In the late 1970s, the Law Reform Commission endorsed the principle as the best way to achieve ‘rational and humane sentencing’.<sup>296</sup> It was also recommended in The Royal Commission into New South Wales Prisons (*Nagle Report*).<sup>297</sup> The principle first appeared in legislation in 1982 in the *Crimes Act 1914* (Cth).<sup>298</sup> Today, it is an embedded sentencing principle. In fact, it has been recognised in legislation in all jurisdictions except for the Northern Territory and Tasmanian statutes.<sup>299</sup>

In the federal provision courts are directed not to impose a sentence of imprisonment unless satisfied ‘that no other sentence is appropriate in all of the circumstances of the case’.<sup>300</sup> Similarly, the principle is expressed in the ACT and NSW such that a sentence of imprisonment can be imposed ‘if the court is satisfied, having considered possible alternatives, that no other penalty is appropriate.’<sup>301</sup> The original Victorian provision also adopted this language,<sup>302</sup> however, the current expression of the last resort principle in Victoria expressly directs the court to consider the purposes of sentencing. Section 5(4) of the *Sentencing Act 1991* (Vic) provides that a court must not impose a sentence of imprisonment ‘unless it considers that the purposes or purposes for which the sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender.’

In Western Australia and South Australia, the last resort principle is qualified by the allowance of community protection considerations. For example, s 6(4) of the

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<sup>295</sup> See Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 15 (1980) 16; Law Reform Commission, *Sentencing: Penalties*, Discussion Paper No 30 (1987) 6.

<sup>296</sup> Law Reform Commission, *Sentencing: Reform Options*, Discussion Paper No 10 (1979) 8.

<sup>297</sup> New South Wales, Royal Commission into New South Wales Prisons, *Report of the Royal Commission into New South Wales Prisons (Nagle Report)* (1978) 423. See generally David Brown et al, ‘The Nagle Report – 25 Years on Symposium’ (2004) 16(1) *Current Issues in Criminal Justice* 93, 95; Women in Prison Task Force, Parliament of New South Wales, *Report of the NSW Women in Prison Task Force* (1985) 122, 126; Maureen Miner and Angela Gorta, *Changing Conditions in a Women's Prison 1972-1984*, Research Publication No 11 (NSW Department of Corrective Services, 1986) 6.

<sup>298</sup> Law Reform Commission, *Sentencing: Penalties*, Discussion Paper No 30 (1987) 6, 97. See also discussion of this in *Stewart* (1994) 72 A Crim R 17, 23.

<sup>299</sup> *Crimes Act 1914* (Cth) s 17A; *Crimes (Sentencing) Act 2005* (ACT) s 10(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(2)(a)(i); *Sentencing Act 2017 (SA)* s 10; *Sentencing Act 1991* (Vic) s 5(4); *Sentencing Act 1995* (WA) s 6(4).

<sup>300</sup> *Crimes Act 1914* (Cth) s 17A(1).

<sup>301</sup> *Crimes (Sentencing) Act 2005* (ACT) s 10(2). See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).

<sup>302</sup> *Penalties and Sentences Act 1985* (Vic) s 11.

*Sentencing Act 1995* (WA) provides that a sentence of imprisonment is necessary only where ‘the seriousness of the offence is such that only imprisonment can be justified or the protection of the community requires it’.<sup>303</sup>

#### *4. Current Sentencing Practices*

In the ACT and Victoria there is the legislative recognition to the relevance of taking into account ‘current sentencing practice’ in determining an appropriate sentence.<sup>304</sup> These are established provisions within the sentencing statutes of these two jurisdictions. However, in 2008 Freiberg observed, in writing on the state of statistical information on sentencing in Victoria, that very little information on current sentencing practices has been available to courts.<sup>305</sup> Although, the Victorian Government created the Sentencing Advisory Council in 2004 and this body has been collecting data on sentencing.<sup>306</sup> The availability of information on current sentencing practices in the ACT has also been limited; with this jurisdiction only developing a sentencing database in December 2013.<sup>307</sup>

Once again, this is an aspect of Australian sentencing that is currently changing. The appearance of sentencing information systems in Australia and the associated change in policy allowing the release of the Office of the Commonwealth Director of Public Prosecutions sentencing statistics to a broader audience has meant that determining ‘current sentencing practices’ is becoming a viable sentencing consideration.<sup>308</sup>

In terms of federal sentencing, local sentencing practices are not relevant to determining an appropriate federal sentence, but federal sentencing practices

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<sup>303</sup> *Sentencing Act 1995* (WA) s 6(4). See also *Sentencing Act 2017* (SA) s 10(2)(b).

<sup>304</sup> *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(z); *Sentencing Act 1991* (Vic) s 5(2)(b).

<sup>305</sup> Arie Freiberg, ‘The Victorian Sentencing Advisory Council: incorporating community views into the sentencing process’ in Arie Freiberg and Karen Gelb (eds) *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, 2008) 148, 157.

<sup>306</sup> See, eg, ‘Sentencing Snapshots’ in Victoria State Government, *Sentencing Advisory Council* (18 March 2014) <<https://www.sentencingcouncil.vic.gov.au/snapshot>>.

<sup>307</sup> See ACT Sentencing Database Unit, *ACT Sentencing Database* (3 December 2013) ACT Supreme Court <[http://www.courts.act.gov.au/supreme/practitioners/act\\_sentencing\\_database\\_actsd](http://www.courts.act.gov.au/supreme/practitioners/act_sentencing_database_actsd)>. On the quality of sentencing statistics in the Australian Capital Territory see also ACT Law Reform Advisory Council, *A Report on Suspended Sentences in the ACT*, Report 1 (2010) 7, 25-27.

<sup>308</sup> Cf. *Hili v The Queen* (2010) 242 CLR 520, 535; *R v Hasan* (2010) 222 A Crim R 306, 318.

across Australia are an important consideration.<sup>309</sup> In *R v Pham*, (French CJ, Keane and Nettle JJ) stated:

Part IB of the Crimes Act does not specifically provide for sentencing judges to take current sentencing practices into account [but]...it is implicit in Pt IB of the *Crimes Act* that a sentencing judge must have regard to current sentencing practices throughout the Commonwealth.<sup>310</sup>

The High Court in *DPP v Dalgliesh (A Pseudonym)*<sup>311</sup> held that ‘current sentencing practices’ in s 5(2)(b) of the *Sentencing Act 1991 (Vic)* was one sentencing factor that is to be taken into account in determining an appropriate sentence. It was found that it is not a controlling factor over the other relevant factors and it not to be treated as something conceptually different.<sup>312</sup>

### 5. Principle of Proportionality

Criminologists and legal academics have provided accounts of the shifts within Australia from a utilitarian model to a rehabilitative model to a retributive model of punishment.<sup>313</sup> Contemporary retributive philosophy is tied into the ‘just deserts’ movement;<sup>314</sup> with the core policy of ‘just deserts’ theory being that the amount of punishment imposed should be proportionate to the level of wrongdoing.<sup>315</sup> In *Hoare v The Queen*,<sup>316</sup> the High Court stated,

A basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.<sup>317</sup>

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<sup>309</sup> *Leeth v Commonwealth* (1992) 174 CLR 455, [32] (Mason CJ, Dawson and McHugh JJ)

<sup>310</sup> *R v Pham* (2015) 256 CLR 550, 557 (French CJ, Keane and Nettle JJ).

<sup>311</sup> (2017) 91 ALJR 1063.

<sup>312</sup> *Ibid* 1075 (Kiefel CJ, Bell and Keane JJ); 1077 (Gageler and Gordon JJ).

<sup>313</sup> See, generally Melissa Bull, *Punishment & Sentencing: Risk, Rehabilitation and Restitution* (Oxford University Press, 2010) 24 – 35; Kate Warner, ‘Sentencing Scholarship in Australia’ (2006-2007) 18(2) *Current Issues in Criminal Justice* 241, 249, 255; Kate Warner, *Sentencing in Tasmania* (Federation Press, 2<sup>nd</sup> ed, 2002) 63; Mirko Bagaric and Kumar Amarasekara, ‘The Errors of Retributivism’ (2000) 24 *Melbourne University Law Review* 124; Mirko Bagaric and Richard Edney, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 10 – 14; Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (The Federation Press, 2010) 1 – 4; George Zdenkowski, ‘Sentencing Trends: Past, Present and Prospective’ in Duncan Chappell and Paul Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (Butterworths, 2000) 161, 162.

<sup>314</sup> See generally Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005).

<sup>315</sup> Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Rutgers University Press, 1985) 10.

<sup>316</sup> (1989) 167 CLR 348.

<sup>317</sup> *Ibid* 354.

This is the principle of proportionality and it has also received statutory recognition within Australia.<sup>318</sup> The principle of proportionality is an important principle within Australian sentencing<sup>319</sup> that has a bearing on the impact of family hardship in sentencing as will be seen in the cases analysed in Chapters Four and Five.

Adherence to the principle of proportionality in Australia does have a significant impact on the approach to determining a sentence. As Preston J has explained:

It fixes the upper limit because a sentence 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. It fixes the lower limit because allowance for the subjective factors of the case, particularly of the offender, cannot produce a sentence which fails to reflect the objective gravity or seriousness of the offence or the objectives of punishment such as retribution and general and individual deterrence.<sup>320</sup>

The rise of retributive justice has also seen a focus upon the circumstances of the offence to the detriment of the individual circumstances of the offender on a policy level. The study of Australian case law will show that the principle of proportionality does impact upon the mitigatory effect of family hardship.

## 6. Sentencing Factors

The traditional account of sentencing factors in legislation in Australia has been to provide a broad statement that the court is to take account of any aggravating and mitigating factors.<sup>321</sup> Such an approach did not specify what those factors might be and the exercise of the sentencing power was constrained only by common law principles. There was then a shift towards providing a non-exhaustive list of sentencing factors. Such factors could be found by a sentencing court to be either aggravating or mitigating dependent upon the circumstances of the individual case.

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<sup>318</sup> See, eg, *Crimes Act 1914* (Cth) s 16A(1) ('...a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence'); *Sentencing Act 1995* (WA) s 6(1) ('A sentence imposed on an offender must be commensurate with the seriousness of the offence.').

Moreover, within the purposes section of Sentencing Acts a requirement 'that the offender is adequately punished' incorporates the common law principle of proportionality see *R v Scott* [2005] NSWCCA 152 (18 April 2005), [15] (Howie J, Grove and Barr JJ).

<sup>319</sup> *Veen v The Queen [No 1]* (1979) 143 CLR 458; *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472.

<sup>320</sup> Justice Brian Preston, 'Principled Sentencing for Environmental Offences- Part 2: Sentencing Considerations and Options' (2007) 31 *Criminal Law Journal* 142, 142.

<sup>321</sup> See, eg, the approach taken in Victoria and the Northern Territory described below.

While factors would be known to be commonly aggravating or mitigating the legislature did not seek to lock such determinations into statute.<sup>322</sup>

Providing a list of matters relevant to sentencing has become a common feature in Australian sentencing legislation. It has been adopted in each Australian jurisdiction except Tasmania and Western Australia.<sup>323</sup> Despite the move towards providing legislative recognition to sentencing factors, there is no consistency in the 'look and feel' of these lists across Australia. There is variation in both the format adopted (when setting out listed sentencing factors) and variation in the sentencing factors recognised in the legislative lists within each jurisdiction.<sup>324</sup>

The one common approach that has been adopted is that the lists of factors are all acknowledged as being non-exhaustive.<sup>325</sup> Accordingly in Australia, it remains the practice that judicial discretion in the exercise of determining an appropriate sentence is broad and that other relevant non-listed circumstances may be taken into account. Mark Findlay, Stephen Odgers and Stanley Yeo succinctly describe the role of sentencing factors within the sentencing process as follows:

At the sentencing hearing, the judge is presented with an array of facts (or factors) by the prosecution and defendant, all of which are claimed to be relevant to the sentencing decision. The judge has the formidable task of sifting through these facts and deciding what weight, if any, should be attached to each of them. In this exercise, the judge must bear in mind the significance of these facts to the justifications or aims of sentencing. Additionally, account must be taken of sentencing laws and practice as well as current attitudes of the public towards the offence, the offender and punishment.<sup>326</sup>

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<sup>322</sup> Cf. The current NSW Sentencing Act, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A. Note that the first Sentencing Act in NSW did not allocate mitigating or aggravating sentencing factors see *Sentencing Act 1989* (NSW).

<sup>323</sup> *Crimes Act 1914* (Cth) s 16A(2), *Crimes (Sentencing) Act 2005* (ACT) s 33, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A, *Sentencing Act 1995* (NT) ss 5(2) and 6A, *Penalties and Sentences Act 1992* (Qld) s 9(2), *Sentencing Act 2017* (SA) s 11; *Sentencing Act 1991* (Vic) s 5(2).

<sup>324</sup> This is explained further below.

<sup>325</sup> See reference within the provision to a courts ability to take into account 'any other relevant circumstances': *Crimes (Sentencing) Act 2005* (ACT) s 33(3); *Sentencing Act 1995* (NT) s 5(2)(s); *Penalties and Sentences Act 1992* (Qld) s 9(2)(r); *Sentencing Act 2017* (SA) s 11(2); *Sentencing Act 1991* (Vic) s 5(2)(g). See also 'in addition to any other matters': *Crimes Act 1914* (Cth) s 16A(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1).

<sup>326</sup> Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press, 5<sup>th</sup> ed, 2014) 246.

Therefore, across Australia the judicial exercise of determining an appropriate sentence for an individual offender remains a discretionary and an intuitive process (discussed further below).

An interesting feature of the statutory lists of sentencing factors is that the language adopted, in respect of consideration to be given to listed factors, is generally obligatory. For example, s 16A(2) of the *Crimes Act 1914* (Cth) states 'In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court...'.<sup>327</sup> Therefore, where any of the listed matters in the federal provision are relevant and known, the court *must* take these into account in determining the appropriate sentence to impose upon a federal offender. Justices Gaudron, Gummow and Hayne drew attention to this language in *Wong*<sup>328</sup> and observed s16A 'obliges'<sup>329</sup> judicial officers to take them into account. The other jurisdictions within Australia, which provide listed matters, also adopt obligatory language.<sup>330</sup>

The obligation extends only so far as requiring judges to take those matters into account, however, it is for the court to then determine the weight to be attached to each matter (if any) and to balance all relevant circumstances in determining an appropriate sentence. This process is expressly addressed in New South Wales, where the legislation states:

The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.<sup>331</sup>

Therefore, in those jurisdictions where lists of sentencing factors are provided, courts must have consideration to any listed factors when they are put before the

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<sup>327</sup> *Crimes Act 1914* (Cth) s 16A(2).

<sup>328</sup> (2001) 207 CLR 584.

<sup>329</sup> *Ibid* 610.

<sup>330</sup> The legislation in these jurisdictions states 'must have regard to...' see *Crimes (Sentencing) Act 2005* (ACT) s 33, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A, *Sentencing Act 1995* (NT) s 5(2), *Penalties and Sentences Act 1992* (Qld) s 9(2), *Criminal Law (Sentencing) Act 1988* (SA) s 10(1), *Sentencing Act 1991* (Vic) s 5(2). New South Wales is the only jurisdiction that does not use the term 'must have regard to...'; nonetheless, s 21A does state that 'the court is to take into account the following matters.'

<sup>331</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5).

court. In the process of determining an appropriate sentence the court may find that a factor is not relevant or that a factor should not be given significant weight.

Moreover, courts have held that lists of sentencing factors are not checklists such that each matter is required to be specifically addressed in the sentencing remarks. For example, in respect to s 16A of the *Crimes Act 1914* (Cth), Hunt J in *Ferrer-Esis*<sup>332</sup> said:

It should be said that that legislation only requires the sentencing judge to take those matters into account; it does not require judges always to refer to each of them when explaining the sentence imposed. Indeed, the act of sentencing is to a large extent incapable of being fitted into such a straitjacket, and in most cases it is unnecessary for the judge to expose the precise reasoning by which the ultimate sentence has been reached... It is only where the judge has formed a particular view in relation to one or more of these items which would not otherwise be apparent in the circumstances of the case that reference should be made to the particular items in the judge's remarks on sentence, so that no erroneous conclusion would otherwise be drawn in relation to those matters.<sup>333</sup>

Despite all of these features, those sentencing factors that do appear in the list are being prescriptively recognised as general sentencing factors within that particular jurisdiction.

In this context, and because the effect of a sentence upon an offender's family or dependants is not a matter that has conventionally received much attention in sentencing discourse, it is significant that the matter has been granted legislative recognition and has appeared in some lists as an enumerated matter. Chapter One explained the role of 16A(2) of the *Crimes Act 1914* (Cth) which houses a list of federal sentencing factors. Chapter Three will describe how family hardship came to be a listed matter in the federal legislation and in the ACT and in SA.<sup>334</sup>

### **(a) Australian Capital Territory**

Chapter 2 of the *Crimes (Sentencing) Act 2005* (ACT) sets out the 'Objects and important concepts'. The broad objects of the Act are located in s 6. These are clearly framed from within an individualised justice framework as they make

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<sup>332</sup> (1991) 55 A Crim R 231.

<sup>333</sup> Ibid 237-238 (Hunt J, Gleeson CJ and Lee CJ at CL agreeing).

<sup>334</sup> *Crimes Act 1994* (Cth), *Crimes (Sentencing) Act 2005* (ACT) and *Criminal Law (Sentencing) Act 1988* (SA). From 2017 family hardship was removed from the legislative list of factors in South Australia.



explicit reference to providing a range of sentencing options, promoting flexibility in sentencing, and maximizing opportunities for sentences to be adapted to individual offenders.<sup>335</sup> The purposes of sentencing are listed within this chapter in s 7 and the meaning of ‘offender’ is defined in s 8. In Chapter 4 ‘Sentencing Procedures Generally’ a legislative list of sentencing factors is provided in s 33<sup>336</sup> Family hardship is listed as a sentencing factor in this section<sup>337</sup> and this is discussed further in Chapter Three.

### **(b) New South Wales**

Part 3 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) is entitled ‘Sentencing Procedures Generally’. The factors relevant to the determination of an appropriate sentence are located within div 1 of this part in s 21A. The framework set out by this section differs from approaches adopted in other Australian jurisdictions. Section 21A identifies a number of sentencing factors and specifies whether they are either aggravating factors (s 21A(2)) or mitigating factors (s 21A(3)).

A legislative determination of whether a specific factor will have a positive or negative effect upon sentence is unique in the Australian context.<sup>338</sup> The approach taken to mitigating and aggravating factors under the NSW model is that where a factor is raised, which is listed within subsection (2) or (3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the discretion at the hands of the sentencing judge is exercised in respect to a determination of relevance and weight to be provided to individual factors.

Of the thirteen factors specifically identified as mitigating factors in subsection (3), the probable effect of the sentence upon the offender’s family or dependants is not listed. Nonetheless, s 21A(1) clearly sets out that the list of matters provided are non-exhaustive and that they are in addition to any other matters that are required or permitted to be taken into account. Therefore, consideration of family hardship

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<sup>335</sup> See *Crimes (Sentencing) Act 2005* (ACT) s 6 (b), (c) and (d).

<sup>336</sup> See *Crimes (Sentencing) Act 2005* (ACT) s 33.

<sup>337</sup> *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(o).

<sup>338</sup> The ALRC has since the late 1980s, preferred the traditional approach towards lists of sentencing factors (as outlined above) and has not supported a shift towards the NSW model. The Northern Territory has taken steps in this direction with the inclusion of s 6A of the *Sentencing Act 1995* (NT) that provides a list of recognised aggravating factors.

as a factor is governed by the common law and sentencing judges are able to take it into account as a mitigating factor under the common law principle.

### **(c) Northern Territory**

Part 2 of the *Sentencing Act 1995* (NT) sets out 'General principles' of sentencing.

There are three sections within this part:

- Sentencing Guidelines (s 5),
- Factors to be considered in determining an offender's character (s 6), and
- Aggravating Factors (s 6A).<sup>339</sup>

Section 5(2) provides a list of sentencing factors that the court must have regard to in sentencing an offender. The list ranges from (a) through to (s) and is clearly stated to be non-exhaustive.<sup>340</sup> Section 6A sets out a statutory list of eight factors that may be regarded as aggravating.

The probable effect of the sentence upon the offender's family or dependants is not a listed factor within s 5(2) of the *Sentencing Act 1995* (NT). However, paragraph (f) provides that the court must have regard to 'the presence of any aggravating or mitigating factor concerning the offender'. Therefore, consideration of family hardship as a factor is governed by the common law and sentencing judges are able to take it into account as a mitigating factor under the common law principle.

### **(d) Queensland**

Section 9 of the *Penalties and Sentences Act 1992* (Qld) sets out what are described as the 'Sentencing guidelines' in operation in Queensland. The matters, which are identified as guidelines, include a provision on the purposes for sentencing, a non-exhaustive list of sentencing factors and the express recognition of two general sentencing principles. The first of these principles is that imprisonment is a sentence of last resort (discussed above).<sup>341</sup> The second general principle is an interesting addition to the Queensland Act. The legislature has recognised that in sentencing an offender the court must have regard to the general principle that 'a sentence that allows the offender to stay in the community is preferable'.<sup>342</sup> This

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<sup>339</sup> *Sentencing Act 1995* (NT).

<sup>340</sup> *Ibid* s 5(2)(s) 'any other relevant circumstance'.

<sup>341</sup> *Penalties and Sentences Act 1992* (Qld) s 9 (2)(a)(i).

<sup>342</sup> *Ibid* s 9 (2)(a)(ii).

reference is to a limited form of the broader common law principle of parsimony. Its legislative recognition could have important consequences in the sentencing of offenders with dependants.

Section 9(2) of the *Penalties and Sentences Act 1992* (Qld) provides the list of sentencing factors to which the court must have regard. An extensive list is provided, from (a) through to (r), however the effect of the sentence upon an offender's dependants is not identified in this list of matters. However, this list of matters is not exhaustive. Consideration of this factor by a sentencing court in Queensland could arise in respect of paragraph (g) ('the presence of any aggravating or mitigating factors') and paragraph (r) ('any other relevant circumstance'). Therefore, consideration of family hardship as a factor is governed by the common law and sentencing judges are able to take it into account as a mitigating factor under the common law principle.

#### **(e) South Australia**

In 2017, South Australia enacted the *Sentencing Act 2017* (SA). This new Act replaced the *Criminal Law (Sentencing) Act 1988* (SA). The Attorney-General in his second reading speech stated:

...*"The primary purpose for sentencing a defendant for an offence must be the protection of the safety of the community (whether as individuals or in general)".* Every sentencing purpose and principle in the Act and, therefore, in the sentencing process that it controls, must be subject to that overriding consideration. The provisions of the Bill emphasise the primacy of this purpose at every turn.<sup>343</sup>

Consultation for the new Act began with the release of a Discussion Paper in 2015. Much of this paper dealt with sentencing options that were under consideration (such as Intensive Correction Orders). However, at page 8 it was noted 'the Government is committed to sentencing reform whereby the safety of the community must be the paramount consideration in sentencing'.<sup>344</sup> Therefore, it is apparent the recent reforms were prompted by a political desire to identify a

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<sup>343</sup> South Australia, Hansard, House of Assembly, 16 November 2016, 7884 (J.R. Rau, Attorney-General).

<sup>344</sup> South Australian Government Attorney-General's Department, *Transforming Criminal Justice – Better Sentencing Options: Creating the Best Outcomes for Our Community*, Discussion Paper (June 2015) 8.

primary purpose of sentencing in South Australia and for that purpose to be the protection of the community.

The *Sentencing Act 2017* (SA) retained a legislative provision setting out a list of sentencing factors. This list now appears in s 11 of the Act. Prior to 2017, family hardship was a listed sentencing factor in this jurisdiction. How family hardship came to be listed and the operation of the *Criminal Law (Sentencing) Act 1988* (SA) will be discussed in Chapter Three. However, family hardship has been omitted from the factors set out in s 11 of the *Sentencing Act 2017* (SA). Therefore, it is no longer a listed factor in South Australia. Consideration of family hardship as a factor is governed by the common law and sentencing judges are able to take it into account as a mitigating factor under the common law principle.

In introducing these reforms there was no explicit consideration of the omission of family hardship from the sentencing factors. In the second reading speech, the Attorney-General states that s 11 can be compared with s 10 of the repealed Act. No specific acknowledgment was provided for the absence of family hardship. However, in discussing 'General Principles' in his second reading speech the Attorney-General noted the review began with a detailed consideration of the NSW Law Reform Commission Report 139.<sup>345</sup> This Report had followed the traditional NSW approach of marginalising consideration of family hardship.<sup>346</sup> The NSW Law Reform Commission Report included 'effect of offender's family or dependants' under the heading 'Other factors we recommend not be included'.<sup>347</sup>

## **(f) Tasmania**

The minimalist approach taken by the Tasmanian legislature means that it has not chosen to address general principles or sentencing guidelines within the *Sentencing Act 1997* (Tas). This is a unique approach to sentencing legislation in Australia. The *Sentencing Act 1997* (Tas) deals with 'General Sentencing Powers' that include the types of orders that the court may impose upon an offender. The

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<sup>345</sup> South Australia, Hansard, House of Assembly, 16 November 2016, 7884 (J.R. Rau, Attorney-General).

<sup>346</sup> This NSW Report and position is discussed in Chapter Three and Chapter Four.

<sup>347</sup> New South Wales Law Reform Commission, *Sentencing*, Report 139 (2013) 94.

Act then engages with procedural matters and sets up legislative frameworks that govern the operation of sentencing orders that may be imposed in Tasmania.

The lack of a ‘Governing Principles’ part to this Act is a notable omission given the broad policy aims set out in the Act’s purposes section. Section 3 of the *Sentencing Act 1997* (Tas) provides eight broad purposes of the Act. Some of these listed purposes are common purposes of sentencing and have been discussed above. However, this section states that the purpose of the Act is threefold, namely to:

- promote consistency in the sentencing of offenders;
- promote public understanding of sentencing practices and procedures; and
- set out the objectives of sentencing and related orders.<sup>348</sup>

These purposes are indicative of broad sentencing aims or of an underlying policy framework in operation in Tasmania.

In 2016 and 2017, some very limited offence<sup>349</sup> and offender<sup>350</sup> specific sentencing factors were introduced into the *Sentencing Act 1997* (Tas), however, providing a statutory enumeration of relevant general sentencing factors and formally recognising general governing sentencing principles, as has occurred in the other jurisdictions, would enhance rather than hinder the listed purposes within the *Sentencing Act 1997* (Tas). Nevertheless, consideration of family hardship as a factor is governed by the common law and sentencing judges are able to take it into account as a mitigating factor under the common law principle.

### **(g) Victoria**

Part 2 of the *Sentencing Act 1991* (Vic) provides the ‘Governing Principles’ for sentencing offenders in Victoria. The part is made up of three sections:

- Sentencing Guidelines (s 5),
- Factors to be considered in determining an offender’s character (s 6), and
- Sentence discount for guilty plea (s 6AAA).<sup>351</sup>

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<sup>348</sup> See *Sentencing Act 1997* (Tas) s 3(c), (f) and (g) respectively.

<sup>349</sup> *Sentencing Amendment (Sexual Offences) Act 2016* (Tas).

<sup>350</sup> *Sentencing Amendment (Racial Motivation) Act 2017* (Tas).

<sup>351</sup> *Sentencing Act 1991* (Vic).

Section 5 sets out what are described as ‘sentencing guidelines’. A short list of sentencing factors that a court must consider is provided in s 5(2)(a)–(g) of the *Sentencing Act 1991* (Vic). At paragraph (g) the provision states that the court must have regard to ‘the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances’. Therefore, consideration of family hardship as a factor is governed by the common law and sentencing judges are able to take it into account as a mitigating factor under the common law principle.

### **(h) Western Australia**

Part 2 of the *Sentencing Act 1995* (WA) sets out ‘General matters’ of sentencing and the first division within Pt 2 houses ‘sentencing principles’. There are four sections within Div 1 these are:

- Principles of Sentencing (s 6),
- Aggravating Factors (s 7),
- Mitigating Factors (s 8),
- Plea of guilty, sentence may be reduced in case of (s 9AA).<sup>352</sup>

The principle of proportionality is contained within s 6(1) of the *Sentencing Act 1995* (WA). Section 6(2) sets out that the seriousness of an offence must be determined by taking into account the statutory penalty, the circumstances of the commission of the offence and any aggravating and mitigating factors.<sup>353</sup>

Aggravating and mitigating factors are represented in ss 7 and 8 of the *Sentencing Act 1995* (WA). The approach adopted in Western Australia is not comparable to the NSW model, which is the only other Australian jurisdiction to address aggravating and mitigating factors in explicit sections. In contrast to NSW (which provides an extensive list of both aggravating and mitigating factors) the approach adopted in Western Australia is to describe or define what an aggravating factor is and what a mitigating factor is. For example, s 8(1) of the *Sentencing Act 1995* (WA) provides ‘Mitigating factors are factors which, in the courts opinion, decrease the culpability of the offender or decrease the extent to which the offender should be punished.’ Section 8 then proscribes that a plea of guilty is a mitigating factor (s

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<sup>352</sup> *Sentencing Act 1995* (WA).

<sup>353</sup> *Ibid* 6(2).

8(2), criminal property confiscation is not a mitigating factor (s 8(3) but see (3a)) and assistance to law enforcement can reduce a sentence.

It would therefore be a considerable stretch to describe s 8 of the *Sentencing Act 1995* (WA) as outlining a list of sentencing factors comparable to the lists provided in the other jurisdictions. In this respect, Western Australian is similar to Tasmania in that the statute does not provide a list of sentencing factors. Nonetheless, the Western Australian statute does engage with sentencing principles and the broad statutory definition of a mitigating factor means that common law family hardship could be taken into account in sentencing an offender in Western Australia.

### III JUDICIAL DISCRETION

The act of determining an appropriate sentence is a judicial function. In *Mohlasedi v The Queen*, Roberts-Smith JA stated, ‘the imposition of a sentence is an exercise of judicial discretion.’<sup>354</sup> In *Barbaro v The Queen* the plurality of the High Court, endorsed its earlier statement in *GAS v The Queen*,<sup>355</sup> that ‘...it is for the sentencing judge, alone, to decide what sentence will be imposed.’<sup>356</sup> In the reflecting on the discretion exercised by sentencing judges, Gaegeler J stated:

...the sentence to be imposed by the court need not be a sentence which is uniquely correct. The range of sentences capable of being characterised as of a severity appropriate in all the circumstances of a particular offence is set by the time-honoured requirement implicit in the section [s16A(1) of the *Crimes Act 1914* (Cth)] that sentencing discretion “must be exercised judicially, according to rules of reason and justice”.<sup>357</sup>

Therefore, judicial discretion is a central component of the act of sentencing.

#### *A. Instinctive Synthesis*

The High Court has given clear direction on the appropriate approach to sentencing within Australia. The High Court has endorsed the ‘instinctive

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<sup>354</sup> [2006] WASCA 267, [23].

<sup>355</sup> (2004) 217 CLR 198.

<sup>356</sup> *Barbaro v The Queen* (2014) 253 CLR 58, 76.

<sup>357</sup> *Ibid* 77.

synthesis' approach to sentencing and has rejected approaches that structure judicial discretion such as guideline judgments<sup>358</sup> or staged approaches to sentencing.<sup>359</sup> Australia is the only common law country to identify the process as an 'instinctive synthesis'<sup>360</sup> approach.<sup>361</sup>

Justice McHugh has described the 'instinctive synthesis' approach as follows:

By instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case.<sup>362</sup>

This means that the act of determining an appropriate sentence is a fluid process, rather than a rigid or mathematical one. It is an approach which requires a judicial officer to operate in a broad and complex arena, weighing up and balancing numerous sentencing factors before making a holistic determination of the appropriate sentence for the offender. Chief Justice Allsop of the Federal Court of Australia has recently described the Australian approach to sentencing in the following terms:

When...one comes to sentencing, certainty gives way to equality, humanity and a regard for the individual. The importance of evaluative assessment by the court toward the reaching of just punishment that recognizes the humanity of the individual has been a feature of the High Court's jurisprudence of the last 15 years.<sup>363</sup>

All Australian courts are required to adopt an instinctive synthesis approach to sentencing.

The first reference to the term 'instinctive synthesis' that has been identified within Australia was in 1974, in the Victorian case of *R v Williscroft*.<sup>364</sup> Justices Adam and Crockett said:

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<sup>358</sup> See especially *Wong v The Queen* (2001) 207 CLR 584, 612 (Gaudron, Gummow and Hayne JJ) and 622 (Kirby J).

<sup>359</sup> *Markarian v The Queen* (2005) 228 CLR 357.

<sup>360</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6<sup>th</sup> ed, 2015) 51 and 449.

<sup>361</sup> Contrasted with structured models such as Federal Sentencing Guidelines established by the United States Sentencing Commission see <http://www.ussc.gov>; Minnesota Sentencing Guidelines see <http://mn.gov/sentencing-guidelines/>; Sentencing Guidelines established by the Sentencing Council in the United Kingdom see <http://sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm>.

<sup>362</sup> *Markarian v The Queen* (2005) 228 CLR 357, 378.

<sup>363</sup> Chief Justice James Allsop, 'Values in Public Law' (Speech delivered at The James Spigelman Oration 2015, Sydney, 27 October 2015).

<sup>364</sup> *R v Williscroft* [1975] VR 292 ('*Williscroft*').



Now, ultimately every sentence imposed represents the sentencing judge's *instinctive synthesis* of all the various aspects involved in the punitive process. Moreover, in our view, it is profitless (as it thought to be in *Kane's Case*) to attempt to allot to the various considerations their proper part in the assessment of the particular punishments presently under examination. It is sufficient to say that in our opinion the learned Judge did not in the cases before him give to the aspects other than reformation the weight that ought to have been allotted to them. Or, in other words, he has undervalued the nature and circumstances and gravity of the offences of armed robbery and attempted armed robbery with the result that we are persuaded that his discretion has miscarried (emphasis added).<sup>365</sup>

In *Wong*,<sup>366</sup> the High Court approved *Williscroft*.

In *Wong*, Gaudron, Gummow and Hayne JJ unequivocally supported the instinctive synthesis approach. They stated, in their joint judgment, that:

[the two-stage approach to sentencing] ...departs from principle because it does not take account of the fact that there are many conflicting and contradictory elements which bear upon sentencing an offender. Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong. We say "may be" quite wrong because the task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of all of them. That is what is meant by saying that the task is to arrive at an "instinctive synthesis". This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features.<sup>367</sup>

The *Wong* decision is instructive on 'instinctive synthesis'. However, the judgment makes clear that the instinctive synthesis approach was not seen as a novel approach to sentencing, but rather, an endorsement of the current practice of intermediate appellate courts.<sup>368</sup>

Four years later the High Court confirmed its approval of the instinctive synthesis approach to sentencing in *Markarian v The Queen*<sup>369</sup> (*'Markarian'*). The plurality (Gleeson CJ, Gummow, Hayne and Callinan JJ) held that:

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<sup>365</sup> Ibid 300.

<sup>366</sup> (2001) 207 CLR 584.

<sup>367</sup> Ibid 611.

<sup>368</sup> (2001) 207 CLR 584, 611. Citing *R v Thomson* (2000) 49 NSWLR 383, the joint judgment states, 'the weight of authority in the intermediate appellate courts of this country is clearly against adopting two-stage sentencing and favours the instinctive synthesis approach.'

<sup>369</sup> (2005) 228 CLR 357.

[f]ollowing the decision of this Court in *Wong* it cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure...<sup>370</sup>

In *Barbaro v The Queen*,<sup>371</sup> French CJ, Hayne, Kiefel and Bell JJ, citing the earlier decision of *Wong*,<sup>372</sup> reiterated that the appropriate approach to sentencing is not a mathematical process. The plurality stated:

Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting features.<sup>373</sup>

Therefore, for over a decade the High Court has unfailingly demanded an ‘instinctive synthesis’ approach to sentencing in Australia.<sup>374</sup>

### 1. Aiming for ‘Reasonable Consistency’

In light of complaints about consistency and fairness in sentencing practices, attention has been directed to achieving what has been identified as ‘reasonable consistency’ in sentencing. In the classic passage from *Wong*, Gleeson CJ identified this as:

The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, *reasonable consistency*.

Most sentencing of offenders is dealt with as a matter of discretionary judgment. Within whatever tolerance is required by the necessary scope for individual discretion, *reasonable consistency* in sentencing is a requirement of justice (emphasis added).<sup>375</sup>

Nine years later, the High Court in *Hili* affirmed that the type of consistency that courts should be striving for is ‘reasonable consistency’.<sup>376</sup> The plurality stated:

The consistency that is sought is consistency in the application of the *relevant legal principles*. And that *requires consistency in the application of Pt IB* of the

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<sup>370</sup> *Markarian v The Queen* (2005) 228 CLR 357, 375.

<sup>371</sup> (2014) 88 ALJR 372.

<sup>372</sup> (2001) 207 CLR 584.

<sup>373</sup> (2014) 88 ALJR 372, 378.

<sup>374</sup> See, eg, *AB v The Queen* (1999) 198 CLR 111; *Wong* (2001) 207 CLR 584; *Markarian v The Queen* (2005) 228 CLR 357; *Hili v The Queen* (2010) 242 CLR 520; *Jones v The Queen* (2010) 242 CLR 520; *Munda v Western Australia* (2013) 249 CLR 600, 621; *Barbaro v The Queen* (2014) 253 CLR 58; *DPP v Dalgliesh (A Pseudonym)* (2017) 91 ALJR 1063, 1072-1073.

<sup>375</sup> *Wong* (2001) 207 CLR 584, 591.

<sup>376</sup> *Hili v The Queen* (2010) 242 CLR 520, 535 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 544 (Heydon J).

*Crimes Act*. When it is said that the search is for “reasonable consistency”, what is sought is the treatment of like cases alike, and different cases differently. Consistency of that kind is not capable of mathematical expression (emphasis added).<sup>377</sup>

This aim was again endorsed by the plurality of the High Court in *Lacey* and in *Barbaro*.<sup>378</sup>

## 2. Disapproval of Instinctive Synthesis

The instinctive synthesis approach to sentencing has been subject to significant and sustained criticism from legal academics.<sup>379</sup> Academic critique appears to fall comfortably within Cyrus Tata’s understanding of the ‘legal rationalist tradition’ whose members seek to ‘tame, confine, and structure discretion by recourse to rules.’<sup>380</sup> For example, Bagaric has been highly critical of the disparities in sentencing arising from the broad discretion that is present within the current system.<sup>381</sup>

There has also been judicial critique, however, this stems from a position that the instinctive synthesis approach does not reflect the steps taken in arriving at sentence. The predominate alternative approach to sentencing is the ‘two stage’

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<sup>377</sup> *Ibid*.

<sup>378</sup> *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 595-596 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Barbaro v The Queen* (2014) 253 CLR 58, 74 (French CJ, Hayne, Kiefel and Bell JJ). See also *R v Pham* (2015) 256 CLR 550, 558 (French CJ, Keane and Nettle JJ) and 564 (Bell and Gageler JJ).

<sup>379</sup> See, eg, Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters LawBook Co, 2014) 3; 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, 'Consistency and Fairness in Sentencing – The Splendor of Fixed Penalties' (2000) 2 *California Criminal Law Review* 1; Mirko Bagaric, 'Sentencing: The Road to Nowhere' (1999) 21(4) *The Sydney Law Review* 597; Richard G Fox, 'Controlling Sentencers' (1987) 20 *Australia and New Zealand Journal of Criminology* 218; Michael Tonry, *Sentencing Matters* (Oxford University Press, 1996) 178; Ian Leader Elliott, 'Editorial: Instinctive Synthesisers In The High Court' (2002) 26 *Criminal Law Journal* 5, 8; George Zdenkowski, 'Sentencing' in Ian Freckelton, and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Thomson Reuters, 2009) 751, 761; John Anderson, 'Standard Minimum Sentencing and Guideline Judgments: An Uneasy Alliance in the Way of the Future' (2006) 30 *Criminal Law Journal* 203, 212-213 and 219; Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6<sup>th</sup> ed, 2015) 52, 81 and 449.

<sup>380</sup> Cyrus Tata 'Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process' (2007) 16(3) *Social & Legal Studies* 425, 428.

<sup>381</sup> Mirko Bagaric, 'Sentencing: The Road to Nowhere' (1999) 21(4) *The Sydney Law Review* 597; 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.

approach. The ‘two stage’ approach sees a court first, makes a quantified determination of the appropriate sentence and, secondly, the court makes adjustments to this figure based on identified aggravating and mitigating factors.<sup>382</sup> Kirby J has argued that:

so many judges in Australia, experienced in criminal trials and in sentencing, have expressed their disagreement with the approaches derived from *Williscroft* and *Young*, it is undesirable...for this Court...to impose those authorities on sentencing judges throughout the Commonwealth.<sup>383</sup>

In *Wong*, Kirby J had failed to endorse the instinctive synthesis approach,<sup>384</sup> and four years later, in his dissenting judgment in *Markarian*,<sup>385</sup> he openly supported the two-stage approach delivering a strong critique of the joint reasons supporting instinctive synthesis.<sup>386</sup> Justice Kirby observed that the ‘growing move of federal and state legislatures in Australia to spell out specific considerations that are to be taken into account in judicial sentencing’<sup>387</sup> was an important change, indicative of an obligation for ‘sentencing courts and courts of criminal appeal to pay regard to aggravating and mitigating factors’,<sup>388</sup> and to take adjustments in determining a sentence.<sup>389</sup>

Over the years, the High Court has recognised criticisms to the instinctive synthesis approach yet has persistently supported this approach to sentencing. In *Markarian*, McHugh J defended the instinctive synthesis approach and observed:

Critics of the instinctive synthesis method place too much emphasis on the “instinct” and too little on the “synthesis”. The use of the word “synthesis” in the context of sentencing identifies the very last part of the process. It recognises that, where a variety of considerations, often tending in opposing directions, operate in the context of a statutory maximum, there must finally be a quantification of the sentence to be imposed. There must be a synthesising of the relevant factors.<sup>390</sup>

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<sup>382</sup> See further, Ian Leader Elliott, ‘Editorial: Instinctive Synthesisers in The High Court’ (2002) 26 *Criminal Law Journal* 5, 8; George Zdenkowski, ‘Sentencing’ in Freckelton, I and Selby, H (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Thomas Reuters, 2009) 751, 759.

<sup>383</sup> *Markarian v The Queen* (2005) 228 CLR 357, 402.

<sup>384</sup> *Wong* (2001) 207 CLR 584, 622.

<sup>385</sup> *Markarian v The Queen* (2005) 228 CLR 357, 390-408.

<sup>386</sup> *Ibid* 406-407.

<sup>387</sup> *Ibid* 402.

<sup>388</sup> *Ibid*.

<sup>389</sup> See generally Kate Warner, ‘Sentencing Review 2004-2005’ (2005) 29 *Criminal Law Journal* 355, 355 – 361.

<sup>390</sup> *Markarian v The Queen* (2005) 228 CLR 357, 387.

To further defend the instinctive synthesis approach within the current sentencing climate, McHugh J explained,

One reason why the idea of instinctive synthesis is apparently abhorrent to lawyers who value predictability and transparency in sentencing is that they see the instinct of a sentencing judge as entirely subjective, personal, arbitrary and unconfined. In fact, although a sentencing judge does ultimately select a number, it is not from thin air that the judge selects it. The judicial air is thick with trends, statistics, appellate guidance and, often enough these days, statutory guidance.<sup>391</sup>

The ‘trends, statistics, appellate guidance and... statutory guidance’ that McHugh J refers to in this passage will be explored later in this Chapter.

Despite global shifts towards structured and standardised sentencing practices in the common law world, for example formulaic sentencing guidelines and grids,<sup>392</sup> the Australian sentencing framework has remained firmly wedded to broad discretion and instinctive sentencing practices. As has been seen above, this is because of the robust defence of an instinctive synthesis approach to sentencing by the High Court and their ardent protection of broad judicial discretion. The weight of authority and current composition of the High Court, indicates that the instinctive approach will prevail for the foreseeable future.

Understanding the instinctive synthesis approach and the broader context of Australian sentencing practices is important content for this study. The instinctive synthesis approach to sentencing within Australia means that it is impossible to quantify the precise reduction provided by sentencing judges who take family hardship into account as a mitigating factor. The importance of this feature in respect of sentencing appeals is addressed further below.

### *B. Individualised Justice*

If the instinctive synthesis approach describes the *method* by which judicial officers are to reach an appropriate sentence, the principle of individualised justice

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<sup>391</sup> Ibid 388.

<sup>392</sup> Discussed further in Chapter Three are the federal Sentencing Guidelines established by the United States Sentencing Commission see <http://www.ussc.gov>; Minnesota Sentencing Guidelines see <http://mn.gov/sentencing-guidelines/>; Sentencing Guidelines established by the Sentencing Council in the United Kingdom see <http://sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm>.

may be described as the *goal*; Chief Justice Gleeson describing it as the 'Holy Grail'.<sup>393</sup> Internationally, the discourse of new penology has classified individualised justice as 'individualized welfare justice'.<sup>394</sup> Individualised justice recognises that the offender, the offence and the broader circumstances of the case are each unique and the sentencing judge needs to tailor the sentence to the individual offender.<sup>395</sup> In Australia, this approach to sentencing has also been called 'individualised sentencing'.<sup>396</sup>

The High Court returned to the language of 'individualised justice' in 2013 observing,

[t]he administration of criminal law involves individualised justice, the attainment of which is acknowledged to involve the exercise of a wide sentencing discretion.<sup>397</sup>

In the same year in the case of *Bugmy v The Queen*,<sup>398</sup> the High Court addressed the function of individualised justice in sentencing holding that taking systematic discrimination against Aboriginal Australians into account would be contrary to individualised justice.<sup>399</sup>

In 2006, the ALRC in its *Same Crime, Same Time* Report strongly supported an individualized justice approach to federal sentencing in Australia.<sup>400</sup> The ALRC described the principle as a requirement that the sentencing court 'impose a sentence that is just and appropriate in all the circumstances of the particular case.'<sup>401</sup> In recognition of the role of individualised justice the ALRC stated:

Courts have consistently recognised the importance of this sentencing principle. For example, in *Kable v Director of Public Prosecutions*, Mahoney ACJ stated that 'if justice is not individual, it is nothing'. Individualised justice can be

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<sup>393</sup> See, The Hon A M Gleeson, 'Individualised Justice - The Holy Grail' (1995) 69 *Australian Law Journal* 421.

<sup>394</sup> Cyrus Tata 'Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process' (2007) 16(3) *Social & Legal Studies* 425, 429. Garland lists individualised sentencing as one of the 'central planks' in the welfare/correctionalist model, see David Garland, *The Culture of Control* (The University of Chicago Press, 2001) 27-28.

<sup>395</sup> Law Reform Commission, *Sentencing: Procedure*, Discussion Paper No 29 (1987) 16.

<sup>396</sup> See, eg, Law Reform Commission, *Sentencing: Procedure*, Discussion Paper No 29 (1987) 16.

<sup>397</sup> *Elias v The Queen* (2013) 248 CLR 483, 494-495 (French CJ, Hayne, Kiefel, Bell and Keane JJ). Cited with approval in *DPP v Dalgliesh (A Pseudonym)* (2017) 91 ALJR 1063, 1072.

<sup>398</sup> (2013) 249 CLR 571.

<sup>399</sup> *Ibid* 594 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>400</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 114, 155-157; 542

<sup>401</sup> *Ibid* 155.

attained only if a judicial officer possesses a broad sentencing discretion that enables him or her to consider and balance multiple facts and circumstances when sentencing an offender.<sup>402</sup>

The ALRC recommended that the principle of individualized justice should be acknowledged in federal legislation as one of five fundamental principles that must be applied in sentencing.<sup>403</sup>

The principle of individualised justice has not been widely mentioned by name in sentencing remarks, but it is a principle that embodies an approach that judicial officers have recognised and defended.<sup>404</sup> In 2008, Spigelman CJ of the New South Wales Court of Criminal Appeal in his keynote address to a national sentencing conference commented:

The principle of individualised justice, depends on the elementary proposition that the wide variation of circumstances of both the offence and of the offender must always be taken into account, so that the sentence is appropriate to the individual case. Experience over the centuries has led to the clear conclusion that this task is best undertaken by the exercise of a broad discretion by individual judges.<sup>405</sup>

In 2013, the plurality of the High Court in *Elias v The Queen*<sup>406</sup> expressly acknowledged the role of individualized justice in the sentencing process. French CJ, Hayne, Kiefel, Bell and Keane JJ stated:

It is the duty of the judge to balance often incommensurable factors and to arrive at a sentence that is just in all of the circumstances. The administration of the criminal law involves individualised justice, the attainment of which is acknowledged to involve the exercise of a wide sentencing discretion.<sup>407</sup>

The principle of individualised justice clearly interconnects with an instinctive synthesis approach to sentencing (discussed above), with both principles involving the exercise of broad judicial discretion. The approach to determining an appropriate sentence is, therefore, a complex mental process requiring judicial

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<sup>402</sup> Ibid.

<sup>403</sup> The other fundamental principles were proportionality, parsimony, totality and consistency, see Ibid 29-30, 156-157.

<sup>404</sup> See, eg, *R v Whyte* (2002) 55 NSWLR 252, 276-278 (Spigelman CJ with Mason P, Barr, Bell and McClellan JJ agreeing); *Kable v Director of Public Prosecutions* (1995) 36 NSWLR 374, 394. See also Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 155.

<sup>405</sup> Chief Justice James Spigelman AC, 'Consistency and Sentencing' (Keynote Address delivered at the Sentencing Conference 2008, Canberra, 8 February 2008) 3; Hon James Spigelman, 'Consistency and Sentencing' (2008) 82 *Australian Law Journal* 450, 450-451.

<sup>406</sup> (2013) 248 CLR 483.

<sup>407</sup> Ibid 494-495.

officers to balance numerous variables and impose a sentence upon an *individual* who is operating in a complex reality.

From this framework, it is apparent that there may well be differences (legitimate differences) between the circumstances taken into account in respect of one offender in contrast to the circumstances taken into account for another offender who is being sentenced for the same type of offence. This is because in determining an appropriate sentence, regard must be had to many sentencing factors tailored to the individual offender and their unique circumstances.

#### IV SENTENCING JURISPRUDENCE

In 1987, Richard Fox identified the scarcity of statistical and descriptive data on sentencing as 'one of the greatest barriers to the achievement of uniformity of approach' in sentencing.<sup>408</sup> The emergence of Sentencing Information Systems around Australia (discussed below) has seen a shift towards providing greater attention to monitoring sentencing practices. These systems have also seen the barriers identified by Fox (ie. reliable statistical information on past sentencing practices) alleviated. However, as the cases of *Hili*<sup>409</sup> and *Barbaro*<sup>410</sup> highlight, the High Court has been very resistant to judicial reliance upon statistical data in sentencing.

State and territory governments have been increasingly active in legislating within the field of sentencing. The actions of legislatures have largely been in the name of implementing a more consistent approach to sentencing. Justice Preston has remarked on the impact of this legislative encroachment into sentencing, noting that:

The task [of sentencing] is discretionary, but the discretion is structured. Within the last three decades, the degree of structuring has increased...The structures include prescribing the maximum (and sometimes the minimum)

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<sup>408</sup> Richard Fox, 'Controlling Sentencers' (1987) 20 *Australia and New Zealand Journal of Criminology* 218, 230.

<sup>409</sup> *Hili v The Queen* (2010) 242 CLR 520.

<sup>410</sup> *Barbaro v The Queen* (2014) 253 CLR 58.



penalties that may be imposed for different offences, and the sentencing considerations that must be taken into account.<sup>411</sup>

As described above, there is an overarching legislative structure to sentencing in each Australian jurisdiction that did not previously exist.

Yet, despite the growth in legislation as a principal source of law on sentencing, the most dominant characteristic of sentencing in Australia remains that it is an exercise of broad judicial discretion.<sup>412</sup> There is, however, more that can be done within the current framework to alleviate concerns about an uncharted 'wasteland'<sup>413</sup> of sentencing. Placing greater importance on sentencing principles is essential to this.

In *Wong*, Gaudron, Gummow and Hayne JJ emphasised the importance of courts setting out sentencing principles guiding the exercise of their judicial sentencing discretion.<sup>414</sup> In the joint judgment they advised:

...it may very well be necessary and appropriate for a court, in the course of resolving the issues presented by the matter before it, to make explicit the sentencing principles that were engaged in the particular matter. Thus, there will be cases where, for example, it may be appropriate to conclude that sentencers should give chief weight to general deterrence in sentencing for a particular kind of offence. Such statements are obviously important in ensuring a principled approach to sentencing in future cases.<sup>415</sup>

This directive from the High Court is being picked up. For example, in speaking on 'Consistency and Sentencing' at the 2008 national sentencing conference, Spigelman CJ remarked that 'it is these [sentencing] principles... which play a critical role in reconciling the principle of individualised justice and the principle

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<sup>411</sup> Justice Brian J Preston, 'Principled Sentencing for Environmental Offences – Part 1: Purposes of Sentencing' (2007) 31 *Criminal Law Journal* 91, 91.

<sup>412</sup> Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265, 265.

<sup>413</sup> In the 1970s Judge Marvin Frankel argued that the 'evil of unbounded discretion' evident in sentencing in the United States resulted in a 'wasteland in the law'. The piece remains a seminal work see Marvin Frankel, 'Lawlessness in Sentencing' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3<sup>rd</sup> ed, 2009) 237, 242. Frankel is also acknowledged in Mirko Bagaric and Richard Edney, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 15.

<sup>414</sup> *Wong* (2001) 207 CLR 584, 605 - 606. See also *Mohlasedi v The Queen* [2006] WASCA 267.

<sup>415</sup> *Wong* (2001) 207 CLR 584, 606.

of consistency.’<sup>416</sup> A plurality of the High Court in the decisions of both *Hili* and *Barbaro* have echoed the call for greater judicial attention to legal principles in sentencing.<sup>417</sup>

This study of family hardship within Australia highlights the importance of paying greater attention to the development and use of sentencing factors and principles. As the sentiments above highlight, there is considerable support from the judiciary, for greater focus upon understanding and explaining approaches to sentencing and the interaction between principles and factors. The research conducted for this dissertation will assist in the transition towards a more sophisticated and nuanced engagement with the role of sentencing factors, principles and approaches.

### *A. Principles of Comity*

The rule of comity is widely accepted and applied in Australia by sentencing courts.<sup>418</sup> Alastair MacAdam and John Pyke observe that ‘[t]his factor will often result in decisions being followed even though they are not strictly binding because for example the decision is from a different hierarchy of courts.’<sup>419</sup> However, in *Farah Constructions*,<sup>420</sup> attention was drawn to the particular importance of the rule when courts are interpreting ‘Commonwealth legislation or uniform national legislation’.<sup>421</sup> In these circumstances, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ recommended that courts in Australia:

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<sup>416</sup> Chief Justice James Spigelman AC, ‘Consistency and Sentencing’ (Keynote Address delivered at the Sentencing Conference 2008, Canberra, 8 February 2008) 7; Hon James Spigelman, ‘Consistency and Sentencing’ (2008) 82 *Australian Law Journal* 450, 451.

<sup>417</sup> *Hili v The Queen* (2010) 242 CLR 520, 536-537 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Barbaro v The Queen* (2014) 253 CLR 58, 74 (French CJ, Hayne, Kiefel and Bell JJ).

<sup>418</sup> See, eg, *R v Jackson* (1972) 4 SASR 81, 91-92; *R v Matthews* (1996) 130 FLR 230, 233; *R v Reynolds* [1999] VSCA 224 (10 December 1999), [19]; *R v Gent* (2005) 162 A Crim R 29, 36; *Director of Public Prosecutions (Cth) v D’Alessandro* [2010] 26 VR 477, 483; *R v Pham* (2015) 256 CLR 550, 558-560. See also Justice Mark Weinberg, ‘The Labyrinthine Nature of Federal Sentencing’ (Keynote address presented at Federal Crime and Sentencing Conference 2012, Canberra, 11 February 2012); Justice Peter Johnson, ‘Consistency in Sentencing for Federal Offences – Challenges for Sentencing Courts in an Evolving Landscape’ (Paper presented at Federal Crime and Sentencing Conference 2012, Canberra, 11 February 2012) 11-13.

<sup>419</sup> Alastair MacAdam and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (Butterworths, 1998) 67.

<sup>420</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

<sup>421</sup> *Ibid* 152.

...should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law.<sup>422</sup>

In the federal sentencing case of *Hili*, the plurality of the High Court affirmed this position. The plurality stated:

In dealing with appeals against sentences passed on federal offenders, whether the appeal is brought by the offender or by the prosecution, the need for consistency of decision throughout Australia is self-evident. It is plain, of course, that *intermediate courts of appeal should not depart from an interpretation placed on Commonwealth legislation by another Australian intermediate appellate court, unless convinced that the interpretation is plainly wrong* (emphasis added).<sup>423</sup>

In *Pham*, French CJ, Keane and Nettle JJ endorsed *Hili* and in strong language stated:

It is settled that, in the absence of binding authority from this Court, an intermediate appellate court must follow a statement of legal principle by another intermediate appellate court unless persuaded that it is plainly wrong. It is also settled that a “sentence itself gives rise to no binding precedent.”<sup>424</sup>

Chief Justice French, Keane and Nettle JJ underscored that judicial comity *should* enhance the ‘identification and application of relevant sentencing principles’ in federal sentencing.<sup>425</sup>

One area that needs attention, to facilitate an appropriate practice of judicial comity, is the quality of sentencing remarks handed down by courts. In 2012, Justice Johnson, in his speech at the annual sentencing conference, emphasised the rule of comity in Australia and the endorsement of this rule by the High Court. However, he advocated to the audience that sentencing remarks and the reasons of intermediate appellate courts needed to have sufficient content on the operation of judicial discretion and sentencing principles for the rule of comity to operate.<sup>426</sup>

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<sup>422</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151-152.

<sup>423</sup> *Hili v The Queen* (2010) 242 CLR 520, 538 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) 541 (Heydon J); endorsed in *R v Pham* (2015) 256 CLR 550, 560 (French CJ, Keane and Nettle JJ).

<sup>424</sup> *R v Pham* (2015) 256 CLR 550, 560.

<sup>425</sup> *Ibid* 558.

<sup>426</sup> Justice Peter Johnson, ‘Consistency in Sentencing for Federal Offences – Challenges for Sentencing Courts in an Evolving Landscape’ (Paper presented at Federal Crime and Sentencing Conference 2012, Canberra, 11 February 2012) 12-13.

This point will be discussed in more detail in Chapter Four and Five in the discussion of the results of the study of the case law on family hardship.

### *B. Appellate Review and Broad Judicial Discretion*

Determining an appropriate sentence, such as determining the length of a custodial sentence or determining the length of a non-parole period, are exercises of judicial discretion and accordingly, 'any appeal against a sentence (whether by the Crown or the offender) is an appeal against an exercise of discretion.'<sup>427</sup> Judicial officers in Australia operate from an instinctive synthesis approach to sentencing and they are provided as much flexibility as the system allows. The instinctive synthesis approach also means that in determining an appeal an appellate court will not have knowledge of a quantifiable reduction for each specific mitigating factors provided in sentencing remarks by the court at first instance. Additionally, Geraldine Mackenzie and Nigel Stobbs have observed that due to the 'wide variation in the nature and depth of sentencing remarks' it might not be clear whether an error has occurred.<sup>428</sup>

Throughout Australia, statutes grant appellate courts the power to hear appeals against sentence.<sup>429</sup> Appeal may be brought by the Crown or by the convicted person. The procedural requirements that govern appellant review are also set out in legislation in each jurisdiction.<sup>430</sup> The state and territory legislative provisions governing the right to appeal against sentence are picked up and applied to federal offences by the operation of s 68(2) of the *Judiciary Act 1903* (Cth).<sup>431</sup> It is not necessary for the purposes of this study to review these legislative provisions.<sup>432</sup>

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<sup>427</sup> *R v Kertebani* [2010] NSWCCA 221, [54] (Hoeben J).

<sup>428</sup> See Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (The Federation Press, 2010) 258.

<sup>429</sup> Sentencing appeals are a creature of statute and were not known at common law see generally Kate Warner, *Sentencing in Tasmania* (Federation Press, 2<sup>nd</sup> ed, 2002) 432. See, eg, *Criminal Appeal Act 1912* (NSW); *Criminal Procedure Act 2009* (Vic); *Criminal Appeals Act 2004* (WA).

<sup>430</sup> See, eg, *Crimes (Appeal and Review) Act 2001* (NSW); *Criminal Appeal Act 1912* (NSW); *Criminal Procedure Act 2009* (Vic) pts 6.1-6.3.

<sup>431</sup> See also *Wong* (2001) 207 CLR 584, 602-603 (Gaudron, Gummow and Hayne JJ); *Barbaro v The Queen* (2014) 253 CLR 58, 78 (Gaeger J); *R v Pham* (2015) 256 CLR 550, 557 (French CJ, Keane and Nettle JJ).

<sup>432</sup> For a good overview of the law of sentencing appeals see Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (The Federation Press, 2010) 250-276.

The High Court laid down the general common law principles of appellate review in 1936 in the case of *House v The King*<sup>433</sup> ('House'). These principles are deeply entrenched and were described in *House* as 'established principles'.<sup>434</sup> Today they are still regarded as 'well-known principles'<sup>435</sup> of general application. For an appeal against sentence to succeed it must be established that the exercise of discretion by the sentencing judge had miscarried; the Crown or the applicant must demonstrate error.<sup>436</sup>

It is not enough for an appellate court to find that it *would* have imposed a different sentence in the circumstances.<sup>437</sup> In *Lowndes v The Queen*,<sup>438</sup> the High court emphasised the importance of respecting discretionary judgments. The Full Court of the High Court stated:

The principles according to which an appellate court may interfere with such a discretionary judgment by a sentencing judge are well established... Of particular importance in the present case is the principle that a court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion. This is basic. The discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice.<sup>439</sup>

Appellate courts frequently acknowledge that the sentencing judge was in a better position than they to make a judgment on sentencing factors including the persuasiveness and weight to be attached to material put before the sentencing court.<sup>440</sup> Therefore, under the common law the discretionary nature of the sentencing task is paramount and is rigorously protected within the appellate review process.<sup>441</sup>

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<sup>433</sup> *House v The King* (1936) 55 CLR 499 ('House').

<sup>434</sup> (1936) 55 CLR 499, 504-505.

<sup>435</sup> See, eg, *Barbaro v The Queen* (2014) 253 CLR 58, 70; *Kaveh v The Queen* [2017] NSWCCA 52 (24 March 2017) [2].

<sup>436</sup> See, eg, *House* (1936) 55 CLR 499, 505; *Cranssen v The King* (1936) 55 CLR 509, 519-520.

<sup>437</sup> *House* (1936) 55 CLR 499, 505; *Cranssen v The King* (1936) 55 CLR 509, 519; *Harris v The Queen* (1954) 90 CLR 652, 655; *Lowndes v The Queen* (1999) 195 CLR 665, 671-672; *Dinsdale v The Queen* (2000) 202 CLR 321, 339.

<sup>438</sup> (1999) 195 CLR 665.

<sup>439</sup> *Lowndes v The Queen* (1999) 195 CLR 665, 671-672 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

<sup>440</sup> See, eg, *Dinsdale v The Queen* (2000) 202 CLR 321, 342.

<sup>441</sup> For a critique of Australian appellate review of sentencing see Sarah Krasnostein and Arie Freiberg, 'Manifest Error: Grounds for Review?' (2012) 36 *Australian Bar Review* 54.

## 1. Common Law Principles Governing Appellate Review

The classic passage on the type of error necessary for appellate review was set out in the case of *House*. Justices Dixon, Evatt and McTiernan described two ways in which the exercise of judicial discretion can be found to have miscarried. Their Honours stated:

If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed...<sup>442</sup>

The error described here is an 'identifiable error'.<sup>443</sup>

In *House*, their Honours went on to observe that there is another type of error that may give rise to a successful appeal. They stated:

It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.<sup>444</sup>

This form of error was commonly referred to under the grounds of 'manifestly excessive' or 'manifestly inadequate' sentence.<sup>445</sup> Recently, the plurality in *Barbaro v The Queen* addressed this type of error and stated:

The conclusion that a sentence passed at first instance should be set aside as manifestly excessive or manifestly inadequate says no more or less than that some "substantial wrong has in fact occurred" in fixing that sentence.<sup>446</sup>

Therefore, an appellate court may intervene where the result (ie. the sentence imposed) is shown to be so obviously wrong, unreasonable or unjust.<sup>447</sup>

The first form of error, where there is an identifiable error, is generally a type of error where there is an error of a material fact or an error in legal principle.<sup>448</sup> The

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<sup>442</sup> *House* (1936) 55 CLR 499, 505.

<sup>443</sup> See *Carroll v The Queen* (2009) 83 ALJR 579, 581 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>444</sup> *House* (1936) 55 CLR 499, 505.

<sup>445</sup> *Wong* (2001) 207 CLR 584, 605.

<sup>446</sup> *Barbaro v The Queen* (2014) 253 CLR 58, 70 (French CJ, Hayne, Kiefel and Bell JJ).

<sup>447</sup> *House* (1936) 55 CLR 499, 505; *Markarian v The Queen* (2005) 228 CLR 357, 370-371; *Munda v Western Australia* (2013) 249 CLR 600, 613 (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

<sup>448</sup> *House* (1936) 55 CLR 499, 505.

second form of error has been described as a ‘residuary category of error’;<sup>449</sup> it being an inherent error that may not be able to be specifically identified from the sentencing reasons. The second form of error has been described by courts as one that can be identified as ‘manifest from the sentence imposed’<sup>450</sup> and as an error where the sentence is ‘so unreasonable or plainly unjust that it bespeaks a miscarriage’<sup>451</sup> of discretion.<sup>452</sup> The second form of error is not easy to prove.<sup>453</sup>

### **(a) Outside an appropriate range**

Commonly the Crown or the appellant arguing the second form of error will claim that a sentence falls outside of an appropriate range for an offence. However, appellate courts are sensitive to the variety of factors that are taken into account by judges in sentencing and the difficult balancing exercise that takes place.<sup>454</sup> Thus, a sentence found to be towards the bottom end or upper end of a range of sentences that could be imposed will not, for this reason alone, be found to be in error. Accordingly, the appropriate range of sentences for an offence has been widely construed by appellate courts.<sup>455</sup>

### **(b) Failure to give weight to a mitigating factor**

Failure to give any weight or a failure to give ‘significant weight’ to a relevant mitigating factor can be regarded as an identifiable sentencing error; the first form of error identified in *House* (see above). Failure for a sentencing judge to consider a relevant matter at all (ie. failure to give any weight to a sentencing factor) is an easier ground to make out but not commonly available. Failure to give significant weight to a sentencing factor can be a difficult ground to make out on appeal. The review of the case law supports that it is particularly difficult to argue that insufficient weight has been attributed to a particular sentencing factor.<sup>456</sup>

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<sup>449</sup> See, eg, *Wong* (2001) 207 CLR 584, 605 (Gaudron, Gummow and Hayne JJ); *Barbaro v The Queen* (2014) 253 CLR 58, 70 (French CJ, Hayne, Kiefel and Bell JJ).

<sup>450</sup> See *R v Kertebani* [2010] NSWCCA 221, [54] (Hoeben J).

<sup>451</sup> See *Le v The Queen* [2006] NSWCCA 136, [29] (Latham J).

<sup>452</sup> See, especially, *House* (1936) 55 CLR 499, 505; *Munda v Western Australia* (2013) 249 CLR 600, 613 (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

<sup>453</sup> *AB v The Queen* (1999) 198 CLR 111, 126; *Markarian v The Queen* (2005) 228 CLR 357, 393.

<sup>454</sup> *Postiglione v The Queen* (1997) 189 CLR 295, 336-337.

<sup>455</sup> See generally Sarah Krasnostein and Arie Freiberg, ‘Manifest Error: Grounds for Review?’ (2012) 36 *Australian Bar Review* 54, 58-67.

<sup>456</sup> See, eg, *R v Pearce* (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Callaway JA, Southwell and Coldrey AJJA, 19 September 1996).

This instinctive synthesis approach to sentencing means that in analysing sentencing remarks and sentencing judgments it is not possible to determine the precise weight that has been attached to an individual sentencing factor, in fact, quantifying the weight attached to a specific factor would be an error.<sup>457</sup> The High Court has emphasised that when sentencing the judgment being exercised is a 'discretionary judgment.'<sup>458</sup> In *Markarian*, McHugh J described the method as one where,

the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment ...<sup>459</sup>

Therefore, the relevance and consideration of sentencing factors is known only when judicial officers discuss their significance and articulate in their remarks the value judgments they have made in respect to individual sentencing factors.

The appellant needs to demonstrate that a particular sentencing factor failed to be considered or was given insufficient weight in its consideration. In *Vagh v Western Australia*,<sup>460</sup> McLure JA stated,

A failure to give adequate weight to a relevant sentencing consideration only gives rise to an (express) appealable error if it amounts to a failure to exercise the discretion actually entrusted to the Court.<sup>461</sup>

For example, failure to refer to a 'highly relevant factor' can demonstrate that a 'factor was disregarded.'<sup>462</sup> But appellate courts do look beyond inadequate sentencing remarks to find that 'the sentence actually imposed demonstrate[s] that principle or factor must have been taken into account.'<sup>463</sup> And appellate courts can grant credit to 'experienced sentencing judges' thus holding that it is unlikely that they have ignored a relevant sentencing factor.<sup>464</sup>

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<sup>457</sup> See discussion above rejecting a mathematical approach to sentencing.

<sup>458</sup> *Markarian v The Queen* (2005) 228 CLR 357, 371 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>459</sup> *Ibid* 378.

<sup>460</sup> [2007] WASCA 17 (19 January 2007).

<sup>461</sup> *Ibid* [76].

<sup>462</sup> Stephen Odgers, *Sentencing: The Law of Sentencing in NSW Courts for State and Federal Offences* (Longueville Books, 2<sup>nd</sup> ed, 2013) 480.

<sup>463</sup> *Ibid* 481.

<sup>464</sup> *Ibid*.



In *Neal v The Queen*,<sup>465</sup> Murphy J (in his dissenting judgment) cited with approval the finding of David Thomas on the effect of mitigating factors in sentencing.

Murphy J stated:

A sentence which fails to reflect the presence of recognized mitigating factors will, in the general run of cases, be reduced on appeal. (Thomas, *Principles of Sentencing* (1979), p. 47.)

Where there are statutory lists of sentencing factors, there is at least a duty upon the sentencing judge to take into account any of the listed sentencing factors.<sup>466</sup>

The study of the case law demonstrates that an appeal ground of failing to take into account a listed sentencing factor is likely to succeed in circumstances where the factor has not been referred to at all in the sentencing remarks.<sup>467</sup> The statutory lists have made an impact in this context. However, there is no obligation upon a sentencing judge to place any real weight upon a listed factor in the process of determining an appropriate sentence (this will be discussed further in Chapter Three). Therefore, where the matter is referred to, but alleged to have been given insufficient weight, sentencing appeals on these grounds remain difficult to prove.

The issue within sentencing appeals of a failure to give sufficient weight to a discretionary factor resonates with civil law debates in family law. In *Lovell v Lovell*,<sup>468</sup> a family law case dealing with infant custody, the High Court addressed the ability of appellate courts to interfere with an exercise of judicial discretion where there was a complaint of insufficient weight being given to relevant considerations. Latham CJ stated,

If completely irrelevant considerations have been taken into account and they have really affected the decision the case is clear, and the order, though made in the exercise of a discretion, should be set aside. Similarly, if relevant considerations are plainly ignored the same result follows. But when the appellate tribunal is considering questions of weight it should not regard itself as being in the same position as the learned trial judge. In the absence of exclusion of relevant considerations or the admission of irrelevant considerations an appellate tribunal should not set aside an order made in the exercise of a judicial discretion... unless the failure to give adequate weight to

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<sup>465</sup> (1982) 149 CLR 305, 319.

<sup>466</sup> Where the statutory provision provides that the listed matters ‘must’ or ‘should’ be taken into account, see, eg, *Crimes Act 1914* (Cth) s 16A(2).

<sup>467</sup> See, eg, *Adams v The Queen* [2003] WASCA 91 (2 May 2003); *Roberts v Johnson* [2003] WASCA 272 (4 November 2003).

<sup>468</sup> *Lovell v Lovell* (1950) 81 CLR 513.

relevant considerations really amounts to a failure to exercise the discretion actually entrusted to the court.<sup>469</sup>

This case has been cited with approval in the context of the exercise of judicial discretion in determining sentence.<sup>470</sup>

These authorities all recognise that a failure to give sufficient weight in appropriate circumstances is a basis on which an appeal court may interfere with a discretionary order. To adopt the language used by Barton A-CJ in *Skinner v The King*,<sup>471</sup> as approved by the High Court in *Lacey*,<sup>472</sup> if the judge has ‘clearly overlooked, or undervalued or overestimated, or misunderstood some salient feature’,<sup>473</sup> a Court of Appeal may review the sentence imposed at first instance. David Thomas also found, through his study of the sentencing practices of the England and Wales Court of Appeal Criminal Division, that denying credit for mitigating factors may occur in exceptional circumstances such as where the need for deterrence or where the prevention of further offences was ‘unusually compelling’.<sup>474</sup> The study of the case law in Chapters Four and Five demonstrates that Australian courts have also adopted broad categories where the impact of mitigating factors is granted no weight or minimal weight.

## V CONCLUSION

This chapter has provided important context on Australian sentencing law and the sentencing process. It has outlined the legislative models that have been adopted in respect of sentencing factors in each jurisdiction within Australia. This chapter has described the scope that each sentencing statute permits or requires for the consideration of sentencing factors. It has explained how family hardship can be

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<sup>469</sup> Ibid 519.

<sup>470</sup> See, eg, *Harvey v Western Australia* [2005] WASCA 117 (20 May 2005) [19] (Roberts-Smith JA with Wheeler JA and Pullin JA agreeing), *Chan v The Queen* [2010] NSWCCA 153 (22 October 2010) [65] (Kirby J with Beazley JA and Johnson J agreeing), *Dipangkear v The Queen* [2010] NSWCCA 156 (21 July 2010) [49] (Whealy J with Hodgson JA and Buddin J agreeing).

<sup>471</sup> *Skinner v The King* (1913) 16 CLR 336.

<sup>472</sup> *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573.

<sup>473</sup> *Skinner v The King* (1913) 16 CLR 336, 340, affd *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 579-580.

<sup>474</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 47-48.

taken into account in sentencing in accordance with legislation or the common law. A review of the sentencing policies that underpin sentencing in each jurisdiction has also been provided and the similarities and differences between the legislative models highlighted. This is the context within which the sentencing decision is made. It is also the context within which the study of the case law, analysing appellate decisions relating to family hardship (across the different Australian jurisdictions), took place. The results of the study of the case law will be set out in Chapters Four and Five.

The next chapter, Chapter Three, begins to trace the development of sentencing jurisprudence on mitigating factors more broadly, and, upon family hardship, specifically. Therefore, it teases out the relationship between family hardship and the sentencing of an offender. Chapter Three tells the story of ‘family hardship’ within Australian Criminal Justice. It will reveal the early origins of consideration of the impact of a penalty upon an offender’s dependants (ie hardship to others). It will explain the importance of Thomas’ work and his influence upon how family hardship has been understood by common law courts. Chapter Three will then set out how the impact of a sentence upon an offender’s family and dependents came to be recognised in legislation in Australia in the Australian Capital Territory, South Australia and the federal jurisdiction.

### 3. 'FAMILY HARDSHIP' AS A SENTENCING FACTOR

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#### I INTRODUCTION

This chapter will show that family hardship is a sentencing consideration which has deep roots in the common law legal tradition. The historical underpinnings of this sentencing consideration have not, to the author's knowledge, been subject of close examination. As explained in Chapter One it is a sentencing factor which is frequently identified as illegitimate and irrelevant to mainstream sentencing practices. This chapter shows that family hardship is actually an embedded sentencing factor within the common law tradition.

Firstly, this chapter begins with a review the way the criminal justice system and courts have traditionally approached the effect of an offender's sentence upon families. It explores the origins of judicial consideration of hardship to others in early common law sentencing practices. The chapter then studies the emergence of sentencing factors (mitigating and aggravating factors) in the common law. It explores the path-breaking work of David Thomas and the impact of his publication, *Principles of Sentencing*,<sup>475</sup> which set out 'the sentencing policy of the Court of Appeal Criminal Division';<sup>476</sup> the highest appellant court in the England and Wales court hierarchy.

This chapter examines Thomas findings on the sentencing practices of English and Welsh courts in the 1970s. His review of the court practices in this period demonstrates that common law courts had been taking family hardship into account in sentencing, but Thomas reported that there was a general reluctance from the Court of Appeal Criminal Division towards significant weight being placed on what it classified as an: 'indirect effect of the conviction or sentence'.<sup>477</sup> This chapter will clarify the influence of this classic piece of work and explain that this

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<sup>475</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 1970).

<sup>476</sup> *Ibid.*

<sup>477</sup> *Ibid* 211.

interpretation was accepted into Australian sentencing practices. It will then describe how and when family hardship came to be recognised in legislation within Australia.

## II TRADITIONAL ACCOUNTS OF PUNISHMENT

The criminal justice system has long been aware of the impact of a sentence upon an offender's family and dependants. However, *how* the criminal justice system has accommodated the hardships of an offender's punishment upon others has shifted over time.<sup>478</sup> The late 18<sup>th</sup> and early 19<sup>th</sup> century practices of imposing punishment upon prisoners did not take into account mitigating factors such as the effect that a sentence may have upon a prisoner's dependants. However, the early criminal justice system accommodated prisoner's children in a variety of ways. At that time, the system predominately dealt with this issue as a function of the administration of sentence.

In the 18<sup>th</sup> century and 19<sup>th</sup> century the role of the judge in the common law courts was to pass sentence upon the offender. A practice of individualised sentencing (as described in Chapter Two) did not exist, however, justice could be tempered to accommodate the circumstances of an individual. For example, judges could be merciful in their practices and sentences.<sup>479</sup> Juries could deliver partial verdicts or false acquittals and they could make recommendations for mercy.<sup>480</sup> The Crown or Governors-General<sup>481</sup> could exercise the prerogative of mercy and pardon the offender or commute the sentence.<sup>482</sup>

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<sup>478</sup> Simon Bronitt and Wendy Kukulies-Smith, 'Crime, Punishment, Family Violence, and the Cloak of Legal Invisibility' (2013) 37(3) *Journal of Australian Studies* 390, 397-398.

<sup>479</sup> The concept of judicial mercy is discussed further in Chapter Six.

<sup>480</sup> J Baker, 'Criminal Courts and Procedure at Common Law 1550-1800' in J S Cockburn (ed), *Crime in England 1550-1800* (Methuen, 1977) 15, 23, 43, 44.

<sup>481</sup> A Smith, 'The Prerogative of Mercy, The Power of Pardon and Criminal Justice' (1983) *Public Law* 398, 426.

<sup>482</sup> See further, Richard Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25 *Monash University Law Review* 1, 5, 20-21; A Smith, 'The Prerogative of Mercy, The Power of Pardon and Criminal Justice' (1983) *Public Law* 398, 417- 426; Gregory Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900* (The Federation Press, 2002) 5-6.

### A. Pleading the Belly

In colonial Australia, as in England and Wales, the effect of a sentence upon third parties was most obviously taken into account in respect of 'pleading the belly'. This practice, operating in the criminal law from at least the 14<sup>th</sup> century,<sup>483</sup> enabled a woman convicted of felony or treason<sup>484</sup> to be reprieved if a jury of twelve matrons was satisfied that the prisoner 'be *quick* with child'.<sup>485</sup> Early colonial case law demonstrates the operation of this practice within Australia.<sup>486</sup> Officially the death penalty could be imposed upon the prisoner following the birth of the child, although penalties were often not enforced after delivery and women were often pardoned.<sup>487</sup> Historical accounts identify women soliciting in gaol in order to become pregnant and bribery of turnkeys was also common.<sup>488</sup> In writing on the operation of the reprieve, Sir Matthew Hale recorded that:

[t]his privilege is to be allowed but once, for if she be a second time with child, she shall not thereby delay execution, but the gaoler shall be punished for not looking better to her.<sup>489</sup>

In England and Wales, in 1931 the reprieve was entrenched in legislation via the enactment of the *Sentence of Death (Expectant Mothers) Act 1931*, 21 & 22 Geo. 5, c 24.

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<sup>483</sup> James Oldham, 'On Pleading the Belly: A History of The Jury of Matrons' in Louis Knafla (ed), *Crime, Police and the Courts in British History* (Meckler, 1990) 1, 3.

<sup>484</sup> Sir Matthew Hale, *Historia Placitorum Coronae* (Professional Books Ltd, first published 1736, 1971 ed) vol 2, 413.

<sup>485</sup> Sir Matthew Hale, *Historia Placitorum Coronae* (Professional Books Ltd, first published 1736, 1971 ed) vol 2, 413. See also Simon Bronitt and Wendy Kukulies-Smith, 'Crime, Punishment, Family Violence, and the Cloak of Legal Invisibility' (2013) 37(3) *Journal of Australian Studies* 390, 397; J. H. Baker, 'Criminal Courts and Procedure at Common Law 1550-1800' in J S Cockburn (ed), *Crime in England 1550-1800* (Methuen, 1977) 15, 44; E Burford and S Shulman, *Of Bridles and Burning: The Punishment of Women* (St. Martin's Press, 1992) 108.

<sup>486</sup> See, eg, *R v Davis* [1789] NSWKR 5

<[http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1789/r\\_v\\_davis/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1789/r_v_davis/)>; *R v McGregor and Maloney* [1834] NSWSup C 13

<[http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1834/r\\_v\\_mcgregor\\_and\\_maloney/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1834/r_v_mcgregor_and_maloney/)>. See also the case of Ann Davis discussed in Gregory Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900* (The Federation Press, 2002) 24.

<sup>487</sup> See Sir Matthew Hale, *Historia Placitorum Coronae* (Professional Books Ltd, first published 1736, 1971 ed) vol 2, 413-414. See generally W.J. Sheehan, 'Finding Solace in Eighteenth-Century Newgate' in J S Cockburn (ed), *Crime in England 1550-1800* (Methuen, 1977) 229, 243.

<sup>488</sup> W.J. Sheehan, 'Finding Solace in Eighteenth-Century Newgate' in J S Cockburn (ed), *Crime in England 1550-1800* (Methuen, 1977) 229, 243.

<sup>489</sup> Sir Matthew Hale, *Historia Placitorum Coronae* (Professional Books Ltd, first published 1736, 1971 ed) vol 2, 413.

### B. Children Accommodated in Gaols

In colonial Australia, there were various forms of punishment imposed by courts these included, 'capital punishment, flogging, imprisonment, reductions of rations, transportation, pillory, work in gaol gangs, and work in irons.'<sup>490</sup> Officially, female prisoners with dependent children who were sentenced by the courts did not have the suffering of their children taken into account; however, the system did accommodate the continued relationship between mother and child. For example, children resided with their imprisoned mothers in gaol (in England and in colonial Australia).<sup>491</sup>

Some female prisoners transported to Australia on convict ships could bring their children with them. In his study of convict women in Van Diemen's Land (1803-1829), Phillip Tardif found that 'children were normally permitted to accompany their mothers on the ships'.<sup>492</sup> This view is supported by data from the convict ships and also supported in accounts on historical practices of this time.<sup>493</sup> For

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<sup>490</sup> Brent Salter, 'Beyond the Rudimentary and Brutal: Procedure, Evidence and Sentencing in Australia's First Criminal Court' (2009) 33 *Criminal Law Journal* 87, 99. Noting that, in Australia, flogging was not restricted to men until 1817 see John Braithwaite, 'Crime in A Convict Republic' (2001) 64 *The Modern Law Review* 11, 20.

<sup>491</sup> See *England: Deirdre Palk, "Fit Objects for Mercy": Gender, the Bank of England and Currency Criminals, 1804-1833'* (2004) 11 *Women's Writing* 237, 244; E Burford and S Shulman, *Of Bridles and Burning: The Punishment of Women* (St. Martin's Press, 1992) 108, 161; W.J. Sheehan, 'Finding Solace in Eighteenth-Century Newgate' in J S Cockburn (ed), *Crime in England 1550-1800* (Methuen, 1977) 229, 236-237. [Sheehan notes that in Newgate wealthy male prisoners could pay for their families to reside with them and there were informal practices of permitting families of poorer prisoners to stay within the gaol] See *Australia: J C Brown, Poverty is not a Crime: The Development of Social Services in Tasmania 1803-1900* (Tasmanian Historical Research Association, 1972) 23; Lyndall Ryan, 'From Stridency to Silence: The Policing of Convict Women, 1803-1853' in D Kirkby (ed) *Sex, Power and Justice: Historical Perspectives on Law in Australia* (Oxford University Press, 1995) 70, 76-77; Carmel Benjamin, 'Prisons, Parents and Problems' in Sandra McKillop (ed), *Keeping People Out of Prison: proceedings of a conference held 27-29 March 1990* (Australian Institute of Criminology, 1991) 165.

<sup>492</sup> See Phillip Tardif, *Notorious Strumpets and Dangerous Girls: Convict Women in Van Diemen's Land 1803-1829* (Angus & Robertson, 1990) 12, 1773 (fn 22).

<sup>493</sup> See generally Phillip Tardif, *Notorious Strumpets and Dangerous Girls: Convict Women in Van Diemen's Land 1803-1829* (Angus & Robertson, 1990) 12, 1773 (fn 22); David Neal, *The Rule of Law In A Penal Colony; Law And Power In Early New South Wales* (Cambridge University Press, 1991) 1-9 [reporting on the story of the Kable family]; E Burford and S Shulman, *Of Bridles and Burning: The Punishment of Women* (St. Martin's Press, 1992) 108, 196; J.C. Brown, *Poverty is not a Crime: The Development of Social Services in Tasmania 1803-1900* (Tasmanian Historical Research Association, 1972) 27; Ryan, Lyndall, 'From Stridency To Silence: The Policing Of Convict Women, 1803-1853' in D Kirkby (ed) *Sex, Power and Justice: Historical Perspectives on Law in Australia* (Oxford University Press, 1995) 70, 83; Deirdre Palk, "'Fit Objects for Mercy": Gender, the Bank of England and Currency Criminals, 1804-1833' (2004) 11 *Women's Writing* 237, 244-250; Simon Bronitt and Wendy Kukulies-Smith, 'Crime, Punishment, Family Violence, and the Cloak of Legal Invisibility' (2013) 37(3) *Journal of Australian Studies* 390, 397.

example, the Bank of England engaged in a practice of providing 'donations' to convict women scheduled for transportation to Australia with additional payments to single women with dependent children.<sup>494</sup> Moreover, Tardif observed that there was a period in England when permission was automatically granted to children less than seven years of age seeking transport with their convict mothers.<sup>495</sup> Records from the Colonial Secretary's Correspondence 1822-1855 reveal that children generally stayed in the female factory with their mothers until the age of three.<sup>496</sup> So significant were their numbers that orphan schools were opened in Tasmania in 1828 to accommodate the increasing numbers of children of female convicts arriving in the Colony.<sup>497</sup>

### C. Petitions of Mercy

By the 19<sup>th</sup> century, it was common for women with dependent children to petition the Crown for mercy. However, this does not appear to have initially been a focus of mercy. Court cases from London's Central Criminal Court, from 1674 – 1913, reveal the various shapes that mercy took in the early administration of common law justice.<sup>498</sup> A general search for the keyword 'mercy' within the website of the Old Bailey Proceedings Online yielded 16,968 hits and demonstrates common aphorisms that appear in the case law in the late 17<sup>th</sup> century were pleas for 'mercy of the King' and 'mercy of the Court' or, in the alternative, 'mercy of the Bench'.<sup>499</sup>

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<sup>494</sup> See Deirdre Palk's study of letters and petitions to the Bank of England. Deirdre Palk, "'Fit Objects for Mercy': Gender, the Bank of England and Currency Criminals, 1804-1833" (2004) 11 *Women's Writing* 237.

<sup>495</sup> Phillip Tardif, *Notorious Strumpets and Dangerous Girls: Convict Women in Van Diemen's Land 1803-1829* (Angus & Robertson, 1990) 12, 1773 (fn 22). See also E Burford and S Shulman, *Of Bridles and Burning: The Punishment of Women* (St. Martin's Press, 1992) 108, 196; JC Brown, *Poverty is not a Crime: The Development of Social Services in Tasmania 1803-1900* (Tasmanian Historical Research Association, 1972) 27, 29.

<sup>496</sup> JC Brown, *Poverty is not a Crime: The Development of Social Services in Tasmania 1803-1900* (Tasmanian Historical Research Association, 1972) 23.

<sup>497</sup> *Ibid* 26.

<sup>498</sup> See the Old Bailey Proceedings Online a database housing over 197,000 proceedings. Tim Hitchcock, Robert Shoemaker, Clive Emsley, Sharon Howard and Jamie McLaughlin, *Proceedings of the Old Bailey London's Central Criminal Court, 1674 – 1913* (version 7.1, April 2013) The Old Bailey Proceedings Online < <http://www.oldbaileyonline.org/index.jsp> >.

<sup>499</sup> The search was conducted on 9 May 2014, see [http://www.oldbaileyonline.org/search.jsp?foo=bar&form=searchHomePage&divs\\_fulltext=mercy&kw\\_parse=and&start=0&count=0](http://www.oldbaileyonline.org/search.jsp?foo=bar&form=searchHomePage&divs_fulltext=mercy&kw_parse=and&start=0&count=0). See also Tim Hitchcock, Robert Shoemaker, Clive Emsley, Sharon Howard and Jamie McLaughlin, *Proceedings of the Old Bailey London's Central Criminal Court, 1674-1913*



The exercise of mercy by the King was the most prevalent act of mercy.<sup>500</sup> This form of mercy was commonly described within the early court reports as an 'Act of Royal Grace and Mercy'.<sup>501</sup> An exercise of mercy in this form was an instrument of the Sovereign.<sup>502</sup> It was a means of tempering harsh sentences, of addressing faults identified within the system and a measure to accommodate public interests.<sup>503</sup> Such pardons generally arose in this period either through a systematic review of the reports or through the granting of general pardons.<sup>504</sup>

A review of these court cases, from London's Central Criminal Court, reveals that pleas of mercy of the Court were commonly pleas for transportation.<sup>505</sup> Thomas has described the 18<sup>th</sup> century as the period in which discretion in the hands of the sentencing judge first arose citing the emergence of the judicial grant of a conditional pardon to be sentenced to transportation to one of the colonies for a term of labour.<sup>506</sup>

Historian Peter King has identified a similar practice of emerging judicial discretion in the 18<sup>th</sup> century.<sup>507</sup> Interestingly in his review of surviving records of felony cases in the Essex quarter session (1760-1800) he has observed that judicial officers were influenced by mitigating pleas which included statements about the impact of a sentence upon the accused's children.<sup>508</sup> He advances the thesis that:

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(version 7.1, April 2013) The Old Bailey Proceedings Online < <http://www.oldbaileyonline.org/index.jsp> >.

<sup>500</sup> In the 18<sup>th</sup> century over 50% of prisoners were pardoned see Clive Emsley, Tim Hitchcock and Robert Shoemaker, *Punishments at the Old Bailey*, (version 7.1, April 2013) Old Bailey Proceedings Online < <http://www.oldbaileyonline.org/static/Punishment.jsp#notpunished> >.

<sup>501</sup> See, eg, Old Bailey Proceedings Online (version 7.0, 25 Feb 2014), *Ordinary of Newgate's Account*, March 1685 (OA16850304).

<sup>502</sup> Falling within the second form of mercy outlined above.

<sup>503</sup> See ATH Smith, 'The Prerogative of Mercy, The Power of Pardon and Criminal Justice' (1983) *Public Law* 398, 398-399.

<sup>504</sup> Clive Emsley, Tim Hitchcock and Robert Shoemaker, *Punishments at the Old Bailey*, (version 7.1, April 2013) Old Bailey Proceedings Online < <http://www.oldbaileyonline.org/static/Punishment.jsp#notpunished> >.

<sup>505</sup> See, eg, Old Bailey Proceedings Online (version 7.0, 25 Feb 2014), *trial of Mall. Floyd*, July 1674 (t16740717-6).

<sup>506</sup> David Thomas, 'The Sentencing Process' in Mike McConville and Geoffrey Wilson (eds), *The Handbook of the Criminal Justice Process* (Oxford University Press, 2002) 473.

<sup>507</sup> Peter King, 'Decision-Makers and Decision-Making in the English Criminal Law, 1750-1800' (1984) 27(1) *The Historical Journal* 25, 38-42.

the relatively light sentences received by convicts in their thirties were probably linked to more general sympathies for destitute convicts and their innocent families.<sup>509</sup>

In King's examination of 18<sup>th</sup> century Department of State papers dealing with prisoner's petitions (often with accompanying judicial reports on the case),<sup>510</sup> he also observed family hardship was relevant. The probable impact upon the accused's dependants (ie. destitution of the family) was raised in character references and in petitioner's pleas,<sup>511</sup> and influenced decisions made.<sup>512</sup>

By the middle of the 19<sup>th</sup> century there appeared to be broader recognition that the role of the judge was to pass sentence upon the offender (as an individual).<sup>513</sup> In writing on the 'Province of the Judge' in the late 19<sup>th</sup> century, Edward W. Cox stated:

The consideration of the *Judge* is for the *criminal*. He has to determine to what extent – tempering justice with mercy and consulting the interests of the public as well as the character of prisoner – he may properly *reduce the penalty*. He has no power to increase to the slightest extent the severity of the law; he may *mitigate* it to almost any extent.<sup>514</sup>

Judicial exercises of mercy in this context and statements in the judgments delivered at this time show that judges viewed this practice as a merciful act. However, could this period be described as the origins of the judicial exercise of mercy or was it rather, as Thomas describes, the beginning of the development of judicial discretion and the origins of what we now see as sentencing powers?

In the first edition of the *Principles of Sentencing*, Thomas observed that there was a residual discretion of mercy that the Court of Appeal Criminal Division could draw upon to provide leniency to an offender in sentencing when no other mitigating factor was appropriate. He stated '...and in other cases there may be

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<sup>508</sup> Ibid 41-43. King also identifies 'post-crime destitution (including family size etc)' as a factor favourable to the accused see Table 3, Factors affecting judicial decision-making, 1789 and 1790, Ibid 43-44.

<sup>509</sup> Ibid 42.

<sup>510</sup> Ibid 42.

<sup>511</sup> Ibid 44-48, 56.

<sup>512</sup> Ibid 56.

<sup>513</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 6.

<sup>514</sup> Edward W Cox, *Principles of Punishment as applied in the Administration of the Criminal Law by Judges and Magistrates* (Law Times Office, 1877) 19.

circumstances of particular hardship not within the general category of mitigating factors where the Court may reduce a sentence 'in mercy'.<sup>515</sup>

In the common law jurisdictions, there was a practice of female prisoners with dependent children petitioning the Crown for mercy, which if successful set aside the sentence of death. The families of offenders, the media and members of general public were also able to participate in this process.<sup>516</sup> A prominent case in Australia, with widespread petitioning to the Crown, was the 19<sup>th</sup> century case of murderess Louisa Collins.<sup>517</sup> Louisa had been found guilty of murdering her second husband and was sentenced to death (suspicion had emerged over the death of her first husband, but the charges were not successful on that count).<sup>518</sup> Petitions of mercy were submitted on behalf of Louisa Collins by over a thousand colonists.<sup>519</sup> Men and women petitioned on the basis of an unsound trial, insanity, gender and hardship to Louisa's children. Louisa at the time of her sentence was a widower with seven children; five children were dependent upon Louisa and still living in the family home.<sup>520</sup> In the last days before her scheduled execution, Louisa made a final plea for mercy for her children's sake to the Governor of New South Wales.<sup>521</sup> Louisa pleaded 'I beg and implore you... have mercy on me for my child's sake. I have seven children... spare me my Lord for their sake...' Her plea was not successful.<sup>522</sup>

This part of the chapter has shown ways the criminal justice system of the late 18<sup>th</sup> and early 19<sup>th</sup> century recognised and accommodated the impact of a sentence

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<sup>515</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 1970) 199.

<sup>516</sup> Simon Bronitt and Wendy Kukulies-Smith, 'Crime, Punishment, Family Violence, and the Cloak of Legal Invisibility' (2013) 37(3) *Journal of Australian Studies* 390, 397.

<sup>517</sup> See Wendy Kukulies-Smith and Susan Priest, "'No Hope of Mercy' for the Borgia of Botany Bay: Louisa May Collins, the last woman executed in NSW, 1889' (2011) 10(2) *Canberra Law Review* 144.

<sup>518</sup> *Ibid* 145-155.

<sup>519</sup> *Ibid* 155-156.

<sup>520</sup> *Ibid* 145, 157.

<sup>521</sup> See The Colonial Secretary's Special Bundle AONSW 4/895.1. See generally Wendy Kukulies-Smith and Susan Priest, "'No Hope of Mercy' for the Borgia of Botany Bay: Louisa May Collins, the last woman executed in NSW, 1889' (2011) 10(2) *Canberra Law Review* 144, 157-158; Simon Bronitt and Wendy Kukulies-Smith, 'Crime, Punishment, Family Violence, and the Cloak of Legal Invisibility' (2013) 37(3) *Journal of Australian Studies* 390, 398.

<sup>522</sup> The Louisa Collins case demonstrates the practice of petitioning for mercy in Australia and also highlights emerging discussion on meanings of 'motherhood' within Colonial New South Wales. See generally Wendy Kukulies-Smith and Susan Priest, "'No Hope of Mercy' for the Borgia of Botany Bay: Louisa May Collins, the last woman executed in NSW, 1889' (2011) 10(2) *Canberra Law Review* 144.

upon dependants of an offender. This period has also been credited as the period when discretion in the hands of the sentencing judge, in the sense that we understand it today, first began to emerge.<sup>523</sup> As will be shown next, by the late 19<sup>th</sup> century there were reported practices within the common law of taking into account 'sentencing factors' in the act of determining an appropriate sentence.

### III THE ORIGINS OF SENTENCING FACTORS

In the English common law tradition, the 19<sup>th</sup> century saw an increase in the quantity and in the quality<sup>524</sup> of legal literature. In this period, the concept of a leading case became popular within the common law legal profession,<sup>525</sup> law reports were standardised,<sup>526</sup> and there was a substantial growth in the writing of the legal treatise (across all fields of law).<sup>527</sup> These legal treatises sought to 'set out, explain, illustrate, and systematize'<sup>528</sup> foundational legal principles in 'a single branch of the law'<sup>529</sup> for those practicing in the field. While Sir Carleton Kemp Allen queries if it is possible to identify 'an exact moment of time when the 'modern' doctrine of precedents may have been said to have established'<sup>530</sup> this was an era when, after centuries of organic growth, the doctrine reached an identifiable form.<sup>531</sup>

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<sup>523</sup> See David Thomas, 'The Sentencing Process' in Mike McConville and Geoffrey Wilson (eds), *The Handbook of the Criminal Justice Process* (Oxford University Press, 2002) 473.

<sup>524</sup> See Sir Carleton Kemp Allen, *Law in the Making* (Oxford, 7<sup>th</sup> ed, 1964) 231.

<sup>525</sup> A.W. B. Simpson, *Leading Cases in The Common Law* (Clarendon Press, 1995) 3-4; A.W.B Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principle and Forms of Legal Literature' (1981) 48 *The University of Chicago Law Review* 632, 633, 662 – 663. For an example of a treatise drawing upon leading cases see John W Smith, *A Selection of Leading Cases on Various Branches of the Law with Notes* (1837-40) cited within A.W.B Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principle and Forms of Legal Literature' (1981) 48 *The University of Chicago Law Review* 632, 662.

<sup>526</sup> See Rupert Cross and J Harris, *Precedent in English Law* (Clarendon Press, 4<sup>th</sup> ed, 1991) 24-25, 126; Sir Carleton Kemp Allen, *Law in the Making* (Oxford, 7<sup>th</sup> ed, 1964) 231.

<sup>527</sup> A.W. Brian Simpson, *Leading Cases in the Common Law* (Clarendon Press, 1995) 5.

<sup>528</sup> *Ibid.*

<sup>529</sup> A.W.B Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principle and Forms of Legal Literature' (1981) 48 *The University of Chicago Law Review* 632, 633.

<sup>530</sup> Sir Carleton Kemp Allen, *Law in the Making* (Oxford, 7<sup>th</sup> ed, 1964) 232.

<sup>531</sup> *Ibid* 232 and 362-363.

## A. Early Legal Treatises

In the late 19<sup>th</sup> century, Edward W. Cox having served in various judicial roles in England<sup>532</sup> set out to undertake a remarkable task for the time and developed a treatise on sentencing practices. Cox had observed that ‘so many circumstances, not admissible at the trial, are to be taken into account for the purpose of punishment...’<sup>533</sup> Cox was an advocate for an approach promoting greater uniformity in sentencing and saw the importance of identifying ‘principles’<sup>534</sup> to which the judicial mind should be directed to in the determination of sentence.<sup>535</sup> Thus, in 1877, Cox published ‘Principles of Punishment as applied in the Administration of the Criminal law by Judges and Magistrates’.<sup>536</sup>

In the preface to this text, Cox noted that, at the time of writing up this work, this subject was new. Cox provided the ‘first comprehensive treatise on sentencing’.<sup>537</sup> He stated:

I had no guide. I was compelled to grope my way without assistance, for the elaborate treatise of BENTHAM was quite inapplicable to the special purpose I had contemplated. His great work was designed to assist the law-maker. I sought assistance for those who *administer* the law. He treats the law as it ought to be and not of the manner in which the existing law should be carried into execution.<sup>538</sup>

Cox, therefore, developed a rudimentary scheme of matters for consideration in sentencing.<sup>539</sup> One hundred years later, another Englishman, David Thomas set out to undertake a similar task (discussed below).

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<sup>532</sup> Chairman of the Bench of Magistrates; Deputy Assistant Judge at Middlesex Sessions; Chairman of the Second Court; Recorder of Falmouth; Recorder of Portsmouth and Commissioner to assist the Judge at Assizes, see Edward W Cox, *Principles of Punishment as applied in the Administration of the Criminal Law by Judges and Magistrates* (Law Times Office, 1877) vii-viii.

<sup>533</sup> Edward W Cox, *Principles of Punishment as applied in the Administration of the Criminal Law by Judges and Magistrates* (Law Times Office, 1877) viii-ix.

<sup>534</sup> *Ibid* xiv.

<sup>535</sup> See discussion of the importance of judicial discretion and advocacy for an ‘approach to uniformity’, *Ibid* xvii-xviii.

<sup>536</sup> *Ibid*.

<sup>537</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 6.

<sup>538</sup> Edward W Cox, *Principles of Punishment as applied in the Administration of the Criminal Law by Judges and Magistrates* (Law Times Office, 1877) xv.

<sup>539</sup> *Ibid* xviii.

In Cox's text we can see the origins of the judiciary developing principles of sentencing and identifying, and cataloguing, relevant sentencing factors or considerations. Cox stated:

It is necessary to premise that I contemplated nothing more than to submit *suggestions*. I designed only an endeavour to trace certain principles, or to be more accurate, certain considerations, that might possibly assist the Judge or Magistrate in approximating to a just determination in punishments...<sup>540</sup>

Cox's work demonstrates the use of sentencing factors in late 19<sup>th</sup> century sentencing practices. For example, the text documents that considerations such as the 'antecedents of the convict',<sup>541</sup> which were not admissible at trial, were raised at sentence and were taken into account by judges in order to determine an appropriate sentence.<sup>542</sup> Moreover, Cox highlighted that there was a diverse range of considerations that could affect the sentence which were taken into account by courts.<sup>543</sup>

In Chapter Seventeen of this work, Cox addressed 'Mitigation of Punishment'.<sup>544</sup> He noted that most offences in England, at this time, were statutory offences with penalties fixed by the statute.<sup>545</sup> However, he stated,

...the statute law invariably declares the *extent* of the punishment to be inflicted for the particular offence. It does not limit the minimum of punishment.

Thus is the Judge invested with a large power to mitigate the legal penalty attaching to the crime in the abstract. Although simple larceny is punishable with imprisonment for two years, the Judge is permitted to mitigate that penalty to any extent he may deem to be required by the circumstances of the particular case.<sup>546</sup>

This is a clear statement of the scope of judicial discretion within this period.

Significantly, the impact of a sentence upon a convict's family was not mentioned within the chapter dealing with 'Mitigation of Punishment'. Cox's model provided that where inquiries were made for the purposes of mitigation, the court was to consider only the circumstances of the crime and the character of the criminal.

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<sup>540</sup> Ibid xv-xvi.

<sup>541</sup> Ibid ix.

<sup>542</sup> Ibid viii-ix.

<sup>543</sup> Ibid ix.

<sup>544</sup> Ibid viii-ix.

<sup>545</sup> Ibid 157.

<sup>546</sup> Ibid 157.

Recognition of the potential impact of a gaol sentence upon a convict's wife and children did appear in Chapter Twelve 'Crimes of Violence'<sup>547</sup>, in the context of commentary on sentencing for the offence of wife-beating. Cox had stated that in sentencing for 'ordinary cases of assault'<sup>548</sup> a judge should be concerned with the 'future protection of the injured party and of the public.'<sup>549</sup> However, in wife-beating cases, he noted that 'the Judge must look beyond this to *their* future.'<sup>550</sup> This feature, of taking into account the potential impact of a sentence upon an offender's wife and children, was identified as one of the principles of punishment<sup>551</sup> in respect of wife-beating offences.

Cox presented quite a detailed discussion of the problems that arose at sentencing. He noted that in respect of wife beating cases, parties often continue to live together and that wives frequently refused to give evidence.<sup>552</sup> Cox's second principle of punishment, identified for wife-beating, applied where the husband must be punished for the past offence, but the court was aware that the prisoner would then continue to live with his wife. After observing that the husband's incarceration will just as greatly affect his wife and children as it will the offender, Cox observed that the approach to sentencing would be to bind the convict in recognizance to be of good behaviour instead of imposing a greater penalty.<sup>553</sup> Taking the impact of a sentence upon a convict's family into account in the context of wife-beating is a narrow consideration of the impact of a sentence upon families and dependants. Moreover, the consideration of this factor also arose in the context of an offence committed within the family and there was clearly an underlying policy of maintaining the family unit. Nonetheless, there was scope of reductions in sentence in the late 19<sup>th</sup> century because of hardship to dependants.

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<sup>547</sup> Ibid 93-113 (Chapter XII).

<sup>548</sup> Ibid 103.

<sup>549</sup> Ibid.

<sup>550</sup> Ibid 103.

<sup>551</sup> Identifying 'principles of punishment' is the approach taken by Cox throughout the text.

<sup>552</sup> Ibid 103.

<sup>553</sup> Ibid 104.

Another specific recognition of hardship upon third parties arose in the context of sentencing young offenders for crimes of wantonness.<sup>554</sup> Here, Cox documented the impact of a sentence upon an offender's wider family (not dependants). He noted that a pecuniary penalty for such crimes, 'punishes the parents, brothers and sisters and not the culprit'<sup>555</sup> and in such circumstances, he advocated for placing the convict on recognizance or a sentence of whipping.<sup>556</sup>

There are no other references to the impact of a sentence upon an offender's family within Cox's 1877 text. Within the chapter 'Character of the Criminal',<sup>557</sup> the consideration of a convict's sex was discussed, however, there was no acknowledgment of women's caring responsibilities nor of any likely grant of leniency because of consequences for the families of female convicts.<sup>558</sup> The late 19<sup>th</sup> century has been credited as a period, in England, when the masculinisation of crime and imprisonment began. Ann Aungles notes that 'in the 1870s the male: female ratio of imprisonment was roughly 3:1 and by the 1920s it was 40:1.'<sup>559</sup> In this period of the criminal law, legally, the husband had subsumed the wife's legal identity so that at law the husband and wife were one person. Any punishment of a male would, therefore, punish his dependants (ie. wife and children).<sup>560</sup>

Thomas has also identified that a review of early 20<sup>th</sup> century case law of the Court of Appeal Criminal Division reveals that the Court was operating from existing precedents.<sup>561</sup> Thomas stated:

...the Court began its task with the assumption that there already existed a body of principle, which it was the Court's duty to articulate and expand.<sup>562</sup>

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<sup>554</sup> Ibid 36-39.

<sup>555</sup> Ibid 37.

<sup>556</sup> Also referred to by Cox as 'birching', see Ibid 33-39.

<sup>557</sup> Ibid 130-148 (Chapter XV).

<sup>558</sup> The tasks of women are listed as washing, sewing and cooking, see Edward W Cox, *Principles of Punishment as applied in the Administration of the Criminal Law by Judges and Magistrates* (Law Times Office, 1877) 145.

<sup>559</sup> Ann Aungles, *The Prison and the Home: A Study of the Relationship Between Domesticity and Penalty*, The Institute of Criminology Monograph Series No 5 (1994) 36.

<sup>560</sup> The husband and wife were one person at law until the passage of the *Married Women's Property Act* 1870.

<sup>561</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 6-7.

<sup>562</sup> Ibid 7.



An examination of Cox's early treatise on punishment and research on early case law of the Court of Appeal Criminal Division, clearly highlights the operation of sentencing factors to mitigate penalty in the late 19<sup>th</sup> century. It shows a movement within the profession to map out the operation of these sentencing principles in particular matters. The text indicates that there was scope for reductions in sentence because of the likely impact of a sentence upon family and dependants in the late 19<sup>th</sup> century. Cox's text evinces that there was, at least, a practice within the courts of taking this factor into account in specific contexts.

### *B. Modern Legal Treatises*

A century later, family hardship was recognised as a legitimate mitigating factor by Thomas. Thomas first published this text 'Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division' (*Principles of Sentencing*)<sup>563</sup> in 1970. It has been credited by Nigel Walker as the 'first full-length book' on sentencing.<sup>564</sup> Walker described sentencing law in this period as 'uninteresting in its simplicity'<sup>565</sup> with very 'little real case law',<sup>566</sup> to readers of the *Criminal Law Review*. He disdainfully remarked that Thomas' text was 'an attempt to make sense of the decisions and dicta'<sup>567</sup> of the Court and that Thomas 'attributed a good deal more sense and consistency to the appellate court than the latter deserved.'<sup>568</sup>

Others have been much more respectful of his work. For example, AWB Simpson has described Thomas' text as a writing up of an oral tradition which 'publishes in comprehensive literary form the customary laws of the criminal appeal in England for the first time.'<sup>569</sup> Sir Leon Radzinowicz (Professor at the Institute of Criminology in Cambridge) described the work as,

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<sup>563</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 1970).

<sup>564</sup> Nigel Walker, 'The English Sentencing System\*' [1971] *Criminal Law Review* 576, 576.

<sup>565</sup> *Ibid.*

<sup>566</sup> *Ibid.*

<sup>567</sup> *Ibid.*

<sup>568</sup> *Ibid.*

<sup>569</sup> A.W.B. Simpson, *Legal Theory and Legal History: Essays on the Common Law* (Hambleton Press, 1987) 379.

... a clear guide to the principles and considerations which shape the thinking of judges, but which have not hitherto been easily accessible either to lawyers or the public.<sup>570</sup>

Thomas' study took place during a period of transition for the Court of Appeal Criminal Division which moved away from tariff sentencing and towards an 'individualized' approach.<sup>571</sup> Walker, remarking on the pressure upon the Court for uniformity, stated:

Conditioned by newspaper editorials and television discussions, sentencers became increasingly self-conscious, and instead of lecturing the offender began to justify themselves in the eyes of the *Sunday Express*.<sup>572</sup>

Yet, despite his critique of 'conjuring' involved in presenting a consolidated text of principles,<sup>573</sup> Walker acknowledged the appearance of the text in courtrooms in 1971 and its clear influence.<sup>574</sup> He has argued that Thomas' work was '...not so much a description as a rationalization: few sentencers thought so clearly. Read as a description, however, it was very persuasive, and within a few years had become a fair account of the way in which many – even most – judges claimed to reason.'<sup>575</sup> Cyrus Tata has described Thomas as one of the two 'most influential sentencing scholars of our time'.<sup>576</sup>

Thomas' text was pioneering in the field as it identified principles of sentencing (as espoused by the Court of Appeal Criminal Division), consolidated these principles, and presented them clearly in a single text. Incredibly, the study behind the text

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<sup>570</sup> Sir Leon Radzinowicz, 'Foreword' in David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 1970) xi; Sir Leon Radzinowicz, 'Foreword' in David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) xi. See also the review of this text in the *Modern Law Review* by White, where White stated that '...it is at present the only work of its type on sentencing', Stephen White, 'Review: Principles of Sentencing by D.A. Thomas' (1971) 34(2) *The Modern Law Review* 227, 227. See the review of the second edition in the *Modern Law Review* by Samuels who stated 'David Thomas created the subject, the principles of sentencing. He systematically studied, collated, rationalised, the judgments of the Court of Appeal and "discovered" the "principles."' Alec Samuels, Alec, 'Review: Principles of Sentencing: The sentencing policy of the Court of Appeal Criminal Division. Second Edition. By David Thomas' (1979) 42(5) *The Modern Law Review* 598, 598.

<sup>571</sup> Nigel Walker, 'Shorter Notices [Book Review of D.A. Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal, Criminal Division*]' (1971) 5(2) *Sociology* 287, 287.

<sup>572</sup> *Ibid* 287-288.

<sup>573</sup> Nigel Walker, 'Shorter Notices [Book Review of D.A. Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal, Criminal Division*]' (1971) 5(2) *Sociology* 287.

<sup>574</sup> Nigel Walker, 'The English Sentencing System\*' [1971] *Criminal Law Review* 576, 576. See also Nigel Walker, 'Shorter Notices [Book Review of D.A. Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal, Criminal Division*]' (1971) 5(2) *Sociology* 287, 288.

<sup>575</sup> Nigel Walker, *Why Punish?* (Oxford University Press, 1991) 156 (see footnote 6).

<sup>576</sup> Cyrus Tata, 'Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process' (2007) 16(3) *Social & Legal Studies* 425, 434.

involved a review of ‘more than ten thousand judgments’<sup>577</sup> of the Court of Appeal Criminal Division over a period of approximately fifteen years.<sup>578</sup> Austin Lovegrove has described Thomas’ study as ‘...the only substantial attempt to offer an account of the legal considerations that do or should more or less consciously exercise the minds of judges as they apply sentencing policy in individual cases.’<sup>579</sup> The *Principles of Sentencing* has had a marked impact upon Australian sentencing practices. Kate Warner has reported, ‘Thomas’ *Principles of Sentencing* remains the most often cited sentencing text in Australian courts with some 378 citations.’<sup>580</sup>

### 1. Thomas’ Categorisation of Mitigating Factors

With the emergence of sentencing factors in the late 19<sup>th</sup> century so too came recognition of the potential impact of a sentence upon an offender’s family as one such sentencing factor. As a result of his research, Thomas identified the more common mitigating factors taken into account in sentencing by the Court of Appeal.<sup>581</sup> Thomas defined four categories of mitigating factors under the common law. These were:

1. the age and history of the offender;
2. the circumstances leading to the commission of the offence;
3. the indirect effect of the conviction or sentence; and
4. the behaviour of the offender since the commission of the offence.<sup>582</sup>

He noted that mitigating factors rarely were argued before the Court in isolation and that it was not possible to identify a tariff for any one factor falling within

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<sup>577</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) xiii.

<sup>578</sup> 1962-1970, then for second edition 1962-1977.

<sup>579</sup> Austin Lovegrove, *The Framework of Judicial Sentencing: A Study in Legal Decision Making* (Cambridge University Press, 1997) 37.

<sup>580</sup> Kate Warner, ‘Sentencing Scholarship in Australia’ (2006-2007) 18(2) *Current Issues in Criminal Justice* 241, 254.

<sup>581</sup> See David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 1970) 171, 198.

<sup>582</sup> See David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 1970) 171 - 198; David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 194 – 222. Note that, in the first edition Thomas included a very brief comment on other mitigating factors, within this part he stated that ‘[i]t is not possible to exhaust the categories of mitigating factors, but those discussed...are probably the most common.’ By the second edition of the text, the short commentary on ‘other mitigating factors’ had been removed.

these categories.<sup>583</sup> However, he stated that it was 'possible to examine some of the more common factors and identify the circumstances under which they are most likely to be effective.'<sup>584</sup>

In the first edition of the *Principles of Sentencing*, Thomas observed that there was a residual discretion of mercy that the Court of Appeal in England and Wales could draw upon to provide leniency to an offender in sentencing when no other mitigating factor was appropriate. He stated '...and in other cases there may be circumstances of particular hardship not within the general category of mitigating factors where the Court may reduce a sentence 'in mercy'.'<sup>585</sup> As will be seen in the studies of the Australian case law the relationship between mercy and family hardship has been repeatedly tested before the courts. This relationship is the subject of substantive analysis in Chapter Six.

Thomas' reference to a residual category of mercy did not appear in the second edition where instead Thomas focused on developing his established four categories of mitigating factors. The third category: 'the indirect effect of the conviction or sentence',<sup>586</sup> listed above, is the category of mitigating factors that dealt with circumstances of hardship. The circumstances of hardship which were identified by Thomas were:

- a. the effect of the sentence on the offender's family;<sup>587</sup>
- b. the loss of career and other indirect hardships;<sup>588</sup> and
- c. additional hardships in prison.<sup>589</sup>

The first type of indirect effect (a) dealt with the impact of a sentence upon third parties. Thereby, Thomas granted recognition to this factor in his ground-breaking study. The following two types (b and c) dealt with the impact of the sentence upon the offender.

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<sup>583</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 1970) 171.

<sup>584</sup> *Ibid.*

<sup>585</sup> *Ibid* 199.

<sup>586</sup> *Ibid* 211.

<sup>587</sup> *Ibid* 211-214.

<sup>588</sup> *Ibid* 214-215.

<sup>589</sup> *Ibid* 215- 216.

The consideration of hardship factors by courts (more broadly and not just in a sentencing context) was widely known at this time. As legal historian and theorist AWB Simpson has observed, before the term was popularised by Ronald Dworkin,<sup>590</sup> 'the expression 'hard case', ... used to mean a case in which the application of the law caused hardship.'<sup>591</sup> Referencing the legal adage 'hard cases make bad law', Simpson noted that hard cases are those cases that provoke sympathy and distort the law.<sup>592</sup> If this legal adage was representative of the mainstream approach to the role of hardship factors within the law at this time, then one would expect to see hardship factors falling within the domain of a judicial exercise of mercy.<sup>593</sup> It is, therefore, significant that Thomas recognised family hardship as a category of 'mitigating factors'. This was an important classification.

Thomas was engaged in a normative process. Thomas cemented family hardships place as a mitigating factor in sentencing under the common law. But he observed that generally the Court of Appeal Criminal Division did not take the effect of an offender's sentence upon family members and dependants into account in sentencing. Thomas noted that:

[t]he Court has stated on many occasions that the hardship caused to the offender's wife and children *is not normally* a circumstance which the sentencer may take into account (emphasis added).<sup>594</sup>

Thomas provided the case of *Lewis*<sup>595</sup> heard by the Court of Appeal Criminal Division in 1972 as an example of this practice.

The *Lewis* case dealt with a burglary offence. In *Lewis* the offender bought an appeal against his sentence of three and a half years. The Court stated that it had been urged:

to take into consideration the unhappiness and the distress that his misdeeds have brought upon his dependants. That alas is something which is an

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<sup>590</sup> See, eg, Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 4<sup>th</sup> ed, 1984) 81-130.

<sup>591</sup> A.W.B Simpson, *Leading Cases in the Common Law* (Clarendon Press, 1995) 3.

<sup>592</sup> *Ibid* 3 [footnote 4].

<sup>593</sup> This aspect of hardship factors will be discussed in detail in Chapter Six.

<sup>594</sup> *Ibid* 211.

<sup>595</sup> That citation adopted by David Thomas for this case was *Lewis* 20.11.72, 2660/A/72 see David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 211.

inevitable consequence of crime, and it is something which the Court cannot regard as a mitigating circumstance.<sup>596</sup>

Noting the language of the Court in the extract above, the Court held that the effect of a sentence upon an offender's family is not regarded as a mitigating circumstance but rather an 'inevitable consequence of crime'. Thomas could easily have adopted this language in his text and not have identified family hardship as a mitigating factor. But Thomas did recognise, 'the effect of the sentence on the offender's family' as a mitigating factor at sentence and placed it under the category of 'the indirect effect of the conviction or sentence'.<sup>597</sup>

In his commentary, to further support the view that this was not a factor that was frequently taken into account by the Court of Appeal, Thomas cited the case of *Sherlock*<sup>598</sup> and the case of *Ingham*.<sup>599</sup> *Sherlock* and *Ingham* were both heard before the Court of Appeal Criminal Division in 1974. In *Sherlock*, a 32-year-old man was sentenced to imprisonment and appealed this sentence. The Court was made aware that his wife had recently given birth and that this couple had previously lost a child. The Court stated:

this Court is very sensitive...to the distress and hardship which sentences of this nature must necessarily bring upon the family, friends and relations of convicted persons; but this is one of the penalties which... convicted persons must pay.<sup>600</sup>

Similarly, in the *Ingham* case the Court once again refused to regard family hardship as a mitigating factor. The facts of *Ingham* were that the appellant's wife was suffering depression caused by the appellant's imprisonment and she was said to be in an 'advanced state of pregnancy'.<sup>601</sup> Thomas in his text noted that,

[t]he Court refused to interfere, saying that 'imprisonment of the father inevitably causes hardship to the rest of the family... part of the price to pay

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<sup>596</sup> *Lewis* 20.11.72, 2660/A/72 cited within David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 211.

<sup>597</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 211.

<sup>598</sup> That citation adopted by David Thomas for this case was *Sherlock* 14.1.74, 2731/A/73 see DA Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 211.

<sup>599</sup> That citation adopted by David Thomas for this case was *Ingham* 3.10.74, 3120/A/74 see DA Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 211.

<sup>600</sup> *Sherlock* 14.1.74, 2731/A/73 cited within David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 211.

<sup>601</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 211.

when committing a crime is that imprisonment does involve hardship on the wife and family, and it cannot be one of the factors which can affect what would otherwise be the right sentence.<sup>602</sup>

In light of this body of case law, how did Thomas classify and reconcile this consideration as a mitigating factor?

Thomas describes the approach by the Court of Appeal Criminal Division in these cases as a 'policy'.<sup>603</sup> Importantly, looking at the way that Thomas has described and discussed this matter within his text, Thomas does not find that 'the effect of the sentence on the offender's family' is *not* a mitigating factor. In fact, he clearly identifies it as one. In effect, he is observing that there is a 'policy' (or practice) of the Court of Appeal of not according this factor significant weight. Thomas also identified what he termed 'three recognizable exceptions'<sup>604</sup> to this policy position. He noted that 'none [of these exceptions] is automatically applied'.<sup>605</sup> Therefore the approach would be to put the matter before the Court and the Court would then consider the plea in mitigation on the merits of the individual case.

The three exceptions identified by Thomas, as a result of his study, were:

- 'where the degree of hardship suffered by the family is exceptional, and considerably more severe than the deprivation suffered by a family in normal circumstances as a result of the imprisonment';<sup>606</sup>
- where the offender is the mother of young children (particularly in relation to less serious offences);<sup>607</sup> and
- 'where both parents are imprisoned simultaneously, or other family circumstances mean that the imprisonment of one parent effectively deprives the child of parental care.'<sup>608</sup>

All of the case law cited by Thomas, within the second edition of the *Principles of Sentencing*, in support of these exceptions, is dated from 1971 to 1977.

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<sup>602</sup> Ibid 211-212.

<sup>603</sup> Ibid 212.

<sup>604</sup> Ibid 212.

<sup>605</sup> Ibid 212.

<sup>606</sup> Ibid 212.

<sup>607</sup> Ibid 212.

<sup>608</sup> Ibid 213.

In the first edition of *Principles of Sentencing* (published in 1970) Thomas had also identified and acknowledged this policy in respect of the effect of a sentence upon an offender's family.<sup>609</sup> He clearly held that this was a mitigating factor. Moreover, it was common enough to grant specific recognition in this text. But, he found that there was a policy or attitude of the Court to not accord this mitigating factor weight.<sup>610</sup>

His position at this time was that gender was a relevant factor at sentencing.

Thomas stated that,

[t]he attitude of the Court to this factor, at least so far as male offenders are concerned... [was that] they ought to have thought about the difficulties to their wives and children...before they ever started out on this kind of criminal enterprise.<sup>611</sup>

He then noted that '[t]his policy is subject to exceptions in extreme cases and there is some evidence of a marked difference in the Court's approach to the effect of the sentence on the offender's family where the appellant is a woman.'<sup>612</sup> The principle of hardship to third parties under the common law was evidently not well developed in Thomas' eyes at this time. He noted that the case law could be interpreted in different ways.<sup>613</sup>

Gender appeared to have an impact on the effectiveness of the plea. However, Thomas noted that the cases dealing with female offenders were also generally matters dealing with trivial offences. In two cases dealing with the procuring of an abortion by female offenders the Court had refused to mitigate a sentence on the basis of family circumstances.<sup>614</sup> Thomas noted that two general principles could explain the Courts practices, namely that:

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<sup>609</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 1970) 190.

<sup>610</sup> *Ibid* 190-191.

<sup>611</sup> *Ibid* 190 [citing *Williams and others* 21.11.66, 2508/66].

<sup>612</sup> *Ibid*.

<sup>613</sup> *Ibid* 191.

<sup>614</sup> *Fallen and Moore* 6.7.65, 897/65, [1965] Crim L R 561 and *Solomon* 20.12.65, 2246/65. See David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 1970) 191.



1. 'mitigating factors have proportionately less effect in relation to more serious offences than to less serious ones';<sup>615</sup> and
2. 'a particular emphasis on deterrence...justifies ignoring mitigating factors'.<sup>616</sup>

Where these circumstances were not present, Thomas thought 'the Court will normally consider family circumstances in the case of female offenders.'<sup>617</sup>

As seen above, by the second edition Thomas' position on the role of gender had shifted. He had qualified his earlier general position of leniency to women in respect of family hardship pleas and had identified that being the mother of young children, particularly when coupled with convictions for less serious offences, did generally result in a reduction in sentence. This practice was regarded as one of the exceptions to the policy of the Court of Appeal Criminal Division of not normally taking family hardship into account.

## *2. The Legacy of Thomas for Family Hardship*

What role Thomas' work has had in defining and shaping sentencing law is an important consideration. In the early 20<sup>th</sup> century, sentencing was a practice conducted by judicial officers, but decisions made on sentencing were considered to have no precedential value.<sup>618</sup> This position has changed both in the UK and in Australia with appellate courts finding that sentencing decisions could be 'wrong in principle'.<sup>619</sup>

Martin Wasik has professed that Thomas both discovered and shaped the law of sentencing as a discipline.<sup>620</sup> The influence of Thomas' work upon the discipline is

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<sup>615</sup> Ibid 191.

<sup>616</sup> Ibid.

<sup>617</sup> Ibid.

<sup>618</sup> Martin Wasik, 'Going Around in Circles? Reflections on Fifty Years of Change in Sentencing' (2004) Apr *Criminal Law Review* 253, 259.

<sup>619</sup> Martin Wasik, 'Going Around in Circles? Reflections on Fifty Years of Change in Sentencing' (2004) Apr *Criminal Law Review* 253, 260-261; Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4<sup>th</sup> ed, 2005) 35-36. See also 'Chapter One, Sentencing Jurisprudence'.

<sup>620</sup> Martin Wasik, 'Going Around in Circles? Reflections on Fifty Years of Change in Sentencing' (2004) Apr *Criminal Law Review* 253, 259.

widely acknowledged.<sup>621</sup> Alec Samuels, reviewing the second edition of the *Principles of Sentencing in the Modern Law Review*, remarked,

Whether judges were consciously applying principles and we did not know about it, or whether they were unconsciously applying principles, or whether David Thomas rationalising *ex post facto*, making “principles” out of a haphazard myriad of isolate instances, bringing order out of chaos, we do not know. What is certain is that in recent years the judges have frequently consulted the first edition, openly or surreptitiously, and thus for the first time in history some sort of systematised and systematic communication of information has gone out to the judiciary.<sup>622</sup>

As it was observed in Chapter Two, the extent of Thomas’ contribution to the field of sentencing means that his work is regarded today as a secondary source of law.<sup>623</sup>

A review of the judgments of the Court of Appeal Criminal Division immediately following the publication of the *Principles of Sentencing* illustrates a clear practice of referencing the *Principles of Sentencing* on family considerations as a mitigating factor.<sup>624</sup> For example, in *R v Sumners* the Court of Appeal considered Thomas’ commentary on family considerations.<sup>625</sup> The headnote for this reported case provided ‘Family Circumstances – Whether a Mitigating Factor – Exceptional Circumstances’.<sup>626</sup> Highlighting that it was still an unresolved matter as to whether this was a mitigating factor or not under the common law.

In *R v Sumners*,<sup>627</sup> the Court of Appeal Criminal Division found that an offender who had been convicted of theft (in breach of trust) should have his sentence reduced from four to three years as his wife was undergoing a serious operation

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<sup>621</sup> See, eg, Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4<sup>th</sup> ed, 2005) 31-36; Kate Warner, ‘Sentencing Scholarship in Australia’ (2006-2007) 18(2) *Current Issues in Criminal Justice* 241, 243.

<sup>622</sup> Alec Samuels, ‘Review: Principles of Sentencing: The sentencing policy of the Court of Appeal Criminal Division. Second Edition. By David Thomas’ (1979) 42(5) *The Modern Law Review* 598, 598-599.

<sup>623</sup> See Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5<sup>th</sup> ed, 2010) 24.

<sup>624</sup> See *R v Sumners* (1979) 1 Cr App R (S) 13; *R v Franklyn* (1981) 3 Cr App R (S) 65; *R v Vaughan* (1982) 4 Cr App R (S) 83; *R v Haleth* (1982) 4 Cr App R (S) 178.

<sup>625</sup> *R v Sumners* (1979) 1 Cr App R (S) 13 referencing David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 212.

<sup>626</sup> *R v Sumners* (1979) 1 Cr App R (S) 13, 13

<sup>627</sup> *Ibid.*

and their four teenage boys would be left without parental supervision.<sup>628</sup> The Court held

...having heard what Mr Baughan has had to say about the special family circumstances – the family, as in many other cases, are the principal sufferers – we find it possible to accede to his plea and, as an act of mercy, to reduce the sentence from four years to three years.<sup>629</sup>

It appears that the Court found that there were special circumstances (falling within the third exception identified by Thomas, see above). However, there is also a clear reference to ‘an act of mercy’, which was not strictly necessary under Thomas’ approach to family considerations as a mitigating factor.<sup>630</sup>

In 1981 in *R v Franklyn*,<sup>631</sup> Thomas’ text was cited as a reference on the point of family considerations as mitigating factors.<sup>632</sup> Here the headnote for the case was ‘Mitigating – Family Circumstances – Single Parent Family Deprived of Parental Care by Imprisonment of Offender – Whether a Relevant Consideration.’<sup>633</sup> In this case, the Court of Appeal reduced the sentence on the basis of children being deprived of parental care. The male offender was a sole parent of four children (5, 10, 13 and 16 years of age) who had assaulted a police officer occasioning actual bodily harm. The children had reacted badly to foster care and had returned to the family home with the eldest child taking responsibility for raising his siblings.<sup>634</sup>

The Court stated:

That situation cannot last very long. In short, unless this man is let out fairly quickly, the chances are that the community will be left with a delinquent family. I do not suppose even the police officer who was assaulted would like that to happen. This Court does not.<sup>635</sup>

Finding ‘wholly exceptional circumstances’ the appeal was successful, and the sentence was reduced from six months to twenty-one days thus enabling the

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<sup>628</sup> Ibid 14.

<sup>629</sup> Ibid 14.

<sup>630</sup> See discussion above and see David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 211-212. In the first edition Thomas had noted that reliance on mercy could occur when no other mitigating factor applied, see David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 1970) 199.

<sup>631</sup> (1981) 3 Cr App R (S) 65.

<sup>632</sup> *R v Franklyn* (1981) 3 Cr App R (S) 65, 65.

<sup>633</sup> Ibid.

<sup>634</sup> Ibid, 66.

<sup>635</sup> Ibid.

offender's immediate release from custody.<sup>636</sup> There was no reference to the term 'mercy' in this judgment.

In *R v Vaughan*<sup>637</sup> and *R v Haleth*<sup>638</sup> both heard before the Court of Appeal Criminal Division in 1982, the *Principles of Sentencing* was once again cited as a reference for the judgment.<sup>639</sup> These two cases also dealt with children being left without parental care. Janet Vaughan had been convicted of three offences of handling stolen money (with eighteen further offences taken into account at sentence).<sup>640</sup> Her husband was also a party to the crimes and had been sentenced to imprisonment. The Court said that the sentence of nine months' imprisonment imposed upon her was appropriate, '[b]ut there is an extra circumstance here, which in mercy and compassion this Court finds compelling...'.<sup>641</sup> Some of their children suffered from health and mental disabilities and the Court found that this, coupled with the absence of both parents and the current care arrangements (friends and neighbours) was not satisfactory having regard to the 'welfare of the children'.<sup>642</sup>

Mr Haleth had been convicted of affray (involving violence) and sentenced to twelve months' imprisonment.<sup>643</sup> The offender's wife and son suffered from a kidney disease, his wife had died from this disease 'not very long after he committed the offence'.<sup>644</sup> The Court received evidence from a consultant paediatrician that it was not in the son's interests that he suffers the anxiety arising from the imprisonment of his father.<sup>645</sup> The Court stated,

We think that the time has come when the mercy of this Court can be shown to this appellant so that he can go home to look after his boy. It is upon this ground alone, that we see fit to bring about his immediate release.<sup>646</sup>

The sentence was suspended for two years.<sup>647</sup>

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<sup>636</sup> Ibid.

<sup>637</sup> (1982) 4 Cr App R (S) 83.

<sup>638</sup> (1982) 4 Cr App R (S) 178.

<sup>639</sup> *R v Vaughan* (1982) 4 Cr App R (S) 83,83; *R v Haleth* (1982) 4 Cr App R (S) 178, 178.

<sup>640</sup> *R v Vaughan* (1982) 4 Cr App R (S) 83, 83.

<sup>641</sup> Ibid 84.

<sup>642</sup> Ibid.

<sup>643</sup> *R v Haleth* (1982) 4 Cr App R (S) 178, 178.

<sup>644</sup> Ibid 179.

<sup>645</sup> Ibid.

<sup>646</sup> Ibid.

<sup>647</sup> Ibid.

A review of these cases illustrates that none of these cases directly cited case law as authority for the approach to mitigating the sentence on the basis of the impact of the sentence upon dependants nor for mitigation of sentence where children will be without parental care. The *Principles of Sentencing* was cited as a reference in all of these cases which demonstrates that the text played a key role in shaping the development of the common law.

'Mercy' appears to be significantly tied into grants of leniency in sentencing in these cases. In three of the four cases reviewed, the Court of Appeal Criminal Division references 'mercy' as a justification for a reduction in sentence when dealing with hardship to an offender's family. What is not clear is whether there is clear acknowledgment by the Court of what could be identified as a 'sentencing principle' of taking family hardship into account in exceptional circumstances. In the cases discussed above, there was no express recognition that family hardship can only be taken into account in exceptional circumstances as a principle of sentencing. Rather, the sentencing principle in that form appears to have been promoted by Thomas.<sup>648</sup>

Family hardship is a sentencing factor which has been raised in pleas in mitigation before courts and this is evidenced in our earliest common law court records. Family hardship was recognised by Thomas as a legitimate sentencing factor but was marginalised by him by the addition of an exceptional circumstances qualification. Deterrence and rehabilitation were privileged by Thomas in his analysis of the *policy* of the Court of Appeal Criminal Division. The materialisation of the policies of a court and the resulting development of a principle of sentencing that hardship to offender's families will only be taken into account in sentencing in exceptional circumstances have had a long-lasting legacy.<sup>649</sup>

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<sup>648</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 211.

<sup>649</sup> As will be seen in the study of the Australian case law in Chapters Four and Five.

### *C. Examples of Family Hardship Being Disconnected from Sentencing*

The approach of courts operating under the common law has been to approach this issue with a keen awareness that distress, hardship and other forms of suffering by dependants are an inevitable outcome of crime, and of punishment. As such the common law has not granted broad recognition to this matter as a mainstream sentencing factor that would routinely be relevant to the process of determining an appropriate sentence. In fact, the potential severity of the impact of a sentence upon dependents and enormity of the issue has led to its sidelining. For example, in 1980 the Court of Appeal Criminal Division in *R v Stanley*,<sup>650</sup> identified that the suffering of children and spouses is routine and common place and if leniency was granted on this basis the courts 'would be altering sentences regularly'.<sup>651</sup> Within the common law legal tradition there have been overt reforms to restrict consideration of family hardship at sentencing.

In the USA approaches to limit judicial discretion in sentencing include mandatory minimum sentences, fixed term sentences, sentencing guidelines and sentencing grids.<sup>652</sup> These approaches have limited, or in some circumstances removed, consideration of family hardship. The Federal Sentencing Guidelines, for example, have deemed that 'family ties and responsibilities are not ordinarily relevant.'<sup>653</sup> For specific offences the guidelines state that, 'family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.'<sup>654</sup> The Federal Sentencing Guidelines also expressly prohibit consideration of gender as a sentencing factor.<sup>655</sup> The

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<sup>650</sup> (1980) 2 Cr App R (S) 296

<sup>651</sup> *R v Stanley and Others* (1980) 2 Cr App R (S) 296, 299.

<sup>652</sup> See, eg, New York's 'Rockefeller Drug Laws', California's 'Three Strikes and You're Out Laws' and Minnesota's 'Sentencing Guidelines...determined through a sentencing "grid"' see Marc Mauer, Cathy Potler and Richard Wolf, 'Gender and Justice: Women, Drugs, and Sentencing Policy' (Research Report, The Sentencing Project, November 1999) 6.

<sup>653</sup> See, eg, §5H1.6. 'Family Ties and Responsibilities (Policy Statement)' of the Federal Sentencing Guidelines Manual available in the current version, see United States Sentencing Commission, 2013 USSC Guidelines Manual (1 November 2013) *United States Sentencing Commission* <[http://www.ussc.gov/Guidelines/2013\\_Guidelines/index.cfm](http://www.ussc.gov/Guidelines/2013_Guidelines/index.cfm)>.

<sup>654</sup> See, eg, §5H1.6. 'Family Ties and Responsibilities (Policy Statement)' of the Federal Sentencing Guidelines Manual available in the current version, see United States Sentencing Commission, 2013 USSC Guidelines Manual (1 November 2013) *United States Sentencing Commission* <[http://www.ussc.gov/Guidelines/2013\\_Guidelines/index.cfm](http://www.ussc.gov/Guidelines/2013_Guidelines/index.cfm)>.

<sup>655</sup> §5H1.10. 'Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)' of the Federal Sentencing Guidelines Manual available in the current version, see United

Minnesota sentencing guidelines have removed consideration of family hardship by limiting consideration of sentencing factors to those that relate to 'aspects of the offence and criminal history.'<sup>656</sup> Therefore, deeming the impact of a sentence upon dependants would fall outside of the legislative framework of relevant sentencing factors.

Barbara Koons-Witt described that the effect of such reforms was: 'factors that were once relevant in the sentencing decisions of women (eg. pregnancy, mother, and primary caregiver) were no longer supported by the changes in the sentencing laws'<sup>657</sup> in those jurisdictions. However, the extent to which courts have conformed with such guidelines and the *scope* of the exclusion of consideration of family hardship in actual sentencing practices in these jurisdictions is a field of current research.<sup>658</sup>

In their efforts to promote greater consistency in sentencing,<sup>659</sup> England and Wales have also established a system of sentencing guidelines.<sup>660</sup> These guidelines are

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States Sentencing Commission, 2013 USSC Guidelines Manual (1 November 2013) *United States Sentencing Commission* <[http://www.ussc.gov/Guidelines/2013\\_Guidelines/index.cfm](http://www.ussc.gov/Guidelines/2013_Guidelines/index.cfm)>.

<sup>656</sup> Barbara Koons-Witt, 'The Effect of Gender on the Decision to Incarcerate Before and After the Introduction of Sentencing Guidelines' (2002) 40 *Criminology* 297, 298.

<sup>657</sup> Barbara Koons-Witt, 'The Effect of Gender on the Decision to Incarcerate Before and After the Introduction of Sentencing Guidelines' (2002) 40 *Criminology* 297, 298.

<sup>658</sup> It has been suggested that guidelines may be being ignored and that leniency to women may be occurring earlier in the court processes through unreviewable police or prosecutorial practices or via sentencing bargaining see Barbara Koons-Witt, 'The Effect of Gender on the Decision to Incarcerate Before and After the Introduction of Sentencing Guidelines' (2002) 40 *Criminology* 297, 302-305, 306, 317. See also William Berry III, 'Mitigation in Federal Sentencing in the United States' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 247, 250-259; Aron Zimmerman, 'Home Alone: Children of Incarcerated Mothers in New York City Under the Rockefeller Drug Laws' (2005) 12 *Cardozo Journal of Law and Gender* 445, 456-458; Supriya Sarnikar, Todd Sorensen and Ronald Oaxaca, 'Do You Receive a Lighter Prison Sentence Because You Are a Women? An Economic Analysis of Federal Criminal Sentencing Guidelines' (Discussion Paper No 2870, Institute for the Study of Labor (IZA), June 2007) 27, 31-32.

For general commentary on the impact that guidelines and grids have had on women offenders in the United States of America, see Myrna Raeder, 'Gender and Sentencing: Single Moms, Battered Women, and other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines' (1993) 20 *Pepperdine Law Review* 905; Ilene Nagel and Barry Johnson, 'The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders under the United States Sentencing Guidelines' (1994) 85 *Criminal Law & Criminology* 181; Sean Berberian, 'Protecting Children: Explaining Disparities in the Female Offender's Pretrial Process, and Policy Issues Surrounding Lenient Treatment of Mothers' (1999) 10 *Hastings Women's Law Journal* 369.

<sup>659</sup> See *Coroners and Justice Act 2009* (UK) s 120(11)(b); Sentencing Council for England and Wales, *About Guidelines* (2016) <https://www.sentencingcouncil.org.uk/about-sentencing/about-guidelines/>.

<sup>660</sup> *Coroners and Justice Act 2009* (UK) s 120.

published by the Sentencing Council.<sup>661</sup> The system of sentencing guidelines in England and Wales is very different to the approach adopted in the USA. As John Anderson describes:

the guidelines produced are designed to be as comprehensive as possible in narrative form and may cover establishing the basis for sentencing; factors influencing sentence for the offence; sentence ranges and starting points; and aggravating and mitigating factors to take into consideration.<sup>662</sup>

Although, Andrew Ashworth has defended the reforms by noting that these guidelines are not tramways<sup>663</sup> and discretion to depart from the guidelines has been retained.<sup>664</sup> Nonetheless, as Hudson has observed the general experience in both the USA and England and Wales has been that, “parity in treatment” in practice has meant more imprisonment of women.’<sup>665</sup>

An examination of the guidelines in England and Wales reveals that family hardship has been granted some, limited, recognition in specific circumstances. For example, in the Definitive Guideline for Burglary Offences being the ‘sole or primary carer for dependent relatives’,<sup>666</sup> is recognised as a ‘personal mitigation factor’<sup>667</sup> and the guideline instructs that ‘in some cases, having considered these factors, it may be appropriate to move outside the identified category range.’<sup>668</sup>

Provisions such as s 166 of the *Criminal Justice Act 2003* (UK) also retain a courts’ broader discretion to take mitigating factors into account where ‘in the opinion of the court, [they] are relevant in mitigation of sentence.’ Therefore, in England and Wales a sentencing judge may find that family hardship is a relevant sentencing

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<sup>661</sup> The Sentencing Council ‘is an independent, non-departmental public body of the Ministry of Justice’, see Sentencing Council for England and Wales, *About Us* (2016) <<https://www.sentencingcouncil.org.uk/about-us/>>

<sup>662</sup> John Anderson, ‘Standard Minimum Sentencing and Guideline Judgments: An Uneasy Alliance in the Way of the Future’ (2006) 30 *Criminal Law Journal* 203, 219.

<sup>663</sup> Andrew Ashworth, ‘Sentencing in Theory and Practice: The English Guidelines Experience’ (Speech delivered at the ANU and NJCA Conference: Sentencing from Theory to Practice, Canberra, 8 February 2014).

<sup>664</sup> See *Coroners and Justice Act 2009* (UK) s 125(1).

<sup>665</sup> Barbara Hudson, ‘Doing Justice to Difference’ in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Oxford University Press, 1998) 224, 248. See also Barbara Hudson, ‘Punishment, Poverty and Responsibility: The Case for a Hardship Defence’ (1999) 8(4) *Social & Legal Studies* 583, 587-588.

<sup>666</sup> Sentencing Council, *Burglary Offences* (2011), 5.

<sup>667</sup> *Ibid.*

<sup>668</sup> *Ibid.*



factor in determining an appropriate sentence as it is a sentencing factor under the common law.

In contrast to these two examples from common law jurisdictions, Australia has not embraced an approach of adopting sentencing guidelines (of the type described above) or sentencing grids. Chapter Two explained that the broader model adopted by legislatures within Australia has been to provide a list of sentencing factors within sentencing legislation. While there is variance in the specific features of the Australian legislative models' all jurisdictions acknowledge that statutory lists of sentencing factors are not exhaustive.

Chapter Two explained that the most prescriptive approach in Australia is that some legislative provisions highlight for judicial officers the sentencing factors that a court *should take into account* when determining an appropriate sentence when such factor 'is relevant' and 'known to the court'. Significantly, and in contrast to the approaches adopted in England and Wales and in the USA where family hardship has been sidelined as an irrelevant sentencing factor, within Australia, some parliaments have stepped in and recognised that the probable effect of an offender's sentence upon family and dependants is a sentencing factor that should be taken into account.

#### IV 'FAMILY HARDSHIP' IN SENTENCING LEGISLATION

Family hardship has been explicitly listed as a sentencing factor to be taken into account in Australian legislation in the Australian Capital Territory, South Australia and the federal jurisdiction.<sup>669</sup> How this came to be and the policy reasons behind this legislative action will be explored in this part. It will examine when and how family hardship came to be recognised in statutes within Australia. This part will also demonstrate that listing family hardship as a sentencing factor in legislation was a notable and significant inclusion.

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<sup>669</sup> *Crimes Act 1914* (Cth) s 16A(2)(p); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(o); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(n).

### A. The Road to Legislative Recognition

In 1978, the same year the *Nagle Report* was published,<sup>670</sup> the Law Reform Commission (later to be the Australian Law Reform Commission) received Terms of Reference from the Attorney-General, Peter Durack, which outlined his concern for:

... (c) the desirability of ensuring that offenders against a law of the Commonwealth are treated as uniformly as possible throughout the Commonwealth in respect of the sentences imposed on them;

(d) the need for a review of laws of the Commonwealth and the Australian Capital Territory, with particular reference to the questions –

(i) whether principles and guidelines for the imposition of sentences of imprisonment should be formulated; and

(ii) whether existing laws providing alternatives to imprisonment are adequate; ...<sup>671</sup>

The Commission's examination into sentencing ran for ten years and during this time it produced four discussion papers, an interim report and a final report.<sup>672</sup>

George Zdenkowski, who was one of the Commissioners in Charge of the Reference,<sup>673</sup> has described the Commission's work as the 'first major comprehensive review of sentencing law in Australia.'<sup>674</sup> In its Interim Report the Commission stated: '[d]espite eight decades of Australian Federation, this is the first study of Federal crime and its punishment in Australia.'<sup>675</sup> This is a remarkable situation however, as explained in Chapter One, at this time in Australian sentencing, 'emphasis...[had] been... on integrating Federal offenders into the local State machinery of criminal justice.'<sup>676</sup> There was no single statutory

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<sup>670</sup> New South Wales, Royal Commission into New South Wales Prisons, *Report of the Royal Commission into New South Wales Prisons (Nagle Report)* (1978).

<sup>671</sup> Law Reform Commission, *Sentencing of Federal Offenders*, Interim Report, Report No 15 (1980) xvii.

<sup>672</sup> Law Reform Commission, *Sentencing: Reform Options*, Discussion Paper No 10 (1979); Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 15 (1980); Law Reform Commission, *Sentencing of Federal Offenders*, Interim Report, Report No 15 (1980); Law Reform Commission, *Sentencing: Procedure*, Discussion Paper No 29 (1987); Law Reform Commission, *Sentencing: Penalties*, Discussion Paper No 30 (1987); Law Reform Commission, *Sentencing*, Report No 44 (1988).

<sup>673</sup> See Law Reform Commission, *Sentencing: Procedure*, Discussion Paper No 29 (1987); Law Reform Commission, *Sentencing: Penalties*, Discussion Paper No 30 (1987).

<sup>674</sup> George Zdenkowski, 'Sentencing' in Freckelton, I and Selby, H (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Thomson Reuters, 2009) 751, 752.

<sup>675</sup> Law Reform Commission, *Sentencing of Federal Offenders*, Interim Report, Report No 15 (1980) xxi.

<sup>676</sup> *Ibid* xxiv.

body of federal sentencing law nor were there entrenched federal sentencing practices.<sup>677</sup>

The reference and the resulting research and reforms marked the beginning of a move towards greater transparency in sentencing within Australia. The most apparent shift came in the consolidation of sentencing laws and procedures into a single body of sentencing provisions. In the federal arena, the legislature did not introduce a sentencing statute, instead pt 1B was introduced into the *Crimes Act 1914* (Cth) via the *Crimes Legislation Amendment Act (No 2) 1989* (Cth). Part 1B contained federal sentencing provisions and it did clearly set out a separate federal sentencing framework.<sup>678</sup>

Alongside the process of consolidating existing sentencing provisions into a single source of sentencing provisions, a significant inclusion into pt 1B included the introduction of a provision containing a list of sentencing factors in the form of s 16A(2) of the *Crimes Act 1914* (Cth). Section 16A(2) was housed within div 2 entitled 'General Sentencing Principles. The section listed thirteen matters that 'must... where relevant and known',<sup>679</sup> be taken into account by a sentencing court when determining the appropriate sentence to impose upon a federal offender. '[T]he probable effect of a sentence or order under consideration would have on any of the person's family or dependants'<sup>680</sup> appeared within this list of sentencing factors.

The explanatory memorandum for the Crimes Legislation Amendment Bill (No 2) 1989 acknowledged the significance of the inclusion of this matter into the new federal section. The memorandum stated:

Subsection (2) contains a number of matters that must be taken into account by a court when selecting a sentence, if relevant... The subsection in part gives statutory recognition to matters already taken into account by courts when sentencing (eg the character, antecedents, age, means and physical or mental

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<sup>677</sup> See comments of Justice Weinberg 'The Labyrinthine Nature of Federal Sentencing' (Keynote address presented at Federal Crime and Sentencing Conference 2012, Canberra, 11 February 2012) <<http://njca.com.au/program/federal-crime-and-sentencing-conference-2012/>>, 2-3. See also Law Reform Commission, *Sentencing of Federal Offenders*, Interim Report, Report No 15 (1980) xxiii.

<sup>678</sup> See Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) 7-8.

<sup>679</sup> See *Crimes Act 1914* (Cth) s 16A(2). This significance of these terms is closely examined below.

<sup>680</sup> *Crimes Act 1914* (Cth) s 16A(2)(p).

condition of the person), *but it also highlights certain matters including the circumstances of the victim and the probable effect of the sentence on the offender's family or dependants* (emphasis added).<sup>681</sup>

Family hardship was a common law sentencing factor, however, as the explanatory memorandum makes clear, there was a clear intention to draw attention to this factor in the sentencing of federal offenders. Studies of sentencing theory have found that during this period 'humanity in sentencing'<sup>682</sup> was not popular and accordingly family hardship was generally not seen as a conventional sentencing consideration.

Judicial attitudes, at the time, were not receptive to legislative intervention.<sup>683</sup> The Law Reform Commission's National Survey of Judges and Magistrates conducted in 1979, found that 'the overwhelming majority (249 or 91.1%) of respondents are opposed, or strongly opposed, to legislative principles and guidelines.'<sup>684</sup> The legislative reforms were expected to lead to greater consistency in sentencing, however, across the Australian jurisdictions, the most favoured method within the judiciary for promoting consistency was via 'decisions of appeal courts laying down principles of sentencing and informal discussion and consultation among judicial officers themselves.'<sup>685</sup> Nonetheless, the Commission favoured giving statutory form to established common law principles and practices<sup>686</sup> and the reforms went ahead.

### *1. Federal Legislation*

A federal sentencing provision with a list of sentencing factors came about because of the work of the Australian Law Reform Commission. One of the recommendations the Commission made in its Final Report was for a federal sentencing provision setting out a list of sentencing factors. It recommended that the list of factors should be 'prescribed in relevant legislation dealing with federal

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<sup>681</sup> Explanatory Memorandum, Crimes Legislation Amendment Bill (No 2) 1989 (Cth) 7.

<sup>682</sup> A phrase used by Austin Lovegrove to describe the role played by personal mitigation and mercy in sentencing see Austin Lovegrove, 'Putting the Offender Back Into Sentencing: An Empirical Study of the Public's Understanding of Personal Mitigation' (2011) 11 *Criminology and Criminal Justice* 37, 38-39.

<sup>683</sup> Law Reform Commission, *Sentencing of Federal Offenders*, Interim Report, Report No 15 (1980) Appendix B, 371.

<sup>684</sup> *Ibid* Appendix B, 428.

<sup>685</sup> *Ibid* Appendix B, 372.

<sup>686</sup> Law Reform Commission, *Sentencing: Penalties*, Discussion Paper No 30 (1987) 8.

and ACT criminal trials'.<sup>687</sup> The Commission saw the inclusion of a list of factors relevant to sentencing as a tool to 'promote *consistency in approach* by sentencers ...'.<sup>688</sup> It specified that there was considerable variation in what kind of information judicial officers considered relevant to sentencing with some judges holding 'certain kinds of information as always relevant to sentencing, while others may not.'<sup>689</sup>

The Commission had initially proposed to limit the factors relevant to sentencing to those matters listed in legislation.<sup>690</sup> But in its Final Report the Commission advocated for a highly permissive approach to listing sentencing matters. It did not promote a list that prescribed an order of priority nor did it promote a list that predetermined matters as either aggravating or mitigating.<sup>691</sup> Moreover, the Commission recommended that a statutory list of sentencing factors should be open-ended. It stated a sentencing court should not be 'obligated to consider all, or any of the matters in the list'.<sup>692</sup> The type of consistency that the Commission promoted was, thus, one of providing a consistent framework or common ground for sentencing principles, while still maintaining an underlying practice of broad judicial discretion and individualised justice.<sup>693</sup>

'Hardship to others'<sup>694</sup> was identified in the ALRC Discussion Paper as a mitigating factor at sentencing that was 'currently used'.<sup>695</sup> This factor was identified in the paper under the broader classification of 'Effect of the sanction'.<sup>696</sup> As discussed above, Thomas had classified it under a group he called 'Indirect Effects of the Conviction or Sentence'.<sup>697</sup> The same type of hardships was captured by each classification see Table 5.

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<sup>687</sup> Law Reform Commission, *Sentencing*, Report No 44 (1988) 91.

<sup>688</sup> *Ibid* 91 (emphasis added).

<sup>689</sup> *Ibid* 89.

<sup>690</sup> Law Reform Commission, *Sentencing: Procedure*, Discussion Paper No 29 (1987) 29.

<sup>691</sup> Law Reform Commission, *Sentencing*, Report No 44 (1988) 90.

<sup>692</sup> *Ibid* 91.

<sup>693</sup> The Commission called for the provision of a 'common standard by which to evaluate individual decision making', see Law Reform Commission, *Sentencing*, Report No 44 (1988) 89.

<sup>694</sup> Law Reform Commission, *Sentencing: Procedure*, Discussion Paper No 29 (1987) 31.

<sup>695</sup> *Ibid* 30.

<sup>696</sup> *Ibid* 31.

<sup>697</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2nd ed, 1979) 211.

**Table 5 Comparison of Hardship Classifications**

Indirect Effect of Conviction or Sentence (David Thomas)	Effect of the sanction (ALRC)
‘The effect of the sentence on the offender’s family’ <sup>698</sup>	‘Hardships to others (distress, reduced financial circumstances and deprivation of emotional support)’ <sup>699</sup>
‘Loss of career and other indirect hardships’ <sup>700</sup> (ie. flowing from the offence such as injuries suffered by offender)	‘Indirect consequences of conviction (loss of or inability to obtain similar employment, loss of pension rights, cancellation or suspension of trading or other licences, diminution of educational opportunities or the possibility of deportation)’ <sup>701</sup>
‘Additional hardships in prison’ <sup>702</sup> (ie. ill health, physical disability)	‘Hardships to the offender (physical or psychological injuries or infirmities, additional hardships in prison)’ <sup>703</sup>

The Discussion Paper, therefore, recognised family hardship as a mitigating factor in sentencing practices in Australia in the 1980s. However, as stated above in the Discussion Paper the Commission proposed to limit the role of sentencing factors and it tentatively proposed<sup>704</sup> to remove the family hardship because it did not fit within a just deserts theory of sentencing.<sup>705</sup>

The ALRC in Report No 44 was unambiguous in its recommendation *for* the inclusion of the impact of a sentence upon third parties within a new legislative list

<sup>698</sup> Ibid.

<sup>699</sup> Law Reform Commission, *Sentencing: Procedure*, Discussion Paper No 29 (1987) 31.

<sup>700</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2nd ed, 1979) 214.

<sup>701</sup> Law Reform Commission, *Sentencing: Procedure*, Discussion Paper No 29 (1987) 31.

<sup>702</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2nd ed, 1979) 215.

<sup>703</sup> Law Reform Commission, *Sentencing: Procedure*, Discussion Paper No 29 (1987) 31.

<sup>704</sup> Ibid 35.

<sup>705</sup> Ibid 34-35

of sentencing factors.<sup>706</sup> The sentencing factor was described in the Report as follows:

*Recommendations*

170 *List of facts relevant to sentencing.*

... the categories of facts relevant to sentencing should not be closed but should at least include ...

- the impact on third parties of a particular sanction, for example, distress, reduced financial circumstances and deprivation of emotional support for the offender's family.<sup>707</sup>

The Report acknowledged that the inclusion of family hardship would stretch the scope of relevant sentencing matters beyond factors related to the offender and his/her conduct.<sup>708</sup> Indeed, it was expressly recognised that the inclusion of family hardship as a listed sentencing matter would be controversial<sup>709</sup> but stated that it had been warned in submissions that there were 'potentially destructive results if the impact of punishment on third parties, especially the family of the offender, was ignored.'<sup>710</sup>

The description adopted for family hardship (above) in the Report also placed the mitigating factor in very general terms. As will be explained in Chapter Four, judicial officers, operating under the common law have a long-standing practice of dismissing both financial hardship upon third parties and emotional hardship inflicted upon third parties as relevant because these are forms of routine suffering to be expected as a result of imposing a sanction. Courts have stated that such forms of hardship to others are irrelevant to the act of determining an appropriate sentence to impose upon an offender.<sup>711</sup> What is important in the Report is that the Commission, in its classification of family hardship, was endorsing a broader approach to the consideration at sentencing.

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<sup>706</sup> Law Reform Commission, *Sentencing*, Report No 44 (1988) 89-92.

<sup>707</sup> *Ibid* 90.

<sup>708</sup> *Ibid* 92.

<sup>709</sup> *Ibid*.

<sup>710</sup> *Ibid*.

<sup>711</sup> See, eg, *Moore v Fingleton* (1972) 3 SASR 164, 167; *Sullivan v The Queen* [1975] Tas SR 146 (NC), 146.

The Report also recommended that ‘motherhood’ should be recognised when sentencing federal offenders. The Report stated:

152. *Motherhood*. A factor which should carry considerable weight in the sentencing decision is being the mother of a young child. Only in exceptional circumstances, which constitute a real concern for the safety of others, should such parent be imprisoned.<sup>712</sup>

Recommendation 152 was not picked up by the new provisions but consideration of the impact upon a young child would certainly have been covered by s 16A(2)(p). During the 1980s, common law jurisdictions were often gender blind in their sentencing reforms and research. For example, Renate Mohr has critiqued the work of the Law Reform Commission of Canada in its reports on sentencing reform.<sup>713</sup> She stated:

Symptomatic of gender-neutrality in sentencing reform efforts is research that consists of constructing our thinking around men rather than women and men, research that involves the gathering of information with regard to one sex and treating it as if it applied to both sexes...<sup>714</sup>

It is, therefore, notable that family hardship and the impact of sentencing on women were recognised and addressed by the ALRC.<sup>715</sup>

### **(a) The resulting federal legislative provision**

The resulting federal provision, which provided a list of sentencing matters, was s 16A(2) of the *Crimes Act 1914* (Cth). The section commenced with the following words:

In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court: ...<sup>716</sup>

The terminology that was adopted for the federal provision was not as permissive as the ALRC had envisaged in Report No 44. The use of the word ‘must’ instead of ‘may’ indicates an obligatory rather than permissive requirement.<sup>717</sup> In *Wong*,

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<sup>712</sup> Law Reform Commission, *Sentencing*, Report No 44 (1988) 1, 124-125.

<sup>713</sup> Renate Mohr, ‘Sentencing as a Gendered Process: Results of a Consultation’ (1990) 32 *Canadian Journal of Criminology* 479, 480.

<sup>714</sup> *Ibid* 479.

<sup>715</sup> The Discussion Paper to the Report had identified that ‘the factors listed as mitigating sentence in the Commission’s Discussion Paper 29 are broad enough to take into account pregnancy, the particular difficulties of single supporting parents and other issues and problems of particular relevance to female offenders’, see Law Reform Commission, *Sentencing: Penalties*, Discussion Paper No 30 (1987) 180.

<sup>716</sup> *Crimes Act 1914* (Cth) s 16A(2).

<sup>717</sup> D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2011) 346.



Justices Gaudron, Gummow and Hayne examined the language of s 16A and the types of matters listed within that section.<sup>718</sup> The joint judgment observed that s 16A 'obliges the sentencer to take *all* of them into account and effect must be given to that legislative command.'<sup>719</sup>

Moreover, in *Wong*, Chief Justice Gleeson (in his critique of the use of guideline judgments for federal sentencing) stated:

This is a risky undertaking when there is a federal statute which spells out in detail the matters to be taken into account by a sentencing judge. The statute is important both for what it says and for what it does not say.<sup>720</sup>

The High Court in *Wong* engaged carefully with the importance of s 16A and the significance of the language used within this provision. As set out above, the majority in *Wong* emphasise the importance of courts sentencing federal offenders, giving effect to the 'legislative command'<sup>721</sup> of the sections in pt 1B.<sup>722</sup> This stance by the High Court has been maintained. For example, later in the case of *Barbaro*, Gaegeler J<sup>723</sup> observed that the inclusion of the phrase '[i]n addition to other matters' demonstrated 'implicit contemplation of that statutory language... that other matters might be required to be taken into account, either by another statute or by the common law.'<sup>724</sup> This is a clear reference to the fact that the legislative lists of factors were not exhaustive.

Interestingly, Report No 44 had identified that there was dissent within the Commission regarding the introduction of a legislative list of sentencing factors and foresaw the above attention to legislative language.<sup>725</sup> The President, Justice Elizabeth Evatt, and the Deputy President, Mr J Greenwell, both expressed concern that 'courts would be obliged to have regard to the language of the legislation'.<sup>726</sup> The High Court's approach to the restatement of common law principles into

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<sup>718</sup> (2001) 207 CLR 584.

<sup>719</sup> *Ibid* 610.

<sup>720</sup> *Ibid* 597.

<sup>721</sup> *Ibid* 610.

<sup>722</sup> *Ibid* 597 (Gleeson CJ); 609-610 (Gaudron, Gummow and Hayne JJ).

<sup>723</sup> In his dissenting judgment.

<sup>724</sup> *Barbaro v The Queen* (2014) 253 CLR 58, 77. See also *El Karhani* (1990) 51 A Crim R 123, 131 (Kirby P, Campbell and Newman JJ).

<sup>725</sup> Law Reform Commission, *Sentencing*, Report No 44 (1988) 91.

<sup>726</sup> *Ibid* 91.

legislative provisions in *Premier Automatic Ticket Issuers Ltd v Federal Commission of Taxation*<sup>727</sup> gave weight to their fears.<sup>728</sup> The arguments made by the President and Deputy President were that greater consistency could be achieved through the development of common law principles rather than exercises in statutory interpretation.<sup>729</sup> However, while the High Court has drawn attention to the language of the legislation, sentencing courts around Australia have been reluctant to give this language much weight.

It has been established that the legislative intent to give prominence to the effect of any sentence upon third parties in the federal arena was deliberate. This then raises the question of why a sentencing factor that had been placed on a clear statutory footing has been given so little judicial attention. As will be demonstrated in Chapter Five, the approach to s 16A(2) by courts exercising federal jurisdiction has been inconsistent. On its face, s 16A(2)(p) appears to be a clear statement of principle. However Australian courts sentencing federal offenders have not consistently approached the word 'must' within s 16A(2).<sup>730</sup> As such, the legislative intent to give prominence to this sentencing factor and to extend the scope of sentencing considerations beyond traditional practices has not been realised.

### **(b) Support for family hardship whether or not exceptional**

The ALRC received its second review into federal sentencing in July 2004. In the Discussion Paper released the following year the ALRC had in its list of proposals a reform to s 16(A)(2) included:

... (p) the probable effect that any sentence option or order under consideration would have on any of the offender's family or dependants, whether or not the circumstances are exceptional; and...<sup>731</sup>

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<sup>727</sup> (1933) 50 CLR 268.

<sup>728</sup> In this case Dixon J stated 'The criterion, which the Legislature has now adopted and established, was formulated by the Courts... So far as it lacks precision or is uncertain in its application, the cause is to be found in the powerlessness of the Courts to do more than state a wide general proposition and to apply it as each case arose. The statement of the proposition was not a definition, but rather an explanation of principle. No doubt, as the language of the statute it must receive a more literal application.' See Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) 91.

<sup>729</sup> Law Reform Commission, *Sentencing*, Report No 44 (1988) 91.

<sup>730</sup> See further Chapter Five.

<sup>731</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) 10, 82 and 577.

The proposal was, not only, to maintain support for family hardship as a listed sentencing factor, but to endorse the original legislative intention to have this recognised as a general sentencing consideration rather than one which arises only in exceptional circumstances.

The Discussion Paper noted:

The weight to be given to this factor would be a matter for the court's discretion. For example, it may be that certain effects on family and dependants would not warrant a modification in the sentence or order imposed. On the other hand, other effects may be sufficiently serious – even if not strictly exceptional – to warrant a modification in the sentence or order imposed when considered in the light of other relevant factors. The effect of dependants should include financial, social, and psychological effects.<sup>732</sup>

In the Report the ALRC maintained support for the impact of a sentence upon third parties as a listed federal sentencing factor.<sup>733</sup> The ALRC acknowledged that family hardship is listed at s 16A(2)(p) of the *Crimes Act 1914* (Cth), but observed: '[h]owever, some courts have read this paragraph down to allow consideration of this factor only in exceptional circumstances.'<sup>734</sup> It openly stated that '[i]n the ALRC's view, courts have taken an unnecessarily restrictive approach to this sentencing factor, but it is a matter on which the common law can develop.'<sup>735</sup> The ALRC is unambiguous in its position that 'a court should be able to consider the likely impact of a sentencing option on an offender's family or dependants whether or not the circumstances are exceptional.'<sup>736</sup> Moreover, the ALRC has been consistent in cataloguing a broad class of potential hardships (financial, social and psychological) upon an offenders family or dependents.

## 2. South Australian Legislation

In South Australia the general principles of sentencing arose out of the common law.<sup>737</sup> The first specific Sentencing Act in South Australia was the *Criminal Law (Sentencing) Act 1988* (SA). Part 2 of the *CL(S)A* set out: 'General Sentencing

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<sup>732</sup> Ibid 80.

<sup>733</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 30-31 [Rec 6-1], 188-190.

<sup>734</sup> Ibid 188. The following cases are cited as support for this finding: *R v Ceissman* (2001) 119 A Crim R 535, [36]; *R v Sinclair* (1990) 51 A Crim R 418, 430.

<sup>735</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 190.

<sup>736</sup> Ibid.

<sup>737</sup> For a treatise of early sentencing law in South Australia see Mary Daunton-Fear, *Sentencing in South Australia* (The Lawbook Company in association with the Australian Institute of Criminology, 1980).

Provisions'. 'General sentencing powers' were contained within pt 2 div 2 of the *CL(S)A* and included s 10 setting out a list of sentencing factors. Section 10 came into operation on 1 January 1989. At this time family hardship was for the first time listed in an Australian statute as a sentencing factor. As described above, it then appeared in the list of sentencing factors introduced into the federal Act.

Section 10 commenced by stating:

A court, in determining sentence for an offence, should have regard to such of the following matters as are relevant and known to the court: ...<sup>738</sup>

The South Australian legislature recognised fifteen sentencing factors ((a)–(o)) in s 10.<sup>739</sup> The list was non-exhaustive.<sup>740</sup> Section 10 did not use the term 'must' (which would appear in the federal provision, s 16A(2)) but, it did employ the term 'should'. The section adopted the phrase 'relevant and known to the court' as the qualifier for the consideration of listed sentencing factors,<sup>741</sup> which is similar to the approach adopted in the federal provision (see above) and the ACT provision (discussed below).

Family hardship was listed at paragraph (n). The language used was very similar to the language that would be adopted in the federal provision. Compare:

- 'the probable effect any sentence under consideration would have on dependants of the defendant': *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(n); and
- 'the probable effect that any sentence or order under consideration would have on any of the person's family or dependants': *Crimes Act 1914* (Cth) s 16A(2)(p) and *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(o).

Influenced by the treatise of Thomas and the suggested change of policy<sup>742</sup> from the England and Wales Court of Appeal Criminal Division, South Australian courts had recognised family hardship as a mitigating sentencing factor in the 1970s and

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<sup>738</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 10(1) (Reprint No 1, 1 July 1991).

<sup>739</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 10(1).

<sup>740</sup> *Ibid* s 10(1)(o) ('any other relevant matter').

<sup>741</sup> *Crimes Act 1914* (Cth) s 16A(2).

<sup>742</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 212; Mary Daunton-Fear, *Sentencing in South Australia* (The Lawbook Company in association with the Australian Institute of Criminology, 1980) 81.

1980s. Mary Daunton-Fear's treatise on *Sentencing in South Australia*,<sup>743</sup> published in 1980, acknowledged 'hardship to the defendant's relatives and dependants'<sup>744</sup> Interestingly, with respect to family hardship, she stated:

Until recently the mainstream of judicial authority seemed to flow in favour of the proposition that hardship likely to be caused to the defendant's relatives and dependants is not a mitigating factor although it might be a ground on which the Crown would exercise clemency.<sup>745</sup>

Her opinion of sentencing practice in South Australia was that the appellate courts had a practice of leaning towards mercy.<sup>746</sup> She acknowledged that family hardship had a mitigatory impact in the South Australian decisions of *Brady v Wright*<sup>747</sup> (1974) and in *R v Wirth*<sup>748</sup> (1976).<sup>749</sup>

In her treatise Daunton-Fear questioned whether the *only* relevant hardship should be that caused to the defendant (clearly influenced by the normative theory that the relevant sentencing factors were those relating to the offence or the offender).<sup>750</sup> However, she reasoned that a family hardship plea was a 'plea for mercy' and on this basis, a court should not be precluded from considering hardship to others (as opposed to hardship to the offender) as a ground for 'leniency'.<sup>751</sup> She stated that 'courts should restrict their clemency to cases where the degree of hardship is extreme and there is a strong likelihood that the offender, and only the offender, could relieve that hardship.'<sup>752</sup>

The case law in South Australia (common law) prior to the commencement of the *Criminal Law (Sentencing) Act 1988* (SA) did see family hardship as a mitigating

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<sup>743</sup> Mary Daunton-Fear, *Sentencing in South Australia* (The Lawbook Company in association with the Australian Institute of Criminology, 1980).

<sup>744</sup> *Ibid* 79-83.

<sup>745</sup> *Ibid* 79. See also Mary Daunton-Fear, 'Sentencing in South Australia: Emerging Principles' (1980) 7 *The Adelaide Law Review* 41, 57.

<sup>746</sup> Mary Daunton-Fear, 'Sentencing in South Australia: Emerging Principles' (1980) 7 *The Adelaide Law Review* 41, 41-42. See *Webb v O'Sullivan* [1952] SASR 65, 66.

<sup>747</sup> (1974) 62 LSJS 44 (14 January 1974).

<sup>748</sup> (1976) 14 SASR 291.

<sup>749</sup> These cases are examined in detail in Chapter Four.

<sup>750</sup> Family hardship was placed under the broader heading of 'The personal circumstances of the defendant' in her treatise. See Mary Daunton-Fear, *Sentencing in South Australia* (The Lawbook Company in association with the Australian Institute of Criminology, 1980) 66.

<sup>751</sup> Mary Daunton-Fear, 'Sentencing in South Australia: Emerging Principles' (1980) 7 *The Adelaide Law Review* 41, 58.

<sup>752</sup> *Ibid*. See also Mary Daunton-Fear, *Sentencing in South Australia* (The Lawbook Company in association with the Australian Institute of Criminology, 1980) 83.

sentencing factor. In 2011, the Attorney-General for South Australia described the original provision as setting out ‘established common law principles of sentencing’.<sup>753</sup> However, there is an open question as to whether family hardship was operating as a mitigating factor (a potential relevant sentencing factor to be balanced against other relevant factors in the process of determining an appropriate sentence) or as a factor that was relevant to the courts exercise of judicial mercy (able to be taken into account in the courts discretion provided the degree of hardship was extreme).

In South Australia, there have been no official recommendations to remove family hardship as a listed sentencing factor in the late 20<sup>th</sup> century and early 21<sup>st</sup> century. In 2000, the *Taken In* Report produced by the South Australian Women’s Legal Service noted its support of the inclusion of s 10(1)(n) of the *Criminal Law (Sentencing) Act 1988* (SA) stating that family hardship was a ‘worthy consideration’<sup>754</sup> and was a ‘vital and legitimate part of a defence council’s submission to the court before sentencing’.<sup>755</sup> The Report did highlight three problems with the consideration of family hardship at sentencing in South Australia. First it identified that the matter was often arising late in court proceedings. Second, the Report identified problems with judicial assessment of ‘probable effect’. Third, it saw difficulties arising when this factor was balanced against deterrence.<sup>756</sup>

A pertinent observation made by the *Taken In* Report was that:

It may be the case that Section 10 sustains a perception of different treatment, but it does not necessarily indicate that women are receiving fair treatment overall.<sup>757</sup>

The Report cautioned that ‘[t]his consideration alone cannot be relied upon to deliver justice to women who have dependants or to ensure the welfare of children.’<sup>758</sup> The relationship between family hardship and gender equality will be discussed further in Chapter Six.

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<sup>753</sup> South Australia, Hansard, House of Assembly, 24 March 2011, 3117 (J.R. Rau, Attorney-General).

<sup>754</sup> Women’s Legal Service (SA) Inc, *Taken In, When Women with Dependent Children Are Taken Into Custody: Implications for Justice and Welfare* (2000) 51.

<sup>755</sup> *Ibid.*

<sup>756</sup> *Ibid.*

<sup>757</sup> *Ibid* 52.

<sup>758</sup> *Ibid* 52. This position is endorsed by the results of the case study in Chapter Four.

Section 10 of the *Criminal Law (Sentencing) Act 1988* (SA) was amended in 2012 via the *Criminal Law (Sentencing)(Guilty Pleas) Amendment Act 2012* (SA). This reform saw the deletion of the original s 10, replaced by a new s 10 now entitled 'Sentencing Considerations'. Nonetheless, many of the listed sentencing factors remained the same. The legislative recognition of 'the probable effect any sentence under consideration would have on dependants of the defendant' was untouched in both its text and location (paragraph (n)).

### **(a) Legislative change post 2012**

There were two changes that took place in these 2012 reforms, which are worth noting. First, an amendment was made to the introductory language of s 10. Second, express recognition within the Act was granted to common law sentencing principles. The passage at the beginning of the new s 10 stated:

In determining the sentence for an offence, a court must have regard to such of the following factors and principles as may be relevant:<sup>759</sup>

The 2012 reforms brought about the insertion of s 9E into the *Criminal Law (Sentencing) Act 1988* (SA). Section 9E provided greater context for the list of sentencing factors provided in s 10. Section 9E was entitled, 'Purpose and application of Division' and stated, '[e]xcept where the contrary intention appears, this Division qualifies rather than displaces the common law principles in relation to sentencing.'<sup>760</sup>As explained in Chapter Two, in 2017 South Australia introduced the new *Sentencing Act 2017* (SA). Family hardship is not a listed sentencing factor in South Australia.<sup>761</sup>

### *3. Australian Capital Territory Legislation*

In *Cotter v Corvisy*,<sup>762</sup> Refshauge J remarked on the changes that have taken place in respect of the encroachment of legislation in the field of sentencing within the Australian Capital Territory ('ACT'). Justice Refshauge reflected on former

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<sup>759</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 10(1).

<sup>760</sup> See *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* (SA) s 5; *Criminal Law (Sentencing) Act 1988* (SA) s 9E.

<sup>761</sup> The study of the case law for this dissertation was conducted up to December 2011. Therefore, the impact of these recent legislative reforms is beyond the scope of this study.

<sup>762</sup> *Cotter v Corvisy* (2009) 185 A Crim R 560.

practices where it was once possible to impose a sentence without reference to legislative provisions. He then observed:

Those days have changed, but change was not quick in coming. In 1988, just before self-government, Part XII (Sentences) of the *Crimes Act 1900* (ACT) consisted of merely 12 sections of 8 pages. It was not until 1993 that there was a statutory prescription of the purposes for which sentences may be imposed. Since then, of course, this jurisdiction, following other jurisdictions which have introduced significant sentencing regimes [various sentencing Acts listed] ... has enacted the *Crimes (Sentencing) Act 2005*. That Act consists of 147 sections and a Dictionary of 48 terms defined in it... Despite the complexity of the legislative regime, there is still room for the application of common law principles of sentencing ... This combines to produce complexity in sentencing and the need for sentencers to be careful when engaging in this process to ensure that they comply with the obligations to be found in statute and in common law.<sup>763</sup>

There have been a number of reforms in the field of sentencing in the ACT.

### **(a) The law pre self-government**

Self-Government occurred in the ACT in 1989. Prior to Self-Government, the Commonwealth had responsibility for the law of the Territory.<sup>764</sup> At this time, the majority of the sentencing provisions were located in the *Crimes Act 1900* (NSW), which applied to the ACT by an Ordinance of the Territory.<sup>765</sup> As observed by Refshauge J in the passage above, there were only a small number of sentencing provisions within this Act.

A key feature of this period in the ACT was that imprisonment rates were low,<sup>766</sup> particularly compared to those imposed in other Australian jurisdictions. For example, in 1979 the imprisonment rate in the ACT was recorded as 16 per 100,000 of the population. In comparison, the New South Wales rate was 76 per 100,000 and South Australia 56 per 100,000. The national average was recorded as 65.4 per 100,000.<sup>767</sup> The length of sentences imposed by judicial officers in the ACT, in this period, were short. For example, in 1975 to 1978 'two thirds of

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<sup>763</sup> *Cotter v Corvisy* (2009) 185 A Crim R 560, [4]-[7].

<sup>764</sup> Law Reform Commission, *Sentencing: Reform Options*, Discussion Paper No 10 (1979) 9.

<sup>765</sup> *Crimes Act 1900* (NSW) (As amended in its application to the Australian Capital Territory by Ordinances of the Territory) See <<http://www.legislation.act.gov.au/a/1900-40/19870211-27536/pdf/1900-40.pdf>>

<sup>766</sup> See Law Reform Commission, *Sentencing: Reform Options*, Discussion Paper No 10 (1979) 18-22.

<sup>767</sup> Data are drawn from Figure 9 'Australian Imprisonment Rates (February 1979)' sourced from the Australian Institute of Criminology. See Law Reform Commission, *Sentencing: Reform Options*, Discussion Paper No 10 (1979) 18.



all...sentences were for a period of less than 6 months and... about 80% were for a period of less than a year.<sup>768</sup>

The Territory did not have its own prison and offenders were incarcerated in New South Wales' prisons.<sup>769</sup> ACT sentencing practices were strongly guided by the common law principle of last resort. This principle had prominence in sentencing practices, rather than just 'lip service', because incarceration occurred interstate. A direct consequence of the reliance upon NSW prisons was that there is entrenched recognition of hardship factors in sentencing practices in the ACT. For example, the federal Law Reform Commission in Discussion Paper No 10 (June 1979) observed that the low imprisonment rate was attributable to the 'general attitude of the judicial officers who pass sentence on offenders.'<sup>770</sup> The Discussion Paper stated:

...judges and magistrates are well aware of the deficiencies of the contemporary N.S.W. prison system, and of the hardships imposed by "transporting" A.C.T. residents to N.S.W. to be imprisoned. They therefore seek, wherever possible, to avoid prison sentences except as a necessary last resort.<sup>771</sup>

The hardships that were recognised were the personal hardships to offenders who would serve their sentences away from family and friends and the hardships this would impose upon their families.<sup>772</sup>

### **(b) The recognition of hardship in sentencing legislation**

Section 429A(1) was the first provision providing a list of sentencing factors for the ACT. This provision was introduced in 1993 and at that time it contained an extensive, (a) to (w), list of sentencing factors.<sup>773</sup> The Explanatory Memorandum to the Crimes (Amendment) Bill (No 2) 1993 (ACT), which proposed s 429A, stated that:

Punishment of criminal offenders has traditionally been an area which allows judges and magistrates to exercise great discretion. Whilst it is important to preserve that flexibility in regard to individual cases, it is also important to ensure that as far as possible there is consistency in approach to punishment and that the penalties in themselves are fair. This Bill sets out factors which, where relevant, must be considered by the court in determining the sentence. ...

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<sup>768</sup> Law Reform Commission, *Sentencing: Reform Options*, Discussion Paper No 10 (1979) 20.

<sup>769</sup> *Ibid.*

<sup>770</sup> *Ibid* 19.

<sup>771</sup> *Ibid* 22.

<sup>772</sup> *Ibid* 22-25, 62.

<sup>773</sup> See *Crimes (Amendment) Act (No 2) 1993 (ACT)* s 5.

While the lists are not intended to be exhaustive, they are intended to provide useful guidelines to both sentencers and legal practitioners.<sup>774</sup>

The passage of the *Crimes (Amendment) Act (No 2) 1993* (ACT) therefore marked a major shift in the legislative framework of sentencing provisions in Territory. Also notable is that one of the underlying policy concerns of the legislature at this time was to encourage 'consistency in approach to punishment'.<sup>775</sup>

Alongside the list of sentencing factors in s 429A, the legislative reforms enshrined the principle of last resort (s 429C) and the principle of just deserts (s 429(1)). Section 429(2) of the *Crimes Act 1900* (ACT) gave recognition to two purposes of sentencing; although they were not labelled as such at this time, but rather, as 'important considerations'<sup>776</sup> relevant to the determination of a just and appropriate sentence. These purposes were rehabilitation and reparation.<sup>777</sup> It was not until 1998 that the legislature provided a dedicated purposes provision of the kind with which we are now familiar in Australia (see Chapter Two).<sup>778</sup>

The Explanatory Memorandum for the *Crimes (Amendment) Bill (No 2) 1993* (ACT) remarked that s 429A set out a list of factors that should be taken into account in sentencing, in light of the principles expressed in s 429 (see above, just deserts, rehabilitation and reparation).<sup>779</sup> That the section was 'not intended to be an exhaustive list' was emphasised in the Explanatory Memorandum.<sup>780</sup> Directly following this comment, the notes on the introduction of s 429A, stated:

*Nor is it intended to exclude the common law principles which govern the relevance of the listed factors. Depending on the circumstances, certain of those factors may be either mitigating or aggravating (for example, consumption of drugs or alcohol) (emphasis added).*<sup>781</sup>

The meaning of the first sentence in the above passage is significant to determining what the legislature had in mind when it introduced this list of sentencing factors;

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<sup>774</sup> Explanatory Memorandum, *Crimes (Amendment) Bill (No 2) 1993* (ACT), 2.

<sup>775</sup> *Ibid.*

<sup>776</sup> *Ibid* 3.

<sup>777</sup> *Crimes Act 1900* (ACT) s 429(2)(a) and (b).

<sup>778</sup> See *Crimes (Amendment) Act 1998* (ACT) s 4. Section 4 repealed the old s 429 of the *Crimes Act 1900* (ACT) and replaced it with a new purposes section recognising punishment, deterrence, rehabilitation, denunciation and protection of the community (incapacitation).

<sup>779</sup> Explanatory Memorandum, *Crimes (Amendment) Bill (No 2) 1993* (ACT), 3.

<sup>780</sup> *Ibid.*

<sup>781</sup> *Ibid.*

including the extent to which they envisaged hardship to others being taken into account in sentencing.

A possible interpretation of the legislative intent is that when operating under the new s 429A, a judge or magistrate determining whether ‘the probable effect that any sentence or order under consideration would have on any of the person’s family or dependants’<sup>782</sup> is relevant to the determination of sentence, would do so having regard to the common law principle of family hardship. Thereby they would find that it is only relevant in exceptional circumstances. However, notwithstanding the legislature’s caveat in the Explanatory Memorandum, ACT courts have not found that this to be the legislative intent (discussed in Chapter Four).

One argument to support the ACT practice is that if limiting the operation of family hardship been the intended approach, a simpler and clearer position would have been expressly to provide the limitation to exceptional circumstances within the legislative provision (s 429A(1)(m)). As outlined above, this limitation was not in the federal drafting of this sentencing factor because as I have argued the federal legislature was not contemplating such a limitation to the operation of the factor in federal sentencing.

The inclusion of the passage within the Explanatory Memorandum of the ACT does raise an interesting question in respect of what the legislature had in mind in respect to the ACT reforms. The ACT provision came into effect *after* the South Australian provision, it is likely that the ACT reforms were to some extent mirroring the South Australian reforms. As mentioned above, South Australian Courts were quick to conclude that s 10(1)(n) did not change the law. For example, in *Adami*, King CJ, Legoe and Bollen JJ had held that ‘the probable effect any sentence under consideration would have on dependants of the defendant’ under s 10(1)(n) was only relevant if it was exceptional hardship.<sup>783</sup>

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<sup>782</sup> *Crimes Act 1900* (ACT) s 429A.

<sup>783</sup> *Adami* (1989) 42 A Crim R 88, 90 (Legoe J), 92 (Bollen J, King CJ agreeing).

Yet, while the comments in the Explanatory Memorandum on s 429A of the *Crimes Act 1990* (ACT) permitted the same argument to be applied by courts that s 429A called for a restricted approach to the ‘relevance’ of family hardship as a sentencing factor, this did not occur. The ACT has been the jurisdiction that has embraced the greatest changes to sentencing following the inclusion of the factor.

The ALRC reports on sentencing reform to the federal and Australian Capital Territory sentencing laws led to extensive reforms to sentencing laws and policies in other Australian jurisdictions.<sup>784</sup> The result of these reforms was the enactment of separate statutes on sentencing, through the mid 80s and early 90s, in each jurisdiction within Australia. The sentencing frameworks which were implemented across Australia were outlined in Chapter Two.

### **(c) Renumbered but not amended**

In 2002, the section which listed sentencing factors became s 342(1) of the *Crimes Act 1900* (ACT). This section listed more than twenty sentencing factors. At paragraph (j), ‘the probable effect that any sentence or order under consideration would have on any of the person’s family or dependants’ was listed. The list of matters also included recognition of hardship to the offender. Section 342(1)(m) listed as a sentencing factor: ‘whether the recording of a conviction or the imposition of a particular sanction would be likely to cause particular hardship to the person’.<sup>785</sup> These were now long-standing sentencing factors in the ACT.<sup>786</sup>

Because of the practice of interstate imprisonment, discussed above, these two hardships (which were given legislative recognition in the Territory) were historically significant sentencing factors in the ACT. This history of detailed factors could help to explain the low custodial sentencing rates in the ACT. Certainly, the appearance of hardship in the list of sentencing factors in the ACT was not locally controversial.

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<sup>784</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders (1978-88)* (23 August 2010) Australian Law Reform Commission <<http://www.alrc.gov.au/inquiries/sentencing-federal-offenders-1978-88>>.

<sup>785</sup> In the current Act the sentencing factor is found within s 33(1)(r) of the *Crimes (Sentencing) Act 2005* (ACT) which states ‘whether the recording of a conviction or the imposition of a particular penalty would be likely to cause a particular hardship to the offender’.

<sup>786</sup> *R v Wilson* [2002] ACTSC 14 (7 March 2002) [33].

In 2004, the Standing Committee on Community Services and Social Equity for the ACT Legislative Assembly handed down its report, 'The Forgotten Victims of Crime: Families of Offenders and their Silent Sentence'.<sup>787</sup> The Report recommended greater support for the family unit<sup>788</sup> and the Committee were attracted to the idea of 'recognising the importance of families in their own right.'<sup>789</sup> The Committee recommended that the new ACT prison (the Alexander Maconochie Centre) have facilities for young children to reside with a primary caregiver.<sup>790</sup>

The current sentencing statute in the ACT is the *Crimes (Sentencing) Act 2005* (ACT). The *Crimes (Sentencing) Act 2005* (ACT) came into effect on 2 June 2006.<sup>791</sup> The Act was a consolidating Act; prior to its enactment the sentencing provisions in the ACT were located within several different legislative instruments. Despite going through various amendments,<sup>792</sup> the language of the original paragraph in s 429A(1)(m) was carried through into s 342(1)(j) of the *Crimes Act 1900* (ACT) and then into s 33(1)(o) of the *Crimes (Sentencing) Act 2005* (ACT).

Section s 33(1) of the *Crimes (Sentencing) Act 2005* (ACT) commences by stating,

In determining how an offender should be sentenced (if at all) for an offence a court must consider whichever of the following matters are relevant and known to the court...<sup>793</sup>

The phrase 'a court must consider whichever of the following matters are relevant and known to the court' is comparable to the language of the federal provision. The meaning of the phrase 'relevant and known to the court', which was also employed in the federal provision, is discussed in more detail below.

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<sup>787</sup> Legislative Assembly Standing Committee on Community Services and Social Equity, Parliament of the Australian Capital Territory, *The Forgotten Victims of Crime: Families of Offenders and their Silent Sentence*, Report 6 (2004).

<sup>788</sup> *Ibid* v, xii-xxii, 27-29.

<sup>789</sup> *Ibid* 27.

<sup>790</sup> *Ibid* 60-62.

<sup>791</sup> *Crimes (Sentencing) Act 2005* (ACT) s 2. See, also, ACT Government, *Notification Statement* (2 December 2005) A.C.T. Legislation Register <<http://www.legislation.act.gov.au/a/2005-58/notification.asp>>

<sup>792</sup> See *Crimes (Amendment) Act (Number Two) 1993* (ACT); *Crimes (Amendment) Act 1998* (ACT); *Crimes Legislation Amendment Act 2001* (ACT) s 43.

<sup>793</sup> *Crimes (Sentencing) Act 2005* (ACT) s 33(1).

Section 33(1) of the *Crimes (Sentencing) Act 2005* (ACT) contains a list of twenty-seven factors; (a) through to (za). At paragraph (o) 'the probable effect that any sentence or order under consideration would have on any of the offender's family or dependants' is listed. The drafting of this sentencing factor is identical to the federal provision. Over the various developments within the sentencing provisions in the ACT, this sentencing factor has not been altered from its original form nor was it ever removed from statute.

### *B. Resistance to Legislative Recognition*

The Commonwealth, the Australian Capital Territory and South Australia remain the only jurisdictions to incorporate hardship to an offender's family and dependants into their legislative list of sentencing factors. As described in Chapter Two, Tasmania and Western Australia have not adopted a practice of including a legislative list of sentencing factors. But what of the other jurisdictions? Did they consider legislative recognition of this sentencing factor in this period of reform? And if they did, on what basis did they reject its legislative recognition?

As a social issue within Australia there has been recognition in numerous government reports, law reform commission reports and policy documents of the serious consequences of the imprisonment of a parent upon dependent children. Aungles classified the reports produced in the 80s as 'framed within the "family crisis" model'<sup>794</sup> focusing on rehabilitation and 'an examination of the way domesticity could be used to reduce the level of recidivism'.<sup>795</sup> The reports of this era focused on prison related programs such as counselling services, improved communications (ie. mail, telephone and prison visits) and funding for volunteer support groups. The reports did not focus upon reforms to sentencing laws or practices. Aungles argues that the outcome of this work was of an 'ad hoc and limited nature'.<sup>796</sup> This next part looks at occasions when Australian jurisdictions have turned their attention to family hardship and its role or recognition sentencing legislation.

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<sup>794</sup> Ann Aungles, *The Prison and the Home: A Study of the Relationship Between Domesticity and Penalty*, The Institute of Criminology Monograph Series No 5 (1994) 105.

<sup>795</sup> Ibid.

<sup>796</sup> Ibid 106.

### 1. Rejected in Queensland

As described in Chapter Two, in Queensland, s 9(2) of the *Penalties and Sentences Act 1992* (Qld) provides the list of non-exhaustive sentencing factors to which the court must have regard. Family hardship is not a listed factor in this jurisdiction. It would appear the Queensland Legislature has focused more on minimising the impact of sentences upon dependants rather than permit an amelioration of the sentence itself.

Since 1989, female offenders have been able to request young children stay with them at the Brisbane Women's Correctional Centre.<sup>797</sup> In November 1998, the Queensland Attorney-General, Matt Foley, and the Minister for Women's Policy, Judy Spence, established a '20 member all-female'<sup>798</sup> taskforce to address the impact of the Criminal Code upon women.<sup>799</sup> The Taskforce considered the 'impact of the sentencing regime on women and sentencing options.'<sup>800</sup> The Taskforce specifically addressed, '[s]hould the needs of female offenders be taken into account on sentence?'<sup>801</sup> The Report raised two issues:

1. That the PSA [*Penalties and Sentences Act 1992* (Qld)] be amended to provide that where a court wishes to impose a custodial sentence in relation to persons with dependants, it be required to examine non-custodial options such as periodic detention orders and increase the use of intensive correction orders.
2. That the use of home detention as a direct sentencing option be examined.<sup>802</sup>

The Report stated: 'the majority of submissions...supported the notion that the court and the corrective services system should take into consideration whether the offender is a caregiver of children.'<sup>803</sup> The Taskforce reported that it 'generally

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<sup>797</sup> See Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *A Report into Children of Imprisoned Parents*, Report No 12 (1997) 24-25.

<sup>798</sup> Susan Currie and Sally Kift, 'Women Surviving as Victims in the Criminal Justice System in Queensland: Is Revictimisation Inevitable?' (1999) 15 *Queensland University of Technology Law Journal* 57, 57.

<sup>799</sup> Explanatory Memorandum, Criminal Law Amendment Bill 2000 (Qld) 1; Queensland and Taskforce on Women and the Criminal Code, 'Women and the Criminal Code' (Report of the Taskforce on Women and the Criminal Code, Office of Women's Policy, February 2000) xi.

<sup>800</sup> *Ibid* 391.

<sup>801</sup> *Ibid* 395.

<sup>802</sup> *Ibid* 396.

<sup>803</sup> *Ibid* 397.

supports the notion that the sentencing court should take into consideration the fact that the female offender is a mother, subject to certain qualifications.’<sup>804</sup>

Interestingly, this general support did not translate into a recommendation that a court be required to take family hardship into account as a sentencing factor. The Taskforce expressly noted concerns with taking that approach and appeared to have been swayed on this point by submissions from the Women’s Policy Unit at the Department of Corrective Services.<sup>805</sup> In the Report a number of extreme examples for why caution should be applied to any approach to list the sentencing factor are cited. These examples were:

...evidence would need to be placed before the sentencing court as to the offender’s family dynamics. It would not be appropriate to sentence to home detention an offender who was abusing her children. Further, should a man with dependant children who has killed the children’s mother be entitled to a sentence which would take account of his responsibilities as a father? The Taskforce also considers that other relationships might need to be taken into consideration, such as care for elderly parents.<sup>806</sup>

None of these considerations would, in fact, be detrimental to legislative recognition of family hardship as a sentencing factor.

A sentencing court would always be required to consider the particular circumstances of the case, the offender and potential the impact on dependants to determine what weight be ascribed to this sentencing factor. Judicial officers are well placed to consider evidence on offender’s personal circumstances and to balance a variety of sentencing options. This is the foundations upon which the instinctive synthesis approach to sentencing operates.

Legislative recognition of a sentencing factor and classification that the factor ‘should be taken into account’ does not mean that the factor must be accorded significant weight by the sentencing court. This nuanced point seemed to be completely overlooked by the taskforce and instead they turned their attention to

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<sup>804</sup> Ibid 398.

<sup>805</sup> Ibid.

<sup>806</sup> Ibid.



'how the correctional system presently deals with prisoners who are mothers'<sup>807</sup> and called for further research on alternative sentencing options.<sup>808</sup>

Increasing focus on human rights may give rise to reform in Queensland. In 2006 the Queensland Anti-Discrimination Commission highlighted children's rights as a core issue in its report on *Women in Prison*.<sup>809</sup> The Commission stated:

2. Children's needs are inadequately addressed. The Queensland Government explicitly acknowledges that the best interests of children are paramount, but this is not reflected in sentencing decisions affecting women, or in the treatment of women and their children in prison. Legislative reform is recommended to ensure the best interests of children are considered, both in sentencing and in the prison system.<sup>810</sup>

As a result, recommendation 57 provided:

That section 9 of the *Penalties and Sentences Act 1991* be amended to include the principle that the best interests of the child be a factor to be considered when sentencing a person with a dependent child.<sup>811</sup>

To date, s 9 of the *Penalties and Sentences Act 1991* (Qld) has not been amended.

## *2. Repeatedly Raised for Consideration in New South Wales*

In NSW, the question of whether to incorporate hardship upon an offender's dependants within a list of mitigating factors has arisen for consideration several times. Yet, taking into account the probable effect of a sentence upon an offender's dependents has never appeared in a list of sentencing factors in NSW.

From the early 1970s, female offenders in this jurisdiction could stay with their baby in a prison hospital until the child was twelve months old.<sup>812</sup> The *Nagle Report* noted that this rule operated rigidly and recommended there be greater scope for the exercise of discretion in its application.<sup>813</sup> Subsequently Mother and

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<sup>807</sup> Ibid.

<sup>808</sup> Ibid.

<sup>809</sup> Anti-Discrimination Commission (Qld), *Women in Prison* (Report, Anti-Discrimination Commission Queensland, 2006)

<sup>810</sup> Ibid 5.

<sup>811</sup> Ibid 14 and 123 (Recommendation 57).

<sup>812</sup> Maureen Miner and Angela Gorta, *Changing Conditions in a Women's Prison 1972-1984*, Research Publication No 11 (NSW Department of Corrective Services, 1986) 24. See also Betty Hounslow, Annie Stephenson, Julie Stewart and Jane Crancher, *Children of Imprisoned Parents* (The Family and Children's Services Agency, Ministry of Youth and Community Services of New South Wales, 1982) 98.

<sup>813</sup> New South Wales, Royal Commission into New South Wales Prisons, *Report of the Royal Commission into New South Wales Prisons (Nagle Report)* (1978) 369.

Baby Units were formally established in 1979.<sup>814</sup> These units began to close the following year.<sup>815</sup> Reporting in 1982, after the closure of Blaxland House (the last operating Mother and Baby Unit in New South Wales) the *Children of Imprisoned Parents Report* stated that the reason for the suspension of the unit was ‘murky and disputed.’<sup>816</sup> It was reported that the unexpected closure impacted upon women offenders who had anticipated use of the unit at sentencing.<sup>817</sup>

In 1982, the *Children of Imprisoned Parents Report* recommended the immediate reopening of the Mother and Baby Units.<sup>818</sup> Then in 1985, the NSW Taskforce on Women in Prison recommended re-opening Mother and Baby Units and advocated for greater attention to be paid to the sentencing of mothers and impact on dependent children.<sup>819</sup> The following year the Mother and Baby Units did not reopen. Instead the *Prison (Amendment) Act 1986* (NSW) was passed to amend the *Prisons Act 1952* (NSW) to include s 29(2)(c) which enabled mother’s of young children absence from their sentence,

for the purpose of enabling the prisoner to serve her sentence with her child or children in an appropriate environment determined by the Commission—such period as may be specified in the permit.<sup>820</sup>

It was not until 1996, that this jurisdiction saw a return to the accommodation of children in prison (via Full Time Residence Programs and Occasional Residence

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<sup>814</sup> Betty Hounslow, Annie Stephenson, Julie Stewart and Jane Crancher, *Children of Imprisoned Parents* (The Family and Children’s Services Agency, Ministry of Youth and Community Services of New South Wales, 1982) 99.

<sup>815</sup> See generally Betty Hounslow, Annie Stephenson, Julie Stewart and Jane Crancher, *Children of Imprisoned Parents* (The Family and Children’s Services Agency, Ministry of Youth and Community Services of New South Wales, 1982) 99-104; Maureen Miner and Angela Gorta, *Changing Conditions in a Women’s Prison 1972-1984*, Research Publication No 11 (NSW Department of Corrective Services, 1986) 5, 24-26, 41.

<sup>816</sup> Betty Hounslow, Annie Stephenson, Julie Stewart and Jane Crancher, *Children of Imprisoned Parents* (The Family and Children’s Services Agency, Ministry of Youth and Community Services of New South Wales, 1982) 101.

<sup>817</sup> *Ibid* 101-102.

<sup>818</sup> *Ibid* 109.

<sup>819</sup> Women in Prison Task Force, Parliament of New South Wales, *Report of the NSW Women in Prison Task Force* (March 1985) 118-120, 124, 202-218.

<sup>820</sup> *Prisons Act 1952* (NSW) s 29(2)(c).

Programs).<sup>821</sup> The practice of permitting mothers of young children an absence from their sentence also continued in the form of 'Local Leave Permits'.<sup>822</sup>

Interestingly, the *Children of Imprisoned Parents Report* in 1982 recommended recognition of the impact of a sentence upon dependants as a sentencing consideration in New South Wales.<sup>823</sup> The Report stated:

- i) That the defendant's responsibility for children, the needs of those children, and the likely effect of a prison sentence on the family, be taken into account as considerations in sentencing, by both lawyers and judges
- ii) That these factors be considered with a view to awarding a non-custodial sentence, wherever possible to a person with dependent children.
- iii) That pre-sentence reports be required to investigate the situation of the defendant's children, assess the likely effect of imprisonment, and report to the court on these matters.
- iv) That the practice of preparing reports on social circumstances be resumed by the Public Soliditor's social worker, and be considered as a legitimate function of her position. (error in original).<sup>824</sup>

The NSW Women in Prison Task Force recommended that the principle of last resort be given recognition in NSW sentencing legislation so that it would become a 'canon of sentencing practice'<sup>825</sup> and be less likely to be ignored or merely granted lip service in NSW sentencing practices in respect of women.<sup>826</sup>

In 1995, the New South Wales Law Reform Commission ('NSWLRC') considered whether to include a list of sentencing factors in its statute.<sup>827</sup> The Commission

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<sup>821</sup> Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *A Report into Children of Imprisoned Parents*, Report No 12 (1997) 11; Legislative Council, Parliament of New South Wales, *Interim Report: Issues Relating to Women*, Select Committee on the Increase in Prisoner Population (2000) 97. See generally Madeline Loy, 'A Study of the Mothers and Children's Program in the NSW Department of Corrective Services' (Paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, 31 October - 1 November 2000).

<sup>822</sup> See *Crimes (Administration of Sentences) Act 1999 (NSW)* s 26. See generally Madeline Loy, 'A Study of the Mothers and Children's Program in the NSW Department of Corrective Services' (Paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, 31 October - 1 November 2000).

<sup>823</sup> Betty Hounslow, Annie Stephenson, Julie Stewart and Jane Crancher, *Children of Imprisoned Parents* (The Family and Children's Services Agency, Ministry of Youth and Community Services of New South Wales, 1982) 162.

<sup>824</sup> *Ibid* 162.

<sup>825</sup> New South Wales Women in Prison Task Force, *Report of the NSW Women in Prison Task Force* (March 1985) 126 (Recommendation 50).

<sup>826</sup> *Ibid* 126.

<sup>827</sup> New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996) x.

stated that it did 'not support the reduction to statutory form of common law principles relating to sentencing'.<sup>828</sup> The following reasons were provided:

1. It is likely to stultify development of the law... Inevitably it would be constrained by literal application of the words and purposes of the statute, thus compromising the desirable flexibility and evolutionary nature of the common law discretion and its ability to adapt to changing societal values.
2. The common law of sentencing is not generally in need of restatement. Even if it were, an attempt to 'reform' it is likely to fail.
3. We are not convinced the recent legislative attempts in other Australian jurisdictions add anything to the common law...
4. In practice, statutory listing is likely to make sentencing a more time-consuming exercise without clear gain. Counterproductively, it may increase the grounds on which the sentence may be appealed, or encourage judicial officers to comply by using a formula...<sup>829</sup>

The first listed reason was a concern that had been shared by the ALRC;<sup>830</sup> but, as we have seen in the discussion above, it was a concern that was overcome in that forum.

The second reason and third reasons with the value of hindsight, were astute observations of the judicial reaction to legislative attempts to reform sentencing in this period. To support this reason, the NSWLRC had referenced the failed attempt by the ALRC to remove 'general deterrence' as a sentencing matter in 1988.<sup>831</sup> The NSWLRC were very conscious of judicial resistance to change. In respect to family hardship as a mitigating factor, in the Discussion Paper it noted that statutory reforms in South Australia, the Australian Capital Territory and Federal statutes appeared to have 'reversed the common law position'<sup>832</sup> but they identified that sentencing courts in South Australia and Western Australia 'have not interpreted the provisions in this way.'<sup>833</sup>

The NSWLRC then stated in its Report that family hardship was one of two sentencing factors where there had been repeated calls for reform.<sup>834</sup> The Report

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<sup>828</sup> Ibid 333. It had earlier stated this position in the Discussion Paper, see New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [2.7-2.12].

<sup>829</sup> New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996) 333-334.

<sup>830</sup> Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) 91.

<sup>831</sup> New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996) 332 (footnote 30). See generally *R v Paull* (1990) 20 NSWLR 427, 434; *El Karhani* (1990) 51 A Crim R 123, 126 – 131.

<sup>832</sup> New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [5.114].

<sup>833</sup> Ibid.

<sup>834</sup> New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996) 335.

stated '[i]t was suggested that the common law was unduly harsh and that a more acceptable approach is possible under s 16A(2)(p) of the *Crimes Act 1914* (Cth)'.<sup>835</sup> These were clearly calls for a similar list of sentencing factors to appear in NSW and for family hardship to appear on that list in the form of the federal provision. The NSWLRC reported that it found (through consultations) that courts had interpreted s 16A(2)(p) narrowly (eg. the West Australian federal sentencing case of *R v Sinclair*<sup>836</sup>) and in its Report stated:

...the common law is inherently more capable of dealing with questions of hardship in a flexible and evolutionary manner than would be any attempted statutory form.<sup>837</sup>

It is unclear from the Report whether the NSWLRC was supportive of reforms but thought that listing the factor in legislation would not bring change or if it was not persuaded by calls to reform to family hardship.<sup>838</sup> It is significant that family hardship was discussed in the Discussion Paper and the Report. The factor was clearly being debated and on the political agenda.

In 1997, the Legislative Council Standing Committee on Social Issues handed down its report on children of imprisoned parents<sup>839</sup> one of its 'key conclusion' was that:

A sentence of imprisonment on a primary carer of children should only be imposed when all possible alternatives have been exhausted. The courts should always seek community-based alternatives, particularly in the case of offenders who have committed non-violent offences.<sup>840</sup>

However, the Report did not contain a sophisticated engagement with sentencing law or principles. The Report stated:

Clearly, the issue of the impact of gender and motherhood on sentencing requires further research and analyses before firm conclusion can be drawn.<sup>841</sup>

The Committee did reject perceptions, said to be held by the community, that: 'mothers who are imprisoned should relinquish their rights as parents'; 'mothers

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<sup>835</sup> Ibid.

<sup>836</sup> (1990) 51 A Crim R 418.

<sup>837</sup> New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996) 335.

<sup>838</sup> The Discussion Paper had stated '...there are some circumstances in which being female is clearly relevant to sentence. Considerations of pregnancy and the needs of very young children are obvious examples.' See New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [5.47].

<sup>839</sup> Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *A Report into Children of Imprisoned Parents*, Report No 12 (1997).

<sup>840</sup> Ibid iii

<sup>841</sup> Ibid 37.

who offend should consider the consequences... before they engage in offending behaviour'; and that this matter is not the community's responsibility.<sup>842</sup> The Committee emphasised in their report that the dependent child is 'innocent of any wrongdoing'<sup>843</sup> and that access to contact and a relationship with a parent is a 'right of the child'.<sup>844</sup> There have been no identifiable changes in legal policy because of this report.

In July 2000, the Legislative Council Select Committee on the Increase in Prisoner Population handed down an Interim Report on 'Issues Relating to Women'.<sup>845</sup> The Committee did not recommend legislative reform but did recommend:

4.88 That, as a matter of urgency, the Attorney General direct the Judicial Commission of New South Wales provide ongoing education and training to judicial officers about the location, purpose and process of entry into the Department of Corrective Services Mother's and Children's program. That education should emphasise that irrespective of the existence of the program, a woman with dependent children and a woman who is pregnant, should only ever be imprisoned as a matter of last resort.<sup>846</sup> (emphasis added)

The Committee's recommendation did not engage directly with sentencing reform and sought to frame the matter as correctional management issue.

In 2002, NSW introduced its provision which set out a list of sentencing factors, s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).<sup>847</sup> The section contained 10 sentencing factors ((a)-(j)). The NSWLRC has stated that the provision was 'substantially based on s 16A of the *Crimes Act 1914* (Cth)'<sup>848</sup> however, a comparison of the two sections suggests that it was loosely based on s 16A. The federal section contained 13 sentencing factors. Consideration of other offences that are required or permitted to be taken into account (16A(2)(b)); guilty pleas (s16A(2)(g)); co-operation with law enforcement agencies (s 16A(2)(h)); and family hardship (s16A(2)(p) did not appear in the original s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The section was subject to

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<sup>842</sup> Ibid.

<sup>843</sup> Ibid.

<sup>844</sup> Ibid.

<sup>845</sup> Legislative Council, Parliament of New South Wales, *Interim Report: Issues Relating to Women*, Select Committee on the Increase in Prisoner Population (2000).

<sup>846</sup> Ibid 45.

<sup>847</sup> *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Act 2002* (NSW) Schedule 1.

<sup>848</sup> New South Wales Law Reform Commission, *Sentencing*, Report 139 (2013) 71.

reform almost immediately and a new s 21A was introduced in 2003.<sup>849</sup> The reforms included a separation of sentencing factors from sentencing purposes<sup>850</sup> and reworked s 21A to set out a list of aggravating factors ((a)-(n)) and a list of mitigating factors ((a) – (m)). Guilty pleas and co-operation with law enforcement were picked up in the new lists of factors<sup>851</sup> but family hardship and taking other offences into account were not acknowledged in the new lists.

In 2006 the Standing Committee on Law and Justice handed down a Report on community based sentencing options in rural and remote New South Wales.<sup>852</sup> The Committee recognised throughout its report that community based sentencing options benefited an offender's family.<sup>853</sup> The types of benefits recognised included the importance of the offender staying with the family when there are children impacted (noting the responsibility of childcare is often carried by female offenders);<sup>854</sup> continued income for the family where the offender is employed and reduced use of social security support;<sup>855</sup> the family of the offender do not need to visit the offender in prison which in rural communities can be particularly difficult and require long distance travel.<sup>856</sup> The Standing Committee found: 'the unavailability of the full range of community based sentencing options in many parts of NSW results in inequitable access to sentencing options for offenders in rural and remote areas.'<sup>857</sup>

The Report recognised that rural and remote areas have higher rates of imprisonment than metropolitan offenders.<sup>858</sup> It identified disadvantaged groups in rural areas which suffer from both a lack of community-based sentencing options and have difficulty accessing any available community-based sentencing

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<sup>849</sup> *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).

<sup>850</sup> *Ibid* Schedule 1 (s 3A).

<sup>851</sup> *Ibid* Schedule 1 (s 21A(3)(k) and (m)).

<sup>852</sup> See Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report 30 (2006).

<sup>853</sup> *Ibid* xii, 19, 20, 21, 22, 23, 38, 72, 147, 178, 181-182, 214, 217.

<sup>854</sup> *Ibid* [2.66], [2.72], [2.77], [3.25].

<sup>855</sup> See *Ibid* [2.63], [2.72], [2.77], [3.25].

<sup>856</sup> See *Ibid* [2.66], [2.77], [3.25]

<sup>857</sup> *Ibid* 34.

<sup>858</sup> *Ibid*.

options. Three of these identified groups were Aboriginal women,<sup>859</sup> female offenders,<sup>860</sup> and sole parents.<sup>861</sup> In addressing each of these disadvantaged groups the Legislative Council Standing Committee on Law and Justice recognised the serious impact upon dependent children of the incarceration of a care giver.<sup>862</sup> But it did not go deeper than this in its report and it did not recommend changes to s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

In 2008, the New South Wales Attorney-General asked the Sentencing Council to 'examine the practices of courts'<sup>863</sup> and legislative provisions in respect to the current principles and 'practices governing reductions in sentence'.<sup>864</sup> The Council released its report in August 2009.<sup>865</sup> The Council stated that the *Crimes (Sentencing Procedure) Act 1999* (NSW) was 'silent in relation to the relevance of hardship to family or dependants as a mitigating factor, and it accordingly falls to be considered in accordance with the common law.'<sup>866</sup> The Council recognised that family hardship was a listed sentencing factor in the federal legislation.<sup>867</sup> Yet, after reviewing the approach that had been taken to this mitigating factor in the New South Wales federal sentencing case of *R v Togias*,<sup>868</sup> the Council stated that s 16(2)(p) of the *Crimes Act 1914* (Cth) should be read as 'requiring the presence of 'exceptional hardship' in order for it to be taken into account'.<sup>869</sup> The Council concluded that:

In these circumstances the Sentencing Council does not see any need for the *Crimes (Sentencing Procedure) Act* to be amended to include a reference to hardship of this kind, to achieve harmony with Commonwealth legislation.<sup>870</sup>

The Chairperson of the NSW Sentencing Council was the Hon James Wood AO QC. During his time on the bench Wood CJ at CL supported a narrow interpretation of the common law principle of family hardship (see Chapter Four).

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<sup>859</sup> Ibid 50-51.

<sup>860</sup> Ibid 57-58.

<sup>861</sup> Ibid 61-62.

<sup>862</sup> Ibid 50-51, 57-58, 61-62, 99

<sup>863</sup> New South Wales Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009) [1.1].

<sup>864</sup> Ibid.

<sup>865</sup> New South Wales Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009).

<sup>866</sup> Ibid [4.41].

<sup>867</sup> Ibid.

<sup>868</sup> (2001) 127 A Crim R 23. This case is discussed in Chapter Five.

<sup>869</sup> New South Wales Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009) [4.43].

<sup>870</sup> Ibid [4.44].



In 2013, the New South Wales Law Reform Commission handed down a report on sentencing it did not support listing family hardship.<sup>871</sup> The Hon James Wood was the Chairperson and Lead Commissioner for this report.<sup>872</sup> The Report stated that ‘the common law position is that a court should not give substantial weight to the effect of any sentence upon third parties unless the circumstances are exceptional.’ The New South Wales case of *R v Edwards*<sup>873</sup> was provided as authority for this position (discussed further in Chapter Four) and it was claimed that ‘the common law in NSW on this matter is well known and including this factor in the proposed provision would be redundant and could cause confusion.’<sup>874</sup>

### *3. Family Hardship a Women’s Issue in Victoria*

In Victoria, in 1981 the Minister for Community Welfare Services received a Report of the (interdepartmental) Committee to Consider the Admission of Infants to Prison.<sup>875</sup> This Report resulted in legislation to permit children (up to the age of four) to reside with imprisoned parents.<sup>876</sup> Victoria also had a formal policy in 1988 from the Victorian Office of Corrections which acknowledged ‘the importance of maintaining parent-child relationships’<sup>877</sup> and best interests of the child.<sup>878</sup> Remarkably, at this time it was ‘the only Australian state whose policy...[did] not exclude fathers from applying to have their child(ren) residing with them: the policy refer[ed] throughout to “parents” ...’<sup>879</sup> Mother and Children programs are still in operation in Victorian prisons. The policy has, however, changed since its early introduction. The ability to have children reside in a prison applies only to

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<sup>871</sup> New South Wales Law Reform Commission, *Sentencing*, Report 139 (2013).

<sup>872</sup> *Ibid* xii. Note that the Hon James Wood was the Chairperson for the NSW Law Reform Commission from 2006 – 2014.

<sup>873</sup> (1996) 90 A Crim R 510.

<sup>874</sup> New South Wales Law Reform Commission, *Sentencing*, Report 139 (2013) 94.

<sup>875</sup> Cited in Carmel Benjamin, ‘Prisons, Parents and Problems’ in Sandra McKillop (ed), *Keeping People Out of Prison: Proceedings of a Conference held 27-29 March 1990* (Australian Institute of Criminology, 1991) 165, 167.

<sup>876</sup> See, eg, *Corrections Act 1986* (Vic) s 31.

<sup>877</sup> Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *A Report into Children of Imprisoned Parents*, Report No 12 (1997) 25.

<sup>878</sup> *Ibid*.

<sup>879</sup> *Ibid* 25. See also Rosemary Woodward, *Families of Prisoners: Literature Review on Issues and Difficulties*, Occasional Paper No 10 (Australian Government Department of Family and Community Services, 2003) 23.

female offenders who are pregnant or mothers and primary carers of pre-school children.<sup>880</sup>

The early sentencing statutes in the 1980s in Victoria did not engage with sentencing purposes, principles and sentencing factors.<sup>881</sup> A list of sentencing factors first appeared in Victorian legislation in 1991.<sup>882</sup> Interestingly, family hardship as a sentencing factor was part of the dialogue in the lead up to the *Sentencing Act 1991* (Vic) although it did not appear in the Act as passed. It is reported that there was dissatisfaction within the community and legal profession with the sentencing regime in operation in Victoria in the 1980s.<sup>883</sup> In October 1985, the Victorian Sentencing Committee received a term of reference on sentencing.<sup>884</sup> Interestingly the terms of reference specified the Committee consider:

...3. The impact of custodial and non-custodial sentences and the length of such sentences on... (vii) the offender and his family.

...4. The impact of remission, pre-release, parole, temporary leaves and other sentence shortening practices on... (vi) the offender and his family....<sup>885</sup>

In 1987, the Victorian Sentencing Committee released a discussion paper on sentencing law and sentencing practice in Victoria with the aim to offer 'options for reform'.<sup>886</sup> Throughout Australia, at this time there was attention upon the role of judicial discretion in sentencing and concerns about resulting 'unjustified disparity in the sentencing of offenders'.<sup>887</sup> At the time, the governing legislation was the *Penalties and Sentences Act 1985* (Vic).

While the terms of reference to the committee were not expressed in gender neutral language (see above 'offender and his family'). The Discussion Paper

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<sup>880</sup> Justice and Regulation, Victoria State Government, *Pregnancy and Childcare* (2017) Corrections, Prisons and Parole

<<http://www.corrections.vic.gov.au/home/prison/going+to+prison/pregnancy+and+childcare/>>.

<sup>881</sup> *Penalties and Sentences Act 1981* (Vic) and *Penalties and Sentences Act 1985* (Vic).

<sup>882</sup> *Sentencing Act 1991* (Vic) s 5(2).

<sup>883</sup> Victorian Sentencing Committee, *Sentencing* (Report, Victorian Attorney-General Department, April 1988) Vol 1, 1.

<sup>884</sup> *Ibid* Vol 1, iv.

<sup>885</sup> *Ibid*.

<sup>886</sup> Victorian Sentencing Committee, *Discussion Paper* (April 1987) 9.

<sup>887</sup> *Ibid* 6.

flagged the sentencing of women was one of the issues for consideration.<sup>888</sup> Family hardship was recognised in the Discussion Paper as one of the examples of mitigating factors that a sentencing court must consider and weigh up in the determination of an appropriate sentence. The paper stated:

Mitigating factors of the offender such as the offender's age and personal history, the offender's general character and reputation in the community, absence of prior convictions, the circumstances leading to the commission of the offence, e.g. provocation, domestic or emotional stress, financial difficulties, an alcohol or drug dependency, *the indirect effect of the conviction or sentences on the offender's family* or loss of career. In addition the offender's behaviour since the commission of the offence is relevant, e.g. genuine remorse, assistance to the police, payment of compensation to the victim. (emphasis added)<sup>889</sup>

The Discussion Paper flagged that:

The courts have become somewhat ambivalent in their approach to the sentencing of women. For a very long time it was considered that the fact that the offender was female and had the care of young children was a mitigating factor that would be taken into account when passing sentence. More recently, however, the Court of Criminal Appeal observed:

"...In some circumstances the sex of the offender may be a relevant consideration: in others it may not."<sup>890</sup>

The Discussion Paper went on to look at 'chivalry' towards woman offenders in the US. While the Discussion Paper did not discuss leniency to women further, it did make the connection that family hardship was a 'special consideration'<sup>891</sup> for women rather than one that could apply to men and women.

In 1988, the Victorian Attorney-General's Department published the Report of the Victorian Sentencing Committee. The Report drew upon the work of the Australian Law Reform Commission.<sup>892</sup> The Report recommended that the Penalties and Sentencing Bill include a statutory list of mitigating factors.<sup>893</sup> The Committee acknowledge that the ALRC included the 'effect of the sanction' as a type of mitigating factor<sup>894</sup> and explained that the consequences of a sentence 'ought'<sup>895</sup> to

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<sup>888</sup> Ibid 8.

<sup>889</sup> Ibid 38.

<sup>890</sup> Ibid 146. This passage was repeated in the Final Report see Victorian Sentencing Committee, *Sentencing* (Report, Victorian Attorney-General Department, April 1988) Vol 1, 372.

<sup>891</sup> Victorian Sentencing Committee, *Discussion Paper* (April 1987) 148; 182.

<sup>892</sup> See, eg, Victorian Sentencing Committee, *Sentencing* (Report, Victorian Attorney-General Department, April 1988) Vol 1, 259

<sup>893</sup> Ibid Vol 2 (Summary of Recommendations – Sum 10).

<sup>894</sup> Victorian Sentencing Committee, *Sentencing* (Report, Victorian Attorney-General Department, April 1988) Vol 1, 260.

<sup>895</sup> Ibid 266.

be taken into account by courts and that ‘such factors should be capable of mitigating a sentence imposed by the court.’<sup>896</sup>

The Report recommended family hardship be specifically acknowledged in statute as a matter a ‘court must be taken into account’.<sup>897</sup> In Volume 2 of the Report, after the Summary of Recommendations the Report set out a draft Penalties and Sentencing Bill. In this draft bill, under the heading ‘Mitigating Factors’, s 9 appeared. Section 9(1) of this bill set out a list of mitigating sentencing factors ‘which a court must consider whether one or more of the following factors are present and, if so, may reduce the sentence according’.<sup>898</sup> Sentencing factors were listed in paragraphs (a) through to (o). Sub-section (2) stated:

(2) In determining sentence a court must take account of –

(a) any indirect effect which the sentence may have on the offender of his or her dependents including –

(i) damage to the offender’s future employment or career; and

(ii) financial or emotional damage to the offender’s dependents; and

(b) if contemplating a monetary penalty, the financial circumstances of the offender.<sup>899</sup>

Therefore, family hardship was expressly endorsed by the Victorian Sentencing Committee. It was placed as a stand-alone provision under s 9 rather than under the general list of sentencing factors in sub-section 1. This was a position that was not taken up by the Victorian Government.

## V CONCLUSION

This chapter has set out how family hardship came to be a listed sentencing factor in statute in three jurisdictions in Australia. Identifying this factor in legislation (‘the probable impact of the sentence upon an offender’s dependants’) as a listed

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<sup>896</sup> Ibid.

<sup>897</sup> Victorian Sentencing Committee, *Sentencing* (Report, Victorian Attorney-General Department, April 1988) Vol 2, Sum-12.

<sup>898</sup> Ibid Vol 2 (the draft bill is printed at the end of this volume).

<sup>899</sup> Ibid Vol 2 (no page number, tacked on to end of vol 2 after Summary of Recommendations).

and legitimate sentencing factor, was an important development in the law with its inclusion being both deliberate and informed. This chapter has highlighted that the language employed in the legislative provisions is prescriptive language. In all three of the jurisdictions, the legislature has provided that a court *must* take this matter into account in sentencing where it is relevant and known. Chapter Four and Chapter Five will explore how this drafting has been interpreted by courts.

The role that these lists of sentencing factors play and the importance placed on listed factors by judicial officers is an important issue, which has received little academic attention. The legislative expression of the principle requires the court to take this factor into account.<sup>900</sup> The threshold provided within the statutory provision is that the hardship to the offender's family and dependants must be 'relevant and known'. This phrase has been discussed above and judicial approaches to this listed factor will be presented in Chapter Four and Chapter Five.

Judicial perspectives on these gradual legislative encroachments upon judicial discretion (and ultimately judicial powers) undoubtedly accounted for the lacklustre judicial response to the appearance of listed sentencing factors. The courts have generally placed little importance on legislative lists of sentencing factors.<sup>901</sup> Studies on sentencing in Australia in the early 80s have identified over two hundred sentencing factors.<sup>902</sup> Therefore, significant visibility and legitimacy was granted to those principles that were given legislative form. It follows that those sentencing factors that were listed within legislation could have gained validity from the explicit reference to them as these were sentencing factors that the legislature believed *should* be taken into account in the determination of sentence. In a matter immediately after the federal reforms Rowland J of the Western Australian Court of Appeal observed that the family hardship was included in the list of sentencing factors and that in sentencing State offenders it

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<sup>900</sup> The threshold provided with the legislation is that the factor must be 'relevant and known'. This phrase that has been discussed above and the Court's interpretation of the phrase will be presented in Chapter Four.

<sup>901</sup> See further Chapter Four and Chapter Five which contains analysis of the case law post the introduction of legislative lists of sentencing factors.

<sup>902</sup> See Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Kegan Paul, 1981) 55; Roger Douglas, 'Sentencing' in Legal Studies Department, *Guilty, Your Worship: A Study of Victoria's Magistrates' Courts* (La Trobe University, Monograph No 1, 1980) 55, 62.

was considered only in exceptional circumstances; he saw this reform as something different from the earlier position, and pointed out that the language of s 16A(2) of the *Crimes Act* was obligatory ('must').<sup>903</sup>

Similarly, the New South Wales Court of Criminal Appeal, in a matter immediately after the federal reforms, observed that s 16A(2) contained a list of sentencing factors,<sup>904</sup> and commented that family hardship was a 'novel inclusion'.<sup>905</sup> But as will be seen from the results of the study of the case law (Chapters Four and Five) family hardship was not embraced as a sentencing factor of general relevance. Chapter Four demonstrates that Australian courts have followed the common law sentencing practices of the English and Welsh courts and, accordingly, its policy as stated by Thomas was accepted into Australian sentencing practices.

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<sup>903</sup> *Oancea* (1990) 51 A Crim R 141, 155.

<sup>904</sup> *El Karhani* (1990) 51 A Crim R 123, 128.

<sup>905</sup> *Ibid* 135.

## 4. THE STATE AND TERRITORY STUDY OF FAMILY HARDSHIP

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### I INTRODUCTION

This chapter presents the outcomes of the state and territory study into family hardship. A methodical and systematic study of the sentencing case law on family hardship in Australia was conducted for this dissertation.<sup>906</sup> The study dealt with both first instance sentencing remarks and appellate court decisions of superior courts throughout Australia. Nonetheless, as indicated in Table 1, in Chapter One, there were very few first instance sentencing remarks identified through the ‘exhaustive shepardizing’ approach adopted for the study of the case law. The purpose of this study was to isolate the consideration of a specific mitigating factor (family hardship) and to trace the development of sentencing principles related to this sentencing factor.<sup>907</sup>

As described in Chapter Three, family hardship has been a listed sentencing factor in legislation in the Federal jurisdiction and in South Australian and the Australian Capital Territory. The legislative articulation of family hardship is: ‘the probable effect that any sentence or order under consideration would have on any of the person's family or dependants’.<sup>908</sup> Whilst most Australian states and territories have not specifically identified this factor in sentencing legislation, the impact of a sentence upon an offender’s family and dependants *may* be taken into account as a mitigating factor at sentencing under the common law.<sup>909</sup>

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<sup>906</sup> See Chapter One ‘Method for Study of the Case Law’.

<sup>907</sup> As explained in Chapter One, this study does not seek to provide results on the number of times family hardship has been raised for consideration in sentencing decisions in each jurisdiction.

<sup>908</sup> *Crimes Act 1914* (Cth) s 16A(2)(p) and *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(o). Very similar language is adopted in South Australia see *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(n) – ‘the probable effect that any sentence under consideration would have on dependants of the defendant’.

<sup>909</sup> See Chapter Three.

The aim of the study of the case law was to identify sentencing principles and the prevailing practice in respect of family hardship as a mitigating factor in each state and territory within Australia. This chapter will set out the results of the state and territory study and present the key findings of the qualitative analysis of this body of case law. The research questions, addressed by the study of the state and territory case law, were:

- How have courts historically dealt with family hardship under the common law?
- Where family hardship has received legislative recognition, has this affected judicial sentencing practice?
- What are the influential cases on family hardship in Australia and what influence have these had on sentencing principles and practice?<sup>910</sup>

There were four key findings:

**Finding 1: Body of Cases that Meaningfully Engage with Family Hardship**

In accordance with the method adopted for this study (see Chapter One), a body of case law was identified in Australia. The table of cases that meaningfully engaged with family hardship as a mitigating factor in each jurisdiction is one of the outcomes of this study and is available in Appendix A. The number of citations each case received throughout Australia is also an important outcome of this study and these data are represented below and in the tables within Appendix A.

**Finding 2: Reveal the Development of Sentencing Jurisprudence on Family Hardship**

Through a systematic and qualitative analysis of case law on family hardship within Australia, this study has revealed the development of sentencing jurisprudence on family hardship. These findings are set out in this Chapter.

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<sup>910</sup> See Chapter One ‘The Research Questions’.



This Chapter also explains that a result of the study of the case law was the identification of legal narratives in the law. Prominent legal narratives were mercy and gender and these narratives added confusion and tension within superior courts as to the appropriate role of family hardship in sentencing. The relationship of family hardship with mercy and gender is considered in more detail in Chapter Six. A review of the research literature in Chapter Six highlights that gender and mercy are intimately connected with family hardship as a sentencing factor and are held to be the source of controversy regarding judicial consideration of family hardship at sentencing.

### Finding 3: Identification of Cases with a High Juristic Status

By studying the arguments presented to superior courts, as expressed in the sentencing remarks and judgments, the place and relevance of hardship to family and dependants in sentencing can be revealed. Horizontal and vertical checks have been conducted for each case included within the study.<sup>911</sup> Therefore, as a result of this research, this chapter presents where adversarial debate has focused its attention and identifies influential cases in the Australian common law jurisprudence.

The identification of particular state and territory approaches to family hardship as a mitigating factor under the common law was another important outcome of the qualitative analysis of the case law. The results of this analysis are set out below. Chapter Five also looks at these findings in the context of the body of federal case law on family hardship.

### Finding 4: Evaluation of the Impact of Legislative Recognition

In Chapter Three, I demonstrated that the inclusion of family hardship as a sentencing factor was a deliberate move by the legislatures to affect and adjust judicial sentencing practices. The adoption of a legislative list of factors was seen as an approach that would encourage greater consistency in sentencing. An important question that this study of the case law sought

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<sup>911</sup> See discussion of the method adopted for this study in Chapter One.

to address is whether legislative recognition of this factor did, in fact, affect judicial sentencing practice.

In the first part of this chapter the jurisdictions of South Australia and the Australian Capital Territory will be discussed. The analysis of the federal jurisdiction has been separated out to the next chapter (see Chapter Five). This separation of analysis enables reflection upon the state and territory sentencing practices and permits comparison with the federal sentencing practices on family hardship. The findings of this study in relation to the evaluation of the impact of legislative recognition will be addressed in Chapter Five.

## II FAMILY HARDSHIP: LISTED IN LEGISLATION

### *A. South Australia*

South Australia was the first jurisdiction to list family hardship in the legislative list of factors, therefore, this part of the chapter commences with an analysis of the South Australian case law. The study of family hardship in South Australia resulted in the analysis of 52 cases (see Appendix A). All of these cases were appellate court judgments. The gender of the offender raising family hardship was a male in 84% of these cases and female in only 16% of the cases.

The study of the case law has revealed that the most influential case on family hardship within Australia is the South Australian case of *R v Wirth*.<sup>912</sup> This case received 102 citations and has been picked up in all state and territory jurisdictions as well as the federal jurisdiction. This case and development of the common law within South Australia, prior to the legislative recognition of family hardship as a sentencing factor and after, is discussed below.

The examination of the South Australian case law reveals that until the legislature listed family hardship as a sentencing factor, within South Australia, courts

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<sup>912</sup> (1976) 14 SASR 291, 293-294 ('*Wirth*').

approached family hardship on the basis that in exceptional circumstances family hardship may mitigate what was otherwise a just sentence. Family hardship, in these early cases, was seen as a feature of sentencing which involved an exercise of the residual discretion of mercy rather than as a sentencing factor to be taken into account in determining an appropriate sentence.

### *1. Early Case Law in South Australia*

The analysis of the early case law of South Australia identified cases ranging from 1969 – 1987. The study of the case law, prior to the passage of the *Criminal Law (Sentencing) Act 1988* (SA), identified twelve cases which explicitly engaged with family hardship's relationship to sentencing. These were all appellate court decisions concerning a primary offender and 73% of these cases involved a male appellant. Therefore, it would be wrong to think that traditionally family hardship was raised only in the sentencing of female offenders. The early cases dealt with whether family hardship *should* be taken into account in sentencing. The case law also dealt with *when* in the sentencing process it arose.

The earliest case in this jurisdiction identified by this study was the High Court decision of *Cobiac v Liddy* (1969).<sup>913</sup> The appellant was a 72-year-old male who was charged with driving offences whilst intoxicated. The issue before the High Court was whether discretionary powers conferred upon a court to take into account mitigating factors when a 'person is charged before a court of summary jurisdiction',<sup>914</sup> could be exercised when a person is charged under s 47 of the *Road Traffic Act 1961-1967* (SA). In obiter, Chief Justice Barwick, Kitto and Owen JJ<sup>915</sup> queried whether the fact that the offender lived with and cared for his 86-year-old sister, fell within the sentencing factors of 'character' or 'antecedents'.<sup>916</sup> They accepted that, 'having regard...to the fact that to send the appellant to gaol would subject him to distress by reason of his being thereby prevented from caring for his aged sister...'<sup>917</sup> it was a relevant factor. Therefore, the joint judgment found that it was a relevant consideration because of its impact upon the offender; the hardship

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<sup>913</sup> (1969) 119 CLR 257.

<sup>914</sup> *Offenders Probation Act 1913-1963* (SA) s 4(1).

<sup>915</sup> Justice McTiernan did not address the offender's care for his sister in his judgment.

<sup>916</sup> *Cobiac v Liddy* (1969) 119 CLR 257, 265.

<sup>917</sup> *Ibid.*

upon the offender arising from him not being able to live with and care for his sister. This approach framed the sentencing consideration in terms of a traditional approach to sentencing in which the sentencing factors were tied to either the offence itself or the offender.

In *Cobiac v Liddy*, Justice Windeyer (in a separate judgement) commented on the role of mitigation within the criminal justice system. He stated:

The whole history of criminal justice has shewn that severity of punishment begets the need of a capacity for mercy.

...

This is not because mercy, in Portia's sense, should season justice. It is that a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice. Therefore, I do not think it should be said that the Parliament of South Australia has done by implication what it certainly has not done explicitly, namely removed the offence in question from within the purview of the *Offenders Probation Act*.<sup>918</sup>

While using the terminology of mercy, Windeyer J was speaking to the importance and role of mitigating factors in sentencing. He was supporting the continued role and importance of judicial discretion in sentencing.

Justice Windeyer found that all of the circumstances considered by the magistrate at sentence including 'the circumstances of his aged sister being dependent on him'<sup>919</sup> were matters he was entitled to take into account at sentencing. However, it is not clear from his judgment that he accepted hardship to third parties as a sentencing factor. Rather, he appeared to view these impacts as hardship to the offender in consequence of hardship to the family. Thus, for example, Justice Windeyer went on to describe this sentencing factor in the context of the importance of the appellant's 'good behaviour' to his sister. Justice Windeyer stated that he thought this factor had the potential to fall under a broad definition of 'antecedents'.<sup>920</sup> Therefore, Windeyer J's analysis of this circumstance, like the traditional approach taken by Barwick CJ, Kitto and Owen JJ, considered the factor by analysing its impact upon the offender.

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<sup>918</sup> Ibid 269.

<sup>919</sup> Ibid 276.

<sup>920</sup> Ibid 276 – 277. The South Australian courts later found that 'antecedents' did not encompass family hardship see *Jones v Morley* (1981) 29 SASR 57, 60-61); *Jones v Morley* (1981) 29 SASR 62, 64.

The following table shows the number of ‘hits’ *Cobiac v Liddy* received within this study. It shows the case has a reasonable citation record in family hardship matters in South Australia, Victoria, Western Australia and in Federal sentencing matters.

**Table 6: Citations to *Cobiac v Liddy* Within the Study**

Jurisdiction	SA	CTH	ACT	NSW	NT	QLD	TAS	VIC	WA
Number of citations	5	3	-	-	-	-	-	3	4

To see these results within the context of the broader study see Appendix A.

In 1972, in *Jarrett v Samuels*,<sup>921</sup> the impact of a custodial sentence upon the female offender’s dependants was in issue before the Supreme Court of South Australia. At sentencing, expert evidence had been provided of the impact a custodial sentence would have upon her sick child. The Chief Summary Magistrate stated:

The question of the effect that a term of imprisonment to be served by the mother would have on the child is a matter which is not appropriate for consideration by the court imposing sentence but may be considered by the Governor in Executive Council in the exercise of the prerogative of mercy.<sup>922</sup>

The appellant appealed the custodial sentence imposed upon her for fraud offences by a summary court.

On appeal, Mitchell J endorsed the position of the Chief Summary Magistrate.

Mitchell J stated:

This is a matter which it would seem to me is very proper to be considered by the proper authorities in the exercise of the prerogative of mercy, but it is not a matter which I or any other court can take into account.<sup>923</sup>

Justice Mitchell, therefore, did not see family hardship as a sentencing factor but as a factor relevant to the Executive’s exercise of the prerogative of mercy.

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<sup>921</sup> (1972) 4 SASR 78.

<sup>922</sup> *Jarrett v Samuels* (1972) 4 SASR 78, 80.

<sup>923</sup> *Ibid.*

Two years later,<sup>924</sup> Bray CJ heard an appeal against sentence in *Moore v Fingleton*<sup>925</sup> where he also found that mercy is a matter for the Crown and not a court. In line with the High Court’s traditional analysis in *Cobiac v Liddy*,<sup>926</sup> Bray CJ stated that sentencing factors must relate to the offender or the crime whereas the impact on dependants was a ‘circumstances peculiar to someone else’.<sup>927</sup> Thus it was not a matter to be considered alongside sentencing factors.

In *Moore v Fingleton*, the appellant had been sentenced to six months imprisonment with hard labour for stealing two suits (valued at approx. \$140).<sup>928</sup> She was pregnant, had a dependent eight-year-old son and a 10 month-old daughter who had spina bifida and required full time care from her mother.<sup>929</sup> While accepting that there were socially beneficial outcomes in taking into consideration the impact of the sentence upon her dependants, Bray CJ emphasised in his judgment that this was a matter for the Executive and that the duty of the court was to ‘mete out even-handed justice.’<sup>930</sup> So again family hardship was cast as an issue to be potentially calling for mercy rather than as a sentencing factor to be considered within the sentencing exercise.

**(a) The most influential case on family hardship**

As mentioned above, this study has identified *Wirth* as the most influential case on family hardship in Australia. *Wirth* was also identified by this study, as the most cited case within South Australia with twenty-five citations (see Table 7).

**Table 7: Citations to *Wirth* within the Study**

Jurisdiction	SA	CTH	ACT	NSW	NT	QLD	TAS	VIC	WA
Number of citations	25	12	3	24	4	1	3	13	17

<sup>924</sup> *Jarrett v Samuels* was heard 13 October 1970. *Moore v Fingleton* was heard 1 June 1972.

<sup>925</sup> (1972) 3 SASR 164.

<sup>926</sup> (1969) 119 CLR 257.

<sup>927</sup> (1972) 3 SASR 164, 168.

<sup>928</sup> *Ibid* 164.

<sup>929</sup> *Ibid* 166.

<sup>930</sup> *Ibid* 170. This relationship between equality and mercy is discussed further in Chapter Six.

The facts of the case in *Wirth* were unique and it is curious that this was the case which gave rise to deeper consideration of the role of family hardship in sentencing. In this case, the appellant was a bank teller who had been convicted of larceny. He had borrowed money, using his parent's house and mother-in-law's house as security, to make restitution to the bank for his offence. He was sentenced to two concurrent terms of two years imprisonment with hard labour, which meant that he would be unable to service the loan and his family members would lose their homes.

In *Wirth*, none of the members of the Full Court of the Supreme Court found that these were circumstances that should have been taken into account. Importantly both Bray CJ and Wells J, Sangster J agreeing, identified that, in the circumstances of this case, the hardship would not have been caused but for the additional acts of the offender.<sup>931</sup> Chief Justice Bray likened the circumstances to 'vicarious atonement for crime' where the offender attempted to use the generosity of others to 'in effect...purchase leniency.'<sup>932</sup>

However, it is the judgment of Justice Wells in *Wirth*, which has attracted judicial attention on the issue of family hardship. Justice Wells agreed with both Bray CJ and Sangster J that the appeal should be dismissed. But, he delivered a separate judgment to address a 'principle of public importance',<sup>933</sup>:

When (if ever), and to what extent (if at all), should the hardship caused directly or indirectly, by a proposed sentence of imprisonment, to the family of, or to others closely associated with, the offender be taken into account by the Court in mitigation of the sentence?<sup>934</sup>

In his well-known response to this question, Well J stated:

Hardship to spouse, family, and friends, is the tragic, but inevitable, consequence of almost every conviction and penalty recorded in a Criminal Court. Again and again, sentencing judges point out that convicted persons should have thought about the likely consequences of what they were doing before they did it – I am, of course, addressing myself to the more serious crimes in which some form of premeditation, wilfulness, or intent, must be proved. It seems to me that courts would often do less than their clear duty – especially, where the element of retribution, deterrence, [sic] or protection of society is the predominant consideration – if they allowed themselves to be much influenced by the hardship that prison sentences, which from all other

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<sup>931</sup> Ibid 293-294 (Bray CJ) and 295 (Wells J).

<sup>932</sup> Ibid 294.

<sup>933</sup> (1976) 14 SASR 291, 294.

<sup>934</sup> Ibid 295.

points of view were justified, would be likely to cause those near and dear to prisoners.

But it has been often remarked that the strength of our law lies in the willingness of judges, when applying a principle, not to carry it past the point where a sense of mercy or of affronted common sense imperatively demands that they should draw back. So it is proper that I should here add that, in my opinion, hardship likely to be caused by a sentence of imprisonment under consideration ought to be taken into account where the circumstances are highly exceptional, where it would be, in effect, inhuman to refuse to do so.<sup>935</sup>

Justice Wells was clearly expressing a general position on the role of family hardship in sentencing. He spoke of the application of principles at sentencing but held that it was important that sentencing judges in the application of principles should not do so in a manner where a 'sense of mercy or of affronted common sense imperatively demands that they should draw back'.<sup>936</sup> Thus, for Wells J in *Wirth*, family hardship arose as a consideration after the application of sentencing principles, in what has in later case law been described as a residual discretion of mercy.

This examination of the early case law in South Australia reveals that the Supreme Court of South Australia did appreciate that there was a practice of mitigating sentences in exceptional circumstances because of hardship to dependants in England.<sup>937</sup> In *Wirth*,<sup>938</sup> Bray CJ commented more extensively on the practice of the England and Wales Court of Appeal Criminal Division and Thomas' commentary in *Principles of Sentencing*. Chief Justice Bray noted that, despite differences in the governing legislation on the grounds for appeal, the family hardship decisions may 'reflect a general change of policy'<sup>939</sup> by that Court. Drawing upon his position in *Moore v Fingleton*, Bray CJ favoured a strong separation between the role of the Crown and the courts. But he conceded that in 'extreme cases' it may be appropriate for a court to take family hardship into account in sentencing but that he could not 'envisage circumstances in which it would be logical to do so'.<sup>940</sup> In

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<sup>935</sup> Ibid 296.

<sup>936</sup> Ibid.

<sup>937</sup> See *Moore v Fingleton* (1972) 3 SASR 164, 169 (Bray CJ); *Tame v Fingleton* (1974) 8 SASR 507, 511 (Walters J).

<sup>938</sup> (1976) 14 SASR 291, 293-294.

<sup>939</sup> Ibid 293.

<sup>940</sup> Ibid 294



*Wirth*, Bray CJ expressly rejected the suggestion that family hardship was a sentencing factor that could carry more weight in the sentencing of women.<sup>941</sup>

In the early 1980s in the case of *R v Spiers*,<sup>942</sup> a Full Court of the Supreme Court of South Australia once again considered the issue of the role of family hardship. The male offender had been convicted of two counts of possession (of Indian hemp). The judge imposed a suspended sentence and the Attorney-General appealed this sentence. The male offender had a young wife (18 years of age) and a newly born child who at the time of sentence was in hospital in the intensive care unit because of a small jaw and cleft palate.

In *Spiers*, the Court dismissed the appeal (2:1). Justice Wells remarked:

All one can say with confidence is that the comprehension and insight of an experienced trial judge may, once in a while, lead him, rightly, to suspend when all the impersonal canons of sentencing seem to unite in declaring that a custodial sentence is called for. Such a suspension may be called for, in my judgment and experience, where to ignore the compassionate features would clearly be to destroy, and to acknowledge them would just as clearly be to promote strongly, the rehabilitative force of a primary sentence. But, I repeat, the circumstances must be extraordinary, and the trial judge must be confident that the proposed order would have the effect just referred to.<sup>943</sup>

Consistent with the approach taken by Wells J, Mitchell ACJ held there was no error in the sentence imposed. As to the role and place of family hardship the approaches of the two Judges are quite similar.

In *Spiers*, Wells J placed family hardship as arising beyond, or after, the normal sentencing deliberation involving the weighing of sentencing factors. Justice Wells equated family hardship to an exercise of compassion.<sup>944</sup> Similarly, Mitchell ACJ saw family hardship as outside the normal consideration of sentencing factors and expressed it as falling within the province of mercy. This point was clearly made quoting *R v Osenkowski*<sup>945</sup> with approval: '[t]here must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case.' Acting Chief Justice Mitchell found:

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<sup>941</sup> Ibid 293.

<sup>942</sup> *R v Spiers* (1983) 34 SASR 546 (Mitchell ACJ, Wells and Sangster JJ) (*'Spiers'*).

<sup>943</sup> Ibid 551.

<sup>944</sup> Ibid 550.

<sup>945</sup> (1982) 30 SASR 212. This case is not a family hardship case.

I have no doubt that that was the view taken by the learned sentencing judge having regard to the matters which I have mentioned, namely the fact that the respondent had married; that he and his young wife had the shared problem of a very sick baby; and that the respondent had a job which appeared to be secure.<sup>946</sup>

*Spiers* illustrates well the narrow scope for sentencing appeals in Australia and the respect provided to the judicial intuition of sentencing judges (discussed in Chapter Two above).

Justice Sangster, in dissent, stated that ‘there can be no doubt that the respondent was extremely fortunate to receive such undeservedly lenient treatment’.<sup>947</sup> He also cited *R v Osenkowski* and accepted, following *Wirth*, that in ‘extreme cases a court can take into account the effect of the sentence on the offender’s family’.<sup>948</sup> On the facts of this case, he thought there was ‘only just-sufficient material’<sup>949</sup> for the sentencing Judge to take into account potential family hardship.

In summary, the examination of the early case law of South Australia highlights that appellate courts were reluctant to accept family hardship as a sentencing factor and were influenced by the traditional approach to sentencing which provided that matters which were relevant considerations in the act of determining a sentence were those matters that were connected to the commission of the crime or matters that directly impacted upon the offender.<sup>950</sup> However, they did accept direction from the UK towards (what was described as a ‘policy’<sup>951</sup>) of taking family hardship into account at sentencing in exceptional cases. Albeit in these early cases the Supreme Court of South Australia saw family hardship as arising after the weighing of sentencing factors, and, therefore, as an exercise of judicial mercy.

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<sup>946</sup> Ibid 549-550.

<sup>947</sup> Ibid 553.

<sup>948</sup> Ibid 554.

<sup>949</sup> Ibid.

<sup>950</sup> See *Cobiac v Liddy* (1969) 119 CLR 257; *Jarrett v Samuels* (1972) 4 SASR 78; *Moore v Fingleton* (1972) 3 SASR 164, 168 (Bray CJ); *Tame v Fingleton* (1974) 8 SASR 507, 511 (Walters J); *Amuso* (1987) 32 A Crim R 308, 314.

<sup>951</sup> See, eg, *Amuso* (1987) 32 A Crim R 308, 313.

## 2. Case Law After Recognition of Family Hardship in Legislation

On 1 January 1988, the South Australian Parliament enacted the *Criminal Law (Sentencing) Act 1988 (SA)* ('*CL(S)A*'). As described in Chapter Three, the new sentencing statute provided a list of sentencing factors which a court should take into account when sentencing an offender. Section 10(1) commenced with the following: 'A court, in determining sentence for an offence, should have regard to such of the following matters as are relevant and known to the court.'<sup>952</sup> Family hardship was identified in this list at paragraph (n): 'the probable effect any sentence under consideration would have on dependants of the defendant'.<sup>953</sup>

Immediately following the passage of the *CL(S)A* the case of *Adami*<sup>954</sup> came before the Supreme Court of South Australia. In this case two brothers (convicted for cultivating between 16 000-32 000 Indian hemp plants) appealed against the severity of their sentence. The ground of appeal put before the court was that the court, at first instance, had failed to take into account the effect of imprisonment upon their businesses and consequently the effect upon their families due to their inability to provide financially for their families.<sup>955</sup>

The circumstances of this case were that the two brothers each commenced a family business whilst they were on bail. An analogy could be drawn between this and the circumstances in *Wirth* where the Court had rejected the ability of an offender to mitigate a sentence when the offender had engaged in additional acts while awaiting trial which were the basis for the hardship claim. In *Adami*, the brothers had commenced businesses *post* offending, which they then sought to rely upon as the basis of a hardship claim.

Justice Legoe mentioned that the businesses had been commenced 'while on bail and awaiting trial',<sup>956</sup> however, he dismissed the appeal on the basis that the sentencing judge had considered family hardship but came to the decision it was

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<sup>952</sup> *Criminal Law (Sentencing) Act 1988 (SA)* s 10(1). See also, the title to s 10 which was 'Matters to which a sentencing court should have regard'.

<sup>953</sup> *Criminal Law (Sentencing) Act 1988 (SA)* s 10(1)(n).

<sup>954</sup> *Adami* (1989) 42 A Crim R 88.

<sup>955</sup> *Ibid* 91.

<sup>956</sup> *Ibid* 90.

not appropriate to suspend the sentence. Justice Bollen (King CJ agreeing) engaged directly with the timing of the commencement of the businesses and specified that where one engages in additional acts which form the basis for the hardship s/he cannot claim the effect of the sentence upon dependants falls within the threshold of 'exceptional'.<sup>957</sup>

The *Adami* case is significant because the Supreme Court of South Australia took this early opportunity to comment upon the new *CL(S)A* and did so specifically in respect to the impact of s 10(1). Justice Legoe stated that the matters listed in the legislative list of sentencing factors were factors that had always been sentencing considerations. He stated:

It is obvious from a fair and proper reading of the section in the context of this particular Act, that the discretionary powers of the sentencing court are left to the general law as laid down in the cases enunciating numerous principles of sentencing.<sup>958</sup>

Justice Bollen (King CJ agreeing) agreed with Legoe J that the Court had always taken the listed matters into account.

Justice Bollen (King CJ agreeing) focused on the use of the term 'relevant' in s 10(1) and said that it 'must mean "relevant to the case at Bar"'.<sup>959</sup> On this basis, he rejected the appellants' argument that s 10(1)(n) changed the law and held:

[t]he probable effect of a sentence on dependants is still relevant only in exceptional cases. The section does not change the law on this point. Moreover, s 10 is no more than a section which declares what has always been the law.<sup>960</sup>

In *Adami*, the Supreme Court of South Australia, rejected the argument that the listing of family hardship in s 10(1)(n) of the *CL(S)A* changed the law. Interestingly the Court did so without discussing mercy or the history of the earlier South Australian cases that this study has revealed focused upon compassion and mercy.

The *Adami* case was the second most influential case in South Australia (after *Wirth*) with 17 citations. The case has been used as a shield to claims that family hardship under s 10(1)(n) is a valid sentencing factor regardless of whether there

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<sup>957</sup> Ibid 92.

<sup>958</sup> Ibid 90.

<sup>959</sup> Ibid 92.

<sup>960</sup> Ibid.

are exceptional circumstances. The study of the case law has revealed that this case has been picked up by family hardship cases in other jurisdictions (see Table 8).

**Table 8: Citations to *Adami* within the Study**

Jurisdiction	SA	CTH	ACT	NSW	NT	QLD	TAS	VIC	WA
Number of citations	17	8	1	3	3	1	-	3	1

Reliance upon *Adami* in other jurisdictions is discussed further below (in the qualitative analysis in each state and territory).

**(a) But, listed as a sentencing factor...**

Importantly, in 1997, Perry J in *Bates v Police*,<sup>961</sup> qualified the position taken in *Adami*. In *Bates*, an appeal before a single judge, the appellant argued that the sentencing magistrate had ‘erred in failing to consider whether the circumstances of the appellant and the offence were such that they provided a basis for the imposition of a penalty other than a term of imprisonment.’<sup>962</sup> The 23-year-old offender had been convicted of three traffic charges arising out of one act (unregistered, uninsured and disqualified driving). He was a repeat offender with two previous convictions.<sup>963</sup> He was unemployed and had been caring for his sister’s two young children while she was imprisoned. When his sister had committed suicide in custody *Bates*, at the age of 19, had become the sole carer for the children. There was no other family who could care for the children if he was imprisoned.<sup>964</sup>

At sentencing the magistrate had stated, ‘the effect of the sentence on the persons reliant on an offender should be given less weight than some other factors in sentencing.’<sup>965</sup> Justice Perry found this was an error and that under s 10(1) of the

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<sup>961</sup> (1997) 70 SASR 66 (‘*Bates*’).

<sup>962</sup> *Ibid* 68.

<sup>963</sup> *Ibid* 67-68.

<sup>964</sup> *Ibid* 68.

<sup>965</sup> *Ibid*.

*CL(S)A* none of the listed factors ‘must necessarily be given less weight than other factors appearing in the other subparagraphs.’<sup>966</sup>

Justice Perry cited the position in *Adami* that a court can take the impact upon dependants into account in exceptional cases, but held that:

Properly understood, I do not think that the explanation of the principle which appears in that passage is at odds with s 10(n) of the *Criminal Law (Sentencing) Act*. Although regard will be had in all cases to the effect of the imposition of a custodial sentence on dependants of the defendant, it will only have a significant effect on penalty if the effect which it has in that respect in the particular case is out of the ordinary.<sup>967</sup>

This interpretation of *Adami*, was cited with approval and adopted by Doyle CJ (Martin and Besanko JJ agreeing) in *R v Carpentieri*<sup>968</sup> (see below).

In *Bates*, Perry J found that the magistrate had erred in failing to give sufficient recognition to family hardship in this case.<sup>969</sup> Justice Perry was influenced by his decision the year earlier in the federal case of *Walsh v Department of Social Security*<sup>970</sup> (*Walsh*). This federal case had involved the sentencing of a husband and wife who had three young dependent children (there was also evidence provided that the children suffered from severe asthma which had previously required hospitalisation).<sup>971</sup> Justice Perry observed that s 10(1)(n) was indistinguishable from the federal provision in s 16A(2)(p) of the *Crimes Act 1914* (Cth).<sup>972</sup>

Justice Perry was influenced by the importance of human rights in his framing of the scope of s 10(1)(n) and s 16(2)(p). In his judgment in *Bates* he cited, in full, his comments on this from *Walsh*, stating:

Various international instruments which have been entered into by Australia emphasise the protection by the society and the State of the family as the natural and fundamental group unit of society, and preservation of the rights of children. Although such international instruments do not form part of Australian law, they serve to underscore the importance of provisions such as s 16A(2)(p) of the *Crimes Act*, which, where possible, should be construed and

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<sup>966</sup> *Ibid.*

<sup>967</sup> *Ibid* 69.

<sup>968</sup> (2001) 81 SASR 164, [19] (*‘Carpentieri’*).

<sup>969</sup> *Ibid* 71.

<sup>970</sup> (1996) 67 SASR 143.

<sup>971</sup> *Ibid* 70.

<sup>972</sup> Examined further in Chapter Five.

applied consistently with them. So that while we should always bear in mind the principles which find expression in relevant international instruments, particularly those which have to do with human rights, recourse to them in this case is hardly necessary, as s 16A(2)(p) of the Act is clear and unambiguous in its terms.<sup>973</sup>

Therefore, the approach laid down in *Bates* by Perry J saw family hardship as a sentencing factor. This was premised upon the placement of this factor, under the legislation, as a listed sentencing factor. What was not openly acknowledged in his judgement was that this moved consideration of family hardship away from mercy (which falls at the end of the exercise of the sentencing discretion) and, instead, positioned it as a factor that arose for consideration in sentencing alongside other sentencing factors. Albeit, he retained the view that the factor would only carry significant weight in exceptional cases stating:

Although regard will be had in all cases to the effect of the imposition of a custodial sentence on dependants of the defendant, it will only have a significant effect on penalty if the effect which it has in that respect in the particular case is out of the ordinary.<sup>974</sup>

In 2001, in *Carpentieri*<sup>975</sup>, a Full Court of the Supreme Court of South Australia endorsed Perry J's reading of *Adami*.

In *Carpentieri*, Doyle CJ (Martin and Besanko JJ agreeing) observed that the CL(S)A had not changed the law. He said:

Section 10(1) of the *Criminal Law (Sentencing) Act 1988* (SA) directs that a sentencing court should have regard to a number of matters including the probable effect of any sentence on dependants of an offender. That section has been interpreted as not altering the common law principles...<sup>976</sup>

As to the application of sentencing principle, Doyle CJ said:

I accept the submission by Mr Wells that, at common law and under the Sentencing Act, a court must have regards to the probable effect of a sentence on the dependants of the defendant. In this case the relevant effect is the effect on Mrs Carpentieri. However, the effect of the cases referred to is that ordinary hardship to a defendant will not be a reason to mitigate or reduce a penalty, but in exceptional cases that hardship may be a reason to do so. I consider that Perry J accurately summarised the position in *Bates v Police*... That is the approach that I would take in this case.<sup>977</sup>

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<sup>973</sup> Ibid 70.

<sup>974</sup> Ibid 69.

<sup>975</sup> *Carpentieri* (2001) 81 SASR 164.

<sup>976</sup> Ibid 167.

<sup>977</sup> Ibid 168.

In light of the analysis of the earlier case law in South Australia and the approach that had been adopted by the Supreme Court of South Australia (see above), accepting family hardship as a sentencing principle was a substantive change in approach. While, the Court maintained the position that family hardship only carried significant weight at sentencing in exceptional circumstances, it is significant, that family hardship shifted from a consideration that arose as part of the courts' discretion to exercise judicial mercy (after all relevant sentencing law had been applied) to a consideration that arose as part of the sentencing exercise as a sentencing factor to be balanced against other sentencing considerations. As a matter of law, after the introduction of the *CL(S)A* family hardship had moved from a factor outside of sentencing law to a factor falling within sentencing law. The theoretical importance of this, has not been acknowledged by the Supreme Court of South Australia.

In *Carpentieri*, Doyle CJ (Martin and Besanko JJ agreeing) held that, in the circumstances of this case, the impact upon Mrs Carpentieri did not meet the threshold of 'exceptional' hardship. Mr Carpentieri had been convicted of producing and possessing cannabis for sale; he had grown 25 plants and possessed in excess of 10kg of cannabis.<sup>978</sup> The court found that the seriousness of the offences, the prevalence of the offences in the jurisdiction and the need for a deterrent punishment<sup>979</sup> supported the need for a custodial sentence.

The study of the case law has revealed that *Bates* and *Carpentieri* have good citation records in South Australian hardship cases. However, in stark contrast to *Adami*, these judgments have not been picked up in other jurisdictions (see Table 9). Nor has the federal case of *Walsh* (which influenced Perry J's analysis in *Bates*) had significant recognition. Of course, *Bates*, *Carpentieri* and *Walsh* arise in the context of family hardship being a listed sentencing factor in legislation at the time of sentencing.

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<sup>978</sup> Ibid 165.

<sup>979</sup> Ibid 173.



**Table 9: Citations to *Bates*, *Carpentieri* and *Walsh* within the study**

Jurisdiction		SA	CTH	ACT	NSW	NT	QLD	TAS	VIC	WA
Number of citations within the study	<i>Bates</i>	10	1	-	-	-	-	-	-	-
	<i>Carpentieri</i>	14	-	1	-	-	-	1	-	-
	<i>Walsh</i>	2	4	-	-	-	-	-	4	-

**(b) Judicial discussion of the rationale**

In *Neill v Police*,<sup>980</sup> Doyle CJ, in an appeal against a sentence imposed in the Magistrate’s Court, clarified the rationale behind taking family hardship into account in sentencing. This judgment has a high juristic status in South Australia (with 11 local ‘hits’, see Table 10 below). Chief Justice Doyle observed that family hardship does not ‘control the outcome’<sup>981</sup> of a sentence. He found it was a sentencing factor that may be taken into account alongside other relevant sentencing factors.

A reading of the family hardship case law highlights that there was ongoing paranoia within the profession about creating a special class of offender, and judgments were quick to direct that taking family hardship into account did not mean that where dependants would be impacted an offender could not be sentenced to imprisonment.<sup>982</sup> Why this sentencing factor has triggered such panicked responses (of an ‘all or nothing’ scope) when other sentencing factors have not been treated in this manner is worthy of deeper academic attention.

In *Neill v Police*, the Chief Justice stated that family hardship is not just an ‘act of mercy to the offender’ but a sentencing factor that is taken into account ‘out of consideration of the welfare of the family, and society’s interest in their welfare’.<sup>983</sup> He emphasised the importance of providing the court with sufficient information

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<sup>980</sup> [1999] SASC 270.

<sup>981</sup> *Ibid* [24].

<sup>982</sup> See, eg, *Milosevski v Police* [2000] SASC 342 (16 October 2000) [14]; *Willis v Police* [2006] SASC 245 (15 August 2006) [41].

<sup>983</sup> *Ibid*.

to consider fully this factor (and drew specific attention to the shortcomings in the evidence before him).<sup>984</sup>

Ten years later, both of these points, were repeated by Justice Kourakis in *R v Buckskin*.<sup>985</sup> Justice Kourakis also spoke of the need for sentencing judges to balance the public interest in the welfare of the children against ‘the need to protect the community through the enforcement of the criminal law.’<sup>986</sup> In particular, he drew attention to the sentencing purposes of punishment and deterrence.<sup>987</sup> This study has revealed that judicial attention to the relationship between family hardship and deterrence was a common practice in Australian family hardship cases. This is also a relationship worthy of deeper academic analysis.

### *3. Cases with High Juristic Status*

As described in Chapter One, in focusing solely on one sentencing factor and by the manual collection of case citations (ie. a process of ‘exhaustive shepardizing’ conducted only on the issue of family hardship) the study identified cases of high juristic status in each jurisdiction for this mitigating factor. There were eight cases in the study of South Australia which recorded 10 or more citations.

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<sup>984</sup> Ibid [25].

<sup>985</sup> [2010] SASC 138 (12 May 2010) [110]-[111].

<sup>986</sup> Ibid [111].

<sup>987</sup> Ibid [109].

**Table 10: High Juristic Status Cases in South Australia**

Case Name	Total number of citations	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<i>Cobiac v Liddy</i> (1969) 119 CLR 257	15	3	-	-	-	-	5	-	3	4
<i>R v Wirth</i> (1976) 14 SASR 291	102	12	3	24	4	1	25	3	13	17
<i>R v Moffa (No 2)</i> (1977) 16 SASR 155	16	3	1	-	1	-	4	1	-	6
<i>Amuso</i> (1987) 32 A Crim R 308	13	2	1	-	-	-	3	1	3	3
<i>Adami</i> (1989) 42 A Crim R 88	37	8	1	3	3	1	17	-	3	1
<i>Bates v Police</i> (1997) 70 SASR 66	11	1	-	-	-	-	10	-	-	-
<i>Neill v Police</i> [1999] SASC 270 (16 June 1999)	11	-	-	-	-	-	11	-	-	-
<i>R v Carpentieri</i> (2001) 81 SASR 164	16	-	1	-	-	-	14	1	-	-

#### 4. Conclusion

The study of the case law after the passage of the *CL(S)A* reveals that despite strong judicial consensus that s 10(1) did not change the common law, the recognition of family hardship in the legislative list of sentencing factors *did have* an impact on the approach taken to this sentencing factor. In South Australia, after the judgment in *Bates*, the approach to family hardship moved away from dismissive statements that the impact of a sentence upon an offender's dependants was not relevant to sentencing unless the circumstances were exceptional. In its place, the judicial approach to family hardship shifted to accepting that this was a sentencing factor but stating that it was to be balanced against other considerations and was only to carry significant weight in exceptional circumstances.

The practical impact of this change in approach should not be underestimated. Family hardship was generally accepted<sup>988</sup> as a reason for the mitigation of a sentence and the focus of the courts was upon the weight to be attached to this

<sup>988</sup> There were exceptions to this see, eg, *Field v Police* [2009] SASC 354 (20 November 2009) [29] where Gray J stated: 'It has long been accepted that hardship to dependents of a defendant is not generally to be taken into account in the defendant's favour...'. However, cases that presented the principle in this manner were in the minority and the study of the case law highlighted that these cases were not cited in later decisions.

factor.<sup>989</sup> Guided by individualised justice the South Australian courts have recognised that this process is dependent upon the unique circumstances<sup>990</sup> of each case.<sup>991</sup>

### *B. Australian Capital Territory*

The study of family hardship in the Australian Capital Territory ('ACT') involved the analysis of 12 cases. Two of these cases were first instance sentencing remarks and ten cases were sentencing appeals. The gender of the offender raising family hardship was a male in 83% of these cases and female in only 17% of the cases.

#### *1. Early Case Law in the Australian Capital Territory*

The ACT is a small jurisdiction and, accordingly one would expect limited case law. The study uncovered only one decision, that engaged substantively with family hardship as a sentencing principle, prior to the introduction of the legislative list of sentencing factors (including family hardship) in the 1993 reforms.<sup>992</sup>

As noted in Chapter Three, self-government for the ACT was obtained in 1989. The ACT Court of Appeal commenced in 2002. In this jurisdiction, '[p]rior to the creation of the Court of Appeal, appeals lay to the High Court (from 1934 until 1977) and then to the Federal Court of Australia (from 1977 until 2002).'<sup>993</sup> This history may account for the limited case law identified by this study.

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<sup>989</sup> See, eg, *R v Ivic* [2006] SASC 8 (19 January 2006); *R v Richards* [2006] SASC 60 (30 March 2006); *Thompson v Police* [2009] SASC 150 (21 May 2009) [22]; *R v Buckskin* [2010] SASC 138 (12 May 2010) [31] (sentencing remarks from the sentencing judge) and see [40], [110]; *R v Marikar* [2010] SASCFC 36 (24 September 2010) [4] (sentencing remarks from the sentencing judge) and see [45], [49]; *R v Ohmer* [2011] SASCFC 44 (18 May 2011) [17], [21]; *R v Marrone* [2011] SASCFC 78 (20 July 2011) [18];

<sup>990</sup> See, eg, *R v Richards* [2006] SASC 60 (30 March 2006) [49] (Sulan J); *R v Hill* [2011] SASCFC 109 (14 October 2011) [41].

<sup>991</sup> As explained in Chapter Three, the South Australian legislature has now removed family hardship from the statutory list of sentencing factors.

<sup>992</sup> See Chapter Three.

<sup>993</sup> ACT Government, *General Information about the ACT Court of Appeal* (20 January 2012) ACT Supreme Court

<[http://www.courts.act.gov.au/supreme/act\\_court\\_of\\_appeal/general\\_information\\_about\\_the\\_act\\_court\\_of\\_appeal](http://www.courts.act.gov.au/supreme/act_court_of_appeal/general_information_about_the_act_court_of_appeal)>. Jurisdiction to hear appeals from the Territories was granted to the Federal Court via *Federal Court of Australia Act 1976* (Cth) ss 24(1)(b) and 28(5), see discussion of this conferral of jurisdiction in *R v J* (1982) 45 ALR 331, 340.

The case of *R v J* (1982),<sup>994</sup> is the earliest ACT case that was identified by this study. This was a Crown appeal from the Supreme Court of the ACT to the Federal Court of Australia, against a suspended sentence imposed upon an male offender who had been convicted of incest and indecent assault upon his step-daughter.<sup>995</sup> The appeal was brought before Toohey, Gallop and Davies JJ and they all agreed that the dependence of the family upon the offender and the impact that the custodial sentence would have upon the family unit were the principal considerations at sentence which led to the imposition of a suspended sentence by the trial judge.<sup>996</sup>

Justices Toohey and Gallop, in separate judgments, found that the Crown appeal should be dismissed. The consideration of family hardship in this case arose in the context of an offence committed within the family. Justices Toohey and Gallop both rejected the claim that there was a principle of law that incest convictions should result in an immediate custodial sentence.<sup>997</sup> This case can be seen as indicative of the operation of an underlying policy within the common law of maintaining the family unit. Justice Toohey commented on the ‘importance of rehabilitating the family’,<sup>998</sup> an approach under the common law that had been identified by Cox in his treatise (see Chapter Three). Justice Toohey J found that the impact of the sentence upon the family unit (and in particular upon the victim of the offence who was also a member of this family unit) was the justification for the suspended sentence imposed.<sup>999</sup>

Justices Toohey and Gallop did not find error in the significant weight that had been accorded to the impact of the offender’s sentence upon his family and dependants. Justice Toohey held:

The learned sentencing judge was called upon to strike a balance between a number of competing considerations and he had a broad discretion in arriving at a result which would, as far as possible, achieve that balance. It was an unenviable task. It is not enough for this court to say that it would have reached a different result.<sup>1000</sup>

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<sup>994</sup> (1982) 45 ALR 331.

<sup>995</sup> Ibid 332.

<sup>996</sup> Ibid 333 (Toohey J), 342-343 (Gallop J), 345 (Davies J).

<sup>997</sup> Ibid 335 (Toohey J), 342 (Gallop J).

<sup>998</sup> Ibid 335.

<sup>999</sup> Ibid 337-338.

<sup>1000</sup> Ibid 339.

Similarly, Gallop J deferred to the broad discretion of the trial judge. He noted that the:

trial judge had a distinct advantage.... in seeing and hearing the offender give evidence on oath, asking him questions himself, assessing his demeanour and attitude to the crime.<sup>1001</sup>

Justice Gallop also remarked that the trial judge had detailed evidence from a social worker, a psychiatrist and offender's wife.<sup>1002</sup>

In dissent, Davies J held that while it was clearly appropriate to take the interests of the family into account in determining sentence,<sup>1003</sup> too much weight was accorded to this consideration and in his view some prison time was required. He stated,

...it is an effect, though an unfortunate one, of the system of criminal justice that a criminal's family, though innocent of his crimes, may be harmed by the sentence of imprisonment which he is called upon to serve.<sup>1004</sup>

Davies J found that a sentence of three years with a twelve-month non-parole period was appropriate; citing and following the reasoning in the NSW case of *R v H*<sup>1005</sup> that, '... regrettably, it is often the family that suffers for a parent's crime and the necessary punishment that must follow'.<sup>1006</sup>

The case of *R v J*<sup>1007</sup> indicates that in the ACT, family hardship was seen as a sentencing factor. All three judges in this case accepted that it was appropriate to take family hardship into account at sentencing. The difference of opinion between the judges was in the weight to be attached rather than the approach to be taken. There was no indication that the factor arose only in the context of the exercise of judicial mercy.

## 2. Case Law After Recognition of Family Hardship in Legislation

As explained in Chapter Three, in 1993 family hardship was listed as a sentencing factor in the ACT and was set out in s 429A(1)(m) of the *Crimes Act 1900* (ACT):

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<sup>1001</sup> Ibid 343.

<sup>1002</sup> Ibid.

<sup>1003</sup> Ibid 345.

<sup>1004</sup> Ibid 347.

<sup>1005</sup> (1980) 3 A Crim R 53.

<sup>1006</sup> *R v H* (1980) 3 A Crim R 53, 66 (Moffitt P) cited in *R v J* (1982) 45 ALR 331, 347 (Davies J).

<sup>1007</sup> *R v J* (1982) 45 ALR 331.

'The probable effect that any sentence or order under consideration would have on any of the person's family or dependants'. In 2002, the provision was renumbered without amendment to s 342(1)(j) of the *Crimes Act 1900* (ACT). No cases were found by this study on the consideration of the first numbered family hardship provision in s 429A(1)(m). The 2004 case of *Craft v Diebert*<sup>1008</sup> was the first case identified that engaged with the judicial interpretation of s 342(1)(j) of the *Crimes Act 1900* (ACT).

*Craft v Diebert*<sup>1009</sup> was a Crown appeal against a periodic detention order imposed upon a male offender (Diebert) convicted of drug cultivation and possession offences. Diebert was the primary carer for his 15-year-old son who suffered from Attention Deficit Hyperactivity Disorder.<sup>1010</sup> At first instance the Magistrate, who imposed an immediate custodial sentence, had not given much weight to the impact of a custodial sentence upon the offender's son. She stated that she hoped that his son would not be left without parental supervision but that hardship to an offender's family is '[p]art of the price to pay when committing an offence'<sup>1011</sup> and that it 'generally cannot be one of the factors which can affect what would otherwise be the just and appropriate penalty.'<sup>1012</sup>

The offender appealed to the Supreme Court and the sentence was varied on appeal with a periodic detention order imposed. The Crown then appealed to the ACT Court of Appeal. The Crown appeal was successful, and the Judge's resentence was overturned on the basis that 'appealable error was not demonstrated'<sup>1013</sup> and the decision of the Supreme Court was 'substitutive rather than corrective of error'.<sup>1014</sup> Despite permitting the appeal, Crispin P and Connolly J in a joint judgment expressly rebuked the DPP's submission that regard should be had to family hardship only in exceptional cases and that the inclusion of the factor within s 324(1)(j) did not change the common law.<sup>1015</sup>

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<sup>1008</sup> [2004] ACTCA 15.

<sup>1009</sup> *Ibid.*

<sup>1010</sup> *Craft v Diebert* [2004] ACTCA 15, [22].

<sup>1011</sup> *Ibid* [32].

<sup>1012</sup> *Ibid.*

<sup>1013</sup> *Craft v Diebert* [2004] ACTCA 15, [11] (Crispin P and Connolly J).

<sup>1014</sup> *Ibid* [73] (French J) (Crispin P and Connolly J agreeing [1]).

<sup>1015</sup> Mr Refshauge SC appeared for the Crown in this case and would later become Refshauge J.

President Crispin and Connolly J rejected the submission that the traditional common law approach identified by the Crown (the principle as set out by the Western Australian Court of Criminal Appeal in *R v Sinclair*<sup>1016</sup>) applied. President Crispin and Connolly J stated,

With very great respect to their Honours, we must say that we are quite unable to accept that a legislative requirement to take such a factor into account can be transliterated into a prima facie requirement to ignore it merely because that would reflect the approach previously recognised at common law.<sup>1017</sup>

This represented a significant judicial acknowledgment of the impact of the legislative reforms in the ACT and the role statutory provisions should have in guiding sentencing discretion.<sup>1018</sup>

Their Honours did acknowledge the relationship between family hardship and deterrence. Their Honours noted that the requirement to adequately punish an offender and deter others may leave little scope for leniency on the basis of the impact of the sentence upon families and dependants, however, they emphasised that such claims did not amount to a legal principle.<sup>1019</sup> President Crispin and Connolly J stated:

However, such an observation should not be misconstrued as a legal principle which, in our opinion, could not be accommodated within the language of s 342 of the *Crimes Act*, let alone the perhaps more broad discretion provided by s 6 of the *Periodic Detention Act*.<sup>1020</sup>

The observations made by Crispin P and Connolly J in *Craft v Diebert*<sup>1021</sup> were obiter. Yet, as the analysis of the case law demonstrates, their obiter statements have been influential in this jurisdiction.

*Craft v Diebert*<sup>1022</sup> was later followed by Refshauge J in three decisions.<sup>1023</sup> Justice Refshauge recognised the approach taken in the ACT Court of Appeal to family

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<sup>1016</sup> (1990) 51 A Crim R 418, 430 (discussed in detail below see ‘Western Australia).

<sup>1017</sup> *Craft v Diebert* [2004] ACTCA 15, [9].

<sup>1018</sup> See, especially, *Craft v Diebert* [2004] ACTCA 15, [1].

<sup>1019</sup> *Craft v Diebert* [2004] ACTCA 15, [10].

<sup>1020</sup> *Ibid.*

<sup>1021</sup> [2004] ACTCA 15.

<sup>1022</sup> *Ibid.*

<sup>1023</sup> *Cotter v Corvisy* (2009) 185 A Crim R 560; *R v Ashman* [2010] ACTSC 45; *Butler v Vickers* [2011] ACTSC 134.



hardship and the binding nature of this upon a single judge.<sup>1024</sup> For example, in *Cotter v Corvisy*, an appeal from the Magistrates Court where one of the grounds claimed was that the Magistrate had failed ‘to have regard to the likely effect of the sentence upon the appellant’s dependants, as required by s 33(1)(o)’,<sup>1025</sup> Refshauge J stated:

[t]he common law appears to have allowed a very limited role for the effect of a sentence on the offender’s dependants... The ACT Court of Appeal, by which, of course, I am bound, has taken a somewhat different course...<sup>1026</sup>

His Honour then cited the passage (noted above) from *Craft v Diebert*<sup>1027</sup> and further stated:

On the basis of these authorities, then, it seems to me that the approach that should be taken is that the effect of a sentence on the family and dependants of the offender should be taken into account, but will only result in any significant leniency where the effect is more severe or prejudicial than the inevitable and usual consequence of the imposition of a proper sentence or where it will not overwhelm the proper statutory purpose for which the sentence should be imposed.<sup>1028</sup>

There was no evidence within the study of this statement of principle being picked up and applied in other cases within the ACT.

In the same month (August 2004) that the *Craft v Diebert*<sup>1029</sup> appeal was handed down the ACT Court of Appeal also delivered the judgment in *R v SP*.<sup>1030</sup> This was a case dealing with sexual intercourse between a teacher and student. There had been delay in bringing the prosecution and this factor coupled with the impact of the sentence upon his children (particularly those not born at the time of the offence) led the trial judge to impose a wholly suspended sentence.<sup>1031</sup>

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<sup>1024</sup> See, especially, *R v Ashman* [2010] ACTSC 45, [39].

<sup>1025</sup> *Cotter v Corvisy* (2009) 185 A Crim R 560, [21].

<sup>1026</sup> *Ibid* [79] – [80].

<sup>1027</sup> [2004] ACTCA 15.

<sup>1028</sup> *Ibid* [82].

<sup>1029</sup> [2004] ACTCA 15.

<sup>1030</sup> (2004) 149 A Crim R 48.

<sup>1031</sup> The sentencing remarks of the trial judge included the following passage ‘In the present case, however, there are, in my view, exceptional circumstances, and I do not accept that the need for general deterrence must include consideration of all of the other factors referred to in the Crimes Act and ultimately require me to take a step which is likely to have a seriously detrimental impact upon the lives of this man’s three innocent children, all of whom have been born since this incident, his new partner, and the two further children to whom he relates as a step-father and who were also born since this incident. Sadly, no one can undo the psychological harm that has been done to the complainant and taking a course which risks harming a number of children would only compound the damages caused by his wrongful conduct’, see *R v SP* (2004) 149 A Crim R 48, 68.

The Crown appealed the sentence and one of the submissions put by the DPP was that hardship to the offender's family had been accorded too much weight and was not sufficient to justify a suspended sentence. Giles J found that family hardship was a 'principal factor which appears to have influenced the primary judge.'<sup>1032</sup> Giles J stated that it was 'no doubt a relevant consideration to take into account' but that,

[m]ost offenders have family ties and third party relationships which would be disturbed if time in custody is served. In my opinion, it was appellable error to elevate that circumstance to a critical level in the sentencing process.<sup>1033</sup>

However, Giles J found no support from the other judges, Higgins CJ and Gray J, on this view.

Chief Justice Higgins found that all relevant matters were considered by the sentencing judge.<sup>1034</sup> However, Higgins CJ found that a wholly suspended sentence was not appropriate and that 'general deterrence was given too little weight, resulting in a manifestly inadequate overall sentence.'<sup>1035</sup> In dissent, Gray J found that consideration of family hardship was appropriate.<sup>1036</sup> He found that it was a combination of factors that led to the suspended sentence and overall, Gray J was not satisfied that error had been established.<sup>1037</sup> This case demonstrates judicial support for consideration of family hardship as a mitigating factor where relevant. *R v SP* has not been picked up in other jurisdictions nor has it been cited in other ACT cases within this study.

Within this jurisdiction, the purposes of sentencing feature prominently in the sentencing remarks and judgments. The purposes of rehabilitation and deterrence were the most frequently discussed sentencing purposes in the body of family hardship cases identified by this study. Rehabilitation was expressly mentioned in eight of the twelve family hardship cases raised by this study. Deterrence was mentioned in seven of the twelve family hardship cases.

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<sup>1032</sup> *R v SP* (2004) 149 A Crim R 48, 68.

<sup>1033</sup> *Ibid* 68-69.

<sup>1034</sup> *Ibid* 51.

<sup>1035</sup> *Ibid*.

<sup>1036</sup> *Ibid* 57.

<sup>1037</sup> *Ibid* 61.

### **(a) Human Rights Act 2004**

The *Human Rights Act 2004* (ACT) has also played a role in this jurisdiction in legitimatising consideration of family hardship factors at sentence. For example, Refshauge J in his sentencing remarks for *R v McLaughlin*<sup>1038</sup> stated:

I have taken into account also the fact that Ms McLaughlin is the carer for her children. Section 11 of the *Human Rights Act 2004* (ACT) as well s 33 of the *Crimes (Sentencing) Act 2005* (ACT) both mandate that I have regard to these matters and that I take into account what was said by the Constitutional Court of South Africa in *M v The State* [2007] ZACC 18, namely that there is a right for the interests of the children to be taken into account even in cases of serious offending.<sup>1039</sup>

The offender's progress in rehabilitation (post the offence) carried significant weight alongside her potential to continue to be a good mother and a suspended sentence was imposed.<sup>1040</sup>

### *3. Cases with High Juristic Status*

In the ACT, the sentencing remarks and judgments primarily cite the legislative provision (ss 341(1)(j) and 33(1)(o)). In this Territory, there has not been a heavy reliance on case law regarding family hardship from other Australian jurisdictions nor has there been a general practice of referencing earlier case law from within the Territory. The ACT table (in Appendix A) demonstrates that there were no cases in this jurisdiction with more than 10 citations. *Craft v Diebert*<sup>1041</sup> was the most frequently cited case on family hardship within the ACT. However, as seen from Table 11, it only received citation in three out of the 10 cases that followed it and, most notably, these were all judgments from the one judge (Refshauge J).<sup>1042</sup>

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<sup>1038</sup> *R v McLaughlin* (Unreported, Supreme Court of the Australian Capital Territory, Refshauge J, 7 August 2009).

<sup>1039</sup> Ibid 6. See also reference to this passage in *R v Ashman* [2010] ACTSC 45, [40] (Refshauge J).

<sup>1040</sup> Ibid 6-8.

<sup>1041</sup> [2004] ACTCA 15.

<sup>1042</sup> *Cotter v Corvisy* (2009) 185 A Crim R 560; *R v Ashman* [2010] ACTSC 45; *Butler v Vickers* [2011] ACTSC 134.

**Table 11: Cases with High Juristic Status in the Australian Capital Territory -  
NIL**

Case Name	Total number of citations	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<i>Craft v Diebert</i> [2004] ACTCA 15.	3	-	3	-	-	-	-	-	-	-

The ACT Table (in Appendix A) also highlights that the case law on family hardship in the ACT has also not been picked up by other Australian jurisdictions.

Interestingly the ACT has referenced case law from South Australia<sup>1043</sup> (which has a similar legislative provision). However, the South Australian courts have not looked to the practice of ACT courts in respect of their interpretation of their legislative provision.

#### 4. Conclusion

The approach in the ACT to family hardship has been to accept family hardship as a sentencing factor. The matter must be ‘relevant and known to the court’ and the Supreme Court of the ACT has been critical of submission made on the basis that this factor was not taken into account where there has been minimal or no evidence before the sentencing court.<sup>1044</sup> The consideration of family hardship in this jurisdiction has not been focused on whether to give regard to the factor or not, but rather, the question of the weight to be attached to this sentencing factor. This study of the case law had revealed that the dominant approach in the ACT is that family hardship is a sentencing factor that is to be balanced against other relevant sentencing factors in the context of the individual circumstances of the case.

<sup>1043</sup> *R v Adami* (1989) 51 SASR 229; *R v Carpentieri* (2001) 81 SASR 164.

<sup>1044</sup> See *Cotter v Corvisy* (2009) 185 A Crim R 560, [77]; *Moh v Pine* [2010] ACTSC 27, [38]; *Butler v Vickers* [2011] ACTSC 134, [44], [64].

### III FAMILY HARDSHIP UNDER THE COMMON LAW

#### *A. Queensland*

The study of the case law on family hardship in the Queensland resulted in the analysis of twenty-three cases. Only one case is a first instance sentencing remark; the remaining cases were all appellate decisions before the Queensland Court of Appeal. The earliest cases identified in this Australian study of family hardship were both located in Queensland. The earliest case was a sentencing appeal from the 1955 and the second earliest was a sentencing judgment from 1966 (both cases discussed in detail below).<sup>1045</sup> The gender of the offender raising family hardship was a male in 48% of these cases and female in 52% of the cases.

##### *1. Historical Narrative of Family Hardship*

The earliest identified Australian cases dealing with family hardship as a sentencing factor, across all jurisdictions, were Queensland cases. These cases were the 1955 case of *Mill v Scott; Ex parte Mill*<sup>1046</sup> and the 1966 case of *R v Jany*.<sup>1047</sup> The case of *Mill* was an appeal brought by the police sergeant against an inadequate sentence imposed upon Scott, a 28-year-old male labourer who had been convicted of assault upon his stepchild.<sup>1048</sup> In the first instance, the Magistrate identified that due to a loss of Scott's earning capacity, a custodial sentence, 'would... impose a further hardship both on the child in question, the wife and other children' within the relationship.<sup>1049</sup> A fine was then imposed with a warning to Scott that should he come before the court again the maximum penalty would be imposed.<sup>1050</sup>

The appeal against sentence was heard before a Full Court of the Supreme Court of Queensland. Chief Justice Macrossan found that the impact of a sentence upon the

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<sup>1045</sup> See *Mill v Scott; Ex parte Mill* [1955] St R Qd 210; *R v Jany* [1966] Qd R 328.

<sup>1046</sup> [1955] St R Qd 210 ('*Mill*').

<sup>1047</sup> [1966] Qd R 328 ('*Jany*').

<sup>1048</sup> *Mill* [1955] St R Qd 210, 218 and 220.

<sup>1049</sup> *Ibid* 213.

<sup>1050</sup> *Ibid*.

offender's family was not a relevant sentencing factor in the circumstances. Chief Justice Macrossan (Mansfield SPJ agreeing) held:

The reason given by the stipendiary magistrate for refraining from imposing the sentence... which he rightly said was warranted, was one which should not have affected his determination of the appropriate penalty. In my opinion, if an offender has committed an offence which clearly should attract a sentence of imprisonment, he should not be relieved of that penalty because the infliction of it may cause adverse conditions for other people.<sup>1051</sup>

Justice Hanger agreed with Macrossan CJ (Mansfield SPJ agreeing) that the sentence imposed was inadequate. However, Hanger J found that the magistrate should not have been influenced to the extent that he was by family hardship.

In *Mill*, on the question of family hardship as an appropriate mitigating factor Hanger J noted its *potential* to mitigate a sentence. Justice Hanger stated:

I am not prepared to say that in no case can the impact upon other persons of punishment of an offender constitute a determining factor... But I think that such cases would be rare, and that the present is not one of them.<sup>1052</sup>

Justice Hanger, therefore, left open the availability of the impact of the sentence upon third parties.

The contrast between the way the factor was described by the Chief Justice, ('he should not be relieved because...[it] may cause adverse conditions for other people'<sup>1053</sup>) compared to Hanger J ('I am not prepared to say that in no case can the impact upon other persons...'<sup>1054</sup>) is important. The Chief Justice's position is indicative of a traditional approach to sentencing which provided that matters which were relevant sentencing factors in the act of determining an appropriate sentence were those matters that were connected to *either* the commission of the crime or matters that directly impacted upon the offender. As discussed above, this approach guided the Supreme Court of South Australia in its early case law on family hardship.<sup>1055</sup> In *Mill*, the Chief Justice's reasoning that the sentence should not be mitigated because of an impact on 'others' highlights that the impact of

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<sup>1051</sup> Ibid 219.

<sup>1052</sup> Ibid 222.

<sup>1053</sup> Ibid 219.

<sup>1054</sup> Ibid 222.

<sup>1055</sup> See *Cobiac v Liddy* (1969) 119 CLR 257; *Jarrett v Samuels* (1972) 4 SASR 78; *Moore v Fingleton* (1972) 3 SASR 164, 168 (Bray CJ); *Tame v Fingleton* (1974) 8 SASR 507, 511 (Walters J); *Amuso* (1987) 32 A Crim R 308, 314.

punishment upon third parties was considered by his Honour to be outside of the attention of the courts. This case highlights that there was tension, at this time, as to the role of family hardship as a mitigating factor at sentencing.

Ten years later, in the case of *Jany* the question before the Queensland Court of Appeal was whether the impact of a sentence upon an offender's family could have a significant mitigating effect where a serious offence had been committed.<sup>1056</sup> The appellate, was a 37-year-old single mother of a very young child (a 15 week-old baby). While working as a real estate agent, she had been convicted of stealing approximately £8,500 from, '44 people during a period of two years and three months'.<sup>1057</sup> The sentencing judge had found that the serious and calculated nature of the offence and the prolonged period of dishonesty weighed against a lesser sentence and sentenced her to three years imprisonment with hard labour.<sup>1058</sup> The sentencing judge in his remarks had drawn upon the principle of equality, stating that he would not grant leniency to Jany because 'she was female and had a child.'<sup>1059</sup>

One of the grounds of appeal raised before the Queensland Court of Appeal was that the sentencing judge had 'departed from principles... [as he had] ignored the fact that the applicant was the mother of a very young illegitimate baby.'<sup>1060</sup> This ground was evidently subject to detailed consideration. The judgment of Lucas J sets out in great detail the policy and practice of the State Children Department.<sup>1061</sup> As a result of consideration of this material, he held: 'that it is by no means inevitable, or even, ... probable, that the applicant will, as a result of the sentence imposed upon her, be permanently parted from her child.'<sup>1062</sup>

In *Jany*, Lucas J (Gibbs and Hart JJ agreeing) found that the correct principles had been applied in this case. This principle appeared to be that where a serious

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<sup>1056</sup> [1966] Qd R 328.

<sup>1057</sup> *Ibid* 329.

<sup>1058</sup> *Ibid* 329 and 330 (citing remarks of the sentencing judge), 332 (Lucas J, with whom Gibbs and Hart JJ agreed).

<sup>1059</sup> *Ibid* 330.

<sup>1060</sup> *Ibid*.

<sup>1061</sup> *Ibid* 330-331.

<sup>1062</sup> *Ibid* 331-332.

offence has occurred, family hardship will not result in significant leniency unless it is an extreme family hardship. It is clear from the judgment of Lucas J that he found a period of time in state care for a young child was not extreme hardship, while inevitable or probable permanent separation from a child could be.<sup>1063</sup>

Much like Hanger J's comments in *Mill*, Lucas J observed that situations such as the one that arose in this case were very rare.<sup>1064</sup> Interestingly, on the application of principle, Lucas J emphasised the importance of formal equality. Justice Lucas (Gibbs and Hart JJ agreeing) stated:

...but it is not to be thought that a different standard of sentencing is necessarily appropriate when the offender is the mother of an illegitimate child of tender years.<sup>1065</sup>

This case pre-dated the common law authorities from the England and Wales<sup>1066</sup> which had found that a young child being left without parental care was a relevant sentencing factor.<sup>1067</sup>

This study of family hardship identified that *Jany* was the only early case which was picked up and cited in another jurisdiction. The results of this study of family hardship revealed that *Jany* was cited by Chief Justice Bray in two South Australian judgments: *Moore v Fingleton* (1972) and *R v Wirth* (1976).<sup>1068</sup> In *Moore v Fingleton* (discussed above) Bray CJ observed that there were scant authorities within the Australian case law on family hardship,<sup>1069</sup> he then looked overseas to the case law of the Court of Appeal Criminal Division and observed that this court had taken an approach that was different to that adopted by the Queensland Court of Appeal in *Jany*.

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<sup>1063</sup> Ibid 332.

<sup>1064</sup> Ibid.

<sup>1065</sup> Ibid.

<sup>1066</sup> Discussed in Chapter Three.

<sup>1067</sup> See, eg, *Fels* 25.7.72, 5421/C/71DA cited within Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 213.

<sup>1068</sup> See *Moore v Fingleton* (1972) 3 SASR 164, 168 and *R v Wirth* (1976) 14 SASR 291, 293.

<sup>1069</sup> *Moore v Fingleton* (1972) 3 SASR 164, 168.



### **(a) Case Law in the 1990s**

There was no further case law identified by this study that dealt with this sentencing principle until the case of *Tilley*.<sup>1070</sup> *Tilley* was a case that dealt with a serious offence. Anne Marie Tilley was convicted of two counts of official corruption identified through the Fitzgerald Inquiry. She had been sentenced to a head sentence of five years imprisonment with a recommended parole after serving 14 days due to the hardship that would result upon her two and a half-year-old daughter.<sup>1071</sup> The co-offender, the father of her child, had also been sentenced to imprisonment. The Crown appealed the recommendation and the reliance given to personal circumstances.<sup>1072</sup>

In *Tilley*, Cooper and Thomas JJ, in separate judgments, commented on the nature of the balancing act involved in sentencing. Justice Thomas stated:

The aspects of retribution, deterrence and rehabilitation are, for present purposes, the main purposes of the sentencing exercise. The object of the sentencing discretion is to strike a proper balance between these factors. Here we have a clear conflict between the first two factors which cry out for a heavy sentence and the third factor of rehabilitation and her personal circumstances which go in favour of some mercy or mitigation...

Mention has been made of the hardship that would result in view of the fact that she would be parted, if a greater custodial term were imposed, from her two and half-year-old daughter. Courts, of course, take account of such matters in a number of ways but are not overwhelmed by them. It is well recognised that very often a prison sentence will result in equal hardship to persons other than the offender. In the case of a male, his wife and children may be the ones who suffer because they lose a father and a person who provides financial support. In the case of a female, it may mean the temporary loss of a mother. It is common that hardship or stress is shared by the family of an offender but that may be an inevitable consequence if the offender is to be adequately punished. An offender cannot shield himself under the hardship he or she creates for others, and courts must not shirk their duty by giving undue weight to personal or sentimental factors.<sup>1073</sup>

The social attitudes towards gender roles of the times are evident in Thomas J's judgment; perceiving that if the offender is male the family would suffer financial loss, while if the offender is female the family would lose a 'mother'.

Similarly, Cooper J addressed the balancing act involved in determining an appropriate sentence. Justice Cooper stated:

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<sup>1070</sup> (1991) 53 A Crim R 1.

<sup>1071</sup> *Tilley* (1991) 53 A Crim R 1, 3 and 5.

<sup>1072</sup> *Ibid* 6.

<sup>1073</sup> *Ibid* 3.

The public interest is promoted by preserving wherever possible a family unit...Rehabilitation and preservation of a stable family environment are both relevant and important to the process of sentencing. However, as the law presently stands, they are but two factors which are required to be balanced against the needs for deterrence and retribution. The function of the court is to impose a sentence having regard to the total criminality of the conduct taking into account all relevant factors including circumstances of mitigation personal to the offender.

In the instant case the effect upon the respondent and her child of separation, distressing though it may be, cannot by itself displace the other factors of deterrence and retribution having regard to her culpability and the criminality of the offence to which she has pleaded guilty when the process of sentencing is undertaken.<sup>1074</sup>

Therefore, Thomas and Cooper JJ, accepted that family hardship was a relevant mitigating sentencing factor and there was expressed requirement that the level of hardship suffered by families needed to be exceptional for it to be a relevant mitigating factor. Both judges held that the error identified was in the *weighting* attached to this factor. In contrast, de Jersey J, while in agreement with the orders proposed by Cooper and Thomas JJ, expressly rejected that family hardship was a relevant mitigating factor.<sup>1075</sup>

*Tilley* is a key case in Queensland. Significantly, in the judgments of both Thomas and Cooper JJ's the instinctive approach to sentencing is adopted. Both judges explained the process of sentencing involving a careful consideration the purposes of sentencing and other relevant sentencing factors.<sup>1076</sup> The relevant sentencing factors in the case and the process involved in determining a sentence were expressly discussed in judicial remarks. This approach to family hardship and sentencing depicts the dominant approach by the Court in the 1990s.

In 1995 in *Tho Le and Diem Mac Le*<sup>1077</sup> the Queensland Court of Appeal considered whether pregnancy was a relevant mitigating factor in sentencing. The issue of family hardship and pregnancy arose in respect to the application for leave to appeal the sentence imposed upon Diem Mac Le. She was convicted of heroin trafficking and was in a de facto relationship with the principal offender (Tho Le). At sentencing, Tho Le was sentenced to eight years' imprisonment and Diem Mac

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<sup>1074</sup> Ibid 6.

<sup>1075</sup> Ibid 5.

<sup>1076</sup> *Tilley* (1991) 53 A Crim R 1, 3 (Thomas J) and 6 (Cooper J).

<sup>1077</sup> (1995) 83 A Crim R 428 ('*Le & Le*').

Le was sentenced to four years' imprisonment. Diem Mac Le was seen to be 'a minor yet willing player'<sup>1078</sup> in the commission of the drug offences. The evidence before the court showed that she had received payment for the drugs on two occasions and acted as a driver for the principal (upon the loss of his licence).

At the time of sentencing, Diem Mac Le was a mother to an eight-year-old daughter and was eight months pregnant.<sup>1079</sup> The father of the unborn child was the principal offender Tho Le.<sup>1080</sup> Diem Mac Le had been disowned by her family when she was 16 years old at the time of her first pregnancy.<sup>1081</sup> Thus, it appeared that she had no external support for the care of her children, although this circumstance was not expressly addressed in the judgments of the Queensland Court of Appeal.

Citing the South Australian case of *Adami* (discussed above),<sup>1082</sup> Pincus JA stated at common law there was authority that 'the effect of a sentence of imprisonment on dependants is not taken into account in fixing the length of sentence.'<sup>1083</sup> He then reflected upon the then recent High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh*<sup>1084</sup> and the requirement to take into account the Rights of a Child Convention<sup>1085</sup> in exercising discretion in respect to a decision about deportation for drug offending (under administrative law). Article 3.1 of the Rights of the Child Convention provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies the best interests of the child shall be of primary consideration.

Pincus JA reasoned that 'the Article refers explicitly to courts: the doctrine of *Teoh* prima facie applies to Queensland courts sentencing offenders'.<sup>1086</sup>

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<sup>1078</sup> Ibid 434.

<sup>1079</sup> Ibid 430.

<sup>1080</sup> Ibid 434.

<sup>1081</sup> Ibid.

<sup>1082</sup> He also cited the federal case of *Tan Hai Huat* (1990) 49 A Crim R 378, 390-391 heard before the Western Australian Court of Appeal. See *Le & Le* (1995) 83 A Crim R 428, 430 (Pincus JA).

<sup>1083</sup> *Le & Le* (1995) 83 A Crim R 428, 430.

<sup>1084</sup> (1995) 183 CLR 273 ('*Teoh*').

<sup>1085</sup> *Convention on the Rights of the Child 1989*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) Art 3.1 cited in *Le & Le* (1995) 83 A Crim R 428, 431 (Pincus JA).

<sup>1086</sup> *Le & Le* (1995) 83 A Crim R 428, 431.

The problem Pincus JA identified with this position was that the United Nations *Convention on the Rights of the Child 1989* required that children's rights be the 'primary consideration' and this was at odds with the language of the *Penalties and Sentences Act 1992* (Qld). Therefore, Pincus JA found that *Teoh* was inapplicable to sentencing courts, but he held that under the common law Queensland courts took into account the effect of a sentence upon an offender's young children as a mitigating factor.<sup>1087</sup> Examining all of the relevant sentencing factors in the case Pincus JA found that while the sentence imposed upon Diem Mac Le was not lenient there was no error identified.<sup>1088</sup>

Justice Thomas (Williams J agreeing) delivered a separate judgment. Like, Pincus JA, he also found that family hardship had been adequately taken into account in determining the four-year-sentence of imprisonment with a recommendation for parole after eighteen months.<sup>1089</sup> Regarding family hardship at sentencing he endorsed the approach taken in *Tilley*<sup>1090</sup> (a case in which he had presided over, see above). In *Le & Le*, Thomas J expressed the principle from *Tilley* as follows:

While these matters evoke sympathy the hardship or stress shared by the family of an offender cannot be allowed to overwhelm factors such as retribution and deterrence.<sup>1091</sup>

The Queensland Court of Appeal, therefore accepted that at common law family hardship was a mitigating sentencing factor. The weight to be attached to this factor depended upon the other sentencing factors in a particular case and the relationship of the purposes of sentencing with the offence committed.<sup>1092</sup>

## **b) The influence of de Jersey CJ**

In 2004, de Jersey CJ who had argued that family hardship was not a mitigating factor in his judgment in *Tilley*<sup>1093</sup>, presided over *R v D'Arrigo; Ex parte A-G*

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<sup>1087</sup> Ibid.

<sup>1088</sup> Ibid.

<sup>1089</sup> Ibid 434.

<sup>1090</sup> *Tilley* (1991) 53 A Crim R 1.

<sup>1091</sup> *Le & Le* (1995) 83 A Crim R 428, 434.

<sup>1092</sup> See *Clarke* (1996) 90 A Crim R 1,7-8; *Barton & Bridges* (1997) 95 A Crim R 228, 234; *R v Costi* [2001] QCA 404 (25 September 2001);

<sup>1093</sup> *Tilley* (1991) 53 A Crim R 1, 5.

(*Qld*).<sup>1094</sup> The offender was convicted of dangerously operating a motor vehicle causing death. At the time of the offence, he was the sole and primary carer of his 16 month-old daughter.<sup>1095</sup> The sentencing judge took into account family hardship as a mitigating factor and imposed a sentence of three years' imprisonment suspended after one day in custody.<sup>1096</sup> The Attorney-General appealed this sentence on the ground that it was manifestly inadequate.

Chief Justice de Jersey (Mc Pherson JA agreeing) found that 'the learned sentencing Judge's sentencing discretion plainly and starkly miscarried.'<sup>1097</sup> Chief Justice de Jersey endorsed the approach taken to family hardship by the Western Australian Court of Appeal in *R v Boyle* (1987),<sup>1098</sup> the New South Wales Court of Criminal Appeal in *R v Edwards* (1996)<sup>1099</sup> and the Northern Territory Court of Criminal Appeal in *Arnold v Trenerry* (1997)<sup>1100</sup> (all cases are discussed below). This approach is that family hardship can only be taken into account in exceptional or extreme circumstances.<sup>1101</sup>

Remarkably, de Jersey CJ used the offender's reliance upon child care facilities during the working day against him. He stated:

In the present case it is not as if the child would be left without care. Care will be provided in the usual way through the Department of Family Services. It is of some relevance to note also that the child is in the care of others during the day while the respondent is at work.<sup>1102</sup>

This is an 'out of touch' judicial remark exhibiting a bias against formal child care equating it to care by 'strangers'. The offender's use of formal child care was not relevant to the impact a custodial sentence may have upon his dependent child.

From his judgment in *Tilley* it is clear that de Jersey CJ did not accept family hardship as a mitigating sentencing factor.<sup>1103</sup> In *D'Arrigo*, de Jersey CJ's judgment

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<sup>1094</sup> [2004] QCA 399 (26 October 2004) (*D'Arrigo*).

<sup>1095</sup> *Ibid* 4-5.

<sup>1096</sup> *Ibid* 2.

<sup>1097</sup> *Ibid* 9.

<sup>1098</sup> (1987) 34 A Crim R 202.

<sup>1099</sup> (1996) 90 A Crim R 510.

<sup>1100</sup> (1997) 142 FLR 229.

<sup>1101</sup> *D'Arrigo* [2004] QCA 399 (26 October 2004) 6.

<sup>1102</sup> *Ibid* 6.

<sup>1103</sup> *Tilley* (1991) 53 A Crim R 1, 5.

discloses that he ascribed to classical sentencing theory that saw an impact upon third parties as falling outside of relevant sentencing considerations. The Chief Justice stated, '[t]he circumstances of the child do not, in short, put the case into the extraordinary category where the interests of third parties may prevail.'<sup>1104</sup> This suggests that rather than conceding that family hardship was a mitigating factor in *D'Arrigo*, de Jersey CJ acceptance that it was a circumstance that could impact upon a sentence in exceptional circumstances was supported by the doctrine of mercy.<sup>1105</sup>

In *D'Arrigo*, McMurdo P delivered a separate judgment. In accordance with the long-standing approach of the Queensland Court of Appeal, she found that family hardship was a mitigating sentencing factor. President McMurdo stated:

The innocent 16 month old child is likely to suffer emotionally with the respondent's incarceration. In a case where imprisonment may, but will not necessarily, be imposed a factor like this may well persuade a judicial officer not to impose a sentence of actual imprisonment.<sup>1106</sup>

Unfortunately, McMurdo P did not cite any authorities in her judgment, however, her approach to family hardship clearly aligned with that expressed in *Mill, Jany* and *Tilley*.<sup>1107</sup> She found the error was in the weight attached to family hardship in the circumstances of the case. President McMurdo stated:

The matters which impressed the learned sentencing Judge were to the respondent's credit but could not overcome the important sentencing principles requiring general and personal deterrence in this serious example of dangerous driving causing death. A significant period of actual custody has to be imposed despite any resulting hardship likely to be rendered to his young child.<sup>1108</sup>

McMurdo P agreed with the order imposed by the Chief Justice, but her judgment is an importance stance against altering the Court's approach to family hardship as a sentencing factor.

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<sup>1104</sup> *D'Arrigo* [2004] QCA 399 (26 October 2004) 8.

<sup>1105</sup> See Chapter Six.

<sup>1106</sup> *D'Arrigo* [2004] QCA 399 (26 October 2004) 12.

<sup>1107</sup> *Mill* [1955] St R Qd 210; *Jany* [1966] Qd R 328; *Tilley* (1991) 53 A Crim R 1.

<sup>1108</sup> *D'Arrigo* [2004] QCA 399 (26 October 2004) 12.

Following the *D'Arrigo*, a blended middle-ground approach emerged. This approach was explained by Atkinson J in *R v Chong; Ex parte A-G (Qld)*.<sup>1109</sup> Justice Atkinson stated:

There is authority for the proposition that the hardship caused to an offender's children by imprisonment may be taken into account of in the exercise of sentencing discretion but only in certain circumstances. It is then one of many factors to be taken into account.<sup>1110</sup>

This approach in Queensland is a middle-ground position which sits between two divergent approaches to family hardship in which family hardship is either:

- a mitigating factor at sentencing where the court is to determine how much weight is to be attached to the factor balancing it against the other relevant factors and purposes of sentencing; or
- it is not a mitigating factor, but it can be taken into account as an act of judicial mercy in extreme or exceptional circumstances.

To hold that family hardship is a sentencing factor but one that *only* triggers when there is exceptional family hardship is an unprincipled compromise between the above two approaches.

This study of the common law has revealed that this 'compromise' approach to family hardship has been widely adopted. In this sense, in Australia, family hardship has been acknowledged at common law in a number of jurisdictions as a sentencing factor albeit a 'special breed' of sentencing factor which only arises where a threshold of exceptional circumstances is met. It is argued in Chapter Six that this position has been adopted because of a lack of judicial attention to the scope of mercy at sentencing.

### **c) Push back**

In 2008 in *Chong*, Justice Atkinson J (Keane and Fraser JJA agreeing) delivered a 10 page judgment carefully considering the question of family hardship as a mitigating factor. In this case the indigenous offender lived on Mornington Island and had been convicted of unlawful wounding and breaching an intensive correction order. She was sentenced to two and a half-years' imprisonment with

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<sup>1109</sup> *R v Chong; Ex parte A-G (Qld)* (2008) 181 A Crim R 200 ('Chong').

<sup>1110</sup> *Ibid* [29].

court-ordered parole on that day of sentence.<sup>1111</sup> The victim of the offence was the offender's mother, and there was a history of violence within the family.<sup>1112</sup> The offender had seven dependent children and was breastfeeding her youngest child.<sup>1113</sup> The Attorney-General appealed against the sentence imposed stating it was manifestly inadequate.

Justice Atkinson carefully reviewed the earlier case law from the Queensland Court of Appeal on family hardship. The judge also considered the role of the United Nations *Convention on the Rights of the Child 1989* and the judgment of Pincus JA in *Le & Le* (discussed above). Justice Atkinson agreed with Pincus JA that under the *Penalties and Sentences Act 1992* (Qld) the rights of a child were not a primary consideration at sentencing. The judge also agreed that this did not preclude family hardship from being a sentencing factor and Atkinson J cited s 9(2)(r) of the *Penalties and Sentences Act 1992* (Qld) which permitted courts to have regard to 'any other relevant circumstances'.<sup>1114</sup> Atkinson J expressed the opinion that there is a 'strong argument for the law reform recommended by the Anti-Discrimination Commission of Queensland... to include this factor explicitly'<sup>1115</sup> as an enumerated matter in the *Penalties and Sentences Act 1992* (Qld).

In respect to the offender being a member of an Indigenous community and family hardship, Atkinson J (Keane and Fraser JJA agreeing) acknowledged the relevance of the following factors:

- her imprisonment will necessarily mean her removal to the mainland far away from her children and particularly the baby and thus any practical means of maintaining personal contact to them through visits or maintaining breastfeeding of the baby;<sup>1116</sup>
- the likely adverse impact on the children with regard to their attendance at school, [is] a particularly important factor in remote Indigenous communities where, as government reports show, the absentee rate from school is much higher than in the rest of the community.<sup>1117</sup> (formatting and dot points added)

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<sup>1111</sup> *Chong* (2008) 181 A Crim R 200, [3].

<sup>1112</sup> *Ibid* [5]-[8].

<sup>1113</sup> *Ibid* [28].

<sup>1114</sup> *Ibid* [31]-[34].

<sup>1115</sup> *Ibid* [33]. The Anti-Discrimination Commission's Report and Recommendations were discussed in Chapter Three.

<sup>1116</sup> *Ibid* [36].

<sup>1117</sup> *Ibid* [41].



It is argued that the principle as explained by Atkinson J in *Chong* foreshadowed a return to the *Tilley* approach in Queensland.

The results of the ‘exhaustive shepardizing’ study of the case law indicates that *Chong* has had some recognition in Queensland (see Table 12) with five citations (noting that this study of the case law stopped at the end of the 2011 calendar year). The study showed that this case had not been picked up in other Australian jurisdictions.

**Table 12: Citations to *Chong* within the Study**

Jurisdiction	QLD	CTH	ACT	NSW	NT	SA	TAS	VIC	WA
Number of citations	5	-	-	-	-	-	-	-	-

Therefore, the study of the case law has revealed that following *D’Arrigo* the blended middle-ground approach has had some prominence in Queensland. Judicial officers, although treating family hardship as a sentencing factor, have restricted the scope for family hardship in sentencing, requiring exceptional circumstances to be established before it is to come into consideration in determining an appropriate sentence. This has meant that judicial officers have found that family hardship is rarely a relevant sentencing consideration.<sup>1118</sup>

The practice in this jurisdiction has not, however, been consistent. There is also evidence of some judicial officers continuing to express the principle in line with *Tilley*; that family hardship is undoubtedly a sentencing factor, and the court must determine what weight to attach to the matter in the circumstances of the particular case. As explained above, it is argued that the decision in *Chong*<sup>1119</sup> marked a return of the Queensland Court of Appeal to the *Tilley* approach to family hardship at sentencing.<sup>1120</sup> Further academic study of the use and scope of family

<sup>1118</sup> See, eg, *R v Stewart* [2008] QSC 208 (25 August 2008); *R v Jovic* [2008] QCA 278 (12 September 2008); *R v Haddad* [2009] QCA 143 (28 May 2009);

<sup>1119</sup> *Chong* (2008) 181 A Crim R 200.

<sup>1120</sup> *R v Wakefield* (2008) 187 A Crim R 514; *R v Haugland* [2009] QCA 46 (6 March 2009); *Bedeau* [2009] QCA 43 (6 March 2009); *R v Nuttall*; *Ex parte Attorney-General* [2011] 2 Qd R 328;

hardship in specific courts in Queensland is required to shed further light on which approach is more common in Queensland’s first instance sentencing practice.

## 2. Cases with High Juristic Status

There were three cases in Queensland that received 10 or more citations (see Table 13). The case with the highest number of local citations was *D’Arrigo* with eleven citations. In fact, all but one of the cases (identified by the process of ‘exhaustive shepardizing’) that followed the *D’Arrigo* decision cited this case. Although as discussed above (in the qualitative analysis of the case law) the sentencing principles in respect to family hardship have not been consistently expressed in this body of case law. The cases of *Le & Le* and *Tilley* were also frequently cited in the Queensland case law with nine and eight citations respectively. *Tilley* is the only case from Queensland which has had broad interjurisdictional interest (see Table 13 and ‘Cases with Cross-Jurisdictional Influence’ below).

**Table 13: High Juristic Status Cases in Queensland**

Case Name	Total number of citations	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<i>Tilley</i> (1991) 53 A Crim R 1	16	3	1	1	1	8	-	1	1	-
<i>Tho Le and Diem Mac Le</i> (1995) 83 A Crim R 428	11	1	1	-	-	9	-	-	-	-
<i>R v D’Arrigo; Ex parte A-G (Qld)</i> [2004] QCA 399 (26 October 2004)	11	-	-	-	-	11	-	-	-	-

## 3. Conclusion

Queensland has the earliest case law addressing the question of family hardship at sentencing. These cases pre-dated Thomas’ publication of the *Principles of Sentencing*.<sup>1121</sup> The question of whether family hardship is a mitigating sentencing factor has been debated in the Queensland Court of Appeal. This study of the case law in Queensland shows that, overall, the *Tilley* approach to family hardship has

<sup>1121</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 1970).

been the dominant approach by the Queensland Court of Appeal. This approach sees family hardship as a sentencing factor that is to be balanced against the other relevant sentencing factors to determine an appropriate sentence. The weight to be attached to the factor is determined by the sentencing judge by taking into account all of the circumstances of the case, the other relevant factors and the purposes of sentencing.

However, the Queensland Court of Appeal has not approached family hardship at sentencing with consistency. In 2004, a comprise approach appeared in this jurisdiction. This approach took on board the exceptional circumstances threshold (which had arisen family hardship was considered under the judicial exercise of mercy) alongside the view that family hardship was a sentencing factor. This created a special breed of sentencing factor one that arose for consideration only when exceptional circumstances were established. Then, and only then, was sentencing judge to take family hardship into account in determining an appropriate sentence and weight it against the other relevant considerations.

### *B. New South Wales*

The study of the case law on family hardship in New South Wales resulted in the analysis of 70 cases. Seven of these cases were first instance sentencing remarks, while the remaining cases (63 cases) were all appellate decisions before the New South Wales Court of Criminal Appeal. The gender of the offender raising family hardship was a male in 55% of these cases and female in 45% of the cases. Despite the large number of cases identified the approach to family hardship has been more settled within New South Wales than in most of the other state and territory jurisdictions.

#### *1. Historical Narrative of Family Hardship*

The early cases in New South Wales highlight that the New South Wales Court of Criminal Appeal endorsed wide discretion in the hands of sentencing judges.<sup>1122</sup>

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<sup>1122</sup> *H* (1980) 3 A Crim R 53; *Anderson* (1987) 32 A Crim R 146; *R v Carlton* (Unreported, New South Wales Supreme Court, Carruthers J, 14 April 1989); *R v Roberts* (Unreported, Supreme Court of New South Wales Criminal Division, Hunt J, 31 August 1989).

The first significant case dealing with family hardship in this jurisdiction is *T*<sup>1123</sup> decided in 1990. As demonstrated in Table 14 below, this case has a high juristic status in New South Wales; being cited in 23 subsequent superior court decisions within New South Wales.

The offender in *T*, was 38-year-old man employed in the Royal Australian Air Force. He was married with two children. One of the children was the young victim of the sexual assault offences.<sup>1124</sup> The sentencing judge imposed an ‘effective head sentence...[of] 14 years penal servitude’<sup>1125</sup> and the offender sought leave to appeal the severity of the sentence.

One of the grounds of appeal raised was whether insufficient weight had been given to the offender’s forfeiture of his service gratuity and retirement pay upon imprisonment.<sup>1126</sup> It was argued before the New South Wales Court of Criminal Appeal that, ‘in failing to take into account the hardship which the loss of the gratuity and retirement pay would cause the applicant’s family’<sup>1127</sup> the sentencing judge had erred. Justice Allen held:

I do not consider that his Honour did err in that regard. It is only in circumstances of exceptional hardship to the applicant’s family that the court will take into account that hardship in mitigation of sentence. The hardship must be so “extreme” – going so far beyond the sort of hardship which inevitably results to a family when the breadwinner is imprisoned, that “a sense of mercy or of affronted common sense imperatively demands that they (the sentencing judges) should draw back”: *Boyle* (1987) 34 A Crim R 202 applying *Wirth* (1976) 14 SASR 291.<sup>1128</sup>

Allen J found that the error had occurred in the sentencing judge giving insufficient weight to the offender’s ‘pleas of guilty and thereby forfeiting his gratuity and retirement pay.’<sup>1129</sup> In *T*, Campbell J also found error. However, he held that loss of valuable pension rights was a mitigating sentencing factor (citing David Thomas’ *Principles of Sentencing*<sup>1130</sup>).

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<sup>1123</sup> *T* (1990) 47 A Crim R 29.

<sup>1124</sup> *Ibid* 36.

<sup>1125</sup> *Ibid* 35.

<sup>1126</sup> *Ibid* 40.

<sup>1127</sup> *Ibid*.

<sup>1128</sup> *Ibid*.

<sup>1129</sup> *Ibid*.

<sup>1130</sup> *Ibid* 32 citing David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2<sup>nd</sup> ed, 1979) 214.

The following year in *R v Dib*<sup>1131</sup>, Allen J in the New South Wales Court of Criminal Appeal had the opportunity to comment further on family hardship at sentencing. This case also has a high juristic status in New South Wales, see Table 14 below. The case was an appeal brought against the severity of sentence. The male offender had been convicted of wounding with intent to do grievous bodily harm and was sentenced to six years with a non-parole period of four and a half years.<sup>1132</sup>

Allen J (Meagher JA and Badgery-Parker J agreeing) accepted the appeal and resentenced the offender to three years' imprisonment.<sup>1133</sup> Relevant to this finding was the offender's care for his 18-year-old handicapped son (the court noted that his wife was also in poor health).<sup>1134</sup> Allen J stated:

It is obvious from the material before the Court that if the son Fadi is deprived of the care of his father extreme hardship is likely to be suffered by him. There is no other person to whom he has the necessary bond to enable the care which he is given to go not merely to his physical comfort but also to such peace of mind that is possible for him to have.

The relevant law was stated in *T*... [his Honour cited the passage from *T* extracted above]

... I consider that the present is one of those very exceptional cases and that the hardship which Fadi would suffer is relevant to the sentence which should be imposed upon the applicant. It must frankly be acknowledged that the taking into account of the hardship to a person other than the offender is anomalous. It cannot be justified by any principle of sentencing. Its jurisdiction is humanity, and that alone.<sup>1135</sup>

It is clear from Allen J's comments in *Dib*, that he did not consider family hardship to be a legitimate sentencing factor. Rather, family hardship was an anomaly, a consideration that raised the court's compassion and family hardship could receive recognition at sentencing as a grant of mercy.

In 1992 in *R v Kirby*,<sup>1136</sup> the Court heard an appeal against the severity of a sixteen month custodial sentence imposed upon the mother of a young child. Debra Kirby

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<sup>1131</sup> *R v Dib* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Meagher JA, Allen J and Badgery-Parker J, 13 September 1991).

<sup>1132</sup> *Ibid* 1.

<sup>1133</sup> *Ibid* 7.

<sup>1134</sup> *Ibid* 6.

<sup>1135</sup> *Ibid* 7.

<sup>1136</sup> *R v Kirby* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Wood, Allen and Abadee JJ, 12 May 1992).

was in a stable de facto relationship and the child was under the care of its father and grandmother during Kirby's imprisonment.<sup>1137</sup> Before the New South Wales Court of Criminal Appeal it was argued that the sentencing judge had given insufficient weight to 'rehabilitation', 'motherhood', and that the custodial sentence was 'likely to deprive the mother of an opportunity of nursing the child... and to deprive the child of the opportunity of being nursed by the mother.'<sup>1138</sup>

Justice Abadee (Wood and Allen JJ agreeing) dismissed the appeal and found no error. Justice Abadee (Wood and Allen JJ agreeing) said:

Even assuming that the hardship to the family principle was applicable, a matter on which I express no firm view – it appears that such principle was considered and taken into account by his Honour when imposing the sentence that he in fact did impose. As to the relevant hardship principle, see the discussion of it by Allen J in the case of Regina v T (Court of Criminal Appeal, 9 March, 1990 unreported).<sup>1139</sup>

The Court acknowledged the sentencing judge also had had regard to the potential for Kirby to receive a leave of absence from prison under s 29(2)(c) of the *Prisons Act 1952* (NSW) which enabled a mother of young children 'to serve her sentence with her child in an appropriate environment determined by the Commission'.<sup>1140</sup> However, in *Kirby*, the New South Wales Court of Criminal Appeal left open the question of whether or not a sentencing judge should take into consideration the possible exercise of Executive Discretion.<sup>1141</sup>

The study of the case law conducted for this dissertation reveals that in the 1990s the New South Wales Court of Appeal was consistent in its application of the principle. The principle, as laid down by Allen J in *T*,<sup>1142</sup> was that sentencing courts were able to consider family hardship in exceptional circumstances in mitigation of sentence; but that hardship 'must be so "extreme" ...that "a sense of mercy or of affronted common sense imperatively demands that they (the sentencing judges)

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<sup>1137</sup> Ibid 4.

<sup>1138</sup> Ibid 10.

<sup>1139</sup> Ibid 5.

<sup>1140</sup> Ibid 5-9.

<sup>1141</sup> Ibid 6. See also comments in *Tiki*, where the court did not form an view on this question, *Tiki* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Finlay and James JJ, 24 August 1994).

<sup>1142</sup> (1990) 47 A Crim R 29.

should draw back'.<sup>1143</sup> The Court, therefore saw family hardship arising at sentencing under judicial compassion or mercy.<sup>1144</sup>

In the appellate case law in this period the issue before the court was whether there were exceptional circumstances in the circumstances of each individual case. Nuanced principles as to what amounted to exceptional circumstances were not developed, rather the New South Wales Court of Criminal Appeal extended considerable discretion to sentencing judges.

In 1996, in *Edwards*<sup>1145</sup> the New South Wales Court of Criminal Appeal held that the principle as expressed in *Wirth*,<sup>1146</sup> *Boyle*,<sup>1147</sup> *T*<sup>1148</sup> and *Adami*<sup>1149</sup> was not limited to family members.<sup>1150</sup> The female offender in *Edwards* had pleaded guilty to unlawful and dangerous act manslaughter.<sup>1151</sup> The victim of the offence was a married man which Edwards had been in a relationship with. In determining sentence, the sentencing judge (Simpson J) had recognised that family hardship in exceptional circumstances can mitigate a sentence.<sup>1152</sup> At sentencing, Simpson J had said:

Where the sufferer from the imprisonment is not a member of the family of the person undergoing imprisonment, it seems to me that the option for mercy is perhaps more readily available. Whether that is so or not, I am satisfied that the circumstances of Keith warrant the taking of a most unusual course, one which would otherwise not be warranted, nor even contemplated.<sup>1153</sup>

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<sup>1143</sup> *Ibid* 40 (Allen J).

<sup>1144</sup> See, eg, *Hatton and Perdicaro* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Gleeson CJ, Ireland J and Lee AJ, 3 November 1992); *R v Sarca* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Wood J, Gleeson CJ and Sheller JA, 11 May 1993); *R v Kerr* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Kirby P, Badgery-Parker J and Loveday AJ, 12 November 1993); *R v Niga* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Gleeson CJ, Kirby P and Ireland J, 13 April 1994); *Tiki* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Finlay and James JJ, 24 August 1994); *Alexander* (1994) 78 A Crim R 141, 145; *R v Leslie* (1995) 21 MVR 208; (Unreported judgment, Supreme Court of NSW Court of Criminal Appeal, Grove, Abadee and Simpson JJA, 10 March 1995); *Maslen and Shaw* (1995) 79 A Crim R 199, 209; *R v Hakim* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Cole JA, Smart and James JJ, 5 September 1996); *R v Rowe* [1996] NSWSC 467 (3 October 1996).

<sup>1145</sup> *Edwards* (1996) 90 A Crim R 510.

<sup>1146</sup> *R v Wirth* (1976) 14 SASR 291.

<sup>1147</sup> *Boyle* (1987) 34 A Crim R 202.

<sup>1148</sup> *T* (1990) 47 A Crim R 29.

<sup>1149</sup> *Adami* (1989) 42 A Crim R 88.

<sup>1150</sup> *Edwards* (1996) 90 A Crim R 510, 517 (Gleeson CJ) (James and Ireland JJ agreeing).

<sup>1151</sup> *Ibid* 511.

<sup>1152</sup> *Ibid* 515.

<sup>1153</sup> Quoted in *Edwards* (1996) 90 A Crim R 510, 515 (Gleeson CJ).

Edwards was a 'personal carer' to 61-year-old 'Keith' who was a long-term resident in a 'group home for intellectually handicapped and psychiatrically disabled.'<sup>1154</sup> Keith was said to be 'difficult to care for, and dangerous, but the respondent had more success in handling him than others before her.'<sup>1155</sup> On the sole basis of the impact of a full-time custodial sentence upon Keith,<sup>1156</sup> the sentencing judge sentenced Edwards to three years penal servitude to be served by way of weekend periodic detention.<sup>1157</sup> The Crown appealed the sentence.

Gleeson CJ (James and Ireland JJ agreeing) accepted a broader reading of the principle, finding that a sentencing judge could in exceptional circumstances 'deal leniently with an offender because of the effect which punishment of the offender will have upon some third party.'<sup>1158</sup> As to Simpson J's reasoning, Gleeson CJ said that the circumstances were not exceptional. He remarked:

It is not easy to understand how, as a matter of logic, or even as a matter of simple mercy, hardship to a member of an offender's family would have a lesser claim upon a court's attention than hardship to a person for whom the respondent was a paid carer... However, in so far as she considered it to be an exceptional case because the person affected by the hardship was not a member of the offender's family, then that cannot be justified as a relevant basis of exception.<sup>1159</sup>

Ultimately, the Court held:

The objective seriousness of the crime for which the respondent was being sentenced, and the importance of even-handed administration of criminal justice, meant that Simpson J was in error in permitting the consequence to a third party deflect her from imposing the sentence of full-time imprisonment, which she plainly indicated she would otherwise have imposed.<sup>1160</sup>

As demonstrated in Table 14 below, the study of the case law on family hardship in Australia revealed that *Edwards* has the highest juristic status in New South Wales; it also has a very strong cross-jurisdictional influence throughout Australia. In fact, it had the second highest cross-jurisdictional influence of the cases identified by this study (see Table 14).

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<sup>1154</sup> *Edwards* (1996) 90 A Crim R 510, 514.

<sup>1155</sup> *Ibid.*

<sup>1156</sup> *Ibid* 512.

<sup>1157</sup> *Ibid* 510 – 511.

<sup>1158</sup> *Ibid* 515.

<sup>1159</sup> *Ibid* 516.

<sup>1160</sup> *Ibid* 518.



**Table 14: Citations to *Edwards* within the Study**

Jurisdiction	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Number of citations	14	3	38	1	7	6	1	8	-

In 1998, the New South Wales Court of Criminal Appeal heard the case of *Day*.<sup>1161</sup> This case does not have a high juristic status in New South Wales, but it is a noteworthy case as in this case Wood CJ at CL delivered the judgment for the Court. Chief Justice Wood would later sit as Chairperson and Lead Commissioner<sup>1162</sup> of the New South Wales Law Reform Commission ('NSWLRC') at the time when its report on *Sentencing* the NSWLRC did not support the listing of family hardship in statute.<sup>1163</sup> The position of the NSWLRC aligns with the view expressed by Wood CJ in *Day*.

The decision in *Day* is also noteworthy because it was the beginning of a series of cases to come before the New South Wales Court of Criminal Appeal where the court took a consistently restrictive approach to the consideration of family hardship and set a high threshold for exceptional circumstances. *Day* was a widow who was raising his three children (aged 15, 13 and 12). He had a gambling habit, was unemployed and received a sole parent's benefit.<sup>1164</sup> *Day* had plead guilty to the supply of heroin and the supply of cannabis and had two other offences taken into account at sentencing.<sup>1165</sup> The sentencing judge had taken into account the impact of a custodial sentence upon his dependent children observing that 'they were at a critical time in their development'.<sup>1166</sup>

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<sup>1161</sup> *Day* (1998) 100 A Crim R 275.

<sup>1162</sup> *Ibid* xii. Note that the Hon James Wood was the Chairperson for the NSW Law Reform Commission from 2006-2014.

<sup>1163</sup> See Chapter Three.

<sup>1164</sup> *Day* (1998) 100 A Crim R 275, 276.

<sup>1165</sup> *Ibid* 275.

<sup>1166</sup> *Ibid* 277.

Chief Justice Wood at Common Law (Sheller JA and Newman J agreeing) found that in taking this approach at sentencing the sentencing judge 'fell into appellable error.'<sup>1167</sup> On the application of the relevant principle, Wood CJ at CL stated:

...his Honour did not make any reference to the well established line of authority that before hardship to third parties, occasioned by a sentence is taken into account, it must be "truly exceptional": *Edwards* (1996) 90 A Crim R 510, that is, so extreme as to lead the court to conclude that: "A sense of mercy or of affronted common sense imperatively demands that it be taken into account" or where: "it would be in effect inhuman to refuse to do so" ...<sup>1168</sup>

This statement of principle is very consistent with the earlier position in *T*,<sup>1169</sup> *Dib*<sup>1170</sup> and *Edwards*.<sup>1171</sup>

The Court found that the hardship in this case was not exceptional. This study has focused on the expression of sentencing principle and practice and has not sought to set out the threshold for exceptional circumstances. In fact, as the Court stated in *Day*, 'little is gained by a comparison since each [case] was determined upon its own facts.'<sup>1172</sup> However, as to the approach to family hardship taken in New South Wales it is important to recognise the question of whether or not the circumstances were exceptional was a completely separate test. At this point, the sentencing judge is not taking into account the other relevant circumstances nor the purposes of sentencing. For example, in *Day*, Wood CJ at CL (Sheller JA and Newman J agreeing) said:

The children in this case were not young children. They were, as the respondent acknowledged in his evidence, beyond the age at which they needed to be collected from school or babysat. None was shown to suffer from any form of illness or other disability calling for special care. They had a grandmother and an aunt prepared to care for them, in the former case, in their own home... They are arrangements of the kind which very many families have to make, for a variety of reasons, other than the imprisonment of a primary carer.<sup>1173</sup>

Thus, the question before the court is what is the potential impact of the sentence upon the third party and is this impact exceptional (in the sense that 'mercy' or

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<sup>1167</sup> *Ibid.*

<sup>1168</sup> *Ibid.*

<sup>1169</sup> *T* (1990) 47 A Crim R 29.

<sup>1170</sup> *R v Dib* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Meagher JA, Allen J and Badgery-Parker J, 13 September 1991).

<sup>1171</sup> *Edwards* (1996) 90 A Crim R 510.

<sup>1172</sup> *Day* (1998) 100 A Crim R 275, 278.

<sup>1173</sup> *Ibid* 278.

‘affronted common sense imperatively demands that it be taken into account’<sup>1174</sup>  
Later in the year, in the case of *Cacciola*,<sup>1175</sup> the Justice Abadee expressly warned lower courts, ‘that care should be taken not to find exceptional circumstances when none exist.’<sup>1176</sup>

**(a) Family hardship as part of the ‘general mix of subjective matters’<sup>1177</sup>**

The analysis of the body of cases identified by this study, shows that the case of *R v X*,<sup>1178</sup> in 2004, marked the beginning of an alternate expression of principle, although this was unlikely to have been the intended effect by Sully J in making his remarks on family hardship. Mrs X had been convicted of the supply of heroin (of a commercial quantity) sentenced to a suspended sentence for two years. The Crown appealed the sentence.<sup>1179</sup>

Mrs X had raised a number of factors in mitigation of sentence including that she was the mother of five children.<sup>1180</sup> Sully J (Grove and Bell JJ agreeing) established that the sentencing judge had found that the family circumstances of the respondent were highly exceptional circumstances.<sup>1181</sup> The New South Wales Court of Criminal Appeal held that the ‘sentencing Judge fell into manifest error in his treatment of the respondent’s family circumstances as “*highly exceptional circumstances*” warranting an additional and discrete measure of leniency.’<sup>1182</sup> In coming to this position, Sully J stated:

To have regard to those circumstances as part of the general mix of subjective matters is one thing. It is, however, an entirely different thing to isolate those family circumstances, characterise them as highly exceptional, and use that characterisation as a justification for a discrete and substantial measure of leniency added onto the respondent’s entitlements under the general law and under the general requirements of sections 22 and 23 of the **Sentencing Procedure Act** [Mrs X received discounts under these section for pleading guilty and for co-operation with law enforcement authorities]. It needs to be borne in mind, whether or not it be thought steely-hearted to say so, that this respondent did what she did with her eyes open; in full knowledge that what she was doing was highly illegal; and for profit to herself and her family.<sup>1183</sup>

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<sup>1174</sup> *Ibid* 277 (Wood CJ at CL).

<sup>1175</sup> *Cacciola* (1998) 104 A Crim R 178.

<sup>1176</sup> *Ibid* 186 (Abadee J). See also comments from Priestly JA at 182 (Kirby J agreeing).

<sup>1177</sup> *R v X* [2004] NSWCCA 93 (8 April 2004), [24].

<sup>1178</sup> *R v X* [2004] NSWCCA 93 (8 April 2004).

<sup>1179</sup> *Ibid* [3].

<sup>1180</sup> *Ibid* [9]-[10].

<sup>1181</sup> *Ibid* [22].

<sup>1182</sup> *Ibid* [25].

<sup>1183</sup> *Ibid* [24].

In making these remarks, Sully J was denying the availability of leniency on the basis of a merciful discount for family hardship in this case. However, the comment on principle implied that family hardship could be considered as part of a general mix of subjective matters at sentencing.

The following month (May 2004) in *R v Girard*,<sup>1184</sup> Hodgson JA (Levine and Howie JJ agreeing) cited Sully J's comments in *R v X* with approval, and found:

In relation to the children, in my opinion, this was not shown to be a case falling within the category of exceptional circumstances as discussed in *Edwards*. It is certainly a matter of concern, and a matter that can be taken into account as one subjective circumstance in assessing the appropriate penalty, that innocent children will be adversely affected by the imprisonment of their parents. However, in the absence of exceptional circumstances, this is not to be taken into account as a specific and particular matter resulting in a substantial reduction or elimination of a sentence of imprisonment.<sup>1185</sup>

This was a subtle shift in language but an important shift in approach. The New South Wales Court of Criminal Appeal in *Girard* was prepared to accept family hardship as a sentencing factor even where the exceptional circumstances threshold had not been reached. More recently, in 2010, the availability of a sentencing judge to take into account family hardship as a sentencing factor, in absence of exceptional circumstances, but 'as part of the general factual matrix in selecting an appropriate sentence' was endorsed by the Full Court of the New South Wales Court of Criminal Appeal in *Dipangkear v The Queen*.<sup>1186</sup>

The case law of the 2000s, also sheds light on a series of cases where it was argued on appeal that the sentencing court had erred in the approach taken with respect to s 44(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).<sup>1187</sup> For example, in *R v Murphy*, one of the grounds of appeal was that, 'His Honour erred in his approach to s 44 of the Crimes (Sentencing Procedure) Act and in failing to find special circumstances.'<sup>1188</sup> Section 44 provided:

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<sup>1184</sup> *R v Girard* [2004] NSWCCA 170 (12 May 2004) ('*Girard*').

<sup>1185</sup> *Ibid* [21].

<sup>1186</sup> *Dipangkear v The Queen* [2010] NSWCCA 156 (21 July 2010) [40]-[41] (Whealy J) (Hodgson JA and Buddin J agreeing).

<sup>1187</sup> See, eg, *R v Grbin* [2004] NSWCCA 220 (2 July 2004); *R v Murphy* [2005] NSWCCA 182 (9 May 2005); *Harrison v The Queen* [2006] NSWCCA 185 (19 June 2006); *Roberts v The Queen* [2007] NSWCCA 112 (20 April 2007); *King v The Queen* [2010] NSWCCA 202 (10 September 2010).

<sup>1188</sup> *R v Murphy* [2005] NSWCCA 182 (9 May 2005) [13].

(1) When sentencing an offender to imprisonment for an offence, the court is first required to set a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence).

(2) The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision)...<sup>1189</sup>

Therefore, the position being argued before the New South Wales Court of Criminal Appeal was when considering the issue of special circumstances in respect of the setting of the non-parole period under s 44(2) the sentencing judge should take into account family hardship. This means that looked at in this context, family hardship would not change the penalty imposed but could mitigate the ratio of the non-parole period to the head sentence.

In 2010, in *King v The Queen*,<sup>1190</sup> Price J (Basten JA and Hall J agreeing) succinctly summarised the relevant principles in respect to family hardship at sentencing. He stated:

Hardship to an offender's family caused by imprisonment is generally an irrelevant consideration and can only be taken into account in highly exceptional circumstances in justifying a non-custodial sentence: *R v Edwards* (1996) 90 A Crim R 510 at 516. There are circumstances, however, that whilst not sufficiently exceptional to justify a non-custodial sentence are sufficiently exceptional in a suitable case to justify a finding of special circumstances: *R v Grbin* [2004] NSWCCA 220; *R v Murphy* [2005] NSWCCA 182.<sup>1191</sup>

This shows an approach to family hardship that marginalised it as a factor in the determination of an appropriate sentence but that took it into account in respect of the terms of the sentence imposed.

## 2. Cases with High Juristic Status

Despite the New South Wales study of the case law being made up on seventy cases. There were only five cases which recorded 10 or more hits through the process of 'exhaustive shepardizing'. These cases are set out in Table 15 below. The cases of *Maslen and Shaw* (1995)<sup>1192</sup> and *Edwards* (1996)<sup>1193</sup> are the only New South Wales cases identified by this study with cross-jurisdictional influence.

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<sup>1189</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44.

<sup>1190</sup> *King v The Queen* [2010] NSWCCA 202 (10 September 2010).

<sup>1191</sup> *Ibid* [18].

<sup>1192</sup> *Maslen and Shaw* (1995) 79 A Crim R 199.

<sup>1193</sup> *Edwards* (1996) 90 A Crim R 510.

**Table 15: High Juristic Status Cases in New South Wales**

Case Name	Total number of citations	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<i>T</i> (1990) 47 A Crim R 29	29	2	1	23	-	1	-	-	2	-
<i>R v Dib</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Meagher JA, Allen J and Badgery-Parker J, 13 September 1991)	11	-	-	11	-	-	-	-	-	-
<i>R v Niga</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Gleeson CJ, Kirby P and Ireland J, 13 April 1994)	11	2	-	9	-	-	-	-	-	-
<i>Maslen and Shaw</i> (1995) 79 A Crim R 199	25	7	-	3	1	-	1	2	11	-
<i>Edwards</i> (1996) 90 A Crim R 510	78	14	3	38	1	7	6	1	8	-

### 3. Conclusion

Early on the New South Wales Court of Criminal Appeal held that family hardship was a sentencing factor that can only be taken into account in ‘highly exceptional’ circumstances. This position was maintained for decades. However, more recent case law in this jurisdiction highlights a softening of approach to family hardship. An alternate line of authority exists where family hardship, whilst not being exceptional, is still able to be considered as part of a general mix of sentencing factors. Family hardship has also been seen to be relevant to the question of whether special circumstances exist, in terms of the ratio of the head sentence to the non-parole period, under s 44(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

#### C. Northern Territory

The case study of family hardship in the Northern Territory involved the analysis of 16 cases (see Appendix A). Only one case was a first instance sentencing remark the remaining cases were all appellate decisions before the Northern Territory Court of Criminal Appeal. There was an even split in the gender of the offender raising family hardship in this jurisdiction: male in 50% of these cases and female in 50% of the cases.

### 1. Historical Narrative of Family Hardship

The earliest case identified by the study of the case law for the Northern Territory is the 1992 case of *Wayne v Boldiston*.<sup>1194</sup> The indigenous female offender was convicted of unlawful assault involving circumstances of aggravation.<sup>1195</sup> She was sentenced to imprisonment and appealed to the Northern Territory Court of Criminal Appeal on the grounds that the sentence was manifestly excessive. The offender 'had grown up in Yuendumu and her first language is Warlpiri.'<sup>1196</sup> She had one child (aged seven or eight) to her late husband, she remarried and had three children (aged five, four and three). She was the primary carer for her four children.<sup>1197</sup> Her husband was unemployed at the time of her sentencing but had 'no experience caring for young children' and it was put before the court that the children 'would have to be split up amongst relatives'.<sup>1198</sup>

Justice Mildren, looked to the case law of the Supreme Court of South Australia. He stated:

I am unable to give this factor any weight. Except in exceptional circumstances, the effect of a sentence on dependants is not a relevant factor: *Adami* ... I do not consider the circumstances here to be exceptional. The fact that the dependants affected are those of a woman is not an exceptional circumstance: *R v Wirth*...<sup>1199</sup>

This expression of the *Adami* principle is the restrictive reading of the case which Justice Perry would later critique in *Bates* (1997)<sup>1200</sup> (see above).

In 1995, the Full Court of the Northern Territory Court of Appeal heard the case of *R v Nagas*.<sup>1201</sup> This case was a Crown appeal against a sentence of 15 months' imprisonment with a five month and 13-day non-parole period imposed upon an indigenous female offender. Nagas had been convicted of an offence of grievous bodily harm, deprivation of personal liberty and theft of a Tupperware™ container,

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<sup>1194</sup> [1992] 85 NTR 8.

<sup>1195</sup> *Ibid* 9.

<sup>1196</sup> *Ibid* 15.

<sup>1197</sup> *Ibid*.

<sup>1198</sup> *Ibid* 16.

<sup>1199</sup> *Ibid*.

<sup>1200</sup> *Bates* (1997) 70 SASR 66.

<sup>1201</sup> (1995) 5 NTLR 45.

personal papers and \$47 cash.<sup>1202</sup> The sentencing judge had found that she had two dependent children (aged five and eleven) who had been sent to Gladstone (Qld) to live with relatives during her sentence.<sup>1203</sup> He noted that 'living in Gladstone, it would not be possible for the respondent and the children to see each other as long as she was retained in gaol'.<sup>1204</sup>

The Crown submitted that too much weight had been given to the fact that the offender was female, a mother of two children, had no criminal record and was employed.<sup>1205</sup> In *Nagas*, the Northern Territory Court of Appeal in a unanimous decision dismissed the appeal. The Court said that family hardship was 'a factor which could be taken into account'<sup>1206</sup> citing the work of David Thomas and the case law of the Supreme Court of South Australia (*Wirth and Adami*).<sup>1207</sup>

The *Nagas*, case is also well known in Australia for its judicial comments on gender.<sup>1208</sup> In its appeal, the Crown had also submitted that:

the sentencing judge had misdirected himself that the question of general deterrence was not as significant as it might otherwise have been because the respondent was a female and the incidence of criminal activity of the kind charged by females was low.<sup>1209</sup>

The Court also rejected this ground and held:

Whether the reason for leniency to women is predicated upon the lower recidivism rate of women, prevalence of a particular type of crime, general deterrence, or simply compassion, the principle is well established and his Honour was correct to have regard to it in sentencing the respondent.<sup>1210</sup>

The Court's approach to gender was altered in 2009 in *Midjumbani v Moore*.<sup>1211</sup>

The study of the case law indicates that within the Northern Territory two streams of practice arose. First, some judicial officers accepted a permissive approach, consistent with the approach in *Nagas*, that family hardship was a relevant

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<sup>1202</sup> *Criminal Code 1983* (NT) ss 181, 196(1) and 210.

<sup>1203</sup> *Nagas* (1995) 5 NTLR 45, 49.

<sup>1204</sup> *Ibid*.

<sup>1205</sup> *Ibid* 53.

<sup>1206</sup> *Ibid* 53-54.

<sup>1207</sup> *Ibid*.

<sup>1208</sup> See Chapter Six.

<sup>1209</sup> *Ibid* 55.

<sup>1210</sup> *Ibid*.

<sup>1211</sup> (2009) 229 FLR 452. See Chapter Six.



sentencing factor under the common law.<sup>1212</sup> Second, some judicial officers took a restrictive approach to family hardship finding it was only relevant in highly exceptional circumstances.<sup>1213</sup> Kearney J's comment in *Amagula v White*<sup>1214</sup> illustrates this approach when he stated:

...such hardship should be taken into account only in highly exceptional circumstances; it must be sufficiently extreme that "a sense of mercy or of affronted commonsense imperatively demands that [the sentencer] should draw back, as it was put by Wells J in *Wirth* (1976) 14 SASR 291 at 296..."<sup>1215</sup>

Kearney J's statement of the relevant principle in *Amagula v White* highlights the court aligning with Queensland, New South Wales, Western Australia and the South Australian approach before *Bates*<sup>1216</sup>.

## 2. Cases with High Juristic Status

The study of the case law revealed that *R v Nagas*<sup>1217</sup> had the most influence locally with 10 citations (see Table 16). This case has not had any influence outside of the Northern Territory. Although *Nagas* does adopt the approach to family hardship outlined in South Australia in *Adami* and *Wirth* and those cases have had significant cross-jurisdiction influence (see below). Another pertinent consideration in respect to the interstate influence of *Nagas* is that Court made sweeping comment in respect to leniency to women in sentencing.

In the Northern Territory, *Wayne v Boldiston*<sup>1218</sup> was the only case with a noticeable cross-jurisdiction influence, although, this was limited as it was only cited in Tasmania and Victoria. Moreover, as seen from Table 16, the number of citations *Wayne v Boldiston* received in these jurisdictions was low.

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<sup>1212</sup> See, eg, *R v Miyatatawuy* (1996) 6 NTLR 44; *Arnold v Trenerry* (1997) 142 FLR 229, 231-232; *FG v Peach* [2003] NTSC 114 (26 November 2003); *Currie v Burgoyne* [2004] NTSC 10 (15 March 2004);

<sup>1213</sup> *Amagula v White* [1998] NTSC 60 (7 January 1998); *Watt v The Queen* [1999] NTCCA 81 (13 August 1999); *R v Martyn* [2011] NTCCA 13 (16 November 2011); *R v Hancock* [2011] NTCCA 14 (18 November 2011).

<sup>1214</sup> [1998] NTSC 60 (7 January 1998).

<sup>1215</sup> *Ibid* 10.

<sup>1216</sup> *Bates* (1997) 70 SASR 66. See also *Watt v The Queen* [1999] NTCCA 81 (13 August 1999).

<sup>1217</sup> (1995) 5 NTLR 45.

<sup>1218</sup> [1992] 85 NTR 8.

**Table 16: High Juristic Status Cases in the Northern Territory**

Case Name	Total number of citations	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<i>Wayne v Boldiston</i> [1992] 85 NTR 8	12	1	-	-	3	-	-	5	3	-
<i>R v Nagas</i> (1995) 5 NTLR 45	12	2	-	-	10	-	-	-	-	-

### 3. Conclusion

Unlike the experience in Queensland where the tension in the expressed form of the common law principle was acknowledged and separate judgments were delivered, in the Northern Territory Court of Appeal did not recognise the variance in approach to family hardship at sentencing. The most recent case law from the Northern Territory predominately adopts the restrictive approach which suggests that this jurisdiction has fallen into line with New South Wales, Queensland and Western Australia.

#### D. Tasmania

The study of family hardship in Tasmania consisted of the analysis of 13 cases. Three cases were first instance sentencing remarks, while the remaining 10 cases were appeals before the Tasmanian Court of Criminal Appeal. The gender of the offender raising family hardship was a male in 60% of these cases and female in 40% of the cases.

##### 1. Historical Narrative of Family Hardship

The earliest case identified for Tasmania is the case of *Sullivan v The Queen* ('*Sullivan*').<sup>1219</sup> Though not reported until 1975, this case was heard in 1972 before the Tasmanian Court of Criminal Appeal. The Court looked to the approach taken by the Supreme Court of South Australia in relation to consideration of family hardship factors at sentencing. Chief Justice Green accepted that family hardship was a sentencing consideration and considered the approach adopted in *Moore v Fingleton*, where the Supreme Court of South Australia had held that while exceptional hardship may justify some leniency, financial hardship was a

<sup>1219</sup> [1975] Tas SR 146 (NC) ('*Sullivan*')

commonplace impact and was not sufficient.<sup>1220</sup> The Chief Justice Green stated that the impact of imprisonment upon dependants of the offender 'must not be permitted to deter a judge from imposing a sentence of imprisonment if he thinks it appropriate.'<sup>1221</sup> The other judges, Chambers and Nettlefold JJ, concurred that it was a 'fact of life' that the imposition of a prison sentence imposes financial hardship upon the offender and his family and that 'the public interest' required a prison sentence to be imposed.<sup>1222</sup>

*Sullivan* set the tone for the Tasmanian approach to family hardship. Following the direction of the Supreme Court of South Australia, the Tasmanian Court of Criminal Appeal accepted that family hardship was a common law sentencing factor. The importance placed upon deterrence laid out by the court in *Sullivan*, meant that family hardship factors were given little weight in this jurisdiction when they arose in matters that also had a public interest factor, which pushed toward a custodial sentence. For example, in 1985, in *Cadman v The Queen* the Defence conceded that 'the practice of the courts' showed that if 'there is a need for a deterrent sentence the circumstances of the offender's family usually will be given little weight when determining the appropriate order.'<sup>1223</sup>

Similarly, in 1990 in *Riley v Tilyard*, Crawford J cited with approval the approach of the Court in *Sullivan* that where the public interest was held to require a prison sentence due to deterrence factors, family hardship carried little weight.<sup>1224</sup> In this case the indigenous male offender had been convicted of driving under the influence and refusing to submit to a breath analysis. He had been sentenced to imprisonment. One ground of appeal was that:

3. The learned magistrate had failed to attach any or sufficient weight to the exceptional and unusual domestic circumstances of the applicant and the likely effect of imprisonment upon his family in those circumstances.<sup>1225</sup>

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<sup>1220</sup> *Moore v Fingleton* (1972) 3 SASR 164, 167 cited in *Sullivan* [1975] Tas SR 146 (NC), 146.

<sup>1221</sup> *Sullivan v The Queen* [1975] Tas SR 146 (NC 1), 146.

<sup>1222</sup> *Ibid.*

<sup>1223</sup> [1985] TASSC 15, [8].

<sup>1224</sup> Citing Chamber J and referencing the judgment of Green CJ in *Riley v Tilyard* [1990] TASSC 86, [13] (Crawford J).

<sup>1225</sup> *Riley v Tilyard* [1990] TASSC 86, [1].

The offender had a lengthy criminal record of similar offences.<sup>1226</sup> Justice Crawford held that deterrence in this case outweighed the fact that the offender's wife was 'substantially ill' and that the offender also had six children (aged 5-11 years).<sup>1227</sup>

The study reveals that from 2000 onwards there was a distinct shift in both the consideration and application of family hardship as a sentencing factor. After 2000 the language of the Supreme Court of Tasmania shifted to statements of 'general principle' that, 'the court should have no regard to the impact which a sentence of imprisonment will have on the members of an accused's family.'<sup>1228</sup> This body of case law, heavily influenced by the Western Australian case of *Boyle*<sup>1229</sup> (discussed below), found that family hardship was only relevant in extreme circumstances such as where the offender was the sole primary carer or where both parents may be imprisoned.<sup>1230</sup>

However, a qualitative analysis of the case law reveals that there was not a clear rejection of family hardship as a mitigating factor by the Supreme Court of Tasmania. In contrast, Crawford J in his judgments acknowledged that family hardship was a mitigating factor, but he stated it was one that did not carry much weight unless there were exceptional circumstances.<sup>1231</sup> The phrasing of the principle by Crawford J aligned with the South Australian approach to family hardship. Crawford J (who presided over *Riley v Tilyard*, see above) also relied upon *Boyle* in his judgments but he expressed the principle in different terms.

The last case identified by this study, was the case of *McCulloch v Tasmania*.<sup>1232</sup> One of the judges, Wood J, added to her judgment: '...some comments regarding an

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<sup>1226</sup> Ibid [6].

<sup>1227</sup> Ibid [13].

<sup>1228</sup> *Williams v McLaughlin* [2000] TASSC 29 (10 April 2000), [9] (Evans J). However, very similar language was adopted in *R v Georgiadis [No 5]* [2001] TASSC 88 (6 August 2001) [29] (Underwood J). *R v Georgiadis [No 5]* was cited with approval in *R v Bullock* [2003] TASSC 37 (13 June 2003) [9] (Slicer J).

<sup>1229</sup> *Boyle* (1987) 34 A Crim R 202.

<sup>1230</sup> *Williams v McLaughlin* [2000] TASSC 29 (10 April 2000); *R v Georgiadis [No 5]* [2001] TASSC 88 (6 August 2001); *Jordan v The Queen* [2002] TASSC 121 (20 December 2002); *R v Bullock* [2003] TASSC 37 (13 June 2003); *Oliver v Tasmania* [2006] TASSC 95 (17 November 2006).

<sup>1231</sup> *Tunks v Taws* [2003] TASSC 58 (4 July 2003), [18]; *Gibbins v White* [2004] TASC 8 (25 February 2004) [19].

<sup>1232</sup> *McCulloch v Tasmania* [2010] TASCCA 21 (22 December 2010).

aspect of the appellant’s personal circumstances and whether it amounts to a mitigating factor.’<sup>1233</sup> She explained that the submissions to the Court had argued that the Court should not have regard to family hardship as a mitigating factor, relying upon the iteration of the principle that a court ‘should not have regard to hardship upon a prisoner’s family’.<sup>1234</sup> Justice Wood rejected this submission. She found that a factor,

labelled in one case “maternal deprivation”... but which could equally be referred to as parental deprivation, is a factor which may be given some weight in mitigation depending on the particular circumstances of the individual case.<sup>1235</sup>

Within Tasmania, family hardship can be seen to have been recognised as a sentencing factor albeit one that will not be afforded much weight unless the circumstances are exceptional.

## 2. Cases with High Juristic Status

This study has revealed that Tasmanian case law on family hardship has not been picked up in other Australian jurisdictions (see Appendix A). There were no cases in Tasmania that received more than 10 citations. *Sullivan* and *R v Georgiadis [No 5]* had the highest local juristic status with three citations each (see Table 17).

**Table 17: Cases with High Juristic Status in Tasmania - NIL**

Case Name	Total number of citations	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<i>Sullivan v The Queen [1975] Tas SR 146 (NC 1)</i>	3	-	-	-	-	-	-	3	-	-
<i>R v Georgiadis [No 5] [2001] TASSC 88 (6 August 2001)</i>	3	-	-	-	-	-	-	3	-	-

## 3. Conclusion

The approach to family hardship in Tasmania traditionally aligned with the common law principle as expressed in South Australia. Despite the appearance of a more restrictive expression of the principle in some decisions in period the 2000-

<sup>1233</sup> Ibid [18].

<sup>1234</sup> Ibid [19].

<sup>1235</sup> Ibid [23].

2006, family hardship was still seen as a legitimate mitigating factor in this jurisdiction.

The Tasmanian Court of Criminal Appeal has considered the development of sentencing principles in respect to the weight to be attached to this factor. The court has a long-standing position that where the public interest or deterrence aspects of a case are strong, family hardship considerations do not prevent a court from imposing an otherwise appropriate custodial sentence. The court has also found that where the imposition of a custodial sentence will result in parental deprivation for the offender's dependants then family hardship may carry some weight.

### *E. Victoria*

The study of family hardship as a sentencing factor in Victoria consisted of the analysis of fifty-five cases (see Appendix A). Four of these cases were first instance sentencing remarks. The remaining fifty-one cases were appellate decisions before the Victorian Court of Appeal. The gender of the offender raising family hardship was a male in 69% of these cases and female in 31% of the cases.

#### *1. Historical Narrative of Family Hardship*

The earliest identified Victorian case law within this study were in the 1970s and 1980s. There were seven cases that fell within this period (1974 – 1988) and all seven cases are appellant decisions from the Victorian Court of Appeal. Only one of the offenders raising family hardship, in this body of early case law, was a female offender.<sup>1236</sup> An examination of the case law in Victoria reveals ongoing tension within the court as to the proper role of family hardship in sentencing. Whilst initially in the 1970's family hardship was seen as a sentencing factor the study reveals a shift toward the concept of a 'special breed' of sentencing factor where there was a requirement for exceptional circumstances to be established before it carried weight at sentencing. Later still, the Court, following *Markovic v The*

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<sup>1236</sup> Helen Margaret Barnacle in *Zampaglione* (1982) 6 A Crim R 287.

*Queen*<sup>1237</sup> would place family hardship outside of sentencing principles and into the realm of a grant of judicial 'mercy'.

### **(a) Family hardship as a sentencing factor**

The first Victorian case identified in the case study is *R v Mitchell*.<sup>1238</sup> This was an appeal brought by the Attorney-General against a sentence imposed in the County Court upon Mr Mitchell.<sup>1239</sup> Mitchell had pled guilty to conspiracy (as a party to an offence in respect of an elaborate bank fraud) and admitted nineteen prior convictions. At first instance he was released upon a \$100 bond and condition to be of good behaviour for five years.<sup>1240</sup>

Mitchell was a 32-year-old father with two children (aged seven and four and a half years). The sentencing judge had taken into account in mitigation of sentence, the minor role Mitchell had in the crime, medical evidence regarding the poor health of Mitchell's wife following the loss of a pregnancy and that the date of the last prior conviction was for offending in 1960. The sentencing judge had stated, 'When you next see that doctor, you can thank him for that report, because I think without it you probably would have served a short sentence.'<sup>1241</sup>

The Attorney-General appealed this sentence on a number of grounds. One of the grounds listed was:

2. That the learned trial Judge having properly concluded that the offence was of such a nature as to ordinarily warrant a gaol sentence was in error in concluding that there were circumstances in the case which justified the passing of a more lenient sentence.<sup>1242</sup>

The Victorian Court of Appeal<sup>1243</sup> found that the 'we cannot agree that the role played by Mitchell was a minor role, nor do we take the view that he was nothing more than a mere courier.'<sup>1244</sup> They accepted that the sentencing judge had taken

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<sup>1237</sup> *Markovic v The Queen* (2010) 200 A Crim R 510.

<sup>1238</sup> [1974] VR 625.

<sup>1239</sup> *Ibid* 625.

<sup>1240</sup> *Ibid* 627.

<sup>1241</sup> *Ibid*. The sentencing judge had later provided a report to the Victorian Court of Appeal stating, 'despite my final remark to the prisoner the question of his wife's health was a minor factor among those which influenced me in deciding the appropriate sentence.' The Victorian Court of Appeal accepted that it was a minor factor, see *R v Mitchell* [1974] VR 625, 630-631.

<sup>1242</sup> *Ibid* 628.

<sup>1243</sup> Judgment of the Court per Pape, Menhennitt and Nelson JJ.

<sup>1244</sup> *Ibid* 631.

into account the health of the offender's wife as a minor factor but found that 'in dealing with a crime as serious as this one was, we think that was a consideration of minimal weight.'<sup>1245</sup> Therefore, the court found some of the grounds of appeal established and imposed a sentence of 18 months imprisonment with a non-parole period of eight months.<sup>1246</sup>

The sentencing practice approved by the Victorian Court of Appeal was that it was for the sentencing court to balance all the relevant sentencing factors, determine the weight to be attached to these factors in light of all of the circumstances including the impact of the purposes of sentencing, and come to an appropriate sentence. In this case deterrence was seen to carry significant weight due to the serious nature of the offence and offending.<sup>1247</sup> What is important to recognise, is that the Victorian Court of Appeal in *R v Mitchell* approached the question of family hardship as one of what weight should be attached to this factor rather than proposing that it was not a relevant sentencing factor. There was no discussion in this case as to whether the hardship upon the wife was exceptional. This approach reveals that the family hardship was seen as a valid mitigating factor at sentencing.

Three months later, in that the same year (1974), the Victorian Court of Appeal heard *R v Polterman*.<sup>1248</sup> The offender had a lengthy criminal history of dishonesty offences.<sup>1249</sup> The offender had previously avoided a sentence of imprisonment for offences of housebreaking and stealing because the Magistrate had been persuaded by his efforts at rehabilitation (including recent marriage). The offender had since reoffended and was convicted for 'eight counts of housebreaking and stealing'.<sup>1250</sup> He was sentenced to a head sentence of four years with a non-parole period of eighteen months. The offender appealed to the Victorian Court of Appeal stating: 'I feel the sentence is far too heavy due to the fact that my wife and six months old daughter are now nearly living in poverty.'<sup>1251</sup>

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<sup>1245</sup> Ibid.

<sup>1246</sup> Ibid.

<sup>1247</sup> This was the eighth ground of appeal and the Victorian Court of Appeal found that this ground had been established, see Ibid.

<sup>1248</sup> *R v Polterman* (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Adam J, Starke J and Crockett J, 2 August 1974).

<sup>1249</sup> Ibid 1.

<sup>1250</sup> Ibid 2.

<sup>1251</sup> Ibid.



Justice Adam (Starke and Crockett JJ) agreeing held:

This Court has so often said when one appeals for mercy on the ground of hardship to a wife or family that the accused ought to have had regard to that before embarking on a life of crime, and the Court cannot be blamed because it deals with an accused on the merits having regard to the gravity of the offence, the past circumstances, and so on. The Court is not so inhuman as not to be very sorry for those placed in the position of this wife and child because of the criminal activities of the husband, but our task is not to yield to pleas based on sentiment or emotion. However humane we may be we have a duty to perform, and that duty we perform as a Court of Appeal in allowing sentences to stand unless we see something has gone wrong in the sentencing... We are only concerned that he should have exercised his discretion properly having regard to proper considerations and leaving out no proper considerations...

There is not a tittle of evidence that His Honour Judge Frederico has approached this sentence improperly having regard to all relevant circumstances, and however much he may have felt for the wife and child in this case – he obviously has felt sympathy for them – he has given a sentence which he considered in the circumstances, having regard to the prior criminal record of the applicant, to be the proper sentence.<sup>1252</sup>

The Court found that there were no grounds to revisit the sentence imposed upon Polterman; the sentencing judge had taken family hardship into account in imposing a sentence but had determined the factor carried very little weight. While using the terminology of ‘mercy’, Adam J was focused upon the exercise of sentencing discretion within the framework of the law. He was solely concerned with the application of sentencing factors rather than a broad discretion to be merciful outside of a legal framework.

In 1982, in *Zampaglione*, the Attorney-General appealed the sentences imposed upon Antonio Zampaglione, Salvatore Zampaglione, David Jewell and Helen Barnacle for serious drug offences.<sup>1253</sup> In respect to the sentence imposed upon Barnacle (12 year sentence) the issue of family hardship was raised before the Victorian Court of Appeal. The sentencing judge had imposed a lighter sentence upon Barnacle than her co-offenders because ‘she was a young woman and the mother of a very young child [eight months old]’.<sup>1254</sup>

On the relevance of ‘gender’ as a sentencing factor, Young CJ and Murray J held:

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<sup>1252</sup> Ibid 2-3.

<sup>1253</sup> (1982) 6 A Crim R 287, 288-289.

<sup>1254</sup> Ibid 310.

It may be thought that she should be treated more leniently simply because she is a woman but even if that has been the general experience in the criminal courts and even if it be appropriate in some classes of case, we see no reason why in this type of case any distinction should be made on the grounds of sex.<sup>1255</sup>

Young CJ and Murray J found that ‘a prison sentence will have a more devastating effect upon her than it would have upon others’<sup>1256</sup> due to her separation from her very young child but held that this consideration cannot be given much weight in the circumstances. Therefore, Young CJ and Murray J framed the issues as one of ‘gender’ and ‘hardship to the offender’ rather than one of ‘family hardship’. They found error in the imposition of the sentence, allowed the appeal, and imposed a sentence of 15 years upon the offender.<sup>1257</sup>

Southwell J, in dissent, recognised the relevance of family hardship. In this case he was in dissent only in respect to the appeal against Barnacle. Southwell J agreed with Young CJ and Murray J with respect to the reasons and orders imposed upon the other offenders. In contrast to the other judges, Southwell J found that the sentence imposed upon Barnacle of 12 years, ‘was not so low as to warrant the interference of this Court.’<sup>1258</sup> Justice Southwell recognised the impact of the sentence upon the offender and the effect that it would have on her very young child (even if the child could spend some time with her in gaol).<sup>1259</sup> He found that these were factors the sentencing judge was ‘entitled to give considerable weight’.<sup>1260</sup> In reaching this conclusion he did not discuss the need for exceptional circumstances. His views were framed in terms of family hardship being a legitimate sentencing factor and an assessment of whether undue weight had been attached to this factor.

From these early cases it is apparent that family hardship had been accepted as a relevant and legitimate sentencing factor in Victoria. The focus in the cases before the Victorian Court of Appeal had been about the weight that could be afforded to the factor within the balancing exercise of each individual case. However, through

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<sup>1255</sup> Ibid.

<sup>1256</sup> Ibid.

<sup>1257</sup> Ibid.

<sup>1258</sup> Ibid 313.

<sup>1259</sup> Ibid.

<sup>1260</sup> Ibid 312.

the 1980's there emerged a shift in the approach of the Victorian Courts to how family hardship was to be approached.

In 1982, in *Marasovic*,<sup>1261</sup> the Attorney-General brought another appeal against sentence on the basis of undue weight given to family hardship. The offender had been convicted with stabbing his wife with intent to do grievous bodily harm. The sentencing judge was influenced by the impact of a custodial sentence upon the offender's children and imposed a probation order.<sup>1262</sup> On appeal the Crown argued the sentencing judge had 'given undue weight to the question of rehabilitating the respondent and the family needs of the respondent's children.'<sup>1263</sup>

In the Victorian Court of Appeal, Kaye J (Brooking J agreeing) held that the 'heinousness of the crime', fact that his victim was his wife, the circumstances in which it was committed and the need for general deterrence<sup>1264</sup> meant that the sentencing judge had erred in imposing a probation order. Kaye J found that it is regrettable that innocent family members will suffer from the sentence but was not persuaded by this.<sup>1265</sup> In dissent, McInerney J held that it was open for the sentencing judge to be persuaded by considerations of rehabilitation and family hardship.<sup>1266</sup>

The following year (1983) in *Pozvek*,<sup>1267</sup> Starke, Kaye and Brooking JJ heard an appeal against sentence on the basis of 'severity of sentence' and 'compassionate grounds due to family situation.'<sup>1268</sup> The offender was 20 years old and the father of three young children (aged three and a half years, two and a half years, and nine months).<sup>1269</sup> The offender's wife and children were living on \$100 a week for food

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<sup>1261</sup> *AG v Marasovic* (Unreported, Supreme Court of Victoria Court of Criminal Appeal, McInerney J, Kaye J and Brooking J, 16 February 1982).

<sup>1262</sup> *Ibid* 6.

<sup>1263</sup> *Ibid* 7.

<sup>1264</sup> *Ibid* 14.

<sup>1265</sup> *Ibid*.

<sup>1266</sup> *Ibid* 10.

<sup>1267</sup> *R v Pozvek* (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Starke J, Kaye J and Brooking J, 2 September 1983).

<sup>1268</sup> *Ibid* 4.

<sup>1269</sup> *Ibid* 2.

and clothing and the offender's wife had been raped while Pozvek was imprisoned.<sup>1270</sup> Applying a similar policy to that expressed by Kaye J in *Marasovic*,<sup>1271</sup> Starke J (Kaye and Booking JJ agreeing) stated:

It is inevitable that the wife and children of a man who goes to gaol are punished very often more than the man himself, but one only has to pause for a moment to see that if those with dependents [sic] are given specially lenient treatment by the Courts, then the whole appearance of justice would be defeated.<sup>1272</sup>

Starke J (Kaye and Booking JJ agreeing) found:

In this case, as I have said, there appears to be no error in the sentencing discretion of the learned Judge. Matters that have been really relied upon, although distressing, cannot be in my view the basis for allowing an application in this Court.<sup>1273</sup>

*Marasovic* and *Pozvek*, appear as the start of a shift away from accepting family hardship as an appropriate sentencing factor.

By 1987, the Victorian Court of Appeal was declaring that family hardship was not generally a relevant mitigating sentencing factor. In *Power*,<sup>1274</sup> Young CJ (Kaye and Gray JJ agreeing) held:

Mr Weinberg acknowledged that hardship to Parson's family and loved ones is not normally a circumstance which can lead the Court to reduce a sentence. There are, no doubt, some occasions when it is appropriate to do so and we were referred to some passages in Professor Thomas's book on Principles of Sentencing... The occasions are rare, and I doubt it is possible to describe them in compendious terms. It is sufficient to say that I am satisfied that the present is not one of them.

Mr Weinberg acknowledged that it was a question of degree, and so it must be. The hardship to Parsons' family will certainly be serious, but I do not think that it is of a character which would justify the Court in interfering with the sentence which the learned Judge passed.<sup>1275</sup>

We can see here, just as occurred in other Australian jurisdictions, the influence of Thomas' text upon Australian sentencing practices. However, what is also apparent is that the language of the court has moved away from finding that family hardship

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<sup>1270</sup> Ibid 4.

<sup>1271</sup> *AG v Marasovic* (Unreported, Supreme Court of Victoria Court of Criminal Appeal, McInerney J, Kaye J and Brooking J, 16 February 1982).

<sup>1272</sup> Ibid 5.

<sup>1273</sup> Ibid.

<sup>1274</sup> *R v Power* (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Young CJ, Kaye J and Gray J, 2 June 1987).

<sup>1275</sup> Ibid 14.W

was relevant but not carrying much weight in the circumstances, to a position that family hardship was not normally relevant.

By the mid to late 1990s the Victorian Court of Appeal had adopted the approach that a sentencing court should have no regard to family hardship, but that 'this is not an absolute rule'<sup>1276</sup> and could be departed from in exceptional circumstances.<sup>1277</sup>

### **(b) Hardship to the offender**

In this jurisdiction there was no controversy in the case law in respect to courts taking into account hardship upon the offender (due to separation from their children).<sup>1278</sup> Under the common law, there was no requirement that such hardship be exceptional to be taken into account as a legitimate sentencing factor, highlighting the prominence of just deserts sentencing theory.<sup>1279</sup>

### **(c) The role of mercy**

The Victorian Court of Appeal, in common with other Australian appellate courts, intermittently employed the term 'mercy' when discussing the consideration of family hardship at sentencing. In the State and Federal sentencing case of *Carmody*,<sup>1280</sup> the distinction between taking into account family hardship as a sentencing factor and taking into account family hardship as an act of judicial mercy was called to the attention of the Victorian Court of Appeal.

The offender, Kim Dung Thi Carmody, was convicted of importing a trafficable quantity of heroin (the federal offence) and trafficking in heroin (the state offence).

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<sup>1276</sup> *Boyle* (1987) 34 A Crim R 202, 205 (Burt CJ).

<sup>1277</sup> See *R v Lynch* (Unreported, Supreme Court of Victoria Court of Appeal, Winneke P, Hayne and Charles JJA, 18 April 1996); *R v Yaldiz* (Unreported, Supreme Court of Victoria Court of Appeal, Winneke P, Hayne JA and Nathan AJA, 4 December 1996); *Yates* (1998) 99 A Crim R 483; *R v Panuccio* [1998] VSC 300 (4 May 1998); *Wall* (1999) 105 A Crim R 426; *R v Howden* [1999] VSCA 130 (16 August 1999).

<sup>1278</sup> See, eg, *R v Ilic* [2003] VSCA 82 (25 June 2003) [14] (Callaway JA) (Winneke ACJ and Buchanan JJA agreeing); *R v Williams* [2004] VSC 429 (29 October 2004) [16] (Kellam J); *R v Nguyen* [2006] VSCA 184 (8 September 2006); *R v Dooley* [2006] VSCA 269 (4 December 2006); *R v Nagul* [2007] VSCA 8 (16 January 2007); *R v Esposito* [2009] VSCA 277 (30 November 2009).

<sup>1279</sup> See Chapter Six.

<sup>1280</sup> (1998) 100 A Crim R 41.

Her husband was also charged and convicted.<sup>1281</sup> In her application to appeal the sentence imposed upon her, Kim Carmody raised new evidence in respect to the impact of the sentence upon her four-year-old son. Her son was 'chronically prone to attacks of febrile convulsion'.<sup>1282</sup> He had spent some time in prison with the offender and coped well but had difficulty upon leaving the prison and living with his Aunt.<sup>1283</sup> It was accepted by all members of the Court that family hardship could only be taken into account in exceptional circumstances.<sup>1284</sup> The relationship between family hardship as a common law factor and its recognition in legislation in the federal statute in this case is explored in Chapter Five.

The Court in *Carmody*, found that family hardship could not be considered as a relevant sentencing factor, however, mercy was warranted. Tadgell JA (Winneke P agreeing) held:

We cannot act as though exceptional circumstances have been shown, for they have not been shown. We can, however, show some mercy, tempering the wind to the shorn lamb. I think this is a case in which to do it...A similar attitude has been taken in the English cases of *Vaughan* (1982) 4 Cr App R (S) 83 and *Haleth* (1982) 4 Cr App R (S) 178. In each of those cases an amendment of sentence was made on appeal so as to achieve the immediate release of a prisoner in order to allow a sick child or children to be cared for.

The circumstances here do not, I think, call for the applicant's immediate release, and the seriousness of her offences precludes it. I would propose, however, that the applicant's sentence be shortened, but on the sole ground that some mercy is warranted. It is really mercy to the child that is deserved, the law having immemorially shown tenderness towards the very young, the very old and the sick.<sup>1285</sup>

Justice Callaway agreed that mercy was appropriate in the circumstances.<sup>1286</sup>

This case is a significant judgment by the Victorian Court of Appeal, because it shows the court recognising that it has an inherent judicial power to exercise mercy. The Court also makes a clear distinction between family hardship as a sentencing factor, and leniency imposed (on the basis of mercy to a sick child) *after* the application of sentencing principles governing sentencing practice.

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<sup>1281</sup> Ibid 42.

<sup>1282</sup> Ibid 44.

<sup>1283</sup> Ibid.

<sup>1284</sup> Ibid 45 (Tadgell JA) (Winneke P agreeing), 46 (Callaway JA).

<sup>1285</sup> Ibid.

<sup>1286</sup> Ibid 47.

The legal issues before the Victorian Court of Appeal in *Holland*<sup>1287</sup> in 2002 were very similar to those in *Carmody*. This was a husband and wife drug trafficking case, where the hardship arising from a custodial sentence imposed upon both parents of a seven-year-old child was in issue. The offenders' daughter (Selby) was placed in the care of her grandparents. Limited evidence was put before the court at sentencing or on appeal, however, it was submitted to the Court of Appeal that this sentence imposed a burden upon the grandparents<sup>1288</sup> and that they would not be able to care for the child long term.<sup>1289</sup>

In *Holland* it was held by all members of the Court that there were no exceptional circumstances in respect to hardship upon the child in this case.<sup>1290</sup> Batt JA stated:

I recognise the very considerable burdens that Selby's paternal grandparents are enduring in order to care for her and my sympathy is engaged. But, in the end, I do not discern in this case the "imperative demand" of which Wells J spoke [*R v Wirth*]. In the circumstances of this case, the incarceration of both parents of one healthy child of seven is not sufficient to constitute exceptional circumstances.<sup>1291</sup>

Similarly, O'Bryan AJA accepted that Selby was an 'innocent victim of her parent's offending'<sup>1292</sup> however, no exceptional hardship upon her had been demonstrated. While in agreement with the other judges, on the expression of the relevant principle, Eames JA stated:

There is always a place for mercy in the sentencing process, but as Callaway JA noted in *R v Carmody* a sentencing judge or magistrate would be failing in his or her duty if proper sentencing considerations were overwhelmed by an emotional response to the hardship which a sentence would impose upon the family of the offender.

As the cases cited by O'Bryan AJA show, there remains, always, the overriding right of the courts to grant such lenience where to do otherwise would offend the sense of mercy of the sentencing judge or magistrate. The circumstances in which such an outcome would occur where the appeal for mercy relates to the impact of a sentence on family or others must, however, be "highly exceptional" [citing *Wirth*] or "clearly exceptional" [citing *Carmody*].<sup>1293</sup>

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<sup>1287</sup> (2002) 134 A Crim R 451.

<sup>1288</sup> *Ibid* 462.

<sup>1289</sup> *Ibid* 457.

<sup>1290</sup> *Ibid* 452 (Batt JA), 454 (Eames JA) and 462 (O'Bryan AJA).

<sup>1291</sup> *Ibid* 452-453.

<sup>1292</sup> *Ibid* 462.

<sup>1293</sup> *Ibid* 453-454.

This statement by Eames JA was an amalgamation of family hardship as a sentencing factor that arose for consideration at sentencing only in exceptional circumstances, and family hardship as an issue capable of being considered, after the consideration of sentencing principles, when the court found ‘mercy’ was warranted.<sup>1294</sup> This blending of these two disparate considerations is noteworthy.

In *Holland*, the underpinnings of a debate (which was to take place in this jurisdiction) materialised over whether mercy could be seen as an extension to family hardship under the common law. In 2007, a line of authority arose within the Victorian Court of Appeal which examined whether there was a residual discretion of mercy open to be exercised by a sentencing judge when exceptional circumstances were not found in respect to family hardship.<sup>1295</sup> In *Nagul*,<sup>1296</sup> Chernov JA (Maxwell P and Habersberger AJA agreeing) stated:

...where hardship to the offender’s family cannot be taken into account for sentencing purposes because of absence of exceptional circumstances, it may be taken into consideration in determining whether mercy should be extended to the offender, the exercise of mercy being part of the exercise of the sentencing discretion. As King CJ said in *R v Osenkowski* in an oft cited passage cautioning against the circumscription of the sentencing discretion by Crown appeals, “[t]here must always be a place for the exercise of mercy where a judge’s sympathies are reasonably excited by the circumstances of the case.”<sup>1297</sup>

This passage was cited with approval in *R v Lane* where it was found that it was an error to fail to extend mercy even in circumstances where the question of whether or not there were exceptional circumstances was borderline.<sup>1298</sup> However, in 2008 in *R v NAD*,<sup>1299</sup> Weinberg JA was deeply critical of the argument that this was a valid ground of appeal.<sup>1300</sup> Weinberg JA stated:

It is one thing to reject a false dichotomy between justice and mercy...It is quite another to posit a requirement that any judge who sentences an offender must, in circumstances similar to those in the present case, in order to avoid sentencing error, accord some indeterminate measure of mercy.<sup>1301</sup>

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<sup>1294</sup> This judicial discretion appeared to be broad and undefined but as stated above in *Carmody* it was thought that compassion for the very young, old and sick could give rise to an exercise of judicial mercy.

<sup>1295</sup> *R v Nagul* [2007] VSCA 8 (16 January 2007); *R v Lane* (2007) 176 A Crim R 471.

<sup>1296</sup> *R v Nagul* [2007] VSCA 8 (16 January 2007).

<sup>1297</sup> *Ibid* 44.

<sup>1298</sup> *R v Lane* (2007) 176 A Crim R 471, 467-477 (Cavanough AJA) (Vincent JA and Neave JA agreeing)

<sup>1299</sup> *R v NAD* [2008] VSCA 192 (26 September 2008).

<sup>1300</sup> *Ibid* [11]-[15].

<sup>1301</sup> *Ibid* [13].



However, the issue was not finally determined in *R v NAD* as the Victorian Court of Appeal accepted fresh evidence and the Crown conceded that this fresh evidence established exceptional circumstances in respect to the hardship imposed upon the offender's daughter.<sup>1302</sup> Thus the comments of Weinberg JA remained obiter and whether there was a residual mercy for family hardship even when exceptional circumstances did not exist remained to be determined.

The relationship of family hardship and mercy came to a head in 2010 in the case of *Markovic v The Queen*.<sup>1303</sup> The Victorian Court of Appeal sat as a full bench of five judges to consider family hardship. The Court described the issues as follows:

The circumstances in which an offender can legitimately seek an exercise of mercy on the ground that his/her imprisonment is likely to cause hardship to members of his/her immediate family or other dependants. (In these reasons we will refer to third party hardship of this kind as "family hardship".)

It has long been the position at common law, that, unless the circumstances are shown to be exceptional, family hardship is to be disregarded as a sentencing consideration. The contention advanced by each of the present applicants, however, was that even if the circumstances of family hardship were not adjudged exceptional, a sentencing court could nevertheless be called on to exercise – on that ground – what is sought to be characterised as a "residual discretion of mercy". Indeed, Mr Markovic argued that failure to extend sufficient "residual" mercy on the ground of family hardship was an appealable error.<sup>1304</sup>

As this study has revealed, certainly from the mid to late 1980s family hardship was seen as a relevant sentencing factor in Victoria only where exceptional circumstances were established. Prior to this, the Victorian Court of Appeal had accepted family hardship as a legitimate sentencing factor that was to be balanced against other sentencing factors; it was a factor that effected appeals in which it was found to have been given insignificant weight or undue weight.

In *Markovic* the Court stated, boldly claimed somewhat inaccurately, that 'the exceptional circumstances test has been adopted throughout Australia as governing position at common law' and that there was a 'uniform national position in relation to sentencing for Commonwealth offences.'<sup>1305</sup> The question of whether there is a uniform approach to federal sentencing is explored in Chapter Five.

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<sup>1302</sup> Ibid [3] (Nettle JA), [52] (Mandie AJA).

<sup>1303</sup> (2010) 200 A Crim R 510 ('*Markovic*').

<sup>1304</sup> Ibid 512.

<sup>1305</sup> Ibid 514.

In *Markovic*, the Court stated that the case law revealed the following rationales for why the exceptional circumstances test was necessary:

1. It is almost inevitable that imprisoning a person will have an adverse effect on the person's dependants.
2. The primary function of the sentencing court is to impose a sentence commensurate with the gravity of the crime.
3. To treat family hardship as the basis for the exercise of leniency produces the paradoxical result that a guilty person benefits in order that innocent persons suffer less.
4. To treat an offender who has needy dependants more leniently than one equally culpable co-offender who has none would "defeat the appearance of justice" and be "patently unjust".<sup>1306</sup>

Considering these in turn, rationale 1 is an oft repeated yet hollow claim. It could also be argued that it is almost inevitable that imprisoning an offender will have an adverse effect upon the offender. This does not prevent a court from taking into account at sentencing that the imprisonment will be 'more burdensome' for some offenders – regardless of exceptional circumstance or not.<sup>1307</sup> The only justification provided by the Court for accepting hardship to the offender as a mitigating factor is that it is a 'conventional' issue of mitigation.<sup>1308</sup> This is an issue of normative theory and as this dissertation has illustrated, such claims are not ahistorical.

Rationale 2 does not prevent family hardship from being taken into account at sentencing as a mitigating factor and considered as part of the balancing process. This is also a normative claim and the study of the sentencing legislation in operation within Australia (see Chapter Two) revealed that a primary purpose of sentencing is rarely identified in each jurisdiction.

Underpinning rationales 3 and 4 is the principle of equality. The tension between family hardship and equality is explored in Chapter Six where it is claimed that in the context of the Australian sentencing model (individualised justice and instinctive synthesis) this rationale does not, and should not, have prominence.

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<sup>1306</sup> Ibid 513 (formatting added).

<sup>1307</sup> Ibid 517.

<sup>1308</sup> Ibid.

The crux of the Court's position in *Markovic* is the application of just deserts theory. As explained in Chapter Two this theory provides that the only relevant sentencing factors are those that relate to the offender or the offence. In the context of just deserts theory family hardship is not seen as a legitimate sentencing factor because it involves consideration of third parties. In *Markovic* we see this explicitly when the Court stated:

As Redlich JA pointed out during the hearing, family hardship is not a mitigating factor properly so-called, since it concerns neither the offender nor the offence.<sup>1309</sup>

The prominence given to just deserts in *Markovic* is a normative position that conflicts with the structure and form of Australian sentencing principles based upon individualised justice and instinctive synthesis.

Throughout this chapter my study reveals that family hardship has been accepted as a legitimate sentencing factor by Superior Courts in Australia. Despite this, the Victorian Court of Appeal sought to marginalise appeals to family hardship by casting it *beyond* normal sentencing considerations. In *Markovic*, the Court held:

We have concluded that the established common law position should be reaffirmed. Our reasons may be summarised as follows:

1. Reliance on family hardship – that is, hardship which imprisonment creates for persons other than the offender – is itself an appeal for mercy.
2. Properly understood, therefore, the purpose and effect of the “exceptional circumstances” test is to limit the availability of the court’s discretion to exercise mercy on that ground.
3. Accordingly, there can be no “residual discretion” to exercise mercy on grounds of family hardship where the relevant circumstances are not shown to be exceptional.
4. The effect on the offender of hardship caused to family members by his/her imprisonment raises different considerations, to which the “exceptional circumstances” test has no application.<sup>1310</sup>

The Court stated that the ‘traditional common law approach treats family hardship as itself being a question of mercy.’<sup>1311</sup> This position is critiqued in Chapter Six. The court went on to limit the use of family hardship further by limiting the exercise of this ‘Mercy’ to exceptional cases.

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<sup>1309</sup> Ibid 515.

<sup>1310</sup> Ibid 513.

<sup>1311</sup> Ibid.

The Court cited the case of *Polterman* as support for this statement, observing, '[a]s the Court of Criminal Appeal said in *Polterman*, reliance on family hardship is an "appeal for mercy"'.<sup>1312</sup> As explained above, in the analysis of the *Polterman* judgment, the use of the term 'mercy' by Adam J was used as a rhetorical flourish rather than in the 'technical' sense of a discretionary power beyond sentencing principles. A full reading of Adam J's judgment highlights that he was concerned with whether the sentencing judge had 'exercised his discretion properly having regard to proper considerations and leaving out no proper considerations', Adam J found: 'There is not a tittle of evidence that His Honour ... approached this sentence improperly having regard to all relevant circumstances...'.<sup>1313</sup> The case law post *Markovic* shows that in Victorian family hardship is not recognised as a sentencing factor. Reductions made to a sentence on the basis of family hardship are made by a grant of mercy.

For example, in 2011 in *DPP v Gerrard*<sup>1314</sup> Neave JA, citing *Markovic*, said:

Having regard to the additional report, I consider that the deafness of the respondent's wife, her consequent dependence on the respondent and his son's autism amount to exceptional family hardship which must be taken into account as a mitigating factor in determining the appropriate term of imprisonment.<sup>1315</sup>

In taking this approach Neave JA did not follow *Markovic* which had removed consideration of family hardship as a mitigating sentencing factor. While agreeing with Neave JA finding that the sentencing judge's discretion had miscarried, her fellow judges, Redlich JA and Bongiorno JA, both delivered separate judgments and pronounced that family hardship was a *request for mercy* not a sentencing factor.

Redlich JA stated:

But his Honour's sympathies were quite reasonably excited by the personal circumstances of the respondent. The respondent's reliance upon the hardship to his family was to be treated by the sentencing judge and this court as a request for mercy. The family hardship described by Neave JA does constitute exceptional circumstances and justified the exercise of mercy and the imposition of a compassionate sentence.<sup>1316</sup>

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<sup>1312</sup> Ibid.

<sup>1313</sup> *R v Polterman* (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Adam J, Starke J and Crockett J, 2 August 1974) 2-3.

<sup>1314</sup> *DPP v Gerrard* [2011] VSCA 200 (30 June 2011).

<sup>1315</sup> Ibid [46].

<sup>1316</sup> Ibid [56].

Similarly, Bongiorno JA stated:

In *Markovic v R*, this Court recently confirmed the long-standing common law rule that unless circumstances are shown to be exceptional, family hardship is to be disregarded as a sentencing consideration. Even when circumstances are exceptional, family hardship is not itself a mitigating factor, though it may form the basis of a plea to the residual discretion of the sentencing court to extend leniency to the prisoner out of compassion to those who would be affected by his or her incarceration.<sup>1317</sup>

Illustrative of this clear shift in approach to family hardship, in *R v Causer*<sup>1318</sup>, Forrest J had held:

Exceptional circumstances amount to a plea for mercy based upon an extraordinary family hardship, consequential upon the imprisonment of the accused. The plea must be seen as irresistible so much as it would be inhumane to refuse to take such circumstances into account.<sup>1319</sup>

This means that Victoria is now in the unique position of seeing family hardship as a circumstance that can only be considered at the end point of the process, after the application of sentencing principles, via the exercise of judicial mercy.

## 2. Cases with High Juristic Status

There were six Victorian cases identified by the study which had a high juristic status (see Table 18 below). Significantly, none of these cases have a strong cross-jurisdiction status. From the 1970's until 2011 there was very little reference made in any other jurisdiction to the Victorian jurisprudence on family hardship.

Although the case of *Markovic v The Queen* is undoubtedly a significant family hardship case in case as the Victorian Court of Appeal sat as a full bench of five judges to consider the issue of family hardship at sentencing. This case was heard in 2010 and the study of the case law conducted for this dissertation concluded at the end of the calendar year in 2011. Although *Markovic* was one of the last cases included in this study, its impact over twelve months (2011-2012), suggests it quickly established itself as the leading case.

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<sup>1317</sup> Ibid [60].

<sup>1318</sup> *R v Causer* [2010] VSC 341 (19 August 2010).

<sup>1319</sup> Ibid [33].

**Table 18: High Juristic Status Cases in Victoria**

Case Name	Total number of citations	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<i>R v Mitchell</i> [1974] VR 625	13	2	-	4	-	-	-	2	5	-
<i>Yates</i> (1998) 99 A Crim R 483	16	1	-	-	1	-	-	-	14	-
<i>Carmody</i> (1998) 100 A Crim R 41	29	11	-	-	-	-	-	-	17	1
<i>R v Panuccio</i> [1998] VSC 300 (4 May 1998)	12	2	-	-	1	-	-	-	9	-
<i>R v Holland</i> (2002) 134 A Crim R 451	19	2	1	-	-	-	-	-	16	-
<i>Markovic v The Queen</i> (2010) 200 A Crim R 510	11	3	1	-	-	-	-	-	7	-

### 3. Conclusion

The early case law in Victoria reveals that family hardship was accepted as a sentencing factor and courts focused on the weight to be attached to this factor when it was raised in sentencing appeals. In the 1980s there was a move away from accepting family hardship as a legitimate sentencing factor. The Victorian Court of Appeal accepted sentencing judges taking into account hardship to the offender but not hardship to others. Despite having a Charter of Human Rights in this jurisdiction the study of the case law did not reveal arguments based on human rights (as occurred in the Australian Capital Territory, see above).

The Victorian Court of Appeal did accept that family hardship could be taken into account under judicial mercy tempering the harsh impact of the law where necessary.<sup>1320</sup> In 2010 in *Markovic*,<sup>1321</sup> the Victorian Court of Appeal sat as a Full Court of five justices to consider the role of family hardship at sentencing and whether in the absence of exceptional circumstances judicial officers could resort to a residual discretion of mercy. The Court held that taking family hardship into account at sentencing was always a plea for mercy; 'it is only in the exceptional case, where the plea for mercy is seen as irresistible, that family hardship can be taken into account.'<sup>1322</sup>

<sup>1320</sup> *Carmody* (1998) 100 A Crim R 41, 45.

<sup>1321</sup> *Markovic v The Queen* (2010) 200 A Crim R 510, 513.

<sup>1322</sup> *Ibid*

## F. Western Australia

The study of family hardship in Western Australia resulted in the analysis of 54 cases (see Appendix A). All of these cases were appellate court judgments. The gender of the offender raising family hardship was a male in 45% of these cases and female in 55% of the cases. With the exception of one federal and state matter (see *Tan Hai Huat*<sup>1323</sup>) the gender of the offender raising family hardship in this sample of cases was not a male offender until the 1995 in the case of *Hodder v The Queen*.<sup>1324</sup> While this evidence is not determinative it is indicative that family hardship was conceived as a gendered issue in this jurisdiction until 2000. Thereafter there appeared a much more even spread between the sexes in respect to family hardship case law in superior courts.

### 1. Historical Narrative of Family Hardship

The earliest case in Western Australia, identified by the study, was *Baude De Bunnetat* from 1985.<sup>1325</sup> The case was an appeal against sentence imposed upon Gloria Angele Baude De Bunnetat. The offender had been convicted of bank robbery (\$1240 cash) and the co-accused was her de factor partner Townsend. The sentencing judge held that they were 'equally culpable and he sentenced each to four years and six months imprisonment'.<sup>1326</sup> A non-parole period of two years and one month was imposed in respect to each sentence. Baude De Bunnetat and Townsend were the parents of a young child.

In 1985, Chief Justice Burt believed he was without relevant common law principle. However, at this time in Australia, the Queensland Court of Appeal, the Supreme Court of Tasmania, the Supreme Court of South Australia, the Supreme Court of the Australian Capital Territory, the New South Wales Court of Criminal Appeal, and the Victorian Court of Appeal had already ruled upon this subject of family hardship as a sentencing consideration. Burt CJ (Brisden and Smith JJ agreeing) stated:

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<sup>1323</sup> (1990) 49 A Crim R 378.

<sup>1324</sup> (1995) 15 WAR 264.

<sup>1325</sup> *Baude De Bunnetat* (Unreported, Supreme Court of Western Australia Court of Criminal Appeal, Burt CJ, Brinsden and Smith JJ, 3 December 1985).

<sup>1326</sup> *Ibid* 2.

The applicant does not complain of the minimum term which was imposed upon her, but I think it is with respect to that that she has some merit. It may be wrong to say that she has merit, but merit I think could be seen within the circumstances generally. I see them as being based in the fact that the applicant is a mother of a very young child... We are told that while in custody, the child can remain with her until it is two years old or thereabouts, and if the mother remains in custody thereafter, there will be an enforced separation and some arrangements will then have to be made for someone to look after the child separated from the mother. That I think is an undesirable thing. I cannot for myself see that there is anything to be gained from that effect if it can be justly and fairly avoided. If you like, you can say it is a compassionate approach or a commonsense approach, but I think the Court – where the facts are there – ought to take it, and if it conflicts with some doctrine then we must just put up with that, but I cannot see that it does conflict with any principle because there is no principle really involved.<sup>1327</sup>

Chief Justice Burt (Brinsden and Smith JJ agreeing) allowed the appeal and reduced the non-parole period imposed upon Baude De Bunnetat to 12 months.<sup>1328</sup>

Although clearly giving weight to the family hardship in this particular case it is noteworthy that Burt CJ regarded he was doing so expressly without reliance upon any sentencing principle.

Two years later the question of family hardship again came before Chief Justice Burt in *Boyle*.<sup>1329</sup> Nadeen Brenda Boyle had been convicted of possession of cannabis with intent to sell or supply it to another.<sup>1330</sup> She was sentenced to two years imprisonment with a 12 month non-parole period.<sup>1331</sup> The case was an appeal against sentence on the ground that a sentence of imprisonment was a punishment of last resort and there were other dispositions that were appropriate in all the circumstances of the case.<sup>1332</sup> In determining the appeal the Court was required to consider whether the impact of the sentence of imprisonment upon the offender's children was a relevant sentencing factor.

Prior to the offence, Boyle had been separated from her husband for some time and was the primary carer of four children. Three were their biological children aged 18, 17 and 14. Boyle also cared for a 14-year-old foster child. Boyle's eldest daughter was mentally retarded. Her 17-year-old daughter had been employed

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<sup>1327</sup> Ibid 4.

<sup>1328</sup> Ibid 5.

<sup>1329</sup> (1987) 34 A Crim R 202.

<sup>1330</sup> *Misuse of Drugs Act 1981* (WA) s 6(1).

<sup>1331</sup> *Boyle* (1987) 34 A Crim R 202, 203.

<sup>1332</sup> Ibid.



full-time at a supermarket. The family lived on very limited funds and Boyle had stated that the reason for committing the offence was to make money to pay the bills.<sup>1333</sup> After Boyle's imprisonment this daughter had stopped working and was looking after her elder sister and two younger sisters.<sup>1334</sup> The information before the court was that:

...there is still insufficient money coming into the house to make ends meet. The applicant's parents are funding the shortfall but their resources are very limited. The pre-sentence report states that the seventeen-year-old girl is "close to breaking point".<sup>1335</sup>

In this context, the question of what was the appropriate role of family hardship at sentencing fell to be considered by the full bench of the Western Australia Court of Appeal.

This time, citing English authorities and the work of David Thomas,<sup>1336</sup> Burt CJ (Kennedy and Franklyn JJ agreeing) stated:

The question as I see it is whether the impact which the sentence of imprisonment will have upon the children is a matter which is relevant to the decision to be made... As to that I think it must be said that generally speaking the answer to that question should be in the negative. The general principle is said to be that a sentencing court should have no regard to the impact which a sentence of imprisonment will have upon the members of the prisoner's family.<sup>1337</sup>

He found that the rule as it applied in England and Wales was not absolute and could be 'departed from in exceptional circumstances.'<sup>1338</sup> In particular, he quoted the three exceptions identified by David Thomas.<sup>1339</sup> Then, looking to South Australian case law, Burt CJ stated:

The Australian authorities would seem to me to reflect the same approach although they consistently emphasise that the general principle to which I have referred will only be departed from "in extreme cases": see *Wirth* (1976) 14 SASR 291, at 294 per Bray CJ, or, as Wells J expressed it in that case (at 296) of the report, when to apply the principle would be "to carry it past the point where a sense of mercy or of affronted commonsense imperatively demands that they (the sentencing judges) should draw back"<sup>1340</sup>

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<sup>1333</sup> Ibid 203.

<sup>1334</sup> Ibid 204.

<sup>1335</sup> Ibid.

<sup>1336</sup> Ibid 205.

<sup>1337</sup> Ibid 204-205.

<sup>1338</sup> Ibid 205.

<sup>1339</sup> Ibid. See further Chapter Three.

<sup>1340</sup> Ibid 206.

Although on this occasion there was engagement with principle, a careful analysis of this case highlights that Burt CJ did not accept the general position that family hardship was a mitigating factor. His approach in this case evinces a resort to judicial mercy; with a condition precedent to this mercy that a court can grant leniency in exceptional circumstances or extreme cases.

In *Boyle*, Burt CJ held that this was an extreme case and set aside the order and proposed to impose a sentence of probation for two years instead of imprisonment. The other judges, Kennedy and Franklyn JJ, agreed it was an extreme case, they agreed with Burt CJ's reasons and order.<sup>1341</sup> Franklyn J added that he found that this was a proper case to provide an opportunity of rehabilitation to the offender.<sup>1342</sup>

In 1994, *Stewart*<sup>1343</sup> a 25-year-old female offender convicted of two counts of possession, of cannabis and cannabis resin, with intent to sell or supply was sentenced to twenty-two months' imprisonment. She brought an appeal against this sentence on the grounds that it was manifestly excessive.<sup>1344</sup> She submitted that 'her personal circumstances and antecedents are such that no term of imprisonment should have been imposed...'.<sup>1345</sup> At the time of sentencing, the offender was three months pregnant and was the mother of three children.<sup>1346</sup> After the imposition of the sentence her eight year old child was cared for by her father.<sup>1347</sup> Stewart's twins (who were four and half months old) to her current de factor partner were residing in prison with Stewart.<sup>1348</sup>

Franklyn J followed the approach laid down in *Boyle*. On the application of family hardship at sentencing he stated:

Generally, hardship caused to an offender's children is not a circumstance to be taken into account. The authorities are clear, however, that it may be taken into account when the degree of hardship that imprisonment will involve is exceptional or when the offender is the mother of young children, or where

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<sup>1341</sup> Ibid.

<sup>1342</sup> Ibid.

<sup>1343</sup> (1994) 72 A Crim R 17.

<sup>1344</sup> Ibid 18.

<sup>1345</sup> Ibid 20.

<sup>1346</sup> Ibid 19.

<sup>1347</sup> Ibid 20 -21.

<sup>1348</sup> Ibid 18.

imprisonment will result in the children being deprived of parental care. In all cases, however, it depends on the gravity of the offence and the circumstances of the case.<sup>1349</sup>

Franklyn J said that he could find little to mitigate the offence observing that even though she was in stable relationship and had a seven-year-old daughter it did not deter her from offending.<sup>1350</sup> He noted that this child was now in the custody and care of her father. In a highly problematic, and sceptical, judicial comment he stated:

the pregnancy which gave rise to the birth of the twins and the present pregnancy were each entered into after arrest, and, one must assume, with knowledge that there was a high probability of a custodial term being imposed.<sup>1351</sup>

Justice Franklyn, on the circumstances of this case, was persuaded by the significance of incapacitation, retribution and deterrence in determining an appropriate sentence for the nature of the offence committed. He refused the appeal.

Justice Owen agreed with Franklyn J's reasons and conclusion. In his short judgment, Owen J expressly mentioned the purposes of sentencing and their relationship to the imposition of an appropriate sentence in this case. He found protection of the public (incapacitation) outweighed her personal mitigation. Interestingly, Justice Owen accepted the general principles of sentencing as laid down by Wallwork J (see below) but said 'I respectfully differ from him in their application in this case.'<sup>1352</sup> Owen J found that the 'sentencing judge had not overlooked or undervalued'<sup>1353</sup> family hardship in determining an appropriate sentence and dismissed the appeal.

Justice Wallwork was in dissent in *Stewart*. He would have allowed the appeal and offered twelve months' probation. Justice Wallwork was persuaded by the offender's potential for rehabilitation.<sup>1354</sup> In his dissenting judgment, Wallwork J

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<sup>1349</sup> Ibid 21.

<sup>1350</sup> Ibid 20.

<sup>1351</sup> Ibid 21.

<sup>1352</sup> Ibid 29-30.

<sup>1353</sup> Ibid 30.

<sup>1354</sup> Ibid 29.

focused exclusively on the role of family hardship at sentencing.<sup>1355</sup> He relied upon the importance of the principle of last resort in sentencing.<sup>1356</sup> He canvassed the research literature on attachment formation in child psychology.<sup>1357</sup> He observed the principle had received legislative recognition federally in s 16A(2)(p) of the *Crimes Act 1914* (Cth). He reviewed the Western Australian and South Australian case law and found that family hardship may be taken into account as a mitigating factor in exceptional cases.<sup>1358</sup> In this case, Wallwork J found that the sentencing judge had not established that no other sentence was appropriate (ie. principle of last resort).<sup>1359</sup> Wallwork J found that the sentencing judge had ‘overlooked, or undervalued, or underestimated matters personal to the applicant and her three young children.’<sup>1360</sup>

The line of case law in Western Australia post *Boyle*,<sup>1361</sup> reveals a fairly consistent application of principle in relation to family hardship. This being: that in exceptional circumstances, family hardship should be regarded not as a matter for mercy but rather a mitigating factor at sentencing and a failure to consider the impact of a sentence upon an offender’s children or undervaluation of this principle, in this context, could give rise to an appeal. However, until 1995, the development of this principle, within Superior Courts in this jurisdiction, was occurring in respect to the sentencing of women. Notably, judicial officers were referring to it in shorthand as the ‘position of motherhood’<sup>1362</sup> in sentencing.

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<sup>1355</sup> Ibid 22-29.

<sup>1356</sup> Ibid 23-24.

<sup>1357</sup> Ibid 24-25.

<sup>1358</sup> Ibid 25.

<sup>1359</sup> *Criminal Code* (WA) s 19A.

<sup>1360</sup> Ibid 28.

<sup>1361</sup> *R v Szathmary* (Unreported, Supreme Court of Western Australia Court of Criminal Appeal, Wallace, Pidgeon and Rowland JJ, 24 May 1989); *Wright v The Queen* (Unreported, Supreme Court of Western Australia Court of Criminal Appeal, Pidgeon, Wallwork, White JJ, 20 August 1992); *Thill v Ryan* (Unreported, Supreme Court of Western Australia, Murray J, 18 December 1992); *Madoc v The Queen* (Unreported, Supreme Court of Western Australia Court of Criminal Appeal, Franklyn, Murray and Scott JJ, 2 June 1993); *R v Stewart* (2007) 98 SASR 56; *Kennedy v Fox* (Unreported, Supreme Court of Western Australia, Owen J, 19 September 1994).

<sup>1362</sup> *Kennedy v Fox* (Unreported, Supreme Court of Western Australia, Owen J, 19 September 1994) 12.

### **(a) Family hardship and male offenders**

In 1995, the Western Australian Court of Appeal heard the case of *Hodder v The Queen*<sup>1363</sup> which had a male offender and raised the issue of family hardship at sentencing. Responding to the gendered nature of the principle's development in this jurisdiction Malcolm CJ looked to a gender-neutral practice called the 'welfare approach'.<sup>1364</sup> Rather than drawing upon the court's established practice in respect to family hardship, the welfare approach arose where the court took into account prospects of rehabilitation and maintaining the family unit,<sup>1365</sup> and was identified from a line of cases dealing with sexual offences within the family.<sup>1366</sup>

*Hodder v The Queen* was a case dealing with domestic violence and three sexual assault offences upon the offender's wife. The twenty-three-year-old male offender was sentenced to two years and eleven months imprisonment. The offender was employed, had two children (aged one and five) and his wife was pregnant at the time of sentencing.<sup>1367</sup> The wife (and victim of the offence) had suffered financial,<sup>1368</sup> mental and physical health problems<sup>1369</sup> since her husband's imprisonment. She had no family support to help with the care of her children.<sup>1370</sup>

Chief Justice Malcom (Kennedy J agreeing) allowed the appeal against sentence and ordered a term of probation. Relying upon the welfare approach, he held:

...the imposition of the prison sentence in the present case has been to inflict a significant punishment upon the victim by depriving her of her breadwinner as well as depriving her of the support and assistance she needs from him as the mother of young children.

In my view, of all the cases which have so far come before this Court, this one does fall within the exceptional circumstances in which a non-custodial disposition was justified.<sup>1371</sup>

In light of the severity of the offences committed including that they involved physical assaults, were witnessed by the children and included threats to prevent reporting, this is highly contentious (for reasons discussed by Murray J in his

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<sup>1363</sup> (1995) 15 WAR 264.

<sup>1364</sup> *Ibid* 275.

<sup>1365</sup> *Ibid*.

<sup>1366</sup> *Ibid* 275-279.

<sup>1367</sup> *Ibid* 268.

<sup>1368</sup> *Ibid* 280.

<sup>1369</sup> *Ibid*.

<sup>1370</sup> *Ibid*.

<sup>1371</sup> *Ibid*.

dissent). As shown in Table 19 below, this case has been an influential decision in Western Australia.

Murray J, in dissent, indicated he would dismiss the appeal. In stark contrast to the approach adopted by Malcom CJ, Murray J relied upon family hardship. In his judgment he set out the South Australian case law (ie. *Amuso* and *Wirth*) and outlined the previous case law of the Western Australian Court of Appeal (ie. *Boyle* and *Stewart*). In consideration of the impact of the sentence upon the offender's wife he found it was not exceptional. He observed that she had friends locally who had helped, family who had recently travelled to Western Australia (from the eastern States) to assist her for a time, and that she could receive welfare assistance from the State.<sup>1372</sup>

The study of the case law in this jurisdiction identifies that there is a dominant approach in Western Australia that family hardship is a mitigating factor only in exceptional circumstances. However, there were some obiter comments from judicial officers in the 1990s that family hardship *should* carry significant weight as a sentencing factor *not only* in exceptional circumstances.<sup>1373</sup> Albeit even the judges who espoused those views (*Wheeler* and *Walsh JJ*), determined the cases before them, allowing for family hardship, by first finding exceptional circumstances.<sup>1374</sup>

Interestingly, in 2004 this issue was raised again by Wallwork J who, whilst agreeing as to the outcome in the case, delivered a separate judgment articulating that 'exceptional circumstances' ought not to be required before family hardship can be considered at sentencing. Justice Wallwork viewed the statutory recognition of the factor in the s16A(2)(p) *Crimes Act 1914* (Cth) not as a change to the law per se, but rather, putting into statutory form modern views on punishment – a position that Wallwork J believed ought to be reflected and applied in a common law context within Western Australia.<sup>1375</sup>

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<sup>1372</sup> Ibid 287-288.

<sup>1373</sup> *Gillespie v Moffitt* (Unreported, Supreme Court of Western Australia, Wheeler J, 18 December 1996); *Webb v Baldwin* (Unreported, Supreme Court of Western Australia, Walsh J, 17 January 1997)

<sup>1374</sup> Ibid.

<sup>1375</sup> *Michael v The Queen* [2004] WASCA 4 (22 January 2004) [55]-[57].

In dissenting comments in *Hodder v The Queen*, Murray J observed that an exceptional case is one which is 'quite out of the ordinary'.<sup>1376</sup> This explanation was given a very literal reading in a stream of cases in the early 2000s, when judicial officers relied upon it in judgments to argue that in the contemporary context single parenthood is no longer unusual. For example, Einfeld J in *Cooper v The Queen* stated '...it must initially be stated that single parenthood these days is not an unusual circumstance.'<sup>1377</sup>

## 2. Cases with High Juristic Status

In Western Australia, *Boyle*<sup>1378</sup> received the highest number of local citations (see Table 19). This was also a case with a very strong cross-jurisdictional influence being picked up in all other jurisdictions except for the Australian Capital Territory and South Australia. *H*<sup>1379</sup> received a high number of citations within Western Australia but did not have cross-jurisdictional influence. *Stewart*<sup>1380</sup> had a strong influence in Western Australia and also has a good cross-jurisdictional citation record with references made to this case in Federal case law and in Queensland and Victoria. *Stewart* had only one appearance in a New South Wales decision.<sup>1381</sup>

**Table 19: High Juristic Status Cases in Western Australia**

Case Name	Total number of citations	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<i>Boyle</i> (1987) 34 A Crim R 202	71	10	-	11	4	5	-	9	13	19
<i>Stewart</i> (1994) 72 A Crim R 17	27	4	-	1	-	3	-	-	5	14
<i>Hodder v The Queen</i> (1995) 15 WAR 264	19	1	-	-	1	-	-	-	-	17

## 3. Conclusion

<sup>1376</sup> (1995) 15 WAR 264, 287.

<sup>1377</sup> *Cooper v The Queen* [2001] WASCA 379 (30 November 2001) [18].

<sup>1378</sup> (1987) 34 A Crim R 202.

<sup>1379</sup> (1995) 81 A Crim R 88.

<sup>1380</sup> (1994) 72 A Crim R 17.

<sup>1381</sup> See *R v Murray* [2000] NSWCCA 430 (8 February 2000).

In comparison to other Australian jurisdictions, there was a very consistent approach to family hardship in Western Australia. The Western Australian Court of Appeal found that generally at sentencing regard was not had to the impact of the sentence upon the prisoner's family, but this was not an absolute rule.<sup>1382</sup> The Court has consistently held that in extreme cases or where exceptional circumstances were present, family hardship may be taken into account although it is to be balanced against the other relevant sentencing factors, the nature of the offence and the relationship with the purposes of sentencing.

As described in Chapter Two, the principle of last resort is an embedded sentencing principle in all Australian jurisdictions. It was reflected in legislation in Western Australia.<sup>1383</sup> The study of the Western Australian case law revealed the courts' application of principle could play a central role in matters where family hardship was raised.<sup>1384</sup> Where the offenders' dependants are likely to be affected by the imposition of a custodial sentence upon the offender the proper application of the principle of last resort means that custodial sentences must only be considered when all other sentencing options are not appropriate in the circumstances.

#### IV CASES WITH CROSS-JURISDICTIONAL INFLUENCE

This study of the case law on family hardship has identified nine cases with cross-jurisdictional influence (see Table 20). The Australian Capital Territory and Tasmanian are notable because none of the States and Territories picked up case law from these jurisdictions, hence these jurisdictions had no case law with cross-jurisdictional influence. *Wayne v Boldiston* was the Northern Territory's most significant case with cross jurisdictional influence and *R v Mitchell* was Victoria's. However, both of these cases were only picked up in three jurisdictions outside of their home jurisdiction and, therefore, neither really demonstrate a meaningful

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<sup>1382</sup> *Boyle* (1987) 34 A Crim R 202.

<sup>1383</sup> Criminal Code (WA) s 19A; *Sentencing Act 1995* (WA) s 6(4).

<sup>1384</sup> See, eg, *Boyle* (1987) 34 A Crim R 202 (Burt CJ); *Stewart* (1994) 72 A Crim R 17 (Wallwork J); *Hull v Western Australia* [2005] WASCA 194 (11 October 2005) (Roberts-Smith JA);



cross-jurisdictional application. This leaves, seven cases with strong cross-jurisdictional influence.

**Table 20: Cases with Cross-Jurisdictional Influence**

Case Name	Jurisdiction Case Heard	Total number of citations	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<i>R v Mitchell</i> [1974] VR 625	Vic	13	2	-	4	-	-	-	2	5	-
<i>R v Wirth</i> (1976) 14 SASR 291	SA	102	12	3	24	4	1	25	3	13	17
<i>Boyle</i> (1987) 34 A Crim R 202	WA	71	10	-	11	4	5	-	9	13	19
<i>Adami</i> (1989) 42 A Crim R 88	SA	37	8	1	3	3	1	17	-	3	1
<i>Tilley</i> (1991) 53 A Crim R 1	QLD	16	1	3	1	1	8	-	-	1	1
<i>Wayne v Boldiston</i> [1992] 85 NTR 8	NT	12	1	-	-	3	-	-	5	3	-
<i>Stewart</i> (1994) 72 A Crim R 17	WA	27	4	-	1	-	3	-	-	5	14
<i>Maslen and Shaw</i> (1995) 79 A Crim R 199	NSW	25	7	-	3	1	-	1	2	11	-
<i>Edwards</i> (1996) 90 A Crim R 510	NSW	78	14	3	38	1	7	6	1	8	-

## V CONCLUSION

This chapter was primarily concerned with the formation of sentencing practices and sentencing principles with respect to family hardship in Australia. The systematic and comprehensive study of the case law has assessed the role which hardship to an offender's family and dependants, has played in sentencing decisions throughout Australia. An outcome of this study has been to present a historical narrative of family hardship as a sentencing factor for each State and Territory. From this narrative the study provides a detailed history of the use of family hardship in sentencing over time, and across jurisdictions. By so doing the study shows how these principles 'emerged' and were applied or distinguished.

Courts have expressed that this sentencing factor has played a role in:

- the decision of whether to incarcerate an offender;
- the length of the sentence imposed (although the quantum of impact can never be measured in Australia);
- the length of a non-parole period; and
- the decision of whether to impose a suspended sentence.

Unlike the UK, where the common law has evolved funnelled through the work of the England and Wales Court of Appeal Criminal Division, in Australia, the courts of appeal in each jurisdiction tackled the local debate about the appropriate role of family hardship at sentencing in different ways. The common law of Australia remains in a fluid state until the matter is authoritatively resolved by the High Court of Australia. The likelihood of referral to the High Court is discussed further in Chapter Five.

Because of the nature of the Australian sentencing landscape (with each State and Territory being responsible for criminal law and punishment<sup>1385</sup>) the framework through which family hardship is considered is not consistent across all jurisdictions. In the ACT and SA, it has been listed matter that *must* be taken into account where relevant and known.<sup>1386</sup> In both of these jurisdictions family hardship has been recognised as a sentencing factor. Both the ACT Court of Appeal and the Supreme Court of South Australia have held that, where relevant, family hardship is to be balanced against other considerations. Generally, family hardship has been considered to only carry *significant weight* in exceptional circumstances.

In the remaining jurisdictions the matter *may* be taken into account at sentencing under the common law, although recent case law in Victoria has placed it beyond sentencing and as an act of mercy. The study of the State and Territory case law confirms an early practice throughout Australia recognising family hardship as a ‘mitigating factor’ and the related decision by a court to grant a significant reduction in light of this factor, only in exceptional circumstances. There is an important distinction to be made between the recognition of a factor as a mitigating factor and the determining the weight to be attributed to that factor.<sup>1387</sup>

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<sup>1385</sup> See Chapter Two.

<sup>1386</sup> Although it has now been removed as a listed sentencing factor in South Australia, see Chapter Three.

<sup>1387</sup> In the sense of balancing it against all other considerations not in the sense of assigning it a numerical value.

Unfortunately some courts have blurred these points querying the place of family hardship as a mitigating factor rather than stating that in the circumstances of the case before them the factor carries little or no weight.

The next chapter (Chapter Five) will look at the family hardship cases in the federal arena. The *Crimes Act 1914* (Cth) provides a list of sentencing factors that 'In addition to any other matters, the court *must* take into account... as are relevant and known (emphasis added)'. Listed at paragraph (p) is 'the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.' Chapter Three highlighted that the listing of this mitigating factor was a considered and deliberate inclusion into the federal Act. Chapter Five will look at how courts around Australia sentencing federal offenders responded to this inclusion and identify if there is a federal sentencing practice in respect to family hardship as a mitigating factor.

## 5. THE FEDERAL STUDY OF FAMILY HARDSHIP

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### I INTRODUCTION

Importantly, for Australian scholarship, this dissertation makes a broader and valuable contribution to research into federal sentencing practices in Australia. As explained in Chapter One, this study was born out of research into federal sentencing law and practice. There has been an ongoing debate in Australia about consistency in federal sentencing and whether there is uniformity of treatment in the sentencing of federal offenders.<sup>1388</sup> Chapter Two described how State and Territory courts vested with federal jurisdiction carry out the sentencing of federal offenders. As federal offenders can be sentenced in any state or territory of Australia it is important that federal sentencing practices are consistent not only within jurisdictions but also between jurisdictions.

Just over a quarter of a century ago federal offenders were ‘sentenced in accordance with the common law principles that governed sentencing in that particular locale.’<sup>1389</sup> But in 1989, with the introduction of pt 1B of the *Crimes Act 1914* (Cth) and a distinctly federal set of sentencing provisions, the landscape changed.<sup>1390</sup> In the last decade the High Court has been applying significant pressure upon courts to openly develop a practice of federal sentencing that is consistent and distinctively federal in character.<sup>1391</sup> Therefore, this dissertation has been conducted within a period of rising interest into federal sentencing practices. This dissertation makes a valuable contribution to this developing field.

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<sup>1388</sup> See further, Wendy Kukulies-Smith, ‘The Quest for Sentencing Consistency in the Federal System’ (Paper presented at Sentencing Conference 2010, National Convention Centre, Canberra, 6 February 2010). See also Judicial Commission of New South Wales, *Sentencing Commonwealth drug offenders*, Research monograph 38 (June 2014) 1.

<sup>1389</sup> Justice Mark Weinberg, ‘The Labyrinthine Nature of Federal Sentencing’ (Keynote address presented at Federal Crime and Sentencing Conference 2012, Canberra, 11 February 2012); Sir Guy Green, ‘The Concept of Uniformity in Sentencing’ (1996) 70 *Australian Law Journal* 112, 118.

<sup>1390</sup> *Crimes Legislation Amendment Bill (No 2) 1989* (Cth).

<sup>1391</sup> *Hili v The Queen* (2010) 242 CLR 520, 527-530; *Barbaro v The Queen* (2014) 253 CLR 58, 70.

This Chapter shows that there has emerged a consistent approach to the treatment of family hardship; with only the Australian Capital Territory not requiring exceptional circumstances before the factor can be taken into account. However, in recent years there has been disquiet expressed within several courts of intermediate jurisdiction about the reading down of the Commonwealth legislation through the application of the common law requirement that the consequences be exceptional.

## II ONE FEDERAL SENTENCING PRINCIPLE AND PRACTICE?

The traditional position in Australia, applying judicial comity, was that Courts exercising federal jurisdiction should give effect to the policy of their own superior courts. In *R v Jackson* (1972) 4 SASR 81. The Court stated:

3. He [the State judge] will, when exercising Federal jurisdiction, give effect to sentencing policies expressed by superior courts in his own hierarchy, particularly if the policies have been expressed with respect to federal offences.
4. He will, when exercising Federal jurisdiction remember that Australia is one country and that policies laid down elsewhere in Australia by superior courts, although not technically binding on him, ought to receive very great attention by him, as it is desirable that there should be similarity of approach by sentencing authorities with respect to Federal offences.<sup>1392</sup>

In *Leeth v Commonwealth* (1992) 174 CLR 455, the High Court accepted that 'sentencing practices may not be uniform'.<sup>1393</sup> However, common law 'sentencing principles are uniform'<sup>1394</sup> throughout Australia.

Due to a lack of empirical data on federal sentencing in Australia discussions about consistency in sentencing are grounded in anecdotal evidence.<sup>1395</sup> For example, the ALRC in its most recent inquiry (*Same Crime, Same Time*) into federal sentencing acknowledged that,

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<sup>1392</sup> *R v Jackson* (1972) 4 SASR 81, 91-92.

<sup>1393</sup> (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).

<sup>1394</sup> *Ibid* 476 (Brennan J).

<sup>1395</sup> See comments by Chief Justice J Spigelman AC, 'Consistency and Sentencing' (Keynote Address delivered at the Sentencing Conference 2008, Canberra, 8 February 2008); Justice Mark Weinberg, 'The Labyrinthine Nature of Federal Sentencing' (Keynote address presented at Federal Crime and Sentencing Conference 2012, Canberra, 11 February 2012); Justice Peter Johnson, 'Consistency in Sentencing for Federal Offences – Challenges for Sentencing Courts in an Evolving Landscape' (Paper presented at Federal Crime and Sentencing Conference 2012, Canberra, 11 February 2012).

[d]ue to the relative lack of Australian research, other inquiries have not been able to furnish conclusive evidence of inconsistency in sentencing.<sup>1396</sup>

Until the recent growth in sentencing information systems there has also been scant commentary on the principles and practice governing federal sentencing in Australia. Therefore, material on when and how federal sentencing provisions differ from a judicial officer's local practice has not been easily ascertainable. Each of these aspects of the federal sentencing system has resulted in concern about a disparate application of federal sentencing law across Australia.

Recommendation Three in the *Same Crime, Same Time* report was a call for equality in the treatment of federal offenders throughout Australia.<sup>1397</sup> This was described in the report as not equality between offenders within a state or territory, but rather, 'broad inter-jurisdictional equality'.<sup>1398</sup> Accordingly, the ALRC called for a consistent understanding of sentencing principles across all jurisdictions. The ALRC recommended:

The same legislative purposes, principles and factors should apply in sentencing adult federal offenders in every state and territory. Inter-jurisdictional consistency in determining the sentence of federal offenders should be encouraged and supported.<sup>1399</sup>

Therefore, having set out above a clear picture of the sentencing principles and sentencing practices in all of the Australian states and territories,<sup>1400</sup> this chapter now presents the outcomes of the study in respect of consideration of family hardship in federal sentencing. The purpose of this chapter is to detect if there is an identifiable federal sentencing practice within Australia and for the first time, to shed light on whether there is consistency in federal sentencing practices throughout Australia.

### *A. The Federal Study*

The federal study on family hardship was much narrower than the study of state and territory practices.<sup>1401</sup> The study of the federal case law only examined case

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<sup>1396</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 508.

<sup>1397</sup> Ibid 28 (List of Recommendations...3. Equality in the Treatment of Federal Offenders)

<sup>1398</sup> Ibid.

<sup>1399</sup> Ibid.

<sup>1400</sup> See Chapter Four.

<sup>1401</sup> See 'Method for Study of Case Law' in Chapter One.

law from the Court of Appeal in each State and Territory. The focus of the federal study was to determine if there was a national consistency gap in federal sentencing. Therefore, this study was concerned with what the superior courts believed were the principles guiding consideration of family hardship in federal sentencing.

The federal study consisted of an analysis of 92 cases. There was case law on the role of family hardship in federal sentencing in all of the Australian State and Territory jurisdictions. The number of cases identified in each jurisdiction is set out above in Table 2 (see Chapter One). The body of federal case law on family hardship, which arose from the process of 'exhaustive shepardizing', is set out in the federal table in Appendix A. Similarly, to the state and territory study, the federal study does not measure how often courts engage with family hardship at sentencing, nor does it examine the likely impact of this sentencing factor. As expressed above, the study of the case law is a study of sentencing principles. The study reveals what the superior courts in each jurisdiction have upheld as the guiding principles governing judicial consideration of family hardship in federal sentencing.

### *1. Federal Cases Heard in the Australian Capital Territory*

This study of the ACT case law revealed that the approach to family hardship at sentencing in this jurisdiction was to accept that it was a mitigating factor. In respect to family hardship at federal sentencing, the Supreme Court of the Australian Capital Territory has found that it is 'clearly a relevant factor.'<sup>1402</sup>

The Supreme Court of the Australian Capital Territory has criticised the approach taken by the New South Wales Court of Criminal Appeal in respect to family hardship at federal sentencing only arising in exceptional cases. In *DPP v Ka-Hung Ip*,<sup>1403</sup> the Court held:

The mandate of the Commonwealth Parliament is quite clear: the sentencing court 'must take into account' the matters set out in subs 16A(2) of the *Crimes Act 1914* (Cth), including '(p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants'.

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<sup>1402</sup> *Turyn v The Queen* [2007] ACTCA 23 (7 September 2007) [4] (Higgins CJ) (Gray and Connolly JJ agreeing).

<sup>1403</sup> [2005] ACTCA 24 (19 July 2005).

The contemplated taking into account of such factors must clearly be real and must occur in every case in which one or more of those factors exist. There is, with respect, simply no warrant for a sentencing court to presume jurisdiction to qualify the clear parliamentary command by suggesting, as has been done, in *R v Hinton* (2002) 134 A Crim R 286, 293, that -- The reference in s 16A(2)(p) of the Crimes Act 1914 (Cth)... should be read as if it were [preceded] by the words "in an exceptional case": *R v Togiias* (2001) 127 A Crim R 23.

Indeed, this court would wish to specially dissociate itself from the reasoning in *R v Togiias* which gave rise to that suggestion...

Of course, what weight a listed factor is to be given is a discretionary matter. In many cases, it will not be possible to give a family's suffering much or any weight. But as a matter of the letter and the clear conceptual intendment of the Parliament, it must be anxiously considered in every case where it exists.<sup>1404</sup>

The ACT is the only jurisdiction to take an approach to s 16A(2)(p) which expressly gives effect to the plain meaning of the words of the section.

## 2. Federal Cases Heard in New South Wales

This study of the NSW case law revealed that the approach to family hardship at sentencing in this jurisdiction was to 'read in' a requirement of exceptional circumstances into s 16(2) of the *Crimes Act 1914* (Cth). The NSW 'gloss' to the section means that the court will take into account *in exceptional circumstances only*, the probable effect that any sentence or order under consideration would have on any of the person's family or dependants. Given the legislative history, examined in Chapter Three, this approach is in direct conflict with the federal legislative intent. Given this inconsistency it is important to review how this 'exceptional' qualification emerged in New South Wales.

### (a) Development of federal principle in New South Wales

The New South Wales Court of Criminal Appeal heard the case of *Muanchukingkan*<sup>1405</sup> after the passage in 1990 of pt 1B of the *Crimes Act 1914* (Cth). In this case, Wood J delivered the judgment for the Court. As discussed in Chapter Four, Wood J did not believe that family hardship was a legitimate sentencing factor. In *Muanchukingkan*, Wood J (Gleeson CJ and Grove JJ agreeing) acknowledged that judicial officer's sentencing federal offenders in New South Wales had to give effect to the provisions in pt 1B. Justice Wood said:

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<sup>1404</sup> Ibid [60]-[61].

<sup>1405</sup>(1990) 52 A Crim R 354.



With the introduction of Pt 1B into the *Crimes Act* on and from 17 July 1990, the *Commonwealth Prisoners Act 1967* was repealed and the Sentencing Act [NSW legislation] ceased to have any application to the sentencing in this State of convicted federal offenders.<sup>1406</sup>

In this matter the male offender was from Thailand and had been convicted for importing (as a 'drug mule') heroin into Australia.<sup>1407</sup> He had 'two wives and 10 children to support in Thailand where he worked as a driver.'<sup>1408</sup>

On the consideration of family hardship in determining the federal sentence, Wood J acknowledged that he had to take it into account. Justice Wood (Gleeson CJ and Grove JJ agreeing) said:

In conformity with the Act it is necessary to observe the direction of s 16A(1) to make "an order of a severity appropriate in all the circumstances of the offence" and then to take into account such of the matters in the check list in s 16A(2) "as are relevant and known to the court."<sup>1409</sup>

Justice Wood recognised that a sentence of imprisonment upon the offender 'will almost certainly be an occasion of considerable hardship for his family and dependants.'<sup>1410</sup> He stated:

The last of these is a matter which traditionally has been regarded as of little or no moment in sentencing but notwithstanding the considerable reservation I entertain as to its relevance, a sentencing court is now constrained by the legislation to take it into account and to expressly acknowledge that it is taken into account where appropriate.<sup>1411</sup>

Significantly, in 1990 directly following the passage of a set of federal sentencing provisions in pt 1B of the *Crimes Act 1914* (Cth), the New South Wales Court of Criminal Appeal felt constrained to follow the direction of the legislation.<sup>1412</sup>

It appears the Court followed this approach in matters heard before Gleeson CJ.<sup>1413</sup> However, in 1997 in the case of *R v Herrera*<sup>1414</sup> a different approach was taken in a

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<sup>1406</sup> Ibid 358.

<sup>1407</sup> Ibid 355.

<sup>1408</sup> Ibid.

<sup>1409</sup> Ibid 359.

<sup>1410</sup> Ibid 360.

<sup>1411</sup> Ibid.

<sup>1412</sup> See also *R v Ehrenburg* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Gleeson CJ, Samuels JA and Loveday J, 14 December 1990) 7 (Loveday J) (Gleeson CJ agreeing).

<sup>1413</sup> See eg *Van de Heuval* (1992) 63 A Crim R 75, 80 (Lee AJ) (Gleeson CJ agreeing) and 81 (Priestley JA); *R v Dagg* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Gleeson CJ, Sully and Bruce JJ, 3 October 1997).

<sup>1414</sup> *R v Herrera* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Hunt CJ, Smart and Grove JJ, 6 June 1997) ('*Herrera*').

matter before Chief Justice Hunt at Common Law. In *Herrera*, the offender in this case had been convicted of social security fraud (to the value of \$90, 073).<sup>1415</sup> The female offender was sole carer of her four year old son who was living with a friend while the offender had been imprisoned.<sup>1416</sup> The Court heard fresh evidence that the 'boy's father (who had previously mistreated him) has now threatened to abduct him. He is an unsuitable person to be in contact with the son...'<sup>1417</sup>.

In *Herrera*, on the relevance of family hardship in sentencing a federal offender, Hunt CJ at CL (Smart and Grove JJ agreeing) said:

A custodial sentence was therefore inevitable in the present case. There are no very special circumstances justifying anything less. The effect of the applicant's incarceration upon her son does not amount to such a circumstance in this case. Section 16A(2)(p) of the Crimes Act requires a judge to take into account the probable effect that any sentence under consideration would have upon the prisoner's family or dependents [sic]. That provision does no more than reflect the common law, which says that hardship to the prisoner's family operates in mitigation only where it is sufficiently extreme, beyond the sort of hardship which inevitably results to a family when a parent is incarcerated, to warrant a non-custodial sentence. The additional material put before this Court does not take the matter any further, unfortunate though it may be.<sup>1418</sup>

This restrictive approach, reading in a threshold for exceptional circumstances, was adopted by the New South Wales Court of Criminal Appeal.<sup>1419</sup>

When Wood J became Wood CJ at CL he maintained the same approach to family hardship as Hunt CJ at CL had before him. For example, in 2001, in *Ceissman*,<sup>1420</sup> the New South Wales Court of Criminal Appeal heard a Crown appeal against a three-year sentence of imprisonment that had been imposed upon an Indigenous offender convicted of importing a trafficable quantity of cocaine. The sentencing judge had taken into account in determining an appropriate federal sentence the offender's youth, early plea of guilty, remorse, caring responsibility for younger brother and younger cousin, relatively good prior record, mental health, physical health, deprived background (including the death of his parents from drugs when

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<sup>1415</sup> Ibid.

<sup>1416</sup> Ibid.

<sup>1417</sup> Ibid.

<sup>1418</sup> Ibid.

<sup>1419</sup> *Herrera* has been explicitly cited in *R v Schluenz* [2001] NSWCCA 314 (10 August 2001); *R v White* [2001] NSWCCA 343 (3 September 2001); *R v El Hani* [2004] NSWCCA 162 (21 May 2004); *R v Kertebani* [2010] NSWCCA 221 (26 October 2010).

<sup>1420</sup> *R v Ceissman* (2001) 119 A Crim R 535.

he was 11 years of age), 'trauma of his parent's death and early exposure to their anti-social lifestyle and illicit use of drugs', and the 'likely effect of the sentence upon his younger brother.'<sup>1421</sup>

Chief Justice Wood at Common Law (Ipp AJA agreeing) found the sentencing judge had 'allowed himself to be unduly swayed by an overly sympathetic view of the respondent's background, and also failed to give proper effect to the need for general deterrence.'<sup>1422</sup> In respect to the relevance of family hardship in determining a federal sentence, Wood CJ at CL (Ipp AJA agreeing) said:

Whilst this is a matter to be taken into account by reason of s16A(2)(p) of the *Crimes Act*, it is not a provision which alters the common law principle that the effect of a sentence upon an offender's family is relevant only in exceptional circumstances: see *Adami*...

As Gleeson CJ pointed out in *Edwards*...there is nothing unusual in sending to prison offenders who are breadwinners or who have the responsibility for the care and support of children...and *Bednarz*...where Simpson J observed that the common law rule was no meaningless incantation, and that it was essential that third party hardship be taken into account only in cases that were truly exceptional.<sup>1423</sup>

Chief Justice Wood at Common Law did not explicitly address that the New South Wales Court of Criminal Appeal had previously found that in respect to federal sentencing family hardship *was* a factor to be taken into account (see above). In *Ceissman*, Wood CJ at CL (Ipp AJA agreeing) found that there was no truly exceptional hardship in this case.<sup>1424</sup> Justice Simpson, in dissent, found that the 'very experienced'<sup>1425</sup> sentencing judge was within his powers, and exercise of sentencing discretion, to impose the sentence which he had.<sup>1426</sup>

The case of *Togias*<sup>1427</sup> was a Crown appeal against a three year suspended sentence imposed upon a female offender.<sup>1428</sup> Nikolitsa Togias was a drug courier who had been convicted for importing 1 kg of ecstasy into Australia. At the time of sentencing she had recently given birth, and evidence from the Department of

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<sup>1421</sup> *Ibid* 538-539.

<sup>1422</sup> *Ibid* 538.

<sup>1423</sup> *Ibid* 541.

<sup>1424</sup> *Ibid*.

<sup>1425</sup> *Ibid* 544.

<sup>1426</sup> *Ibid*.

<sup>1427</sup> *Togias* (2001) 127 A Crim R 23.

<sup>1428</sup> *Ibid* 24.

Corrective Services had revealed that there would be delay in access to Mother and Baby prison facilities.<sup>1429</sup> The sentencing judge had taken this into account at sentencing, finding that impact of the delay for an unknown period would be inhumane (upon mother and child).<sup>1430</sup>

In responding to the Crown appeal against a manifestly inadequate sentence, the respondent in *Togias* raised before the Court the United Nations *Convention of the Rights of the Child 1989*.<sup>1431</sup> However, Spigelman CJ was highly critical of the quality of the arguments put before the Court on this issue. For example, he pointed out that:

the court was not referred to a line of authority in the High Court on the use to be made in Australian law of international legal instruments. The court was not referred to any authority in which a court anywhere in the world has applied treaty obligations in the sentencing process.<sup>1432</sup>

On this question, Spigelman CJ said, ‘the court has not received the kind of assistance required for the determination, for the first time, of the important principles involved.’<sup>1433</sup> The other judges, Grove J and Einfeld AJ, agreed on this point.<sup>1434</sup>

The sentencing judge on the consideration of family hardship in federal sentencing had understood that the common law threshold of exceptional circumstances applied at federal sentencing. He stated that the ‘hardship to the child had to be classified as “exceptional” before it could be given substantial weight for the purposes of s 16A(2)(p).<sup>1435</sup> Chief Justice Spigelman found this to be the correct application of the principle of family hardship at federal sentencing. He stated:

The necessity for such an “exceptional” effect has long been accepted for sentencing at common law: see, for example, *Edwards*...

The South Australian Court of Criminal Appeal held that legislation in that State to the same effect as s 16A(2)(p) did not affect the application of the common law principle: *Adami* ... The Western Australian Court of Criminal Appeal came

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<sup>1429</sup> Ibid.

<sup>1430</sup> Ibid.

<sup>1431</sup> Ibid 27-29.

<sup>1432</sup> Ibid 28.

<sup>1433</sup> Ibid 29.

<sup>1434</sup> Ibid 38 (Grove J), 43 (Einfeld J).

<sup>1435</sup> Ibid 25.

to the same conclusion with respect to s 16A(2)(p): *Sinclair* ... This was also the conclusion of the Court of Appeal in Victoria: *Matthews* ...

Courts of Appeal in three States have interpreted s 16A(2)(p) as not altering the common law. Exceptional hardship is required. It is important that Courts of Criminal Appeal adopt the same approach to the interpretation of national legislation ...

If there is to be any change in this position, and that was not put in this case even on a formal basis, only the High Court can effect it.<sup>1436</sup>

Chief Justice Spigelman noted that the sentencing judge had found that there were exceptional circumstances on the facts of this case. Similarly, Grove J, in his judgment, noted that exceptional circumstances had been found by the sentencing judge who had acknowledged the ‘tenderness of the law towards pregnancy and childbirth ... on a continuing basis.’<sup>1437</sup> Both judges, Spigelman CJ and Grove J, found that in the circumstances of this case the sentencing judge should have used his discretion to adjourn the act of sentencing permitting the parties to have more time to receive material relevant to the act of sentencing.<sup>1438</sup>

In *Togias*, the Court, Grove J (Spigelman CJ and Einfeld AJ in agreement on the orders<sup>1439</sup>) allowed the Crown appeal, quashed the sentence imposed and remitted the matter back to the District Court. Three separate judgments were handed down in *Togias*, and judicial consensus was only reached regarding the orders imposed, namely, that the Crown appeal be allowed. It was held that the sentence imposed was manifestly inadequate but for different reasons in each judgment. Nonetheless, *Togias* has been seen as authority for the New South Wales Court of Criminal Appeal’s endorsement of reading in ‘exceptional circumstances’ into s 16A(2)(p) of the *Crimes Act 1914* (Cth).<sup>1440</sup> For example, Howie J (Wood CJ at CL and Sully J agreeing) in *R v Hinton*,<sup>1441</sup> said:

It is clear that the reference in s 16A(2)(p) of the Crimes Act 1914 (Cth) to the “probable effect that any sentence or order under consideration would have on any of the person’s family or dependants” should be read as if it were

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<sup>1436</sup> *Ibid* 26.

<sup>1437</sup> *Ibid* 32.

<sup>1438</sup> *Ibid* 24 (Spigelman CJ), 34 and 41 (Grove J).

<sup>1439</sup> *Ibid* 29 and 41.

<sup>1440</sup> See, eg, *R v Hinton* (2002) 134 A Crim R 286; *R v Aller* [2004] NSWCCA 378 (5 November 2004); *Le v The Queen* [2006] NSWCCA 136 (25 August 2006); *Cao v The Queen* [2009] NSWCCA 273 (11 November 2009); *Sowaid v The Queen* [2011] NSWCCA 177 (8/8/11).

<sup>1441</sup> (2002) 134 A Crim R 286.

proceeded by the words “in an exceptional case”: *R v Toggias* (2001) 127 A Crim R 23...<sup>1442</sup>

In *Le v The Queen*,<sup>1443</sup> Latham J recognised that a different approach has been taken in the Australian Capital Territory but held, ‘In any event, *Toggias* is binding on this Court.’<sup>1444</sup> Despite the consistent application of *Toggias*, within New South Wales, it appears increasingly likely the question of whether family hardship needs to be ‘exceptional’ to be taken into account will be referred to the High Court (discussed below).

### 3. Federal Cases Heard in the Northern Territory

This study of the Northern Territory case law revealed that the approach to family hardship at sentencing in this jurisdiction was to accept that it was a mitigating factor. In respect to family hardship at federal sentencing, the Northern Territory Court of Criminal Appeal has, citing *Nagas* observed that hardship suffered by family members when a relative is imprisoned is a common occurrence<sup>1445</sup> and that ‘such hardship is not normally a circumstance that the sentencing magistrate may take into account when sentencing an offender.’<sup>1446</sup> Despite the references to *Nagas*, the reasoning is more consistent with the restrictive approach taken in *Amagula v White*<sup>1447</sup> (see Chapter Four). The reliance on *Nagas*, notwithstanding the explicit differences on reasoning, highlights that the Court has not acknowledged the tension in the principle within its own jurisdiction.

### 4. Federal Cases Heard in Queensland

The study of the local Queensland case law (see Chapter Four) revealed that the approach to family hardship at sentencing in this jurisdiction has fluctuated over time. Early case law highlights the Queensland Court of Appeal treated family hardship as a sentencing factor and paid attention to whether the sentencing judge had erred in the weight that was attached to the factor. In the early 2000s, influenced by the approach taken by Superior Courts in other jurisdictions to

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<sup>1442</sup> Ibid 293.

<sup>1443</sup> [2006] NSWCCA 136 (25 August 2006).

<sup>1444</sup> Ibid [25].

<sup>1445</sup> See *Haruma v McCarthy* [2008] NTSC 18 (23 April 2008) [31]; *R v Hancock* [2011] NTCCA 14 (18 November 2011) [46].

<sup>1446</sup> *Haruma v McCarthy* [2008] NTSC 18 (23 April 2008) [31].

<sup>1447</sup> *Amagula v White* [1998] NTSC 60 (7 January 1998).

family hardship at sentencing, the Queensland Court of Appeal accepted the approach that family hardship was only to be seen by the sentencing judge as a relevant sentencing factor if the hardship amounted to exceptional circumstances. However, the study of the case showed that after the decision in *Chong*<sup>1448</sup> (2008) there was a softening in the expression of the principle in respect to family hardship and what could be described as a return to accepting it as a sentencing factor generally, and focusing upon the weight attached to the factor and the balancing act between it and other sentencing factors raised in the individual case.

The study of the early federal case law reveals that the Queensland Court of Appeal respected the plain language and intent of the federal sentencing legislative provisions. In *Theodossio & Said*,<sup>1449</sup> the Queensland Court of Appeal found that s 16A(2)(p) of the *Crimes Act 1914* (Cth) imposed an obligation upon a sentencing judge in federal matters to take family hardship into account where relevant and known. The Court said:

The learned judge was, by s 16A(2)(p), obliged in the circumstances to take into account the probable effect of the proposed condition on the child. He said that he was satisfied the child would not suffer. We respectfully differ from that view.<sup>1450</sup>

The approach that family hardship, as a listed federal sentencing factor, was required to be taken into account in federal sentencing was followed by the Queensland Court of Appeal.<sup>1451</sup> Of course, during this time this practice did not mean that family hardship was always seen to carry significant weight, it could be found to be a matter that carried very little weight in the circumstances of the case.<sup>1452</sup>

The question of whether Queensland should follow the emerging federal practice of 'reading in' exceptional circumstances into s 16A(2)(p) was considered in *R v*

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<sup>1448</sup> (2008) 181 A Crim R 200.

<sup>1449</sup> *Theodossio & Said* (1998) 104 A Crim R 367.

<sup>1450</sup> *Ibid* 369.

<sup>1451</sup> *R v Alvarez* [2000] QCA 290 (24 July 2000); *R v Edwards* [2001] QCA 93 (14 March 2001); *R v Carter* [2005] QCA 402 (3 November 2005); *R v Ruha* [[2011] 2 Qd R 456 [judgment delivered 9 February 2010]; *Desborough* [2010] QCA 297 (25 October 2010); *R v Burling* [2011] QCA 51 (25 March 2011).

<sup>1452</sup> See, eg, *R v Ruha* [[2011] 2 Qd R 456; *R v Burling* [2011] QCA 51 (25 March 2011).

*Huston; ex parte Cth DPP*.<sup>1453</sup> This case involved the sentencing of three offenders (75 year old Henke, 65 year old Huston and 58 year old Fox<sup>1454</sup>) who were convicted of conspiring together to defraud the Commonwealth.<sup>1455</sup> The Commonwealth suffered no loss from the conspiracy but had it succeeded it was estimated to have amounted to 4.5 million dollars.<sup>1456</sup> The Crown appealed the sentence imposed upon each offender arguing each sentence was manifestly inadequate.<sup>1457</sup>

On the sentencing judge's consideration of family hardship as a sentencing factor, the Director of Public Prosecutions argued 'the sentencing judge should not have made any allowance for the effect of the sentence on family without first considering whether the circumstances of adverse effect were exceptional'.<sup>1458</sup> The Court said:

There is nothing in the terms of s 16A(2) which suggests that the probable effect on family or dependants must be exceptional before the factor can influence a contemplated sentence. However a uniform line of authority has so construed the provision, aligning it with the approach taken under similar statutory regimes imposed by state parliaments and at common law ...

The Court of Appeal of the Supreme Court of Victoria recently reaffirmed its adherence to that principle in *Markovic v The Queen* [2010] VSCA 105...

This Court must, obviously, follow the same approach to the construction of s 16A(2)(p)...<sup>1459</sup>

Having found the need to show exceptional circumstances before family hardship could be considered the Court found, in this case, there were no exceptional circumstances. Thus, the court found error in the approach of the sentencing judge on taking family hardship into account.<sup>1460</sup>

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<sup>1453</sup> [2011] QCA 350 (6 December 2011).

<sup>1454</sup> Ibid [4] and [38]-[43].

<sup>1455</sup> Ibid [1].

<sup>1456</sup> Ibid [26].

<sup>1457</sup> Huston had been sentenced to four years imprisonment, Henke to four and a half years imprisonment and Fox to three years imprisonment.

<sup>1458</sup> Ibid [45].

<sup>1459</sup> Ibid [46]-[51].

<sup>1460</sup> Ibid [52]-[56].



### 5. Federal Cases Heard in South Australia

The examination of the local case law on family hardship in this jurisdiction (see Chapter Four), revealed that the Supreme Court of South Australia saw family hardship as falling outside of traditional, mainstream sentencing factors and saw it having a role in sentencing in exceptional circumstances when the court's mercy was triggered. The study of the early federal case law in South Australia is consistent with this finding.<sup>1461</sup> After the passage of s 10(1)(n) of the *Criminal Law (Sentencing) Act 1988* (SA) the Supreme Court of South Australia in *R v Adami*,<sup>1462</sup> found that the statutory list of sentencing factors did not change the law in SA, namely, that (as had been the case under the common law) family hardship was to be taken into account only in exceptional circumstances.

Interestingly all of the South Australian federal cases involved the sentencing of federal offenders for social security fraud. In 71% of these cases the gender of the offender raising family hardship was female and in 29% of the cases the offender was male. The case of *R v Cameron & Simounds*,<sup>1463</sup> was a Crown appeal against federal sentences imposed by the District Court of South Australia upon Ms Cameron and Mr Simounds for 'systematic, deliberate and sustained fraud over a substantial period of time'<sup>1464</sup> against the Commonwealth. Cameron was a sole parent to an 11 year old daughter. She was sentenced to two years imprisonment but was immediately released.<sup>1465</sup> In the Supreme Court of South Australia, King CJ (Duggan and Debelle JJ agreeing) did not identify a specific error in the exercise of the sentencing judge's discretion, but held that 'the immediate release of these offenders is so disproportionate to the degree of their offending that it must follow that there has been an error in the sentencing process.'<sup>1466</sup> King CJ (Duggan and Debelle JJ agreeing) did not find that family hardship was not a relevant sentencing factor in this case but said that the 'sustained and deliberate fraud over a period of time' meant that 'the deterrent purpose of punishment must be paramount. The

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<sup>1461</sup> *Vurovecz v Carmen* (1982) 100 LSJS 397; *Graham v Bartley* (1984) 57 ALR 193; *Vasin and Scherf v The Queen* (1985) 61 ALR 70.

<sup>1462</sup> (1989) 51 SASR 229.

<sup>1463</sup> (Unreported, Supreme Court of South Australia Court of Criminal Appeal, King CJ, Duggan and Debelle JJ, 19 July 1993).

<sup>1464</sup> *Ibid* 3.

<sup>1465</sup> *Ibid*.

<sup>1466</sup> *Ibid* 6.

necessity of protecting the integrity of the social security system by deterrent penalties must take priority over other considerations.’<sup>1467</sup>

In *Walsh v Department of Social Security*,<sup>1468</sup> Shaun and Melissa Walsh, a married couple and parents of three young children (a two year old child, a four and a half year old and an eight year old child), were sentenced to imprisonment in the Magistrates Court for social security fraud.<sup>1469</sup> Mr and Mrs Walsh appealed their custodial sentences and in submissions stated the children all suffered from asthma and had required ‘hospitalisation on numerous occasions’ and the impact of the sentences would mean they were ‘separated from both of their parents’.<sup>1470</sup> Justice Perry acknowledged the decision of *R v Cameron & Simounds* and the importance of general deterrence in sentencing federal offenders for sustained and systematic fraud against the Commonwealth.<sup>1471</sup> The Court was directed to human rights arguments addressing the United Nations Convention on the *Rights of the Child 1989* and protection of the family unit,<sup>1472</sup> however, Perry J found that ‘recourse to them in this case is hardly necessary, as s16(A)(2)(p) of the Act is clear and unambiguous in its terms.’ Justice Perry held:

It appears to me that, bearing that provision in mind, either the learned sentencing magistrate failed to pay sufficient regard to the effect upon the appellants’ three young children of a custodial sentence imposed upon both parents, or, on the basis of additional materials which has been placed before me for the purposes of the appeal, recognition of the need to have regard to the dependant children should result in intervention by way of appeal in a form appropriate to ensure that the welfare of the children is adequately protected.

In all the circumstances, in my opinion, that result would best be achieved by allowing the appeal of Melissa Walsh to the intent [sic]that in her case she should be given the benefit of a conditional release...<sup>1473</sup>

There was no explanation in the judgment as to why Mrs Walsh was best placed to care for the children in this case.

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<sup>1467</sup> Ibid.

<sup>1468</sup> *Walsh v Department of Social Security* (1996) 67 SASR 143.

<sup>1469</sup> Ibid 145.

<sup>1470</sup> Ibid 146.

<sup>1471</sup> Ibid.

<sup>1472</sup> *International Covenant on Civil and Political Rights*, opened for signature 28 March 1979, [1980] ATS 23 (entered into force 13 August 1980) Art 23 and *Convention on the Rights of the Child 1989*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) Art 3(2).

<sup>1473</sup> Ibid 147.

The most recent federal case in South Australia, identified by this study is the federal case of *R v Berlinsky*,<sup>1474</sup> Doyle CJ stated that s 16A(2)(p) 'mirrors s 10(1)(n)'<sup>1475</sup> and on the facts of this case the 'adverse effect on Berlinsky's son resulting from her deportation, is too speculative for it to be given any weight in the sentencing process.'<sup>1476</sup> But he did find that the 'interests of her child call for careful consideration, although the decision of the court cannot be affected by the risk of deportation.'<sup>1477</sup> Chief Justice Doyle, therefore, separated out the consideration of family hardship which could be considered, and impact of risk of deportation, which could not be considered in determining an appropriate sentence.

Justice Bleby agreed with these reasons but delivered a separate judgment addressing issues of statutory interpretation of s16A (discussed below). Justice Gray was in dissent on the question of whether deportation was relevant to family hardship. He found 'the risk of the parent's deportation and the probable consequent effect on a child is clearly an exceptional circumstance and therefore a relevant matter within the meaning of s 16A(2)(p) to be considered when sentencing.'<sup>1478</sup> It can, therefore, be seen that South Australia has adopted the approach of 'reading in' exceptional circumstances as a threshold requirement, before family hardship can be considered at federal sentencing.

#### *6. Federal Cases Heard in Tasmania*

This study of the Tasmanian case law revealed that the approach to family hardship at sentencing in this jurisdiction was to accept that it was a mitigating factor. In federal sentencing cases the Tasmanian Court of Criminal Appeal found that family hardship was a mitigating factor.<sup>1479</sup> Where public interests and deterrence carried significant weight in a particular case the local approach to family hardship had been that it carried very little weight.

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<sup>1474</sup> [2005] SASC 316 (8 September 2005).

<sup>1475</sup> *Ibid* [30].

<sup>1476</sup> *Ibid* [32].

<sup>1477</sup> *Ibid* [37].

<sup>1478</sup> *Ibid* [66].

<sup>1479</sup> *Garnsey v Stamford* [2002] TASSC 43 (4 July 2002); *Elliott v Anstie* [2006] TASSC 17 (19 April 2006); *McAree v Barr* [2006] TASSC 37 (26 May 2006); *Emms v Barr* [2008] TASSC 49 (4 September 2008).

In 2002 in *Garnsey v Stamford*,<sup>1480</sup> Underwood J found ‘little mitigatory weight’<sup>1481</sup> in the family circumstances that arose in this case. The offender had led evidence at sentencing that he supported his father who was a gambler, alcoholic and had suffered a head injury. It was argued that the offender was the only family member in Tasmania who was able to provide support for the offender’s father.<sup>1482</sup> Consistent with the local Tasmanian approach, the Court in *Garnsey* did not find that family hardship was *not* a sentencing factor. The Court focused on the question of weight. Justice Underwood did not cite any federal sentencing cases for his statement of principle.<sup>1483</sup> While it is not a requirement to do so, it is interesting that s 16A(2)(p) of the *Crimes Act 1914* (Cth) was also not mentioned in making a finding in respect to family hardship in a federal sentencing case.

In contrast to *Garnsey*, the case of *Mc Aree v Barr*<sup>1484</sup> in 2006 engaged with s 16A(2)(p). The offender was the primary carer for her mother who was 74 years old and had multiple complex health problems meaning that she required daily care and psychological support.<sup>1485</sup> On the role of s 16A(2)(p) at sentencing, Evans J said: ‘Courts of Criminal Appeal in three States have held that this provision is declaratory of the common law and is not intended to change it.’<sup>1486</sup> The decisions Evans J relied upon were the Western Australian Court of Appeal in *Sinclair*,<sup>1487</sup> the Victorian Court of Appeal in *Matthews*<sup>1488</sup> and the New South Wales Court of Criminal Appeal in *Togias*.<sup>1489</sup>

On the common law principle of family hardship, Evans J said:

At common law the general principle is that a sentencing court should have no regard to the hardship which a sentence of imprisonment will have upon the members of an offender’s family as hardship is part of the price to pay for committing an offence...This general approach to hardship is not an absolute rule and it will be departed from in exceptional cases... Even if established,

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<sup>1480</sup> *Garnsey v Stamford* [2002] TASSC 43 (4 July 2002).

<sup>1481</sup> *Ibid* [7].

<sup>1482</sup> *Ibid*.

<sup>1483</sup> He cited Hunt CJ at CL’s comments in *Maslen and Shaw* (1995) 79 A Crim R 199, 209.

<sup>1484</sup> *McAree v Barr* [2006] TASSC 37 (26 May 2006).

<sup>1485</sup> *Ibid* [12].

<sup>1486</sup> *Ibid* [21].

<sup>1487</sup> *Sinclair* (1990) 51 A Crim R 418.

<sup>1488</sup> *R v Matthews* (1996) 130 FLR 230.

<sup>1489</sup> *R v Togias* (2002) 132 A Crim R 573.

exceptional hardship is not a passport to freedom. It is one of the factors that must be taken into account in all the circumstances of the case. In some cases, it is entitled to great weight, in others to hardly any weight.<sup>1490</sup>

It is plain that family hardship was regarded as a sentencing factor, consistent with the Tasmanian state approach. Albeit one that would not be afforded significant weight except in exceptional circumstances. In this jurisdiction, the Tasmanian Court of Criminal Appeal has had regard to a general common law approach to hardship and have used it to inform the interpretation of s 16A(2)(p).

### *7. Federal Cases Heard in Victoria*

The study of the local case law on family hardship in the state of Victoria revealed that there is a long history of considering family hardship as an act of judicial mercy (see Chapter Four). Following the introduction of pt1B of the *Crimes Act 1914* (Cth) the Victorian Court of Appeal, in *R v Broda*,<sup>1491</sup> was asked to consider whether the appearance of family hardship as a listed factor under s 16A(2)(p) meant that it should be taken into account at federal sentencing. The Court was directed to the South Australian state case of *Adami*<sup>1492</sup> and the Western Australian federal case of *Sinclair*<sup>1493</sup> which held that 's16A(2)(p) did not change the common law.'<sup>1494</sup> However, on this occasion the Victorian Court of Appeal did not express a view on this question and left this issue open.<sup>1495</sup> The same position was taken the year later in *R v Bullock*.<sup>1496</sup> Justice Southwell (Ashley and Harper JJ agreeing) said '[i]t is, accordingly, in my view, unnecessary for this Court, as it was unnecessary in *Broda*, to decide whether to adopt the reasoning in the judgments in *Adami* and *Sinclair*.'<sup>1497</sup> This was clearly seen by the Victorian Court of Appeal not to be a simple issue, but rather one that required deeper consideration.

The examination of case law conducted for this study reveals that sentencing judges after these cases, were taking family hardship into account in determining

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<sup>1490</sup> *McAree v Barr* [2006] TASSC 37 (26 May 2006) [21].

<sup>1491</sup> *R v Broda* (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Phillips CJ, Crockett and Southwell JJ, 8 May 1992).

<sup>1492</sup> (1989) 42 A Crim R 88.

<sup>1493</sup> (1990) 51 A Crim R 418.

<sup>1494</sup> *Ibid* 10.

<sup>1495</sup> *Ibid*.

<sup>1496</sup> *R v Bullock* (1993) 112 FLR 323.

<sup>1497</sup> *Ibid* 328.

an appropriate federal sentence.<sup>1498</sup> The Victorian Supreme Court's position was not expressly stated until the case of *R v Matthews*.<sup>1499</sup> This case was a matter dealing with both state and federal theft and fraud offending.<sup>1500</sup> The offender appealed to the Victorian Court of Appeal against the four-year custodial sentence imposed upon him and one of the grounds of appeals was:

3. [As amended before this Court:] That the learned sentencing judge was in error in ruling that in order to take into account the effect of a sentence on third parties, the effect had to be exceptional.<sup>1501</sup>

On the question, of whether s 16A(2)(p) required family hardship to be taken into account as a general sentencing factor at federal sentencing, Chief Justice Phillips (Southwell and Hampel AJJA) said:

At first sight the provision would seem to require the court to take into account any hardship. However, there is powerful authority for the proposition that hardship is "relevant" only if it is exceptional. In *R v Sinclair* (1990) 108 FLR 370 the Court of Criminal Appeal of Western Australia considered this provision. Malcolm CJ, with whom the other members of the court agreed, held that the inclusion of par (p) in s 16A(2) does not alter the common law, which had for long stated that only exceptional hardship was relevant. In my opinion this Court should follow the interpretation given to the relevant provision by the Western Australian Supreme Court.<sup>1502</sup>

The reasoning of the Victorian Court of Appeal, in *Matthews*, reveals that priority was placed on a uniform application of federal law rather than the language and intent of the section. The Court took the view that it was highly desirable to follow a decision on the interpretation of a Commonwealth statute made by a Full Court of Appeal of another State.<sup>1503</sup> Therefore, following the decision of the Full Court of the Western Australian Court of Criminal Appeal, the Victorian Court of Criminal Appeal adopted the approach that exceptional circumstances should be read into s 16A(2)(p) of the *Crimes Act 1914* (Cth).

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<sup>1498</sup> See *R v Manifold* (Unreported, Supreme Court of Victoria, Appeal Division Court of Criminal Appeal, Crockett, Marks and Hampel JJ, 2 December 1993) and *R v Hebaiter* (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Crockett and Southwell AJA, 28 August 1995).

<sup>1499</sup> (1996) 130 FLR 230 ('*Matthews*').

<sup>1500</sup> See *Ibid* 230-231.

<sup>1501</sup> *Ibid* 231.

<sup>1502</sup> *Ibid* 233.

<sup>1503</sup> *Ibid*. Citing *Leighton Contractors Pty Ltd v Kilpatrick Green Pty Ltd* [1992] 2 VR 505, 510 which cited with approval *R v Abbrederis* [1981] 1 NSWLR 530, 542 and *R v Parsons* [1983] 2 VR 499, 506.

In 1998, in the state and federal case of *Carmody*<sup>1504</sup> (examined above see Chapter Four) the Victorian Court of Appeal stood by its approach in *Matthews*.<sup>1505</sup> But this application of common law principle to the language of s 16A(2)(p) meant that for justice to be done the Victorian Court of Appeal turned to ‘mercy’ to take into account family hardship. *Carmody* raised the issue of the impact a custodial sentence imposed upon a mother would have upon her young sick child. This probable impact was deemed not to rise above the threshold of exceptional, but the court held it still could ‘show some mercy’.<sup>1506</sup> The study of the federal case law in Victoria shows that this approach was followed in a number of decisions.<sup>1507</sup>

In 2010, the Full Court of the Victorian Court of Appeal in *Markovic*<sup>1508</sup> put a stop to the practice of seeing mercy as a fall-back option where the exceptional circumstances test was not met. An analysis of the decision in *Markovic* was conducted in Chapter Four. In *Markovic* the Court found that the ‘traditional common law approach treats family hardship as itself being a question of mercy’<sup>1509</sup> and rejected the argument that there was a ‘residual discretion of mercy.’<sup>1510</sup>

In 2011, in *DPP (Cth) v Kieu Thi Bui*<sup>1511</sup> the Crown appealed a three year custodial sentence with an immediate release upon giving \$5000 recognisance and agreeing to a three year good behaviour bond, imposed upon a female offender convicted of importing heroin (as a ‘drug mule’).<sup>1512</sup> The offender had raised as a mitigating factor at sentencing the impact a custodial sentence would have upon her infant twin daughters.<sup>1513</sup> The Crown appealed on the basis that the sentence was manifestly inadequate. The Crown submitted that the sentencing judge had,

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<sup>1504</sup> (1998) 100 A Crim R 41.

<sup>1505</sup> *Ibid* 45.

<sup>1506</sup> *Ibid*.

<sup>1507</sup> *R v Thai* [2005] VSCA 283 (29 November 2005) [41]. See also *R v Reynolds* (1999) VSCA 224 (10 December 1999) [24] acknowledging the availability of mercy albeit not found relevant on the facts of this case.

<sup>1508</sup> (2010) 200 A Crim R 510.

<sup>1509</sup> *Ibid* 513.

<sup>1510</sup> *Ibid* 532.

<sup>1511</sup> [2011] VSCA 61 (9 March 2011).

<sup>1512</sup> *Ibid* [3]-[13].

<sup>1513</sup> *Ibid* [14]-[16].

wrongly considered whether family hardship *combined with* the respondent's cooperation with the authorities, constituted exceptional circumstances. The correct approach would have been to consider whether family hardship *alone* constituted exceptional circumstances warranting a non custodial disposition.

The second error is said to relate to her Honour's failure to assess the issue of family hardship on the balance of probabilities.<sup>1514</sup>

The Victorian Court of Appeal identified three errors in the approach taken by the sentencing judge to family hardship. First, in considering it generally in combination with other sentencing factors. Second, in referring to 'risk' rather than 'probable effect'. Third, that the sentencing judge thought she could rely upon her discretion to extend mercy if exceptional circumstances were not made out.<sup>1515</sup>

The Court observed, that in respect to the third error, her Honour's sentencing decision 'preceded this Court's decision in *Markovic* and accordingly no criticism can be made of her Honour.'<sup>1516</sup> However, post *Markovic*, such a view was now seen to be 'wrong in law';<sup>1517</sup> there was no option for a residual discretion of mercy. In respect to the second error, the language of s 16A(2)(p) required the sentencing judge to consider the 'probable effect'. The Court said 'it is an error to refer to the existence of exceptional circumstances in the context of family hardship in terms of risk. Such matters are to be assessed on the balance of probabilities.'<sup>1518</sup>

In respect to the first error, the Victorian Court of Appeal articulated that exceptional circumstances was a threshold requirement that must be met before family hardship could be taken into account as a sentencing factor. Ross AJA (Nettle and Hansen JJA agreeing) held '[f]amily hardship must – on its own – be adjudged to constitute exceptional circumstance before it can be taken into account as a sentencing consideration.'<sup>1519</sup> As discussed in Chapter Four, this is setting 'family hardship' out as a special breed of sentencing factor (one that only arises in exceptional circumstances) rather than treating it in the usual manner (in which all other sentencing factors are treated) and leaving it as a matter to be

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<sup>1514</sup> Ibid [24]-[25].

<sup>1515</sup> Ibid [28]-[30].

<sup>1516</sup> Ibid [26].

<sup>1517</sup> Ibid [30].

<sup>1518</sup> Ibid [29].

<sup>1519</sup> Ibid [28].



considered and balanced against other relevant factors and the purposes of sentencing.

### *8. Federal Cases Heard in Western Australia*

The study of the local Western Australian case law on family hardship found that it was not considered to be a sentencing factor but in extreme cases or exceptional circumstances it may be taken into account (see Chapter Four). As seen from the analysis of the case law above, the Western Australian federal sentencing decision in *Sinclair*<sup>1520</sup> established the approach that the listing of family hardship in s16A(2)(p) of the *Crimes Act 1914* (Cth) did not change the law and that courts should read in a threshold test for 'exceptional circumstances' before considering this factor in determining an appropriate federal sentence.

Following the introduction of pt1B of the *Crimes Act 1914* (Cth), the Western Australian Court of Appeal heard a Crown appeal against a 33-month sentence (suspended after two months and upon entering into a recognisance release order<sup>1521</sup>) imposed upon a divorcee convicted of 'extremely serious'<sup>1522</sup> social security fraud. The Crown submitted that the sentencing judge had given undue weight to family hardship and 'in particular erred in holding that it [s 16A(2)(p)] altered established sentencing principles.'<sup>1523</sup> The Western Australian Court of Appeal found error in the sentencing judge's 'interpretation of the effect of s 16A(2)(p)'.<sup>1524</sup>

*Sinclair* was 32 years old with two dependent children. Her 12 year old son had 'serious learning problems as a result of a handicap' and her daughter suffered from 'serious emotional problems and it was alleged that she had suffered sexual abuse, although this was not verified.'<sup>1525</sup> The sentencing judge had remarked:

...s 16A(2)(p) directs that in sentencing you I must - not may or shall but must - take into account the probable effect that any sentence or order under consideration would have on any of the person's family or dependants. This is a

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<sup>1520</sup> (1990) 51 A Crim R 418.

<sup>1521</sup> *Ibid* 419.

<sup>1522</sup> As described by the sentencing judge and held to be an apt description by the Western Australian Court of Appeal. See *Ibid* 423.

<sup>1523</sup> *Ibid* 426 (see Ground 1(d)).

<sup>1524</sup> *Ibid* 431.

<sup>1525</sup> *Ibid* 422-423.

new provision which came into operation in July this year and did not exist when the chapters on the matter were written in D A Thomas, *Principles of Sentencing* (2<sup>nd</sup> ed, 1979) or when the decision of *Scarse* was handed down.

It also seems to me that the position of the care giver and nurturer must be regarded separately from the position of the bread-winner and father figure. The daily care giver is absolutely essential in the child's life it seems to me and there is that distinction as well as the fact that this has now been enacted into the legislation on a mandatory basis.<sup>1526</sup>

The sentencing judge went on to explain the probable impact the sentence would have upon the children in this case.<sup>1527</sup>

Chief Justice Malcolm (Kennedy and Pidgeon JJ agreeing) looked to the Supreme Court of South Australia's approach in *Adami*<sup>1528</sup> to the impact of the introduction of s 10(1)(n) of the *Criminal Law (Sentencing) Act 1988* (SA) where the Court had held that s 10 did not change the law.<sup>1529</sup> With respect to the facts of this case, Malcom CJ (Kennedy and Pidgeon JJ agreeing) did not find exceptional circumstances as the children's father had 'obtained an order for interim custody of the children in the Family Court during the applicant's period of imprisonment.'<sup>1530</sup> The approach taken in *Sinclair*, was that s 16A(2)(p) should be read as though preceded by the words 'in exceptional circumstances'. Despite submissions made on appeal that the words of the federal provision are clear and the statute does not require exceptional circumstances,<sup>1531</sup> this has been the approach taken to family hardship at federal sentencing in Western Australia.

### *B. One Federal Approach to Family Hardship?*

Courts have a long tradition of interpreting statutes so that they align with common law practices. In the interpretation of legislation courts operate under a presumption against the alteration of common law doctrine.<sup>1532</sup> In 1975, in *Maunsel v Olins*,<sup>1533</sup> Lord Simon of Glaisdale stated,

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<sup>1526</sup> Ibid 425.

<sup>1527</sup> See Ibid 426.

<sup>1528</sup> (1989) 42 A Crim R 88.

<sup>1529</sup> *Sinclair* (1990) 51 A Crim R 418, 430.

<sup>1530</sup> Ibid 431.

<sup>1531</sup> See, eg, *Macri v Moreland* [2008] WASC 194 (12 September 2008) [24].

<sup>1532</sup> See DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2011) 188-194.

<sup>1533</sup> [1975] AC 373.

It is true that there have been pronouncements favouring a presumption in statutory construction against a change in the common law... Indeed, the concept has sometimes been put (possibly without advertence) in the form that there is a presumption against change in the law pre-existing the statute which falls for construction.<sup>1534</sup>

Pearce and Geddes, in commenting on the Australia experience, have observed that courts 'referred frequently to the presumptions and have shown no reluctance to apply them.'<sup>1535</sup> They noted that the following passage from O'Connor J in *Potter v Minahan*<sup>1536</sup> has been cited with approval by the High Court in numerous decisions.<sup>1537</sup> In the classic passage, O'Connor J stated,

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.<sup>1538</sup>

In Australia the courts' response to the legislative innovation to grant broader recognition of hardship to others in sentencing, has been to give the legislative provisions a 'strict and narrow interpretation'.<sup>1539</sup> This meant reading the paragraph down so that it applied only in exceptional circumstances, in line with existing common law practices, despite the absence of a reference to 'exceptional circumstances' within the drafting of any of the provisions.

Alternatively, it could be argued that reading s 16A(2)(p) alongside the common law principle of family hardship so that it includes the term 'only in exceptional circumstances' is not providing relevant context to the statutory expression in paragraph (p). It would have been quite easy for the Legislature to narrow the statutory expression by including this phrase. Drawing on the language of the High

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<sup>1534</sup> [1975] AC 373, 394.

<sup>1535</sup> Speaking here to the presumption that legislation does not alter common law doctrine and the presumption that legislation does not invade common law rights. See DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2011) 189.

<sup>1536</sup> (1908) 7 CLR 277.

<sup>1537</sup> DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2011) 189.

<sup>1538</sup> (1908) 7 CLR 277, 304.

<sup>1539</sup> See the fourth approach identified by Roscoe Pound and described by him as 'the orthodox common law attitude to legislative innovations' in Roscoe Pound, 'Common Law and Legislation' (1908) 21 *Harvard Law Review* 383, 385. See also Finn's observation that 'judicial treatment of statutes in this country fall into Pound's third and fourth categories (liberal interpretation..., and strict and narrow interpretation), Paul Finn, 'Statutes and the Common Law' (1992) 22 *University of Western Australia Law Review* 7, 19.

Court in *Bui v DPP (Cth)*,<sup>1540</sup> when addressing the question of whether the law as it related to double jeopardy on appeals was picked up by s 16A, the Court held that to read s 16A in the manner submitted... 'would be to gloss the text impermissibly by introducing a notion for which there is no textual foundation. It would go well beyond giving relevant content to any of the expressions found in the section.'<sup>1541</sup> This dissertation posits that the reading in of 'exceptional circumstances' should also be seen to impermissibly put a *gloss on the text going well beyond the relevant content* (see *Bui v DPP (Cth)* above).

### **(a) Federal cases with a high juristic status**

The study of the federal case law revealed that *Togias*<sup>1542</sup> has a very high federal juristic status (see Table 21 below). The only case with more federal citations was the case of *Sinclair*<sup>1543</sup> and this was only by one 'hit'. The Western Australian Court of Appeal's statement of principle in *Sinclair* is the only federal case within this study which has a very strong cross-jurisdictional juristic status (this case was examined above).

From the Victorian Court of Appeal, *Matthews* and *Carmody* are both federal cases with a high juristic status (see Table 21 below). They both have very similar 'hit' rates in terms of citations in later federal case law engaging with the principle of family hardship; with *Matthews* having 10 'hits' and *Carmody* 11 'hits'. Table 21 shows that *Carmody* had a much higher citation rate in later Victorian cases than *Matthews* did. This finding highlights the importance of the relationship between mercy and family hardship in Victorian sentencing theory and practice (this relationship is discussed further in Chapter Six).

The Full Court decision of Victorian Court of Appeal in case of *Markovic*,<sup>1544</sup> (dealing with both state and federal offences) is undoubtedly an important case on the role of family hardship in sentencing. This case was heard in 2010, therefore, the importance of this decision within family hardship case law was not captured

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<sup>1540</sup> *Bui v DPP (Cth)* (2012) 244 CLR 638.

<sup>1541</sup> *Ibid* 651 (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

<sup>1542</sup> (2001) 127 A Crim R 23.

<sup>1543</sup> (1990) 51 A Crim R 418.

<sup>1544</sup> (2010) 200 A Crim R 510.

by this study which examined case law on family hardship in Australia until the end of the calendar year in 2011.

**Table 21: Federal Cases with a High Juristic Status**

Case Name	Jurisdiction Case Heard	Total number of citations	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<i>Togias</i> (2001) 127 A Crim R 23	NSW	21	16	-	4	-	-	-	-	1	-
<i>Carmody</i> (1998) 100 A Crim R 41	Vic	25	11	-	-	-	-	-	-	13	1
<i>R v Matthews</i> (1996) 130 FLR 230	Vic	15	10	-	-	1	-	-	-	4	-
<i>Sinclair</i> (1990) 51 A Crim R 418	WA	33	17	3	1	-	-	3	3	2	4

**(b) Is there more to come...?**

As discussed above, appellate courts throughout Australia, except for the Court of Appeal in the Australian Capital Territory, have held that if there is to be a change to the approach to family hardship in federal sentencing the High Court need to effect that change. In 2013, in *R v Zerafa*,<sup>1545</sup> two judges of the New South Wales Court of Criminal Appeal, Hoeben CJ at CL and Latham J, found that it was now for the High Court to change the interpretation to s 16A(2)(p). Hoeben CJ at CL (Latham J agreeing) found:

In relation to s 16A(2)(p) it is not appropriate for this Court to overrule or depart from cases such as *Togias* and *Hinton*. As the respondent accepted, the “exceptional hardship” approach has been followed in Queensland and Victoria, and to a limited extent in South Australia and Western Australia. It is only the ACT which has refused to follow that line of authority. As Spigelman CJ acknowledged in *Togias*:

If there is to be any change in this position, and that was not put in this case even on a formal basis, only the High Court can effect it.<sup>1546</sup>

In *R v Zerafa*, Beech-Jones J was in dissent on the issue of the interpretation of s 16A(2)(p). Justice Beech- Jones stated:

In my view, the words of s 16A(2)(p) are clear. The secondary materials confirm that meaning. The cases that have considered the provision have not

<sup>1545</sup> (2013) 235 A Crim R 265.

<sup>1546</sup> *Ibid* 287-288.

reconciled their construction with either. I am satisfied that the construction of s 16A(2)(p) which reads the provision as though it was preceded or proceeded by the words “in an exceptional case” is plainly wrong...<sup>1547</sup>

In 2015, in *Elshani v The Queen*,<sup>1548</sup> the question of whether s 16A(2)(p) should be read consistently with the common law was brought back before the New South Wales Court of Criminal Appeal. Once again, Beech-Jones J (in dissent on this issue again) found that the line of authority that was being followed was ‘clearly wrong’.<sup>1549</sup> This view is the position this dissertation has reached after a careful analysis of family hardship as a mitigating factor at common law.

In *Elshani*, Adam J held ‘...in *Zerafa*, the principle stated by the majority has now become too embedded for this Court to reconsider it.’<sup>1550</sup> Similarly, Gleeson JA held:

the approach of the majority in *Zerafa* and the line of authority on which it is based, has been consistently followed in this court...

In these circumstances, it is unnecessary to address the applicant’s contention that the decision of the majority in *R v Zerafa* and the other decision of this Court and other intermediate appellate courts that have applied the “exceptional hardship” approach to s 16A(2)(p) were wrongly decided. That contention would require the Court to be “convinced” that the interpretation of s 16A(2)(p) of the *Crimes Act* in those decisions is “plainly wrong” ...<sup>1551</sup>

The view of the majority was that if there was to be a change it needed to be through direction from the High Court.

Most recently, in 2017, the question has been put back before the New South Wales Court of Criminal Appeal in *DPP (Cth) v Pratten (No 2)*<sup>1552</sup> and *Kaveh v The Queen*.<sup>1553</sup> In *Pratten (No 2)*, obiter comments from two judges of the Court underscored the growing disquiet about the approach that has been adopted in Australia with respect to s16A(2)(p) of the *Crimes Act 1914* (Cth). In their judgments, both Campbell and Adams JJ expressed that Beech-Jones J gave a persuasive dissent in *Zerafa*. Justice Campbell stated:

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<sup>1547</sup> Ibid 299.

<sup>1548</sup> (2015) 255 A Crim R 488.

<sup>1549</sup> Ibid 502.

<sup>1550</sup> Ibid 500.

<sup>1551</sup> Ibid 491.

<sup>1552</sup> [2017] NSWCCA 42 (17 March 2017) (*‘Pratten (No 2)’*).

<sup>1553</sup> [2017] NSWCCA 52 (24 March 2017).

I wish to record, with respect, that there is much to be said for the view expressed by Beech-Jones J about the construction of s 16A(2)(p) *Crimes Act 1914* (Cth) in *R v Zerafa*. Given the matter was not argued: the long line of contrary authority; and we are but a court of three is not an appropriate case to consider departing from the established construction generally agreed in by intermediate courts of appeal throughout the Commonwealth.<sup>1554</sup>

Similarly, Adams J said: ‘I wish only to add that I too am of the view that there is much force in the view expressed by Beech-Jones J in *R v Zerafa* concerning the proper construction of s 16A(2)(p) of the *Crimes Act 1914* (Cth).’<sup>1555</sup> In *Kaveh v The Queen*, Basten JA commented that ‘there remains a live issue’<sup>1556</sup> as to whether the standard of ‘exceptional circumstances’ should apply to federal sentencing under s 16A(2) of the *Crimes Act 1914* (Cth).

### III ISSUES OF STATUTORY INTERPRETATION

Section 80 of the *Judiciary Act 1903* (Cth) provides that the common law of Australia applies to courts exercising federal jurisdiction. However, the common law applies only if one of three possible circumstances arises. Section 80 provides in full:

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.<sup>1557</sup>

One of these circumstances is that the common law applies so far as the laws of the Commonwealth are not applicable. The Commonwealth has legislated in respect to family hardship as a relevant sentencing factor. In *Bui*,<sup>1558</sup> the High Court held that, ‘[s]ection 16A applies of its own force to the sentencing of persons convicted of offences against Commonwealth laws.’<sup>1559</sup> Applying the logic of the High Court as espoused in *Bui* there is no gap to be filled by common law reasoning within the

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<sup>1554</sup> *Ibid* [162].

<sup>1555</sup> *Ibid* [163].

<sup>1556</sup> *Ibid* [6].

<sup>1557</sup> *Judiciary Act 1903* (Cth) s 80.

<sup>1558</sup> *Bui v DPP* (Cth) (2012) 244 CLR 638.

<sup>1559</sup> *Ibid* 650 (The Court).

Commonwealth laws on the question of family hardship. As such the common law principles on this matter ought not be picked up and applied to federal offenders.

Therefore, the inclusion of the common law principle of family hardship (alongside the language of s 16A(2)(p)) must arise as a matter of statutory interpretation.

However, this approach is also problematic. In *Bui*, the High Court citing *Johnson v The Queen*<sup>1560</sup> and *Hili v The Queen*<sup>1561</sup> stated:

It [s 16A] is able to accommodate some judicially-developed sentencing principles where such principles give relevant content to the statutory expression in s 16A(1) “of a severity appropriate in all the circumstances of the offence”, as well as expressions such as “the need to ensure that the person is adequately punished for the offence”, which appears in s16A(2)(k).<sup>1562</sup>

In *R v Zerafa*, Beech-Jones J stated ‘unlike the provisions described in...*Hili* (ie s 16A(1) and (2)(k)), s 16A(2)(p) is not drafted at a level of generality that permits the accommodation of the principle in *Wirth*.’<sup>1563</sup>

#### *A. The Meaning of ‘Must Take into Account...as are Relevant and Known’*

The federal provision states at s 16A:

(2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:

...

(p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.<sup>1564</sup>

The presence in the legislation of the word ‘must’ suggests that a listed matter is required to be taken into account in sentencing a federal offender,<sup>1565</sup> where it meets the threshold of ‘relevant and known’. In *Wong*,<sup>1566</sup> Gaudron, Gummow and Hayne JJ stated that ‘[t]o the extent that the matters identified in s 16A(2) are relevant and known to the Court, the sentencer must take those into account.’<sup>1567</sup>

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<sup>1560</sup> (2004) 78 ALJR 616, 622.

<sup>1561</sup> (2010) 242 CLR 520, 528.

<sup>1562</sup> *Bui v DPP* (Cth) (2012) 244 CLR 638, 651.

<sup>1563</sup> *R v Zerafa* (2013) 235 A Crim R 265, 294.

<sup>1564</sup> *Crimes Act 1914* (Cth) s 16A.

<sup>1565</sup> Pearce and Geddes provide that ‘must’ prima facie imposes an obligation see DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2011) 348-349.

<sup>1566</sup> (2001) 207 CLR 584.

<sup>1567</sup> (2001) 207 CLR 584, 610.



The provision, therefore, provides discretion to the court in respect of whether a matter is deemed relevant. Once found to be relevant, there is also discretion in the weight that can be attached to the matter by the court.

The phrase 'known to the court' was considered in the case of *R v Olbrich*.<sup>1568</sup> The case concerned the importation of a trafficable quantity of heroin. The issue arose as to whether a sentencing court could assume the offender was a principal when it had no knowledge as to whether the offender was a 'principal' or a 'mere courier'.<sup>1569</sup> As Ian Leader-Elliott describes, the High Court found that the 'offender bears the burden of persuasion on factors which would mitigate the penalty.'<sup>1570</sup> In *R v Olbrich*, the plurality stated:

... we reject the contention that a judge who is not satisfied of some matter urged in a plea on behalf of an offender must, nevertheless, sentence the offender on a basis that accepts the accuracy of that contention unless the prosecution proves the contrary beyond reasonable doubt.<sup>1571</sup>

The court's reasoning was that the sentencing judge may not be persuaded (on the balance of probabilities) by the evidence of the offender. Therefore the offender carries an evidential burden in respect to matters of mitigation.

Appellate courts within Australia have found that family hardship is a 'relevant' mitigating factor only where exceptional circumstances apply. The Supreme Court of the Australian Capital Territory has rejected the view that exceptional circumstances can be read into s16A(2)(p) of the *Crimes Act 1914* (Cth).<sup>1572</sup> The case law also reveals that the term 'relevant' has also been held to mean where sufficient evidence has been put before the court. The study of the case law on family hardship has highlighted that a lack of evidence presented to the sentencing judge in respect to family hardship has been a common complaint in cases by appellate courts.<sup>1573</sup> The meaning of 'relevant' within the identical ACT provision was raised in *Wilkinson v Bunt*<sup>1574</sup> where Nield AJ stated that:

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<sup>1568</sup> (1999) 199 CLR 270, 278.

<sup>1569</sup> *R v Olbrich* (1999) 199 CLR 270, 279-280.

<sup>1570</sup> Ian Leader Elliott, 'Editorial: Instinctive Synthesisers in The High Court' (2002) 26 *Criminal Law Journal* 5, 7. See *v Olbrich* (1999) 199 CLR 270, 281.

<sup>1571</sup> *R v Olbrich* (1999) 199 CLR 270, 280 (Gleeson CJ, Gaudron, Hayne and Callinan JJ)

<sup>1572</sup> *DPP v Ka-Hung Ip* [2005] ACTCA 24 (19 July 2005) [60]-[61].

<sup>1573</sup> See, eg, *R v Toghias* (2001) 127 A Crim R 23, 25; *Pickett v Fox* (1993) 112 FLR 345, 348;

<sup>1574</sup> [2011] ACTSC 98.

As s 33 subsection (1) of the *Crimes (Sentencing) Act 2005* (ACT) says, “A court must consider whichever of the following matters are relevant and known to the court.” If a fact is not known by the sentencing judge or magistrate because the offender has not adduced evidence of the fact, then the sentencing judge or magistrate could not be expected to take the fact into account in the determination of an appropriate sentence for an offence or to inquire as to why evidence of that fact has not been adduced.<sup>1575</sup>

Although purporting to define relevance, in this context, the case, in fact, dealt with what was known.

### *B. The Meaning of ‘Probable Effect that any Sentence or Order’*

In respect of the federal provision Spigelman CJ observed that “[it] is of some significance that the Parliament has identified this matter in terms of a “probable effect”, not merely a “possible effect”.’<sup>1576</sup> However, Spigelman CJ did not explore the term “probable effect” further.

In *R v Berlinsky*,<sup>1577</sup> Bleby J commented on the term ‘probable effect’. He said:

I accept that dictionaries will give a variety of meanings to the word “probable”. However, in the context of s 16A of the Crimes Act I consider that the effect to be considered is that which is more probable than not or more likely to occur than not. If a lesser standard were required, it is likely that the drafter would have used the word “possible” rather than “probable”.

It was therefore necessary for the sentencing Judge to take into account the probable effect on the child that the sentence under consideration would have on the child.<sup>1578</sup>

However, in *R v Belinsky*, Gray J came to a different view and said that ‘probable’ was not as narrow as Bleby J proposed. Justice Gray turned to the Oxford English Dictionary, the Latin roots of the term and judicial comments by Lord Reid in *Wagon Mound (No 2)* and found that:

In the context of s 16A(2)(p), a provision obviously intended by the legislature to enable the Court to take into account a wide range of circumstances and eventualities, the term “probable” is correctly interpreted as including events that are possible, in the sense of being credible or having the appearance of truth, that is, events that are plausible outcomes, not merely fanciful postulations. Such an interpretation provides consistency of approach when sentencing.<sup>1579</sup>

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<sup>1575</sup> [2011] ACTSC 98, [22].

<sup>1576</sup> *R v Togiass* (2001) 127 A Crim R 23, [10].

<sup>1577</sup> *R v Berlinsky* [2005] SASC 316 (8 September 2005).

<sup>1578</sup> *Ibid* [42]-[43].

<sup>1579</sup> *Ibid* [58].

In *Burns*,<sup>1580</sup> Owen J remarked that the 'section calls for an examination of the probable effect of the sentence on the third party, not on the offender.'<sup>1581</sup> He said that, therefore, evidence of the impact on the offender of her separation from the children is 'quite different consideration to that thrown up by s16A(2)(p)'.<sup>1582</sup>

The case analysis in Chapter Four and Five have highlighted that judicial officers when determining an appropriate sentence to impose upon an offender are not made aware of the conditions the offender will face in prison. While the conditions of the sentence are a matter for the Executive, this presents difficulties in respect of sentencing where there is the potential for an offender to have access to a Mother and Baby Unit within the prison, but it is unknown at the time of sentence whether this will transpire or not. There are also practical issues which impact upon the probable effect of a sentence upon an offender's dependants such as the location of the prison, the access the prisoner has to their dependants (particularly where children are housed with extended family or friends or placed in foster care) and the variable rules governing visiting access and the duration of telephone calls.<sup>1583</sup>

### *C. Meaning of 'Family or Dependants'*

Both the federal and ACT provisions expressly reference the impact of the sentence upon the offender's 'family or dependants'.<sup>1584</sup> There is no definition of 'family' provided within the Dictionary in the *Crimes (Sentencing) Act 2005* (ACT). However, within the federal provision the term 'family' includes de facto partners,<sup>1585</sup> a child (as defined by the *Family Law Act 1974* (Cth))<sup>1586</sup> and an extended definition is also provided within s 16A(4)(c).<sup>1587</sup> There is no legislative definition for the term 'dependants' in either jurisdiction.

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<sup>1580</sup> (1994) 71 A Crim R 450.

<sup>1581</sup> *Ibid* 457.

<sup>1582</sup> *Ibid*.

<sup>1583</sup> For more information on the kinds of problems that arise, see Shine for Kids Co-operative Ltd, *Putting Your Child First, A survival guide for carers of children of prisoners, their families and workers* (SHINE for Kids, 2007).

<sup>1584</sup> *Crimes Act 1914* (Cth) s 16A(2)(p); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(o).

<sup>1585</sup> *Crimes Act 1914* (Cth) s 16A(4)(a).

<sup>1586</sup> *Crimes Act 1914* (Cth) ss 16A(4)(b) and 3 (definition of child); *Family Law Act 1974* (Cth) s 4.

<sup>1587</sup> Section 16A(4) provides:

It appears that there has been no judicial consideration of either the term 'family' or 'dependants' in case law engaging with the application of either the federal or the ACT provisions. This study did not find any cases where the meaning of these terms was a fact in issue, nor where the meaning of these terms was raised in obiter.

## V CONCLUSION

The purpose of this study was to isolate the consideration of the federal sentencing provision relating to family hardship that on its face appeared to be expressed in legislation as a clear and specific mitigating factor. The goal was to trace the development of sentencing principles related to this sentencing factor in federal sentencing. This chapter has outlined the approach taken in each jurisdiction. The approach taken in each state and territory with respect to family hardship has influenced the approach taken to deciding federal cases in those jurisdictions.

Superior courts throughout Australia have been conscious to adopt a consistent approach to federal sentencing practice and the interpretation of the provisions within pt 1B of the *Crimes Act 1914* (Cth). As discussed above, the exception to this is the Australian Capital Territory which has stuck with its local interpretation (based on an equivalent provision) and not 'read in' a common law threshold of 'exceptional circumstances'. If the High Court suggests that the common law 'in exceptional circumstances' approach is wrong at law in the interpretation of s 16A(2)(p) then courts exercising federal jurisdiction will be bound to follow that approach. This will further embed the Australian Capital Territory Court of Appeals reading of s 33(1)(o) and any further legislative reforms at the state and

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(4) For the purposes of a reference in this Part to a family, the members of a person's family are taken to include the following (without limitation):

- (a) a de facto partner of the person;
- (b) someone who is the child of the person, or of whom the person is the child, because of the definition of child in section 3;
- (c) anyone else who would be a member of the person's family if someone mentioned in paragraph (a) or (b) is taken to be a member of the person's family.

territory level seeking to enhance consideration of hardship should have a positive impact.

Immediately after the passage of pt 1B the question was raised before superior courts within Australia as to whether s 16A(2)(p) changed the law in respect to the consideration of family hardship at sentencing. However, it was quickly decided that the listing of family hardship in s 16A(2)(p) did not change the common law interpretation and the provision should be read as if preceded by the words 'in exceptional circumstances.'

This position was not reached by a careful consideration of the statutory interpretation principles which give effect to the intention of the legislature, reflected in the foundational reports of the ALRC, as discussed in Chapter Three. As a matter of sentencing principle, reading in 'exceptional circumstances' with respect to only one mitigating factor in the federal list in pt 1B is an anomaly. However, this 'gloss' on s 16A(2)(p), save for some recent dissent,<sup>1588</sup> has not been openly acknowledged by superior courts within Australia. Chapter Six examines the secondary literature in the fields of sociology, psychology, criminology and legal philosophy to consider whether further light can be shed on why family hardship has been seen to be such a controversial consideration in sentencing.

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<sup>1588</sup> *R v Zerafa* (2013) 235 A Crim R 265, 299 (Beech-Jones J); *Elshani v The Queen* (2015) 255 A Crim R 488, 502 (Beech-Jones J).

## 6. FAMILY HARDSHIP AND GENDER

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### I INTRODUCTION

This Australian study of the case law has highlighted that consideration of family hardship as a mitigating factor in sentencing is controversial. Underlying the tensions present in the use and operation of this sentencing factor is a normative question, namely, whether or not it is legitimate for a judicial officer to consider the impact of a sentence upon an offenders' family and dependants. While some have lamented the move away from sentencing discretion being aligned only with the particular offence and the particular offender,<sup>1589</sup> the analysis in Chapter Two showed that this is an ahistorical and inaccurate view of sentencing theory and practice. From the earliest records of common law sentencing practices courts did exercise discretion and take into account the impact of a sentence upon an offender's dependants as discussed above (Chapter Three).<sup>1590</sup>

There are a variety of justifications that can be made in respect to the consideration of family hardship at sentencing. These include:

- innocent people should not suffer;<sup>1591</sup>
- the rights of the child;<sup>1592</sup>

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<sup>1589</sup> See, eg, Sir Guy Green, 'The Concept of Uniformity in Sentencing' (1996) 70 *Australian Law Journal* 112, 113; Ilene Nagel and Barry Johnson, 'The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders under the United States Sentencing Guidelines' (1994) 85 *Criminal Law & Criminology* 181, 207.

<sup>1590</sup> See, eg, Edward W Cox, *Principles of Punishment as applied in the Administration of the Criminal Law by Judges and Magistrates* (Law Times Office, 1877).

<sup>1591</sup> Mirko Bagaric and Theo Alexander, 'First-Time Offenders, Productive Offender, Offender with Dependents: Why the Profile of Offenders (Sometimes) Matters in Sentencing' (2015) 78(2) *Albany Law Review* 397, 399, 435-437.

<sup>1592</sup> *Convention on the Rights of the Child 1989*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) Art 3. See Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6<sup>th</sup> ed, 2015) 196; Helen Codd, 'Prisoners' Families: Issues in Law and Policy' (2004) 55 *Amicus Curiae* 2, 6-7; Helen Codd, 'Through the Looking Glass? Prisoners' Children and Penal Policy' (2007) 69 *Amicus Curiae* 3; Helen Codd, *In the Shadow of Prison: Families, Imprisonment and Criminal Justice* (Willan Publishing, 2008) 91-100; Vanessa Munro, 'The Emerging Rights of Imprisoned Mothers and Their Children' (2002) 14(3) *Child and Family Law Quarterly* 303; Helen Codd, *In the Shadow of Prison: Families, Imprisonment and Criminal Justice* (Willan Publishing, 2008) 164-165; Vanessa Munro, 'Turning Rights from The Outside In: Re-Visiting the Politics of Separation in Prison Mothers and Baby Units: CF v Secretary of State for the Home Department and Another' (2005) 17(4) *Child and Family Law Quarterly* 545; Vanessa Munro, 'From Mothering Behind

- the right to family life;<sup>1593</sup>
- impact mitigation.<sup>1594</sup>

This chapter will scrutinise the tension between family hardship as a sentencing factor and gender.

Two dominant explanations for leniency to mothers have been chivalry theory and judicial mercy. These will be explored below alongside the problematic association between taking family hardship into account and equal justice. In the 1980s Catherine MacKinnon famously argued that the 'law, structurally, adopts the male point of view'.<sup>1595</sup> Undoubtedly a lot has happened in the decades since, however, it is still necessary to question whether equality claims are actually calling for a swift return to equality in relation to male offenders and men's experience. MacKinnon's words still have resonance in modern day legal systems:

When it is most ruthlessly neutral, it is most male; when it is most sex blind, it is most blind to the sex of the standard being applied. When it most closely conforms to precedent, to "facts", to legislative intent, it most closely enforces socially male norms and most thoroughly precludes questioning their content as having a point of view at all.<sup>1596</sup>

This chapter examines the role equality theory, gender bias, judicial paternalism and mercy have played in the understanding of, and justifications for, taking family hardship into account. The chapter interrogates if these understandings help or hinder a proper understanding of sentencing within Australia.

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Bars to Parenting Beyond Barriers? The Right of Family Life and the Politics of Imprisonment' (2007) 69 *Amicus Curiae* 6.

<sup>1593</sup> *International Covenant on Civil and Political Rights*, opened for signature 28 March 1979, [1980] ATS 23 (entered into force 13 August 1980) Arts 17, 23, and 8. See Mirko Bagaric and Theo Alexander, 'First-Time Offenders, Productive Offender, Offender with Dependents: Why the Profile of Offenders (Sometimes) Matters in Sentencing' (2015) 78(2) *Albany Law Review* 397, 432-433; Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6<sup>th</sup> ed, 2015) 196.

<sup>1594</sup> See Christine Piper, 'Should Impact Constitute Mitigation?: Structured Discretion Versus Mercy' (2007) 2 *Criminal Law Review* 141; Susan Easton, 'Dangerous Waters: Taking Account of Impact in Sentencing' (2008) 2 *Criminal Law Review* 105.

<sup>1595</sup> Catherine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, 1989) 216.

<sup>1596</sup> *Ibid* 248.

## II 'CHIVALRY THEORY' AND 'JUDICIAL PATERNALISM'

It has been widely stated in the research literature that common law courts have had a long-standing practice of granting leniency to female offenders when passing sentence. Typically, this practice has been described under the terms 'chivalry theory' or 'judicial paternalism'.<sup>1597</sup> These terms were adopted to describe the expectation that male judicial officers acted upon protective assumptions when sentencing female offenders.<sup>1598</sup> The norms that were seen to be operative in the lenient treatment of female offenders at sentencing included that female offenders were passive, weaker, submissive and often led astray.<sup>1599</sup>

In the 1980s, empirical research into the impact of gender in sentencing was conducted,<sup>1600</sup> the importance of this wave of research was that this was the first

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<sup>1597</sup> See Rita Simon, *Women and Crime* (Lexington Books, 1975) 49; Kathleen Daly, 'Neither Conflict nor Labelling nor Paternalism Will Suffice: Intersections of Race, Ethnicity, Gender and Family in Criminal Court Decisions' (1989) 35(1) *Crime & Delinquency* 136, 137; Kathleen Daly, 'Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing' (1989) 3(1) *Gender & Society* 9, 10; Barbara Hudson, *Justice through Punishment: A Critique of the 'Justice' Model of Corrections* (St Martin's Press, 1987) 116, 122; Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (Butterworths, 2001) 30 – 32; Brenda McGowan and Karen Blumenthal, 'Children of Women Prisoner: A Forgotten Minority' in Laura Crites (ed), *The Female Offender* (Lexington Books, 1978) 121, 123; Barbara Koons-Witt, 'The Effect of Gender on the Decision to Incarcerate Before and After the Introduction of Sentencing Guidelines' (2002) 40 *Criminology* 297, 298, 299, 305; Darrell Steffensmeier, 'Assessing the Impact of the Women's Movement on Sex-Based Differences in the Handling of Adult Criminal Defendants' (1980) 26 *Crime and Delinquency* 344, 349-351; Mary Eaton, *Justice for Women? Family, Court and Social Control* (Open University Press, 1986) 22 – 25; David Farrington and Allison Morris, 'Sex, Sentencing and Reconviction' (1983) 23(3) *British Journal of Criminology* 229, 229; Myrna Raeder, 'Gender and Sentencing: Single Moms, Battered Women, and other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines' (1993) 20 *Pepperdine Law Review* 905, 917; Gayle Bickle and Ruth Peterson, 'The Impact of Gender-Based Family Roles on Criminal Sentencing' (1991) 38(3) *Social Problems* 372, 372; Candace Kruttschnitt, 'Women, Crime and Dependency: An Application of the Theory of Law' (1982) 19 *Criminology* 495, 496; Ilene Nagel and Barry Johnson, 'The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders under the United States Sentencing Guidelines' (1994) 85 *Criminal Law & Criminology* 181, 188; Bronwyn Naylor, 'Sentencing Female Offenders in the Magistrate's Court: Preliminary Report on a Pilot Study' (Paper presented at the Women and the Law, Canberra, 24-26 September 1991); Samantha Jeffries and Christine Bond, 'Gender, Indigeneity, and the Criminal Courts: A Narrative Exploration of Women's Sentencing in Western Australia (2013)23(1) *Women & Criminal Justice* 19, 19-20.

<sup>1598</sup> See generally, Kathleen Daly, 'Structure and Practice of Familial-Based Justice in a Criminal Court' (1987) 21 *Law & Society Review* 267, 268; Kathleen Daly, 'Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing' (1989) 3(1) *Gender & Society* 9,10; Barbara Hudson, 'Doing Justice to Difference' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Oxford University Press, 1998) 224, 228.

<sup>1599</sup> See Ilene Nagel and Barry Johnson, 'The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders under the United States Sentencing Guidelines' (1994) 85 *Criminal Law & Criminology* 181, 188.

<sup>1600</sup> See Carol Hedderman and Loraine Gelsthorpe (eds), *Understanding the Sentencing of Women* (Home Office Research Study No 170, A Research and Statistics Directorate Report, Home Office, 1997) 3.



time 'gender' was the focus of study. The operation of paternalism and chivalry were contested through the work of David Farrington and Allison Morris,<sup>1601</sup> Candace Kruttschnitt,<sup>1602</sup> Darrell Steffensmeier,<sup>1603</sup> Kathleen Daly,<sup>1604</sup> and Mary Eaton.<sup>1605</sup> For example, Eaton stated,

...the claims that women offenders receive preferential treatment because of their sex are unfounded. When the relevant influences on sentencing are adequately considered the differences on grounds of sex are removed.<sup>1606</sup>

A central finding within this research literature was that 'gender-bias' was not the reason for differences in sentences imposed upon offenders.

The research conducted in this period identified that sentencing and the decision-making processes involved were highly complex processes. Statistics are open to misinterpretation when this complexity is overlooked.<sup>1607</sup> The research conducted in the 1980s identified a variety of variables that were relevant to differences in sentencing outcomes between men and women. These identified variables are:

- circumstances of offending;
- the gravity of offences committed;
- type of offences committed;
- life course factors;
- age;
- previous convictions;

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<sup>1601</sup> David Farrington and Allison Morris, 'Sex, Sentencing and Reconviction' (1983) 23(3) *British Journal of Criminology* 229; Allison Morris, 'Sex and Sentencing' (1988) *Mar Criminal Law Review* 163.

<sup>1602</sup> Candace Kruttschnitt, 'Women, Crime and Dependency: An Application of the Theory of Law' (1982) 19 *Criminology* 495; Candace Kruttschnitt, 'Sex and Criminal Court Dispositions: The Unresolved Controversy' (1984) 21 *Research in Crime and Delinquency* 213; Candace Kruttschnitt and Donald Green, 'The Sex-Sanctioning Issue: Is it History?' (1984) 49(4) *American Sociological Review* 541.

<sup>1603</sup> Darrell Steffensmeier, 'Assessing the Impact of the Women's Movement on Sex-Based Differences in the Handling of Adult Criminal Defendants' (1980) 26 *Crime and Delinquency* 344; Darrell Steffensmeier, John Kramer and Cathy Streifel, 'Gender and Imprisonment Decisions' (1993) 31(3) *Criminology* 411.

<sup>1604</sup> Kathleen Daly, 'Discrimination in the Criminal Courts: Family, Gender, and the Problem of Equal Treatment' (1987-1988) 66 *Social Forces* 152; Kathleen Daly, 'Structure and Practice of Familial-Based Justice in a Criminal Court' (1987) 21 *Law & Society Review* 267; Kathleen Daly, 'Neither Conflict Nor Labelling Nor Paternalism Will Suffice: Intersections of Race, Ethnicity, Gender and Family in Criminal Court Decisions' (1989) 35 *Crime & Delinquency* 136; Kathleen Daly, 'Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing' (1989) 3(1) *Gender & Society* 9; Kathleen Daly, *Gender, Crime and Punishment* (Yale University Press, 1994).

<sup>1605</sup> Mary Eaton, *Justice for Women? Family, Court and Social Control* (Open University Press, 1986).

<sup>1606</sup> *Ibid* 30.

<sup>1607</sup> Carol Hedderman and Loraine Gelsthorpe (eds), *Understanding the Sentencing of Women* (Home Office Research Study No 170, A Research and Statistics Directorate Report, Home Office, 1997) 3-4 citing the work of Roger Hood, *Race and Sentencing: A Study in the Crown Court* (Oxford, 1992).

- involvement of other offenders; and
- family circumstances.<sup>1608</sup>

The studies of this era recognised that these kinds of variable (listed above) are crucial independent variables at sentencing. However, these studies emerged in the disciplines of sociology and criminology, therefore, the researchers understood these concepts as statistical ‘variables’ rather than ‘sentencing factors’.

For the purposes of this study of family hardship as a sentencing factor, it is significant that ‘family circumstances’ and ‘motherhood’ were identified in this research literature as an important variable.<sup>1609</sup> But the meaning of this to sentencing practices was interpreted in light of the discourses in which the studies were situated. For example, Kruttschnitt in her early work saw this as indicative of the operation of social control upon women by the legal system.<sup>1610</sup> Women with dependent children and families received lighter sentences and less control by probation officers, whereas, ‘freer women’<sup>1611</sup> received harsher sentences and had more control imposed on them.<sup>1612</sup>

Within social science research literature, there has been a failure to recognise family hardship as a relevant mitigating sentencing factor. For example, Koons-

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<sup>1608</sup> See David Farrington and Allison Morris, ‘Sex, Sentencing and Reconviction’ (1983) 23(3) *British Journal of Criminology* 229, 230-213, 240-241, 245; Mary Eaton, *Justice for Women? Family, Court and Social Control* (Open University Press, 1986) 11-30; Candace Kruttschnitt, ‘Women, Crime and Dependency: An Application of the Theory of Law’ (1982) 19 *Criminology* 495, 503-508; Jeanne Flavin, ‘Of Punishment and Parenthood: Family-Based Social Control and the Sentencing of Black Drug Offenders’ (2001) 15 *Gender & Society* 611, 622-631; Darrell Steffensmeier, ‘Assessing the Impact of the Women’s Movement on Sex-Based Differences in the Handling of Adult Criminal Defendants’ (1980) 26 *Crime and Delinquency* 344, 347-349, 354; Darrell Steffensmeier, John Kramer and Cathy Streifel, ‘Gender and Imprisonment Decisions’ (1993) 31(3) *Criminology* 411, 435 and 439; Kathleen Daly, ‘Gender and Sentencing: What We Know and Don’t Know from Empirical Research’ (1995) 8(3) *Federal Sentencing Reporter* 163, 164-165.

<sup>1609</sup> See, eg, David Farrington and Allison Morris, ‘Sex, Sentencing and Reconviction’ (1983) 23(3) *British Journal of Criminology* 229, 230-213, 240-241, 245; Mary Eaton, *Justice for Women? Family, Court and Social Control* (Open University Press, 1986) 11-30; Candace Kruttschnitt and Donald Green, ‘The Sex-Sanctioning Issue: Is it History?’ (1984) 49(4) *American Sociological Review* 541, 549; Jeanne Flavin, ‘Of Punishment and Parenthood: Family-Based Social Control and the Sentencing of Black Drug Offenders’ (2001) 15 *Gender & Society* 611, 622-631; Kathleen Daly, ‘Discrimination in the Criminal Courts: Family, Gender, and the Problem of Equal Treatment’ (1987) 66(1) *Social Forces* 152, 154; Kathleen Daly, ‘Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing’ (1989) 3(1) *Gender & Society* 9, 11.

<sup>1610</sup> Candace Kruttschnitt, ‘Women, Crime and Dependency: An Application of the Theory of Law’ (1982) 19 *Criminology* 495.

<sup>1611</sup> *Ibid* 507.

<sup>1612</sup> *Ibid*. See also Gayle Bickle and Ruth Peterson, ‘The Impact of Gender-Based Family Roles on Criminal Sentencing’ (1991) 38(3) *Social Problems* 372.

Witt drawing upon eight separate studies in the 1980s and 1990s, observed that women who conform with traditional gender roles are treated leniently at sentencing while those who do not are treated more harshly than men.<sup>1613</sup> A result of her study, comparing sentencing practices in Minnesota pre-guidelines to practices post guidelines, was that 'gender' did not have a significant influence on sentencing.<sup>1614</sup> Koons-Witt found that 'leniency and the chivalrous views of the courts appear to be limited to those women with dependent children.'<sup>1615</sup> She called for further research to understand how motherhood and fatherhood is considered by courts.<sup>1616</sup>

For legal scholarship, a limitation to Koons-Witt's research findings is that she did not acknowledge family hardship as a legitimate sentencing factor, instead labelling mitigation on this basis as 'lenient or chivalrous' treatment of women. If her finding is placed within the context of legal discourse, then she has identified the role of family hardship as a common law sentencing factor. Reframing her findings, highlights that Minnesota courts were taking into account family hardship in sentencing offenders, post the introduction of the guidelines. This is a very interesting research finding supporting the continued role of family hardship as a central mitigating factor in sentencing despite efforts to marginalise it.

Kathleen Daly was one of the first researchers to draw attention to the gaps between studies conducted by sociologists and by legal scholars.<sup>1617</sup> Daly's research in the USA included analysis of court proceedings and documents (ie. pre-sentence reports and sentencing remarks)<sup>1618</sup> and interviews with court

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<sup>1613</sup> Barbara Koons-Witt, 'The Effect of Gender on the Decision to Incarcerate Before and After the Introduction of Sentencing Guidelines' (2002) 40 *Criminology* 297, 300, 305-306.

<sup>1614</sup> *Ibid* 313, 320.

<sup>1615</sup> *Ibid* 320.

<sup>1616</sup> *Ibid*.

<sup>1617</sup> See Kathleen Daly, *Gender, Crime and Punishment* (Yale University Press, 1994) 172; Kathleen Daly, 'Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing' (1989) 3(1) *Gender & Society* 9, 11.

<sup>1618</sup> See Kathleen Daly, 'Discrimination in the Criminal Courts: Family, Gender, and the Problem of Equal Treatment' (1987) 66(1) *Social Forces* 152, 157; Kathleen Daly, 'Neither Conflict nor Labelling nor Paternalism Will Suffice: Intersections of Race, Ethnicity, Gender and Family in Criminal Court Decisions' (1989) 35(1) *Crime & Delinquency* 136, 136; Kathleen Daly, *Gender, Crime and Punishment* (Yale University Press, 1994) vii and 177.

officials.<sup>1619</sup> Influenced by Kruttschnitt's research, Daly has identified that, 'court officials draw a major distinction between two groups of defendants – those with familial responsibilities and those without such responsibilities.'<sup>1620</sup> In her early research she identified that rather than focusing upon a 'sex effect'<sup>1621</sup> or female offender's dependence upon men, more research attention should be paid to 'whether male and female defendants have dependants.'<sup>1622</sup>

Daly identified that courts took into account the impact of a sentence upon 'innocent family members'.<sup>1623</sup> Interestingly, her research found that 'courts attached even greater social costs to removing caregivers than wage earners from families.'<sup>1624</sup> This study of the Australian case law highlighted, that Australian courts have also had a general practice of placing limited importance on the financial impact upon a family due of the incarceration of a wage earner.

A key outcome of Daly's empirical research was that she rejected the operation of traditional paternalism<sup>1625</sup> in sentencing practices and identified that courts were acting upon what she classified as 'familial paternalism'.<sup>1626</sup> This was the courts protection of families. For example, in the late 1980s, Daly reported:

These results challenge the commonly held notion that the court protects women (female paternalism), and reveal instead that the real object of court protection is families (familial paternalism). This distinction between female and familial paternalism is illustrated by the following judicial discussion of whether a woman who cared for children should be jailed:

A lot will depend on what will happen to the children. Chances are that if there is no one to take care of the children, I won't punish

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<sup>1619</sup> Kathleen Daly, 'Structure and Practice of Familial-Based Justice in a Criminal Court' (1987) 21 *Law & Society Review* 267, 270-272; Kathleen Daly, 'Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing' (1989) 3(1) *Gender & Society* 9, 12-13; Kathleen Daly, 'Gender and Sentencing: What We Know and Don't Know from Empirical Research' (1995) 8(3) *Federal Sentencing Reporter* 163, 163.

<sup>1620</sup> Kathleen Daly, 'Discrimination in the Criminal Courts: Family, Gender, and the Problem of Equal Treatment' (1987) 66(1) *Social Forces* 152, 154; Kathleen Daly, 'Gender and Sentencing: What We Know and Don't Know from Empirical Research' (1995) 8(3) *Federal Sentencing Reporter* 163, 163

<sup>1621</sup> Kathleen Daly, 'Discrimination in the Criminal Courts: Family, Gender, and the Problem of Equal Treatment' (1987) 66(1) *Social Forces* 152, 152.

<sup>1622</sup> *Ibid* 154.

<sup>1623</sup> Kathleen Daly, 'Gender and Sentencing: What We Know and Don't Know from Empirical Research' (1995) 8(3) *Federal Sentencing Reporter* 163, 163.

<sup>1624</sup> *Ibid* 163.

<sup>1625</sup> See Kathleen Daly, *Gender, Crime and Punishment* (Yale University Press, 1994) 197.

<sup>1626</sup> Kathleen Daly, 'Structure and Practice of Familial-Based Justice in a Criminal Court' (1987) 21 *Law & Society Review* 267, 268, 282-283.

the children. I feel no sympathy toward her, but I do feel that the children are entitled to sympathy.<sup>1627</sup>

Daly, therefore, identified courts taking into account the impact of the sentence upon the offender's dependants at sentencing. Her research evidences courts looking beyond just the impact of the sentence upon the offender and even selecting the impact on third parties as more relevant to the impact upon the offender.

Family hardship as expressed in Australian legislative provisions captures Daly's concept of 'familial paternalism'. For example, the federal expression of family hardship as a mitigating factor provides that courts must take into account 'the probable effect that any sentence or order under consideration would have on any of the person's family or dependants'.<sup>1628</sup> This is familial paternalism. The court is to take into account as a mitigating factor the probable impact on this particular offender's dependants. Remembering, it is for the court to determine what weight is to be attached to this sentencing factor and how it is to be balanced against other sentencing factors.

In her research findings Daly also found that courts frequently justified taking familial paternalism into account because the offenders were '... more stable and ... [had] more to lose by getting in trouble again'.<sup>1629</sup> Daly observed that courts identified that, 'these defendants have more informal social control in their lives and have a greater stake in normative social adulthood.'<sup>1630</sup> While not explicitly connecting family hardship to the sentencing purpose of 'rehabilitation', at this point in her work that is what she is describing. Daly's research findings support the proposition of this dissertation that family hardship is a long-standing and important mitigating sentencing factor in the common law tradition. Her research supports that in the 20<sup>th</sup> century family hardship was a legitimate consideration at

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<sup>1627</sup> Ibid.

<sup>1628</sup> *Crimes Act 1914* (Cth) s 16A(2)(p).

<sup>1629</sup> Kathleen Daly, 'Structure and Practice of Familial-Based Justice in a Criminal Court' (1987) 21 *Law & Society Review* 267, 273.

<sup>1630</sup> Ibid 274.

sentencing by common law courts. This is so even if it has not been properly recognised as such in the research literature.<sup>1631</sup>

Daly also observed that familial paternalism demonstrated courts recognising and taking into account the social costs of punishment when sentencing. She identified two reasons why familial paternalism has operated in favour of women more than men. These reasons were:

(1) gender divisions of labor define women, not men, as the primary caregivers; and

(2) the court attaches more importance to caregiving than breadwinning in maintaining family life. Thus, those engaged in caregiving (predominantly women) are thought to be most deserving of leniency.<sup>1632</sup>

By the use of the term 'leniency' here, Daly is referring to is 'mitigation' in sentencing.<sup>1633</sup>

Darrell Steffensmeier had reported similar findings after examining the empirical research.<sup>1634</sup> He found that "chivalrous" treatment of women defendants has been greatly exaggerated'.<sup>1635</sup> He noted that lack of empirical research prior to the 1980s on sex differences in the handling of adult defendants. He argued the academic supposition had been largely built on assumptions.<sup>1636</sup> Steffensmeier identified that courts took into account child care responsibilities at sentencing for male and female offenders.<sup>1637</sup> He hypothesised that 'as child care had traditionally been defined as the responsibility of women, it follows that more allowances... would be made for females' by the courts.<sup>1638</sup>

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<sup>1631</sup> Berberian also argues that this was a problematic and underdeveloped field of research. See Sean Berberian, 'Protecting Children: Explaining Disparities in the Female Offender's Pretrial Process, and Policy Issues Surrounding Lenient Treatment of Mothers' (1999) 10 *Hastings Women's Law Journal* 369, 371.

<sup>1632</sup> Kathleen Daly, 'Structure and Practice of Familial-Based Justice in a Criminal Court' (1987) 21 *Law & Society Review* 267, 282.

<sup>1633</sup> Kathleen Daly, *Gender, Crime and Punishment* (Yale University Press, 1994) 197 and 263. In contrast to Mary Eaton and Pat Carlen, Daly argues that familial paternalism does not harm women. She claims that the empirical research supports the view that women may benefit at sentencing from caring responsibilities but that the research does not support that women without these responsibilities are penalised because of this.

<sup>1634</sup> Darrell Steffensmeier, 'Assessing the Impact of the Women's Movement on Sex-Based Differences in the Handling of Adult Criminal Defendants' (1980) 26 *Crime and Delinquency* 344.

<sup>1635</sup> *Ibid* 354.

<sup>1636</sup> *Ibid* 345.

<sup>1637</sup> *Ibid* 350.

<sup>1638</sup> *Ibid*.

### *A. Reverberations in the Australian Literature*

Despite research findings which have debunked the assumption that chivalry or judicial paternalism pervade court sentencing practices, the perception of gender bias is deeply embedded and persists in the literature. In the Australian literature, claims of chivalry and judicial paternalism have been commonly made. For example, in the first edition of Fox and Freiberg, a definitive text on sentencing in Victoria, it was stated: 'It is often asserted that the criminal justice system is biased in favour of women... In sentencing, this bias is well entrenched.'<sup>1639</sup>

In the 2009 edition of *Ross on Crime*, a prominent Australian criminal law text, David Ross QC, under the heading 'women', stated that: '[g]enerally, sentences for women are less than for men on equivalent offences.'<sup>1640</sup> This broad statement was supported by the 1995 case of *Nagas*.<sup>1641</sup> In *Nagas*, the Court referenced assumption that 'in practice women are commonly treated with less severity than men'<sup>1642</sup> citing the first edition of Fox and Freiberg. In *Nagas*, the Northern Territory Court of Criminal Appeal stated:

It is clearly established that allowance is made for the fact that in practice women are commonly treated with less severity than men... Whether the reason for leniency to women is predicated upon the lower recidivism rates of women, prevalence of a particular type of crime, general deterrence or simply compassion, the principle is well established.<sup>1643</sup>

There was no legislative support, at that time, for the position that 'gender' was a relevant sentencing factor. In fact, the terms 'gender' and 'sex' have not appeared in any of the lists of sentencing factors in any Australian statutes (see Chapters Two and Three).<sup>1644</sup>

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<sup>1639</sup> Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 1985) 465.

<sup>1640</sup> David Ross, *Ross on Crime* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 1236.

<sup>1641</sup> (1995) 5 NTLR 45. This case is discussed in Chapter Four.

<sup>1642</sup> (1995) 5 NTLR 45.

<sup>1643</sup> *R v Nagas* (1995) 5 NTLR 45, 55 (Gallop, Angel and Thomas JJ). See also D Ross, *Ross on Crime* (4<sup>th</sup> ed, 2009) 1236.

<sup>1644</sup> *Crimes Act 1914* (Cth) s 16A(2), *Crimes (Sentencing) Act 2005* (ACT) s 33, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A, *Sentencing Act 1995* (NT) s 5(2), *Penalties and Sentences Act 1992* (Qld) s 9(2), *Criminal Law (Sentencing) Act 1988* (SA) s 10(1), *Sentencing Act 1991* (Vic) s 5(2).

In 2009, Riley J in the Northern Territory case of *Midjumbani v Moore*<sup>1645</sup> stated that gender is *not* a relevant matter to be taken into account at sentencing. Justice Riley observed that there had been a shift in the approach to gender since the decision in *R v Nagas*. He stated:

I do not accept that the gender of the offender is, per se, a relevant matter that should have been taken into account by his Honour. The submission relied upon the judgment of the Court of Criminal Appeal in *R v Nagas* where their Honours made the passing observation that “in practice women are commonly treated with less severity than men” and, in that regard, reference was made to comments in the first edition of *Fox and Freiberg, Sentencing, State and Federal Law in Victoria*. The second edition of that work revisits the issues and notes that the empirical evidence in support of such assertions “is at best equivocal and over recent years any biases, if they do exist, are likely to be less pronounced.” The learned authors go on to observe that it is now accepted that gender alone should not form the basis of differential treatment in sentencing.<sup>1646</sup>

The latest edition of *Ross on Crime*<sup>1647</sup> retains the reliance upon the assumption and continues to reference *Nagas*.<sup>1648</sup> The only caveat to the current edition under the heading ‘Women’<sup>1649</sup> is the addition of the statement: ‘However, courts often say that gender does not reduce a sentence appropriate for the seriousness of the crime.’<sup>1650</sup>

However, there has been a marked general shift in the mainstream Australian sentencing texts on gender bias in sentencing. Kate Warner has identified that Fox and Freiberg did not maintain their reporting of gender bias. Warner observed, ‘...in their second edition, Fox and Freiberg report that contemporary judicial comment is devoid of any reference to a policy of leniency towards women.’<sup>1651</sup> In respect of her jurisdiction of study, Warner reported: ‘[a] search of Tasmanian decisions found no express reference to a policy or bias or leniency in favour of women.’<sup>1652</sup> Bagaric and Edney, in their textbook, do not engage at all with gender as a sentencing factor, they do, however, identify and discuss family hardship<sup>1653</sup>

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<sup>1645</sup> *Midjumbani v Moore* (2009) 229 FLR 452.

<sup>1646</sup> *Ibid* 459.

<sup>1647</sup> Mirko Bagaric, *Ross on Crime* (Thomson Reuters, 7th ed, 2016). Bagaric took over authorship of this text for the 6th edition in 2013.

<sup>1648</sup> Mirko Bagaric, *Ross on Crime* (Thomson Reuters, 7th ed, 2016) 1389 and earlier Mirko Bagaric, *Ross on Crime* (Thomson Reuters, 6th ed, 2013) 1379.

<sup>1649</sup> *Ibid*.

<sup>1650</sup> *Ibid*.

<sup>1651</sup> Kate Warner, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002) 96.

<sup>1652</sup> *Ibid*.

<sup>1653</sup> See Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 2014) 516-522.



(classified as 'hardship to others' in their text). In the latest edition of this text, they have listed 'harm to dependants of the offender' in a table of mitigating considerations and ascribed this factor a maximum weight of 20% at sentencing.<sup>1654</sup>

Studies are still being conducted in Australia to demonstrate that variations in sentencing outcomes are not due to gendered discrimination. For example, Poletti's study of the sentencing of female offenders in New South Wales identified that males (8.6%) were twice as likely as females (4.2%) to be given a full-time prison term.<sup>1655</sup> However, she rejected the claim that it was due to gender and 'unfair discrimination',<sup>1656</sup> observing that 'men tend to commit more serious offences or have a more extensive criminal record'.<sup>1657</sup> The identification of valid and relevant sentencing factors which justify the lower imprisonment rates of women has been a consistent finding in the research conducted both in Australia and overseas.<sup>1658</sup>

### III UNRAVELLING MERCY AND FAMILY HARDSHIP

A common explanation for taking family hardship into account at sentencing is that it is an act of judicial mercy. The judicial exercise of mercy merits much deeper consideration than it has received in legal discourse. As Nigel Walker states, '[a]natomists of criminal justice systems usually ignore the tiny organ called 'mercy' or 'clemency''.<sup>1659</sup>

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<sup>1654</sup> Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 4<sup>th</sup> ed, 2017) 473.

<sup>1655</sup> Patrizia Poletti, 'Sentencing Female Offenders in New South Wales' (Sentencing Trends No 20, Judicial Commission of New South Wales, May 2000).

<sup>1656</sup> The term used by Poletti in the paper see Patrizia Poletti, 'Sentencing Female Offenders in New South Wales' (Sentencing Trends No 20, Judicial Commission of New South Wales, May 2000).

<sup>1657</sup> *Ibid.*

<sup>1658</sup> See, eg, Bronwyn Naylor, 'Sentencing Female Offenders in the Magistrate's Court: Preliminary Report on a Pilot Study' (Paper presented at the Women and the Law, Canberra, 24-26 September 1991; Barry Godfrey, Stephen Farrall and Susanne Karstedt, 'Explaining Gendered Sentencing Patterns for Violent Men and Women in the Late-Victorian and Edwardian Period' (2005) 45 *British Journal of Criminology* 696, 700.

<sup>1659</sup> Nigel Walker, 'The Quiddity of Mercy' (1995) 70 *Philosophy* 27, 27.

Under early common law practices the role of the judge was to pass sentence upon the offender and notions of individualised sentencing did not exist.<sup>1660</sup> However, through the doctrine of mercy, justice was tempered to accommodate the circumstances of an individual. Mercy could be exercised by the judge, jury or the Executive. Mercy, in this sense, was not a sentencing factor; it was a process of pardoning as an exercise of compassion or clemency. It was argued in Chapter Three that in the 19<sup>th</sup> century, as sentencing law and practices changed, the courts came to recognise a concept of ‘sentencing factors’. Early legal treatise like Cox (see Chapter Three) recognised family hardship as a sentencing factor. There were, however, no clean lines between the exercise of mercy as a form of compassion at sentencing<sup>1661</sup> and mitigating effects of sentencing factors.

In the 20<sup>th</sup> century as the movement to develop an appropriate and principled sentencing practice progressed, the role of taking into account the impact of a sentence upon an offender’s dependants was displaced from the dominant theoretical framework. While the research literature clearly highlights that ‘family hardship’ was a common sentencing consideration in 20<sup>th</sup> century sentencing practices, it was not acknowledged as a mainstream sentencing consideration in the scholarly literature.<sup>1662</sup>

Under a strict ‘just deserts’ approach to sentencing, the impact of a sentence upon an offender’s dependants is not a legitimate sentencing factor as it is neither relevant to the seriousness of the offence nor the circumstances of the offender. Therefore, taking into account the effect of a sentence upon an offender’s family or dependants would be a departure from what would otherwise be proportionate or just. In contrast, a court could legitimately take into account hardship upon the offender (which could include hardship on the offender caused by separation from children). Within a ‘just deserts’ approach to sentencing a judge who takes into account the effect of the sentence upon dependants *could* be administering ‘mercy’

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<sup>1660</sup> See Chapter Three.

<sup>1661</sup> On the interconnected meanings of ‘mercy’ and ‘compassion’ See Steven Tudor, ‘Modes of Mercy’ (2003) 28 *Australian Journal of Legal Philosophy* 79, 80-81 and 95-98.

<sup>1662</sup> For example, Easton claims that family hardship as a generalised sentencing principle would lead to ‘absurd and unfair results’ and would ‘stray far from retributivism which focuses on the responsibility of the offender for the specific offence’. See Susan Easton, ‘Dangerous Waters: Taking Account of Impact in Sentencing’ (2008) 2 *Criminal Law Review* 105, 113.

when considering hardship upon dependants. Assessed against the 'just deserts' approach, an exercise of 'mercy' is an act of 'compassion' falling outside of principled sentencing practice.<sup>1663</sup>

#### *A. Limited Analysis of the Exercise of Judicial Mercy*

There are three forms of mercy recognised as operating within the modern State. The first is the form of mercy as it appears in religious dogma: God's mercy. The second form of mercy stems from the sovereign: the royal prerogative of mercy.<sup>1664</sup> The royal prerogative of mercy is a reserve power of the Crown and is, therefore, an Executive power.<sup>1665</sup> The third form is mercy that may be exercised between individuals. Legal philosopher Jeffrie Murphy claims that it is this third form of mercy that is exercised by judicial officers.<sup>1666</sup>

One of the early sources within the criminal law research literature recognising and defining 'judicial mercy' is Sir Carleton Kemp Allen's text *Aspects of Justice* published in the 1950s.<sup>1667</sup> He accepted that mercy, 'has always existed in every system of law as a matter of humane discretion.'<sup>1668</sup> However, he argued that, at the time of writing, judicial mercy had become more than charity.<sup>1669</sup> Notwithstanding, the role of broad judicial discretion in sentencing, Allen argued that: 'it is now in many circumstances imperative *legally* as well as morally' (emphasis added).<sup>1670</sup> He observed that the role of judicial mercy within the criminal justice system was to restrain excessive harshness<sup>1671</sup> and he argued that it had 'become an integral part' of the criminal justice system.<sup>1672</sup>

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<sup>1663</sup> Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 165-179.

<sup>1664</sup> See Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5<sup>th</sup> ed, 2010) 61.

<sup>1665</sup> In Australia, the power is vested in the Queen and exercisable by the Governor General see *Australian Constitution* s 61. Under an exercise of the prerogative of mercy an offender may be freed absolutely or conditionally pardoned.

<sup>1666</sup> Jeffrie Murphy, 'Mercy and Legal Justice' in Jeffrie Murphy and Jean Hampton, eds, *Forgiveness and Mercy* (Cambridge University Press, 1988) 165-169, 179-180.

<sup>1667</sup> Sir Carleton Kemp Allen, *Aspects of Justice* (Stevens & Sons, 1958).

<sup>1668</sup> *Ibid* 62.

<sup>1669</sup> *Ibid* 63.

<sup>1670</sup> *Ibid*.

<sup>1671</sup> *Ibid*.

<sup>1672</sup> *Ibid* 64.

Jeffrie Murphy has identified that mercy is often used within the criminal law as a term 'to refer to certain of the demands of justice (e.g. the demands of individuation)'.<sup>1673</sup> He observed that this is problematic because mercy, in this sense, is part of the system – it is obligatory.<sup>1674</sup> Alternatively, mercy is a 'departure from justice',<sup>1675</sup> 'it is totally different from justice and actually requires (or permits) that justice sometimes be set aside.'<sup>1676</sup> Murphy favoured understanding the concept of judicial mercy as a gift and not duty.<sup>1677</sup>

### B. 'Mercy' and 'Mitigating Factor'

In 2005 in *Sentencing and Criminal Justice*, Ashworth observed that within the criminal justice system, 'the absence of clear principle is often converted into the language of 'showing mercy''.<sup>1678</sup> This is a very astute reflection. Research literature that does not recognise family hardship as a sentencing factor may, on a closer reading, equate aspects of family hardship mitigation with judicial acts of mercy. For example, David Thomas drew attention to judicial mercy in this first edition of *Principles of Sentencing*<sup>1679</sup> but, by his second edition the reference to 'mercy' had been removed and categories of mitigating factors qualified.<sup>1680</sup> Jacobson and Hough bundled family hardship into 'factors that call for clemency' in their study of mitigating factors,<sup>1681</sup> unfortunately aligning family hardship with notions of clemency and compassion rather than accepting it as an individualising sentencing factor.

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<sup>1673</sup> Jeffrie Murphy, 'Mercy and Legal Justice' in Jeffrie Murphy and Jean Hampton, eds, *Forgiveness and Mercy* (Cambridge University Press, 1988) 169.

<sup>1674</sup> Ibid.

<sup>1675</sup> Ibid 167.

<sup>1676</sup> Ibid 169.

<sup>1677</sup> Ibid 169, 180. Robinson has also identified and commented on this confusion in the literature, see Robinson, Paul, 'Mercy, Crime Control, and Moral Credibility' in Austin Sarat (ed), *Merciful Judgments and Contemporary Society: Legal Problems, Legal Possibilities* (Cambridge University Press, 2012) 99, 100-101.

<sup>1678</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4<sup>th</sup> ed, 2005) 177.

<sup>1679</sup> David Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 1970) 199.

<sup>1680</sup> See discussion of David Thomas in Chapter Three.

<sup>1681</sup> Jessica Jacobson and Mike Hough, *Mitigation: The Role of Personal Factors in Sentencing* (Prison Reform Trust, 2007) 62.

Daly, in reporting her research findings in 1987, claimed that: 'familied men and women may be "bad" parents and thus not deserving of court mercy.'<sup>1682</sup> As discussed above,<sup>1683</sup> in Daly's research the term 'mercy' is used instead of 'mitigation'. But Daly was describing the role of 'familiar paternalism' as a mitigating sentencing factor and, importantly, she was not talking about the broader discretion of courts to exercise judicial mercy (operating outside or beyond sentencing frameworks). Another way of explaining this, in the context of sentencing principles would be to state that – courts have held that bad parents do not deserve family hardship mitigation. The sentencing process here would involve: (a) considering family hardship as a mitigating factor; (b) determining the relationship of that factor to the other sentencing factors relevant in the case; and (c) finding that the factor does not receive much mitigating weight in circumstances where the children are likely to *benefit* from the sentence upon the offender.

In 2005, von Hirsch and Ashworth modified their proportionate approach to sentencing by recognising 'equity factors'.<sup>1684</sup> This greater recognition of mitigating factors was an important development in sentencing theory. Previously, their theoretical account ignored this aspect of sentencing. What they have called 'equity factors' are factors which do not go to the seriousness of the offence; some examples they provide are very elderly and infirm offenders.<sup>1685</sup> Von Hirsch and Ashworth, do not address the probable effect of the sentence upon third parties but it is a hardship factor which could conceptually fall within their notion of an equity factor. Most significantly they refer to humanitarian principles and mercy as justification for recognition of these factors in sentencing. Von Hirsch and Ashworth observe,

the subject of equity factors has scarcely been addressed in the sentencing literature, and only a handful of articles in the philosophical literature exist on the general subject of 'mercy'. We ourselves have not dealt with this topic before, and find that we still have not come up with a systematic analysis,

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<sup>1682</sup> Kathleen Daly, 'Structure and Practice of Familial-Based Justice in a Criminal Court' (1987) 21 *Law & Society Review* 267, 285.

<sup>1683</sup> See 'Theory and Judicial Paternalism' above.

<sup>1684</sup> See Appendix 1 'Equity Factors in Sentencing': Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 165-179.

<sup>1685</sup> *Ibid* 165, 174, 176.

comparable to those that we have offered in earlier chapters. What we can only offer here is some possible themes for further consideration.<sup>1686</sup>

In 2007, Christine Piper entered the debate with an article in the *Criminal Law Review*.<sup>1687</sup> Piper argued for the classification and consideration of ‘impact in sentencing’.<sup>1688</sup> Piper held that impact mitigation included:

- illness;
- disability;
- old age;
- young offenders;
- vulnerability;
- harm from other prisoners;
- innocent others, especially children;<sup>1689</sup> and
- female prisoners’ due to the current difficulties of the Prison Service in accommodating them.<sup>1690</sup>

She argued that there is a place for courts to take such mitigation into account in sentencing<sup>1691</sup> but she was very clear that ‘the merciful exercise of discretion is not an acceptable mechanism for taking account of punishment impact.’<sup>1692</sup>

Ashworth, by the 2010 edition of *Sentencing and Criminal Justice*,<sup>1693</sup> had developed his views on mercy in sentencing in several ways. First, he openly addressed the judicial use of mercy to reduce a sentence.<sup>1694</sup> Second, he understood mercy to operate only in a small proportion of cases to ‘take account of extraordinary factors relating to the offender’s situation.’<sup>1695</sup> In his text, he provided the example of *Schumann*<sup>1696</sup> where a woman attempted to kill herself

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<sup>1686</sup> Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 165.

<sup>1687</sup> Christine Piper, ‘Should Impact Constitute Mitigation?: Structured Discretion Versus Mercy’ (2007) 2 *Criminal Law Review* 141.

<sup>1688</sup> *Ibid*

<sup>1689</sup> *Ibid* 143.

<sup>1690</sup> *Ibid* 141-142.

<sup>1691</sup> *Ibid* 155.

<sup>1692</sup> *Ibid* 150.

<sup>1693</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5<sup>th</sup> ed, 2010).

<sup>1694</sup> The topic of ‘Mercy’ was addressed in Chapter 5 ‘Aggravation and Mitigation’ see Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5<sup>th</sup> ed, 2010) 190-191.

<sup>1695</sup> *Ibid* 190.

<sup>1696</sup> [2007] 2 Cr App R (S) 465 cited in Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5<sup>th</sup> ed, 2010) 191. See also Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6<sup>th</sup> ed, 2015) 201.

and her child by jumping from a bridge. After the failed attempt, she kept the child alive while waiting for help. Lord Phillips CJ held that the court could, 'put the guidelines and authorities on one side and apply mercy instead.'<sup>1697</sup> In England and Wales, the Court of Appeal (Criminal Division) provided that the exercise of judicial mercy is something other than the application of sentencing guidelines and authorities.

In the second case example, Ashworth provided, *Attorney-General's Reference No. 11 of 2007*,<sup>1698</sup> a court reduced a sentence because an offender's terminally ill sister had died. In critiquing the role of mercy in this case, Ashworth stated:

the judicial use of the concept of mercy suggests that the sentence reduction is discretionary...[but,] in principle [the legal issue is,]... is this a factor that should or should not be allowed to affect sentence. If the answer is yes, it should then be for the court, as with other aggravating and mitigating factors, to assess its strength and to give appropriate effect to it. Referring to it as 'mercy' suggests a broad discretion, and that is only suitable for really extraordinary cases with unusual features.<sup>1699</sup>

This current approach of separating out mitigating factors from acts of mercy, aligns with what legal philosophers (such as Murphy see above) have endorsed.<sup>1700</sup> It also aligns with the Victorian 'exceptionalism' in relation to family hardship (see Chapter Four).

Ashworth's current position is that the concept of mercy should be employed only for truly extraordinary cases, not for circumstances where compassion is raised but the court is actually taking into account a sentencing factor such as hardship to the offender.<sup>1701</sup> He has maintained his view that taking family hardship into account at sentencing departs from principled sentencing practices.<sup>1702</sup> However, he conceded that if it is thought that a sentencing court should make a reduction

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<sup>1697</sup> Ibid.

<sup>1698</sup> [2008] 1 Cr App R (S) 26 cited in Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5<sup>th</sup> ed, 2010) 191. See also Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6<sup>th</sup> ed, 2015) 201.

<sup>1699</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5<sup>th</sup> ed, 2010) 191.

<sup>1700</sup> Jeffrie Murphy, 'Mercy and Legal Justice' in Jeffrie Murphy and Jean Hampton, eds, *Forgiveness and Mercy* (Cambridge University Press, 1988) 169, 180. Robinson has also identified and commented on this confusion in the literature, see Robinson, Paul, 'Mercy, Crime Control, and Moral Credibility' in Austin Sarat (ed), *Merciful Judgments and Contemporary Society: Legal Problems, Legal Possibilities* (Cambridge University Press, 2012) 99, 100-101.

<sup>1701</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6<sup>th</sup> ed, 2015) 201.

<sup>1702</sup> Ibid 196.

for family hardship, 'the question should be faced squarely, without drifting into the blancmange of mercy.'<sup>1703</sup>

If we unravel family hardship as a sentencing factor from judicial mercy, the issue becomes, as Ashworth outlined in the quote above a two-step inquiry:

1. Is it a relevant sentencing factor that should be allowed to affect sentence?
2. If yes, it is then for the court to assess its weight and give appropriate affect to it.

In regard to the second step, in Australian sentencing practice this is a question of determining the weight to be attached to this principle and to balance it against other relevant sentencing factors.

It is interesting that Ashworth connects the notion of extraordinary cases with the policy developed in the use of judicial mercy. Is this where the exceptional circumstances qualification to family hardship emerged? Is it in the mistaken interconnectedness of 'family hardship' and 'mercy' that the requirement for exceptional, extraordinary and unusual hardships have arisen? Importantly modern-day analysis of 'mercy' places it as part of a broader unfettered discretion held by judicial officers.<sup>1704</sup> It is not simply the merciful exercise of sentencing principles. This is a critical distinction. Resort to judicial mercy is a practice of *pardonning*<sup>1705</sup> not sentencing. Consideration of family hardship is not an exercise of judicial mercy. Family hardship is a legitimate and well-established sentencing factor.<sup>1706</sup> Indeed, it is an appealable error for a judicial officer to fail to give appropriate weight to a relevant mitigating factor.<sup>1707</sup> Therefore, as an established mitigating factor judicial officers have an obligation to take into account family hardship where it is relevant mitigating factor.

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<sup>1703</sup> Ibid 197.

<sup>1704</sup> See, eg, Richard Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25 *Monash University Law Review* 1, 4-5.

<sup>1705</sup> For discussion of 18<sup>th</sup> century pardoning practices see Peter King, 'Decision-Makers and Decision-Making in the English Criminal Law, 1750-1800' (1984) 27(1) *The Historical Journal* 25, 38-42

<sup>1706</sup> Similarly, Steven Tudor argues that taking an offender's ill health into account at sentencing is not an act of mercy, 'for it is a well-established legal principle that an offender's ill health can be a mitigating factor in sentencing.' In contrast, Tudor argues releasing a terminally ill prisoner from prison for a short time so they can die at home is a situation of mercy. See Steven Tudor, 'Modes of Mercy' (2003) 28 *Australian Journal of Legal Philosophy* 79, 97.

<sup>1707</sup> See Chapter Two.



### 1. *Judicial Mercy in Australian Sentencing Law*

As seen in Chapter Four and Chapter Five, family hardship has been described within Australian sentencing remarks and judgments as a merciful approach to sentencing. Problematically, in doing so, the sentencing factor is innately delegitimatised. As it is not seen as a relevant sentencing factor, but rather, a judicial exercise of 'compassion' or 'humanity'. In this context, it can be sinuously interpreted as leniency based on gender (as discussed above). Another problematic aspect to the language of mercy is that the approach and consideration of the impact of a sentence upon offender's dependants moves outside of a legal principled framework and instead falls to the whim of the judicial officer. In fact, it is argued that this is where the requirement of 'exceptional hardship' to third parties arose.

Richard Fox, in his study of the role of mercy in sentencing, perceived family hardship as a clear example of 'pure mercy'.<sup>1708</sup> He advised that the sentence would need to produce 'extraordinary hardship'<sup>1709</sup> to third parties for courts to extend mercy. Interestingly, despite earlier acknowledgement that s 16A(2) of the *Crimes Act 1914* (Cth) was an example of a legislative checklist of 'acceptable mitigating factors',<sup>1710</sup> Fox later unquestioningly reported that the listing of s16(A)(2)(p) (family hardship) did not alter the common law.<sup>1711</sup> Fox stated:

This is a clear example of mercy as a meta-principle operating outside the confines of standard sentencing rules. Even so, to establish such exceptional hardship justifying mercy, the defendant must produce 'cogent evidence' of exceptional hardship.<sup>1712</sup>

This analysis is hard to accept in light of the analysis above. Where family hardship has been expressly listed in legislation the court is not operating within 'mercy' but rather taking into account a listed mitigating factor, that flows from the 'demands of individuation'.<sup>1713</sup>

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<sup>1708</sup> Richard Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25 *Monash University Law Review* 1, 16.

<sup>1709</sup> *Ibid* 17.

<sup>1710</sup> *Ibid* 9.

<sup>1711</sup> *Ibid* 18.

<sup>1712</sup> *Ibid* 18.

<sup>1713</sup> Jeffrie Murphy, 'Mercy and Legal Justice' in Jeffrie Murphy and Jean Hampton, eds, *Forgiveness and Mercy* (Cambridge University Press, 1988) 169.

The Australian discourse on mercy and family hardship arose within a framework where exercises of judicial mercy were understood as falling outside of the dominant theoretical account of sentencing practice. In *Morrison v Behrooz*,<sup>1714</sup> Gray J stated:

Outside of the principles of mitigation, sentencing authorities have an inherent discretion to grant leniency under the doctrine of mercy. In *Cobiac v Liddy* Windeyer J observed:

The whole history of criminal justice as shewn that severity of punishment begets the need for capacity for mercy... This is not because mercy, in Portia's sentence, should season justice. It is that a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice.

In *R v Miceli*, the Victorian Court of Appeal recognised the doctrine of mercy as relevant to the exercise of sentencing discretion and upheld the observations of King CJ in *R v Osenkowski*, where it was observed:

...There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform.<sup>1715</sup>

That judicial officers hold inherent power deriving from the common law to wield mercy has been widely acknowledged within Australia.<sup>1716</sup> As seen in Chapter Four, there has been recent judicial analysis in Australia on the role of 'mercy' in sentencing which has been revived in the form of the Victorian 'exceptionalism' discussed above.<sup>1717</sup>

#### IV EQUALITY THEORY: SIMILARITY AND DIFFERENCE

There is a very large body of feminist literature on equality and the similarity and difference debates are long-standing.<sup>1718</sup> The similarity argument (formal equality) is that men and women should be treated identically, which Elaine Player states is

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<sup>1714</sup> [2005] SASC 142 (15 April 2005) [42].

<sup>1715</sup> *Morrison v Behrooz* [2005] SASC 142 (15 April 2005) [46]-[47].

<sup>1716</sup> See, eg, Criminal Law and Penal Methods Reform Committee of South Australia, First Report, *Sentencing and Corrections* (July 1973) 9; *AR v Wood* [2008] WASC 119 (18 June 2008), [42].

<sup>1717</sup> See *Markovic v The Queen* (2010) 200 A Crim R 510.

<sup>1718</sup> See Lynne Haney, 'Feminist State Theory: Applications to Jurisprudence, Criminology, and the Welfare State' (2000) 26 *Annual Review of Sociology* 641, 644-650.

based on the 'liberal conception of strict egalitarianism'.<sup>1719</sup> For example, Martin Wasik claims that taking family responsibilities into account at sentencing is a form of 'indirect discrimination'<sup>1720</sup> since personal mitigation (such as family hardship) is available to some defendants but not others and it breaches the principle of equality before the law and fair treatment in sentencing.<sup>1721</sup>

The difference argument (substantive equality) is that men and women are essentially different and that this difference must be recognised and taken into account. Barbara Hudson has argued that a study of penal policy demonstrates that a dominant way the law engages with difference is to '...rule differences irrelevant, by specifying only a narrow range of factors that are relevant to decision making.'<sup>1722</sup> However, we ought to be very careful that the legal recognition of pregnancy and breastfeeding is not being excluded in the interests of gender neutrality precisely because these are aspects of women's unique experience. There is a need to guard against the fact that 'gender-neutral terms frequently obscure the fact that so much of the real experience of "persons", so long as they live in gender-structured societies, does in fact depend on what sex they are.'<sup>1723</sup>

The operation of family hardship as a mitigating factor in the sentencing of female offenders is not unwarranted gender-bias. The operation of this sentencing factor to reduce sentences of female offenders occurs because of existing (and unequal) social structures operating within Australian society.<sup>1724</sup> The *impact* of sentencing is gendered because existing moral relations and social practices in parenting roles remain gendered.<sup>1725</sup>

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<sup>1719</sup> Elaine Player, 'Women in the Criminal Justice System: The Triumph of Inertia' (2014) 4(3) *Criminology and Criminal Justice* 276, 280.

<sup>1720</sup> Martin Wasik, 'Going Around in Circles? Reflections on Fifty Years of Change in Sentencing' (2004) Apr *Criminal Law Review* 253, 265.

<sup>1721</sup> *Ibid.*

<sup>1722</sup> Barbara Hudson, 'Gender Issues in Penal Policy and Penal Theory' in Pat Carlen (ed), *Women and Punishment: The Struggle for Justice* (Willan Publishing, 2002) 21, 36.

<sup>1723</sup> Susan Moller Okin, *Justice, Gender and the Family* (Basic Books, 1989) 11.

<sup>1724</sup> Ann Aungles, *The Prison and the Home: A Study of the Relationship Between Domesticity and Penalty*, The Institute of Criminology Monograph Series No 5 (1994) 130.

<sup>1725</sup> Susan Sharp, 'Editorial' (2006) 1 *Feminist Criminology* 3, 3-4; Vanessa Munro, 'The Emerging Rights of Imprisoned Mothers and Their Children' (2002) 14(3) *Child and Family Law Quarterly* 303, 313; Susan Sharp and Susan Marcus-Mendoza, 'It's a Family Affair: Incarcerated Women and Their Families' (2001) 12(4) *Women & Criminal Justice* 21, 26; Barbara Myers, et al, 'Children of Incarcerated Mothers' (1999) 8(1) *Journal of Child and Family Studies* 11,12; Susan Williams, 'A Feminist View of Mercy, Judgment, and the "Exception" in the Context of Transitional Justice' in Austin Sarat (ed),

To tarnish this sentencing factor because it more frequently mitigates the sentence of female offenders is not gender neutrality. In the context of the USA, Daly has observed that:

the problem is that men's lives and the character of their crimes are taken as the norm, against which women are to measure up. Thus, the only way that women can be seen to achieve adult status is by "raising" their punishment to the male standard. This makes sense only if one assumes that *men's lives and crimes – not women's – ought to be the norm.*<sup>1726</sup>

The same observation is applicable to the Australian context.

The norm in sentencing is the male offender.<sup>1727</sup> The primary reason family hardship is controversial within Australian sentencing practices is because it considers impacts which have not fallen predominantly within the dominant male experience. Clearly, this is not a sufficient justification for excluding it as a legitimate sentencing factor. Equal treatment would be satisfied with equal treatment of offenders who have primary caring responsibilities for dependents.<sup>1728</sup>

Ilene Nagel and Barry Johnson have been leading opponents of special treatment for women in the criminal justice system. They have argued that:

a special treatment approach to criminal sentencing should trouble feminists, because it perpetuates damaging stereotypes of female weakness, implying moral inferiority that undermines claims to full citizenship and even personhood.<sup>1729</sup>

However, taking into account the potential impact of sentence upon an offender's dependants need not be seen as 'special treatment' for women. The sentencing principle can apply to fathers who are primary caregivers and mothers who are

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*Merciful Judgments and Contemporary Society: Legal Problems, Legal Possibilities* (Cambridge University Press, 2012) 247, 272; Susan Moller Okin, *Justice, Gender and the Family* (Basic Books, 1989) 11.

<sup>1726</sup> Kathleen Daly, 'Gender and Sentencing: What We Know and Don't Know from Empirical Research' (1995) 8(3) *Federal Sentencing Reporter* 163, 166.

<sup>1727</sup> See generally Ralph Henham, *Sentencing: Time for a Paradigm Shift* (Routledge, 2014) 53; Adrian Howe, *Punish and Critique: Towards a Feminist Analysis of Penalty* (Routledge, 1994) 126.

<sup>1728</sup> Vanessa Munro, 'The Emerging Rights of Imprisoned Mothers and Their Children' (2002) 14(3) *Child and Family Law Quarterly* 303, 313.

<sup>1729</sup> Ilene Nagel and Barry Johnson, 'The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders under the United States Sentencing Guidelines' (1994) 85 *Criminal Law & Criminology* 181, 197.

primary caregivers. In fact, this study of the Australian case law has demonstrated that under the common law it is *not* a sentencing factor which has been raised and considered only in the sentencing of female offenders.<sup>1730</sup>

The issue of family hardship is one of 'impact'; taking into account the probable impact on an offender's dependants – not a broad category of offenders but the specific offender and not a broad category of dependants but the specific individuals who are dependent upon the offender who is being sentenced. The weight attached to this consideration will be individualised. This rationale sits comfortably within the guiding concept of Australian sentencing practice: 'individualised justice'.

By its nature, individualised justice is unequal in application. As explained by Myrna Raeder:

If the effect of imprisonment on children is considered, this does not mean that single mothers would automatically be given probation or substantial departures. A variety of factors, including the seriousness of the crime and the defendant's culpability, must be considered. In some cases, the gravity of the offense and the need to protect the public will outweigh the social costs of imprisoning a defendant.<sup>1731</sup>

Similarly, Jeanne Flavin has argued that justice should recognise, 'men and women's many and complex lived social realities and the many forms and functions of families.'<sup>1732</sup>

Declarations that women will have children or try to get pregnant to avoid suffering the full force of the sentencing courts powers are routinely made and infrequently questioned.<sup>1733</sup> Do we accuse men of going out and finding employment in a devious effort to avoid a custodial sentence? Claims that taking a circumstance of many women's experience (ie primary responsibility for the care of dependants) will result in sentencing disparity are also not frequently

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<sup>1730</sup> See Chapter Four.

<sup>1731</sup> Myrna Raeder, 'Gender and Sentencing: Single Moms, Battered Women, and other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines' (1993) 20 *Pepperdine Law Review* 905, 963.

<sup>1732</sup> Jeanne Flavin, 'Of Punishment and Parenthood: Family-Based Social Control and the Sentencing of Black Drug Offenders' (2001) 15 *Gender & Society* 611, 631.

<sup>1733</sup> See, eg, *Stewart* (1994) 72 A Crim R 17,21; *Togias* (2001) 127 A Crim R 23, 44; *R v Togias* (2002) 132 A Crim R 573, 580 and 584.

challenged. Such claims mock the integrity of an individualised sentencing system and the intelligence of judicial officers,<sup>1734</sup> who on a day to day basis are professionally required to consider and weigh up a variety of facts in order to reach a sound and just determination.

Taking family hardship into account as a mitigating factor can be critiqued as providing an unwarranted advantage to the family unit.<sup>1735</sup> Such a position can be freely acknowledged as a fundamental legal value.<sup>1736</sup> The criminal justice system is imbued with values. For example, in 2004 in the ACT, the Standing Committee on Community Services and Social Equity endorsed a move towards special treatment for primary carers:

The Committee believes that when primary carers are incarcerated (either male or female) special attention should be paid to ensuring their relationship with their children is not fractured.<sup>1737</sup>

This policy privileges the relationship between a primary carer and a child. Currently in Australia, this may disproportionately impact (and benefit) mothers more than fathers, but the policy is gender neutral and not centred on a male experience. As Raeder, aptly states, '[i]f more men provided childcare, they too would benefit from this factor. The break is given not for being female, but for being a caregiver.'<sup>1738</sup>

## V CONCLUSION

It is not useful to categorise family hardship as a factor arising from 'judicial paternalism', 'mercy' or 'gender bias'. This chapter has recommended that family

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<sup>1734</sup> The exercise of professional discretion of other participants in the criminal justice system (ie. police officers and prosecution) has not been critiqued to the same degree.

<sup>1735</sup> See, eg, Ilene Nagel and Barry Johnson, 'The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders under the United States Sentencing Guidelines' (1994) 85 *Criminal Law & Criminology* 181, 206-208.

<sup>1736</sup> Indeed, the Right to Family is recognised as a fundamental human right in the ICCPR. See also Simon Bronitt and Wendy Kukulies-Smith, 'Crime, Punishment, Family Violence, and the Cloak of Legal Invisibility' (2013) 37(3) *Journal of Australian Studies* 390.

<sup>1737</sup> Legislative Assembly Standing Committee on Community Services and Social Equity, Parliament of the Australian Capital Territory, *The Forgotten Victims of Crime: Families of Offenders and their Silent Sentence*, Report 6 (2004) 39.

<sup>1738</sup> Myrna Raeder, 'The Forgotten Offender: The Effect of the Sentencing Guidelines and Mandatory Minimums on Women and Their Children' (1995) 8(3) *Federal Sentencing Reporter* 157, 158.

hardship be recognised as a legitimate sentencing factor which courts *should* take into account when sentencing an offender with dependants. The operation of family hardship as a mitigating factor to recognise the probable impact of a sentence upon dependent children is lawful and appropriate. If assessed from the perspective of the impact of the sentence upon the offender's dependants, it applies equally to men and women and is a legitimate concern.

This sentencing factor may affect the nature of a sentence imposed upon female offenders more than male offenders simply because they occupy greater caring responsibilities in societies. Categorising family hardship as a gender-biased sentencing factor is not helpful and misaligns what this sentencing factor is about. Further research work in this area could consider whether it is appropriate to categorise family hardship as a factor arising from 'familial paternalism'<sup>1739</sup> or whether it could be framed in the context of 'children's rights',<sup>1740</sup> and one's right to family life.

Australia retains a practice of individualised justice.<sup>1741</sup> Judicial officers are capable of taking into consideration complex factual matrixes. The law recognises that they can take into consideration economic marginalization, ties to the community, good character and social difficulties such as gambling addiction and alcoholism. Judicial officers can, and should, consider the circumstances of parenthood and caregiving. It is for the sentencing court to determine an appropriate sentence for each offender, based on the facts of the individual case and individual offender's circumstances.<sup>1742</sup> Therefore, in passing sentence a sentencing court should consider:

- whether family hardship is a relevant sentencing factor in the circumstances;

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<sup>1739</sup> A term adopted by Kathleen Daly in 1987 to explain leniency in the sentencing of women, identified in her study of sentencing practices in a Massachusetts courthouse, see Kathleen Daly, 'Structure and Practice of Familial-Based Justice in a Criminal Court' (1987) 21 *Law & Society Review* 267.

<sup>1740</sup> See generally Helen Codd, 'Through the Looking Glass? Prisoners' Children and Penal Policy' (2007) 69 *Amicus Curiae* 3, 3-4.

<sup>1741</sup> For discussion of the impact of the move away from individualised justice see Barbara Hudson, 'Punishment, Poverty and Responsibility: The Case for a Hardship Defence' (1999) 8(4) *Social & Legal Studies* 583.

<sup>1742</sup> See institutive synthesis and individualised justice discussion in Chapter Two.

- if so, how it is to be balanced against any other relevant sentencing factors;  
and
- how much weight is to be attached to it.

A judge can take into account all circumstances of the offender that are relevant and known to the court in determining an appropriate sentence. Circumstances of female offenders are often different, but this is not gender bias or discrimination. If a judge attaches different weight to the same circumstances of a male and female offender, then we may attribute that to gender bias. However, attributing weight to a difference between caregiver and non-caregiver is not the same.



## 7. FINAL COMMENTS

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The legal research literature is only just beginning to carefully examine the role of sentencing factors. It certainly has not yet dealt seriously with family hardship as a mitigating sentencing factor. This research begins to address this gap. As this is an emerging field of research and due to the vast gaps in research in this area the overall approach adopted for this study has been a mixed method approach. This dissertation has addressed the practice governing the use of family hardship as a mitigating factor within the common law and it has identified the effects this matter has had in sentencing across the Australian sentencing landscape.

The norm through which legal scholars have constructed sentencing law and practice is based upon male experiences. Within the research literature the experiences of women at sentencing have not been validated. Instead taking family hardship into account at sentencing has frequently been mistakenly classified as 'mercy', 'chivalry' and 'judicial paternalism'. Taking into account responsibilities for the primary care of children and the probable impact a sentence may have upon these children, as a mitigating sentencing factor will result in differential gendered outcomes. However, this is because of current social constructions of care and perceptions of motherhood. Within Australia, increasing rates of imprisonment of women and little social change in the constructions of care giving in families within Australian society means that the impact of parental incarceration upon children is a manifest social issue which must be addressed.

This dissertation has demonstrated family hardship is a vital mitigating sentencing factor. Courts have a long-standing history of taking family hardship into account at sentencing under the common law. Despite the emergence of 'just deserts' as a significant normative framework, courts have continued to take this factor into account. This study of family hardship has explored the shifts that have occurred which have taken Australia, more than any other common law jurisdiction, towards legislative intervention and recognition of family hardship. It has examined the difficulties that have arisen in respect of realising acceptance of the impact of a sentence upon offender's dependants in sentencing.

The overall purpose of this dissertation has been to trace the way that courts have approached this sentencing factor and to contribute to current knowledge. The research for this dissertation involved a study of the case law on family hardship within Australia. This consisted of a series of jurisdictionally based studies of sentencing remarks and appellate judgments to reveal how judicial officers have approached family hardship as a sentencing factor. The study of the case law confirmed that family hardship arises in sentencing decisions for both male and female offenders.

The study of the Australian case law has shed light on the way sentencing principles and practice have developed in each jurisdiction and highlighted gaps, divergence and localised practices. The study traced the evolution and growth of sentencing principle by applying an innovative methodology of ‘exhaustive shepardizing’. The methodology exposed, at different times and in different jurisdictions the following:

- recognition of family hardship only if exceptional circumstances exist;
- no recognition of family hardship within the sentencing process but scope for mercy in exceptional cases; and
- recognition of family hardship as a sentencing factor.

The study has exposed that although there is, in theory, one common law in Australia, there is certainly not uniformity in the approach to family hardship. The jurisdictions have to differing degrees and at different points in time placed more or less emphasis on the approaches identified above.

Superficially, it may appear that all the jurisdictions, except for the ACT, have a common approach to family hardship because they have all been reluctant to allow family hardship to be considered alongside other sentencing factors. However, Chapters Four and Five have shown that the Australian landscape is much more complicated. Appellate courts have drawn upon differing rationales to maintain this marginalisation of family hardship. Moreover, these rationales have not been consistently espoused and have varied within jurisdictions. Even cases that have ‘high juristic’ value, as leading cases, can be seen to be in conflict as to the rationales adopted.

The research conducted for this dissertation involved studies of the role of family hardship as a sentencing factor in all jurisdictions in Australia, including the consideration of family hardship in federal sentencing. The research therefore shed light on federal sentencing practice against the backdrop of state and territory sentencing practices. It is the ability to analyse the federal sentencing practice in light of identified state and territory practices that makes this study particularly important. There has been little research of the influence of state and territory practice upon federal sentencing practice and accordingly the extent to which this contributes to inconsistent sentencing of federal offenders. By providing such analysis this dissertation contributes to current knowledge about consistency in federal sentencing practice across Australia. The differences in approach between jurisdictions are reflected in the ways the various jurisdictions have interpreted the federal provision in s16A(2)(p) of the *Crimes Act 1914* (Cth). The conflict between the common law and the plain meaning of the Commonwealth statute remains to be determined by the High Court. Recent developments in the case law suggest the High Court will soon be called on to determine whether the common law 'exceptional' qualification applies to federal law.

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*Director of Public Prosecutions Act 1986* (NSW)  
*Director of Public Prosecutions Act 1991* (NT)  
*Director of Public Prosecutions Act 1984* (Qld)  
*Director of Public Prosecutions Act 1991* (SA)  
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## APPENDIX A

Total: 92 cases										
Federal Family Hardship Cases	Cth		ACT	NSW	NT	Qld	SA	Tas	Vic	WA
<i>Tan v The Queen</i> [2011] VSCA 427 (20 December 2011)	-		-	-	-	-	-	-	-	-
<i>R v Huston; ex parte Cth DPP</i> [2011] QCA 350 (6 December 2011)	-		-	-	-	-	-	-	-	-
<i>R v Hancock</i> [2011] NTCCA 14 (18 November 2011)	-		-	-	-	-	-	-	-	-
<i>Sowaid v The Queen</i> [2011] NSWCCA 177 (8 August 2011)	-		-	-	-	-	-	-	-	-
<i>R v Burling</i> [2011] QCA 51 (25 March 2011)	-		-	-	-	-	-	-	-	-
<i>DPP (Cth) v Kieu Thi Bui</i> [2011] VSCA 61 (9 March 2011)	-		-	-	-	-	-	-	-	-
<i>R v Kertebani</i> [2010] NSWCCA 221 (26 October 2010)	-		-	-	-	-	-	-	-	-
<i>Desborough</i> [2010] QCA 297 (25 October 2010)	-		-	-	-	-	-	-	-	-
<i>R v Ngo; R v Truong</i> [2010] QCA 151 (18 June 2010)	-		-	-	-	-	-	-	-	-
<i>Markovic v The Queen</i> (2010) 200 A Crim R 510	3		1	-	-	-	-	-	7	-
<i>R v Ruha</i> [[2011] 2 Qd R 456	-		-	-	-	-	-	-	-	-
<i>Cao v The Queen</i> [2009] NSWCCA 273 (11 November 2009)	-		-	-	-	-	-	-	-	-
<i>Coombe v The Queen</i> [2009] WASCA 105 (8 June 2009)	-		-	-	-	-	-	-	-	-
<i>R v Gajjar</i> [2008] VSCA 268 (18 December 2008)	-		-	-	-	-	-	-	-	-
<i>Macri v Moreland</i> [2008] WASC 194 (12 September 2008)	-		-	-	-	-	-	-	-	-
<i>Emms v Barr</i> [2008] TASSC 49 (4 September 08)	-		-	-	-	-	-	-	-	-
<i>Ord v The Queen</i> [2008] NSWCCA 162 (8 August 2008)	-		-	-	-	-	-	-	-	-
<i>Haruma v McCarthy</i> [2008] NTSC 18 (23 April 2008)	-		-	-	-	-	-	-	-	-
<i>Le v The Queen</i> [2007] FCA 1463 (18 September 2007)	-		-	-	-	-	-	-	-	-
<i>Turyrn v The Queen</i> [2007] ACTCA 23 (7 September 2007)	-		-	-	-	-	-	-	-	-
<i>Mohlasedi v The Queen</i> [2006] WASCA 267 (5 December 2006)	-		-	-	-	-	-	-	-	-
<i>R v Nguyen</i> (2006) 166 A Crim R 124	1		-	-	-	-	-	-	-	-
<i>Thomas v The Queen</i> [2006] NSWCCA 313 (6 October 2006)	-		-	-	-	-	-	-	-	-
<i>Nolan v Jarvis</i> [2006] TASSC 64 (14 September 2006)	-		-	-	-	-	-	-	-	-
<i>Le v The Queen</i> [2006] NSWCCA 136 (25 August 2006)	1		-	2	-	-	-	-	-	-
<i>McAree v Barr</i> [2006] TASSC 37 (26 May 2006)	1		1	-	-	-	-	1	-	-
<i>Elliott v Anstie</i> [2006] TASSC 17 (19 April 2006)	-		-	-	-	-	-	-	-	-
<i>DPP (Cth) v Gaw</i> [2006] VSCA 51 (15 March 2006)	3		-	-	-	-	-	-	2	-
<i>R v Thai</i> [2005] VSCA 283 (29 November 2005)	-		-	-	-	-	-	-	2	-
<i>R v Carter</i> [2005] QCA 402 (3 November 2005)	-		-	-	-	-	-	-	-	-
<i>R v Liu</i> [2005] NSWCCA 378 (25 October 2005)	2		-	-	-	-	-	-	-	-
<i>R v Berlinsky</i> [2005] SASC 316 (8 September 2005)	3		1	-	-	-	-	-	1	-
<i>DPP v Ka-Hung Ip</i> [2005] ACTCA 24 (19 July 2005)	1		-	-	-	-	-	-	-	-
<i>R v Wood</i> [2005] NSWCCA 233 (22 June 2005)	-		-	1	-	-	-	-	-	-
<i>R v Lo</i> [2004] NSWCCA 382 (5 November 2004)	-		-	-	-	-	-	-	-	-
<i>R v Aller</i> [2004] NSWCCA 378 (5 November 2004)	1		-	-	-	-	-	-	-	-
<i>R v El Hani</i> [2004] NSWCCA 162 (21 May 2004)	-		-	-	-	-	-	-	-	-
<i>S v The Queen</i> [2003] WASCA 309 (10 December 2003)	-		-	-	-	-	-	-	-	3
<i>R v Thomson</i> [2003] VSCA 164 (24 October 2003)	-		-	-	-	-	-	-	2	-
<i>Parry</i> [2003] WASCA 222 (18 September 2003)	1		-	-	-	-	-	-	-	-
<i>Evans v The Queen</i> [2003] WASCA 194 (26 August 2003)	-		-	-	-	-	-	-	-	-

Federal Family Hardship Cases Continued	Cth		ACT	NSW	NT	Qld	SA	Tas	Vic	WA
<i>R v Hinton</i> (2002) 134 A Crim R 286	6		-	1	-	-	1	-	1	1
<i>R v Togiass</i> (2002) 132 A Crim R 573	1		-	-	-	-	-	-	-	-
<i>Garnsey v Stamford</i> [2002] TASSC 43 (4 July 2002)	-		-	-	-	-	-	-	-	-
<i>R v Reardon</i> [2002] NSWCCA 203 (20 June 2002)	-		-	-	-	-	-	-	-	-
<i>Miranda</i> (2002) 128 A Crim R 362	-		-	-	-	-	-	-	-	-
<i>Togiass</i> (2001) 127 A Crim R 23	16		-	4	-	-	-	-	1	-
<i>Thom</i> [2001] WASCA 322 (23 October 2001)	1		-	-	-	-	-	-	-	-
<i>R v White</i> [2001] NSWCCA 343 (3 September 2001)	-		-	-	-	-	-	-	-	-
<i>Radebe v The Queen</i> [2001] WASCA 254 (24 August 2001)	-		-	-	-	-	-	-	-	-
<i>R v Schluenz</i> [2001] NSWCCA 314 (10 August 2001)	-		-	-	-	-	-	-	-	-
<i>R v Quesada</i> [2001] NSWCCA 216 (30 May 2001)	-		-	-	-	-	-	-	-	-
<i>Nguyen v The Queen</i> (2001) 160 FLR 284	3		-	-	-	-	-	-	-	3
<i>R v Ceissman</i> (2001) 119 A Crim R 535	2		-	-	-	-	-	-	-	-
<i>R v Edwards</i> [2001] QCA 93 (14 March 2001)	-		-	-	-	-	-	-	1	-
<i>Nguyen v The Queen</i> (2001) 160 FLR 216	4		-	-	-	-	-	-	-	4
<i>R v Caradonna</i> [2000] NSWCCA 398 (6 October 2000)	2		-	-	-	-	-	-	-	-
<i>R v Howe</i> [2000] NSWCCA 405 (6 October 2000)	-		-	-	-	-	-	-	-	-
<i>R v Alvarez</i> [2000] QCA 290 (24 July 2000)	-		-	-	-	-	-	-	-	-
<i>R v Capper</i> [2000] NSWCCA 63 (14 March 2000)	1		-	-	-	-	-	-	-	-
<i>R v Reynolds</i> (1999) VSCA 224 (10 December 1999)	-		-	-	-	-	-	-	-	-
<i>Theodossio &amp; Said</i> (1998) 104 A Crim R 367	-		-	-	-	-	-	-	-	-
<i>R v Mitchell</i> (Unreported, Supreme Court of Western Australia Court of Criminal Appeal, Pidgeon, White and Steytler JJ, 28 October 1998)	1		-	-	-	-	-	-	-	-
<i>Bernier v The Queen</i> (1998) 102 A Crim R 22	-		-	-	-	-	-	-	-	-
<i>DPP (Cth) v Rogers</i> [1998] VSC 274 (20 April 1998)	-		-	-	-	-	-	-	-	-
<i>Carmody</i> (1998) 100 A Crim R 41	11		-	-	-	-	-	-	13	1
<i>R v Dagg</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Gleeson CJ, Sully and Bruce JJ, 3 October 1997)	-		-	-	-	-	-	-	-	-
<i>Miceli</i> (1997) 94 A Crim R 327	4		-	-	-	-	1	-	11	1
<i>R v Herrera</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Hunt CJ, Smart and Grove JJ, 6 June 1997)	4		-	-	-	-	-	-	-	-
<i>R v Purdon</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Hunt CJ at CL, McInerney J and Donovan AJ, 27 March 1997)	-		-	-	-	-	-	-	-	-
<i>R v Hogan</i> (Unreported, Supreme Court of Victoria Court of Appeal, Phillips, Hayne and Callaway JJA, 11 March 1997)	-		-	-	-	-	-	-	2	-
<i>DPP(Cth) v Carter</i> [1998] 1 VR 601	3		-	-	-	-	1	-	-	1
<i>Walsh v Department of Social Security</i> (1996) 67 SASR 143	4		-	-	-	-	2	-	4	-
<i>Nguyen &amp; Phan</i> (1996) 86 A Crim R 521	-		-	-	-	-	-	-	-	-
<i>R v Matthews</i> (1996) 130 FLR 230	10		-	-	1	-	-	-	4	-
<i>R v Hebaiteer</i> (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Crockett and Southwell AJA, 28 August 1995)	-		-	-	-	-	-	-	2	-
<i>Burns</i> (1994) 71 A Crim R 450	-		1	2	-	-	-	-	1	10
<i>R v Manifold</i> (Unreported, Supreme Court of Victoria, Appeal Division Court of Criminal Appeal, Crockett, Marks and Hampel JJ, 2 December 1993)	-		-	-	-	-	-	-	2	-
<i>R v Cameron &amp; Simounds</i> (Unreported, Supreme Court of South Australia Court of Criminal Appeal, King CJ, Duggan and Debelle JJ, 19 July 1993)	1		-	-	-	-	-	-	-	-
<i>Pickett v Fox</i> (1993) 112 FLR 345	-		-	-	-	-	-	-	-	-

<b>Federal Family Hardship Cases Continued</b>	<b>Cth</b>		<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>Qld</b>	<b>SA</b>	<b>Tas</b>	<b>Vic</b>	<b>WA</b>
<i>R v Bullock</i> (1993) 112 FLR 323	-		-	-	-	-	-	-	-	-
<i>Van de Heuval</i> (1992) 63 A Crim R 75	1		-	-	-	-	-	-	-	1
<i>R v Broda</i> (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Phillips CJ, Crockett and Southwell JJ, 8 May 1992)	1		-	-	-	-	-	-	-	-
<i>Muanchukingkan</i> (1990) 52 A Crim R 354	1		-	-	-	-	-	-	-	-
<i>R v Ehrenburg</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Gleeson CJ, Samuels JA and Loveday J, 14 December 1990)	-		-	1	-	-	-	-	-	-
<i>Sinclair</i> (1990) 51 A Crim R 418	17		3	1	-	-	3	3	2	4
<i>Tan Hai Huat</i> (1990) 49 A Crim R 378	-		-	-	-	-	-	-	-	-
<i>Scarce v Tampalini</i> (Unreported, Supreme Court of Western Australia Court of Criminal Appeal, Kennedy J, 21 March 1990)	2		-	-	-	-	-	-	-	-
<i>R v Lux</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Roden, Allen and Carruthers JJ, 26 August 1988)	2		-	-	-	-	-	-	-	-
<i>Vasin and Scherf v The Queen</i> (1985) 61 ALR 70	1		-	-	-	-	-	-	1	-
<i>Graham v Bartley</i> (1984) 57 ALR 193	0		-	-	-	-	-	-	3	-
<i>Vurovecz v Carmen</i> (1982) 100 LSJS 397	1		-	-	-	-	1	-	-	-

<b>Total: 12 cases</b>										
<b>Australian Capital Territory Family Hardship Cases</b>	<b>Local</b>		<b>Cth</b>	<b>NSW</b>	<b>NT</b>	<b>Qld</b>	<b>SA</b>	<b>Tas</b>	<b>Vic</b>	<b>WA</b>
<i>Butler v Vickers</i> [2011] ACTSC 134 (24 August 2011)	-		-	-	-	-	-	-	-	-
<i>R v Ashman</i> [2010] ACTSC 45 (21 May 2010)	-		-	-	-	-	-	-	-	-
<i>Moh v Pine</i> [2010] ACTSC 27 (6 April 2010)	-		-	-	-	-	-	-	-	-
<i>R v McLaughlin</i> (Unreported, Supreme Court of the Australian Capital Territory, Refshauge J, 7 August 2009)	1		-	-	-	-	-	-	-	-
<i>Tran v Tan</i> [2009] ACTSC 66 (12 June 2009)	-		-	-	-	-	-	-	-	-
<i>Talukder v Dunbar</i> [2009] ACTSC 42 (16 April 2009)	-		-	-	-	-	-	-	-	-
<i>Cotter v Corvisy</i> (2009) 185 A Crim R 560	-		-	-	-	-	-	-	-	-
<i>Islam v The Queen</i> [2006] ACTCA 21 (17 November 2006)	-		-	-	-	-	-	-	-	-
<i>Banks v The Queen</i> [2005] ACTCA 10 (16 February 2005)	-		-	-	-	-	-	-	-	-
<i>R v SP</i> (2004) 149 A Crim R 48	-		-	-	-	-	-	-	-	-
<i>Craft v Diebert</i> [2004] ACTCA 15 (12 August 2004)	3		-	-	-	-	-	-	-	-
<i>R v J</i> (1982) 45 ALR 331	-		-	-	-	-	-	-	-	-

<b>Total: 70 cases</b>										
<b>New South Wales Family Hardship Cases</b>	<b>Local</b>		<b>Cth</b>	<b>ACT</b>	<b>NT</b>	<b>Qld</b>	<b>SA</b>	<b>Tas</b>	<b>Vic</b>	<b>WA</b>
<i>Winter v The Queen</i> [2011] NSWCCA 59 (28 March 2011)	-		-	-	-	-	-	-	-	-
<i>Mokhaiber v The Queen</i> [2011] NSWCCA 10 (11 February 2011)	-		-	-	-	-	-	-	-	-
<i>King v The Queen</i> [2010] NSWCCA 202 (10 September 2010)	-		-	-	-	-	-	-	-	-
<i>Dipangkear v The Queen</i> [2010] NSWCCA 156 (21 July 2010)	-		-	-	-	-	-	-	-	-
<i>R v Thomas Sam</i> [2009] NSWSC 1003 (28 September 2009)	-		-	-	-	-	-	-	-	-

<b>New South Wales Family Hardship Cases Continued</b>	<b>Local</b>		<b>Cth</b>	<b>ACT</b>	<b>NT</b>	<b>Qld</b>	<b>SA</b>	<b>Tas</b>	<b>Vic</b>	<b>WA</b>
<i>Pham v The Queen</i> [2009] NSWCCA 25 (17 February 2009)	-		-	-	-	-	-	-	-	-
<i>Elmir v The Queen</i> [2009] NSWCCA 22 (17 February 2009)	-		-	-	-	-	-	-	-	-
<i>R v Bui</i> [2008] NSWCCA 297 (12 December 2008)	-		-	-	-	-	-	-	-	-
<i>Rylands v The Queen</i> [2008] NSWCCA 106 (23 May 2008)	-		-	-	-	-	-	-	-	-
<i>RWB v The Queen</i> (2008) 184 A Crim R 453	-		-	-	-	-	-	-	-	-
<i>Hopley v The Queen</i> [2008] NSWCCA 105 (15 May 2008)	1		-	-	-	-	-	-	-	-
<i>Eken v The Queen</i> [2007] NSWCCA 320 (13 December 2007)	1		-	-	-	-	-	-	-	-
<i>R v Rich</i> [2007] NSWCCA 193 (5 July 2007)	-		-	-	-	-	-	-	-	-
<i>Roberts v The Queen</i> [2007] NSWCCA 112 (20 April 2007)	2		-	-	-	-	-	-	-	-
<i>Stumbles v The Queen</i> [2006] NSWCCA 418 (21 December 2006)	1		-	-	-	-	-	-	-	-
<i>Ly v The Queen</i> [2006] NSWCCA 324 (4 October 2006)	-		-	-	-	-	-	-	-	-
<i>Harrison v The Queen</i> [2006] NSWCCA 185 (19 June 2006)	-		-	-	-	-	-	-	-	-
<i>Elsobky v The Queen</i> [2006] NSWCCA 168 (26 May 2006)	1		-	-	-	-	-	-	-	-
<i>MJD v R</i> [2006] NSWCCA 151 (10 May 2006)	-		-	-	-	-	-	-	-	-
<i>R v Gip</i> (2006) 161 A Crim R 173	1		-	-	-	-	-	1	-	-
<i>R v Gardner</i> [2005] NSWCCA 383 (10 November 2005)	-		1	-	-	-	-	-	-	-
<i>R v Murphy</i> [2005] NSWCCA 182 (9 May 2005)	1		-	-	-	-	-	-	-	-
<i>R v Moss</i> [2004] NSWCCA 422 (2 December 2004)	-		-	-	-	-	-	-	-	-
<i>R v Grbin</i> [2004] NSWCCA 220 (2 July 2004)	3		-	-	-	-	-	-	-	-
<i>R v Vongsouvanh</i> [2004] NSWCCA 158 (19 May 2004)	-		-	-	-	-	-	-	-	-
<i>R v Girard</i> [2004] NSWCCA 170 (12 May 2004)	4		2	-	-	-	-	-	-	-
<i>R v X</i> [2004] NSWCCA 93 (8 April 2004)	2		2	-	-	-	-	-	-	-
<i>R v Huynh</i> [2003] NSWSC 1066	-		-	-	-	-	-	-	-	-
<i>R v Clark</i> [2003] NSWCCA 288 (6 August 2003)	-		-	-	-	-	-	-	-	-
<i>R v Spicer</i> (2003) 139 A Crim R 206	-		-	-	-	-	-	-	-	-
<i>R v Cakovski</i> (2003) 141 A Crim R 446	-		-	-	-	-	-	-	-	-
<i>R v O'Dea</i> [2002] NSWCCA 91 (22 March 2002)	1		-	-	-	-	-	-	-	-
<i>R v Douglass</i> [2001] NSWCCA 250 (23 May 2001)	1		-	-	-	-	-	-	-	-
<i>R v Pates</i> [2001] NSWCCA 142 (6 April 2001)	-		-	-	-	-	-	-	-	-
<i>R v Willard</i> (2001) 120 A Crim R 450	-		-	-	-	-	-	-	-	-
<i>R v Bednarz</i> [2000] NSWCCA 533 (4 December 2000)	5		4	-	-	-	-	-	-	-
<i>R v Clarke</i> [2000] NSWCCA 160 (5 May 2000)	2		-	-	-	-	-	-	-	-
<i>R v Luong</i> [2000] NSWCCA 139 (14 April 2000)	-		1	-	-	-	-	-	-	-
<i>R v Toomalati</i> [2000] NSWCCA 105 (22 March 2000)	2		-	-	-	-	-	-	-	-
<i>R v Kirkwood</i> [2000] NSWSC 184 (3 March 2000)	-		-	-	-	-	-	-	-	-
<i>R v Robinson</i> [2000] NSWCCA 556 (25 February 2000)	-		-	-	-	-	-	-	-	-
<i>SLR</i> (2000) 116 A Crim R 150	-		2	-	-	-	-	-	-	-
<i>R v Murray</i> [2000] NSWCCA 430 (8 February 2000)	-		-	-	-	-	-	-	-	-
<i>Le</i> (1999) 107 A Crim R 355	-		-	-	-	-	-	-	-	-
<i>R v Chan</i> [1999] NSWCCA 103 (29 April 1999)	1		1	-	-	-	-	-	-	-
<i>R v White</i> [1999] NSWCCA 60 (30 March 1999)	2		2	-	-	-	-	-	-	-
<i>Cacciola</i> (1998) 104 A Crim R 178	-		1	-	-	-	-	-	-	-
<i>Byrne</i> (1998) 104 A Crim R 456	2		2	-	-	-	-	-	-	-
<i>Day</i> (1998) 100 A Crim R 275	5		2	-	-	-	-	-	-	1
<i>Edwards</i> (1996) 90 A Crim R 510	38		14	3	1	7	6	1	8	-

<b>New South Wales Family Hardship Cases Continued</b>	<b>Local</b>	<b>Cth</b>	<b>ACT</b>	<b>NT</b>	<b>Qld</b>	<b>SA</b>	<b>Tas</b>	<b>Vic</b>	<b>WA</b>
<i>R v Rowe</i> [1996] NSWSC 467 (3 October 1996)	-	-	-	-	-	-	-	-	-
<i>R v Hakim</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Cole JA, Smart and James JJ, 5 September 1996)	-	-	-	-	-	-	-	-	-
<i>Maslen and Shaw</i> (1995) 79 A Crim R 199	3	7	-	1	-	1	2	11	-
<i>R v Leslie</i> (1995) 21 MVR 208; (Unreported judgment, Supreme Court of NSW Court of Criminal Appeal, Grove, Abadee and Simpson JJA, 10 March 1995)	-	-	-	1	-	-	-	-	-
<i>Alexander</i> (1994) 78 A Crim R 141	-	1	-	1	-	-	-	-	-
<i>Tiki</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Finlay and James JJ, 24 August 1994)	5	3	-	-	-	-	-	-	-
<i>Wilmot</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Dunford and Findlay JJ, 4 July 1994)	3	-	-	-	-	-	-	-	-
<i>R v Niga</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Gleeson CJ, Kirby P and Ireland J, 13 April 1994)	9	2	-	-	-	-	-	-	-
<i>R v Kerr</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Kirby P, Badgery-Parker J and Loveday AJ, 12 November 1993)	-	-	-	-	-	-	-	-	-
<i>R v Ihm &amp; Ors</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Hunt CJ at CL, Allen and Matthews JJ, 9 November 1993)	3	-	-	-	-	-	-	-	-
<i>R v Sarca</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Wood J, Gleeson CJ and Sheller JA, 11 May 1993)	1	1	-	-	-	-	-	-	-
<i>Hatton and Perdicaro</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Gleeson CJ, Ireland J and Lee AJ, 3 November 1992)	3	-	-	-	-	-	-	-	-
<i>R v Kirby</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Wood, Allen and Abadee JJ, 12 May 1992)	1	-	-	-	-	-	-	-	-
<i>R v Dib</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Meagher JA, Allen J and Badgery-Parker J, 13 September 1991)	11	-	-	-	-	-	-	-	-
<i>R v Spruce</i> (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Gleeson CJ, Mahoney JA and Studdert J, 18 October 1990)	2	-	-	-	-	-	-	-	-
<i>T</i> (1990) 47 A Crim R 29	23	2	1	-	1	-	-	2	-
<i>R v Roberts</i> (Unreported, Supreme Court of New South Wales Criminal Division, Hunt J, 31 August 1989)	3	-	-	-	-	-	-	-	-
<i>R v Carlton</i> (Unreported, New South Wales Supreme Court, Carruthers J, 14 April 1989)	2	-	-	-	-	-	-	-	-
<i>Anderson</i> (1987) 32 A Crim R 146	-	1	-	-	-	-	-	-	-
<i>H</i> (1980) 3 A Crim R 53	-	-	1	-	-	-	-	-	-

<b>Total: 16 cases</b>										
<b>Northern Territory Family Hardship Cases</b>	<b>Local</b>	<b>Cth</b>	<b>ACT</b>	<b>NSW</b>	<b>Qld</b>	<b>SA</b>	<b>Tas</b>	<b>Vic</b>	<b>WA</b>	
<i>R v Hancock</i> [2011] NTCCA 14 (18 November 2011)	-	-	-	-	-	-	-	-	-	
<i>R v Martyn</i> [2011] NTCCA 13 (16 November 2011)	-	-	-	-	-	-	-	-	-	
<i>Payne v The Queen</i> [2007] NTCCA 10 (20 August 2007)	-	-	-	-	-	-	-	-	-	
<i>Kuiper v Brennan</i> [2006] NTSC 54 (5 July 2006)	-	-	-	-	-	-	-	-	-	
<i>Noble-Webster v Simms</i> [2006] NTSC 52 (3 July 2006)	-	-	-	-	-	-	-	-	-	
<i>Currie v Burgoyne</i> [2004] NTSC 10 (15 March 2004)	-	-	-	-	-	-	-	-	-	
<i>FG v Peach</i> [2003] NTSC 114 (26 November 2003)	-	-	-	-	-	-	-	-	-	

<b>Northern Territory Family Hardship Cases Continued</b>	<b>Local</b>		<b>Cth</b>	<b>ACT</b>	<b>NSW</b>	<b>Qld</b>	<b>SA</b>	<b>Tas</b>	<b>Vic</b>	<b>WA</b>
<i>Cifra v Davis</i> [2002] NTSC 14 (15 March 2002)	-		-	-	-	-	-	-	-	-
<i>Watt v The Queen</i> [1999] NTCCA 81 (13 August 1999)	-		-	-	-	-	-	-	-	-
<i>Amagula v White</i> [1998] NTSC 60 (7 January 1998)	-		-	-	-	-	-	-	-	-
<i>Arnold v Trenerry</i> (1997) 142 FLR 229	1		-	-	-	4	-	-	-	-
<i>R v Miyatatawuy</i> (1996) 6 NTLR 44	1		-	-	-	-	-	-	-	-
<i>Mawson v Nayda</i> (1995) 5 NTLR 56	8		1	-	-	-	-	-	-	-
<i>R v Nagas</i> (1995) 5 NTLR 45	10		2	-	-	-	-	-	-	-
<i>Munungurr v The Queen</i> (1994) 4 NTLR 63	-		-	1	-	-	-	-	-	-
<i>Wayne v Boldiston</i> [1992] 85 NTR 8	3		1	-	-	-	-	5	3	-

<b>Total: 23 cases</b>										
<b>Queensland Family Hardship Cases</b>	<b>Local</b>		<b>Cth</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>SA</b>	<b>Tas</b>	<b>Vic</b>	<b>WA</b>
<i>R v Edwards</i> [2011] QCA 331 (22 November 2011)	-		-	-	-	-	-	-	-	-
<i>R v McConachy</i> [2011] QCA 183 (3 August 2011)	-		-	-	-	-	-	-	-	-
<i>R v Nuttall; Ex parte Attorney-General</i> [2011] 2 Qd R 328	-		-	-	-	-	-	-	-	-
<i>R v Price; Ex parte Attorney-General</i> [2011] QCA 87 (6 May 2011)	-		-	-	-	-	-	-	-	-
<i>R v Haddad</i> [2009] QCA 143 (28 May 2009)	-		-	-	-	-	-	-	-	-
<i>Bedeau</i> [2009] QCA 43 (6 March 2009)	-		-	-	-	-	-	-	-	-
<i>R v Haugland</i> [2009] QCA 46 (6 March 2009)	-		-	-	-	-	-	-	-	-
<i>R v Jovic</i> [2008] QCA 278 (12 September 2008)	-		-	-	-	-	-	-	-	-
<i>R v Wakefield</i> (2008) 187 A Crim R 514	-		-	-	-	-	-	-	-	-
<i>R v Stewart</i> [2008] QSC 208 (25 August 2008)	-		-	-	-	-	-	-	-	-
<i>R v Chong; Ex parte A-G (Qld)</i> (2008) 181 A Crim R 200	5		-	-	-	-	-	-	-	-
<i>R v Oldfield</i> [2004] QCA 435 (16 November 2004)	-		-	-	-	-	-	-	-	-
<i>R v D'Arrigo; Ex parte A-G (Qld)</i> [2004] QCA 399 (26 October 2004)	11		-	-	-	-	-	-	-	-
<i>R v MP</i> [2004] QCA 170 (20 May 2004)	6		-	-	-	-	-	-	-	-
<i>R v Murphy</i> [2003] QCA 128 (20 March 2003)	-		-	-	-	-	-	-	-	-
<i>R v Costi</i> [2001] QCA 404 (25 September 2001)	-		1	-	-	-	-	-	-	-
<i>R v Whitehouse</i> [1998] QCA 148 (26 March 1998)	1		-	-	-	-	-	-	-	-
<i>Barton &amp; Bridges</i> (1997) 95 A Crim R 228	-		-	-	-	-	-	-	-	-
<i>Clarke</i> (1996) 90 A Crim R 1	1		2	-	-	-	-	-	-	-
<i>Tho Le and Diem Mac Le</i> 1995) 83 A Crim R 428	9		1	1	-	-	-	-	-	-
<i>Tilley</i> (1991) 53 A Crim R 1	8		1	3	1	1	-	-	1	1
<i>R v Jany</i> [1966] Qd R 328	-		-	-	-	-	2	-	-	-
<i>Mill v Scott</i> [1955] St R Qd 210	-		-	-	-	-	-	-	-	-

<b>Total: 13 Cases</b>										
<b>Tasmanian Family Hardship Cases</b>	<b>Local</b>		<b>Cth</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>Qld</b>	<b>SA</b>	<b>Vic</b>	<b>WA</b>
<i>McCulloch v Tasmania</i> [2010] TASCCA 21 (22 December 2010)	-		-	-	-	-	-	-	-	-
<i>Oliver v Tasmania</i> [2006] TASSC 95 (17 November 2006)	-		-	-	-	-	-	-	-	-
<i>Clay v Clay (No 4)</i> [2004] TASSC 145 (7 December 2004)	-		-	-	-	-	-	-	-	-
<i>Gibbins v White</i> [2004] TASC 8 (25 February 2004)	-		-	-	-	-	-	-	-	-
<i>Tunks v Taws</i> [2003] TASSC 58 (4 July 2003)	-		-	-	-	-	-	-	-	-
<i>R v Bullock</i> [2003] TASSC 37 (13 June 2003)	-		-	-	-	-	-	-	-	-
<i>Jordan v The Queen</i> [2002] TASSC 121 (20 December 2002)	-		-	-	-	-	-	-	-	-
<i>R v Georgiadis [No 5]</i> [2001] TASSC 88 (6 August 2001)	3		-	-	-	-	-	-	-	-
<i>Williams v McLaughlin</i> [2000] TASSC 29 (10 April 2000)	-		-	-	-	-	-	-	-	-
<i>Ponsford v Wynwood</i> [2000] TASSC 21 (4 March 1999)	1		1	-	-	-	-	-	-	-
<i>Riley v Tilyard</i> [1990] TASSC 86 (9 April 1990)	1		-	-	-	-	-	-	-	-
<i>Cadman v The Queen</i> [1985] TASSC 15 (12 April 1985)	1		-	-	-	-	-	-	-	-
<i>Sullivan v The Queen</i> [1975] Tas SR 146 (NC 1)	3		-	-	-	-	-	-	-	-

<b>Total: 55 cases</b>										
<b>Victorian Family Hardship Cases</b>	<b>Local</b>		<b>Cth</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>Qld</b>	<b>SA</b>	<b>Tas</b>	<b>WA</b>
<i>MGP v The Queen</i> [2011] VSCA 321 (20 October 2011)	-		-	-	-	-	-	-	-	-
<i>R v El-Hage (Sentence)</i> [2011] VSC 452	-		-	-	-	-	-	-	-	-
<i>DPP v Gerrard</i> [2011] VSCA 200 (30 June 2011)	1		-	-	-	-	-	-	-	-
<i>Reilly v The Queen</i> [2010] VSCA 278 (22 October 2010)	-		-	-	-	-	-	-	-	-
<i>R v Causer</i> [2010] VSC 341 (19 August 2010)	-		-	-	-	-	-	-	-	-
<i>R v Cowen</i> [2010] VSC 321 (9 August 2010)	3		-	-	-	-	-	-	-	-
<i>Pollard v The Queen</i> [2010] VSCA 156 (18 June 2010)	2		-	-	-	-	-	-	-	-
<i>Markovic v The Queen</i> (2010) 200 A Crim R 510	7		3	1	-	-	-	-	-	-
<i>R v Esposito</i> [2009] VSCA 277(30 November 2009)	-		1	-	-	-	-	-	-	-
<i>R v Xeba</i> [2009] VSCA 205 (17 September 2009)	2		-	-	-	-	-	-	-	-
<i>DPP v Najjar</i> [2009] VSCA 246 (15 October 2009)	2		1	-	-	-	-	-	-	-
<i>R v NAD</i> [2008] VSCA 192 (26 September 2008)	4		2	-	-	-	-	-	-	-
<i>R v Davidson; R v Konestabo</i> [2008] VSCA 188 (23 September 2008)	-		-	-	-	-	-	-	-	-
<i>DPP v Toumngoun</i> [2008] VSCA 91(29 May 2008)	-		-	-	-	-	-	-	-	-



<b>Victorian Family Hardship Cases Continued</b>	<b>Local</b>		<b>Cth</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>Qld</b>	<b>SA</b>	<b>Tas</b>	<b>WA</b>
<i>R v Ienco</i> [2008] VSCA 17 (14 February 2008)	-		-	-	-	-	-	-	-	-
<i>R v Lam</i> [2007] VSCA 246 (1 November 2007)	2		-	-	-	-	-	-	-	-
<i>R v Lane</i> (2007) 176 A Crim R 471	4		1	-	-	-	-	-	-	-
<i>R v Selcuk</i> [2007] VSCA 143 (29 June 2007)	1		-	-	-	-	-	-	-	-
<i>DPP v Coley</i> [2007] VSCA 91 (14 May 2007)	1		-	-	-	-	-	-	-	-
<i>Pandevski</i> [2007] VSCA 84 (2 May 2007)	-		-	-	-	-	-	-	-	-
<i>R v Jaross</i> [2007] VSCA 68 (21 March 2007)	3		-	-	-	-	-	-	-	-
<i>R v Nagul</i> [2007] VSCA 8 (16 January 2007)	9		-	-	-	-	-	-	-	-
<i>R v Dooley</i> [2006] VSCA 269 (4 December 2006)	3		-	-	-	-	-	-	-	-
<i>R v Nguyen</i> [2006] VSCA 184 (8 September 2006)	5		-	-	-	-	-	-	-	-
<i>R v Luong, Nguyen and Cao</i> [2005] VSCA 94 (29 April 2005)	-		-	-	-	-	-	-	-	-
<i>DPP v Lehmann</i> [2005] VSCA 9 (9 February 2005)	-		-	-	-	-	-	-	-	-
<i>R v Williams</i> [2004] VSC 429 (29 October 2004)	1		1	-	-	-	-	-	-	-
<i>R v Close</i> [2004] VSCA 188 (7 October 2004)	1		-	-	-	-	-	-	-	-
<i>R v Satalich</i> [2004] VSCA 132 (5 August 2004)	-		-	-	-	-	-	-	-	-
<i>DPP v Rzek</i> [2003] VSCA 97 (6 August 2003)	-		-	-	-	-	-	-	-	-
<i>R v Ilic</i> [2003] VSCA 82 (25 June 2003)	-		-	-	-	-	-	-	-	-
<i>R v James, Merett and Mousley</i> [2003] VSCA 13 (14 February 2003)	-		-	-	-	-	-	-	-	-
<i>R v Garratt</i> [2002] VSCA 160 (27 September 2002)	-		-	-	-	-	-	-	-	-
<i>R v Holland</i> (2002) 134 A Crim R 451	16		2	1	-	-	-	-	-	-
<i>Orphanides</i> (2002) 130 A Crim R 403	2		-	-	-	-	-	-	1	-
<i>R v Fisher</i> [2001] VSCA 164 (19 September 2001)	1		-	-	-	-	-	-	-	-
<i>R v Leesley</i> [2001] VSCA 90 (7 June 2001)	2		-	-	-	-	-	-	-	-
<i>R v La Mude</i> [2001] VSCA 33 (20 March 2001)	-		1	-	-	-	-	-	-	-
<i>R v Howden</i> [1999] VSCA 130 (16 August 1999)	-		-	-	-	-	-	-	-	-
<i>Wall</i> (1999) 105 A Crim R 426	-		1	-	-	-	-	-	-	-
<i>R v Panuccio</i> [1998] VSC 300 (4 May 1998)	9		2	-	-	1	-	-	-	-
<i>Carmody</i> (1998) 100 A Crim R 41	17		11	-	-	-	-	-	-	1
<i>Yates</i> (1998) 99 A Crim R 483	14		1	-	-	1	-	-	-	-
<i>R v Pennant</i> [1998] 2 VR 453	3		1	-	-	-	-	-	-	-
<i>R v Yaldiz</i> (Unreported, Supreme Court of Victoria Court of Appeal, Winneke P, Hayne JA and Nathan AJA, 4 December 1996)	2		-	-	-	1	-	-	-	-
<i>R v Pearce</i> (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Callaway JA, Southwell and Coldrey AJJA, 19 September 1996)	-		1	-	-	-	-	-	-	-

<b>Victorian Family Hardship Cases Continued</b>	<b>Local</b>		<b>Cth</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>Qld</b>	<b>SA</b>	<b>Tas</b>	<b>WA</b>
<i>R v Lynch</i> (Unreported, Supreme Court of Victoria Court of Appeal, Winneke P, Hayne and Charles JJA, 18 April 1996)	3		-	-	-	1	-	-	-	-
<i>R v Katsimalis</i> (Unreported, Supreme Court of Victoria Court of Appeal, Murphy J, King J, Gobbo J, 14 April 1988)	3		1	-	-	-	-	-	-	-
<i>R v Power</i> (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Young CJ, Kaye J and Gray J, 2 June 1987)	3		1	-	-	-	-	-	-	-
<i>R v Pozvek</i> (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Starke J, Kaye J and Brooking J, 2 September 1983)	4		1	-	-	-	-	-	-	-
<i>AG v Marasovic</i> (Unreported, Supreme Court of Victoria Court of Criminal Appeal, McInerney J, Kaye J and Brooking J, 16 February 1982)	3		1	-	-	-	-	-	-	-
<i>Zampaglione</i> (1982) 6 A Crim R 287	3		1	-	-	-	-	-	-	-
<i>R v Hall</i> (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Starke J, Anderson J and Fullagar J, 15 February 1980)	3		1	-	-	-	-	-	-	-
<i>R v Polterman</i> (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Adam J, Starke J and Crockett J, 2 August 1974)	3		1	-	-	-	-	-	1	-
<i>R v Mitchell</i> [1974] VR 625	5		2	-	4	-	-	-	2	-

<b>Total: 52 cases</b>										
<b>South Australian Family Hardship Cases</b>	<b>Local</b>		<b>Cth</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>Qld</b>	<b>Tas</b>	<b>Vic</b>	<b>WA</b>
<i>Police v Reid</i> [2011] SASC 210 (1 December 2011)	-		-	-	-	-	-	-	-	-
<i>R v Pickard</i> [2011] SASCFC 134 (11 November 2011)	-		-	-	-	-	-	-	-	-
<i>R v Hill</i> [2011] SASCFC 109 (14 October 2011)	-		-	-	-	-	-	-	-	-
<i>R v Marrone</i> [2011] SASCFC 78 (20 July 2011)	-		-	-	-	-	-	-	-	-
<i>R v D, RHC</i> [2011] SASCFC 31 (21 April 2011)	-		-	-	-	-	-	-	-	-
<i>R v Bandjak</i> [2011] SASCFC 19 (1 April 2011)	-		-	-	-	-	-	-	-	-
<i>R v Ohmer</i> [2011] SASCFC 44 (18 May 2011)	-		-	-	-	-	-	-	-	-
<i>Marticanaj v The Queen</i> [2010] SASCFC 82 (23 December 2010)	-		-	-	-	-	-	-	-	-
<i>R v Marikar</i> [2010] SASCFC 36 (24 September 2010)	-		-	-	-	-	-	-	-	-
<i>Alexiadis v Police</i> [2010] SASC 182 (30 June 2010)	-		-	-	-	-	-	-	-	-
<i>R v Buckskin</i> [2010] SASC 138 (12 May 2010)	3		-	-	-	-	-	-	-	-
<i>Stewart v Police</i> [2010] SASC 28 (18 February 2010)	-		-	-	-	-	-	-	-	-
<i>Field v Police</i> [2009] SASC 354 (20 November 2009)	-		-	-	-	-	-	-	-	-
<i>Bush v Police</i> [2009] SASC 318 (7 October 2009)	-		-	-	-	-	-	-	-	-
<i>Thompson v Police</i> [2009] SASC 150 (21 May 09)	-		-	-	-	-	-	-	-	-
<i>Nattrass v Police</i> [2008] SASC 267 (8 October 2008)	-		-	-	-	-	-	-	-	-
<i>R v H, Mg</i> [2008] SASC 264 (3 October 2008)	-		-	-	-	-	-	-	-	-
<i>R v Beer</i> [2007] SASC 375 (26 October 2007)	-		-	-	-	-	-	-	-	-

<b>South Australia Family Hardship Cases Continued</b>	<b>Local</b>		<b>Cth</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>Qld</b>	<b>Tas</b>	<b>Vic</b>	<b>WA</b>
<i>Police v Hatty</i> [2007] SASC 180 (21 May 2007)	-		-	-	-	-	-	-	-	-
<i>R v Stewart</i> (2007) 98 SASR 56	-		-	-	-	-	-	-	-	-
<i>R v M, H</i> [2007] SASC 41 (19 February 2007)	-		-	1	-	-	-	-	-	-
<i>R v Schaefer and Schiworski</i> [2006] SASC 348 (21 November 2006)	-		-	-	-	-	-	-	-	-
<i>Willis v Police</i> [2006] SASC 245 (15 August 2006)	-		-	-	-	-	-	-	-	-
<i>R v Bryden</i> [2006] SASC 203 (13 July 2006)	-		-	-	-	-	-	-	-	-
<i>Aylett v Police</i> [2006] SASC 132 (4 May 2006)	-		-	-	-	-	-	-	-	-
<i>R v Modra</i> [2006] SASC 106 (12 April 2006)	-		-	-	-	-	-	-	-	-
<i>R v Richards</i> [2006] SASC 60 (3 March 2006)	2		-	-	-	-	-	-	-	-
<i>R v Ivic</i> [2006] SASC 8 (19 January 2006)	3		-	-	-	-	-	-	-	-
<i>R v Gorcilov</i> [2005] SASC 326 (18 August 2005)	-		-	-	-	-	-	-	-	-
<i>R v Penno</i> [2004] SASC 354 (12 November 2004)	9		-	-	-	-	-	-	-	-
<i>Gorcilov v Police</i> [2002] SASC 45 (11 February 2002)	1		-	-	-	-	-	-	-	-
<i>R v Carpentieri</i> (2001) 81 SASR 164	14		-	1	-	-	-	1	-	-
<i>Milosevski v Police</i> [2000] SASC 342 (16 October 2000)	-		-	-	-	-	-	-	-	-
<i>Neill v Police</i> [1999] SASC 270 (16 June 1999)	11		-	-	-	-	-	-	-	-
<i>Hemming v Perkins</i> [1999] SASC 212 (3 June 1999)	-		-	-	-	-	-	-	-	-
<i>G v Police</i> [1999] SASC 216 (26 May 1999)	1		-	-	-	-	-	-	-	-
<i>Riley v Police</i> [1999] SASC 21 (2 February 1999)	-		-	-	-	-	-	-	-	-
<i>Bates v Police</i> (1997) 70 SASR 66	10		1	-	-	-	-	-	-	-
<i>R v Mangelsdorf</i> (1995) 66 SASR 60	7		-	-	-	-	-	-	-	-
Adami (1989) 42 A Crim R 88	17		8	1	3	3	1	-	3	1
<i>Amuso</i> (1987) 32 A Crim R 308	3		2	1	-	-	-	1	3	3
<i>R v Rowe</i> (1983) 109 LSJS 291 (21 September 1983)	-		1	-	-	-	-	-	-	-
<i>R v Spiers</i> (1983) 34 SASR 546	-		1	-	-	1	-	1	1	5
<i>Jones v Morley</i> (1981) 29 SASR 62	1		-	-	-	-	-	-	-	-
<i>Jones v Morley</i> (1981) 29 SASR 57	-		-	-	-	-	-	-	-	-
<i>R v Moffa (No 2)</i> (1977) 16 SASR 155	4		3	1	-	1	-	1	-	6
<i>R v Wirth</i> (1976) 14 SASR 291	25		12	3	24	4	1	3	13	17
<i>Tame v Fingleton</i> (1974) 8 SASR 507	3		-	-	-	-	-	-	2	-
<i>Brady v Wright</i> (1974) 62 LSJS 44 (14 January 1974)	1		-	-	-	-	-	-	-	-
<i>Moore v Fingleton</i> (1972) 3 SASR 164	1		2	-	1	-	1	2	-	-
<i>Jarrett v Samuels</i> (1972) 4 SASR 78	1		1	-	-	-	-	-	-	-
<i>Cobiac v Liddy</i> (1969) 119 CLR 257	5		3	-	-	-	-	-	3	4

<b>Total: 54 Cases</b>										
<b>Western Australian Family Hardship Cases</b>	<b>Local</b>	<b>Cth</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>Qld</b>	<b>SA</b>	<b>Tas</b>	<b>Vic</b>	
<i>McLean v Western Australia</i> [2011] WASCA 60 (16 March 2011)	-	-	-	-	-	-	-	-	-	
<i>Juma v Western Australia</i> [2011] WASCA 54 (14 March 2011)	-	-	-	-	-	-	-	-	-	
<i>Mountain v Western Australia</i> [2009] WASCA 161 (13 August 2009)	-	-	-	-	-	-	-	-	-	
<i>Speering v Western Australia</i> [2008] WASCA 266 (23 Dec 2008)	-	-	-	-	-	-	-	-	-	
<i>Western Australia v Wynne</i> [2008] WASCA 195 (26 Sept 2008)	-	1	-	-	-	-	-	-	-	
<i>Challis v Davison</i> [2008] WASC 198 (22 August 2008)	-	-	-	-	-	-	-	-	-	
<i>Trajkoski v Western Australia</i> [2008] WASCA 130 (20 June 2008)	-	-	-	-	-	-	-	-	-	
<i>Logan v Kuser</i> [2008] WASC 65 (29 April 2008)	-	-	-	-	-	-	-	-	-	
<i>Woodley v Western Australia</i> [2008] WASCA 92 (24 April 2008)	-	-	-	-	-	-	-	-	-	
<i>Brown v Western Australia</i> [2008] WASCA 48 (4 March 2008)	-	-	-	-	-	-	-	-	-	
<i>Egan v Western Australia</i> [2007] WASCA 182 (5 September 2007)	-	-	-	-	-	-	-	-	-	
<i>Norton v Western Australia</i> [2007] WASCA 75 (10 April 2007)	-	-	-	-	-	-	-	-	-	
<i>Findlay v Western Australia</i> [2007] WASC 61 (19 March 2007)	1	-	-	-	-	-	-	-	-	
<i>Anderson v Western Australia</i> [2007] WASCA 25 (5 February 2007)	-	-	-	-	-	-	-	-	-	
<i>Arcari v Christie</i> [2007] WASC 298 (7 December 2007)	-	-	-	-	-	-	-	-	-	
<i>MoodyJackamarra v Western Australia</i> [2007] WASCA 7 (12 January 2007)	-	-	-	-	-	-	-	-	-	
<i>Osborne v Fuller</i> [2006] WASC 295 (21 December 2006)	-	-	-	-	-	-	-	-	-	
<i>Western Australia v Skaines</i> (Unreported, Supreme Court of Western Australia Court of Criminal Appeal, Roberts-Smith, McLure and Buss JJA, 11 August 2006)	4	1	-	-	-	-	-	-	-	
<i>Bolton v Western Australia</i> [2006] WASCA 120 (27 June 2006)	-	-	-	-	-	-	-	-	-	
<i>Hull v Western Australia</i> [2005] WASCA 194 (11 October 2005)	-	-	-	-	-	-	-	-	-	
<i>Western Australia v Bruce</i> [2004] WASCA 226 (18 October 2004)	3	-	-	-	-	-	-	-	-	
<i>Johnson v Scott &amp; Anor</i> [2004] WASCA 76 (23 January 2004)	-	-	-	-	-	-	-	-	-	
<i>Michael v The Queen</i> [2004] WASCA 4 (22 January 2004)	1	1	-	-	-	-	-	-	-	
<i>Roberts v Johnson</i> [2003] WASCA 272 (4 November 2003)	-	-	-	-	-	-	-	-	-	
<i>Smith v The Queen</i> [2003] WASCA 235 (12 September 2003)	-	-	-	-	-	-	-	-	-	
<i>Rechichi v The Queen</i> [2003] WASCA 98 (14 May 2003)	-	-	-	-	-	-	-	-	-	
<i>Adams v The Queen</i> [2003] WASCA 91 (2 May 2003)	-	1	-	-	-	-	-	-	-	
<i>Davis v The Queen</i> [2002] WASCA 298 (30 October 2002)	-	-	-	-	-	-	-	-	-	
<i>Dodd v Hoogewerf</i> [2002] WASCA 15 (18 January 2002)	1	1	-	-	-	-	-	-	-	
<i>Cooper v The Queen</i> [2001] WASCA 379 (30 November 2001)	1	-	-	-	-	-	-	-	-	
<i>Day v The Queen</i> (2001) 127 A Crim R 403 (14 September 2001)	-	-	-	-	-	-	-	-	1	

<b>Western Australian Family Hardship Cases Continued</b>	<b>Local</b>	<b>Cth</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>Qld</b>	<b>SA</b>	<b>Tas</b>	<b>Vic</b>
<i>R v 'Epr'</i> [2001] WASCA 214 (25 July 2001)	-	-	-	-	-	-	-	-	-
<i>Dinsdale v The Queen</i> (2000) 202 CLR 321	-	-	-	-	-	-	-	1	-
<i>Taylor v Fairman</i> [2000] WASCA 121 (5 May 2000)	-	-	-	-	-	-	-	-	-
<i>Anderson v The Queen</i> [1999] WASCA 291 (2 December 1999)	-	-	-	-	1	-	-	-	-
<i>Rogers v The Queen</i> [1999] WASCA 239 (5 November 1999)	3	-	-	-	-	-	-	-	-
<i>R v Ottobriano</i> [1999] WASCA 207 (14 July 1999)	-	-	-	-	-	-	-	-	-
<i>R v Jeffree</i> [1998] WASCA 22 (13 February 1998)	3	1	-	-	-	-	-	-	-
<i>Narrier v Fallows</i> (Unreported, Supreme Court of Western Australia, Murray J, 11 April 1997)	-	-	-	-	-	-	-	-	-
<i>Anderson</i> (1996) 18 WAR 244	8	-	-	-	-	-	-	-	-
<i>Webb v Baldwin</i> (Unreported, Supreme Court of Western Australia, Walsh J, 17 January 1997)	2	-	-	-	-	-	-	-	-
<i>Gillespie v Moffitt</i> (Unreported, Supreme Court of Western Australia, Wheeler J, 18 December 1996)	2	-	-	-	-	-	-	-	-
<i>Johnston v The Queen</i> (Unreported, Supreme Court of Western Australia Court of Criminal Appeal, Franklyn, Owen and Parker JJ, 13 December 1996)	-	1	-	-	-	-	-	-	-
<i>Warrell v Kay</i> (1995) 83 A Crim R 493	1	-	-	-	-	-	-	-	1
<i>Hodder v The Queen</i> (1995) 15 WAR 264	17	1	-	-	1	-	-	-	-
<i>Kennedy v Fox</i> (Unreported, Supreme Court of Western Australia, Owen J, 19 September 1994)	1	-	-	-	-	-	-	-	-
<i>Stewart</i> (1994) 72 A Crim R 17	14	4	-	1	-	3	-	-	5
<i>Madoc v The Queen</i> (Unreported, Supreme Court of Western Australia Court of Criminal Appeal, Franklyn, Murray and Scott JJ, 2 June 1993)	2	-	-	-	-	-	-	-	-
<i>Thill v Ryan</i> (Unreported, Supreme Court of Western Australia, Murray J, 18 December 1992)	2	-	-	-	-	-	-	-	-
<i>Wright v The Queen</i> (Unreported, Supreme Court of Western Australia Court of Criminal Appeal, Pidgeon, Wallwork, White JJ, 20 August 1992)	3	1	-	-	-	-	-	-	-
<i>Tan Hai Huat</i> (1990) 49 A Crim R 378	-	-	-	-	-	1	-	-	-
<i>R v Szathmary</i> (Unreported, Supreme Court of Western Australia Court of Criminal Appeal, Wallace, Pidgeon and Rowland JJ, 24 May 1989)	6	1	-	-	-	-	-	-	-
<i>Boyle</i> (1987) 34 A Crim R 202	19	10	-	11	4	5	-	9	13
<i>Baude De Bunnetat</i> (Unreported, Supreme Court of Western Australia Court of Criminal Appeal, Burt CJ, Brinsden and Smith JJ, 3 December 1985)	5	-	-	-	-	-	-	-	-