

THE HON T F BATHURST AC
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'IS DISCRETION THE BETTER PART OF SENTENCING?'
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INTRODUCTION

1. There are few areas of law which excite the public imagination to quite the same degree as does sentencing. A verdict of “guilty” may all be well and good, but it is the sentence which most often attracts the attention and approbation or reprobation of the public. People should be reluctant to pass comment on a verdict of “guilty” or “not guilty” without the benefit of having heard the evidence which has been presented to the jury or judge, and, with some recent exceptions, people generally are. However, the same courtesy is not often extended to sentences or to the judges who impose them, again, as we have seen recently.
2. It is often difficult to identify the precise grounds on which public commentators take issue with particular sentences. Usually, the critique goes no further than labelling a sentence as being too lenient for the type of offence which was committed based on the length or severity of the sentence. There is rarely examination of the actual basis upon which a sentence was imposed, or the considerations which might have been held by the sentencing judge to be relevant. Instead, proposals which emphasise a quantitative approach to assessing sentences and the judges who impose them are encouraged.¹

* I express my thanks to my Research Director, Mr Damian Morris, for his assistance in the preparation of this address.

¹ See Matthew Guy MP, ‘Greater Accountability and Scrutiny for Judges’ (Media Release, 19 November 2018) <<https://www.matthewguy.com.au/media-release/guy-greater-accountability->

3. I would not be the first to point out that there is something of a disconnect between this criticism and the nature of the sentencing task required by law. Indeed, there is evidence which suggests that there is a disconnect between this criticism and the how members of the public react when they are required to decide on the sentence for an offender with knowledge of the relevant facts. Recent studies of jurors in Tasmania and Victoria show that the sentences which they would impose are, generally speaking, more lenient than those imposed by the sentencing judges, and that a large majority regarded the sentence ultimately imposed as appropriate.²
4. However, I think that the misplaced attention given to the length and severity of sentences by public commentators does serve to highlight the importance of the direction in which the High Court has taken sentencing jurisprudence in this country since it began taking an active role in hearing and determining applications for leave to appeal against sentence over the course of the 1970s and 1980s. Stated broadly, the Court has fairly decisively rejected approaches to sentencing which give priority to what might be described as “quantitative” considerations in favour of affirming the primacy of the discretion reposed in the sentencing judge by the common law as modified by statute.³
5. Now, as lawyers, I’m sure that we all know that “discretion” is, at the very least, the better part of valour.⁴ But, when it comes to talking about

and-scrutiny-for-judges/>. It should be noted that both the Judicial Commission of New South Wales and the Sentencing Advisory Council of Victoria both already provide public statistics on sentencing, but not for the purpose of assessing judges.

² See Kate Warner et al, ‘Public Judgment on Sentencing: Final Results from the Tasmanian Jury Sentencing Study’ (Trends and Issues in Crime and Criminal Justice No 407, Australian Institute of Criminology, February 2011); Kate Warner et al, ‘Measuring Jurors’ Views on Sentencing: Results from the Second Australian Jury Sentencing Study (2016) 19 *Punishment & Society* 180. In the latter, there was an exception for cases involving child sexual abuse. No similar study has taken place in New South Wales.

³ *GAS v The Queen* (2004) 217 CLR 198, 211 [31] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

⁴ William Shakespeare, *Henry IV, Part One* (5.4.115–21)

“discretion” in its legal sense, I think that it is sometimes given short shrift, which leads to its significance being underappreciated. Therefore, in this address, I propose to look at the central role which the idea of discretion plays in shaping the sentencing jurisprudence of the High Court and how it has influenced recent developments in the law. I will begin by outlining some historical aspects of sentencing in New South Wales, and how they shed some light on the current emphasis of the High Court on the discretion of the sentencing judge. Then, I will turn to look at how this emphasis manifests in the approach of the High Court to sentencing jurisprudence both under the common law and statute.

A BRIEF HISTORY OF SENTENCING

(a) The “prehistory” of sentencing

6. The legal history of sentencing really only begins in the 20th century after the passage of legislation permitting appeals in criminal proceedings.⁵ Prior to this time, a sentence imposed by a judge was final and their exercise of discretion could not be reviewed,⁶ although, at a practical level, harsh and unjust sentences could be mitigated through conditional pardons granted in the exercise of the prerogative of mercy by the

⁵ The *Criminal Appeal Act 1907* (UK) was the first example of such legislation. Later legislation in other jurisdictions, such as the *Criminal Appeal Act 1912* (NSW), was based on the United Kingdom legislation, although there were differences. For the passage of criminal appeal legislation in New South Wales, see G D Woods, *A History of Criminal Law in New South Wales: The New State 1901–1955* (Federation Press, 2018) ch 13.

⁶ From 1849, there was a limited power for a judge to state a case to the Supreme Court on a question of law: see *Criminal Cases Reserved Act 1849* (NSW) s 1; *Criminal Law Amendment Act 1883* (NSW) s 422. However, there were restrictions on this power which meant that it was not used to review exercises of discretion in sentencing, and further, there was no power for the Court to resentence: see *R v White* (1875) 13 SCR 339, 341–3 (Martin CJ); *Hume v The Queen* (1888) 9 LR (NSW) 168, 170 (Windeyer and Stephen JJ). For sentences imposed by justices of the peace, the most common means of appeal was by way of rehearing at a Court of Quarter Sessions, which did not allow for the possibility of development of sentencing principle: see *Justices Summary Jurisdiction Act 1835* (NSW) s 3; *Justices Acts Amendment Act 1900* (NSW) s 9; *Sweeney v Fitzhardinge* (1906) 4 CLR 716, 728–30 (Griffith CJ), 732–3 (Barton J), 737–8 (Isaacs J).

Governor.⁷ Nevertheless, there was little opportunity for the development of a sentencing jurisprudence by appellate courts, and any discretion which existed in relation to the imposition of a penalty was unconfined by any common law rules.⁸

7. However, while the discretion generally was not limited by rules of the common law, this did not mean that there were no restrictions on its exercise. As in other areas of the law, statute played an important role in qualifying the exercise of the discretion long before the development of the common law.⁹ Sometimes, statute required a particular penalty to be imposed. Other times, statute only required a particular type of penalty “not exceeding” a certain amount to be imposed, and conferred a discretion to determine the penalty below that amount. For example, in the English criminal law consolidation of the late 1820s,¹⁰ which applied in New South Wales,¹¹ each section which conferred a discretion to determine a penalty “not exceeding” a certain amount did so by

⁷ *Criminal Law Amendment Act 1883* (NSW) s 409 codified this practice by permitting the Governor to “grant at any time to an offender under sentence a remission of the whole or any portion of such sentence on condition of his giving security by recognizance for his good behaviour”: see also G D Woods, *A History of Criminal Law in New South Wales: The New State 1901–1955* (Federation Press, 2018) 344–5.

⁸ However, there were rules which defined what types of penalty might be imposed for offences under the common law which did not have a penalty prescribed by statute: see *R v White* (1875) 13 SCR 339, 341 (Martin CJ). There were no common law rules which imposed what might be called a “maximum” penalty when the discretion was otherwise at large: see *Re Forbes* (1887) 8 LR (NSW) 68, 76 (Innes J).

⁹ See, eg, Mark Leeming, ‘Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room’ (2013) 36 *University of New South Wales Law Journal* 1002; Mark Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019) ch 1.

¹⁰ *Criminal Law Act 1826* (UK); *Criminal Statutes Repeal Act 1827* (UK); *Criminal Law Act 1827* (UK); *Larceny Act 1827* (UK); *Malicious Injuries to Property Act 1827* (UK); *Offences Against the Person Act 1828* (UK).

¹¹ Each statute came into force prior to 25 July 1828, and therefore applied automatically by force of *Australian Courts Act 1828* (UK) s 24. However, each of the statutes except the *Offences Against the Person Act 1828* (UK) was also expressly applied by the *Imperial Criminal Acts Adoption Act 1828* (NSW) s 1.

expressly noting that the penalty was to be “at the Discretion of the Court” below that amount.¹²

8. These restrictions on the exercise of a discretion were limited and are unlikely to have given rise to problems. More difficult issues concerning the impact of statute arose when New South Wales consolidated and amended its criminal legislation in the *Criminal Law Amendment Act 1883* (NSW), which introduced a table of mandatory minimum sentences for offences where a penalty of penal servitude for life or a fixed term had been prescribed.¹³ Such offences were, general speaking, those which had previously been described as “felonies”.¹⁴ However, no mandatory minimum sentences were imposed for offences where only imprisonment or another penalty had been prescribed. In these cases, the penalty remained discretionary but “not exceeding” a certain amount.
9. There was public backlash at the harsh outcomes under the new sentencing regime,¹⁵ which offers a sharp contrast with the enthusiastic support which mandatory minimums have received in our own time.¹⁶ Amending legislation was passed shortly thereafter in 1884,¹⁷ which, on its intended reading, allowed a judge to impose either a minimum sentence of penal servitude for three years or a term of imprisonment for any period in lieu of the former mandatory minimums.¹⁸

¹² See also Ruth Paley (ed), *The Oxford Edition of Blackstone’s Commentaries on the Laws of England* (Oxford University Press, 2016) vol 4, 244.

¹³ *Criminal Law Amendment Act 1883* (NSW) s 8. See also G D Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788–1900* (Federation Press, 2002) 357.

¹⁴ *Criminal Law Amendment Act 1883* (NSW) s 4 had in fact reversed the definition so that it was the fact that a liability to “penal servitude” was imposed for an offence which made it a “felony”.

¹⁵ G D Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788–1900* (Federation Press, 2002) 357–61; see, eg, *Criminal Law Amendment Act 1883* (NSW) s 24.

¹⁶ See, eg, *Crimes Act 1900* (NSW) s 25B.

¹⁷ *Criminal Law Amendment Act 1884* (NSW).

¹⁸ G D Woods, *A History of Criminal Law in New South Wales: The New State 1901–1955* (Federation Press, 2018) 341.

10. Unfortunately, the language of the statute was ambiguous. Instead, it was interpreted to mean that there remained a minimum penalty of three years for any offence where a penalty of penal servitude had been prescribed.¹⁹ Any sentence which imposed a lesser penalty for an offence which rendered a person liable to penal servitude was “illegal” and liable to be set aside by a reviewing court upon a case stated.²⁰ However, there was no discretion for the reviewing court to resentence the offender, or even to remit to the lower court to resentence; the earlier sentence was simply vacated.²¹
11. Ultimately, the vice of mandatory minimum sentencing was remedied by further legislation in 1891.²² It made clear that, for every offence where a penalty of penal servitude had been prescribed, there was a choice between imposing a sentence of penal servitude or imposing a sentence of imprisonment instead. If the former, then a minimum term applied. If the latter, then a maximum term applied. Mandatory minimum sentencing was retained in form, but, in practice, since there was little to distinguish a sentence of penal servitude and a sentence of imprisonment by this time, it had been removed.²³ It was removed even as a matter of form in 1924.²⁴
12. The only presently-existing reminder of these events in legal history is s 18 of the *Crimes (Sentencing Procedure) Act 1999* (NSW),²⁵ which

¹⁹ See *R v Bell* (1888) 9 LR (NSW) 65, 68 (Stephen, Owen and Foster JJ); G D Woods, *A History of Criminal Law in New South Wales: The New State 1901–1955* (Federation Press, 2018) 342.

²⁰ See *Criminal Law Amendment Act 1883* (NSW) s 422.

²¹ See *Hume v The Queen* (1888) 9 LR (NSW) 168, 170 (Windeyer and Stephen JJ).

²² *Criminal Law and Evidence Amendment Act 1891* (NSW) s 4.

²³ See G D Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788–1900* (Federation Press, 2002) 363.

²⁴ After the repeal of the *Criminal Law Amendment Act 1883* (NSW), the formal existence of the mandatory minimums had been continued in *Crimes Act 1900* (NSW) s 442. They were repealed by the *Crimes (Amendment) Act 1924* (NSW) s 21(c).

²⁵ This provision is a successor to the version of *Crimes Act 1900* (NSW) s 442 inserted by *Crimes (Amendment) Act 1924* (NSW) s 21(c).

provides what otherwise might seem to be rather obvious: that the penalties specified at the end of a provision are in fact maximums, and permit the imposition of any penalty “not exceeding” the penalty specified. However, I think that that these events also help remind us that our legal system started from the position that the punishment to be imposed on an offender was based on nothing more than the opinion of the judge as to what was appropriate in the circumstances of the case, qualified to some degree by statutory provisions which prescribed the type of penalty and a minimum or maximum. A sentence could only be set aside for error if it failed to comply with these limited prescriptions.

13. Far from being a dead end for legal analysis, I think that acknowledging that our legal system started from this position sheds a great deal of light on the subsequent development of sentencing jurisprudence in the High Court, and I do not think that it is hard to see why. While both common law and statutory regulation of the sentencing discretion has increased, we have still retained the core idea of sentencing as a process which depends upon the judgment and opinion of the individual judge to determine the appropriate sentence. Later developments and changes were interpreted against this background.

(b) *Appeals against sentence: the birth of the search for “error”*

14. Nowhere is this more evident than in the gradual development of a sentencing jurisprudence after the introduction of a right to appeal against sentence. In New South Wales, the opportunity to consider the circumstances in which the newly constituted Court of Criminal Appeal would interfere in a sentence on an appeal under s 5(1)(c) of the *Criminal Appeal Act 1912 (NSW)*²⁶ arose early. Within a year, in *R v Skinner*,²⁷ the Court heard an appeal against a sentence of penal servitude for 7 years imposed on a male offender after conviction on a charge of “carnally knowing” a girl between 10 and 16 years of age. The

²⁶ Unless otherwise stated, the provisions of the *Criminal Appeal Act 1912 (NSW)* referred to in this address have not relevantly changed since their enactment.

²⁷ (1913) 13 SR (NSW) 280.

maximum sentence was penal servitude for 10 years.²⁸ The ground of appeal was simply that the sentence was “excessive”.²⁹

15. The leading judgment was delivered by one of my predecessors as Chief Justice, Sir William Cullen. His Honour was alive to the fact that the task of a sentencing judge is often “a very delicate one”, which is certainly no less true today than it was a century ago. His Honour was perhaps less in tune with the sensitivity which we might now expect in cases of this nature when he turned to discuss the mitigating factors, and referred to the “extremely vicious character of the girl” concerned. However, lest anyone get the impression that his Honour was one-sided in his assessment of the situation, he also condemned the “extremely vicious character of the man” as well.³⁰
16. His Honour was on safer ground to modern ears when he discussed what he saw the duty of a Court Criminal Appeal in an appeal against sentence. He quoted from *R v Sidlow*,³¹ which was a decision of the English Court of Appeal made shortly after the passage of the English criminal appeal legislation in 1907. In that case, Lord Chief Justice Alverstone said that a court “would not interfere with a sentence unless it was apparent that the Judge at the trial had proceeded upon wrong principles or given undue weight to some of the facts proved in evidence”.³² His Lordship also said that it was “not possible to allow appeals because individual members of the Court might have inflicted a different sentence more or less severe”, a remark which bears a striking

²⁸ *Crimes Act 1900* (NSW) s 71.

²⁹ (1913) 13 SR (NSW) 280, 282.

³⁰ *Ibid* 287. His Honour’s choice of words sounds rather amusing to modern ears because, in addition to its contemporary meaning, “vicious” also used to be an antonym of “virtuous”, just as “vice” is still an antonym of “virtue”.

³¹ (1908) 1 Cr App R 28.

³² *Ibid* 29.

similarity to what was affirmed by the High Court in *Lowndes v The Queen*³³ over ninety years later.

17. Chief Justice Cullen applied the remarks of the Lord Chief Justice in *Sidlow* without demur. Since he could find no evidence that the sentencing judge had failed to give “full consideration” to any of the relevant circumstances, he declined to interfere with the sentence, despite feeling that it was “severe”.³⁴ The other members of the Court agreed with this conclusion,³⁵ as did a unanimous High Court in *Skinner*.³⁶ Acting Chief Justice Barton and Justice Isaacs both expressly affirmed a principle in almost identical terms to that stated in *Sidlow*, which received the concurrence of Justices Gavan Duffy, Powers, and Rich.³⁷
18. From this point, it might seem as though it would have been smooth sailing to the modern statements of principle in *Dinsdale v The Queen*,³⁸ which require Courts of Criminal Appeal to find the presence of one of the categories of error identified in *House v The King*³⁹ as a precondition to allowing an appeal against sentence. Indeed, the majority judgment in *House v The King* expressly relied upon *Sidlow*,⁴⁰ and the statements in the two cases are broadly similar. However, the course of precedent, just like that of true love, never did run smooth.⁴¹ In fact, there was an

³³ (1999) 195 CLR 665, 671 [15] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

³⁴ (1913) 13 SR (NSW) 280, 290.

³⁵ *Ibid* 290 (Sly J), 290–1 (Gordon J).

³⁶ *Skinner v The King* (1913) 16 CLR 336.

³⁷ *Ibid* 339–40 (Barton ACJ), 342–3 (Isaacs J), 344 (Gavan Duffy, Powers and Rich JJ).

³⁸ (2000) 202 CLR 321, 323–4 [3] (Gleeson CJ and Hayne J), 329 [21] (Gaudron and Gummow JJ), 339–40 [57]–[58] (Kirby J).

³⁹ (1936) 55 CLR 499, 504–5 (Dixon, Evatt and McTiernan JJ).

⁴⁰ *Ibid* 505 (Dixon, Evatt and McTiernan JJ).

⁴¹ William Shakespeare, *A Midsummer Night's Dream* (1.1.132–140).

interlude of over half a century before the nature of an appeal against sentence was understood as a search for “error” as we now do today.

19. The catalyst for the shift away from the course approved by the High Court in *Skinner* had its genesis in the enactment of section 5D of the *Criminal Appeal Act 1912* (NSW) to provide for Crown appeals against sentence in 1924.⁴² It conferred power on the Court of Criminal Appeal to, “in its discretion, vary the sentence and impose such sentence as ... may seem proper”, which was in somewhat different terms to the power which had been conferred under section 6(3) in relation to appeals by an offender. The precise terms of the statutory language conferring power on the Court to review a sentence under section 6(3) had not formed part of the reasoning in adopting the principles in *Sidlow*, and thus, in *R v King*,⁴³ the Court of Criminal Appeal had no difficulty in holding that they also applied to the power under section 5D.⁴⁴
20. As it does, from time to time, the High Court took a different view. In *Whittaker v The King*,⁴⁵ decided in 1928, a majority of the High Court expressed the view, in obiter, without reasoning, and without hearing argument, that section 5D conferred an “unlimited” discretion on the Court of Criminal Appeal to vary a sentence on a Crown appeal,⁴⁶ over the emphatic protests of Justices Isaacs and Higgins in separate judgments.⁴⁷ Presumably, this conclusion was based on a literal reading of the terms of the section. Despite the deficiencies in this reasoning,

⁴² *Crimes (Amendment) Act 1924* (NSW) s 33. For the reasons for the introduction of the Crown right of appeal against sentence, see G D Woods, *A History of Criminal Law in New South Wales: The New State 1901–1955* (Federation Press, 2018) 358–9.

⁴³ (1925) 25 SR (NSW) 218.

⁴⁴ *Ibid* 221–2 (Street CJ), 225 (Gordon and James JJ). See also *R v Withers* (1925) SR (NSW) 382; *R v Whittaker* (1928) 28 SR (NSW) 411.

⁴⁵ (1928) 41 CLR 230.

⁴⁶ *Ibid* 235 (Knox CJ and Powers J), 253 (Gavan Duffy and Starke JJ).

⁴⁷ *Ibid* 241–50 (Isaacs J), 252–3 (Higgins J).

within a week, it had been applied by the Court of Criminal Appeal, not only to section 5D, but also to an appeal governed by section 6(3).⁴⁸

21. Through this somewhat unsatisfactory turn of events, the Court of Criminal Appeal came to be regarded as having a completely unfettered discretion to resentence in both types of appeal.⁴⁹ However, it is somewhat difficult to reconstruct what this meant in practice. In *R v Geddes*,⁵⁰ decided mere days prior to *House v The King*, Chief Justice Jordan considered the principles on which a Court of Criminal Appeal should intervene in an appeal against sentence. After identifying cases of “error” as a clear, but infrequent, category warranting intervention,⁵¹ his Honour stated that, if no error had been found, the Court should intervene if “the sentence appears to it to be out of reasonable proportion to the circumstances of the crime”, paying due regard to the advantages of the sentencing judge, in determining for itself whether another sentence should be imposed.⁵²
22. Now, in a practical sense, there is probably little to differentiate these two circumstances in which a Court would intervene from the two broad categories of “error” identified in *House v The King*. However, I think that the fact that, following *Whittaker*, the circumstances of intervention stated by Chief Justice Jordan in *Geddes* were not restricted to “error” is still a significant conceptual difference. So long as there is an available ground of appeal which permits a reassessment of the circumstances before the sentencing judge without requiring identification of “error”, it is difficult to speak of the development of a distinctive sentencing jurisprudence.

⁴⁸ *R v Gosper* (1928) 28 SR (NSW) 568, 570 (Street CJ), 572 (Ferguson and James JJ).

⁴⁹ See C E Weigall and G C Addison, *Hamilton and Addison: Criminal Law and Procedure New South Wales* (Law Book Co, 3rd ed, 1930) 522, citing *R v Gosper* (1928) 28 SR (NSW) 568.

⁵⁰ (1936) 36 SR (NSW) 554.

⁵¹ *Ibid* 555.

⁵² *Ibid* 556.

23. Indeed, on one possible reading, the majority judgment in *House v The King* acknowledges a difference between the principles which it outlined and those which were being applied in criminal appeals, although, it might be said, not without some disquiet.⁵³ It could also be possible to interpret the reluctance of the High Court to intervene in sentencing appeals as an acceptance, even if not an endorsement, of this different position.⁵⁴ In any case, it seems clear that an approach following *Whittaker*, with the gloss provided by Chief Justice Jordan in *Geddes*, was applied at least until the 1970s.⁵⁵
24. Even in the 1970s, appeals against sentence were determined in a manner which is distinctly foreign to modern ears. For example, in *R v Rushby*,⁵⁶ the Court of Criminal Appeal appeared to depart from the sentence imposed by the sentencing judge simply because it came to a different conclusion about the importance of general deterrence.⁵⁷ It might well have been an “error” for the sentencing judge to fail to take general deterrence into account, and there may have been a need to establish some form of “error” at a practical level in order to convince a Court to interfere. However, the absence of any such language in the judgment or reasoning is telling.
25. While it is difficult to point to any precise point at which the prevailing approach changed, it is possible that it simply occurred gradually. A need to establish “error” in practice might easily become a requirement

⁵³ (1936) 55 CLR 499, 505 (Dixon, Evatt and McTiernan JJ): “Unlike courts of criminal appeal, this court has not been given a special or particular power to review sentences imposed upon convicted persons. Its authority to do so belongs to it only in virtue of its general appellate power”. See also *Cranssen v The King* (1936) 55 CLR 509, 519–20 (Dixon, Evatt and McTiernan JJ); *Harris v The Queen* (1954) 90 CLR 652, 655–6 (Dixon CJ, Fullagar, Kitto and Taylor JJ).

⁵⁴ See *White v The Queen* (1962) 107 CLR 174.

⁵⁵ See *R v Cuthbert* [1967] 2 NSW 329, 330 (Herron CJ); Ray Watson and Howard Purnell, *Criminal Law in New South Wales* (Law Book Co, 1971) vol 1, 586, citing *R v Gosper* (1928) 28 SR (NSW) 568.

⁵⁶ [1977] 1 NSWLR 594.

⁵⁷ *Ibid* 598–9 (Street CJ).

to establish “error” in law. Certainly, by the early 1980s, it was being asserted that the requirement to establish “error” was a long-standing precondition to allowing an appeal against sentence in the Court of Criminal Appeal.⁵⁸ Nevertheless, the fact that cases from other jurisdictions made express decisions to adopt the approach in *House v The King* over the approach in *Whittaker* during the 1970s,⁵⁹ as well as the comments made by some members of the High Court in *Griffiths v The Queen*⁶⁰ in 1977, suggests that some change in approach had in fact occurred.

26. This newfound emphasis on finding “error” is significant because it was probably a necessary condition for development of a distinctive sentencing jurisprudence. If all a Court of Criminal Appeal were required to conclude in order to allow an appeal was that a sentence was “out of reasonable proportion to the circumstances of the crime”,⁶¹ then the Court could come to a different view on the appropriate sentence without necessarily having to specify its precise point of disagreement with the sentencing judge. There would then be little scope for the development and explanation of principles which the sentencing judge ought to have applied. Instead, these considerations would simply be subsumed into the Court’s re-exercise of the discretion and not be clearly exposed.

⁵⁸ *R v Vachalec* [1981] 1 NSWLR 351; *R v Munday* [1981] 2 NSWLR 177; *R v Visconti* [1982] 2 NSWLR 104. However, it is notable that *House v The King* appears to have remained rarely cited in sentencing judgments in the Court of Criminal Appeal until after *AB v The Queen* (1999) 198 CLR 111 and *Dinsdale v The Queen* (2000) 202 CLR 321.

⁵⁹ See *R v Liekefett; Ex parte Attorney-General (Qld)* [1973] Qd R 355, 366 (Hart, Matthews and Kneipp JJ); *Kovac v The Queen* (1977) 15 ALR 637, 643 (Bowen CJ, Smithers and Connor JJ); *R v Tait* (1979) 46 FLR 386, 387–8 (Brennan, Deane and Gallop JJ).

⁶⁰ (1977) 137 CLR 293, 308–10 (Barwick CJ), 326–7 (Jacobs J), 330–1 (Murphy J). It should be noted that Jacobs J had been a member of the Supreme Court of New South Wales and had sat on the Court of Criminal Appeal. His remarks are therefore of particular interest. Unfortunately, they do not make clear whether his rejection of a wider interpretation of *Whittaker* represented a departure from the prevailing practice in New South Wales.

⁶¹ *R v Geddes* (1936) 36 SR (NSW) 554, 556 (Jordan CJ).

27. It is therefore perhaps not surprising that the High Court only began to take an active role in the development of sentencing jurisprudence when the necessity for “error” began to be emphasised during the 1970s and 1980s.⁶² Its earlier reluctance to hear appeals from what might have been thought to have been largely discretionary judgments of the Court of Criminal Appeal disappeared as it began intervening to correct discrete errors appearing in the approach of those courts. With the sometimes reluctant cooperation of intermediate appellate courts, it was not long before the High Court elevated the search for “error” in the sense described in *House v The King* to be the defining characteristic of the Court of Criminal Appeal in an appeal against sentence.⁶³
28. The path which was taken to reach the current understanding of the nature of an appeal against sentence might have been a long and somewhat tortuous one, but I think that it still has relevance for understanding the direction in which sentencing jurisprudence has been taken by the High Court in recent times. In particular, I think that it sheds light on a tension between the role of sentencing judges and the role of appellate courts which lies at the heart of the sentencing discretion. This tension may best be explained in the following way.
29. Confining the role of an appellate court to the search for “error” tends to emphasise the width of the discretion placed into the hands of the sentencing judge and the expectation that the sentence which they deliver should be final and conclusive by minimising the role to be played by the appellate court. However, once an appellate court has defined rules, principles and practices to be followed, deviation from which constitutes an “error”, it is much easier and more likely that the discretion at first instance will miscarry by falling into one of those

⁶² See, eg, *Power v The Queen* (1974) 131 CLR 623; *Veen v The Queen* (1979) 143 CLR 458; *R v De Simoni* (1981) 147 CLR 383; *Lowe v The Queen* (1984) 154 CLR 606; *Ibbs v The Queen* (1987) 163 CLR 447; *Veen v The Queen [No 2]* (1988) 164 CLR 465, *Mill v The Queen* (1988) 166 CLR 59.

⁶³ *Dinsdale v The Queen* (2000) 202 CLR 321, 323–4 [3] (Gleeson CJ and Hayne J), 329 [21] (Gaudron and Gummow JJ), 339–40 [57]–[58] (Kirby J).

errors, requiring the appellate court to re-exercise the discretion to impose a sentence afresh. In the end, despite its apparent width, the original discretion to impose a sentence becomes narrowly confined.

30. Now, I should not be taken as suggesting by any means that this tension demonstrates some irremediable flaw in the direction that sentencing jurisprudence has been taken by the High Court. In fact, quite the opposite. I think that the recent course of authority in the High Court can largely be understood as an attempt to navigate this tension by defining the categories of “error” broadly enough to permit real review of excessive or inadequate sentences, yet narrowly enough to avoid subjecting sentencing judges to intolerably prescriptive rules confining their exercise of discretion.
31. While I cannot speak for the High Court, the ultimate purpose behind this balancing act appears to me to be that with which I began this address: to affirm the primacy of the “discretion” reposed in the sentencing judge by our legal system. Despite perennial criticism of sentencing judges, the legislature, and by extension, the people, have not seen fit to do away with this central tenet of sentencing law in this country. If, then, the primacy of the role played by the sentencing judge is to be retained, it cannot be doubted that it is necessary to be careful and clear about defining which categories of “error” can cause the discretion to miscarry and how.
32. Of course, the exercise of discretion can miscarry for reasons other than “error”, strictly so called. There may have been a denial of procedural fairness to either the Crown or the offender,⁶⁴ or there could be some other ground for claiming that there has been a miscarriage of justice.⁶⁵ It might be possible to say that these are categories of “error” of some description as well, although I do not think that how they are characterised is particularly important. The categories of “error” which I

⁶⁴ See, eg, *Pantorno v The Queen* (1989) 166 CLR 466; *R v White* [2018] NSWCCA 238.

⁶⁵ *Betts v The Queen* (2016) 258 CLR 420.

am focusing on in this address are those identified in the majority judgment in *House v The King*, which might be called “legal” errors, including manifest excess and manifest inadequacy, as opposed to errors going to procedural fairness or a miscarriage of justice.

THE PRIMACY OF DISCRETION IN THE HIGH COURT

(a) The types of “error”

33. Having discussed the tension to which the development of sentence law over the previous century has given rise, and the broad nature of the response of the High Court to that tension, I think that it is useful to look at how this has played out in some of the cases which the High Court has decided on sentencing over the past decade.

34. Now, it seems to me that different considerations arise depending upon whether the source of the legal error arises from the common law or from statute. The High Court has a measure of freedom in defining the scope of the common law, while it is more constrained in interpreting the provisions of a statute by the need to give effect to legislative intention.⁶⁶ For this reason, I will look at how the idea of the primacy of the discretion reposed in the sentencing judge has affected the approach taken by the High Court in relation to the definition of legal errors arising from the common law and statute separately.⁶⁷

(b) Common law

35. Turning to the common law first, perhaps the best example of how the idea of the primacy of discretion has influenced the approach taken by the High Court is in the development of rules relating to the extent to which what might broadly be described as “sentencing practice” might be taken into account.

⁶⁶ *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 591–2 [43]–[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁶⁷ Of course, this distinction is not intended to be exclusive. There are many circumstances in which it will be difficult to identify a rule as being either “common law” or “statutory”.

36. The starting points for the modern line of authority in the High Court are the decisions in *Wong v The Queen*⁶⁸ and *Markarian v The Queen*.⁶⁹ At a broad level, both cases could be said to consider how the existence of discretion could be reconciled with the idea of “systematic fairness” and “reasonable consistency” in sentencing.⁷⁰ Both rejected the idea that it was necessary to adopt a “mathematical approach” to sentencing which used a quantified starting point to guide the exercise of discretion in order to promote fairness and consistency.⁷¹ Instead, they accepted that these values could still be achieved by applying an approach which was described as requiring the sentencing judge to make an “instinctive synthesis” of *all* the relevant circumstances.
37. While some members of the Court had made some comments on the use of sentencing statistics in *Wong*,⁷² the place of “sentencing practice” in the exercise of the sentencing discretion was not at the forefront of either case. However, following on from *Wong* and *Markarian*, this question was considered in the High Court in *Hili v The Queen*⁷³ and has received consistent attention in recent years in cases such as *R v Pham*,⁷⁴ *R v Kilic*⁷⁵ and *Director of Public Prosecutions (Vic) v Dalglish*.⁷⁶

⁶⁸ (2001) 207 CLR 584.

⁶⁹ (2005) 228 CLR 357.

⁷⁰ (2001) 207 CLR 584, 591 [6] (Gleeson CJ).

⁷¹ *Wong v The Queen* (2001) 207 CLR 584, 610–2 [72]–[76] (Gaudron, Gummow and Hayne JJ), 632–4 [132]–[140] (Kirby J); *Markarian v The Queen* (2005) 228 CLR 357, 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ), 377–8 [50]–[52] (McHugh J).

⁷² (2001) 207 CLR 584, 608 [65] – [66] (Gaudron, Gummow and Hayne JJ).

⁷³ (2010) 242 CLR 520.

⁷⁴ (2015) 256 CLR 550.

⁷⁵ (2016) 259 CLR 256.

⁷⁶ [2017] HCA 41.

38. With the goals of fairness and consistency in mind, I do not think that there was or is any controversy in these cases that it is at least appropriate to impose some limit on the discretion by requiring *some* regard to be had to “sentencing practice”, including the sentences which have been imposed in previous cases.⁷⁷ The question is rather a matter of the degree to which it should be considered and how it should be considered. Despite, or perhaps, because of, the number of cases on this topic which the High Court has taken on over the last decade, I think that the law is relatively clear. I will start with *Hili* and the contribution which it made to the understanding of this aspect of the law.
39. *Hili* considered the practice of applying a judicially-developed “norm” for the percentage of a head sentence which a federal offender should spend in mandatory imprisonment without parole.⁷⁸ The “norm” was not derived from statute,⁷⁹ or from any particular features of the cases to which it applied. It was simply the “usual” proportion between the term of mandatory imprisonment and the head sentence.⁸⁰ While there was no suggestion that the “norm” was applied rigidly in all cases, the majority judgment emphatically rejected the idea that it was appropriate for a sentencing judge to consider such a “norm” in determining a sentence,⁸¹ and viewed it as an inappropriate way to give effect to the goal of “consistency” in sentencing offenders.⁸²
40. The majority judgment then went on to explain the type of “consistency” which is required in sentencing in a well-known and oft-cited passage.⁸³

⁷⁷ *Hili v The Queen* (2010) 242 CLR 520, 536 [53] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Barbaro v The Queen* (2014) 253 CLR 58, 74 [41] (French CJ, Hayne, Kiefel and Bell JJ).

⁷⁸ (2010) 242 CLR 520, 532 [36] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁷⁹ *Ibid* 529–30 [29].

⁸⁰ *Ibid* 530–1 [31]–[33].

⁸¹ *Ibid* 534 [44].

⁸² *Ibid* 535 [48].

⁸³ *Ibid* 535–6 [49].

Their Honours said, to my mind, consistently with the approach in *Wong* and *Markarian*, that it was “consistency in the application of the relevance legal principles” which was required in sentencing. At most, a range of previous sentences could amount to a “yardstick against which to examine a proposed sentence”,⁸⁴ which in itself did not establish anything meaningful about the sentence to be imposed in a particular case. If a previous sentence was to be relied upon for anything further, then this would require an “examination of the whole of the circumstances that have given rise to the sentence” in order to identify the principles upon which it was based.⁸⁵

41. It seems to me that the effect of this type of reasoning is to reject the idea that the sentencing discretion can be exercised in a “mechanical” or “mathematical” way by being constrained to follow previous sentences without exercising independent judgment to consider the circumstances of those cases and their comparability with the case to be decided. However, the way in which this issue arose in *Hili* meant that it was not necessary for the majority judgment to go any further and consider how this task might be undertaken. It was sufficient to simply reject the validity of unthinking reliance on simple statistics such as the “norm” in that case.
42. In two of the other cases to which I have referred, *Pham* and *Kilic*, it was necessary for the High Court to consider this issue in a little more detail. In *Pham*, the relevant offence was one of importing a marketable quantity of a border controlled drug. The offender was broadly described as having played the role of a “courier” in the offence, had pleaded guilty, and had no prior convictions. A table and graph were relied upon which compiled sentences for similar offences where the offenders had those characteristics. The graph showed a correlation between the quantity of the drug imported and the length of the term of

⁸⁴ Ibid 537 [54], adopting the remarks of Simpson J in *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1, 71 [304].

⁸⁵ Ibid.

imprisonment. It was said to demonstrate that “the only variable factor affecting offence seriousness is the quantity [of drug] imported”.⁸⁶

43. The High Court rejected this approach to the use of previous sentencing practice, even though the table and graph had been prepared to include only those previous sentences which shared some relevant characteristics with the case to be decided. It was found that the table and graph had the effect of impermissibly emphasising only those features of the previous examples of offending and directing attention away from the other circumstances of each of those cases.⁸⁷ It seems that, if those cases were to be of use in sentencing, it would have required a more detailed comparison between their circumstances and the circumstances of the case to be decided.
44. *Kilic* demonstrates how the High Court intends such an analysis to be undertaken. It concerned an offence of intentionally causing serious injury in circumstances where the offender had doused his partner with petrol and set her alight.⁸⁸ Unlike in *Pham*, where there had been numerous cases in which offenders had been sentenced for similar offences, in *Kilic*, there were few cases which involved the infliction of serious injury using fire.⁸⁹ In reviewing these cases, the High Court concluded that none were really comparable with the circumstances of the case for decision, and thus, that those cases did no more than illustrate “particular aspects of the spectrum of seriousness” of the type of offence.⁹⁰
45. Nonetheless, it is instructive to note how the survey of the cases undertaken by the High Court was conducted. In my view, it focused on identifying the weight which was accorded to the various factors taken

⁸⁶ (2015) 256 CLR 550, 561 [32] (French CJ, Keane and Nettle JJ).

⁸⁷ Ibid 561–3 [34]–[37] (French CJ, Keane and Nettle JJ), 566 [52] (Bell and Gageler JJ).

⁸⁸ (2016) 259 CLR 256, 261–3 [5]–[13] (Bell, Gageler, Keane, Nettle and Gordon JJ).

⁸⁹ Ibid 265 [16].

⁹⁰ Ibid 268 [25].

into account by the sentencing judges and comparing those factors with circumstances of the case for decision at a fairly broad level.⁹¹ The Court expressly eschewed an approach to the cases which emphasised a single factor, such as the severity of the injuries to the victim, to the exclusion of others.⁹² What was important was whether, taken as a whole, the circumstances of the cases were such that they were comparable with the case for decision.⁹³

46. I think that the approach taken in *Kilic* affords a good example of the approach outlined by the High Court in *Hili* is to be applied. It emphasises the importance of the discretion reposed in the sentencing judge by requiring them to make a judgment about the comparability of previous cases with the case before them, and not to rely on the application of a mechanical rule about the “range” of previous sentences to guide the exercise of their discretion. In this way, the sentencing discretion can be exercised in a manner which ensures that the values of “systematic fairness” and “reasonable consistency” identified by Gleeson CJ in *Wong* are upheld.
47. Of course, this also means that there are circumstances in which previous cases, while otherwise comparable, should not be followed. *Dalgliesh* is one example. In that case, a sentencing judge was found to have erred in imposing a sentence for incest because the previous sentences relied upon as comparable were also infected by error. On appeal, the Victorian Court of Appeal found that the existing sentencing practice for incest was “not a proportionate response to the objective gravity of the offence, nor does it sufficiently reflect the moral culpability of the offender”,⁹⁴ but declined to correct the error, and the High Court

⁹¹ Ibid 268–70 [26]–[31].

⁹² Ibid 271 [32]–[33].

⁹³ Ibid 271–2 [34]–[36].

⁹⁴ *Director of Public Prosecutions (Vic) v Dalgliesh* [2016] VSCA 148, [128], quoted in *Director of Public Prosecutions (Vic) v Dalgliesh* [2017] HCA 41, [35] (Kiefel CJ, Bell and Keane JJ).

held that it erred in failing to do so.⁹⁵ Consistency in principle was not required when the principle itself was erroneous.

48. Nevertheless, I think it is clear that this kind of case would arise only infrequently. The most difficult task for sentencing judges in taking sentencing practice into account will remain identifying and assessing which previous cases may be comparable. Needless to say, this task is not made easier by parties who persist in simply referring to the relevant statistics published by the Judicial Commission. These statistics should be treated as a starting point for research, not as the submissions which are handed up to the judge. I think I can say with confidence that all judges, both those at first instance and on appeal, would be more assisted by submissions which clearly identify which cases are said to be comparable and why.
49. In the end, the emphasis of the High Court in these cases on sentencing practice comes back to the discretion which is reposed in the sentencing judge, and it is by no means the only common law sentencing doctrine in which this emphasis is found, particularly in recent years. Another example is the current approach to taking into account social disadvantage in sentencing, particularly of Aboriginal offenders. In *Bugmy v The Queen*,⁹⁶ the High Court rejected a prescriptive approach to the impact of social disadvantage, and instead emphasised the importance of making an assessment of an individual's circumstances and history in every case.⁹⁷
50. The principle of "individualised justice" played a significant role in informing the Court's reasoning on this issue,⁹⁸ and it is that same principle which has rested at the heart of the continued focus on the

⁹⁵ [2017] HCA 41, [63] (Kiefel CJ, Bell and Keane JJ), [84] (Gageler and Gordon JJ).

⁹⁶ (2013) 249 CLR 571.

⁹⁷ Ibid 592–4 [36]–[39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), quoting *Kennedy v The Queen* [2010] NSWCCA 260, [53] (Simpson J); *Neal v The Queen* (1982) 149 CLR 305, 326 (Brennan J).

⁹⁸ Ibid 592 [36].

discretion to impose a sentence which our legal system sees fit to confer upon a judge ever since the outcry against mandatory minimum sentencing in the late 19th century. Despite over a century of the development of the significance of the idea of discretion in our system of sentencing, there has been little sustained legislative appetite for it to be removed. However, there are some inroads which have been made by statute, and it is to these to which I will now turn.

(c) *Statute*

51. The principal statute which impacts the exercise of discretion by sentencing judges is, of course, the *Crimes (Sentencing Procedure) Act 1999* (NSW). Despite its relatively recent enactment, many of its provisions are modern reformulations of older provisions which have a long history. Many of these provisions are of relatively long standing or are well-understood. For example, the concept of a “non-parole period” which is currently found in several provisions was first introduced over fifty years ago, and the purposes for which it is to be imposed have been settled in broad terms since the decision of the High Court in *Power v The Queen*⁹⁹ in 1974.
52. There are also provisions, which, despite having been on the statute book for some time, have only received a definitive interpretation relatively recently. One example is section 43, which permits proceedings to be reopened if a penalty has been imposed that is “contrary to law”. In *Achurch v The Queen*,¹⁰⁰ the High Court considered the interpretation of this provision and held that it did not permit the reopening of proceedings merely because a legal error had been made in the course of exercising the sentencing discretion.¹⁰¹ It gave as an example of a penalty which would be “contrary to law” a penalty “which it

⁹⁹ (1974) 131 CLR 623.

¹⁰⁰ (2014) 253 CLR 141.

¹⁰¹ *Ibid* 161 [32] (French CJ, Crennan, Kiefel and Bell JJ), 163–4 [40] (Gageler J).

is beyond the power of the court to impose because some precondition for its imposition is not satisfied”.¹⁰²

53. This conclusion turned on the text of the provision read in light of its statutory purpose. However, it should be noted that the Court also placed some reliance on the “principle of finality”, which was said to require that “controversies, once resolved, are not to be reopened except in a few, narrowly defined circumstances”,¹⁰³ and to provide support for a presumption that section 43 “was not to provide a substitute for the appellate system”.¹⁰⁴ While not necessarily a significant focus of the decision, it is possible to discern an underlying concern to preserve the primacy of the “original jurisdiction” of the sentencing judge and their exercise of the sentencing discretion against the encroachment of the search for “error”. Similar considerations were also relevant in *Lacey v Attorney-General (Qld)*.¹⁰⁵
54. The provisions considered in *Achurch* and *Lacey* are somewhat specialised, and different in nature from the common law rules which I have already discussed so far. They were procedural provisions, rather than ones which constrained the original exercise of discretion. I think that it is important to note that the High Court has still construed them with the effect which they would have on the exercise of discretion by the sentencing judge in mind. It is clear that the interpretation of a mechanism which provides for the review of the exercise of discretion must take this factor into account.
55. Now, the *Crimes (Sentencing Procedure) Act 1999* (NSW) also includes provisions which attempt to regulate the substantive exercise of discretion by sentencing judges. Unlike the provisions in *Achurch* and

¹⁰² Ibid 161 [32] (French CJ, Crennan, Kiefel and Bell JJ), 164 [41] (Gageler J).

¹⁰³ Ibid 152 [14] (French CJ, Crennan, Kiefel and Bell JJ), quoting *Burrell v The Queen* (2008) 238 CLR 218, 223 [15] (Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ).

¹⁰⁴ Ibid 153 [15] (French CJ, Crennan, Kiefel and Bell JJ).

¹⁰⁵ (2011) 242 CLR 573, 594 [51] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Lacey, many of these provisions have been introduced only recently and do not have an extensive pedigree. In these circumstances, while the text of the provision must always be controlling,¹⁰⁶ general contextual considerations loom larger than they might otherwise do for a provision which has the benefit of a well-understood origin. Certainly, this seems to have been the approach of the High Court in *Muldrock v The Queen*¹⁰⁷ to the interpretation of the standard non-parole period provisions in Division 1A.

56. In the terms they were introduced, these provisions might be thought to have been fairly prescriptive about the process which would be required to be followed in sentencing for one of the offences for a standard non-parole period was prescribed. Section 54B(2) originally provided that a court “is to set the standard non-parole period ... unless ... there are reasons” for setting a different period.¹⁰⁸ As is well-known, the interpretation of section 54B(2) which was ultimately adopted by the Court of Criminal Appeal, based on the decision in *R v Way*,¹⁰⁹ was that it required a “two-stage” sentencing process.¹¹⁰ The High Court unanimously rejected this approach.
57. It seems to me that the nature of the discretion conferred on a judge when sentencing an offender was a critical contextual factor in this decision. While the determination of a non-parole period was an important part of the exercise of discretion, it remained only “one part of the larger task of passing an appropriate sentence upon the particular

¹⁰⁶ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34, [14] (Kiefel CJ, Nettle and Gordon JJ).

¹⁰⁷ (2011) 244 CLR 120.

¹⁰⁸ See *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) sch 1 cl 4.

¹⁰⁹ (2004) 60 NSWLR 168.

¹¹⁰ *Muldrock v The Queen* (2011) 244 CLR 120, 129–30 [21] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

offender”,¹¹¹ and other provisions of the Act introduced at the same time were contrary to the suggestion that the standard non-parole period provisions were intended to make the determination of the non-parole period the focal point of the entire sentencing process.¹¹² Instead, the standard non-parole periods were simply to be an additional “guidepost” to be taken into account in the exercise of discretion described by Justice McHugh in *Markarian*.¹¹³

58. Needless to say, *Muldrock* represents a strong endorsement of the primacy of the discretion reposed in the sentencing judge. This is all the more so given that its result was confirmed by the legislature two years later, when amendments were made to clarify the language in Division 1A in terms which accorded with the decision.¹¹⁴ This seems to be a clear affirmation of the approach taken by *Muldrock* to the relationship between the provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the discretion conferred on the sentencing judge, which will form an important consideration in the interpretation of amendments to that Act in the future.
59. It seems likely that the Act will continue to be amended regularly, as an important component of the administration of criminal justice in this State. Significant changes have occurred fairly recently.¹¹⁵ Some of these new provisions might not have much of an impact on how the sentencing discretion is exercised. Others might have a bigger impact. There will undoubtedly be some uncertainties in operation which will need resolution, and ultimately, those uncertainties will fall to be

¹¹¹ Ibid 128 [17].

¹¹² Ibid 128–9 [18]–[20].

¹¹³ (2005) 228 CLR 357, 378 [51], quoted in *Muldrock v The Queen* (2011) 244 CLR 120, 131–2 [26] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

¹¹⁴ See *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013* (NSW) sch 1.

¹¹⁵ See *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW); *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW).

resolved by applying orthodox principles of interpretation by reference to the text, context and purpose of a provision.¹¹⁶

60. If the language of the provision is unambiguous, then there will be little scope for constructional choice. More equivocal provisions may require closer analysis of their legal context and purpose. As the High Court has found in *Achurch, Lacey and Muldrock*, a critical component of that context will be the primacy of the discretion conferred by our legal system on the sentencing judge. It will be important to keep this consideration in mind when construing later amendments to avoid giving them an unduly prescriptive operation and opening up the possibility of further categories of “error”.
61. These considerations are equally applicable to the interpretive problems raised by other statutes, although these problems can be more acute. A provision designed to solve a particular problem in an area of law outside sentencing will often not consider how it might affect the sentencing process, with the result that very little textual guidance is given to disclose legislative intention. *Chiro v The Queen*¹¹⁷ is the example I have in mind. The case is complex, and I will not attempt to go into it in detail here. I will simply note that it too demonstrates the importance of carefully considering the relationship between the interpretation of a provision and the impact which it will have on the discretion of the sentencing judge.

CONCLUDING REMARKS

62. This review of some of the High Court’s recent cases on sentencing clearly demonstrates the importance which it accords the discretion conferred on the sentencing judge in its jurisprudence. While ultimately having its origins in reasons of history, it has emerged as an important factor in defining the width of the categories of “error” on the grounds of

¹¹⁶ *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34, [14] (Kiefel CJ, Nettle and Gordon JJ).

¹¹⁷ (2017) 260 CLR 425.

which a sentence is able to be challenged. Further, it is an important part of the context which influences the interpretation of statutory provisions which affect its exercise. Taking it into account in developing the common law and when construing legislation ensures that an overly prescriptive approach is avoided.

63. It is here that I would like to sound a note of caution. Even with an approach to the development of the common law and statutory construction which takes full account of the role of discretion in the sentencing process, there is still the possibility that an exercise of discretion can become too susceptible to challenge on the ground of error. The sheer number of matters which a sentencing judge is required to take into account means that it will usually be possible to allege that the judge has failed to take one of the matters into account, even when no other legal error has occurred and the sentence might otherwise be adequate.
64. A key contributor to this problem is the number of provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which require the attention of the sentencing judge. While, as *Muldrock* demonstrates, each provision might individually be consistent with an exercise of discretion by the sentencing judge, the complexities of the interaction of the provisions with each other has the potential to lead to significant, technical errors and the overturning of the original sentence on appeal. Section 44 is a provision which can cause particular problems in this respect, since it can be easily overlooked when there is a need to deal with a complex sentence structure.¹¹⁸
65. There is no easy answer to this problem. There is the potential for an air of artificiality to be introduced into the sentencing process, since the existence of a technical error may say nothing about the adequacy of the sentence overall. In these circumstances, perhaps there is something to be said for the interpretation of section 6(3) of the *Criminal Appeal Act*

¹¹⁸ See, eg, *Brennan v The Queen* [2018] NSWCCA 22.

1912 (NSW) under *Whittaker* and *Geddes*, which would limit the grounds of appeal to what we would probably now describe as “manifest excess” or “manifest inadequacy”. This would probably result in a more realistic approach to the exercise of discretion by sentencing judges. It ought to be remembered that the approach to sentencing outlined by Chief Justice Jordan in *Geddes* was said by Justice McHugh to have “never been bettered” and probably to have “never been equalled”.¹¹⁹

66. Our legal system has moved in a different direction and the time for change has long past, short of statutory intervention. Nevertheless, appellate courts must ensure that they are not too quick to find new categories of “error” which might undermine legitimate exercises of discretion, and sentencing judges, with the assistance of the counsel who advise them, must do the best they can to exercise their discretion in accordance with the law.
67. Thank you for your time.

¹¹⁹ *Markarian v The Queen* (2005) 228 CLR 357, 383 [65].