Sentencing for Sex Offences

A practical guide to the relevant factors

by

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1. Introduction

Whilst there is nothing new under the sun, in years gone by the whole area of sentencing for sexual assault offences was comparatively simple.

There weren't that many types of statutory sexual assault, to begin with. And (compared to modern times) there were not that many complaints for the courts to deal with.

There was rape, indecent dealing, indecent assault, carnal knowledge, incest and sodomy. Leaving aside the vagaries of bestiality, that was about it.

In the eighties however the whole area began to expand and diversify. Rape became sexual penetration without consent. Fellatio and Cunnilingus (concepts previously unknown and unrequired) crept into the statutes.

Oral and digital penetrations took on new severity. Aggravated sexual assault was born. The offence of sexual relationship was invented. Or rather, given a name.

Offences sprang up criminalising a range of sexual offences not previously criminal. Offences against lineal relatives came to include step children and defacto children. The traditional age of consent for persons in a variety of positions of trust rose from 16 years to 18 years. And so it went on.

The once relatively simple area of sentencing for sexual assault become a minefield, and a complex and specialised area of the law.

The following paper, whilst not attempting to be exhaustive, looks at various aspects of the sentencing process as it relates to sex offences in attempt to ascertain whether there is any perceptible pattern that emerges, and whether there are any guidelines evolving which might serve as a guide to predicting future sentences in this area.

Whilst many of the cases referred to are Western Australian cases, it is submitted that they are generally representative of the approach adopted elsewhere in Australia and of general applicability.

2. Tariff – Is there any such thing when it comes to Sexual Assault?

In contrast to the sentencing of drug offenders, it has always been comparatively difficult to ascertain any level or tariff for sexual assault. Some cases have even attempted to suggest that no tariff exists. For example McKechnie J in *R-v-Chilvers* [2003] WASCA 87 stated clearly that there was no tariff (at [20]):

> *"There is no established tariff for sexual offences…"*

It is however submitted that with the volume of reported sentencing cases now available it is possible to distil a broad discretionary range of sentences that have emerged over the past 20 years for offences of sexual assault.

In *VIM-v-The State of Western Australia* (2005) 31 WAR 1 the Court of Appeal said (at [301]):

> *"Accepting that each case in this area turns very much on its own facts, and that there is no tariff, it is nevertheless useful to consider what are the usual sentences imposed, and what is the range of sentences imposed. Only against that information can a claim that a term is within or outside the appropriate range be understood."*

After thus disavowing the existence of any tariff, the Court then went on to conduct an exhaustive examination of sentences imposed over the past 15 years, which appear in three separate schedules to the judgment, at pages 67-68.

3. The essential factors in the sentencing exercise

Sexual assault cases often encompass a bewilderingly array of circumstances with significant differences, both in the kind and criminality of behaviour involved and factors personal to the offender.

The proper exercise of sentencing discretion requires a court to have regard to all relevant matters in the imposition of a sentence proportionate to the criminality involved rather than simply placing the case within a range of commonly imposed sentences: *R-v-Podirsky* (1989) 43 A Crim R 404; *R-v-Pinder* (1992) 8 WAR 19; *VIM-v- The State of Western Australia* (supra).

Where the offence involves a sexual assault upon a young child within a family, the paramount consideration will always be the protection of that child. This will be reflected by the imposition of a deterrent sentence that reflects the seriousness with which the court and the community views the offence.

Such matters were discussed at length in *Woods-v-R* (1994) 14 WAR 341, which noted that personal circumstances and good antecedents, contrition, and personal efforts at rehabilitation are of lesser importance.

In *Dempsey-v-The Queen*, unreported; CCA SCt of WA; Lib. No. 960059; 9 February 1996, Murray J, in dealing with an offence involving a child victim, set out the relevant considerations to which attention would generally need to be given in deciding sentence in cases of this nature.

In doing so his Honour attempted to identify the factors which enable degrees of heinousness to be ascribed to what is generally regarded by the community as one of the most heinous types of offending.

The factors enunciated by his Honour have come to be known as the "Dempsey

Factors" and in Western Australia form the starting point for any sentence involving a child victim.

His Honour said (in Lib. No. 960059C at page 6):

> *"Without purporting to state the relevant considerations in an exhaustive way, the following would seem to me, having regard to the terms of the Code itself and to the general law, to be factors to which attention would need generally to be given in deciding upon the imposition of sentence -*
>
> 1. *The nature of the conduct in question, the degree of perversion or deviance demonstrated.*
> 2. *The relative ages of the offender and the victim.*
> 3. *Whether the offender was in a position of trust or authority with respect to the victim, thus better enabling the commission of the offence.*
> 4. *Whether there was, apart from such position of trust or authority, any element of coercive or forceful behaviour on the part of the offender.*
> 5. *The circumstances of the victim and the degree to which that person was not only taken advantage of, but his or her corruption was contributed to by the commission of the offence.*
> 6. *Whether the offence was repeated and if so over what period or periods of time so as to enable the court to consider whether it was of an isolated character or displayed recidivism on the part of the offender.*
> 7. *The degree of remorse displayed and whether any such contrition has been effectively followed up by determined efforts to achieve the offender's rehabilitation.*
> 8. *The youth of the offender.*
> 9. *The extent to which the victim's co-operation in the commission of the offences was secured by friendship or by the offer of some reward.*
> 10. *The actual impact of the commission of the offence upon the child established by a victim impact statement or otherwise.*

11. Whether the offender has a prior relevant criminal history.

12. The prevalence of such offences in the community at the time and the degree to which particular circumstances indicate a heightened need to seek to achieve the protection of the community and particularly of young persons from the commission of such offences, whether with or without their consent."

The purpose was to give some guidance in respect of those matters or circumstances that would generally be significant in approaching the complex task of sentencing for offences of sexual penetration or attempted sexual penetration of children.

His Honour's formulation has been referred to many times subsequently in West Australian sentencing appeals and remains the touchstone and starting point of the sentencing exercise in most cases of this kind.

It is curious that his Honour's formulation does not however appear to have been adopted or referred to authoritatively at all in other jurisdictions.

4. Penile/Digital/Oral Penetrations: Is there any difference?

Throughout Australia, Legislatures have abolished the distinction between the various different forms of penetration that once existed.

Prior to this, acts of digital penetration without consent were classified as offences of indecent assault or gross indecency and attracted a significantly lower maximum penalty than the crime of rape. By abolishing the distinction between penile and digital penetration the Legislatures have reflected the change in community thinking about the essential nature of sexual crimes involving penetration.

In *Steuart-v-R*, unreported; CCA SCt of WA; Lib. No. 950486; 15 September 1995, Malcolm CJ said (at 20):

> *"It has been generally accepted that offences of digital penetration of the vagina are not regarded as being as serious as penile penetration."*

A similar approach was adopted in *Nelson-v-R*, unreported; CCA SCt of WA; Lib. No. 950376; 1 June 1995, at 9 (affirmed in *Ling-v-R* [2000] WASCA 129), where it was observed that:

> *"cases of digital penetration have traditionally been regarded as less serious offences calling for less serious penalties"*

The position in Australia has however changed somewhat since then.

Sully J in *R-v-O* [2005] NSWCCA 327 qualified this general proposition that an act of digital penetration is less serious than an act of penile penetration,. His Honour said (at [32]):

> *"I would accept that, as a general proposition, an act of digital penetration, as such, is less serious than an act of penile penetration as such. I do not agree, however, that such a general proposition is, more or less as of course, a proposition of universal applicability in cases of digital penetration. One only has to read the victim impact statements of KW and of JS to see at once how damaging to a particular victim an act of digital penetration, let alone more than a single such act, can be to a very young child."*

The matter was also considered by the Northern Territory Supreme Court in *R-v-Riley* (2006) 161 A Crim R 414 where Martin (BR) CJ observed (at [8]):

> *"Speaking generally, it is not difficult to imagine circumstances in which an act of penile penetration will be viewed as a more aggravated offence than an act of digital penetration. However, advancing a general proposition that an act of digital penetration is less serious than an act of penile penetration is apt to mislead.*

> *As a community, we have moved beyond many misguided views with respect to sexual assaults of various types to a more enlightened understanding of the motivations for and impacts of sexual assaults. The community has come to understand that the gravity of sexual offending should not be judged simply by drawing a distinction between penile penetration and penetration by other parts of the body or objects. Regardless of the means used for penetration, the community now understands that these types of sexual assaults are all serious crimes of violence accompanied by sexual acts, the gravity of which must be assessed according to its individual circumstances rather than by an artificial and often misleading distinction between penile and other means of penetration."*

One case however that seems to run contrary to the proposition that different types of penetration need not be distinguished is *R-v-GWM* (2005) 152 A Crim R 482, where Studdert J (at [44]), with whom Hulme J agreed, held that:

> *"…a crime involving penile penetration of a young child is a more serious form of sexual intercourse than cunnalingus"*

It is submitted that current judicial thinking is that the difference in sentence required for any particular type of penetration is diminishing, and that in particular the difference between penile and digital penetration is no longer considered to be of great significance.

5. Illegal acts between consenting parties; the old "Carnal Knowledge"

There has always been a difficulty in the area of illegal acts between consenting parties, or carnal knowledge, as it pertains to sentencing. Where the act in question is non-consensual the task is much simpler as many of the general principles will apply.

Similarly there will not be all that much difficulty where there is a gross breach of trust, or a significant difference in age between the parties.

From a sentencing perspective the main problem arises where the act is committed between two consenting individuals who are not manifestly different in age.

Cases that offer some guidance in this regard include *R-v-Clarke* [2000] WASCA 229 and *R-v-Avery* [2002] WASCA 136. In *Clarke* the offender was 20 years old and the victim 15 years old. In *Avery* the offender was 20 years old and the victim was 13 years old.

Apart from factors personal to the offender the Court in these two cases viewed the most relevant factors as being:

- the age discrepancy
- any relevant abuse of trust
- use of alcohol
- premeditation or opportunism
- any degree of deviance or perversity
- the nature of the relationship between the parties generally.

Other cases where the position has been evaluated include *Marris-v-R* [2003] WASCA 171 and *Coulter-v-R,* unreported; CCA SCt of WA; Lib. No. 960507; 9 April 1996.

In *Ellis-v-R*, unreported; CCA SCt of WA; Lib. No. 970480; 29 September 1997, the Offender was convicted of indecent dealing with a child in the context of a fully consensual relationship between the two parties who were co-workers at a supermarket. The Offender was aged 21 years and the Victim 17 years. Because of the fact that the Offender occupied a slightly elevated position in the workplace he was deemed to be a person in a position of trust for the purposes of the legislation.

The case involved an appeal against conviction (he had been acquitted of charges involving allegations of sexual (penile) penetration) but the Court (and the Crown) appeared to have no difficulty with him having been dealt with by way of a non-custodial penalty.

More recently, in an unrelated Victorian case which gained nationwide prominence (mainly, one suspects, because the offender was female), a schoolteacher was jailed for a fully consensual sexual dalliance with a 15 year old male student: see *DPP (Vic)-v-Ellis* (2005) 153 A Crim R 340.

At first instance a non-custodial sentence had been imposed, but this was set aside after a Crown appeal. The Court of Appeal was of the view that the initial sentence violated the rule of sexual equality before the law. Callaway JA observed (at [11]);

> *"The law does not require an artificial transposition treating men as though they were women or women as if they were men. It is not fallacious to detect error in the present sentence because it is completely different from the sentence that would have been imposed on a male offender."*

Whereas once it would have been almost unthinkable to jail a person such as the respondent in *Ellis*, the Courts have indicated that there is unlikely to be any leniency afforded female offenders in these sort of cases, notwithstanding the maturity of the victim or the consensual nature of the relationship.

6. Offences against sex workers

Whilst statistics do not always reflect this, it is known that due to the nature of their job, sex workers are regularly victims of sexual assault. However, there is little case law on the sentencing considerations of offenders who have been convicted of sexual assault against a sex worker.

There was once a school of thought to the effect that prostitutes were somehow a lesser form of victim than a "virtuous" woman. This line of authority is however is now seen as outmoded. The fact that a victim is a sex worker is now seen as a neutral factor rather than a mitigating or aggravating factor in the sentencing process.

It has been held by the Court of Criminal Appeal in New South Wales that:

> *"the past history of the victim, particularly reference to her having engaged in prostitution … was irrelevant and that all citizens are entitled to equal protection under the law"*: see *The Queen-v-Villar* [2004] NSWCCA 302 at [155] citing *The Queen-v-Leary,* unreported; CCA of NSW; 8 October 1993.

It is rare to see a sex worker indicate through their victim impact statement (if one is given) that they have suffered psychological damage associated entirely with being the victim of sexual assault. Due to the nature of their profession, sex workers often come from extremely unfortunate backgrounds that in turn brings with it associated psychological trauma.

In *Director of Public Prosecutions-v-Crilly and Atkinson,* unreported; CCA SCt of VIC; 248 of 89; 13 of 90; 1 February 1990, the Court accepted that the fact that a victim of an aggravated rape did not suffer any long-term effects was a relevant sentencing consideration. Also, in *The Queen-v-Meizys,* unreported; CCA SCt of VIC; 154 of 1990; 1 October 1990, a lesser sentence was imposed because there was evidence that a victim of a serious assault did not suffer any severe injuries that produced permanent or long lasting adverse effects.

Further, the sentence of an offender should reflect the trauma and injury suffered by the victim. If a sex worker who is a victim of sexual assault, is shown not to have suffered any long-term psychological or physical injury as a result of the offence the sentence of the offender should obviously reflect this.

7. Stale offences, self-rehabilitation and old age

Many cases of sexual assault do not surface for years after the event, sometimes decades. Many of these cases will involve an offender who has self-rehabilitated and lived an exemplary life in the intervening period.

Such cases often prove a difficult exercise for sentencing judges, the offender being a person who is unlikely to re-offend and who is not in need of any rehabilitation.

The mere passage of time does not attract *"a great deal of discount by way of sentence in relation to sexual offence"*: see *R-v-Tiso* (1990) Crim LR 607; affirmed in *Dick-v-R* (1994) 75 A Crim R 303 at 307.

In *Bell-v-R* [2001] WASCA 40, Anderson J was of the view that when offences are "stale", considerations of simple fairness and mercy may require that leniency be extended to the offender. See also *R-v-Todd* [1982] 2 NSWLR 517 at 519 - 520 (affirmed in *Mill-v-The Queen* (1988) 166 CLR 59 at 64) and *R-v-Miceli* [1998] 4 VR 588.

In *Bell* (supra) Anderson J (at [4] – [7]), with whom Kennedy J and Stein AJ agreed, discussed the impact of the fact that the offences were "stale" upon the sentences to be imposed. His Honour made the point that the sentencing objective of personal deterrence is significantly diminished in cases of this kind where many years have elapsed since the last offence. Additionally, he noted that in such cases the court may be able to conclude that rehabilitation has already taken place.

Anderson J in *Bell* also looked at the approaches of different courts to the sentencing of offenders for "stale" offences. His Honour concluded (at [8]) that although it was not easy to reconcile the cases, it is reasonably clear that

> *"delay will attract a significant discount only where the sentencing court concludes that there has been real progress towards rehabilitation as such or*

> *where other favourable factors have positively emerged in the time between the offences and the passing of sentence".*

His Honour made the following further observation (at [12]):

> *"The point is that in cases of intra-familial sexual abuse, the offending often goes undetected for a long time, the offender will often be a person who has led an otherwise blameless life, will often be of no danger to anyone except children in the family and will usually be most unlikely to reoffend once the offending in question is disclosed, or the opportunity to commit offences against the particular complainant has gone. Because these are common features in cases of this kind, they are not of much mitigatory weight. Other sentencing considerations overwhelm them. Sentencing objectives in this kind of case focus on the need to protect young, defenceless children from abuse at the hands of adults who are in a position of trust and authority over them in the family setting and who are in a position to conceal their offending."*

In *R-v-Petchell*, unreported; CCA SCt of WA; Lib. No. 930346; 16 June 1993, it was held that the passage of time between the commission of the offence and its detection and punishment in cases involving sexual abuse within the family is not, of itself, a significant mitigating factor.

R-v-Petchell (supra) involved a long history of intimidation and sexual intercourse by a father upon his stepdaughter, involving two pregnancies, cruelty, physical aggression, threats, and the child's alienation from her natural mother. The Offender was convicted after trial. On the Crown appeal a sentence of 12 years in aggregate was imposed. Franklyn J said that *"the mere fact of delay in apprehension"* is not as a general rule a mitigating factor, nevertheless, the Court accepted as a mitigatory circumstance the fact that, since 1981, when the Offender ceased his criminal conduct, he had lived a completely blameless life.

Another case where the difficulties involved with sentencing historical sexual offences were examined was *Austin-v-R* (1996) 87 A Crim R 570. The offences in this case had occurred between 30 and 50 years before. The victims were the offender's daughter and stepdaughters. At the time of sentencing he was aged 87 and had a life expectancy of 3 to 5 years.

In this case Malcolm CJ, upholding the reasons given in *Smith-v-R,* unreported; CCA SCt of WA; Lib. No. 940285; 2 June 1994, observed that (at 572):

> *"... the significance of old age as a mitigating factor, particularly when combined with ill-health, is that it constitutes a basis on which the court, in the exercise of mercy, may impose a sentence significantly shorter than otherwise might be the case."*

The same sort of approach is adopted in non-sexual assault cases: *DPP-v-Che Kien* [2000] VSC 376. In this case Cummins J found that the offender (aged 80 at the time of the offence) was at the time of the murder suffering from a *"serious mental disturbance",* although not mentally impaired as defined by the law. Having reviewed the authorities His Honour said (at [17]):

> *"... I impose sentence guided by the principles stated in those authorities - essentially, that old age is central to but not determinative of the quantum of sentence to be imposed."*

Perhaps the most comprehensive examination of this issue comes from the South Australian case of *R-v-Liddy (No.2)* (2002) 135 A Crim R 468. This case involved a former magistrate convicted of a number of offences of unlawful sexual intercourse with a person under the age of 12 years.

The offender in *Liddy* was aged 56 at the time of sentence, and had received a term of 25 years imprisonment with a minimum term of 18 years to be served before parole. The sentence was upheld on appeal.

Mullighan J (at [24] to [53]) examined the question of old age and self-rehabilitation; and concludes that even in a case where there was such a long non-parole period, the question of age alone could not operate to reduce the sentence even where there was a real prospect that the offender would die in prison.

8. Victim Impact Statements

The sentencing legislation of the various states has for some time now allowed for the victims of offending to put before the court their perspective of the impact of the offences; see for example ss. 24 & 25 *Sentencing Act* (WA). However, the precise purpose of and the weight to be attributed to any such report in the sentencing process is often the subject of conjecture.

The sentencing tribunal may have regard to the victim impact statement as demonstrating the effect of the commission of the offences upon the complainant to that point in his or her life and potentially for the future. These are matters directly related to a proper appreciation of the seriousness of the offences: *R-v-Pinder* (supra) at 39 - 40 per Murray J, with whom Malcolm CJ and Pidgeon J agreed.

In *R-v-Dowlan* [1998] 1 VR 123 Charles JA observed that in relation to the Victorian victim impact statement legislation (at 140):

> *"... if objection is taken, on a matter in substance, to any part of the statement, the judge should either rule it inadmissible or make it clear, during the plea or in sentencing reasons, that no reliance would be, or was being, placed on that part of the statement."*

That passage was cited by Kennedy J in *Mitchell-v-R* (1998) 20 WAR 257, who went on to observe (at 261) that the opportunity must be given to the offender to challenge any facts set out in the statement and that if any facts in the statement are to be treated as aggravating factors for sentencing purposes, it would of course be necessary for the

sentencing judge to be satisfied beyond reasonable doubt as to their truth before he or she made use of it: see also *Langridge-v-The Queen* (1996) 17 WAR 346 per Kennedy J.

Further, the fact that a victim impact statement is adduced does not make it obligatory for the sentencing judge to accept its contents: see *Mitchell* (supra) per Ipp J at 266.

There has been some debate as to whether persons other than the direct victim are able to provide relevant statements of the impact of the offence for consideration by the court. Cases such as *R-v-Previtera* (1997) 1994 A Crim R 76 were to that effect. The more recent view however appears to be to the contrary.

In *R-v-FD & JD* (2006) 160 A Crim R 392 it was held that a greater sentence cannot be passed because of the impact of the crime on the victim's family (see also *R-v-Slater* (2001) 121 A Crim R 369 at 374-375 [19]-[24]).

Statutory provisions such as ss 13(b) and 24 of the *Sentencing Act* (WA) now largely obviate that problem; although the provisions of the *Criminal Procedure Act* (NSW) have been interpreted to have the opposite effect; see *R-v-Bollen* (1998) 99 A Crim R 510 per Hunt CJ.

Cases such as *Mitchell* (supra) indicate that there is a right for defence counsel to view any proposed Victim Impact Statement before it is used; and to take timely objection to offensive parts thereof, such as the author nominating the type or length of sentence that should be imposed.

The definitive approach to pre-sentence reports, it is submitted, has yet to be determined. In *R-v-Tzanis* (2005) 44 MVR 160, (referred to in *R-v-FD* (supra)) the NSW Court of Appeal convened a five member bench to specifically consider and resolve the matter, particularly the viewpoints expressed in *Previtera* (supra) and *Bollen* (supra). The Court however found that the case was not the correct vehicle to make the necessary determination. Speigelman CJ said:

> *" It appears that no suitable vehicle has emerged for the grant of special leave by the High Court to resolve these differences. This Court has set a bench of five in order to reconsider Previtera and Bollen if necessary. Nevertheless it is not appropriate to do so unless the issue squarely arises. In my opinion it does not arise."*

It appears that we may have to wait for the High Court to find a suitable case in which the answer may lie.

9. Non-custodial options

In the vast majority of cases, any conviction for any form of sexual penetration without consent (or where consent is not relevant) will attract an immediate custodial sentence.

There are however some notable cases where non-custodial dispositions have been considered appropriate. In *VIM-v-The State of Western Australia* (supra) the Court, in reviewing the range of custodial sentences imposed, observed that (at [287])

> *"Nothing in what we say should be taken to mean that a sentencing judge may not impose a non-custodial penalty […] if the circumstances of the individual case clearly demand such a disposition in accordance with proper legal principle.*

In *Dinsdale-v-The Queen* (2002) 202 CLR 321 (a case of digital penetration) the High Court found a suspended sentence to be appropriate despite the matter involving a breach of trust on a 9 year old girl by a mature adult offender and having gone to trial.

In *R-v-Chilvers* (supra) a probationary order was seen as being appropriate for a series of indecent dealings and digital penetrations (two separate victims) despite the offender having been in breach of trust in a family situation. An important

consideration in this case was the offender's contrition and remorse, and the wishes of the victims' mother that the family unit stay intact as far as possible.

In *R-v-Chilvers* (supra) McKechnie J (with whom Anderson and Parker JJ agreed) said (at [28]):

> *"…even in cases of sexual assault sometimes the community's interests are best served by a sentencing disposition which maximizes the possibility of rehabilitation for the offender at the expense of a lengthy, or in this case, any term of imprisonment to be immediately served. To hold otherwise would effectively deny any operation of the provisions of the Sentencing Act relating to suspended sentences and ISO's in cases of intra familial sexual offences."*

Whilst fines generally have not been a favoured means of disposition in cases of sexual assault, they are not unknown.

In *James-v-R* (1985) 14 A Crim R 364 a term of 9 months imprisonment was overturned and a fine of $1,750.00 was imposed on a 41 year old appellant who had indecently dealt with a 12 year old boy. The offence involved touching the boy's genitals and offering him money to allow him to continue. The appellant was a complete stranger to the boy and had picked him up as a hitch-hiker.

This sort of approach in a sexual assault case was however short lived and in *Nevermann-v-R* (1989) 43 A Crim R 347 the Court refused to interfere with a custodial term of six months imposed on a first offender for a comparatively minor indecent assault on a 17 year old girl. Brinsden J distinguished the case from *James* (supra), observing:

> *"I reject the notion that an offender whose financial circumstances indicate an ability to pay a substantial fine, but who exhibits no remorse for the commission of a sexual offence can, in effect, buy his way out of prison by the imposition of a fine."*

However, in *Biggs-v-R,* unreported; CCA SCt of WA; Lib. No. 960657; 11 November 1996, an offender *in loco parentis* was fined $10,000 for indecent assault on his 12 year old step-daughter. His appeal against the severity of the fine was (some might think predictably) unsuccessful. Perhaps not surprisingly, we have been unable to find any case where the decision in *Biggs* has been followed at first instance or on appeal.

10. Indigenous issues

The West Australian sentencing experience mirrors the approach in other states, including the Northern Territory in that as a starting point the sentencing principles applying to an offender in a remote aboriginal community must *ab initio* be the same for any offender, but factors personal to the offender by reason of his living circumstances including his race and the particular afflictions suffered by his ethnic group vis a vis alcohol or social deprivation, will always be relevant.

The sentencing appeals of *Rogers & Murray-v-R* (1989) 44 A Crim R 301, involved serious sex offences by remote dwelling Aboriginal men. *Rogers* was convicted of sexual penetration of a 7 year old child, and *Murray* convicted of a violent sexual penetration against an adult woman in her home.

Malcolm CJ considered the relevance of traditional living circumstances and alcohol dependence to the sentencing exercise and examined the sentencing authorities that had touched upon the issue. In noting the effect of the *Racial Discrimination Act 1975* (Cth), his Honour said (at 307):

> *"….the sentencing principles to be applied in relation to a sexual offence committed by an aboriginal must be the same as those in any other case. It is apparent however, that there may well be particular matters which the court must take into account, in applying those principles, which are mitigating factors applicable to the particular offender…"*

His Honour acknowledged that as far back as 1987, when Burt CJ was passing sentence on three full blood Aboriginal men for a pack rape, (*Charlie, Uhl and Nagamarra-v-R*, unreported; SCt of WA; No 96 of 1987) Burt CJ dealt with the complexities of approach to alcohol abuse as a factor in the sentencing discretion:

> *"Over the past 10 years or so each of you has become addicted to alcohol which is in the process of destroying you both your culture and you personally, and I do not hold you altogether responsible for that. But it is clear to me that your present condition cannot be constructively dealt with by the criminal law in its normal operation".*

A closer look at these authorities shows that whilst we may view equality before the law as axiomatic, when it comes to the actual sentencing disposition, the cultural and living circumstances and life experience of remote dwelling Aboriginal offenders bear such a remarkable contrast to those of the rest of the Australia community, that there will in truth always be a quite different approach to the sentencing exercise.

The issue of the relevance of an indigenous cultural perspective in sexual assault cases was more recently addressed by the Northern Territory Court of Criminal Appeal in the case of *R-v-GJ* [2005] NTCA 20.

The Accused, an Aboriginal man in his mid fifties, pleaded guilty to two offences against a young girl in her early teens, one of which was a charge of having sexual intercourse with the child. The sentencing judge found that at the time of the offences the Accused believed that traditional law permitted him to have sex with the Complainant.

In accordance with custom, the Complainant had been promised to the Accused as a wife. The child had been schooled outside the community and did not know the Accused well. When a rumour came to the ears of the Accused that the child had had sex with a young boy, he assaulted her and abducted her. The Accused took her to his home and later had forced sexual intercourse and later anal intercourse.

The Crown and the Court accepted that based on his understanding and upbringing in traditional law, and notwithstanding the want of consent, the Accused believed intercourse with the child was acceptable. The sentencing court found that fundamental beliefs, based on traditional laws, prevailed in the thinking of the Accused and prevented him from realising there was an absence of consent.

The Accused was ignorant of the Northern Territory law, a first offender, of previous good character, was entitled to the benefit of a guilty plea and was not regarded as predatory. Whilst acknowledging the conflict between traditional values and the law of the Northern Territory the sentencing judge regarded there to be no choice but to take the traditional perspective on the matter into account as a factor in the sentencing exercise.

The 19 month sentence imposed for the sexual intercourse count was the subject of a Crown appeal. On appeal the lead judgment of Mildren J dealt with a number of issues, particularly the relevance of traditional indigenous law to the sentencing exercise. At [30] onwards his Honour acknowledged that generally speaking the Accused's belief that he was following traditional Aboriginal law made him less morally culpable.

But his Honour went on to ask: less morally culpable than what? His Honour restated that the offending was objectively very serious and that even though there was an acceptance of such conduct in traditional law, nonetheless traditional law placed no obligation upon the offender to act as he did and the factor was therefore of less weight in the sentencing exercise

11. Concurrency and Totality

These two principles are of critical importance in the majority of sentencing cases involving sexual assault.

It is not uncommon to see indictments for sexual offences contain a large number of counts. Where once it was common to charge a single count, it has for some time been fashionable to charge every physical act preliminary to the ultimate act of sexual penetration as a separate count.

In addition, it is also sadly the case that many offenders commit their offences on the same complainant over a long course of time before there is any complaint; necessitating an indictment which reflects the totality of the offending: see *Jarvis-v-R* (1998) 20 WAR 201.

It is therefore not unusual to see sentencing judges in sexual assault cases resort to the totality principle to keep sentences within workable and non-crushing parameters: see *Mill-v-R* (1988) 166 CLR 59*; Postiglione-v-R* (1997) 189 CLR 295*;* and *Ellis-v-R* (2005) 154 A Crim R 450.

Just when a sentence becomes "crushing" is not a matter that has been well explained. In *Jarvis* (supra) Anderson J (at 217) held that:

> *"… a long sentence is not necessarily a crushing sentence and a sentence that might be thought by the prisoner to be a crushing sentence is not necessarily excessive…"*

It is generally accepted however that a sentence may become "crushing" when it is so long that all desire for rehabilitation is likely to be extinguished: see *Yates-v-R* [1985] VR 41 at 48; and *Vaitos-v-R* (1981) 4 A Crim R 234.

Cumulation of sentences is usually required where there is more than one victim (*VIM-v-The State of Western Australia* (supra) at [295]), although there will come a point where concurrency must intervene to keep the sentence proportionate to the circumstances of the offending: see *Dickens-v-R* (2004) 147 A Crim R 343.

In *Dickens-v-R* (supra) McLure J, as she then was, (Murray J agreeing, Jenkins J dissenting) allowed a degree of concurrency in respect of two separate offences on two separate victims which would have fallen clearly outside the usual rules for concurrent sentences. The reason for doing so was totality and the need to avoid a crushing sentence.

It is respectfully submitted that *Dickens* is a simple but classic exposition of the application of both the concurrency principle and the totality principle as they apply in sexual assault cases, and the analysis of both rules by McLure J at [11] to [19] is particularly succinct.

For a discussion of the totality principle specifically in relation to child sex offences see *R-v-Kench* (2005) 152 A Crim R 294.

12. Opprobrium resulting from the conviction and hardship in prison

Beyond any doubt persons sentenced to imprisonment for sexual offences tend to do their time "harder" than other inmates. There is the threat of attack from other prisoners and the disadvantages of being on the lowest rung of the prison community. Many are kept in strict security for their own protection.

There is also the public opprobrium which attends anyone convicted (or even charged with) a serious sexual assault. This has been recognised by the High Court in *Ryan-v-R* (2001) 206 CLR 267, although the extent to which it may be a mitigating factor is not entirely resolved by the various judgments.

Whilst Kirby and Callinan JJ in separate judgments were of the view that public vilification and opprobrium would operate as a mitigating factor, McHugh and Hayne JJ were to the contrary, and Gummow J did not address the issue.

The question often arises as to how much by way of mitigation ought to be afforded an offender who is imprisoned for this sort of offence on account of these factors.

The issue was examined at some length in *Liddy* (supra). The appellant in that case by virtue of his previous occupation as a magistrate (who had until comparatively recently to his conviction sentenced many offenders to imprisonment) was in particular jeopardy of retribution within the system: see Mullighan J at [97]. Despite this, it was not seen as a factor that should operate to diminish his sentence.

The question of persons required to serve their sentences in protective custody is usually regarded as mitigatory: see *AB-v-R* (1999) 198 CLR 111 at 152; and *R-v-AB (No.2)* (2000) 117 A Crim R 473 per Barr J at 495.

The degree to which factors such as this will mitigate any particular offence will however always depend heavily on the facts of the case in question: see *Bekink-v-R* (1999) 107 A Crim R 415; and *R-v-Boon,* unreported; CCA SCt of NSW; 17 November 1983.

13. Parole

Although granted parole eligibility, persons convicted of sex offences may face difficulties in obtaining release on parole, beyond that experienced by other types of prisoners. This is because release is conditional upon completing a sex offender treatment program, which in turn is conditional upon the prisoner admitting his guilt for the offences in question. This is not always possible, especially where the prisoner has been (or claims to have been) wrongly convicted.

In some states, prisoners who continue to deny guilt after conviction are not admitted to sex offender programs and consequently never become eligible for parole.

In *Varney-v-R* (2000) 23 WAR 187, the Applicant prisoner with numerous convictions for offences of a sexual nature had applied seven times unsuccessfully for admission to the custodial sex offender treatment program. It was accepted, in that case, that due to funding restrictions, that program was only available to persons who admitted their guilt (see 196 [24], 204-205 [55]-[56]).

In this respect, Ipp J (with whom Malcolm CJ and Wallwork J agreed) said (at 208 [71]):□□

> *"I accept that in coming to its decision the Board took into account the denial of guilt by the applicant and the fact that for that reason he was not admitted to and did not undertake the SOTP* [Sex Offenders Treatment Programme]. *In my view, the inference to be drawn from the words expressing the decision is that the Board had regard to these matters on the basis that both the denial of guilt and the non-participation in the SOTP were factors tending to render the applicant unsuitable for parole. In my view, the Board was entitled to regard these matters in that light and so take them into consideration: see Mott v Community Corrections Board (Qld) [1995] 2 Qd R 261 at 268-270, per Fitzgerald P; at 275-276, per McPherson JA; at 271, per Davies JA; R v Secretary of State for the Home Department; Ex parte Zulfikar; R v Parole Board; Ex parte Zulfikar."*□

In *Varney* (supra), Malcolm CJ (at 190 [3]) and Ipp J (at 204-205 [55]-[56]) observed that there might be many reasons why a prisoner would not accept his guilt. These include an unwillingness to accept that he had lied in the past, an unwillingness to confront loss of face in accepting what has previously been denied and the possibility that the prisoner had been wrongly convicted.

Although a decision to refuse parole based solely upon the offender's denial of guilt and refusal or inability to enter a rehabilitation program would be erroneous, these matters remain relevant to the decision whether to grant or refuse parole: see *Mott-v-Queensland Community Corrections Board* [1995] 2 Qd R 261 per Fitzgerald P at 269-270, Davies JA at 271-272, and McPherson JA at 275-276; and *Varney* (supra) per Ipp J at 208 [71]. Further, *Varney* has been followed in New South Wales: *CU-v-State Parole Authority of NSW* [2006] NSWSC 526.

Despite the decision in *Varney* (supra), the prison authorities in Western Australia continue to insist on an acceptance of guilt before a prisoner can be considered for parole, with the effect that many prisoners find themselves serving the full non-parole term

It is submitted that the concept of refusing parole to persons who refuse to accept guilt over offences that they have been convicted is offensive to human rights, no matter how soundly based in principle. Bank robbers and drug dealers would not appear to be subject to the same sort of disability.

It will be interesting to see if the present regime survives the Human Rights legislation that has recently been enacted in Victoria and has been foreshadowed in Western Australia.

14. The Future

If there is any perceptible change in judicial attitudes that is to be gleaned from the recent trend of cases it is that the tariff is certainly on the "up".

In *VIM-v-The State of Western Australia* (supra) at [288] the West Australian Court of Appeal recently observed that there had been in recent years a *"firming up"* of sentences for sexual assault, particularly those involving children. The reason for this was expressed as being as a result of the "*better understanding of the long term effects of such offending"* which has been asserted in cases such as *Rogers-v-R* [2004]

WASCA 147 at [54] and *S-v-R* [2004] WASCA 113 at [56]. The Court in *VIM-v-The State of Western Australia* (supra) went on to examine the effects of this type of offending in some detail (at [289] to [294]).

Rightly or wrongly, one might expect to see this sort of "firming up" in sentences for sexual assault across the board in years to come.

However, where the Courts of a particular jurisdiction decide to increase the going rate for sentences to be imposed, it will not be appropriate for such increased sentences to be imposed upon persons who had committed their offences before the new standard was announced. Whilst it is possible that this might happen, it should not be done in the absence of good reasons for retrospective application: see *R-v-D* (1997) 69 SASR 413, 96 A Crim R 364, referred to in *R-v-Kench* (supra).

The jurisprudence of sexual assault has developed significantly over the past 25 year and no doubt will continue to do so.

Many of the archaic and quasi-biblical notions that once governed the area have disappeared.

Whilst the physical acts constituting the offences themselves remain largely unchanged, our terminology and our conception of them, and their hierarchy, have and will continue to evolve with our understanding of their impact on the victim, the family and on society in general.

One would expect that the area of sexual assault will continue to become more specialised and the task of counsel and sentencing judges will not be immune from that process.

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J A Davies