

## **HANDOUT**

### **The Judge's Perspective On Sentencing**

#### **The Honourable Justice Osborn**

I am privileged to have the opportunity to speak to you this evening at the invitation of the Chairman of what I see is called the Accreditation and Dispensation Committee.

My own first recollection of accreditation and certification goes back 50 years to a very cold morning when I obtained my Herald Learn to Swim certificate in Colac Lake. At that time I succeeded only with some serious encouragement from the officiating dairy farmer's wife.

Although my topic tonight is the judge's perspective on sentencing, I understand that what is intended is that I should try and tell you what judges really want from barristers before sentencing. The answer I suppose is simple, we want you to make it easy. But that answer itself provokes the question why is it not easy?

In early 1957 at about the time I was plunging into the water at Lake Colac (which back then although muddy was free of blue/green algae and teeming with redfin), two men William John O'Meally and John Henry Taylor were breaking out of Pentridge Gaol. In so doing, Taylor shot a warder, one Davis, in the thigh with a pistol, fracturing the femur. Volume 98 of the Commonwealth Law Reports records subsequent events at page 13 following. In August 1957 the two men pleaded guilty before Hudson J in the Supreme Court to a charge of having escaped from Pentridge Gaol. They further pleaded not guilty to charges of wounding Davis with intent to do him grievous bodily harm. In due course they were found guilty. Taylor was then aged 27 with 10 prior convictions going back to 1950. They included offences of both dishonesty and

violence, including robbery under arms and in 1955 a prior gaol escape, larceny and assault with intent to rob whilst armed. At the time of his further escape with O'Meally in 1957, he was serving sentences aggregating about 13½ years with about 10½ years remaining to be served. O'Meally, who was then aged 37, admitted nine prior convictions going back to 1938. They included convictions for receiving, breaking and entering, assault, and in May 1952 murder. You may recall that the murder was that of a young policeman outside a cinema in Dandenong Road, Caulfield. At the time of conviction for that offence he was sentenced to death but this was commuted to "imprisonment for the full term of his life without any remissions whatsoever and without the benefit of the regulations relating to the remission of sentences." In 1955 he was also like Taylor convicted of a prison escape and sentenced to 4 years' imprisonment to be served concurrently with his life sentence. On 31 October 1957 Hudson J sentenced Taylor to 4 years' imprisonment in respect of the 1957 escape and 6 years for the wounding. In addition, on the charge of wounding, he was sentenced to be once privately whipped with the cat-ò-nine-tails and the number of strokes was fixed at 12. O'Meally received a like sentence. Each of the prisoners sought leave to appeal from the Court of Criminal Appeal of Victoria but that application was dismissed by Lowe and Gavan Duffy JJ with Smith J dissenting.

In his sentencing remarks Hudson J had made clear that "the award of corporal punishment is something that every court will shrink from, and it should be regarded as a punishment to be directed only in exceptional circumstances." His honour held however that the circumstances were exceptional and called for such punishment.

He referred to the need to protect prison officers against violence; the temptation of prison officers to inflict private punishment if such violence were not adequately punished by the court; His Honour's view that the prisoners' records demonstrated they

were beyond hope of reform, His Honour's view that the imposition of further terms of imprisonment would be a totally inadequate punishment of no real deterrent value and in O'Malley's case would be farcical; His Honour's view that in Taylor's case it would be so far distant a penalty as to have no deterrent value. His Honour then referred to the Departmental Committee of Corporal Punishment in its Report to the Secretary of State for the Home Department of 19 February 1938, which recommended that corporal punishment be retained as a punishment for serious offences against prison discipline because of its deterrent value. Lastly, he recorded that he accepted medical evidence that whipping would not be injurious to prisoners' health and that he had taken into account representations made on their behalf. He concluded that distasteful though it was, he should direct corporal punishment.

In dissent in the Court of Criminal Appeal Smith J accepted the submission that the orders for whipping were unduly severe, stating in part:

"Whether whipping is to be regarded as a severe punishment or not must, of course, depend upon the standards of the time. A few centuries ago, the suspects were interrogated on the rack, and burning at the stake was common and the ordinary penalty for serious crime was death, whipping was naturally regarded as a minor punishment. But with the growth of feeling against cruelty and the development of modern police systems, and the consequent drastic reduction in the severity of the sanctions of criminal law, whipping has come to be regarded, as properly so, as an extremely severe punishment, when imposed upon adults. In addition, over the last 100 years or thereabouts, the view has steadily gained ground, and it appears now to be generally accepted by those expert in such matters, that the whipping of adults is a form of punishment the use of which is ordinarily unwise, because it is likely to prove harmful not only to the interests of the prisoners so punished, but also to the interests of the gaol staffs and the community as a whole.

Over 100 hundred years ago, the Commissioners on the Criminal Law, in their Seventh Report, expressed the opinion that with very narrow exceptions confined to cases in which it might be proper to mark the offence with signal reprobation, the punishment of whipping should be rejected. 'It is a punishment,' they said, 'which is uncertain in point of severity, which inflicts an ignominious and indelible disgrace on the offender, and tends we believe, to render him callous and greatly to obstruct his return to any honest course of life'."<sup>1</sup>

He went on to detail the findings of a series of international reports relating to corporal punishment and then after recording that the sentencing judge had made it plain that he accepted that whippings were very severe sentences, dissected the reasons advanced for the penalty in this case.

- (1) He observed that it could not be said that in the case of Taylor who is serving a limited term of imprisonment, that absent whipping no effective punishment would be imposed at all.
- (2) In the case of O'Malley a penalty imposed to be served after the expiration of previous sentences would also affect his prospects of release in old age.<sup>2</sup>
- (3) Further no weight had been given to the fact that the prisoners were kept in separate confinement for seven months after the offence.
- (4) The statement that both men were clearly beyond the hope of reform was in his Honour's view open to challenge if the long view term were taken.
- (5) A reference to the temptation to prison officers to use unlawful behaviour, unless they themselves were adequately protected against violence, was problematic for a number of reasons (which I do not have time to elaborate).
- (6) The weight to be given to the 1938 report relied on by Hudson J was open to serious challenge

Accordingly, in his Honour's view the appeal should be allowed and the appellants resentenced to additional cumulative periods of imprisonment.

The matter then went to the High Court comprising Dixon CJ, Williams, Webb, Fullagar and Taylor JJ. It was argued first that the relevant provisions of the *Crimes Act* did not authorise whipping for the offence committed and secondly, that the considerations which led to the infliction of the whipping went outside those governing the relevant discretion.

From 1864 to 1949 the Victorian *Crimes Act* had provided for whipping in respect of a group of homicidal, violent and sexual offences. Thereafter the discretion to inflict whipping was dependent upon "the opinion of the court that the commission was attended or accompanied by cruelty or great personal violence."

The High Court rejected the argument that the words "accompanied by" meant additional to conduct constituting the offence. It further held that the surrounding circumstances identified by the sentencing judge, were relevant to the exercise of the discretion, because they were "not irrelevant" to the character of the great personal violence in issue.

What does this case say to us in terms of my topic? First, that although the judgments of the High Court at that time still illuminate the substantive law in a number of areas, the politically predominant character of community expectations with respect to sentencing for violent offences has changed. We no longer order whippings. Notions of appropriate sentencing are simply not as fixed as most other significant elements of the criminal law. Indeed, an eminent neurologist friend of mine tells me that the probability is that in 50 years' time the primary question for the sentencing judge, confronted with serious and deliberate violence, will be whether the prisoner is to be genetically modified or not. Whether that is proved to be correct or not, the simple point

is that sentencing causes anxiety in part because it occurs in a continuing historical flux of changing ideas.

The second observation I would make about the decision in O'Meally, is that the characterisation of the personal violence in issue relevant to sentencing was not limited to the objective content of violence. It extended to matters affecting the moral culpability of the prisoners, including the fact that they were prisoners, that they had already broken out of gaol previously, that the man shot was a prison official wounded in order to effect an escape and that the men respectively had before them the terms of imprisonment I have already referred to. So that once the sentencing discretion was enlivened the potentially relevant circumstances were complex and extended to social considerations on which views in the community might differ widely. Once again the potential complexity of the matrix of fact that may be said to bear upon a particular sentencing discretion materially complicates the sentencing judge's task on a day to day basis.

The third observation I would make is that there is no evidence of which I am aware, that flogging was ever particularly effective as a sentencing option save to assuage public outrage. But if we are honest, the application of the sort of empirical tests that are routinely applied to assess the success of medical procedures, would lead to the rejection of most of the sentencing options available to us in the present day at least in terms of effectual impact on human behaviour. Once again this is not particularly conducive to easy confidence in sentencing.

The last observation that O'Meally's case prompts in me is that the sentencing exercise confronts a judge with his or her own notions of injustice. As Solzhenitsyn wrote in *The First Circle*:

"What is the most precious thing in the world? It seems to be the consciousness of not participating in injustice. Injustice is stronger than you are, it always was and it always will be; but let it not be committed through you."

If it is accepted that sentencing may be difficult, what then can barristers do to help? No doubt every judge would come up with a different list but I will content myself with six things.

- (a) Comply with their duties as counsel;
- (b) Engage in rational discourse;
- (c) Put forward a coherent case on the facts;
- (d) Grapple with the subjective;
- (e) Save us from error; and
- (f) Show a way forward.

I pass over the obvious, which is that you must persuade the particular judge whom it is your good fortune to draw. It is said Napoleon was colour blind and could not tell the sight of blood from water. I do not pretend that each of us does not have different capacities for perception and insight depending on the case before us. Likewise, I realise most of you will have days when, like Nina Simone, you will go into court singing to yourselves: "I'm just a soul whose intentions are good, Oh Lord please don't let me be misunderstood."

## **Counsel's Obligations**

The Victorian Bar Good Conduct Guide deals with the obligations of counsel in criminal trials in chapter 9 and I refer you to it.

In turn Practice Rule 147 provides:

"A prosecutor must not seek to persuade the court to impose a vindictive sentence or a sentence of a particular magnitude, but:

- (a) must make an adequate presentation of the facts;
- (b) must correct any error made by the opponent in address on sentence and fairly test any defence evidence;
- (c) must inform the court of any relevant authority or legislation bearing on the appropriate sentence;
- (d) must assist the court to avoid appealable error on the issue of the sentence;
- (e) may submit that a custodial or non-custodial sentence is appropriate; and
- (f) may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant appellate authority."

Although the Rules do not specifically so provide, one would expect defence counsel also to reciprocally address each of the matters listed. Rule 152 further provides:

"Where the accused is a person who suffers from some mental or physical disability or appears to be disadvantaged from lack of education, lack of familiarity with the English language, lack of ability to communicate, or otherwise, a barrister appearing for the accused should take special care to ensure that those factors do not work to the accused's prejudice."

Practice Rules 158 and 159 further provide:

"A barrister will not have made a misleading statement to a court simply by failing to disclose facts known to the barrister concerning the client's character or past, when the barrister makes other statements concerning

those matters to the court and those statements are not themselves misleading.

Where on sentence a barrister is aware of a client's previous convictions which have not been made known to the court by the prosecution, the barrister is under no duty to correct the omission of the prosecution. However, the barrister remains under a duty not to mislead the court and therefore should not make any submission capable of being regarded as an assertion that the client has no previous convictions."

I take these rules as a given starting point but I do not propose to say more about these Rules except to observe rule 147(f) appears to be given little effect in practice.

### **Rational Discourse**

There is a sense in which the process or ritual, if you like, of judgment is itself significant to the community. The process of sentencing is not simply concerned with outcomes. This is implicit in the provisions now contained in the *Sentencing Act* with respect to victim impact statements but it is of more fundamental and general importance. If denunciation of the prisoner's conduct is a legitimate end of sentencing, as the *Sentencing Act* 1991 tells us, then surely the message must have a rational basis, if it is to carry any real authority.

The process of rational discourse not only assists judges but in a fundamental sense serves to legitimise the Court's decision.

It may also offer some comfort to your customer who probably feels like Josef K in Kafka's *Der Prozess* (the trial).

If you ask what does the process of rational discourse involve, then I would call in aid two concepts utilised as the touchstones of decision making in town planning law. I do

so partly because some of you would expect me to and despite the fact that I realise the connection between the two fields is tenuous. Sitting in both fields in the Supreme Court demonstrates that a garden in planning law is something which contributes to the amenity of the area and may constitute a landscape buffer. In the criminal law it is more likely to be the place where the accused is alleged to have buried the deceased or the murder weapon. Nevertheless, the two concepts I have in mind are those of net community benefit and sustainable outcomes. The first notion recognises that serious decisions made in the public interest will almost always involve the balancing of competing factors favouring different results. These are to be resolved by decision as to the net community benefit to be achieved by a particular outcome. The factors include both policy objectives or sentencing purposes and factual considerations. Both categories of factor may include matters which favour different and conflicting outcomes. Such a decision making framework is common to administrative decisions, but may trouble lawyers, because it gives no guarantee of what consideration will be regarded as paramount either conceptually or factually. In effect it maximises the discretionary nature of the decision. It follows from its nature that rational discourse requires an advocate to confront the identification of relevant factors and enter into questions of balance. It is seldom particularly useful to just put one side of the equation, without at least acknowledging counterbalancing factors. The fact that sentencing is ultimately thought to involve an instinctive synthesis<sup>3</sup>, does not preclude the rational articulation of the factors relevant to that synthesis, nor does it preclude rational argument as to their relative weight in the circumstances of the case.

The second concept I have mentioned namely that of sustainable outcomes is not capable of being literally applied to sentencing, but it encourages the view that rational

discourse requires a broad long term perspective and should not merely be a response which confronts the present shock and horror of a problem.

### **Addressing the Facts**

Disraeli said "Justice is truth in action". We may not have the confidence of the 19<sup>th</sup> Century but sentencing necessarily involves an inquiry into the truth of relevant facts, including in particular the character of the criminal conduct in issue.

In his book *Advocacy With Honour*, the Hon. John Harber Phillips QC deals with the making of a plea at chapter 10. He suggests that counsel must consider the age of their client, their client's background, their client's involvement in the crime or crimes, their client's present situation, the necessity for evidence upon the plea, and how best to put a final submission which seeks to balance relevant considerations, review sentencing options and produce a positive, constructive suggestion as to what should be done. The structure he suggests has much to commend it.

At one point he suggests:<sup>4</sup>

"Pose the following questions for yourself:

- Was your client the principal actor in the offence or did he play a minor role?
- Was the offence premeditated or was it performed on the spur of the moment?
- What pressures was your client subject to in either instance?
- Was the offence isolated or, if it is conduct of a criminal nature extended over a protracted period of time could it be legitimately categorised as really one criminal enterprise?
- Was your client influenced by another offender?
- If so, was he disadvantageously placed to resist that influence by reasons of relationship, age, inexperience etc?

Try, too, to quantify the amount of damage, either physical or monetary. Keep an eye out for materials suggestive of the desirability of obtaining a psychiatric report and, if in any doubt, obtain one anyway."

Particular cases will raise other issues of fact but those listed above are a useful starting point.

The basic rules which the judge must apply on sentencing are simply:

- He or she must sentence on a basis that is consistent with the jury's verdict (if any);
- He or she must be satisfied beyond reasonable doubt of matters adverse to the accused; and
- He or she must be satisfied on the balance of probabilities of matters favourable to the accused.<sup>5</sup>

It can be seen it may be less than helpful to give an account of relevant facts from the accused's point of view, without addressing the relative cogency of the evidence.

It may be that the judge should have a reasonable doubt as to some characterisation of the facts put forward by the prosecution, or that he or she should be satisfied of facts favourable to the accused, but simply asserting a story will often not be enough.

Particular problems arise where the client wishes to preserve appeal rights in respect of conviction by maintaining a position of denial, or where there are obvious gaps in his or her story (e.g. where did the accused obtain the weapon used in the offence, or how did some other circumstance critical to the sequence of events occur?) Particular facts in issue need to be addressed in the light of or despite such gaps in the evidence. It

needs to be recognised that the judge may simply not be persuaded one way or the other as to particular facts and the consequences of this possibility for the prisoner need to be considered.

The judge may be left in the position Coldrey J recently found himself in the case of *Liu*<sup>6</sup> when he said at [32]:

"I have mentioned these aspects of your record of interview to indicate the absence of any sufficient satisfactory material before the Court as to how the events in this house unfolded. What you said to police was, in my view, designed to minimise the gravity of the crimes you had perpetrated. Even if you are genuinely unable to advance reasons for your actions, that circumstance must be of concern to this Court and the community."

A further problem arises when the judge is not satisfied (again as in *Liu*) of the factual basis on which a psychologist's report or other opinion relating to the accused's state of mind, is premised.

### **The Subjective Explanation for the Offence and Associated Questions of Moral Culpability**

The application of the above principles may be particularly problematic where a plea is directed to persuading the judge of reduced moral culpability. I instance provocation which has now been abolished as a defence to murder. It will not now be for the prosecution to disprove provocation as a possibility upon the trial. It will be for the defence on plea to persuade the judge on the balance of probabilities that there was provocation, that the prisoner lost self-control and (if the case permits) that the ordinary person might also have lost self-control and killed as the prisoner did in the relevant circumstances.

It is highly likely that the evidence bearing on these factual issues may be just as contentious in the sentencing context as it was under the law now repealed upon trial when the failure by the prosecution to disprove provocation, resulted in a verdict of manslaughter.

Indeed it may be that the potential ambit of evidence will be expanded from that traditionally received on sentence.

The Victorian law Reform Commission *Defences to Homicide Final Report*<sup>7</sup> stated at 7.35 (p. 282):

"7.35 ... Although judges frequently denounce the behaviour of men who kill their partners in the context of infidelity or threatened separation, men who are convicted of manslaughter on the grounds of provocation receive significantly lighter sentences than men convicted of murder. The abolition of provocation as a partial defence will require courts to consider how to sentence men who kill in those circumstances.

7.36 Where the offender pleads guilty to murder and/or there is evidence the killing was unpremeditated, they will often receive a sentence at the lower end of the range for murder, although this will depend on a range of factors. Evidence of a psychiatric illness falling short of mental impairment may also be regarded as reducing culpability. However, if the killing involved particularly brutal or sustained violence, or the offender has a history of violence against the accused ... this may result in a sentence at the higher end of the range."

The report went on to suggest:

"7.37 In some cases it would be useful for the prosecution to lead at sentencing both case specific and general social context evidence on the dynamics of violence. This would assist the judge to understand the reasons why, for example, the deceased had reacted violently or abusively to the offender before the killing. Absence of such evidence could lead the court to conclude that the offender's culpability is to some extent reduced by the alleged behaviour of the deceased, even though the deceased's behaviour was a response to the offender's prior violence."

It may be of course that such evidence will now have been led at committal or trial because evidence falling within the family violence provisions of section 9AH of the *Crimes Act* may be before the court if self defence is an issue.<sup>8</sup>

If evidence of the type suggested is to be regarded as potentially significant to the sentencing process, it may give rise to significant forensic dispute at the sentencing hearing. It may also raise significant issues of social equity and in particular the capacity of legally aided offenders, to meet and challenge such evidence.

The reform to the law poses a further more fundamental issue. It reflects the growing trend identified by Fox and Freiberg<sup>9</sup> for modern penal legislation to deal with excuses after guilt. As they observe this invests the sentencer with vastly increased responsibility.

The Victorian Law Reform Commission's Final Report with respect to Defences to Homicide ultimately expressed the view at 7.53 and 7.54:

"The Commission considers it important to address the concern that a conviction for murder will necessarily attract a higher sentence than would have been the case for a manslaughter conviction, if provocation were retained. There is no minimum sentence for either murder or manslaughter. The sentencing judge should be prepared to use the full range of options available when the offender has been subjected to violence by the victim. When an offender is convicted of murder, the court should consider whether the violence experienced by the offender, combined with other factors, justifies imposing a very short custodial sentence or even suspending it altogether. In other words, the full range of sentencing options should be considered, even where the offender is convicted of murder. This is recommended below.

During our consultations, some people were concerned that judges sentencing offenders who have been convicted of murder would feel under public pressure to impose longer sentences, even where this was inappropriate because of the circumstances of the killing. At present the shorter sentences imposed on offenders who kill in response to violence or other types of provocation can be attributed to the fact that they were convicted of manslaughter, rather than murder. The Commission considers that the best way of meeting this concern is to provide the public with more information about the sentencing process. In [7.60] we refer to the recent

establishment in Victoria of an Sentencing Advisory Council, which shall have responsibility for providing public education on sentencing."

It can be seen that despite the abolition of provocation as a partial defence to murder, it was envisaged that it might still be of such significance as a factual consideration as to result in a non-custodial sentence of the type sometimes imposed (principally on women) offenders convicted of manslaughter in the past.

I fear there may be very difficult pleas to be made by some of you in the future, if you are to achieve this result and likewise some difficult sentencing exercises for judges.

I can only say that this sort of situation is a classic example of that in which the Bench would hope for genuine assistance from the Bar in working out how the new law should operate in practice.

In more general terms however difficult all this may seem, a credible explanation as to how the offender came to do what he or she did, is likely to be of material assistance to the judge. It will either leave the judge persuaded on the probabilities or unable to be satisfied beyond reasonable doubt of less favourable scenarios.

### **Error**

The decisions of the Court of Appeal are replete with cases in which the judge:

- (a) failed to have regard to a material fact or give it sufficient weight;
- (b) failed to have regard to the relevant provisions of the *Sentencing Act 1991*;
- (c) failed to have regard to case law bearing on the relevant principles to be applied in the particular case; or

- (d) imposed a manifestly excessive sentence,

I offer the following short list of some of the matters which are the subject of helpful authority: Aboriginality, addiction, aggravating features of the offence, alcoholism, assistance to the authorities, breach of trust, brutality, concurrence and cumulation, consequences for future employment, depression, deterrence, duration of the offending conduct, extensive delay, flight from the scene, good character, gratuitous unprovoked behaviour, guilty plea, habitual offender, impact of imprisonment on dependent child, medical disorder, mental disorder/intellectual disability, mitigating features, parity, place of the offence, prior convictions, proportionality, provocation, relationship between head sentence and non-parole period, remorse, role in an organised offence such as drug trafficking, self-defence, totality, vulnerability to prison conditions.

This list is not complete, most of you will have made pleas in which other significant factors arose. You can see there is considerable scope for the articulation of principle relevant to the sentencing discretion and in its absence for error by the judge.

It falls outside the scope of this paper to digest the vast amount of authority which is constantly generated with respect to sentencing. Nevertheless, it is possible to say something about the broad conceptual framework in which the relevant principles are to be applied. The purposes of the Act as stated in s.1 include:

- "(d) to prevent crime and promote respect for the law by—
- (i) providing for sentences that are intended to deter the offender or other persons from committing offences of the same or a similar character; and
  - (ii) providing for sentences that facilitate the rehabilitation of offenders; and
  - (iii) providing for sentences that allow the court to denounce the type of conduct in which the offender engaged; and

- (iv) ensuring that offenders are only punished to the extent justified by—
  - (A) the nature and gravity of their offences; and
  - (B) their culpability and degree of responsibility for their offences; and
  - (C) the presence of any aggravating or mitigating factor concerning the offender and of any other relevant circumstances; ..."

These notions of deterrence, rehabilitation, denunciation, and just and appropriate sentence, are taken up by s.5(1) which states that:

- "(1) The only purposes for which sentences may be imposed are—
- (a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or
  - (b) to deter the offender or other persons from committing offences of the same or a similar character; or
  - (c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
  - (d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or
  - (e) to protect the community from the offender; or
  - (f) a combination of two or more of those purposes."

In turn s.5(2) sets out factors to which the Court must have regard (terminology that implies other matters may also be relevant).

- "(2) In sentencing an offender a court must have regard to —
- (a) the maximum penalty prescribed for the offence; and
  - (b) current sentencing practices; and
  - (c) the nature and gravity of the offence; and
  - (d) the offender's culpability and degree of responsibility for the offence; and
  - (daa) the impact of the offence on any victim of the offence; and
  - (da) the personal circumstances of any victim of the offence; and
  - (db) any injury, loss or damage resulting directly from the offence; and

- (e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; and
- (f) the offender's previous character; and
- (g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances."

After specifying some further statutory factors to which the Court may have regard or alternatively must not have regard, the Act goes on to state in s.5(3) that:

"A court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed."

This principle is then elaborated in s.ss.5(4) –(7).

It can be seen that the Act both states matters of fundamental principle and elaborations of such principle, the utility of some of which elaborations may be debatable, e.g. s.5(2)(da) and (db) and see s.6.

It is, however, necessary that these principles have a protean quality if they are to accommodate changing circumstances.

Moreover, the Act requires decision making that involves first, identification of the purposes which a sentence should serve and secondly, consideration of relevant factors, including the character of the offence as a component of our system of law, the circumstances of the offence, the impact of the offence and the offender's prior and subsequent conduct.

As I have already observed the achievement of a particular purpose may conflict with the achievement of another relevant purposes, and the giving of weight to a particular factor may count against the giving of weight to another relevant factor.<sup>10</sup>

It can be seen that counsel's role in assisting the Court may involve identifying relevant purposes and/or the existence of relevant factors. The failure to identify such factors and explicitly apply them to the sentencing equation, is a frequent basis for challenge on appeal.

### **Assistance with the Way Forward**

The above matters should culminate in a considered submission as to the sentencing options. In most serious cases and particularly if the case is one where there is a risk of adverse emotional reaction from the bench, it is prudent to refer to what are called in other circles "comparable sales", to try and establish a range of potentially appropriate penalties. And then to distinguish the characteristics of your case so as to fix on a range of appropriate outcomes.

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1 *William John O'Meally and John Henry Taylor v The Queen* (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Lowe, Gavan-Duffy and Smith JJ, 19 December 1957).

2 *Cf R v Jolly* [1982] VR 46.

3 *R v Williscroft* [1975] VR 292 at 300 per Adam and Crockett JJ.  
4 at p. 89.

5 *R v Storey* [1998] 1 VR 359; *R v Olbrich* (1999) 199 CLR 270.

6 [2007] VSC 42

7 October 2004.

8 *Crimes Act* 1958 s 9AH (3) Evidence of —

- (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
- (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;
- (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
- (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;
- (e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;
- (f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

9 Richard G. Fox and Arie Freiberg, *Sentencing State and Federal Law In Victoria* (2nd ed, 1999) Oxford University Press [182].

10 *Veen v R* (No. 2) (1988) 164 CLR 465, at 476.