Justice Responses to Sexual Violence

Submission to

Australian Law Reform Commission

of Mr. F. Gilroy - May 2024.

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1. The Author

The following commentary and its proposed recommendations are provided by Mr. Frank Gilroy, a recently retired solicitor, having practiced law in Newcastle N.S.W. and who prior to that career served for 40 years as a NSW Police Officer, before retiring having attained the rank of Detective Chief Inspector.

After obtaining his legal qualifications at Sydney University, he successfully completed his post-graduate Legal Practice qualifications through the College of Law. He also holds a post-graduate degree Management from the University of Wollongong, and subsequently continued with additional legal studies in jurisprudence with the Harvard University Law School in the United States of America.

His Policing career spanned duties including major crime investigations as a Detective of the Homicide Squad, involving numerous successful murder investigations including a number committed involving sexual violence. His later policing career included frontline Policing Command and Leadership roles as a Duty Officer, Crime Manager and Local Area Commander. He was also selected and undertook secondments including as the Police Force's advisor to the NSW Department of Premier and Cabinet.

The recommended actions proposed within this submission are drawn from extensive experience and knowledge of the author, obtained through his careers in the Australian legal profession as a Solicitor, as well as from four decades as a Police Officer.

2. Introduction

Rather than has traditionally been the case where the relevant portions of society were limited to smaller identifiable cohorts of survivor victims of crime, of recent times the wider variety of participants in public outcries and demonstrations held across the nation illustrate there is an increasing proportion of the community who have collectively arrived at the conclusion, 'The Law does not protect us.' Confirmation of this contention is possible if one is to refer to images in national and international news media depicting the regular public demonstrations around Australia, noting the banners which are prominently displayed during those events, declaring that belief.

The object of the administration of criminal justice is considered by society to be the responsibility to serve as a conduit through which Government is expected to fulfil its duty in protecting the general community from becoming victims of crime. It is the inadequate utilization of the available penalties within present legislation which is the catalyst of the emergent belief of failure the law for which the Government is held accountable by society. Any doubt of the existence of this perception can be swiftly dispelled in observance of the surprise and subsequent consternation expressed by 'lay members' of the community when informed of the actual available maximum penalties for crimes under present legislation.

Recognition of this situation accepts the fact new legislative provisions are not what is necessary. That is so as it is not an inadequacy of the law per se which is the genesis of this growing perception of the law's failure in protecting the community from becoming victims of crime.

What would be achieved through the enactment of new legislative provisions imposing harsher penalties? In putting aside momentarily, recognition of the necessity for penalties to impose harsher sanctions upon offenders, the response to that inquiry is that nothing would be achieved merely from new legislative sanctions.

That would be so since in the absence of the implementation of effective enhancements impacting upon the obligations which act to govern the considerations of the Courts, the sentences actually imposed would retain their present ineffective character. The Court, in adherence to its present obligations would remain forced to utilize those newly available legislative sanctions inadequately in sentencing. The reason for the inadequacy is the continued absence of any viable deterrent to result from the outcome of sentencing.

Increased frequency of occurrences of crime are repeated demonstrations of the direct consequence of the failure to utilize the sanctions in place within the law. The Legislature's intention in the enactment of instruments containing punishment, was in retribution specifically with the view to protect the community through effective prevention of such conduct.

It is crucial to remain conscious of the fact that sanctions within the laws in a civilized society exist with various specific objectives. A primary one of these is that through the threat of their imposition upon detected perpetrators of abhorrent conduct, a deterrence against incidences of such conduct is generated by the law through punishment. Through the failure to continue to impose effective punishments there has developed an axiomatic absence of deterrence to the undertaking of offending conduct, including sexual violence. Why would it not occur, and reoccur when the ramifications upon the perpetrators of such conduct is negligible?

This inadequate admonishment of offending conduct is being demonstrated with increasing regularity, and not only in relation to conduct involving sexual violence. Confirmation of this wider derisory impact upon the prevention of the creation of victims of crime, by the present inadequate utilization of the provisions of the law in sentencing, is evident through emergent trends in the incidences of a plethora of other criminal activities. It is for example, illustrated in categories of crimes including, yet not restricted to, domestic violence related homicides, serious road crimes, and the incidence of youth crime activities within numerous jurisdictions around Australia.

Those increases in crime trends resulted in recognition by varied groups, including the New South Wales Law Reform Commission[1], of the necessity for the imposition of harsher sanctions upon offenders due to acceptance of the need for a more significant deterrence of crime than that which is presently being occasioned.

The proposition of this submission does not recommend any alteration to the legislative sanctions presently existing within the law. The primary focus of this submission's proposed course of action is for more effective utilization of presently existing sanctions. What is required for Justice to be achieved is possible through the implementation of an alternative paradigm impacting upon presumptions and considerations of the Courts during sentencing.

It is intended in this submission to extrapolate upon a notion proposing that through rationalization of the priorities within the paradigm influencing the considerations in operation in the sentencing phases of the criminal justice processes, the recognized necessary enhancement to the effective provision of Justice will be achieved. Furthermore, it is intended to illustrate the existence of the appropriate mechanisms presently in operation within the processes in administration of justice through which the rationalization recommended is possible.

3. Absence of Deterrence – 'The Law doesn't protect us'

Any contention which proposes that the current outcomes of sentencing processes in the various Australian criminal justice systems function to effectively provide an adequate deterrence to the undertaking of conduct contrary to the law, and through such effect thereby reduce crime, is it is argued to be a fiction. Presently insufficient weight is apportioned to the evaluation of the need to protect the community and to deterrence of criminal conduct than that which is afforded to considerations in mitigation of the perpetrators culpability when sentencing convicted offenders.

[1] NSW Law Reform Commission, Consultaton Paper 23, *Serious Road Crime*, p viii.

When inappropriate weight is attributed to preferences for rehabilitation of the perpetrator over other recognized purposes for sentencing criminals, it requires the subjugation of the rights of the survivor victims of crime, as well as those of society, to the rights of the perpetrator. That is because affording that concept a priority in sentencing considerations can only occur at the expense of the six other purposes for punishment of offenders recognized by the law. When such a prioritization is considered preferable by some, it is likely due to their failure to, or their decision to not recognize that to achieve that imbalance is to ignore, and thereby discredit, or at least devalue, the equally appropriate considerations relating to the imposition of punishment upon perpetrators. A significant one of these is the requirement for deterrence, achieved in part through retribution to flow as a result of the offender's dereliction in adherence to society's required standards of conduct under the social contract of its membership.

How is it a society determines certain conduct to be below requisite societal standards? It is through the enactment of laws declaring the conduct illegal. Those laws contain sanctions for a breach of those standards. Why is it those laws contain sanctions? It is intended, as the other recognized reasons for sentencing by Courts declare, to deter such conduct in society's members and admonish the offenders for committing those crimes.

When the law inadequately responds to crime, the otherwise avoidable outcome is the creation of circumstances in which the victim observes no adequate punishment from society upon the perpetrator. Those victims then find it necessary, in addition to the psychological challenges of recovering from the trauma of the crime committed upon them, to further endure the realization society has compounded that failure with also failing to impose any tangible deterrent upon the specific perpetrator to reoffend, and further still, failed to generate any effective deterrent to others.

Realistically it is more likely those failures shall have the effect of encouraging, rather than discouraging, other potential offenders as a consequence of them witnessing the inadequacy of response by the law in terms of potential ramifications from crime. The harm continues because it is apparent to survivor victims, after those failures in response to crime, it is considered to be an appropriate gesture by some, for society to offer to financially compensate the victim, under the guise of protecting them from the rigors of a being a witness in a criminal trial.

Circumstances have then evolved into a significantly inefficient and damaging position. This is so as any compensation, were it to be in lieu of punishment, serves to be a demonstration of what the former American Chief Justice of the US Court of Appeals for 7th Circuit, Richard Allen Posner described as, *'...compensation is a means of deterring inefficiency...'*.[2] The inefficiency in this respect being the failure by society in prevention of the creation of a victim of a crime of sexual violence.

That failure by society in this situation is a demonstration of the fact which when ignored is thus one which society refuses to accept, or the least to address, namely its responsibility to prevent crime. That is also illustrated in recognition of the fact of the absence of any tangible acceptance of responsibility for failure to prevent the creation of victims is contained within any 'Charter of Victims' Rights.' All such Charters examined do not propose any action until *after* the offence. A more onerous obligation by society to its member's would be accepting to undertake protection of the 'rights' not to be victimized as a result of society's failures in preventing crime. Effective deterrence of crime would allow society to address this more appropriate, yet ignored responsibility.

More pernicious than those failures for survivor victims, is the fact that it is then implied by the response of the society which further failed them through the absence of punishment, that the provision of compensation for the physical and psychological harm the perpetrator inflicted upon the victim, is deemed to be an appropriate response to that harm. It is so considered despite the fact doing so is tantamount to society converting the harm the survivor victim suffered into a dollar value. To blithely accept this response as an acceptable reaction by society for its failure to protect a victim is naïve, grossly demeaning and hence unconscionably inappropriate.

Equally inappropriate and inconsiderate of survivor victims of sexual violence emotional and psychological state, is the proposal for offence specific courts, or court days.[3] Are its proponents so uninformed, or disconnected with relevant circumstances as to actually be unaware this proposition would stigmatize all victims attending such a court?

[2] Posner, R A 'Economic Analysis of Law', (Wolter, Kluner, Law & Business, Aspen Publishers, 2011).
[3] Australian Government, Australian Law Reform Commission, Issues Paper 49, 'Justice Response to Sexual Violence', 18, [89].

That is so, being as they would feel immediately recognizable as the victims of sexual violence simply by being in attendance. In recognizing this as fact, it is appropriate at this juncture to require consideration of the impact this would have upon the readiness of victims to report offences.

Any doubts in relation to this situation arising can be dispelled by recognition of the trepidation victims of domestic violence experience in attending court upon the days of the week specifically designated for attending to domestic violence cases. Their concerns arise not merely from facing their tormentor, which can and often is effectively addressed. It is from feeling recognized by all as a domestic violence victim merely by being in attendance which often produces such fears. This is a fear so overwhelming for some that it is preferable to suffer abuse than endure the embarrassment they feel from that experience, and hence do not report the abuse.

Whether in respect of protective orders, or to compensatory responses to crimes of sexual violence, there exists a significant risk associated with the adoption of such outcomes where they are proposed in lieu of criminal prosecution and subsequent effective punishment. Yet, such responses are often raised as alternative responses, under a guise of protecting survivor victims from the rigors of criminal proceedings. The risks posed by such actions in lieu of punishment, rather than as an adjunct to it, have been long recognized and discussed widely, including in previous endeavours of the Australian Law Reform Commission *(ALRC / the Commission)*.

To highlight but a few, reference is made to the ALRC Final Report 114 in which such concerns were repeatedly raised,

'There may be legitimate reasons that police and prosecutors, ...might seek a protection order…but not pursue criminal charges. ...But are decision makers sometimes wrongly choosing to pursue one remedy at the expense of another?'[4]

[4] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence-A National Legal Response, (ALRC Final Report 114) October, 2010, 352, [8.32].*

Further to accepting the result of the subjugation of the rights of survivor victims and society to those of criminals from the assertion of such a stance, were the observations that avoiding criminal prosecution for violent crime is an approach which is also, *'...downplaying its significance by applying what is essentially a private law remedy.'*[5]

To refute the proposition of the possible adequacy of purely compensatory responses for survivor victims, raised in the Commission's present issue paper[6]it is recommended reference is made to earlier activities of the Commission itself. Attention is drawn to the Commission's Final Report 114 and the reference therein to the observations of Dr. Jocelynne Scott,

'... Dr. Jocelynne Scott argued that family violence laws effectively "decriminalize" family violence:"...treating assault not as criminal, but to be dealt with by a civil law 'solution'. The man is not penalized for assaulting his wife...", '[7].

Within the same report the Commission utilizes the then Federal Attorney-General's reference to Amnesty International noting this organization's recommendation which declared, '*Civil protection orders are an essential part of the state's responsibility to protect survivors of violence, but should complement, not replace a criminal response.'*[8].

As previously pondered, how does such a response by society to crimes if imposed in lieu of punishment, act to deter further occurrences of it, by that perpetrator or other observers with a predilection for such conduct? Simply it does not, it fails. How then does that serve to reduce the incidence of sexual violence in that community? Obviously, it does not achieve this either. The tangible outcome of doing so would therefore become an added legitimacy to the belief, "The Law doesn't protect us".

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[5] Ibid, quoting B Felilberg and J Behrens, *Australian Family Law: The Contemporary Context, (2008), 200.*
[6] Australian Government, Australian Law Reform Commission, Issues Paper 49, 'Justice Response to Sexual Violence', 27, [127].
[7] Above n 4, [8.35].
[8] Above n 4, quoting Australian Government, Attorney-General's Department, Family Courts Violence Review (2009), http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyCourtsViolenceReview, at 28 January 2010.

It is a belief which is becoming an argument which is increasingly difficult to dispel, becoming one in which from the perspective of survivor victims, is observed as a perpetrator being afforded a degree of mercy by society through its courts' sentencing processes, which is greater than the mercy which was provided by that offender to their victim during their commission of the crime.

Being overly draconian in its nature as that observation may well be, it does however effectively illustrate the degree of culpability of the perpetrator during the commission of the crime. This culpability is what is being inevitably subjugated by considerations bearing a preponderance towards rehabilitation over punishment. By accepting society should conduct itself at a level superior in benevolence than that demonstrated by the perpetrator towards the victim, it is proposed therefore that more significant attention be directed during sentencing considerations to the fact that the perpetrator's egocentric motivated criminal conduct towards the victim was at a standard below that which society is prepared to tolerate.

It is at this juncture that it is incumbent upon the criminal justice system, on behalf of society, to ensure action is taken to deter that perpetrator from repeating, or others from undertaking such conduct. That is achieved through effective punishment of the offender under the rule of law of society. At this point in a mature society, unlike a dismissive offer of financial compensation, to do so is a tangible expression of compassion generated from the commission of the offence and is appropriately and truly deserved by its victim long before any such entitlement accrues for its perpetrator. Compassion towards the offender is required to be earned through contrition.

When it is recognized the creation of victims is the result of the absence of a deterrence to criminal behaviour, it is obvious the reduction of the creation of victims is the natural consequence of an enhanced deterrent of crime. It is an irrefutable fact that the severity of the sentence likely to be imposed has the potential to act as a deterrent to the commission of crime. This fact is recognized by the ALRC when stating, *…impact upon the preparedness of an accused person to plead…include increased maximum penalties, reduced availability of sentence reductions…* '[9]

[9] Australian Government, Australian Law Reform Commission, Issues Paper 49, 'Justice Response to Sexual Violence', p 20, [97].

What is conspicuous in its absence is the existence of a likely punishment to create a deterrent significant enough to deter the commission of the offence in the first place. The effective enhancement of such a deterrence is possible through implementation of what it is this submission proposes.

Its achievement requires the rationalization of the paradigm determining the governing presumptions operating in the exercise of sentencing processes. The proposed course of action more effectively utilizes the laws currently operating within Australian jurisdictions. This is considered preferable rather than perpetuating the recognized failures of any proposal which functions to unintentionally or otherwise, dismissively financially compensate those who have had their quality of life devastated because society failed to protect them by failing to deter crime.

4. The Sentencing Paradigm – Shifting the Presumption

The proposed course of action can and shall address those shortcomings since its adoption allows superior courts to rationalize, and potentially harmonize the punishment for crime across jurisdictions. This is possible through the uniform impact upon the obligations which operate upon Courts' responsibilities in their sentencing processes.

The proposed realignment of priorities shall see sentences imposed which serve to act as a deterrent upon those potentially considering undertaking such conduct. It shall occur through a naturally resulting rise in the severity of sentences determined to be appropriate through the evolved sentencing processes.

It does so whilst invoking an appropriately egalitarian consideration of the rights of individual offenders, their victims, and those of society under the rule of law. The ALRC Issues Paper states as an objective to consider, *"... how to promote just outcomes for people who have experienced sexual violence."* [10] .

[10] Ibid, Introduction, 1 [1].

To facilitate doing so it is not considered inappropriate to catalogue as a point of reference, the established explicit purposes for which a court is to impose a sentence upon an offender. Those purposes according to law are:

i) to ensure the offender is adequately punished for the offence;
ii) to prevent crime by deterring the offender, and others from committing similar offences;
iii) to protect the community from the offender;
iv) to make the offender accountable for his/her actions;
v) to denounce the conduct of the offender;
vi) to recognize the harm done to the victim and to the community;
vii) to promote the rehabilitation of the offender.

It is proposed that it is reasonable to accept there has developed a paradigm akin to a position of *poitor est conditio defendentis*. The result has seen the import of an influence upon sentencing considerations resulting in the inadequate attribution of weight afforded to factors (i) – (vi) when compared to that which is presently attributed to purpose (vii) above. Addressing this imbalance shall rationalize sentencing considerations directing attention more than at present upon the Offence, and less upon the Offender. Addressing this anomaly of the administration of the criminal justice system effectively attends to the repair necessary regarding distinct, '*... strengths and weaknesses in the current criminal justice system...* '[11].

A proposal is therefore presented which if implemented shall be successful in achieving the necessary rationalization of the priorities. Due to its attention to the abovementioned factors that will ensure the proposed rationalization achieves an expressed desired outcome of the activities of the ALRC upon the subject issue, namely, *'... ensuring community values are represented in the criminal justice system.'*[12]

[11] Ibid 1 [5].
[12] Ibid 15, [72].

It commences through adoption of a proposed new paradigm requiring the Court's considerations upon sentencing to commence from the position of anticipating the imposition of the existing maximum penalty attributable to the relevant offence. Such a concept is not innovative, and in fact is merely a natural extrapolation of the current sentencing processes. Those processes which were previously touched upon by the ARLC in its report entitled, *'Considerations to be taken into account when sentencing'*[13], in which it noted, '*Sentencing courts also consider the maximum penalty for the offence as set by the legislature, and any submissions as to penalties for similar offending imposed by the court.'*[14] This proposal alters neither of those matters considered by sentencing courts.

During the sentencing process, under this new proposed premise, there is no alteration to the presentation of evidence in mitigation on the convicted offender's behalf. Such evdence is still adduced pertaining to matters, the consideration of which are attributed weight in deliberation of the duration of imprisonment necessary in respect of the particular matter before the court. The proportion of any reduction in sentence to be applied as a result shall be determined in qualitative terms. This determination however is limited in content to nominated categories, in accordance with new sentencing guidelines, themselves determined through the imposition of guideline judgements by the jurisdiction's superior court.

In adoption of this approach judicial officers undertaking the sentencing role shall continue to effectively retain their judicial discretion, subject as it is at present to obligations imposed by the superior court in the form of guideline judgements. The evidence presented in mitigation during submissions will be directed to justification of a reduction of the sentence from the maximum.

The appropriateness of the parameters proposed is evident, and further the proposal draws extrinsic support from recommendations received and referred to by the ALRC, which urge that it is appropriate, *'...to provide that sentencing standards at the time of sentencing apply rather than standards at the time of the offending.'*[15]

[13] Australian Law Reform Commission , ALRC Report 133, 11/01/2018, [6.7].
[14] Above n 13, citing Commonwealth Royal Commission into Institutionalised Responses to Child Sexual Abuse, Consultation Paper-Criminal Justice (2016) [12.1].
[15] Above n 9, 21, [101].

Other stakeholders retain their capacity to communicate their issues and concerns in relation to consideration of factors pertinent to the formulation of sentencing guidelines, as it is at present through a variety of sources, including local parliamentary representatives, and for example in New South Wales the state's Sentencing Council.

Criticism of this proposal is likely to additionally purport that utilization of the recommended process would be disproportionately harsh in its effect upon offenders from lower educated and disadvantaged socio-economic circumstances within the community. This has become a standardized claim made in response to any enhancement of the deterrent effect of the law. However, to argue such is to ignore the clear reality of the fact that the situation would in fact be the direct opposite of such a contention.

The recommended process functions to ensure the maintenance of an egalitarian approach to sentencing. It does so because it maintains less privileged offenders as being those with a greater capacity during the sentencing process to present matters for consideration in mitigation. The recommended process thereby continues to afford the potential for such offenders to have their sentences lowered further from the maximum penalty. Such offenders continue to potentially glean greater consideration than offenders who are more advantaged in terms of socio-economic standing, educational history and capacity, as well as opportunity within the community, and hence having the capacity to raise less matters in mitigation of their conduct. Additionally, the appropriate appellant processes of any jurisdiction remains unaltered.

By utilizing the maximum penalty prescribed as the benchmark it was intended to provide, the consideration central to this proposition is one the High Court of Australia has previously recognized as appropriate. The Court succinctly illustrated this point in the matter of *Veen*[16] when His Honour Mason C.J. stated;

> *'...the maximum penalty prescribed for an offence...does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case.'*[17].

[16] Veen v The Queen (No.2) (1988) 164 CLR 465.
[17] Ibid, [15].

5. Restorative Justice and the risk of perpetuating failures

The incorporation of the principles of restorative justice and its relevant processes presents the opportunity to further enhance the potential impact of the proposed amendments. Achieving this is however dependent upon the juncture within the processes of the administration of criminal justice at which this is to occur.

The risks of negating a deterrence to crime by considering alternative responses if such are undertaken in lieu of punishment have been illustrated. Such risks are equally pertinent to the case of any proposal for the substitution of criminal prosecution by processes of Restorative Justice. The notion of restorative justice, as described within the Commission's Issue Paper itself identify the continued existence of those previously identified risk factors. It refers to the process as one which, *' ... focusses on the examination of the harm caused by the offence and options for repairing that harm.'*[18] What is immediately apparent were it to be undertaken in isolation, is the absence to addressing the need for deterrence of the crime being committed, or repeated by its perpetrator or emulated by others.

As stated, there exists it is proposed a viable option for incorporation of restorative justice principles into effectively addressing the issue of sexual violence, or other violent crime. Relevant programs such as examples proposed by the Commission[19] have the capacity to be worthwhile undertakings if incorporated into the resolution processes at the appropriate juncture.

The most significant positive outcomes would be achievable when incorporated to facilitate presentation of the successful undertaking of activities performed by the offender as a demonstration of their genuine contrition. Similarly, equal weight should be afforded to recognition of the fact that no such activity was attempted, or it failed due to the absence of contrition on the offender's behalf. As declared earlier, the compassion of society is provided as a result of being earned by offenders through demonstration of their tangible contrition.

[18] Above n 9, 25, [121].
[19] Above n 9, 25, [122].

The incorporation of such evaluations at this phase of proceedings would directly link the performance of directed tasks to society's requisite contrition for the harm inflicted. The evaluations utilize predetermined indicators of performance, with success and failure gauged within the context of those requisite outcomes. The effectiveness conferred upon said results is generated from inculcation of those achievements or failures into considerations in mitigation of penalty, or the formulation of parole equations. In this manner positive outcomes achieved afford benefits to all parties while maintaining the law's capacity for deterrence.

6. Recommendations

It is recommended the following actions are undertaken to implement the submitted proposal:

(a) In reference to the recognized purposes of punishment by Courts, the implementation of a prioritization of sentencing considerations to be more upon the Offence, and less upon the Offender is adopted. Thereby eliminating the present inadequate attribution of weight afforded to factors (i) – (vi) when compared to that which is attributed to purpose (vii).

(b) The adoption of a proposed new paradigm requiring the Court's considerations upon sentencing to commence from the position of anticipation of the imposition of the existing maximum penalty attributable to the relevant offence.

(c) The presentation of evidence in mitigation on the convicted offender's behalf is adduced pertaining to matters limited in their content to nominated categories in accordance with new sentencing guidelines.

(d) Sentencing guidelines are determined through guideline judgements made in consideration of the new sentencing paradigm by the jurisdiction's superior court.

(e) The proportion of any reduction in sentence to be applied following the consideration of such evidence shall be determined in qualitative terms as a percentage of the penalty, ensuring the maximum penalty therefore remains prominent in considerations.

(f) Incorporation of principles of Restorative Justice is undertaken in conjunction with punishment and through being incorporated to facilitate presentation of the results of undertaking directed activity by the offender, and thereby considered as a demonstration of the degree of their contrition.

(g) Similarly, equal weight is afforded to the fact that no such activity was attempted, or failed to achieve its goals, and shall be considered to be a demonstration of an absence of contrition on the offender's behalf.

(h) The inculcation of those achievements or failures is into considerations in mitigation of penalty, or the formulation of parole equations, or other punishments being constructed.

7. Conclusions

The natural evolution of Australia's social environment as it pertains to law and order is illustrated through this commentary. It illustrates that when the law inadequately responds to crime, the otherwise avoidable outcome which the victim, the offender, and recently the general community observe, is the absence of any adequate deterrent from society upon the perpetrator of crime. This is equally applicable to any crime, including violent crime and crime involving sexual violence. With the expanding recognition of this situation there is an increasing proportion of the community who have collectively concluded, and demonstrate their displeasure with the perceived fact that, 'The Law does not protect us.'

It has been purported that the increased frequency of occurrences of crime are repeated demonstrations of the direct consequence of the failure to utilize the sanctions in place within the law. The intention of the Legislature in the enactment of instruments containing punishment, was in retribution for such conduct and was undertaken specifically with the view to prevention of such conduct.

It is crucial to remain cognizant of the fact sanctions within the laws of a civilized society exist with a number of specific objectives. One of these is that through the threat of the imposition of punishment upon detected perpetrators of related abhorrent conduct, a deterrence against incidences of such conduct is generated. Through the failure to impose appropriate punishments there has developed an axiomatic absence of deterrence to the undertaking of offending conduct.

Conducting brief examination of data pertaining to relevant sentences imposed regarding sexual and domestic violence crime over recent decades in Australia[20], revealed a causal nexus which resulted in the generation of the basis for this rapidly developing collective perception of a failure of the law to protect its community.

This nexus is seen to involve the increasing incidence of crime with the inadequate admonishment of offending conduct. It is demonstrated with increasing regularity, and not only in relation to conduct involving sexual violence. Confirmation is provided of the current derisory impact upon crime rates to result from the present inadequate utilization of provisions of the law in sentencing. It was shown as evident through emergent trends in the incidences of a plethora of other criminal activities, citing various examples around Australia.

Reference was made to a significant cause of the failure in utilization of the penalties within legislative provisions being due to the imbalance which has developed in the weight attributed to factors impacting upon the obligatory considerations upon the Courts during the sentencing phases of the criminal justice processes. It is pointed out how the needs to protect the community and to the deterrence of criminal conduct is appropriately addressed through the deterrent effect to criminal conduct which the imposition of adequate punishment induces. It was discussed that it is considered that presently insufficient weight is apportioned to the evaluation of such needs than that which is afforded to considerations in mitigation of the perpetrators culpability when sentencing convicted offenders.

[20] Brisbane Magistrates' Court, 2001, Family Violence offences resulted in 2.7% imprisonment; Australia wide 2014, Domestic Violence Homicides averaged 1 per week; NSW month of April 2024, 11 Domestic Violence Homicides.

It is believed important to iterate the fact the proposition of this submission has not recommended any alteration to the legislative sanctions presently existing within the law. It is shown to be unnecessary since the primary focus of this submission's proposed course of action is upon a more effective utilization of presently existing sanctions. It is purported that what is required for Justice to be appropriately enhanced is possible through the implementation of the proposed alternative paradigm through its impact upon presumptions and considerations of the Courts during sentencing.

It was shown the proposed enhancement commences through requiring the Court's considerations upon sentencing to commence from the position of anticipating the imposition of the existing maximum penalty attributable to the relevant offence. Matters to be considered in the calculation of an appropriate sentence within any particular case shall then proceed from that point.

As an aside, it is noted that the present political environment could facilitate implementing a potential harmonization between jurisdictions, considering the similar political persuasion of the States' and Federal Government in Australia existing at present.

It was noted that through utilization of the relevant processes within each jurisdiction for communication with its superior court during its formulation of relevant guideline judgements, the recommended rationalization of considerations is capable of being introduced.

There is proposed a viable option for incorporation of restorative justice principles into effectively addressing the issue. Such related initiatives have been demonstrated possessing the capacity to be worthwhile undertakings, if as recommended they are incorporated into the resolution processes at the appropriate juncture. The positive effect to be gleaned would then be through incorporation to facilitate presentation of genuine contrition or otherwise by offenders.

The recommended process was shown as maintaining input from all stakeholders including superior courts, the Legislature, and society through various administrative bodies. Additionally the appropriate appellant processes of any jurisdiction remain unaltered.

The submission inquired, how does such a response by society to crimes deter further occurrences of it, by that perpetrator or other observers with a predilection for such conduct? It concludes it does not, it fails. It subsequently asks, how then does that serve to reduce the incidence of sexual violence in that community? It confirms that obviously it does not achieve this either. The tangible outcome of the observed societal evolution therefore has become an added legitimacy to the belief, "The Law doesn't protect us."

Adoption of the recommended proposal is an opportunity, if taken, to dispel that assumption, and demonstrate the contrary. The effect of implementing the proposed process would be to induce the imposition of more relevant periods of imprisonment, thereby provide a corresponding enhanced deterrent influence upon potential offenders, and thus a resultant reduction in these crimes.

These benefits would collectively provide a tangible negation of the existing perception of inadequacy of 'the law' regarding these and any crimes to which the proposed process is applied. Furthermore, doing so would successfully maintain that which was alluded to by the present Chief Justice of the NSW Supreme Court, His Honour Chief Justice Bell, stating during his address at the NSW Opening of Law Term dinner, '*The rule of law does not exist in a vacuum…'.*[21]

These potential outcomes have been shown to be achievable through the effective utilization of current mechanisms functioning within the criminal justice system. Equally significant it the fact demonstrated that the penalties available to be imposed are existing maximum penalties. It has been demonstrated how the recommended proposal's implementation would reinstate the character of sentences imposed as a substantial demonstration of the law's rationalization with legislative and societal intent in its responses to crime.

[21] The Law Society of NSW, *The Law Society Journal: 200 years of the Supreme Court of NSW(March,2024) 62.*

It was illustrated how criticism of this recommendation is anticipated to be expressed predominantly from proponents of a primarily conciliatory and rehabilitative priority for the sentencing role of the courts. However as has been demonstrated, by suggesting such to be appropriate is to effectively accept it as being appropriate to subjugate the rights of survivor victims and society to those of the criminal.

Finally, reference is again made to the observations of the then Chief Justice of the High Court of Australia, His Honour, Mason C.J in the matter of Veen[22] stating,

' ... sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society; deterrence of the offender and of others who might be tempted to offend; retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. ... '[23].

In addition to the content of the above from His Honour, it is difficult not to take notice regarding the order in which the subject purposes were described. Recognizing they are not to be considered in isolation, as is proposed it is noted rehabilitation should not be so considered either.

[22] Above n 16.
[23] Ibid, [476].