CASE NOTE

RYAN v THE QUEEN*

PARADOX AND PRINCIPLE IN SENTENCING A PAEDOPHILIC PRIEST: *RYAN*'S CASE IN THE HIGH COURT

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I PARADOX IN SENTENCING

Few crimes generate more genuine public indignation than sexual offences against children. Whether called 'child sexual abuse' or 'paedophilia',[1] and whether legally defined in terms of indecent assault or various forms of sexual penetration, such crimes are regarded as abhorrent. This is not only because of the assault upon the physical and psychological integrity of the young victims,[2] but also because of the abuse of trust and power which is relied upon to gain access to them and to contrive situations in which they can more readily be assaulted.

These are particularly insidious offences because of the manipulative manner in which offenders within a family take advantage of being alone with victims, or outsiders inveigle themselves into the confidence and homes of their targets.[3] An

* (2001) 179 ALR 193 ('*Ryan*').

1 The diagnostic criteria for paedophilia require that the person, over a period of at least six months, have recurrent intensely sexually arousing fantasies, sexual urges, or behaviours involving sexual activity with a prepubescent child or children (generally aged 13 years or younger). The fantasies, sexual urges, or behaviours should cause clinically significant distress or impairment in social, occupational, or other important areas of functioning. The person falling into this category must be at least aged 16 years and at least five years older than the child or children concerned in the fantasies, urges or behaviours: American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, 1994) 528.

2 Angela Browne and David Finkelhor, 'Impact of Child Sexual Abuse: A Review of the Research' (1986) 99 *Psychological Bulletin* 66; David Finkelhor, *A Sourcebook on Child Sexual Abuse* (1986).

3 Jon Conte, Steven Wolf and Tim Smith, 'What Sexual Offenders Tell Us about Prevention Strategies' in N Zoe Hilton, Margaret Jackson and Christopher Webster (eds), *Clinical Criminology: Theory, Research and Practice* (1990) 361; Stephen Smallbone and Richard

obsessive element in the motivation for the offending behaviour also tends to produce serial offences. By silencing the child through threats of exposure, humiliation or worse, or by bribes or other seductive inducements, the offender aims to create an environment in which the sexual abuse may be repeated with impunity.

When cases come to light of priests or other members of religious orders who, in violation of the tenets of their faith, have sexually assaulted youngsters in their care, intense media coverage and a deep sense of shock are engendered in the public.[4] However, judicial sentencers and the courts of appeal which oversee them must respond to the crimes and their circumstances in a principled manner.[5] This is easier said than done, for though judges strive to approach the task in a detached and rational fashion, '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.'[6] Judges are aware that even the established principles of sentencing may produce countervailing effects when applied simultaneously to the same case. Protection of the community may, for instance, point towards a longer custodial sentence, while remorse and cooperation may indicate a shorter one.

Though paedophiles have not been singled out as a distinct legislative or case law category for special attention in sentencing,[7] the task of dealing with them, particularly those cloaked in a religious vocation, does involve confronting a number of sentencing paradoxes. First, there is the methodology of sentencing — whether it is an intuitive and holistic process or one susceptible to analysis and dissection.

Second, there is the relevance to sentencing of the character of the offender. While it may appear that anyone who commits serious crimes can only be regarded as of bad character, the law distinguishes present from prior character. Though evidence of prior bad character is not ordinarily permitted to be adduced as an aid to proving the charges,[8] both common law and statute accept that the accused's prior good character is relevant to sentencing as a mitigating factor.[9] But the benefits of good character can be displaced when the high standing and fine reputation of the offender are the very masks behind which the criminality is hidden.

Wortley, *Child Sexual Abuse: Offender Characteristics and Modus Operandi* (Trends and Issues in Crime and Criminal Justice No 193, Australian Institute of Criminology, 2001).

4 Jamie Martin, 'Justice for Victims? — The Sentencing of Public Trust Figures Convicted of Child Sexual Abuse: A Focus on Religious Leaders' (1994) 32 *Alberta Law Review* 16.

5 Richard G Fox, 'Sentencing a Compulsive Paedophile: Shame File or Science?' (1991) 65 *Law Institute Journal* 523.

6 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ) ('*Veen [No 2]*').

7 Cf the 'serious offender' legislation contained in the *Sentencing Act 1991* (Vic) pt 2A.

8 *Dawson v The Queen* (1961) 106 CLR 1, 16 (Dixon CJ).

9 Eg *Crimes Act 1914* (Cth) s 16A(2)(m) directs that a court, in sentencing a federal offender, must have regard to 'the character, antecedents, cultural background, age, means and physical or mental condition of the person'; *Sentencing Act 1991* (Vic) s 5(2)(f) requires a court, in sentencing a person offending against Victorian law, to take account of 'the offender's previous character'.

Third, the repetitious and serial nature of the conduct may indicate a malevolent and dangerous person. However, if the behaviour is the result of underlying physical or psychiatric conditions which diminish the offender's capacity to exercise self-control, this may be taken into account in mitigation.[10] Sentencing law's response to the existence of mental or personality disorders, drug and alcohol induced states, and hormonal or other conditions affecting behaviour is contradictory. In some instances these conditions are regarded as reducing culpability for the offence and are viewed as mitigating factors warranting a discount from the penalty that would normally apply; in others they are regarded as aggravating the situation. Repetitious sexual assaults symptomatic of an underlying obsessive-compulsive psychiatric disorder may indicate the need to adopt a rehabilitative approach. But equally, the compulsion to engage in such activities may be regarded as warranting an extended sentence justified in terms of community protection. Special protective legislation has been framed for this purpose in some jurisdictions in respect of recidivist sexual offenders, but none uses a psychiatric classification such as 'paedophile' to identify the class of offender requiring special attention at sentencing.

II THE FACTS IN *RYAN V THE QUEEN*

In *Ryan*, the High Court of Australia set aside a lengthy sentence imposed by a New South Wales District Court judge upon Vincent Ryan who, when a Catholic priest, had, between 1972 and 1993, frequently sexually assaulted young boys in his care. A large number of these offences only became known to the police because Ryan had voluntarily revealed them.

In December 1997 he pleaded guilty in the District Court to nine counts of indecent assault, three counts of 'sexual intercourse with a person under the age of 16 years knowing that he was not consenting', one count of gross indecency and one count of indecency. Ryan asked the judge to take into account 39 additional offences. The total effective sentence on these guilty pleas and admissions was 16 years' imprisonment with a non-parole period of 11 years.

In imposing the sentence, the judge said that the appellant's admissions of previous undisclosed crimes went to his credit, showed his contrition and entitled him to a discount in punishment.[11] However, the judge did not identify the extent of that discount. In discussing the circumstances of trust in which Ryan had made contact with the victims, mention was made specifically of his status as a Catholic priest.[12] Though testimonials were tendered in support of his prior good character and reputation in his religious vocation, the judge denied that these entitled him to any leniency whatsoever.[13]

[10] *R v McCracken* (1988) 38 A Crim R 92 (Supreme Court of Victoria, Court of Criminal Appeal).
[11] *R v Ryan* (Unreported, District Court of NSW, Judge Nield, 26 September 1997) 13.
[12] Ibid 9–10.
[13] Ibid 12.

An appeal to the New South Wales Court of Criminal Appeal against the severity of the sentence was unanimously dismissed.[14] The sentence was held to be free of error and in line with those imposed in similar cases.[15]

III Sentencing Appeals in the High Court

The High Court has repeatedly said that it will not allow an appeal against a sentence unless exceptional circumstances exist.[16] A heavy or lenient sentence is not of itself enough.[17] The Court requires specific error to be shown in the reasons supporting the sentence, or that the sentence itself demonstrates such a manifestly unreasonable or erroneous exercise of the sentencing discretion as to require correction in order to prevent a serious miscarriage of justice.[18]

Ryan's assertion that, even in the absence of specific error, his sentence was manifestly excessive was not pursued further in the High Court. Nor was he successful in his complaint that an error had been made in granting insufficient credit for the disclosure of unknown offences. But a majority of those on the Bench (McHugh, Kirby and Callinan JJ, with Gummow and Hayne JJ dissenting) agreed that the denial of *any* credit for his prior good character was such a significant error of principle as to justify allowing the appeal.[19] The order of the Court was that the case be remitted to the NSW Court of Criminal Appeal for the sentence to be reconsidered in accordance with the reasons for judgment of the High Court.[20]

IV Disclosure of Previously Unknown Offences

The District Court judge had stated that he had taken into account Ryan's voluntary disclosure of unprosecuted offences and had allowed him a sentencing credit for having done so.[21] However, Ryan's complaint was that he should have been given an identifiable, more substantial discount than the unquantified and apparently small one acknowledged by the sentencer. On appeal, Ryan relied on the NSW Court of Criminal Appeal ruling in *R v Ellis*[22] in which a distinction was drawn between (1) a plea of guilty entitling a convicted person to an *element*

[14] *R v Ryan* [1998] NSWSC 55 (Unreported, Gleeson CJ, Cole JA, Levine J, 2 March 1998).

[15] See especially *R v Ridsdale* (1995) 78 A Crim R 486 (Supreme Court of Victoria, Court of Criminal Appeal). This case involved 46 counts of sexual offences against altar boys and other children by a priest, in which a sentence of 18 years with a non-parole period of 15 years was upheld. *R v Ridsdale* has recently been applied to cases of others in religious positions of trust lower in the hierarchy: see, eg, *R v AB [No 2]* (2000) 117 A Crim R 473 (NSW Court of Criminal Appeal) in which sex offences were committed against pupils by a Marist Brothers' teaching fellow.

[16] Eg *Lowe v The Queen* (1984) 154 CLR 606.

[17] *White v The Queen* (1962) 107 CLR 174; *Radenkovic v The Queen* (1990) 170 CLR 623; *Postiglione v The Queen* (1997) 189 CLR 295.

[18] *House v The King* (1936) 55 CLR 499.

[19] *Ryan* (2001) 179 ALR 193, 201 (McHugh J), 217 (Kirby J), 235 (Callinan J).

[20] As at 18 March 2002 the case had not been relisted before the NSW Court of Criminal Appeal for resentencing.

[21] *R v Ryan* (Unreported, District Court of NSW, Judge Nield, 26 September 1997) 13.

[22] (1986) 6 NSWLR 603.

of leniency in the sentence; (2) a plea of guilty and conviction based on a voluntary disclosure which attracts a *further element* of leniency; and (3) a plea of guilty based on the voluntary disclosure of offences which would not otherwise have been discovered for which '*a considerable element of leniency* should properly be extended by the sentencing judge.'[23]

In the High Court, only Kirby J attributed an error of principle to the sentencer's failure to spell out precisely how he was applying the criteria in *R v Ellis*.[24] The others did not believe it was necessary for the quantum of the discount to be declared, even in the general terms offered in *R v Ellis*.[25] While it might be useful to do so, it was not essential. Callinan J explained that to require each subjective element in the sentencing decision to be quantified would 'interfere with the intuitive process that sentencing involves.'[26]

It has been common amongst sentencers to assert that what they do is an 'art' not a 'science'[27] and that it is the product of their 'instinctive synthesis of all the various aspects involved in the punitive process.'[28] The opaqueness produced by the 'intuitive' method of arriving at a sentence is intended to deter the bringing of sentencing appeals by defendants who seek to attack the penalty by unravelling the individual threads of reasoning which support it. Kirby J's approach is a more transparent one. Although he was outnumbered on the methodological point, it is to be noted that the 'intuitive' or 'instinctive synthesis' method, though still attractive to judges,[29] is being eroded by legislation which expressly or impliedly requires identification of the benefit allowed an offender because of the presence of certain key mitigating factors, such as pleading guilty[30] or cooperating with the authorities as an informer or in other ways.

For example, in *R v Nagy*, a federal drug case, the majority of the Full Court of the Supreme Court of Victoria, Court of Criminal Appeal, strongly supported the 'instinctive synthesis' approach in arriving at a sentence, unless statutory or

23 Ibid 604 (Street CJ, with whom Hunt and Allen JJ agreed) (emphasis added). The Court said there:

> Although less well recognised, because less frequently encountered, the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency, the degree of which will vary according to the degree of likelihood of that guilt being discovered by the law enforcement authorities, as well as guilt being established against the person concerned.

24 *Ryan* (2001) 179 ALR 193, 216:

> There was no reference to *R v Ellis*. ... Neither in the reasoning of the sentencing judge, nor in the resulting sentence, do I consider that the principle in *R v Ellis* was applied. It follows that, on the face of things, a specific error of sentencing principle has occurred which the appellant identified and the Court of Criminal Appeal failed to correct.

25 Ibid 194 (McHugh J), 208 (Gummow J), 229 (Hayne J), 236–7 (Callinan J).

26 Ibid 237. See also at 227 (Hayne J).

27 Eg *Wise v The Queen* [1965] Tas SR 196, 200 (Crisp J).

28 *R v Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ). See also *R v Young* [1990] VR 951; *R v Nagy* [1992] 1 VR 637.

29 *Veen [No 2]* (1988) 164 CLR 465, 476–7 (Mason CJ, Brennan, Dawson and Toohey JJ); *AB v The Queen* (1999) 198 CLR 111, 121–2 (McHugh J).

30 In *R v Thomson* (2000) 49 NSWLR 383, a NSW guideline judgment on discounts for pleas of guilty, there is a discussion of 'quantification and the instinctive synthesis' at 396–411 (Spigelman CJ).

public policy considerations dictated otherwise.[31] The dissenter, McGarvie J, advanced powerful arguments on those very grounds.[32] He noted that at common law a sentencer could always quantify any discount granted, and that now under the *Crimes Act 1914* (Cth), a sentencer who reduces a federal sentence or federal non-parole period because an offender has undertaken to cooperate with law enforcement agencies is required to state the precise extent of the discount granted for that cooperation. If the promised cooperation is not forthcoming, the Director of Public Prosecutions can then appeal against the reduced sentence out of time.[33] McGarvie J also drew attention to the fact that the 'instinctive synthesis' approach tended to frustrate the public policy of encouraging pleas of guilty, informing and other forms of cooperation with police and prosecutorial authorities in order to reduce the burden on the courts and to facilitate the fight against crime. The instinctive approach was at variance with those aims, because the nature and extent of the available discounts were not made manifest and thus attractive to other accused persons who might be persuaded by the significant advantages of pleading guilty and being cooperative.[34]

V Credit for Prior Good Character

Ryan contended that the District Court judge had erred in denying him any leniency under this head and that the NSW Court of Criminal Appeal was equally wrong in ruling that no sentencing error had been made in this regard.

The sentencing judge had said:

> His capacity, speaking generally, as a priest was well recognised and well received, as shown by the testimonials ... He is well liked and well respected by some people, as shown by those testimonials. ... But an unblemished character and reputation is something expected of a priest. His unblemished character and reputation does not entitle him to any leniency whatsoever.[35]

The NSW Court of Criminal Appeal's devaluation of Ryan's previous good character, reputation and achievements was based less on a belief that these were qualities expected of priests in any event than on the fact that the attributes referred to were part of a false persona which facilitated the crimes charged.

> In a circumstance where the essence of the criminality of the conduct of an offender is abuse of a position of trust, it is ordinarily not of great assistance to the offender to observe that he occupied a position of trust. The offences

[31] [1992] 1 VR 637.

[32] Ibid 645–50.

[33] *Crimes Act 1914* (Cth) s 21E(1). There is similar legislation in Victoria, but it does not compel the sentencer to declare the extent of the reduction in sentence granted: *Crimes Act 1958* (Vic) s 567A(1A), (1B); *Sentencing Act 1991* (Vic) s 5(2AC); cf *R v O'Brien* (1991) 55 A Crim R 410 (Supreme Court of Victoria, Court of Criminal Appeal). The problem of subsequently uncooperative offenders has also arisen under State law: see *R v J* (1992) 59 SASR 145, where the Supreme Court of South Australia indicated that it would be most useful to appellate courts if sentencers stated the extent of the discount.

[34] *R v Nagy* [1992] 1 VR 637, 650 (McGarvie J).

[35] *R v Ryan* (Unreported, District Court of NSW, Judge Nield, 26 September 1997) 12.

> committed by the present appellant were only made possible by the trust that was reposed in him in connection with the pursuit of his priestly vocation.[36]

By pointing to his good works and reputation, Ryan was making a general claim to have been a person of good character prior to his offending. The establishment and relevance of an accused's 'good character' in criminal prosecutions has been the subject of much controversy. As recently as 1999, in the High Court case of *Melbourne v The Queen*, Kirby J identified nine questions that had been raised in the legal literature regarding the nature and use of 'good character', including whether the concept should be recognised at all.[37] For instance:

> Is it an outmoded or antiquated notion of morality and human propensity which has been overtaken by psychological experimentation and understanding, and which should no longer be reflected in the directions which judges give to contemporary juries? ...
>
> Is it necessary, or appropriate, to draw a distinction between particular categories of crimes, such that evidence of good character or the absence of convictions will be treated as relevant to, say, a crime of dishonesty, but not necessarily to an unpremeditated, spontaneous crime of a sexual or other nature? Or is good character a badge of good citizenship which the law acknowledges, for policy reasons, so that it stands the accused in good stead when faced by a criminal accusation which goes to trial? ...
>
> Are 'good character' and 'reputation', which are sometimes used interchangeably in the cases, the same notion? Or does 'good character' refer to inner qualities of the accused which may or may not be reflected in that person's public reputation?[38]

Though in relation to the proof of guilt at a contested trial 'good character' is taken as referring to the inherent qualities of the accused rather than reputation or the absence of convictions,[39] at the sentencing stage of a trial the prisoner's prior good works, good reputation, or absence of any earlier involvement with the criminal justice system are accepted as indicative of good character and, normally, as having a mitigating effect on the sanction to be imposed.[40]

> The evidence of good conduct, or of matters which reveal redeeming features of the offender's character, tendered as relevant to sentencing will rarely, if ever, be discarded as immaterial to the sentencing function. The evidence may sometimes be disbelieved. It may sometimes be overridden by the objective seriousness of the offences or by countervailing evidence or by other

[36] *R v Ryan* [1998] NSWSC 55 (Unreported, Gleeson CJ, Cole JA, Levine J, 2 March 1998) [18] (Gleeson CJ, with whom Cole JA and Levine J agreed).

[37] (1999) 198 CLR 1, 33–5.

[38] Ibid 33–4 (citations omitted).

[39] Ibid 15 (McHugh J); Roderick Munday, 'What Constitutes a Good Character?' [1997] *Criminal Law Review* 247.

[40] *Ryan* (2001) 179 ALR 193, 209 (Gummow J), 217 (Kirby J); *R v Ireland* (1987) 49 NTR 10, 24 (Nader J); *R v Pahuja [No 2]* (1989) 50 SASR 551, 562 (White J). See generally Richard G Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999) 266–89.

> considerations. But it is a mistake in sentencing to treat such evidence as irrelevant to the task at hand.[41]

Indeed, according to McHugh J, a sentencing judge is *bound* to treat evidence of good character as relevant, even though the weight to be accorded to prior good character will vary according to the circumstances.[42] Kirby and Callinan JJ agreed with McHugh J that some credit should have been allowed at sentencing for Ryan's prior good character as revealed in his pastoral work with adults.[43] Gummow and Hayne JJ dissented, not on the general point of principle, but only on the basis that

> [i]t was open to the sentencing judge to conclude that the good works upon which the appellant relied in partial discharge of his office of trust and influence were liable wholly to be displaced by the malign exercise of the power of his religious office.[44]

The District Court judge had said that, in any event, no credit would be given for the offender's prior good character because good reputation was expected of a priest. This proposition was demolished by Kirby J with his observation that, if it was to be a valid sentencing consideration, it

> would deny persons who happen to be priests (or in equivalent occupations) the benefit to which all other persons in our community coming before a court for sentence are entitled, namely to rely on evidence relevant to their character and past conduct and to bring such evidence to account so that the sentencing judge considers them as a whole person and not solely under the shadow of their crimes.[45]

This must be correct — the application of any of the fundamental sentencing principles, such as mitigation, cannot be excluded simply because the offender, whether priest, police officer, teacher or company director, holds a position of trust and obligation towards others.

It is an entirely different proposition, one accepted by all members of the Bench, that sentencers may exercise a discretion regarding the degree of leniency to be granted. But Gummow and Hayne JJ read the scope of the discretion as permitting a complete refusal to attach any significance whatsoever to evidence of good character.[46] The majority view (and the better one, it is submitted) is that credible evidence of prior good character can never be wholly irrelevant to the type or quantum of sentence. What the original sentencer did is now prohibited. *Ryan* stands for the proposition that a sentencer *must* ameliorate individual

[41] *Ryan* (2001) 179 ALR 193, 217 (Kirby J).
[42] Ibid 199 (McHugh J).
[43] Ibid 218 (Kirby J), 234–5 (Callinan J).
[44] Ibid 209–10 (Gummow J). See also at 228–9 (Hayne J).
[45] Ibid 218. Kirby J was also worried that denial of credit for prior good character, because Ryan was a priest, meant that the appellant was being subjected to additional punishment by a criminal court for religious offences such as sinning and breach of priestly vows: at 211–12.
[46] Ibid 209–10 (Gummow J), 228 (Hayne J).

sentences, or the total effective sentence,[47] by attaching *some* weight to the offender's proven prior good character.

There are, however, a number of 'weight reducing' considerations:[48]

- The fact that the offence or offences were not isolated acts, but rather part of a prolonged course of criminal activity. This may take the form of repeated acts against the same victim or victims, or similar acts against different victims, or both.[49]
- The length of time the accused was engaged in this form of undetected crime.[50]
- The extent to which the crimes were deliberately and carefully planned and executed.[51]
- Whether the benign appearance or good standing of the offender was the very mask behind which the crimes were committed.[52] For instance, whether the accused was leading a double life, doing 'good works' as a cover for committing the offences.[53] As Hayne J explained:

  > the fact that an offender has done good things in the past, or has been well reputed in the community, may, Janus-like, wear two aspects. The fact that this offender was, to outward appearances, a devoted minister to his adult parishioners is admirable. But the appellant was able to secure the trust of his victims and their parents because he was thought to be worthy of respect.[54]

- The gravity of the breach of trust involved and the need to give priority to general and specific deterrence.[55]

It is implicit that when Australian sentencers act in accordance with this latest High Court ruling, they should at least declare that they have done so. Though quantification of the type or degree of leniency accorded to the prisoner on account of prior good character is not required, unarticulated compliance with *Ryan* in the course of sentencing by 'instinctive synthesis' will only invite further appeals.

VI Special Principles for Paedophiles?

This case is of additional significance because of the exchange of views by their Honours on whether they should formulate more detailed sentencing principles for offenders, who, like Ryan, might be classified as paedophiles.

47 Eg when giving directions as to concurrency, or in setting non-parole terms.

48 This list does not purport to be exhaustive.

49 *Ryan* (2001) 179 ALR 193, 201 (McHugh J), 233 (Callinan J). See, eg, *R v Hermann* (1988) 37 A Crim R 440 (NSW Court of Criminal Appeal); *Phelan v The Queen* (1993) 66 A Crim R 446 (NSW Court of Criminal Appeal).

50 *Ryan* (2001) 179 ALR 193, 227, 228 (Hayne J).

51 Ibid 234 (Callinan J). See, eg, *R v Morley* [1985] WAR 65.

52 Eg drug couriers: *Brodie v The Queen* (1977) 16 ALR 88; *R v Leroy* [1984] 2 NSWLR 441; white collar criminals: *R v McLean* (2000) 2 VR 118.

53 *Ryan* (2001) 179 ALR 193, 201 (McHugh J).

54 Ibid 227.

55 Ibid 219 (Kirby J).

McHugh J acknowledged that as the issues and implications of doing so had not been argued before the Court, the present case was not an appropriate one in which to try to give such guidance. However his Honour warned that sooner or later the matter would have to be addressed by the High Court.[56]

Hayne J agreed that to attempt to lay down principles for the guidance of judges in sentencing paedophiles was premature and he doubted that, in any event, reliance on any such classification would be of utility at sentencing. His Honour wisely cautioned his colleagues that the tag had no fixed meaning. It could be given a broad colloquial or narrow technical definition.[57] Moreover, whatever criteria were applied by those seeking to establish the accused's psychological status as a 'paedophile', or claiming that the person was suffering from a condition called 'paedophilia', it was not clear whether such evidence, if admitted, would be received as a mitigating or aggravating factor by the judge fixing the sentence.[58] Certainly McHugh J put on record his view that paedophilia was not to be regarded as a psychiatric illness reducing the offender's moral culpability: 'Indeed, the public view — which cannot be disregarded if courts are to maintain the confidence of the community — may be that the paedophile should get the heavier sentence ... because he is more likely to re-offend.'[59]

Nor did McHugh J accept that the underlying condition reduced the capacity of paedophiles to learn the lesson of sanctions imposed in the interest of general deterrence.[60] Though recognising there were advocates for the adoption of a rehabilitative approach which might point towards greater use of community-based sentences designed to treat and reform the offender,[61] his Honour took the position that

> [t]he 'persistently punitive' attitude of the community towards criminals means that public confidence in the courts to do justice would be likely to be lost if courts ignored the retributive aspect of punishment. In the middle of the 20th century, the need for sentences that were conducive to the rehabilitation of the prisoner was much emphasised. Less attention was then paid to the retributive aspect which was often ignored by an embarrassing silence. But under the notion of giving the offender his or her 'just deserts', the retributive aspect has re-asserted itself in recent years. In the case of offences by paedophiles, it is

56 Ibid 202 (McHugh J).

57 Ibid 230 (Hayne J), 210 (Gummow J); see above n 1 for the American Psychiatric Association definition of paedophilia.

58 *Ryan* (2001) 179 ALR 193, 230 (Hayne J).

59 Ibid 202–3 (McHugh J); also drawing upon *Channon v The Queen* (1978) 20 ALR 1, 4 (Brennan J); *Veen [No 2]* (1988) 164 CLR 465, 476–7 (Mason CJ, Brennan, Dawson and Toohey JJ).

60 *Ryan* (2001) 179 ALR 193, 202–6.

61 Ibid 204, citing Bill Glaser, 'Paedophilia: The Public Health Problem of the Decade' in Marianne James (ed), *Paedophilia: Policy and Prevention* (Research and Public Policy Series No 12, Australian Institute of Criminology, 1997) 4, 11; John Nicholson, 'Defence of Alleged Paedophiles: Why Do We Need to Bother?' in Marianne James (ed), *Paedophilia: Policy and Prevention* (Research and Public Policy Series No 12, Australian Institute of Criminology, 1997) 44. There is a further discussion by McHugh J at 206 on the problem of limited resources for treatment, the question of the amenability of the offender to treatment, and the success rate of the treatment regimes which may be offered.

> currently the most important factor in the sentencing process because their crimes are committed against one of the most vulnerable groups in society and they almost invariably have long-term effects on their victims. According to current community standards, it is proper that paedophiles should be severely punished for their crimes.[62]

Even if the policy is that 'paedophiles should be severely punished for their crimes', the severity of that punishment must be proportionate to the gravity of the particular circumstances of the offender and their offences. Proportionality is a fundamental principle of sentencing which the High Court insists must be applied in all cases.[63] In the absence of special legislation authorising the imposition of extended or indefinite sentences for the protection of the community against serious or serial offenders,[64] it sets a limit on how severe (or lenient) a sentencer may be.

But if paedophiles do deserve severe punishment, does the restraining principle of proportionality mean that the level of judicially imposed punishment has to be reduced to compensate for the additional punitive consequences which these offenders will inevitably suffer, such as humiliation, public opprobrium and permanent stigma? McHugh and Hayne JJ thought not,[65] Kirby and Callinan JJ were more sympathetic[66] and Gummow J was silent on the point.

Applications for a reduction in the length of a sentence of imprisonment because of the hardship likely to be suffered by the prisoner in serving it are generally met by the response that the sentence is intended to produce hardship. A view commonly expressed by courts of criminal appeal is that relief from any exceptional hardship is a matter for the executive government in the exercise of its functions in the administration of correctional services, or the exercise of clemency.[67] Sentencers are often made aware that the prisoner will suffer further serious civil consequences as a result of a conviction having been recorded. Such consequences may include loss of or disbarment from employment, loss of pension rights, cancellation or suspension of trading or other licences, or the possibility of deportation.

The courts have responded ambivalently, 'sometimes decreasing a sentence to take into account the additional detriment and sometimes refusing to do so. The cases present no clear pattern.'[68] The present case is no exception. However, it should be pointed out that general public opprobrium and social stigma are one

[62] *Ryan* (2001) 179 ALR 193, 205 (citations omitted). McHugh J added that the element of incapacitation would also be served by this approach: at 205.

[63] *Veen [No 2]* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ), 485–6 (Wilson J), 490–1 (Deane J), 496 (Gaudron J); *Chester v The Queen* (1988) 165 CLR 611, 618; *Hoare v The Queen* (1989) 167 CLR 348, 354; Richard G Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489.

[64] Eg *Sentencing Act 1991* (Vic) pt 2A (serious offenders). See especially s 6D, which expressly authorises disproportionately severe sentences, and ss 18A–18P (indefinite sentences).

[65] *Ryan* (2001) 179 ALR 193, 206 (McHugh J), 230 (Hayne J).

[66] Ibid 222 (Kirby J), 234 (Callinan J).

[67] Fox and Freiberg, above n 40, 337–8.

[68] Ibid 334. The question of whether it is proper to take mitigating account of the likelihood of parallel punishment under Aboriginal customary law in dealing with indigenous offenders has been the subject of discussion in cases such as *R v Minor* (1992) 79 NTR 1.

step further removed than specific legal disabilities in terms of material detriment. There are certain collateral consequences of being convicted of an indictable crime that must be accepted as an integral part of the punishment, rather than a basis for mitigating it. These include the fact that the conviction produces a permanent alteration in the offender's legal status and that the proceedings are a form of public censure and denunciation intended to reproach the offender and deliberately to stigmatise them in order to maximise the deterrent effect on the offender and other like-minded wrongdoers.

Kirby J drew attention to the growing number of cases coming before appellate courts in relation to the sentencing of persons convicted of serial sexual offences against minors.[69] Though his Honour too conceded that the current High Court appeal was not an appropriate occasion to do so,[70] Kirby J pressed courts of appeal to consider whether there were additional policy considerations which should be incorporated in some form of appellate guidance regarding the approach to be adopted by judges in sentencing such offenders.[71] The guidance could draw on the large body of judicial, academic and scientific material dealing with such offenders available in Australia and overseas. It could address matters such as how proof of the existence of some underlying factor (eg a mental disorder, drug addiction or paedophilia) might affect the allocation of punishment, particularly when it is associated with repeated wrongdoing.

> The appellant's paedophilia is an explanation for his sexual attraction to young persons. It is not a defence to the criminal conduct in which he engaged. However, depending on the evidence or other material available to the sentencing judge, it might be appropriate, in sentencing such an offender, to consider the common cause of his multiple offences as that cause is relevant to evaluating the totality of his wrongdoing.[72]

This would bear on the exercise of discretions such as whether the sentences imposed in relation to individual victims should be served concurrently rather than cumulatively,[73] as well as upon the sentencer's evaluation of the overall moral blameworthiness of the offender:

> Where serial criminal offences manifest a common underlying condition which is properly proved, for example one giving rise to a 'compulsive sexual syndrome', it would seem arguably appropriate in sentencing to take the underlying condition into account.[74]

69 *Ryan* (2001) 179 ALR 193, 210–11.

70 This was due to the inadequate evidentiary foundation concerning Ryan's 'condition' of paedophilia, its origins, treatability and prognosis, and the absence of argument on grounds of appeal specific to that issue drawing on current medical and criminological knowledge: ibid 220.

71 Ibid 220–4.

72 Ibid 223 (Kirby J) (citation omitted).

73 'Where strong common elements linking criminal acts are accepted, it can sometimes be an error of principle, in determining punishment, to ignore that fact or to give undue weight to the separate acts involved': ibid.

74 Ibid, citing *R v McCracken* (1988) 38 A Crim R 92, 96–7 (Crockett CJ) (Supreme Court of Victoria, Court of Criminal Appeal); Fox, 'Sentencing a Compulsive Paedophile', above n 5, 525.

VII TOWARDS A GUIDELINE JUDGMENT?

Vincent Ryan was convicted and sentenced under New South Wales law and must now be resentenced by the NSW Court of Criminal Appeal. That court broke new ground in Australian sentencing when, on 12 October 1998, Spigelman CJ indicated that thenceforth the Court was prepared to issue guideline judgments with respect to sentencing for particular offences or classes of offence.[75] In doing so, the Court was following the lead of the English Court of Appeal (Criminal Division) which, in the early 1970s, began to issue judgments which went beyond the point raised in the particular case and which suggested a sentencing scale for various common forms of the class of crime committed by the offender. These judgments aimed to offer a degree of coverage and integration of approach not found in the normal run of appeals against sentence.[76]

The first NSW Court of Criminal Appeal guideline judgment in *R v Jurisic*[77] related to the sentencing of offenders for causing death or grievous bodily harm by dangerous driving. Then followed judgments on sentencing of armed robbers,[78] low-level drug couriers,[79] and on the discount to be granted for a plea of guilty.[80] These guidelines are intended to be indicative only and do not bind sentencing judges, but their objective is to promote consistency in sentencing. To date they have been the result of the Court of Criminal Appeal exercising common law powers rather than relying on the later enacted *Criminal Procedure Amendment (Sentencing Guidelines) Act 1998* (NSW).[81] The scope and authority of common law sentencing guidelines has recently come under attack in the High Court,[82] but the statutory foundation for guideline judgments has been strengthened by the passing of the *Crimes (Sentencing Procedure) Act 1999* (NSW) part 3 division 4.[83]

[75] *R v Jurisic* (1998) 45 NSWLR 209. See also Evelyn McWilliams, 'Sentencing Guidelines: Who Should Be the Arbiter, the Judiciary or Parliament?' (1998) 36 *Law Society Journal* 48; J J Spigelman, 'Sentencing Guideline Judgments' (1999) 73 *Australian Law Journal* 876. For developments in Western Australia, see Neil Morgan and Belinda Murray, 'What's in a Name? Guideline Judgments in Australia' (1999) 23 *Criminal Law Journal* 90.

[76] Eg *Caird v The Queen* (1970) 54 Cr App R 499 (riot); *Turner v The Queen* (1975) 61 Cr App R 67 (robbery); *Taylor v The Queen* (1977) 64 Cr App R 182 (unlawful sexual intercourse); *Farrugia v The Queen* (1979) 69 Cr App R 108 (living on the earnings of prostitution).

[77] (1998) 45 NSWLR 209.

[78] *R v Henry* (1999) 46 NSWLR 346.

[79] *R v Wong* (1999) 48 NSWLR 340. The High Court has subsequently ruled in *Wong v The Queen* [2001] HCA 64 (Unreported, Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, 15 November 2001) that the NSW Court of Criminal Appeal does not have power to formulate sentencing guidelines for federal offences if they are inconsistent with the general sentencing directives found in the *Crimes Act 1914* (Cth) s 16A, or if they too narrowly determine the approach to be taken in future cases.

[80] *R v Thomson* (2000) 49 NSWLR 383.

[81] Subsequently replaced by the *Crimes (Sentencing Procedure) Act 1999* (NSW).

[82] *Wong v The Queen* [2001] HCA 64 (Unreported, Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, 15 November 2001).

[83] Section 36 provides that:

> Guideline judgment means a judgment that is expressed to contain guidelines to be taken into account by courts sentencing offenders, being: (a) guidelines that apply generally, or (b) guidelines that apply to particular courts or classes of courts, to particular offences or

When Ryan's case returns to the NSW Court of Criminal Appeal, a full Bench of that court will be called upon to resentence Ryan in accordance with the reasons for judgment of the High Court. At minimum, the judges must adopt a new position on granting credit for a serious sex offender's prior good character; they must consider where they stand on the weight to be attached to the disapprobation, distress and stigma suffered by Ryan as a result of his fall from grace; and they are free to call for evidence and legal argument from both sides on the special problems to be faced in sentencing persons who describe themselves, or who are classified by others, as paedophiles. This should be the occasion for a guideline judgment, one building upon the High Court's decision in *Ryan* and on the established principles of Australian sentencing law.[84]

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classes of offences, to particular penalties or classes of penalties or to particular classes of offenders (but not to particular offenders).

84 In light of the doubt expressed by Gaudron, Gummow and Hayne JJ about the power of the NSW Court of Criminal Appeal at common law to formulate guidelines which go beyond the particular class of offence charged or to frame the guidance in limited numerical terms rather than as an elaboration of underlying governing principles (*Wong v The Queen* [2001] HCA 64 (Unreported, Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, 15 November 2001) [79]–[88] (Gaudron, Gummow and Hayne JJ), supported by Kirby J at [132]–[140]), it would be best for the Attorney-General to be asked to apply for a guideline under the statutory procedures allowed for under the *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 4.

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