PAUL BYRNE MEMORIAL LECTURE

UNIVERSITY OF SYDNEY LAW SCHOOL

Thursday 30 October 2025

1 Thank you for the kind invitation to share some thoughts on sentencing with you all this evening. It is a distinct honour to do so on the occasion of one in the annual series of lectures given in memory of Paul Byrne SC. Paul and I were appointed as senior counsel on the same day in 1995. That group included Cliff Hoeben, who would later become a judge of my court and Chief Judge at Common Law, along with Tony Meagher in the Court of Appeal, Stephen Rothman in Common Law and Michael Pembroke in Equity. There was also in that group Dick Edmonds, Les Katz and Alan Robinson who were appointed to the Federal Court. Also Helen Murrell who became the ACT Chief Justice via the District Court bench and Robert Keleman who also joined the District Court. Although I can't say for sure, even though he was more than eminently qualified to be appointed as a judge, I suspect that Paul's singular love of advocacy and the criminal law would have seen him fighting for the rights of accused men and women long into the

years that tragically and prematurely eluded him in the end. He was a swashbuckling kind of character at the bar and universally admired and respected.

2 Paul's experience as a criminal lawyer was far superior to mine. Even after more than 50 years in the law and 19 years as a judge doing criminal trials, I am still having trouble understanding why police insist that what I would simply call a *woman* has to be described as a *female person*. Worse still, a *dead woman* is now invariably, but at least consistently, a *deceased female person*. I'm sure Paul could have explained all this to me if I had cared to ask!!

3 I was appointed to the Supreme Court 12 years after Paul and I took silk in February 1977. I did not come from a background in the criminal law. My practice had been more closely associated with medical negligence and challenges to the wills of dead relatives. When I took the appointment, however, it was with the knowledge that I would sit as a single judge in criminal trials and as a member of the Court of Criminal Appeal hearing sentence and convictions appeals from the District Court and the Supreme Court. I resisted an invitation from the then Chief Justice to transfer from the Common Law Division to the Equity Division because of the considerable fondness I had developed for

criminal trials and criminal appellate work. In the last nearly 19 years on the Supreme Court I have conducted a considerable number of jury and judge alone murder trials and sentenced people who have been convicted following such trials as well as those who chose to plead guilty.

4 It would be fair to say that when I started as a judge, I did not know a whole lot about sentencing. However, that did not stop me from incautiously accepting an invitation at the start of my second year on the court to deliver a paper to the National Sentencing Conference at the ANU in February. That speech is on the Supreme Court website and can be read by anyone who may be interested. Having regard to my relative inexperience in sentencing matters, I somewhat audaciously chose to float the idea, purely for discussion purposes, that if sentences in Australia were reduced in length by 50% across the board, it would not make any significant difference to civilised life as we know it. Well I can say that was a triumph of hope over experience. I re-emphasise that my paper was intended for discussion purposes only, but it created a firestorm that burned for a long time and has been fanned to the point of reignition occasionally by media interests who wish to revive or create some negative sentiment following one of my sentences, which seems to be quite often. It also

caused some mild alarm among some of my fellow judges with decades of experience as criminal practitioners and judges between them who were happy to treat me and my radical, not to say heretical, views as the ramblings of a bleeding heart civil lawyer.

5 Some years later, in 2010, I sat as the most junior of three judges in the CCA on what was to become the important decision of *Muldrock*. That case became very significant in the history of the Supreme Court following the decision of the High Court allowing Mr Muldrock's appeal, overturning *R v Way*, and the subsequent need to resentence a very large number of prisoners in cases involving standard non-parole periods. It is not that aspect of the case I want to emphasise tonight.

6 *Muldrock* in the CCA was both a Crown appeal pursuant to s 5D of the *Criminal Appeal Act 1912* and an application by Mr Muldrock for leave to appeal against his sentence. He had pleaded guilty to a charge of having sexual intercourse with a child less than 10 years of age contrary to s 66A of the *Crimes Act 1900*. The maximum penalty for the offence was 25 years imprisonment and the legislature has provided a standard non-parole period of 15 years. When he was sentenced, Mr Muldrock asked that another offence of aggravated indecent assault contrary to s 61M(1) of the

Crimes Act on the same victim be taken into account on sentence. That offence carried a maximum penalty of 10 years imprisonment with a standard non-parole period of 5 years.

7 Mr Muldrock's plea of guilty attracted an uncontroversial 25% discount.

8 Now this is where it gets interesting! The sentencing judge in the District Court imposed a sentence of 9 years imprisonment but provided a non-parole period of only 96 days backdated to commence on 22 April 2009 and expire on 28 July 2009, the day on which he was sentenced! He directed as a condition of parole, that it was only to be granted on the basis that he was taken into a treatment facility in Orange which provided supported living. It had a capacity to compel residents to reside there and to provide programs for the rehabilitation of sex offenders. The service it provided differed from the CUBIT program in that it offered holistic support in a therapeutic environment to a maximum of five residents and was specifically developed for people with an intellectual disability. The service focused on providing sex offenders with specific intervention on a day-to-day basis through staff support. So this was a sentence individually formulated and structured to account for Mr Muldrock's particular difficult circumstances.

9 The Crown submitted that the sentence imposed by the sentencing judge was manifestly inadequate and that the sentencing judge had made the following errors:

1. He gave excessive weight to rehabilitation and Mr Muldrock's disability and inadequate weight to the other purposes of sentence identified in s 3A of the *Crimes (Sentencing Procedure) Act 1999* in determining the appropriate non-parole period.

2. He failed properly to consider the relevance of the standard non-parole period of 15 years in determining the appropriate non-parole period. That, as you will recall, is the significant issue that attracted most attention and led to all the so-called "Muldrock" appeals in the courts.

3. He structured the sentence to reflect his erroneous view that he had "power to make conditions about parole."

4. He failed to identify any basis for a finding of special circumstances and in particular special circumstances of a character that warranted a non-parole period which represented less than 3% of the total term. The statutory ratio of non-parole to parole periods is 75:25 unless special circumstances exist to justify a variation of that ratio.

10 Mr Muldrock also filed an application for leave to appeal against his head sentence. He submitted that a term of 9 years was in all the circumstances excessive. That was so notwithstanding what on one view might have been regarded as an extremely generous non-parole period.

11 Mr Muldrock committed the offence when he was 30 years of age. His Honour found that he was "significantly intellectually disabled" and accordingly concluded that he was not a suitable vehicle for general deterrence. One medical report suggested he was "undoubtedly mentally retarded" and could barely read or write. Another report concluded that Mr Muldrock was "in the border-line range, only one point from mental retardation" and had "little control over his acting out behaviour" and "little comprehension of what constituted criminal behaviour."

12 The Chief Judge at Common Law rejected Mr Muldrock's application for leave to appeal against his sentence in the following terms:

> 15 In his application for leave to appeal the respondent challenged the total term of his sentence. The respondent submitted that the sentencing judge had been overly concerned with the protection of the community and had failed to consider the fact that the respondent would be subject to the *Crimes (Serious Sex Offenders) Act 2006* under which he may be

placed under a continuing detention order or extended supervision order even after his sentence has expired.

16 The respondent's submission must be rejected. With respect to the latter submission s 24A(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) makes clear that in sentencing an offender, the court must not take into account, as a mitigating factor in sentencing, the fact that the offender has or may become a registrable person under the *Child Protection (Offenders Registration) Act 2000* as a consequence of the offence or has or may become the subject of an order under the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) or the *Crimes (Serious Sex Offenders) Act 2006* (NSW). The obligation on a court when sentencing an offender is to impose a sentence appropriate to all of the circumstances of the offence and the personal circumstances of the offender. The sentencing court cannot anticipate the circumstances of an offender when he or she may be due for release.

17 The submission that the sentencing judge placed excessive emphasis on the protection of the community must also be rejected. Given the nature of the respondent's offence committed on a 9 year old boy and the fact that he had previously committed a similar offence there was a considerable need for the sentencing judge to be mindful of the requirement to protect the community.

18 In my judgment the application by the respondent for leave to appeal should be refused."

13 Howie J agreed. The point of my reference to this case is that I also agreed. I regret having done so. The reason for my regret is reflected in what became the decision of the

High Court, which for presently relevant purposes may be encapsulated in the following order in that Court:

> "For the reasons that follow, the Court of Criminal Appeal erred by refusing leave to challenge the severity of the sentence. It was conceded below that Black DCJ's sentencing discretion had miscarried. This enlivened the Court of Criminal Appeal's power in its discretion to vary the sentence and to impose such sentence as seemed proper. In re-sentencing the appellant the Court of Criminal Appeal should have taken, but did not take, sufficient account of the appellant's mental retardation. The appeal should be allowed and the proceedings should be remitted to the Court of Criminal Appeal for that Court to re-sentence the appellant."

14 When the CCA heard Mr Muldrock's case, I had been a judge for almost exactly three years. I sat with two very experienced judges. In the case of Rod Howie, a judge with an extensive reputation in criminal law. My only questionable claim to fame by then was to have given the controversial speech to the sentencing conference to which I have already referred and with which both justices McClellan and Howie had expressed significant disagreement and undisguised annoyance.

15 I have to say I felt considerable unease at the time that a substantially mentally retarded offender, such as Mr Muldrock, should not be thought to be not just morally but

somehow also legally deserving of a much more sympathetic hearing and the beneficiary of an application of divergent or lateral thinking so as to create a possibly unique, perhaps novel, solution even though potentially at odds with strict application of what was perceived to be the law at the time. I did not have the experience, but more especially the confidence, to take such a view in dissent even though Mr Muldrock's subjective case seemed to me overwhelmingly to favour a different outcome, or at least the outcome chosen by the trial judge. I have since learned that you should trust your instincts when sentencing. They are very often the best place to start and the best place to finish. It is important to remember that instinctive synthesis is a compound noun.

16 Section 3A of the *Crimes (Sentencing Procedure Act, 1999* is in these terms:

> "3A **Purposes of sentencing**
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> The purposes for which a court may impose a sentence on an offender are as follows:
>
> (a) to ensure that the offender is adequately punished for the offence,
>
> (b) to prevent crime by deterring the offender *and other persons* from committing similar offences,
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> (c) to protect the community from the offender,

(d) to promote the rehabilitation of the offender,

(e) to make the offender accountable for his or her actions,

(f) to denounce the conduct of the offender,

(g) *to recognise the harm done to the victim of the crime and the community*."

17 Section 5(1), of course, says this:

> "5 **Penalties of imprisonment**
>
> (1) A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate."

I will return to alternatives to full-time imprisonment later when I talk about Kristian White.

18 In that one provision (s 3A) is to be found the dominant statutory exhortation to judicial officers on how to go about the task of sentencing an individual for a particular crime. However, even with statutory guidance, sentencing is one of the most notoriously difficult judicial tasks available. It is often said that there is no one correct sentence. That is a sentiment intended to convey the obvious fact that several minds may differ about a particular sentencing outcome and produce several different results. However, provided that *House v R* constraints are adhered to, the instinctive

synthesis approach to sentencing means that there is scope for legitimate differences of opinion in any one case. This is perhaps most notably well understood by practitioners who know that Magistrate A might be more or less likely to give a bond or an Intensive Correction Order than Magistrate B in the same set of circumstances. This is inevitably just the luck of the draw, and we have all been on different sides of that equation from time to time.

19 In fact, I remember many years ago as a young barrister appearing for a man on a plea relating to an indecent act in a public toilet. I thought I had a chance of a reasonable result until the Magistrate commenced his remarks on sentence with the words, “Mr Harrison, I remember the days when gay meant happy”!! That Magistrate, I should say, was terribly fearsome, but sadly is now long dead. I know that for a fact because, as that young barrister, I went to his funeral to make sure.

20 In the final analysis, however, genuine error – that is to say, the imposition of a sentence that breaks the rules in some way – is always amenable to the possibility of correction by a higher court. There is in this country a quite remarkable system of judicial supervision of sentences that are arguably wrong. By extension, the sentence that stands at the end of the appellate process is by definition **a** (not **the**)

correct sentence. The important point is that minds may differ. And the very possibility that there may be such differences is to be applauded and cherished, not reviled or weaponised.

21 We have in Australia a system of sentencing that is as fair and intellectually robust as the fairest and most closely scrutinised system of sentencing that exists anywhere in the world. My difficulty, and something I want to touch upon this evening, is that I am concerned that this is neither universally understood nor appreciated in the community. Moreover, I think it is both actively, or at least conveniently, misunderstood and misrepresented by particular, large sections of the media. I am also of the view that because of this, the system is under constant threat of being diminished and depreciated unless attention to the problem is given now.

22 There is a very normal and natural tendency among all of us, or at least many of us, to care little about sentencing outcomes with which we are not directly concerned. When involved as criminal practitioners or students of the criminal law we are all genuinely concerned with sentencing outcomes. Beyond that it is unusual for people to pay much attention. That seems to be the position of most members of society at large. That is unfortunately so despite the fact

that a sentence of imprisonment is close to, if not, the most significant event that can happen to any person. It compares unfavourably with death of a relative, divorce, bankruptcy or loss of professional credential. Interestingly, it is often closely associated with one or more of these events. It really takes cinematic depictions of prison life, like *The Shawshank Redemption*, or something similar, to bring home the predations and excruciating distress associated with institutional loss of liberty.

23 Men and women in the community with no legal training or experience in the criminal law in my view do not often understand or appreciate this. I expect many of you have attended or will one day attend a client in the police cells or at Long Bay or Mullewa or Silverwater or Parklea. How often have you heard the cry that prisoners get it too easy or that gaol is a joke! Such a visit is likely to alter your views. I have no doubt that your actual or anecdotal experience will be the same as mine. One day in gaol is bad enough. How much more difficult might we expect several months or years or decades to be.

24 There is therefore, in this mist of societal ignorance or apathy, a fertile audience for the sowing and dissemination of misinformation. One of the things I wish to emphasise is the popular, not to say populist, community view that no

sentence is long enough and that the longer the sentence, the better it is for all. Why is this attitude so prevalent, where has it come from, and can it ever be changed? There is a cognate attitude to prisoners on remand seeking bail. The public assumption is that arrest equals guilt and so why should anyone not remain in gaol until his or her trial. This attitude also now sees legislative recognition following on recent amendments to the *Bail Act,* which are themselves a response to governmental concern that the safety of the community somehow has to be guaranteed, not merely safeguarded. This is really quite silly and yet this attitude adversely affects the lives of those whose liberty would otherwise be unexceptional until the trial process can take its course. We could learn a lot from the Scandinavians and very little from the North American model.

25 What we see emerging in our community today is the slide into the regrettable situation where the length of sentences has become the currency of the commentariat. When was the last time that you ever heard a radio broadcaster, or read any newspaper circulating in New South Wales, suggesting that a sentence imposed on a particular offender was simply too long. I am willing to bet that no one here has ever heard or read such a thing. Indeed, it is worse than that. I have even heard broadcasters suggest

that the imposition of a life sentence, which tells you something about the nature of the crime, is too good for the person concerned. It doesn't take a genius to appreciate what that comment calls forth, something that we in Australia don't want ever to see again.

26 What is it that fuels these attitudes? Researchers in several jurisdictions have shown that when people are given the opportunity to impose a theoretical sentence based upon a hypothetical (but in fact actual) set of circumstances they almost always proceed to sentence the offender in the example to a no more severe sentence than was given to the actual offender by the judge or magistrate. This suggests at least that a full understanding of the circumstances will include a proper appreciation of the offender's background, motivations, failings and general subjective case. Conversely, you will no doubt have seen that an offender's subjective circumstances, such as intellectual or social impoverishment, mental illness, drug addiction or Aboriginality, are regularly scoffed at in the papers and pejoratively characterised as the stock-in-trade of some tricky lawyer's attempt to avoid punishment for a client, rather than factors that are critical to the sentencing exercise. So once again I ask, why are we so harsh and unforgiving?

27 Moreover, and in a contradictory sense, the community in Australia often takes a generally insular and basically ethnocentric view of sentencing. For example, you may recall that not so long ago in Indonesia, an Australian couple were sentenced for the murder of a Bali policeman. The woman was sentenced to 4 years imprisonment and the man was sentenced to 8 years imprisonment. The public attitude to these sentences here tended generally to be that these are Australian people who have fallen victim to a foreign system of justice and that as a result they have been sentenced to far too long for what occurred. Why this reversal of attitude? The answer is not easily found. I suspect that there is an element of cultural superiority involved and that Australians should not have to endure the "less sophisticated processes and outcomes of a country near the equator". It is timely to observe that the sentences imposed by the Bali court would be considered lenient by local Australian standards and I am certain would be pilloried here if a similar sentence were even considered as suitable punishment for the murder of a policeman.

28 So why the call for longer sentences at home? I think the answers are many.

29 First, people are led to believe that long sentences are a good idea. A criminal in custody is one less person to worry

about and the longer the sentence the less worried we need to be. That attitude of course changes when the gaoled person is your brother or your wife or your child. Unfortunately, censorious attitudes to applications for bail don't often soften, even when the remand prisoner's full story is revealed.

30 Secondly, the public are never told anything else. Biblical notions of equal punishment and retribution have a self-satisfying ring to them.

31 Thirdly, the public never gets the opportunity to distinguish between grades of seriousness of like offences. All murders are murders. All drug sellers are the same. All one punch assailants are drunks on the lookout for trouble. There is no information of a comparative type that permits rational discrimination between the worst and the rest.

32 Fourthly, it makes those who escape or avoid the criminal justice system feel better in themselves if other folk aren't so fortunate. This is a species of comforting schadenfreude that people seem to embrace, taking vicarious delight from the suffering of others.

33 Is any of this important? If I am correct in my assessment that sentences have become an important subject of the news cycle, there is little to be said for encouraging

sentences that are not newsworthy. Accepting that it may on one view be circular to argue in this way, it explains the reason why one never hears news of a sentence being reduced or overturned unless it supports the contention that sentences should be ever longer. A prime example of such an instance is the case of *Barbieri v R* [2016] NSWCCA 295 in which the sentence imposed on an offender who pleaded guilty to killing a policeman was unexceptionally reduced by 10 years on appeal upon the basis that the sentencing judge had in effect given insufficient wight to the effects of the offender's severe mental illness. Once again that was a case in which populist media reports of the offence emphasised the occupation of the deceased and downgraded the significance of the particular subjective circumstances of the offender whereas the court concluded that the offender was, among other things, an unsuitable vehicle for general deterrence because his mental illness reduced his moral culpability.

34 A similar public outburst of irrational rage occurred in the case of the sentence of one of two brothers involved in the concealment of the death of a Griffiths schoolteacher. The brothers, who were twins, were sentenced separately. The brother who committed the *actus reus* of the offence was the second to be sentenced. In the events that occurred,

the sentencing judge sentenced that brother to life imprisonment. However, the other brother was sentenced first for being only an accessory after the fact to murder. He was sentenced to a term or imprisonment that roughly corresponded to his time served and he was released. The public reaction to that sentence was swift and unfortunately predictable. There was public outrage. I am aware that large crowds gathered outside the court and it all became very rowdy and unpleasant. It was clearly the result of the public's inability to distinguish between the criminality of the two brothers. The sentence imposed on the accessorial brother was proper and unexceptional, a fact that should have been apparent to those who reported it. The corollary of this tale is that when it became known that the brother who committed the murder proposed to appeal against the severity of his life sentence, the media circus started up once again, upon the then untested assumption that no lesser sentence could ever be warranted.

35 There is an even more fundamental problem with the public's perception of sentences and way the media consistently assert that because they are somehow not long enough, they must therefore be legally wrong, meaning likely to be overturned on appeal. This common

but self-serving misconception is dangerous and needs to be corrected.

36 Not so long ago I was required to sentence Harriet Wran, the daughter of a now deceased former Premier of this State. I must say that I gave thought to not referring to her by name this evening, but the sad tale is irrevocably linked to her identity and the details are now regrettably in the public domain, as I will explain. Ms Wran was originally charged with murder, along with two accomplices, when a drug-buy at a Redfern flat went wrong. Ms Wran's liability for murder was dependent upon the Crown being able to prove that she knew that one of her co-accused was armed with the knife that ultimately killed the deceased. Ms Wran denied that she knew this. Significantly, neither of her co-accused was called to give evidence against her at the trial, so that the Crown case on the important aspect of what she knew was deficient. There had been no witnesses apart from the three accused who could have spoken to whether or not Ms Wran had foreknowledge that her co-accused was armed. The Crown ultimately accepted Ms Wran's plea of guilty to being an accessory after the fact to murder and robbery in company in full satisfaction of the indictment.

37 I sentenced Ms Wran to a term of imprisonment of 4 years with a non-parole period of 2 years for the robbery offence

and a period of 1 year for the accessory offence: see *R v Wran* [2016] NSWSC 1015. In the events that occurred, Ms Wran had almost served the non-parole period by the time she was sentenced and was released on parole shortly thereafter. The press reaction, among other issues, that are not presently relevant, was to suggest that the sentence was appellably wrong, that she was receiving favourable treatment because of who she was (meaning who her late father was) and that the Director of Public Prosecutions should immediately appeal. The Director did not immediately appeal. In fact, he didn't appeal at all. That decision not to appeal was, if I may say so, entirely unexceptionable because any informed understanding of those sentences in the particular circumstances would appreciate that they were arguably stern. They were entirely in accordance with the principles in the guideline of *R v Henry* (1999) 46 NSWLR 346. However, it did not suit the media to accept that the total sentence was appropriate. Their only interest was to assert that it was not long enough and ought to be challenged.

38 A particularly cynical corollary of this was that one Sydney newspaper subsequently ran a potentially mischievous article drawing attention to the so-called "discrepancy" between the sentence imposed by me upon Mr Lee, who

committed the act of stabbing that killed the deceased, and the sentence imposed upon Ms Wran. The inference from what purported to be an interview with Mr Lee was that Ms Wran's involvement in, or if you like her criminal culpability for, the death of the deceased was greater than was reflected in the offences to which she pleaded guilty. That was probably intended to be a swipe at me but I suspect quite unknown by the journalist was in fact a clear and unwarranted collateral attack upon the prosecuting authorities. Significantly however, the tone of the article was capable of being understood as suggesting that the Courts and the judges exercise some kind of prosecutorial role and have a say in what charges are brought and what charges are dropped. I say no more about that obvious and gratuitous mistake.

39 One predictable biproduct of certain criticisms that I directed at the standard of media reporting of the case before trial were a subsequent series of articles in the same Sydney newspaper that were critical of me. That is probably standard for the course and not something that troubles judges in any particular way. One unintended feature of this criticism, however, was that the paper referred to the hopefully academic presentation that I had offered up for discussion at a sentencing conference in

Canberra in 2008 in which I posed the question whether halving the current non-parole periods of all currently serving prisoners would have any adverse effect on them, in terms of rehabilitation or risk of re-offending and so forth or on society. I realise I have already mentioned this. The newspaper sought entirely unsuccessfully to embarrass me by drawing attention to this lecture that had become lost in the mists of time. The sweet irony for me was that my paper could not have been given better publicity if I had paid someone to promote it.

40 I rather suspect, however, that the thing that really annoyed the media was the fact that I accepted submissions on behalf of Ms Wran that the adverse publicity she had received from this newspaper amounted to extra curial punishment. Part of my sentencing remarks were to the following effect:

> "Ms Wran has been subjected to a sustained and unpleasant campaign by some of the daily newspapers circulating in Sydney. Articles in The Daily Telegraph and The Sunday Telegraph have carried distasteful and wholly misleading headlines such as "Plea to escape murder trial: Harriet's secret bid to cut a deal" and "Nev's daughter seeks get-out-of-jail [*sic,* gaol] deal in drug murder case. Wran Plea for Mercy". The latter article recounted what should have been confidential details of negotiations between Ms Wran's lawyers and the Director of Public Prosecutions. In the events that occurred, the offer of a plea was rejected by the Director shortly after the article was published.

That article was followed on 13 March 2016 by another full page banner headline and four page spread titled “How I Ended Up in Hell” that included lengthy extracts from letters sent to Ms Wran by Mr Lee and private letters, published in full online, from Ms Wran to a personal friend. It included details of her daily prison life, her interactions with other inmates and her observations about warders. Its publication exposed Ms Wran to unwelcome attention from inmates and some prison staff. The publicity intensified after Ms Wran’s plea. On 7 July 2016 the front page banner headline proclaimed, “DIRTY HARRIET”. The sub-headline “Revealed: Wran’s role in ice junkies’ plot to murder a drug dealer” and accompanying prominent two page article incorrectly implied that Ms Wran had willingly taken part in a planned murder and had “lured” Mr McNulty to his death.

The most recent front page and inside four page spread “The Harriet Wran File” dated 10 July 2016 contained the most extensive detail. Headlines on page one referred to “Daddy’s little girl to ice junkie” and “Sex, drug binge after murder”. Inside they included “Murder, Then Loud Sex” and “Killer junkie thought she was hooker on night of murder”. The sexual allegation has not been advanced by the Crown and has been vehemently denied by Ms Wran. The pictures and text include other details of the crime not alleged against Ms Wran or her co-offenders and other untested allegations. The details can only have been sourced from an improperly obtained copy of the police brief of evidence.

On each occasion the articles were also published online where they will remain, continuing indefinitely the damage to Ms Wran’s reputation. The articles and allegations within them were picked up and repeated in other news organisations including online versions of The Sydney Morning Herald and The Daily Mail. Ms Wran is not able to anticipate when or if this gratuitous campaign will end.

It is submitted on behalf of Ms Wran that this publicity has been humiliating for her and has caused her immense psychological distress in her already vulnerable condition. The articles make allegations about her criminality, sexual conduct and reputation that have no basis in fact but from which she has no ability to defend herself. Ms Wran maintains that these publications appear designed to invite public vilification and

opprobrium and that some imply Ms Wran has sought or received special treatment due to her family connections. Ms Wran's privacy, and that of her family, has also been grossly invaded. Family photos have been re-published. Ms Wran's private correspondence has been extracted for prurient consumption. Even her distraught telephone calls to her mother have been transcribed and, in an extraordinary step, re-enacted for listeners to consume online. It is submitted on her behalf that the psychological distress caused to Ms Wran and the irreparable and unfair damage to her reputation merits a finding that she has suffered extra curial punishment: see *Ryan v The Queen* [2001] HCA 21; (2001) 206 CLR 267; *Einfeld v Regina* [2010] NSWCCA 87; (2010) 200 A Crim R 1 at [85]-[100]; *Kenny v R* [2010] NSWCCA 6.

The media interest has focused on Ms Wran's family background and her physical appearance. The intense media attention is disproportionate to her involvement in the relevant events. She submitted that it is therefore appropriate significantly to mitigate her sentence in these circumstances: see R v Wilhelm [2010] NSWSC 378 at [33].

Ms Wran also contended that the extra curial punishment goes beyond the traditional case of adverse publicity and warranted even more substantial acknowledgment. The publicity has made Ms Wran a potential target in a dangerous environment. Each publication led to unwanted attention to Ms Wran in gaol and has generated safety concerns for her. On 10 July 2016 she was told that the gate to her wing had been locked for her protection after an article was published. There is a real risk that Ms Wran may be moved back to a much more confined environment as a direct result of the publicity with potential serious mental and physical health implications.

The Crown has proffered, quite properly in my view, no submissions in response to these concerns. In my opinion the publication of these egregious articles warrants the imposition of a sentence that takes account of Ms Wran's continuing exposure to the risk of custodial retribution, the unavoidable spectre of enduring damage to her reputation and an impeded recovery from her ongoing mental health and drug related problems"

41 More recently I was called upon to sentence Kristian White, a police constable who caused the death of a 95-year-old woman in a nursing home in Cooma, who was suffering from dementia, by employing his taser to disable her when she presented to the staff holding a knife. The constable was found guilty of manslaughter by reason of either criminal negligence or unlawful and dangerous act. Bear in mind that he was legally entitled to use the taser in the course of performing his duties, so the manslaughter charge he faced, not to say the conviction, was not without some controversy. The maximum sentence for manslaughter is 25 years imprisonment. There is obviously no standard non-parole period having regard to the diverse range of offences that is contemplated by that offence. There is also no power of a sentencing court to impose an intensive correction order: s 67(1)(a) of the *Crimes (Sentencing Procedure) Act, 1999.* I sentenced Constable White to a community correction order for a period of 2 years and 425 hours of community service pursuant to section 8(1) of that Act.

42 That sentence attracted significant negative attention in some sections of the media. In particular, members of the deceased woman's extended family called publicly for "justice", a phrase that arguably failed to give recognition to

the fact that Constable White had been convicted for the wrongful death of their mother or grandmother, when on one available view a jury verdict acquitting him was equally probable on the evidence. In sentencing the offender, I had anticipated the likelihood of some reaction of this type and I attempted subtly to say so in my remarks on sentence which, if you will briefly indulge me, I will repeat for your benefit now:

> "[13] Before I proceed further, it is important to note the following things. It is usual and perfectly understandable that many people will have an interest in the result of any sentencing proceedings and not merely the offender awaiting sentence. People other than those who are directly involved in the events that give rise to the relevant offence, such as an accused, often have and forcefully express a desire to follow what happens in court. These include, as in this case, relatives and friends of the deceased, whose position as victims is expressly recognised by statute. Further, and more generally, complete strangers to the proceedings, such as members of the general population and the local community, and often in large numbers, although only affected indirectly, nevertheless remain vicariously invested in the due administration of the criminal justice system. These individuals are entitled to a clear explanation of what happens to an accused person, or what sentence is imposed and why. These different roles are not necessarily mutually exclusive.
>
> [14] Sentencing is a complex and complicated task. It is not designed to be so. It is not intended to vex the uninitiated. But unlike theatrical or cinematic representations of this aspect of the criminal law, sentences in this country are not handed down without giving due consideration to a very large number of important and often contradictory themes. I have

watched for many years how at least some of those assembled in court to hear counsels' submissions on sentence will feel the need audibly to express frustration and dismay that the court's decision is not instantaneous. That is understandable. This case proved to be no exception.

[15] The things to which I will now direct attention are essential matters to be considered and dealt with in these proceedings, as in any similar case. It may appear to some to be overly technical, tedious and pedantic. However, we are in this country the beneficiaries of a remarkable system of criminal justice. My task in sentencing Mr White constitutes a significant example of the operation of that system. But while it is acceptable and understandable that opinions about judicial decisions will inevitably differ, it would be a fundamental error for any particular individual or group of individuals to conclude that the worth of our system of criminal justice is coextensive with, or is only to be judged by, that individual or group's level of agreement or satisfaction with the sentencing outcome in any particular case."

43 These were views that I have consistently attempted to promote in my judgments. History will record that my attempt to communicate these sentiments on this occasion was not apparently successful. The relatives called for, and the Crown agreed to, an appeal against the inadequacy of my sentence. That appeal was unanimously dismissed by the Court of Criminal Appeal.

44 That case was another example of the developing political significance of so-called victims' rights. I wish to emphasise that I am not critical or dismissive of that development. These "rights" have in a limited sense become enshrined in

legislation in the context of victim impact statements and the expanding use to which sentencing judges are required or permitted to take them into account. Unfortunately, in my experience, the attitudes and level of understanding of victims and victims' representatives tend, perhaps unremarkably, to be significantly one-dimensional and not necessarily much in harmony with the dispassionate and objective mind that a sentencing judge is required to apply.

45 I note in passing that in the case of Christopher Dawson, which attracted enormous public attention and spawned a podcast, the family of Lynette Simms said not one word to my knowledge that was critical of the sentence I imposed upon Mr Dawson for killing his wife. They would appear properly and reasonably to have accepted that a non-parole period of 21 years imprisonment for a man in his mid-70s satisfied all of the relevant factors that one needs to consider when imposing a sentence. The papers for once appear to have agreed.

46 The issue concerned with the detention of asylum seekers is even more perplexing. Clearly enough, people in immigration detention have not committed a crime or been sentenced in the conventional sense but their practical circumstances are not much different to a remand prisoner. At least a remand prisoner understands the charge that he

or she faces and will with any luck have a fair idea of when a trial might be expected. The issue with asylum seekers is not whether their indeterminate detention is too short or too long but whether anyone cares at all. There is no easily understandable relationship between the seriousness of something they are alleged to have done and the wisdom of keeping them in custody. The default position of the media, with some notable exceptions of opinion pieces, is that deterrence is at work here ("the boats have stopped") so the detention period can last indefinitely.

47 The burden of all of this is that there is alive and well in our community a feeling that accused and convicted people deserve no sympathy and should be put away for as long as possible. This sentiment is the currency of the market that lives off others' suffering. It is non-discriminating. It insidiously undermines the judicial process and confidence in judicial officers who are necessarily exposed to unwanted and unnecessary pressure. Public scrutiny of sentencing decisions is essential. Ill-informed, far worse ununiformed, criticisms are not. The lives of accused individuals should not so easily be called up for barter in the daily news cycle. It is essential as practitioners and students of the criminal law that we all hold fast to principle and apply it in the face even of ignorance and prejudice.

48 If one of the objects of sentencing is to protect the community from the offender, it has to be realised and accepted that there are limits to this protection. Every convicted person cannot be locked away forever. When a person is sentenced, his or her case receives intense scrutiny from all sides and the Court. A proper sentence is determined having regard to the available information. Sentencing cannot be risk free. A sentence can be formulated so as best to strike the proper balance, but it must be a balance. And there must come a time when a prisoner is entitled to be released. However, we have, alike with cognate provisions in the States and Territories, the *Crimes (High Risk Offenders) Act 2006* which can provide for the extended detention of someone who has completed a sentence, or for their extended or continued supervision and electronic monitoring for periods of up to five years after the expiration of the parole period. This is in effect a parliamentary endorsement of the proposition that some sentences are not long enough or of the curious notion that judicial exercises of discretion in the imposition of sentences need constantly to be revisited. The legislation proceeds upon the implicit basis that the State somehow has an obligation to guarantee the safety of all of us, and yet in practical and philosophical terms, this is nothing short

of an absurdity. In the meantime, the currency of the prison sentence becomes ever more politically valuable.

49 Before I conclude, I want to make it plain that I do not say that sentences should fail to reflect the criminality of the crime. There is a distinction to be drawn between the need for leniency and compassion on the one hand and an inappropriate failure to give effect to sentencing principles on the other hand. Put another way, judges should never be afraid to sentence sternly if the facts demand it. Unless it be thought that I am not prepared to impose a stern sentence when it's required, let me give you this example.

50 In *R v Abu-Mahmoud* [2022] NSWSC 238 [restricted], after a judge alone trial, I sentenced the offender to a head sentence of 44 years for murder. Mr Abu-Mahmoud had cynically solicited the killing of a 15 year old boy. He sought what he mistakenly believed was retribution for the death of his nephew in a street fight, for which the assailant had been taken into custody on remand awaiting trial. The assailant was, in that circumstance, in gaol and therefore beyond the reach of Mr Abu-Mahmoud who chose instead to order and pay for the killing of the assailant's younger brother. That boy was shot by a contract killer in his bedroom one night as he slept. It is difficult to conceive of a more terrible crime by anyone who did not commit the

actus reus. Even more tragically, in an awful twist, the brother of the deceased boy was later acquitted of the murder of Mr Abu-Mahmoud's nephew. Mr Abu-Mahmoud neither appealed against my judgment finding him guilty of murder nor the sentence I imposed for that crime.

51 Finally let me mention deterrence. It is also one of the s 3A purposes of sentencing. What is deterrence? Deterrence in this context proceeds upon the assumption or supposition that a person, rationally considering his or her options before committing a crime, will analyse the severity of the punishments previously handed out to like offenders. This analysis, so it is said, will then play an important role in that person's decision whether or not to commit the crime and before doing so to draw back and reflect upon what had happened to others who had been caught. So the argument runs, the drunk and violent husband who suspects his wife of infidelity researches the sentencing statistics for murder or serious assault before proceeding to attack her. The outlaw motorcycle gang sergeant-at-arms thinks twice before stabbing a rival for his position because the gaol time is going to be quite long. The drunk in the pub chooses not to thump the person who knocked over his schooner because the consequences are just too scary.

52 It will be obvious that concepts such as general and specific deterrence in this context are not intended to reduce a sentence. On the contrary, the length of the sentence is thought to deter and the longer the sentence the greater the deterrence. The community and the media love this stuff and accept it as holy writ. It actually has the endorsement of the highest court in the land. It is sufficient and respectful for me merely to say I do not share this view. Studies both here and overseas over many decades have consistently revealed that the singular most effective deterrent to all criminal activity is the likelihood of detection. Only when people who consider committing a crime appreciate that they are unlikely to go unnoticed if they do will they reconsider their position. As practitioners in criminal courts understand, or should understand, this is a very important thing to bear in mind when making sentencing submissions. Properly understood, not many cases qualify as vehicles for general deterrence, even accepting, as I do not, that general deterrence as a sentencing tool is effective. I would like to think Magistrates and Judges would be receptive to these arguments.

53 In expressing my views, I need to make it clear that as a judge of the Supreme Court I am required to apply the law. I have no difficulty doing so. I hold personal views that

sentences are often longer than they could be and that we need to be cautious not to over-penalise offenders. I can hardly imagine that a woman in her middle fifties sentenced to three life sentences with a non-parole period of 33 years for poisoning relatives with toxic mushrooms is likely to have her sentence increased by the Victorian full court. But I have learned to expect that anything is possible.

54 I am often asked if I find it stressful dealing with cases such as the ones I have described. My answer is always no, in the sense that I am dealing with what are by then historical events. I would not like by way of contrast to be a police officer or a paramedical first responder who turns up to the crime scene when the awful circumstances are still raw.

55 Thank you for your attention. It has been a distinct privilege to address you in honour of the late Paul Byrne SC. May you all successfully aspire to the compassion and wisdom Paul brought to his practise of the criminal law.

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