The former Chief Justice of the High Court, the Hon Murray Gleeson AC, speaking some years ago to a collection of judges, discussed the enduring public perception that the courts are out of touch when it comes to sentencing criminal offenders. Notwithstanding that perception he expressed his belief in the public's acceptance that individualised sentencing is just. He suggested that judges should take every opportunity to explain the system and how it works in practice¹. In deference to that suggestion, I have chosen to speak about sentencing and the exercise of judicial discretion today. I do so also because I have had an amount of experience at the coalface in sentencing as a judge of the New South Wales Supreme Court. That experience causes me to

¹ Gleeson, 'Out of Touch or Out of Reach?' (Speech delivered at the Judicial Conference of Australia Colloquium, Adelaide, 2 October 2004) at 4.
question one aspect of the modern trend that favours statutory
guidance of the exercise of the sentencing discretion.

My emphasis will be on the practice in New South Wales, not
only because of my familiarity with that jurisdiction, but also
because the trend is most evident in the provisions of the New
South Wales sentencing statute\textsuperscript{2}. My focus is on the sentencing of
offenders for serious indictable offences in the higher courts. I am
out of touch with the practice in Magistrates Courts. I am aware
that the vast bulk of sentencing is done by Magistrates. And I am
mindful of the demands of their work. Magistrates may be required
to make decisions affecting individual liberty several times in one
day. It is a considerable skill to be able to absorb a deal of
information on the spot, to weigh competing submissions and arrive
at a just result explained in \textit{ex tempore} reasons. We are well served
by the quality of the magistracy throughout Australia and I intend no
disrespect to the work of their courts in confining my remarks to the
field of sentencing in the higher courts about which I have some
relatively current knowledge.

\textsuperscript{2} \textit{Crimes (Sentencing Procedure) Act} 1999 (NSW).
Judges and Magistrates should not become preoccupied with the unflattering treatment that is often accorded to sentencing decisions in the popular media. Judge Greg Woods’ engrossing history of the criminal law in the colonial period should cure judicial officers of any quaint notion that in bygone years there existed an attitude of restraint on the part of the press towards the decisions of courts. The perception fostered by the media that courts are out of touch and unduly lenient is not a modern development\(^3\).

I share with Murray Gleeson confidence in the public acceptance that the sentencing of offenders should involve the exercise of an individualised discretion. We have had little appetite in Australia for the idea that criminal punishments should be dictated by the application of a fixed rule\(^4\). A form of mandatory matrix sentencing was introduced in New South Wales in the late 19th

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\(^4\) The Northern Territory continues to preserve a mandatory sentence for murder under s 157 of the *Criminal Code* (NT). Section 236B of the *Migration Act 1958* (Cth) currently sets out mandatory minimum penalties for a number of migration-related offences. A number of mandatory sentencing provisions are

Footnote continues
Century. The history is detailed by Greg Woods in the chapter titled "The Light that Failed". The enactment of the scheme followed a campaign in the *Sydney Morning Herald* criticising the perceived leniency of the courts. Within months of the introduction of the scheme the bluntness of its application became the cause of concern. The leader writer of the *Sydney Morning Herald* wrote "[t]he repetition of hard cases lowers the administration of justice" and "[w]e have had only a short experience of the working of the new system, but it has been long enough to indicate the need for change." The scheme lasted for just on one year. In moving the Bill to effect its repeal W B Dalley observed that the scheme had led to the imposition of penalties that were "grotesquely disproportionate to the offence." Echoing the sentiments expressed in the *Sydney Morning Herald’s* editorial, he said "[i]t is of no use
passing a law for the punishment of crime if you leave untouched the existence of a public sentiment which doubts the justice of your tribunals.”

The value of individualised justice is not in issue. Just on 60 years ago the then Chief Justice of South Australia said that it was the role of the sentencing judge "to make the punishment fit the crime, and the circumstances of the offender, as nearly as may be." It is a proposition to which it is difficult to take exception so far as it goes. The purposes of punishment are various and require different emphasis in different cases. Individualised sentencing involves the exercise of judgment. That judgment is vested in the sentencing judge. A classic statement of discretionary decision-making is found in the joint reasons in a case concerning an order made under the *Family Law Act 1975* (Cth):

"Because these assessments call for value judgments in respect of which there is room for reasonable differences

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10  *Webb v O’Sullivan* [1952] SASR 65 at 66 per Napier CJ.

11  *Norbis v Norbis* (1986) 161 CLR 513 at 518 per Mason and Deane JJ.
of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends.”

It is the task of the judge to weigh competing and at times conflicting considerations and to arrive at a sentence that is expressed in months and years. Because it involves the exercise of judgment there will always be a range of sentences that fit the crime. This feature of individualised justice is in tension with the value of equal justice\textsuperscript{12}. Equal justice strives for a result that treats like cases alike and in which the outcome depends as little as possible on the identity of the judge.

The tendency to the provision of statutory guidance for the exercise of the sentencing discretion, evident over the past 20 years in most of the Australian jurisdictions, is sometimes seen as being a response to perceived public concern with the leniency of sentences. Considerations of this sort may have informed some developments in this area, but the genesis of the concept is found in more thoughtful

\textsuperscript{12} Spigelman, 'Consistency and Sentencing' (Speech delivered at the Sentencing Conference, National Judicial College of Australia, Canberra, 8 February 2008) at 2-3.
ideas than the rhetoric associated with the "law and order" debate. Critical to understanding the development of thinking in this area is the work done by the Australian Law Reform Commission ("the ALRC") in its first sentencing reference. Influential ideas informing the discussion at the time included the democratic notion that any member of the public wishing to know the basis upon which courts sentence offenders should be able to turn to a statute and find a clear articulation of the relevant principles\textsuperscript{13}. Importantly, the statement of those principles was thought to promote consistency in sentencing.

The ALRC received its first reference on sentencing in 1978. The terms of the reference do not suggest that a concern at the time was that sentences were unduly lenient. The Commission was asked to review and report on the laws of the Commonwealth and the Australian Capital Territory relating to the imposition of

punishment for offences. It was directed to have particular regard to a number of matters, which included\textsuperscript{14}:

- The formulation of principles and guidelines for the imposition of a sentence of imprisonment;
- The question of whether legislation should be introduced to provide that no person is to be sentenced to imprisonment unless the court is of the opinion that, having regard to all the circumstances of the case, no other sentence is appropriate;
- The adequacy of existing laws providing alternatives to sentences of imprisonment;
- The need for laws providing alternatives to sentences of imprisonment; and
- The need for greater uniformity in sentencing.

The ALRC's final report was published in February 1988\textsuperscript{15} ("the Report"). The Report recorded that all Australian governments were committed to reducing the emphasis on imprisonment as a sanction. Ministers responsible for corrections were said to have endorsed a public statement issued in 1987 stating that "policies and practices should promote diversion from imprisonment and


should reduce the maximum and the average sentence length of imprisonment."\(^\text{16}\)

The Report commented on the absence of research demonstrating the existence of unjustified disparity in sentencing. Nonetheless, it was considered that such evidence as there was pointed to unjustified disparity as a problem\(^\text{17}\). Significantly, the exercise of the sentencing discretion was thought to be largely unregulated\(^\text{18}\). In this respect the Report extracted a short quotation from the decision of the Victorian Court of Appeal in *Williscroft*\(^\text{19}\):

"[E]very sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process."

\(^{16}\) Australian Law Reform Commission, *Sentencing*, Report No 44, (1988) at 27 [53]. A focus of the work of the ALRC in this field has been on alternatives to imprisonment in the sentencing of offenders.


\(^{19}\) *R v Williscroft* [1975] VR 292 at 300 per Adam and Crockett JJ.
The phrase "instinctive synthesis" has enlivened a sectarian debate in the study of sentencing.

The Report concluded that "[a] rational and consistent system of law requires the existence of a common standard by which to evaluate individual decision-making." It proposed that a non-exhaustive list of matters should be enacted in the sentencing statute reflecting matters relevant to the exercise of the discretion. The list of these matters contained in the Report was necessarily expressed at a high level of generality and included the considerations that courts ordinarily take into account in sentencing offenders: the degree of intention, premeditation or planning; the level of participation in the offence; whether a weapon was used; the extent and nature of harm to victims; whether the offender knew that the victim was particularly vulnerable; matters personal to the offender such as age and character; remorse; and whether the

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offender was affected by alcohol or other drugs, mental health difficulties and the like\textsuperscript{21}.

There were two dissentients to the recommendation respecting the statutory statement of the considerations relevant to sentencing. The dissentients were of the view that a statutorily prescribed list may be the least satisfactory way of achieving consistency. They cautioned that courts would be obliged to have regard to the language of the prescribed list and that this might lead to a literal approach to sentencing\textsuperscript{22}.

I pause here to observe that if one were merely to read the Report it might seem that in Australia in 1988 judges were not constrained, in sentencing offenders, to apply principle nor to explain their decisions. That impression would be wrong. Judges gave reasons for sentencing decisions applying a body of general law principles which were well understood. Their reasons were the subject of appellate review.

The ALRC’s Report was published in the year that the landmark decision governing the principles of sentencing, *Veen v The Queen (No 2)*, was delivered. The facts of that appeal posed the difficulties involved in the exercise of the sentencing discretion in an acute fashion: a killing which would otherwise have been murder was reduced to manslaughter by reason of the offender’s mental impairment. Yet the sentencing judge had imposed a sentence of life imprisonment by giving weight to Veen’s dangerousness. The discussion of principle draws on the decided cases and on a wider academic debate concerning theories of punishment23. The statement of the sentencing discretion in the joint reasons has not been bettered24:

"[S]entencing 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

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24 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476 per Mason CJ, Brennan, Dawson and Toohey JJ.
overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."

Veen's mental impairment was a factor that mitigated his offence because it reduced his moral culpability for it. The same factor was relevant to the protection of the community because it made Veen dangerous. In the circumstances of that case it was a factor that justified a severe sentence, provided that sentence was proportionate to the offence. No one reading Veen [No 2] should come away with the view that a judge sentencing an offender is at liberty to select a term of years because it feels right and proceed to the imposition of a sentence without explaining the reasons that justify it.

The recommendations made by the ALRC in the Report were reflected at least to some degree in the elaborate scheme for the sentencing of Commonwealth offenders that was effected by the introduction of Pt 1B into the Crimes Act 1914 (Cth)\textsuperscript{25}. The scheme

\textsuperscript{25} Part 1B of the Crimes Act 1914 (Cth) sets out a detailed regime for the sentencing of persons convicted of federal offences. It was inserted by the Crimes Legislation Amendment Act (No 2)
has attracted criticism in its practical operation. I am concerned only with s 16A which sets out the matters to which courts are to have regard in sentencing. Section 16A(1) states that in determining the sentence to be passed in respect of any person for a federal offence, a court must impose a sentence that is of a severity appropriate in all the circumstances of the offence. Section 16A(2) requires the court to take into account such of 14 stated matters as are relevant and known to the court. The statement of those matters is expressed in broad terms.

The reduction of the various matters that courts traditionally have taken into account in sentencing to the language of a statutory provision focuses attention on the particular words used. It invites attention to what is not said. The omission of reference to general deterrence in the factors listed in s 16A(2) was notable. It was an

1989 (Cth), which also repealed the Commonwealth Prisoners Act 1967 (Cth).

issue that arose in *El Karhani*\(^{27}\). An experienced judge sentenced an offender for the offence of importing a trafficable quantity of heroin into Australia to a sentence that was below the range of sentences for that offence. He did so because the scheme of s 16A(2) referred to personal deterrence but not to general deterrence. The judge considered that the omission signified a legislative intention that general deterrence was not to be taken into account in the sentencing of federal offenders. In the event the sentence gave no weight to deterrence as a factor since it was common ground that the offender was unlikely to re-offend. The Director of Public Prosecutions appealed against the manifest inadequacy of the sentence.

The idea that one of the purposes of punishment is to deter likeminded persons from offending has informed the sentencing of offenders for a long time\(^ {28}\). The weight given to general deterrence varies according to the offence under consideration. It is common to

\(^{27}\) *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370.

\(^{28}\) A contrary view, favoured by the ALRC in its Report, is that it is unjust to sentence an individual in order to deter others from wrongdoing: Australian Law Reform Commission, *Sentencing*, Report No 44, (1988) at 18 [37].
accord significant weight to it in sentencing for offences involving
the importation of drugs. The Court of Criminal Appeal considered it
unlikely that the Parliament had intended by the omission of a matter
in the checklist in s 16A(2) to do away with one of the fundamental
principles of sentencing. The Court had regard to the provision of s
16A(1), which imposes a duty to ensure that the sentence is of a
severity appropriate to the offence. At the date El Karhani was
decided, it would have been difficult to speak meaningfully of an
appropriate sentence by reference to the pattern of sentencing for
drug importation offences without consideration of general
deterrence. The Court of Criminal Appeal concluded that a
sentence which did not take into account general deterrence would
not meet the command of s 16A(1)\textsuperscript{29}. In the result the general
command of s 16A(1) proved more informative than the checklist in
s 16A (2).

\textsuperscript{29} Director of Public Prosecutions (Cth) v El Karhani (1990) 21
NSWLR 370 at 378 per Kirby P, Campbell and Newman JJ.
Before parting with the appeal in *El Karhani*, the Court observed:\(^{30}\):

"Different views may be held about the provision in s 16A(2) of a checklist of considerations to be taken into account, to the extent relevant and known, in determining the sentence. The time taken in sentencing Federal offenders will necessarily increase under this legislation. However, judges must comply with the law as Parliament has stated it. ... The obligation under s 16F to explain certain matters to the convicted offender makes it self-evidently desirable that that which has to be explained is itself reasonably clear. This cannot be said either of the purpose of the new legislation nor of its terms."

Part 1B of the *Crimes Act 1914* (Cth) came into operation in July 1990. The scheme had been in operation for several years when the New South Wales Law Reform Commission ("the Commission") was asked to report on the law of sentencing. The Commission released a discussion paper and solicited submissions on the issue of whether sentencing law should be consolidated, including by the statutory incorporation of the principles of the common law. The submissions received in response to this aspect of the discussion paper were against the proposal\(^{31}\).

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\(^{30}\) *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370 at 387.
In its Final Report, the Commission recommended against the incorporation of a statutory statement of relevant considerations. It pointed out that courts might be constrained by the words the drafter selected to express the considerations and that this may introduce a degree of inflexibility. It noted the decision in *El Karhani* and the risk that a statement of relevant considerations might invite attention to the omission of others. It foreshadowed that the incorporation of a statutory list would make sentencing a more time-consuming exercise without a "clear gain" and that it may increase the grounds of appellate challenge. Its views had echoes of those expressed by the dissentients to the ALRC Report's recommendations on this topic.

The Commission’s recommendations in this respect were not adopted. In 2002 s 21A was introduced into the New South Wales sentencing statute. The Bill for the amending Act which inserted s 21A originated in the Upper House and, prior to amendments, proposed reforms of a more far-reaching kind. In its final form the

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Act preserved judicial discretion and adopted the approach of stating a non-exhaustive list of the factors to be taken into account by the court in sentencing\(^{33}\). Not long after this the Parliament enacted a more structured and prescriptive sentencing regime\(^{34}\). Under this scheme standard non-parole periods apply to a number of offences and a new s 21A lists the aggravating and mitigating factors that are to be taken into account in sentencing. In this respect the New South Wales provision differs from the model adopted in most jurisdictions, which does not specify that a factor is either aggravating or mitigating.\(^{35}\) That model recognises that the same factor may, depending on the circumstances of the case, be aggravating or mitigating.


\(^{33}\) Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) was inserted by the *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Act 2002* (NSW).

\(^{34}\) *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).

\(^{35}\) See, for example, *Sentencing Act 1991* (Vic), s 5; *Penalties and Sentences Act 1992* (Q), s 9; *Sentencing Act 1995* (WA), s 6; *Criminal Law (Sentencing) Act 1988* (SA), s 10; *Crimes (Sentencing) Act 2005* (ACT), s 33; and *Sentencing Act 1997* (Tas). Section 6A of the *Sentencing Act 1995* (NT) sets out a range of aggravating factors that a court may take into account in addition to the general matters set out in s 5.
Again, it is clear that the New South Wales Parliament did not intend to do away with individualised sentencing under the scheme introduced by these amendments. In his second reading speech for the Bill the Attorney-General said that the purpose of the amendments was to provide further guidance and structure to judicial discretion and to promote consistency and transparency in sentencing\textsuperscript{36}. As noted, the amendments introduced a significant change to the sentencing of offenders for offences to which standard non-parole periods apply. I intend to confine my remarks to the impact of s 21A on sentencing. The provision requires the court to take into account the stated aggravating and mitigating factors to the extent that those factors are relevant and known to the court. The provision makes clear that the aggravating and mitigating factors are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law. At the time of its introduction there were 14 aggravating factors and 13 mitigating factors. There have been a

\textsuperscript{36} New South Wales, Legislative Assembly, \textit{Parliamentary Debates} (Hansard), 23 October 2002 at 5813.
number of amendments to the provision in the last six years. There are now 21 aggravating factors. The number of mitigating factors has not changed. Thus, at the present time a judge sentencing an offender in New South Wales is required to take into account 34 non-exhaustive factors to the extent that those factors are relevant and known.

The ALRC conducted a further review of the sentencing of federal offenders between 2004 and 2006. In its most recent report it recommended a complete re-working of s 16A of the Crimes Act 1914 (Cth). A new taxonomy is proposed. The factors relevant to sentencing, it is suggested, should be collected by reference to common themes in eight broad groupings with examples in each

37 Amendments were made once in 2006, twice in 2007, once in 2008 and once in 2009.

38 Section 21A(3)(i), as enacted, provided that one mitigating factor was that the offender had shown remorse "by making reparation for any injury, loss or damage or in any other manner". The Crimes (Sentencing Procedure) Amendment Act 2007 (NSW) substituted a new version of s 21A(3)(i). It currently provides that remorse is a mitigating factor only if the offender has provided evidence that he or she has accepted responsibility for his or her actions, and has acknowledged or made reparation for any injury, loss or damage caused by his or her actions (or both).

category. Factors presently found in s 16A that are relevant to the purposes of punishment including deterrence, personal and general, are to be dealt with elsewhere in the statutory scheme. So, too, are the factors of the plea of guilty and assistance to the authorities which are taken into account by reason of the incentive they provide to the promotion of the administration of criminal justice. The scheme has not, to date, been enacted.

The Law Reform Commission of Western Australia has expressed its support for the enactment of a non-exhaustive list of sentencing factors for the guidance of judges in 2005.

Concerns that the statutory prescription of sentencing factors may give rise to practical difficulties have been raised from time to time. Those concerns find some support in the experience under


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the present Commonwealth and New South Wales sentencing statutes. The ALRC's most recent report shows that consideration was given to the suggestion that the statutory prescription model may cause unanticipated problems. The authors of the report adhere to the view that statutory guidance serves to promote consistency\textsuperscript{44}.

It has been suggested that at the heart of the debate concerning statutory guidance of the judicial discretion in sentencing is the dispute between the advocates of the "instinctive synthesis" approach and the advocates of the two-stage, or structured, approach\textsuperscript{45}. Support for that analysis, if it were needed, might be found in the choice of the brief quotation from \textit{Williscroft} that appears at the commencement of the ALRC's review of sentencing practice in the 1988 Report. Further support is found in the ALRC's most recent report, which quotes the submission of one "stakeholder" who proposed the need for a statutory statement of

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  \item[45] Freiberg, 'Twenty Years of Changes in the Sentencing Environment and Courts' Responses' (Speech delivered at the
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mandatory considerations because "[i]t is all too easy for judges to follow their intuition and to consider factors that are not relevant to the purposes of sentencing"⁴⁶.

That individual’s submission suggests that the phrase "instinctive synthesis" coined in Williscroft may be rather too compressed a statement of the concept⁴⁷. It is a shorthand expression that is intended to convey that process of decision-making in which competing considerations are taken into account in the manner described in Veen [No 2]. The two-stage approach is generally taken to involve the determination of a notional starting point reflecting the seriousness of the offence from which increments and decrements are made to take into account factors of aggravation and mitigation respectively. The arguments for and against each are exposed in the judgments of McHugh and Kirby JJ

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⁴⁷ In this respect, see Leader-Elliott, 'Editorial' (2002) 26 Criminal Law Journal 5.
in *Markarian v The Queen*\(^{48}\). Justice McHugh favoured the instinctive synthesis approach. He pointed out that discretionary sentencing does not involve mathematical precision. In his view the structured approach of the two-stage sentencer creates an "illusion of exactitude"\(^{49}\). Furthermore, the fixing of the notional sentence itself involves the selection of a figure from a range\(^ {50}\). The allocation of increments and decrements to that notional sentence, in McHugh J's view, was likely to generate appeals\(^ {51}\). He favoured appellate review as the means of promoting consistency\(^ {52}\).

Justice Kirby set out the opposing arguments, starting perceptively in light of the submission quoted above, with the observation that the phrase "instinctive synthesis" is apt to send a wrong signal as to the law of sentencing in Australia. More profoundly, he considered that the instinctive synthesis approach is contrary to the tendency towards transparency in other areas of the


\(^{49}\) *Markarian v The Queen* (2005) 228 CLR 357 at 378 [52].

\(^{50}\) *Markarian v The Queen* (2005) 228 CLR 357 at 379 [55].

\(^{51}\) *Markarian v The Queen* (2005) 228 CLR 357 at 386 [71].

\(^{52}\) *Markarian v The Queen* (2005) 228 CLR 357 at 390 [84].
law. Justice Kirby acknowledged that sentencing is not a mechanical or arithmetic activity and that it requires human judgment. However, he considered that the adequate exposure of the reasoning process guards against idiosyncratic decision-making.

The joint reasons in *Markarian* accept that the weight of authority in intermediate appellate courts in Australia is in favour of the instinctive synthesis approach in preference to an approach involving the addition and subtraction, item by item, from some "apparently subliminally derived figure" in order to arrive at the correct sentence. Nonetheless, the joint reasons allow that in a given case, deduction for a factor may not involve error.

There is a deal of academic support for the dissenting judgment of Kirby J in *Markarian*. Professor Freiberg observes that

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53 *Markarian v The Queen* (2005) 228 CLR 357 at 403-404 [129].

54 *Markarian v The Queen* (2005) 228 CLR 357 at 405-406 [133]-[135].

55 *Markarian v The Queen* (2005) 228 CLR 357 at 375 [39] per Gleeson CJ, Gummow, Hayne and Callinan JJ.
"if sentencing is not transparent, public confidence will be lost."\textsuperscript{56} He suggests that McHugh J's views assume public acceptance of the skill and experience of judges. He pointed to the gloomy results in this respect of a Victorian survey conducted by the \textit{Herald Sun} a few years ago. He noted that the sample was small and self-selected: nonetheless, the circumstance that 91 percent of those surveyed thought criminals were let off lightly was an indication of the need for greater transparency\textsuperscript{57}. Professor Warner also favours the views of Kirby J. She comments that transparency trumps instinctive synthesis\textsuperscript{58}.

I find it unhelpful to frame the debate as if it is between inscrutable and unexaminable decision-making on the one hand and transparency on the other hand. \textit{Markarian} is not an invitation to

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\textsuperscript{56} Freiberg, 'Twenty Years of Changes in the Sentencing Environment and Courts' Responses' (Speech delivered at the Sentencing: Principles, Perspectives and Possibilities Conference, Canberra 10-12 February 2006) at 10.

\textsuperscript{57} Freiberg, 'Twenty Years of Changes in the Sentencing Environment and Courts' Responses' (Speech delivered at the Sentencing: Principles, Perspectives and Possibilities Conference, Canberra 10-12 February 2006) at 10.

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judges to depart from giving reasons for their decisions. Giving reasons for decisions, including discretionary decisions, is what judges do. In this field, as in other fields of judicial decision-making, reasons serve to explain to the parties the basis of the decision and to enable appellate review\textsuperscript{59}. I do not read McHugh J's reasons in \textit{Markarian} as suggesting any departure from this norm. I take one of his concerns to be the avoidance of unmeritorious, technical, appeals. A like concern informed the New South Wales Law Reform Commission's recommendation against the statutory statement of sentencing factors.

The former Director of Public Prosecutions for New South Wales, in a paper delivered shortly before his retirement commented that the process of sentencing in that State has become so elaborate that\textsuperscript{60}:

"[t]he process of sentencing itself ... is virtually never correctly carried out ... Now judges must take scores of pages in which multiple errors will usually be discernable."

\textsuperscript{59} \textit{House v The King} (1936) 55 CLR 499.
In context, his remarks were not a criticism of the judiciary but rather of the practical difficulties attending sentencing under the prescriptive regime in the sentencing statute. The enactment of s 21A has proved to be a fertile ground for appellate lawyers. It may be doubted that this was its intended operation. The Parliament made clear that its intention is not to depart from the accepted principles of the common law in the sentencing of offenders. However, much as the New South Wales Law Reform Commission foreshadowed, the statement of those principles in the language of the provision has given rise to appellate debate. The debates have had a semantic quality to them.

Some illustrations may serve to make the point.

One of the factors that a court in New South Wales must take into account as an aggravating factor, which is stated in s 21A(2)(g), is that the emotional harm caused by the offence is

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60 Cowdery, ‘Reforming the Criminal Justice System’ (Speech delivered at the Public Defenders Criminal Law Conference, Sydney, 26 February 2011) at 9.

substantial. It would be surprising if a court, assessing the seriousness of an offence, did not take into account that the offence had occasioned emotional harm to the victim. In many offences in which there is a personal victim such harm is presumed. That circumstance explains the difficulty occasioned by the language of par (g). A judge sentencing an offender for a number of sexual assaults committed on children found the offences were aggravated by the factor referred to in par (g). Absent the statutory prescription of factors the judge would, no doubt, have taken into account the emotional and psychological harm to the children in the assessment of the seriousness of the offences. However, as courts assume, without evidence, that sexual interference with children causes long-term psychological and emotional harm, it was an error for the judge to make a finding for the purposes of par (g)\(^{62}\). The factor there-stated requires that the offence cause "substantial" emotional harm. There was no evidence that these children had suffered emotional harm exceeding that which the law presumes any child so abused would have suffered.

The requirement of par (g) that the emotional harm be caused by the offence has also given rise to consideration of whether the substantial emotional harm experienced by a complainant as the result of sexual assault was wrongly taken into account because it was associated with the disruption to her family life following her disclosure and not directly by the assault. The court found that the causal link was, on the facts of that case, sufficient.

Of course, difficulties are presented by the application of common law principles in sentencing. One pitfall is the taking into account of a circumstance of the offence that would expose the offender to conviction for a more serious offence. As is explained in De Simoni, to do so would be to punish the offender for an offence of which he or she has not been convicted. The statutory statement of the aggravating factors in New South Wales has multiplied the opportunities for the related error of "double counting". The statutory list includes as aggravating factors matters

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63 Clarke v The Queen [2009] NSWCCA 13 at [13]-[15].
which are not infrequently elements of the offence\textsuperscript{65}. It has proved to be a trap for the unwary\textsuperscript{66}. The difficulties do not end there. An aggravating factor in the statutory list may be an inherent characteristic of the offence, notwithstanding that it is not an element of that offence. In such a case it will be an error to take it into account as an aggravating factor\textsuperscript{67}. Thus, it was held to be an error to find an offence of dangerous driving based upon the offender’s high range blood alcohol level was aggravated by the fact that the offence was committed without regard to public safety within s 21A(2)(i) of the statute.

It may not be surprising to learn that the aggravating factor, that the offence involves gratuitous cruelty\textsuperscript{68}, has been productive of error. It is reasonable to think that a judge would be unlikely to overlook the infliction of gratuitous cruelty in assessing the seriousness of an offence. The inclusion of gratuitous cruelty in the

\textsuperscript{65} Section 21A(2)(b), (c), (cb), (e), (ea), (eb), (i), (k), (o).

\textsuperscript{66} \textit{R v Boulad} [2005] NSWCCA 289.

\textsuperscript{67} \textit{Elyard v The Queen} [2006] NSWCCA 43 at [10] per Basten JA, [40] per Howie J, and [99] per Hall J.

\textsuperscript{68} \textit{Crimes (Sentencing Procedure) Act} 1999 (NSW), s 21A(2)(f).
statutory checklist has required the Court to distinguish gratuitous violence causing painful injury from gratuitous cruelty, the latter requiring the infliction of pain as an end in itself\textsuperscript{69}. Decisions of the New South Wales Court of Criminal Appeal since the enactment of s 21A contain much analysis of this character. It is analysis that is brought about by the endeavour to encapsulate in the language of a statute the nuanced considerations that may bear on the assessment of the seriousness of an offence. The refinements made necessary by the interpretation of the language of the provision are not always edifying. When Parliament commands a judge to take into account a particular matter (or not to take into account a particular matter) it is the judge's duty to obey that command. If the command is to take into account emotional harm that is "substantial" it should not surprise that the court will give meaning to the word and look for evidence to distinguish the case in which the harm meets that description from the case in which it does not. Whether the explication of why the emotional harm caused to the child victim of a sexual assault does not reach the threshold of being "substantial"

\textsuperscript{69} McCullough v The Queen (2009) 194 A Crim R 439 at 447 [30]-[33].
within the statute enhances the quality of decision-making, or the public's perception of the process, may be another matter.

Ordered rationality in the statement of the factors bearing on the determination of the appropriate sentence for an offence is an elusive goal. It is true, as the ALRC's most recent report notes, that an offender's plea of guilty and assistance to the authorities are factors that can be distinguished from other factors that are personal to the offender\textsuperscript{70}. However, this does not undermine the force of the observations in \textit{Gallagher}\textsuperscript{71}:

"It must often be the case that an offender's conduct in pleading guilty, his expressions of contrition, his willingness to co-operate with the authorities, and the personal risks to which he thereby exposes himself, will form a complex of inter-related considerations, and an attempt to separate out one or more of those considerations will not only be artificial and contrived, but will also be illogical."

Reasons for sentence should make clear the factual basis upon which the judge proceeds. They should deal with the parties'


\textsuperscript{71} \textit{R v Gallagher} (1991) 23 NSWLR 220 at 228.
submissions and explain by reference to the well-understood principles of sentencing why the judge has arrived at the sentence. They should be able to be understood by the person being sentenced and, in the case of offence for which there is a victim, by the victim. It is a good thing if they do not cause added distress to the victim or to the victim's family. It should be possible to arrive at a transparent and just assessment of the seriousness of the offence without excessive refinement.

The reasons for sentence imposed by judges of the Supreme Courts of the States and Territories are available on the internet. Reading those reasons, including those of judges from jurisdictions in which the applicable sentencing statute does not provide a list of the matters to be taken into account, should serve to reassure members of the public that judges do not approach the sentencing of offenders by following their intuition, and taking into account factors that are not relevant to the purposes of sentencing.

I am not familiar with the Herald Sun’s survey to which reference has been made. It would not be surprising if readers of the Herald Sun were to form an impression that courts are unduly lenient from the coverage of cases in that newspaper. In his speech
on sentencing Murray Gleeson suggested that one method of testing informed public opinion about sentencing would be to survey the views of jurors as to the justness of the sentence imposed in the case that they had tried. Professor Warner and her colleagues have undertaken such a study\textsuperscript{72}. Jurors who had served on 138 trials were the subject of the survey. The general knowledge of this group of crime trends and of sentencing patterns was low. The majority of respondents considered sentences to be too lenient. Such views were most pronounced with respect to sexual offences and offences of violence. A different pattern emerged with respect to the cases that the respondents had tried. There was a high level of satisfaction with the sentence imposed in those cases. Ninety percent of respondents considered that the sentence was either very, or fairly, appropriate. More than half (52 percent) proposed a more lenient sentence than that imposed by the judge. The jurors who had served on cases involving offences of violence, sexual offences and drug offences were evenly split between those who recommended more severe and those who favoured less severe sentences. Those

who favoured a more lenient sentence than the sentence imposed by the judge were likely to endorse the judge's sentence once informed of the reasons for it. Those who had originally nominated a more severe sentence were more likely to remain fixed in their views.

Professor Warner's research results are in keeping with the results of studies elsewhere\(^{73}\). They do not suggest that there is reason for concern that sentences imposed by the courts do not "fit the crime". Needless to say the results of the survey have not received widespread publicity in the popular press.

Judges can and do give detailed reasons for the sentences that they impose. In many cases those reasons are readily accessible. We cannot make people read them. Most people are likely to get their information about the administration of criminal justice from the media. It is how most of us acquire general information about the

broad range of human affairs of which we have no specialised knowledge. However, in the administration of criminal justice, as much as in any area of public administration, it is to be hoped that policy decisions are made on the strength of informed debate and not in response to perceptions of public opinion generated by the reporting of individual cases.