



SENTENCING CONFERENCE

6 & 7 February 2010 | National Convention Centre | Canberra

Hosted by the National Judicial College of Australia & ANU College of Law

2010 Sentencing Conference

6 – 7 February 2010
Canberra, Australia

Hosted by the

National Judicial College of Australia & ANU College of Law



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CONFERENCE ORGANISING COMMITTEE

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Ms Jane Avent, National Judicial College of Australia

Ms Wendy Mohring, ANU College of Law

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Conference Venue

National Convention Centre
31 Constitution Avenue
Canberra ACT 2601
02 6257 4905

Plenary Sessions
Concurrent Sessions
Conference Dinner

Bradman Theatre
Bradman Theatre & Menzies Theatre
The Ballroom (dress: neat casual)

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program

Saturday	6 FEBRUARY 2010
8.30am	REGISTRATION
9.00 – 9.15am Bradman Theatrette	<p>Session 1: WELCOME Prof MICHAEL COPER, Dean, ANU College of Law Chief Justice WAYNE MARTIN, Chair, Council of the National Judicial College of Australia</p>
9.15 – 10.30am Bradman Theatrette	<p>SESSION 2: INFORMING THE PUBLIC ABOUT SENTENCING</p> <p>Informing the Public: Whose job is it? Ms JENNI COADY, Victorian Sentencing Advisory Council</p> <p>Using Juries to Educate and Inform the Public About Crime and Sentencing Issues Prof KATE WARNER, University of Tasmania Assoc Prof JULIA DAVIS, University of South Australia</p> <p>Labelling 'Life' as a Mandatory Sentence: Effective denunciation or misleading populism? Dr JOHN ANDERSON, University of Newcastle NSW</p> <p><i>Session chair:</i> Justice Debra Mullins, Supreme Court of Queensland</p>
10.30 – 11.00am	Morning tea in foyer
11.00am – 1.00pm Bradman Theatrette	<p>SESSION 3A: SENTENCING INDIGENOUS OFFENDERS</p> <p>FILM PRESENTATION of 'Bush Law' (Aboriginal customary law in the Northern Territory)</p> <p>The Aftermath of Sentencing: Naming and shaming of Indigenous youth in the Northern Territory Assist Prof ROBYN LINCOLN, Bond University QLD Prof DUNCAN CHAPPELL, University of Sydney</p> <p>The Sentencing Response to Defendants Who Have Fetal Alcohol Spectrum Disorder Assoc Prof HEATHER DOUGLAS, University of Queensland</p> <p>The Impact of Mandatory Sentencing on Indigenous Offenders Mr STEPHEN JACKSON, Department of Justice, Northern Territory Ms FIONA HARDY, Department of Justice, Northern Territory</p> <p><i>Session chair:</i> Justice Trevor Riley, Supreme Court of the Northern Territory</p>

<p>11.00am – 1.00pm Menzies Theatrette</p>	<p>SESSION 3B: THE 'WARRIOR GENE': GENETIC FACTORS IN SENTENCING</p> <p>Lack of Free Will Due To Genetic Factors as A Mitigating Factor in Sentencing Dr DEBRA WILSON, University of Canterbury NZ</p> <p>Genetic Mitigation Mr ALLAN MCCAY, University of Sydney</p> <p>Genetic Factors in Sentencing Prof SIMON EASTEAL, School of Medical Research, The Australian National University</p> <p><i>Session chair:</i> Dr Mark Nolan, ANU College of Law</p>
<p>1.00 – 2.00pm</p>	<p>Lunch in foyer</p>
<p>2.00 – 3.00pm Bradman Theatrette</p>	<p>SESSION 4A: SENTENCING OF CORPORATE OFFENDERS</p> <p>The Principles That Apply to the Sentencing of Corporate Offenders: The \$17 million speeding offence? Justice MONIKA SCHMIDT, Supreme Court of New South Wales</p> <p>The Relevance of 'Corporate Culture' in Sentencing for Corporate Offences Prof RICK SARRE, University of South Australia</p> <p><i>Session chair:</i> Justice John Dowsett, Federal Court of Australia</p>
<p>2.00 – 3.00pm Menzies Theatrette</p>	<p>SESSION 4B: SENTENCING BY VIDEO LINK</p> <p>Remote Sentencing: Possibilities and pitfalls Prof DAVID TAIT, University of Western Sydney Prof JANE GOODMAN-DELAHUNTY, Charles Sturt University NSW Ms ANNE WALLACE, University of Canberra Ms EMMA ROWDEN, University of Melbourne</p> <p>Sentencing by Video Link: The Western Australian experience Chief Justice WAYNE MARTIN, Supreme Court of Western Australia</p> <p><i>Session chair:</i> Justice Richard Refshauge, Supreme Court ACT</p>
<p>3.00 – 3.30pm</p>	<p>Afternoon tea in foyer</p>

program

<p>3.30 – 5.00pm Bradman Theatrette</p>	<p>SESSION 5: SENTENCING FOR COMMONWEALTH OFFENCES</p> <p>The Quest for Sentencing Consistency in the Federal System Ms WENDY KUKULIES-SMITH, The Australian National University</p> <p>Variations in Federal Sentencing Mr DAVID ADSETT, Office of the Commonwealth Director of Public Prosecutions QLD Mr MARK PEDLEY, Office of the Commonwealth Director of Public Prosecutions VIC</p> <p>A Judicial Perspective on Consistency in Sentencing for Commonwealth Offences Judge DEBORAH RICHARDS, District Court of Queensland</p> <p><i>Session chair:</i> Ms Miriam Gani, ANU College of Law</p>
<p>7.00pm The Ballroom (Convention Centre)</p>	<p>Conference dinner Speaker: Dr ANTONIO PASSINI, President of the Wine Society of Italy</p> <p><i>Host:</i> Prof Michael Coper, Dean, ANU College of Law</p>

Sunday	7 FEBRUARY 2010
<p>9.00 – 10.30am Bradman Theatrette</p>	<p>SESSION 6: SENTENCING IN ARSON (BUSHFIRE) CASES</p> <p>Sentencing as an Aspect of Crime Prevention to Reduce Deliberate Bushfires in Australia Dr DAMON MULLER, The Australian National University</p> <p>Managing Arson Offenders: What do we know already and what do we need to know? Dr REBEKAH DOLEY, Bond University QLD</p> <p>Defending People Charged With Arson (Bushfire) Offences Mr MARK WOODS, Tyler Tipping & Woods, Traralgon, Victoria</p> <p><i>Session chair:</i> Judge Paul Rice, District Court of South Australia</p>
<p>10.30 – 11.00am</p>	<p>Morning tea in foyer</p>
<p>11.00am – 12.30pm Bradman Theatrette</p>	<p>SESSION 7A: SENTENCING AND CHILDREN</p> <p>The Specific Deterrent Effect of Custodial Penalties on Juvenile Reoffending Dr ANDREW MCGRATH, Charles Sturt University NSW</p> <p>Provisional Sentencing of Children Ms KATHERINE MCFARLANE, Charles Sturt University NSW</p> <p><i>Session chair:</i> Magistrate Stephen Corry, Children's Court New South Wales</p>

<p>11.00am – 12.30pm Menzies Theatrette</p>	<p>SESSION 7B: SENTENCING FOR OFFENCES MOTIVATED BY HATRED OR PREJUDICE</p> <p>Sentencing for Offences Motivated by Hatred or Prejudice Prof ARIE FREIBERG AM, Victorian Sentencing Advisory Council</p> <p>Sentencing for Prejudice Assoc Prof GAIL MASON, University of Sydney</p> <p><i>Session chair:</i> Chief Justice Wayne Martin, Chair, Council of the National Judicial College of Australia</p>
<p>12.30 – 1.30pm</p>	<p>Lunch</p>
<p>1.30 – 3.00pm Bradman Theatrette</p>	<p>SESSION 8: SENTENCING IN SO CALLED 'TECHNICAL RAPE' CASES</p> <p>Sexual Consent: Implications for judicial sentencing practices Dr RACHEL KING, Australian Centre for the Study of Sexual Assault, Victoria</p> <p>Judicial Sentencing Remarks and the Re-victimisation of Victims of Sex Offences Mr MICHAEL O'CONNELL, Commissioner for Victims' Rights, South Australia</p> <p>The Preparation and Delivery of Sentencing Remarks in Sexual Assault Cases Judge JOHN NICHOLSON, District Court of New South Wales</p> <p><i>Session chair:</i> Justice Chris Maxwell, Court of Appeal, Victoria</p>
<p>3.00pm</p>	<p>Close</p>

SATURDAY | 6 FEBRUARY

SESSION 1: WELCOME

Chief Justice Wayne Martin, *Chair, Council of the National Judicial College of Australia*

Professor Michael Coper, *Dean, ANU College of Law, The Australian National University*

SESSION 2: INFORMING THE PUBLIC ABOUT SENTENCING

Informing the Public: Whose job is it?

Ms Jenni Coady, *Victorian Sentencing Advisory Council*

Many recent surveys have found low levels of public trust and confidence in criminal justice systems around the world. Courts in particular have rated poorly in such surveys, with perceived lenient sentencing being cited as a cause behind this belief. Research has also revealed that the public has very little accurate knowledge about the criminal justice system, with some studies concluding that the more information people have the less punitive they become. While there have been many endeavours to measure these phenomena, little has been written about whose responsibility it should be to inform and educate the community about such matters—with the goal to increase trust and confidence in the courts.

This paper will consider whether the media or the judiciary can realistically be expected to educate the community about sentencing issues. It will conclude by suggesting that sentencing councils are the best equipped to take on this function in a coordinated and broad sense. The Victorian Sentencing Advisory Council—through community consultation, public opinion measurement, sentencing data analysis and legal policy research—gathers a large body of information and evidence that is translated into contemporary and relevant community education messages. The paper will describe how the Sentencing Advisory Council is tackling community education at three levels—curriculum-based programs for high schools, public information sessions for adult networking groups and advocacy organisations and interactive online learning programs.

Jenni Coady is currently the Community Engagement Manager for the Victorian Sentencing Advisory Council (<http://www.sentencingcouncil.vic.gov.au/>). Ms Coady has worked on all 'sides' of the law—working to educate communities about policing and crime prevention, Legal Aid, violence prevention, and equal opportunity.

Using Juries to Educate and Inform the Public About Crime and Sentencing Issues

Professor Kate Warner, *Faculty of Law, University of Tasmania* &

Associate Professor Julia Davis, *University of South Australia*

Large scale surveys of public opinion demonstrate that the public has very little accurate knowledge about the criminal justice system and many misperceptions about the nature and extent of crime and court outcomes. This has implications for the criminal justice system

because it has also been shown that punitive attitudes and a lack of confidence in courts and the legal system are linked to inaccurate knowledge about crime and sentencing. For this reason it is suggested that educating the public about these issues would both improve confidence and reduce punitiveness.

This paper will describe the results of a jury study which has two aims: first, to explore the possibility of using jurors as a means of ascertaining public opinion about sentencing and secondly, to investigate the usefulness of using the jury as a means to inform the public about crime and sentencing issues. The focus of this paper is on the second aim. The study's methodology and results will be described and the advantages and disadvantages of using jurors as a means of educating the public about crime and sentencing discussed.

Kate Warner is a Professor of Law at the University of Tasmania where she teaches Criminal Law, Criminology, Sentencing and Evidence. Currently she is Director of the Tasmania Law Reform Institute, which is based at the Law Faculty. She is a Foundation Member of the Australian Academy of Law. Her current research interests include sentencing and public opinion and criminal procedure and human rights. She leads a Criminology Research Council project which is surveying jurors about sentencing and is a member of an ARC project team lead by Professor Geraldine Mackenzie of Bond University on public confidence and sentencing. Kate Warner is the principal author of *Sentencing in Tasmania* (2nd edn) Federation Press and writes the annual Sentencing Review for the *Criminal Law Journal*.

Julia Davis joined the Law School at University of South Australia in January 2008 as Associate Professor in Law after 13 years of teaching and research experience at the Faculty of Law at the University of Tasmania. Her teaching expertise includes Tort Law, Jurisprudence, Sentencing Law and Conflicts (Private International Law). Her research focuses on the theoretical, practical and psychological aspects of sentencing, the philosophy of the criminal law and the concept of justice. She is a member of the research team that is led by Professor Kate Warner, which has been funded by the Criminology Research Council to conduct a Jury Sentencing Survey over the period 2007–09. The study aims to develop a new survey approach that can be added to the existing suite of public opinion survey methodologies, to identify a better way of measuring informed public opinion about judges and sentencing and to use the survey results to assist policy makers to improve confidence in the criminal justice system.

Labelling 'Life' as a Mandatory Sentence: Effective denunciation or misleading populism?

Dr John Anderson, *Deputy Head, Law School, University of Newcastle*

The sentence of life imprisonment is universally either the maximum or mandatory penalty for the crime of murder in the various states and territories of Australia. It is also provided as a maximum or mandatory sentence for some other serious crimes. It is the most severe punishment available in jurisdictions where capital punishment has been abolished. In its 'truthful' form it means that the person will serve imprisonment for the term of their natural life. In practice, however, sentences of life imprisonment even when expressed in mandatory terms rarely exist without the eventual possibility of the offender being released.

Using the label of 'life sentence' can therefore be misleading and rather than being an effective form of denunciation of crime it may be reflective only of populist sentiment for extreme retribution. It will be argued that in those Australian jurisdictions where a mandatory life sentence applies upon conviction for murder it does not provide a mechanism for reflecting, in a

transparent and equitable manner, the different levels of culpability that exist between the conduct constituting murder and the offenders responsible for such conduct. The early release of prisoners subject to a 'mandatory' life sentence demonstrates that such a sentence was not necessarily an appropriate disposition in the first instance. Thus it is simply being used as a populist 'law and order' device rather than a transparent and equitable sentencing option.

In other jurisdictions where a life sentence is the maximum penalty, there are no clear criteria for imposition of the sentence which will result in the offender being incarcerated for the term of his or her natural life. In NSW, the life sentence is mandatory for murder and serious heroin and cocaine trafficking where the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of a life sentence. This legislative formulation adapted from the common law of sentencing does little to ensure an equitable distribution of this most severe form of punishment. It will be argued that there needs to be significant reforms if the 'life imprisonment' label is to continue being used in Australian sentencing.

John Anderson is a Senior Lecturer in the School of Law, Faculty of Business and Law at the University of Newcastle. He is also currently Deputy Head of School. John began his academic career after several years in practice as a solicitor. He had practised exclusively in criminal law, employed as a solicitor and then senior solicitor/advocate in the Office of the Director of Public Prosecutions (NSW). John currently lectures in various courses taught by the School of Law at the University of Newcastle, including *Criminal Law and Procedure*, *Advanced Criminal Law* and *Evidence*. He has a strong research interest in sentencing and related criminal justice issues. He also has a developing multi-disciplinary research interest in methods of reducing alcohol-related harm, particularly through the criminal justice system.

SESSION 3A: SENTENCING INDIGENOUS OFFENDERS

***Bush Law*: Film presentation**

Bush Law is a half-hour documentary which explores, through the voice of Aboriginal elders, the arguments for Aboriginal law being formally recognised and incorporated into the mainstream Australian criminal justice system. The focal law in the film is Warlpiri law in the remote NT aboriginal community of Lajamanu but the maker of the documentary, Danielle Loy, says the principles espoused are also supported by other Northern Territory Indigenous peoples. The documentary was made with the assistance of a grant from the Northern Territory Film Office.

The Aftermath of Sentencing: Naming and shaming of Indigenous youth in the Northern Territory

Assistant Professor Robyn Lincoln, *Criminology, Bond University, Qld*
Professor Duncan Chappell, *Faculty of Law, University of Sydney*

Juveniles have long-standing protection against identification in the justice system including publication of their names and identifying features in the mass media. This has been a practice recognised internationally for decades and is supported, among other places, by the UN Convention on the Rights of the Child which Australia ratified in December 1990. In addition, the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) renders severe restrictions on the publication of any information allowing identification of

youth found guilty of a criminal offence. Reflecting these principles all Australian jurisdictions, with the exception of the Northern Territory, have in place legislative provisions to protect the privacy of young people. However, in very recent times, there have been proposals to remove these protections in a number of jurisdictions (QLD, WA and NSW).

Against this background this paper presents findings from a research project designed to obtain information regarding the impact upon indigenous young people of being named and shamed in public media fora within the NT. The research canvasses the views of stakeholders (judiciary, legal representatives, politicians, media personnel, indigenous community members, and so on). The research is intended to inform public policy and law reform concerning an issue which has special relevance to the judiciary, given their role within the juvenile justice system in upholding or rejecting the provisions of youth justice legislation with respect to the relevant naming provisions. The effects of public identification clearly have implications for adult offenders and for victims of crime and thus the broader implications from this research study will also be addressed.

Robyn Lincoln's academic background is in psychology, sociology and criminology with special interest in Aboriginal crime and justice issues. She has lectured at Bond University since 1994 and also at universities in Queensland (UQ, QUT and Griffith). Her research work has been conducted at UQ, QUT, Simon Fraser University in Vancouver and Rutgers University in New Jersey. Robyn also has interests and experience in academic publishing and worked as Senior Editor at Aboriginal Studies Press in Canberra for five years. She was Managing Editor of the *Journal of Sociology* and was previously Editor of the *Australian Journal of Social Issues*. While Robyn has broad-ranging interests in the criminological field, she has focused on the treatment of marginalised groups within the criminal justice system. Projects have involved research on the careers of white-collar offenders, runaway and homeless youth, violence in Aboriginal communities, fraud by medical practitioners and peer influences on juvenile offending. Robyn's most recent work has centred on the new field of forensic criminology where she has examined forensic interviewing techniques and miscarriages of justice. Her publications include co-authored books entitled *Justice in the Deep North: A Historical Perspective on Crime and Punishment in Queensland* (2003) and *Jean Lee: The Last Woman Hanged in Australia* (1997). She has also published a number of journal articles and book chapters with colleagues including: 'Inequality and Crime' (2006); 'DNA Evidence' (2005); 'Aboriginal Crime and Justice' (2004); 'Forensic Interviewing' (2002); 'Naming and Shaming Sex Offenders' (2001).

Duncan Chappell is a lawyer and criminologist. He is Adjunct Professor at the Faculty of Law, University of Sydney as well as holding the position of Professorial Fellow at the University of Wollongong's Centre for Transnational Crime Prevention. In 2007 he was the Acting Director of the University of Sydney's Institute of Criminology. Duncan is the immediate past President (2001–06) of the New South Wales Mental Health Review Tribunal (MHRT), and of the Commonwealth Secretariat Arbitral Tribunal based in London (2001–05). He is also a past member of the NSW Law Reform Commission (2002–06). Before taking up his position with the MHRT, Professor Chappell was for five years (1996–2001) a Deputy President of the Australian Federal Administrative Appeals Tribunal (AAT). Prior to his full time membership of the AAT, Professor Chappell was the Director of the Australian Institute of Criminology (AIC). He has been a frequent consultant and adviser to governments and other public and private agencies in North America and Australia. In 1992 he served as the Australian representative on a Commonwealth Observer Mission to South Africa (COMSA) where he acted as both co-chair and chair. Professor Chappell has published widely on a range of crime and criminal justice issues. His most recent book, co authored with Vittorio Di Martino, is *Violence at Work* (3rd edn), International Labour Office, Geneva.

The Sentencing Response to Defendants Who Have Fetal Alcohol Spectrum Disorder

Associate Professor Heather Douglas, *School of Law, University of Queensland*

This paper will explore the sentencing response to defendants who have Fetal Alcohol Spectrum Disorder (FASD). FASD is the umbrella term for a range of brain disorders that result from exposure to maternal alcohol consumption during gestation. Many who have FASD have difficulty linking their actions to consequences, controlling impulses and remembering things and thus a diagnosis of FASD raises particular issues in sentencing. The paper will overview the effects of FASD and the difficulties associated with its diagnosis. Drawing on case-law and on interviews with lawyers and field officers from Aboriginal Legal Services in Queensland, this paper will examine the appropriate aims of sentencing in FASD cases as well as discuss appropriate penalties. The paper will address the question of whether, and if so, in what circumstances, FASD should be perceived as a mitigating factor.

Heather Douglas is an Associate Professor in the Law School at the University of Queensland. She researches and teaches in criminal law and procedure. Her PhD examined the work of Justice Martin Kriewaldt and the application of the criminal law to Indigenous people during the assimilation period. Heather has published articles on sentencing in relation to Indigenous customary law, the use of maximum security imprisonment units, domestic violence offenders and on the use of preventive detention. She is the author, with Sue Harbidge, of *Criminal Process in Queensland* (2008, LBC). Heather was a part-time commissioner with the Queensland Law Reform Commission from 2001 until 2007.

The Impact of Mandatory Sentencing on Indigenous Offenders

Mr Stephen Jackson & Ms Fiona Hardy, *Department of Justice, Northern Territory*

The NT Department of Justice has an abiding interest and extensive experience in the application of mandatory sentencing. The paper will be based on the Department's experiences over the past 10 years. The paper will address:

- The drivers for mandatory sentencing
- Where mandatory sentencing applies in the NT
- Mandatory sentencing's impact on the NT prisoner population
- Analysis of Indigenous status of offenders sentenced under mandatory sentencing.

Stephen Jackson followed a career in information technology in the public and tertiary education sectors for some twenty years. He was appointed Director of Research and Statistics in 1999, and currently holds that position within the Northern Territory Department of Justice.

Fiona Hardy has gained extensive prosecuting experience in Western Australia (commencing in 1987) and more recently in the Northern Territory as a senior Crown Prosecutor. Currently a senior legal policy officer in the NT Department of Justice with responsibility for the Criminal Justice team, Fiona has considerable experience in providing high-level policy advice, legal advice and support to the Attorney-General of the Northern Territory and NT government agencies. She has represented the NT on a number of national committees and working groups. Fiona has just completed a temporary assignment as Deputy Coroner in the NT.

SESSION 3B: THE 'WARRIOR GENE': GENETIC FACTORS IN SENTENCING

Lack of Free Will Due to Genetic Factors as a Mitigating Factor in Sentencing

Dr Debra Wilson, *School of Law, University of Canterbury, NZ*

While it is generally accepted that there is no 'criminal gene', there is a widening acceptance that variants of some genes do result in a higher propensity for criminal conduct. This paper will discuss the scientific basis for a genetic propensity for crime, then focus on several US cases in which it has been argued that lack of free will due to genetic factors ought to be taken into account in determining either liability for criminal conduct, or as a mitigating factor in sentencing.

Debra Wilson is a lecturer in law at the University of Canterbury, New Zealand, where she teaches a course in Law and Medicine. She has recently completed a PhD at Monash University focusing on the legality and appropriateness of laws prohibiting human reproductive cloning. One of her main research interests is medical law and ethics, particularly focusing on the impact of emerging technologies on the law.

Genetic Mitigation

Mr Allan McCay, *Foundation Law Program, University of Sydney*

In this paper I argue that some pleas based on credible evidence from a behavioural geneticist ought to have a mitigating effect at sentencing. Certain social factors which are linked with offending are currently recognised as worthy of mitigation at sentencing. For example, in New South Wales there are numerous cases in which Aboriginal offenders have relied on the Fernando Principles as laid down by Justice Wood. These principles relate to the formative effect of adverse social circumstances on the conduct of offenders and are grounds for mitigation. These principles are not restricted in scope to aborigines and there have been attempts to extend the scope of application to other groups; for example, Gypsies in *Jones v R* (2009 NSWCCA). Other cases seek to rely on the formative effect of adverse social circumstances without reference to membership of a group (*R v Korhonen* 1999 NSWSC). The courts are morally justified in adopting the view that such influences are relevant because this form of mitigation recognises the effect of factors outside the offender's control on conduct, and moderates punishment accordingly. The paper will then outline some recent research from behavioural genetics which might be used in a plea in mitigation before going on to argue that the formative effect of genetic predispositions is morally similar to the formative effect of social circumstances on offenders

Allan McCay teaches at the University of Sydney Foundation Program and is a PhD candidate at the Law Faculty at the University of Sydney. His research focusses on the implications of behavioural genetics for sentencing. He is admitted to practice as a solicitor in Scotland, Hong Kong, New South Wales and Tasmania. Prior to working at the Foundation Program he was an associate at the law firm, Baker and McKenzie (Hong Kong Office) and he initially qualified as a solicitor with the Scottish firm Tods Murray. He has also been a visiting researcher at the University of California, Riverside and the University of Stirling.

Genetic Factors in Sentencing

Professor Simon Easteal, *John Curtin School of Medical Research, The Australian National University*

Genetic factors potentially impact sentencing in three ways. First they may determine how likely a person is to commit an offence or to repeatedly commit offences. Second they may result in a person having a psychiatric condition that affects how they behave and which may cause them to commit criminal acts. Third, they may affect how a person responds to a sentence that is imposed on them. This paper will consider implications of these impacts on the purposes for which sentences are imposed and on the way in which mitigating and aggravating factors might be considered. For the most part the paper will illustrate these points using the example of Attention Deficit Hyperactivity Disorder, which is a highly heritable, readily treatable condition that is extremely prevalent in prison populations and which is strongly associated with other risk factors for criminal behaviour such as substance abuse and with criminal recidivism.

Simon Easteal is the Deputy Director of the John Curtin School of Medical Research at The Australian National University. He has published two books and more than 160 academic articles. He has served on numerous editorial boards, advisory committees, government taskforces and working parties and other bodies in public and private organisations, and he has provided expert opinion in relation to genetic evidence used in court cases in most Australian jurisdictions. He has a wide range of research interests and a strong commitment to understanding the broader societal implications of his research. His current research focuses on the evolutionary interplay between humans and their environments with the aim of understanding how this dynamic process gave rise to our complex biology; how it made us such a diverse species; and how it impacts our health and wellbeing. He is particularly interested in how genes and cultures co-evolve to shape personalities, cognitive styles and social behaviour. This evolutionary perspective provides a framework for understanding the impact of human psychological diversity on health and on individual potential in a wide range of human activities within educational, management and the legal contexts.

SESSION 4A: SENTENCING OF CORPORATE OFFENDERS

The Principles That Apply to the Sentencing of Corporate Offenders: The \$17 million speeding offence?

Justice Monika Schmidt, *Supreme Court of New South Wales*

The paper looks at the principles that apply to the sentencing of corporate offenders for regulatory offences as well as more conventional crimes, against a background of ongoing controversy as to whether a fine is an adequate way of dealing with corporate misconduct, particularly when the individuals involved in the commission of an offence are not necessarily prosecuted. The question of whether the right balance has been achieved in the prosecution and sentencing of corporations is considered in light of legislative developments, the role of prosecutorial decision makers, Law Reform Commission consideration and public expectation that corporate crimes will be dealt with.

Monika Schmidt graduated from the University of Sydney. Her Honour was a partner in the firm of Minter Ellison from 1986–93. Justice Schmidt lectured at the University of Sydney for a number of years, and has been a member of the NSW Courts Standing Advisory Committee on Judicial Education since 1996. Justice Schmidt was appointed to the NSW Industrial Court and

Industrial Relations Commission in 1993. She was appointed a Deputy President of the Australian Industrial Relations Commission in 1998. Justice Schmidt was appointed to the Supreme Court of New South Wales in July 2009.

The Relevance of 'Corporate Culture' in Sentencing for Corporate Offences

Professor Rick Sarre, *University of South Australia*

The Australian Capital Territory (ACT) in 2004 became the first (and only) jurisdiction in Australia to adopt the recommendations of a national legislative criminal code officers group and to introduce an offence of industrial manslaughter. This was done via the *Crimes (Industrial Manslaughter) Act 2003* which led to a new Part 2.5 (sections 49–55) of the ACT Criminal Code. This law now incorporates the notion of 'corporate culture' in the creation of the offence. Recklessness (leading to culpability) can now be shown by proving that a 'corporate culture' existed within a corporation that directed, encouraged, tolerated or led to noncompliance with the contravened law. It can also be demonstrated where a corporation 'failed to create and maintain a corporate culture requiring compliance with the contravened law.' This paper will explore the notion of corporate culture as a means by which corporations can and should be called to account for deaths in the workplace. The Australian experience is short, but significant in this regard. It will also canvas the possibilities of available and appropriate sentences in the event that a conviction is recorded. What are the goals? What is the evidence of any deterrent factors?

Rick Sarre is Professor of Law and Criminal Justice at the University of South Australia. He was, from 1992–98, the Head of the School of Law and Legal Practice, University of South Australia. He currently lectures in criminal justice, policing, media law, sport law and commercial law with the School of Commerce. His qualifications include an undergraduate degree in law (Adelaide University), undergraduate studies in religion and sociology (Graceland University, Iowa, USA), and post-graduate degrees in criminology (University of Toronto, Canada) and law (University of Canberra, ACT). He was Visiting Library Fellow, Newhouse Center, Rutgers University, New Jersey, USA in 1990, spent time with the Jesuit Refugee Service (JRS) in Hong Kong and Australian Lawyers for Refugees Port Hedland in 1992, was Visiting Professor at Graceland University, Iowa in 1997 and was Visiting Research Professor at Umeå University, Sweden in 2004. He received a Citation from the Australian Learning and Teaching Council in 2008.

SESSION 4B: SENTENCING BY VIDEO LINK

Remote Sentencing: Possibilities and pitfalls

Professor David Tait, *School of Law, University of Western Sydney*

Professor Jane Goodman-Delahunty, *Graduate School of Policing, Charles Sturt University*

Ms Anne Wallace, *Faculty of Law, University of Canberra*

Ms Emma Rowden, *Faculty of Architecture, University of Melbourne*

The paper will explore the architectural, procedural and psychological issues in delivering sentences over a video link. The authors report on an experiment carried out in the County Court of Victoria involving remote communications, in which the design of the remote facility, the technology and the orientation processes were systematically varied. The study, *Gateways to Justice*, was funded by the Australian Research Council, and industry partners included the

Victorian Department of Justice, the Western Australian Department of the Attorney General, the ACT Director of Public Prosecutions and the Australian Federal Police.

David Tait currently heads the Justice Research Group at the University of Western Sydney. He has undertaken research into various sentencing issues, including magistrates' use of imprisonment (with Ken Polk), changing sentencing patterns in Victoria (with Arie Freiberg and Stuart Ross), sentencing information systems, suspended sentences, and increases in recidivism brought about by excessive uses of incarceration. He has also analysed different forms of ritual process in courts and tribunals. He leads four ARC projects in the justice environments area, on juries and interactive visual evidence, video-mediated communications in the court and court safety and security. Industry partners for these projects include the AFP, the AIJA, the ACT DPP and courts and justice departments in Victoria, Western Australia and South Australia. He is also a chief investigator on an ARC-funded study of mental health tribunals with Terry Carney and Duncan Chappell.

Jane Goodman-Delahunty has conducted empirical research on juries for over 25 years and was a consultant to the ABA on jury competence. In 2007 she led a multi-state study of jury satisfaction and confidence in the criminal system. She is a lawyer, psychologist, mediator, and NSW Law Reform Commissioner (part-time).

Anne Wallace is a PhD candidate at Sydney University Law School, where she is one of two full-time researchers engaged on a three-year multi-disciplinary, Australia Research Council-funded study into the use of video-mediated communications in courts ('Gateways to Justice'). She is also a Chief investigator on another ARC-funded project on Court Safety & Security ('Fortress or Sanctuary'). Anne also holds an appointment of Adjunct Professor at Denver University Sturm College of Law, where she teaches (virtually) on Court Information Technology. She also teaches part-time at the University of Canberra in Forensic Evidence and Justice Studies. Anne practised, primarily as a prosecutor and civil litigator, for 10 years prior to taking up her appointment as Deputy Director of the Australian Institute of Judicial Administration (2003–06). Her interest in court technology developed at the AIJA where she managed *Technology for Justice Conference* series (1998–2002) and, with IT consultant, Jeff Leeuwenburg, co-authored three reports on the use of technology in Australian courts. Anne has published widely in the field of court technology, and makes regular presentations to conferences and seminars in Australia, and internationally. She is a regional Board member of the International Association of Court Administration and member of the National Judicial College's Indigenous Cultural Awareness Committee.

Emma Rowden is completing a PhD in Architecture at the University of Melbourne on the design of remote court environments as part of the ARC-funded 'Gateways to Justice' project. She has an interest in the ethics and politics of urban design and architecture, with a disciplinary background that encompasses architecture, theatre, film, media and cultural studies.

Sentencing by Video Link: The Western Australian experience

The Hon Chief Justice Wayne Martin, *Supreme Court of Western Australia*

The Sentencing Act in Western Australia was amended in 1998 to provide for West Australian courts to sentence by video link. The Court may direct the offender to appear in this way for sentencing where it is 'in the interests of justice'. There are advantages to offenders (for example avoiding travel for long distances in difficult circumstances for a short sentencing proceeding) and pitfalls (cases of mistaken identity and loss of subtle communications by some offenders). This paper will canvass the experience of the WA judiciary in applying these provisions.

Wayne Martin was appointed to the Supreme Court of Western Australia in May 2006. He was appointed as a Judge of the Court, a Judge of the Court of Appeal and as the Chief Justice of Western Australia. He graduated with a Bachelor of Laws (First Class Honours) in 1973 from the University of Western Australia and was an articled clerk with Lavan & Walsh, Perth. He completed a Master of Laws from the University of London in 1975 and was admitted to practice in Western Australia in 1977. After being a Senior Litigation Partner with Keall Brinsden, Perth, from 1984–88, he joined the Independent Bar in 1988 and was appointed a Queens Counsel 1993. From 2001–03, he was Counsel assisting the HIH Royal Commission in Sydney. He served as President WA Bar Association from 1996–99, Chairman of Law Reform Commission of WA from 1996–2001, President of the Law Society in 2006 and Director, Law Council of Australia in 2006.

SESSION 5: SENTENCING FOR COMMONWEALTH OFFENCES

The Quest for Sentencing Consistency in the Federal System

Wendy Kukulies-Smith, *ANU College of Law, The Australian National University*

In 2006 the Australian Law Reform Commission produced the results of two years of research into the operation of Part IB of the Crimes Act 1914 (Cth). The Same Crime, Same Time Report found that the federal legislation was complex, ambiguous, illogically structured, and inconsistent in its use of terminology. One of the primary terms of reference for the inquiry was the issue of equality. In particular whether equality in sentencing federal offenders should be maintained between federal offenders serving sentences in different states and territories, or between offenders within the same state and territory, regardless of whether they are state, territory or federal offenders (ALRC 103, 2006, 1.6).

Is this the latest iteration of the perpetual quest for consistency in sentencing? After finding evidence of inconsistency in the treatment of federal offenders the ALRC recommended equality in treatment of federal offenders. How might this be achieved and what does equal treatment mean in the federal system?

Wendy Kukulies-Smith is a Teaching Fellow at the ANU College of Law. She has taught in Criminal Law and Procedure, Legal Theory and Foundations of Australian Law. Wendy is currently the editor of the 'Principles and Practice' component of the Commonwealth Sentencing Database. The Database provides judicial officers with concise commentary on federal legislative provisions and sentencing principles with links to relevant legislation and case law. Wendy's research interests include sentencing, criminal law and justice, gender, legal history and theories of punishment. She is undertaking a PhD entitled *Punishing Parents: the effect of family or dependants on sentencing in Australia*.

Variations in Federal Sentencing

Mr David Adsett, *Office of the Commonwealth Director of Public Prosecutions, Queensland &*

Mr Mark Pedley, *Office of the Commonwealth Director of Public Prosecutions, Victoria*

This paper looks at the relationship between the non-parole periods and head sentences imposed on federal offenders in the three years between 2006/7 and 2008/9 across a total of 439 sentences. The sentences are analysed by type of offending and on a State/Territory basis. The survey of sentences reflects consistency for drug sentences across Australia. In other offence

types there is some variation of approach in the various jurisdictions but a reasonable level of consistency bearing in mind the approach reflected in the Judiciary Act 1903 is that federal sentencing is carried out by State/Territory courts and so State/Territory practice has a bearing on the sentences imposed.

David Adsett has managed the Commonwealth Director of Public Prosecutions operations in Queensland since 2006. He is a Barrister with Law and Arts degrees from the University of Queensland and a Master of Laws degree from the University of Sydney. He has over two decades experience as a Federal Prosecutor in Brisbane, Sydney and Perth. During his career he has conducted prosecutions for a wide range of Commonwealth offending, including money laundering, tax fraud, commercial fraud, drug importation, people smuggling and terrorism. He has also conducted criminal assets recoveries under the Proceeds of Crime Act.

Mark Pedley is the Deputy Director (Melbourne) of the Office of the Commonwealth Director of Public Prosecutions. He holds degrees in Arts and Law from the University of Melbourne. After admission as a barrister and solicitor, he worked in private practice then joined the Commonwealth Deputy Crown Solicitor's Office in Melbourne. In 1984 Mark went to the newly created Office of the Commonwealth Director of Public Prosecutions and became Deputy Director in 1994. He also held an appointment as a Crown Prosecutor for the State of Victoria. He is a member of the Advisory Committee of Monash University, Criminal Justice Research Consortium, the Justice Statement Advisory Group to Department of Justice (Vic), the County Koori Court Reference Group, and the Criminal Law Section, of the Law Institute of Victoria.

A Judicial Perspective on Consistency in Sentencing for Commonwealth Offences

Judge Deborah Richards, *District Court of Queensland*

The process of sentencing offenders is one of the more difficult yet possibly the most closely scrutinised areas of judicial practice. The ideal of equality of justice is a cornerstone of our system, yet if equality of justice means consistency in sentencing, then is that ideal possible to achieve? The sentencing of Commonwealth offenders is an area of sentencing where the desire to create consistency in sentencing for federal offences across Australia is hampered by the fact that state courts in sentencing federal offenders tend to be influenced by the sentencing schemes that operate in that State. Practically speaking, it is impossible for a sentencing judge to ignore the likely sentence an offender might get for a similar state offence. This paper questions whether the quest for consistency in sentencing Commonwealth offenders is the legal equivalent of searching for Atlantis. Is it possible to have true consistency in sentencing across Australia when the sentences are being handed down in state courts with significantly different sentencing regimes? How much are we influenced by the usual sentencing practice of our state court? What are the practical difficulties faced by judges when striving for consistency in Commonwealth sentencing?

Deborah Richards has been a judge of the District Court of Queensland since 1998 and has been resident in Ipswich since that time. Like many of the regional courts in Queensland she sits mostly in the criminal jurisdiction when sitting in Ipswich. She has also been a Children's court judge and was a member of the Health Practitioners Tribunal from 1999 to 2009.

SUNDAY | 7 FEBRUARY

SESSION 6: SENTENCING IN ARSON (BUSHFIRE) CASES

Sentencing as an Aspect of Crime Prevention to Reduce Deliberate Bushfires in Australia

Dr Damon Muller, *ARC Centre of Excellence in Policing & Security, National Centre for Epidemiology & Population Health, The Australian National University*

Based on previous research undertaken by the Australian Institute of Criminology it seems that approximately half of all vegetations fires—some 20,000 to 30,000 each year—are deliberately lit, and that arson in all forms costs the Australian community \$1.6 billion annually. Although it can be very difficult to identify whether a fire is deliberately lit, and even more challenging to identify who is responsible, there are still a range of strategies and interventions that may reduce the likelihood of bushfire arson occurring.

This report seeks to assist and inform fire-prevention policies and practices by examining what we know about the risk factors for arson and who commits it. Available evidence suggests that the risk of deliberate fires is higher during certain times of the year and week and that there are 'hot spots', most notably on the edge of urban areas. On known offenders there is limited research and it primarily relies on small samples of convicted arsonists. As a result situational and community crime prevention that addresses the local environment is most likely to have an impact, whilst offender-based approaches have to focus on the treatment of known offenders, both adults and juveniles. To assist the further development of preventative initiatives the report discusses the main crime prevention principles and approaches by linking them to examples of programs that target the environment, the community and known offenders. A wide range of measures are provided as examples, including those related to controlling access, fuel reduction, removing abandoned cars, and various community awareness campaigns that have targeted specific groups and/or communities. However, the report concludes that more investment is required in impact evaluation to ensure that the efficacy of discrete programs is better understood, and that, to be more collaborative and strategic, crime prevention approaches in the future will need to involve fire and other agencies, and local communities.

Damon Muller is a postdoctoral fellow with the ARC Centre of Excellence in Policing and Security (CEPS) at the National Centre for Epidemiology and Population Health at the ANU in Canberra. Damon has a PhD in Criminology from the University of Melbourne. He previously worked as a research analyst at the Australian Institute of Criminology conducting research into bushfire arson as part of the Bushfire Cooperative Research Centre. His research interests include topics such as homicide and violent crime, criminal profiling, arson and juvenile justice. He is currently researching issues of in understanding and managing uncertainty in relation to policing and security.

Managing Arson Offenders: What do we know already and what do we need to know?

Dr Rebekah Doley, *Clinical Psychology Program, Bond University, Queensland*

With heightened community focus on the issue of arson prevention and management in our community, work has commenced on developing a best practice approach to managing convicted arson offenders. Currently in Australia there is no standardised treatment modality

designed specifically to address the unique demands of intervention with adult deliberate firesetters. This paper will present the results of a preliminary review into current best practice for risk assessment of arson offenders. Issues pertaining to treatment goals will also be canvassed. In Australia, currently there is no consistent approach to the assessment and intervention of either juvenile or adult arsonists. Reference to advances in the international arena will be made and the applicability of the lessons learned overseas to the domestic context will be examined.

Rebekah Doley BA(Hons) Grad Dip Psych Prac MSc(Inv Psy) MPsych (Clin) PhD MAPS MCC AMFC is an Assistant Professor in Psychology at Bond University, Gold Coast, Queensland where she is the Director of the Clinical Psychology Program. She teaches post graduate courses in forensic and clinical psychology, undertakes research and supervises probationary psychologists. In addition, Dr Doley is an Official Visitor for the NSW Minister of Health with a role in monitoring compliance with mandated mental health policies and procedures of local facilities of mental health services. Dr Doley also runs a private psychology practice in Tweed Heads, NSW. Dr Doley has a history of researching and lecturing the psychology of serial firesetting in the UK, USA, NZ and Australia. As a result of her work in this area she has been awarded the Queens Trust Award in 1995 and CFS/S.A. Great Training and Research Award in 1995, 1998, 1999, and 2000. In addition to lecturing domestically and internationally on this issue, Dr Doley has developed a screening instrument for firefighters which has been introduced nationally in New Zealand. Her recent contribution to the field is a book entitled *A snapshot of serial arson in Australia* which details findings from published empirically based research in Australia comparing serial, one-time and non-arson offenders across a range of offence features and personal characteristics. Currently Dr Doley is working with several US collaborators on various projects including developing a risk assessment protocol for arson offenders on parole and investigating the phenomenon of copycat arson. She is also a member of The Australian Bushfire Arson Prevention Initiative and a contributor for *Matchbook* (an online journal on the prevention and treatment of juvenile firesetting).

Defending People Charged With Arson (Bushfire) Offences

Mr Mark Woods, *Tyler Tipping & Woods, Traralgon Victoria*

Bushfire by arson is a difficult crime to characterise, and has a number of elements which make it a difficult crime for the lawyer to professionally deal with. The fact is that not all bushfires by arson result in loss of life or private property. Some bushfires by arson could never conceivably cause such loss, whilst some undoubtedly would, but for the swift and often heroic actions of firefighters and others, the preventative measures taken by people before the fire was lit, the topography and vegetation of the area lit, the prevailing meteorological conditions before and during the fire, and the actions of potential victims.

In attempting to characterise any bushfire in terms of its potential or actual seriousness, those responsible for representing the alleged arsonist are faced with a significant disparity in the resources available to them, compared with those available to the prosecution. This is a significant issue going to the criminality of the defendant. Objective tests as to recklessness of conduct are found throughout the criminal law in relation to the charges an alleged arsonist might face. Evidence of the various factors to be taken into account when applying the objective test is crucial—and never more so when it comes to sentencing and the issue of proportionality.

Matters peculiar to the defendant arsonist are difficult to discern. Forensic psychological and psychiatric assessment may (and usually does) point to some mental health problems, but not to

the nexus (if one exists) between those problems and the motivation for arson. Hence the sentencing issue of rehabilitation, and the likelihood of reoffending become problematic with heightened community focus on the issue of arson prevention and management in our community, work has commenced on developing a best practice approach to managing convicted arson offenders. Currently in Australia there is no standardised treatment modality designed specifically to address the unique demands of intervention with adult deliberate firesetters. This paper will present the results of a preliminary review into current best practice for risk assessment of arson offenders. Issues pertaining to treatment goals will also be canvassed. In Australia, currently there is no consistent approach to the assessment and intervention of either juvenile or adult arsonists. Reference to advances in the international arena will be made and the applicability of the lessons learned overseas to the domestic context will be examined.

Mark Woods is a partner in the law firm Tyler Tipping and Woods in Victoria. He is an accredited specialist in criminal law and has acted for twenty seven persons charged with arson (bushfire) offences in the last three years. In 2009 Mr Woods was a recipient of a special award by the Law Institute of Victoria for his work as a legal co-ordinator for Bushfire Legal Help, a group of legal service organisations who provided free information and support for Victorians affected by the 2009 bushfires. Mr Woods is a current Council member and past president of the Law Institute of Victoria. He chairs the Access to Justice Committee of the Law Council of Australia, and is immediate past chair of the Australian Legal Assistance Forum. He is a board member of the Victoria Law Foundation, the Leo Cussen Institute for Continuing Legal Education, and the National Pro Bono Resource Centre. Mr Woods has presented frequently at conferences in Australia and abroad on criminal law, family law, and access to justice topics.

SESSION 7A: SENTENCING AND CHILDREN

The Specific Deterrent Effect of Custodial Penalties on Juvenile Reoffending

Dr Andrew McGrath, *School of Social Sciences & Liberal Studies, Charles Sturt University NSW*

On an average day in 2006–07, 941 young people were held in detention across Australia (AIHW 2008: 51). The costs associated with juvenile detention are very high. For example, although only 10.3 percent of the 6,488 juveniles who appeared in the NSW Children's Court in 2007 were given a control order, 48 percent of the budget of the NSW Department of Juvenile Justice is spent keeping juvenile offenders in custody (NSW Department of Juvenile Justice, personal communication 2009).

Given the high cost of juvenile detention, one would expect to find a large body of Australian research examining its potential benefits. To date, however, little research has been conducted on the effect of custodial sentences on juvenile recidivism. It is known that more than two-thirds of the young people who receive a control order from the NSW Children's Court are convicted of a further offence within two years of their custodial order. It is not known what their reconviction rate would have been had they not received a custodial penalty. This study addresses this issue. This paper is taken from the report of research commissioned by the Criminology Research Council.

Andrew McGrath is a Lecturer in developmental psychology and forensic psychology in the School of Social Sciences and Liberal Studies at Charles Sturt University NSW. Andrew's PhD, which examined the extent to which subjective reactions to being sentenced in the Children's Court influenced subsequent offending, was awarded in 2007. He has previously taught psychology at the University of Sydney, and Macquarie University. He is currently collaborating with the NSW Department of Juvenile Justice, in an investigation of re-offending patterns among young people being supervised by the Department.

Provisional Sentencing of Children

Ms Katherine McFarlane, Charles Sturt University NSW

In September 2009 the NSW Sentencing Council published a report on Provisional Sentencing of Children. It proposed a scheme of 'provisional' sentencing should be available in respect of children aged between 10 and 14 years who have been convicted for the offence of murder, where the information available, at the time of sentencing, does not permit a proper assessment to be made in relation to the presence or likely development in the offender of a serious personality and psychiatric disorder, and as a consequence an assessment as to their potential for future dangerousness or rehabilitation. Provisional sentencing as a concept would allow for a notional sentence to be imposed at an initial sentencing procedure, with an ability to later vary or adjust that sentence during the course of the sentence, according to a variety of factors that might include assessments as to the offender's capacity to rehabilitate, and as to future dangerousness, and take into account a better understanding of any mental health conditions that may have emerged or become apparent as the child matures. The NSW Department of Justice and Attorney Generals is currently accepting public submissions on the merits of the provisional sentencing scheme. The official Government response to the report is expected shortly.

Katherine McFarlane is one of the joint authors who prepared the Report on Provisional Sentencing of Children for the NSW Sentencing Council. She was the Executive Officer of the NSW Sentencing Council from 2006 to June 2009, when she took up a temporary appointment as Executive Officer of the Children's Court of NSW. A former solicitor, Official Visitor to the NSW prison system and advisor to the Shadow Minister for Community Services and Aboriginal Affairs, she currently lectures in Justice Studies/Criminology at Charles Sturt University, Bathurst. Kath is currently undertaking a PhD in Law at the University of New South Wales.

SESSION 7B: SENTENCING FOR OFFENCES MOTIVATED BY HATRED OR PREJUDICE

Sentencing for Offences Motivated by Hatred or Prejudice

Professor Arie Freiberg AM, *Victorian Sentencing Advisory Council*

In June 2009 the Victorian Sentencing Council was asked to urgently advise the Attorney-General as to how the Sentencing Act 1991 (VIC) could be amended so that where an offence is motivated by hate or prejudice against a particular group (for example based on their race, religion, ethnicity, disability or sexual orientation) this motivation is taken into account as an aggravating circumstance at the time of sentencing. The Council was not asked to advise on the merit of amending the Victorian Act but rather the form of such an amendment.

In this presentation, Arie Freiberg (the chair of the Council) and Felicity Stewart (the Council's Principal Legal Policy Officer) discuss the context in which the reference occurred, the Council's advice to the Attorney-General and the developments in Victoria since the advice was provided.

Arie Freiberg is Dean of the Faculty of Law at Monash University in Melbourne and chair of The Victorian Sentencing Advisory Council. Previously he held appointments at the University of Melbourne, the Australian Institute of Criminology and the Commonwealth Director of Public Prosecutions. Professor Freiberg's particular areas of expertise are sentencing and the administration of criminal justice. He is the author of major works in both fields. He has served as a consultant to the Victorian, South Australian Western Australian and federal government on sentencing matters.

Felicity Stewart is the Principal Legal Officer at the Sentencing Advisory Council and has worked in criminal law for over ten years. In her four years at the Council she has completed reviews of issues including the post sentence detention of high risk offenders, the adequacy of the maximum penalties for particular offences (for example drink driving offences) and the role of provocation in sentencing. Previously Ms Stewart worked as a criminal lawyer at Victoria Legal Aid, as a Judge's associate in the Supreme Court of Victoria and, in Scotland, as the Legal Assistant to the Lord President of the Court of Session and Lord Justice General of Scotland. She has an Arts degree and an Honours degree in Law.

Sentencing for Prejudice

Associate Professor Gail Mason, *Director, Institute of Criminology, University of Sydney*

In 2003 NSW introduced sentence aggravation provisions for offences motivated by prejudice or group hatred. The Northern Territory has had comparable provisions since 2006. Although legislatures have been virtually silent on the purpose of these provisions, comparable 'hate crime' laws in international jurisdictions have been introduced with the clear intention of addressing the problem of prejudice-related crime against those groups who are its primary targets: racial, religious, ethnic, sexual and disabled minorities. This paper will analyse reported decisions under the NSW provisions (s21A(2)(h) *Crimes (Sentencing Procedure) Act 1999*). Four issues of significance emerge: whether the provisions apply to individual forms of hatred; whether intra-group conflict is covered; whether criminal conduct influenced by racial stereotypes comes within the ambit of the applicable motive test; and the question of which groups should be protected under the legislation. In terms of the last issue, the paper will consider the extent to which the recent decision of the NSWCCA in *Dunn v R* to include paedophiles as a protected group under s21A(2)(h) is capable of contributing to the social justice goals of hate crime laws.

Gail Mason is Co-Director of the Sydney Institute of Criminology, Faculty of Law, University of Sydney. Prior to this she taught in Gender Studies at the University of Sydney and Criminology at Victoria University of Wellington, New Zealand. Professor Mason's research revolves around the issues of hate crime and discrimination. She is especially interested in the ways in which legal and social discourse constitute our understandings of what it means to 'hate' others. Gail is currently involved in several research projects, including an international comparison of hate crime law, a critique of the role of emotion in the construction and definition of hate crime and an exploration of resilience to gendered violence amongst former-refugee communities in Australia. She is Executive Editor of *Current Issues in Criminal Justice*, Associate Editor of the *Australian and New Zealand Journal of Criminology* and Series Editor for the *Institute of Criminology Monograph Series*.

SESSION 8: SENTENCING IN SO CALLED 'TECHNICAL RAPE' CASES

Sexual Consent: Implications for judicial sentencing practices

Dr Rachel King, *Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies*

Recent debate about sexual assault suggests that we continue to grapple with the meaningfulness of consent in sexual interaction, at what point that interaction becomes criminal and who is responsible for establishing—and negating—free agreement. Neither legal practitioners nor the judiciary are exempt from this challenge, as the assessment of 'technical rape' by a judicial officer shows.

Judicial officers have the added challenge of interpreting evidence of consent or non-consent in a way that satisfies the standards of legal culpability. Yet consent is also an experiential, relational and ethical issue. Using the narratives of 33 victim/survivors of sexual assault, this paper discusses the factors these women see as influencing their ability to freely agree to sex. In particular, situational context, relationships, and alcohol use are factors that emerge to impact on the quality of 'free agreement'. This paper examines the implications these finding might have for judicial sentencing practices, as judges are increasingly expected to incorporate more defined and complex understandings of sexual non-consent into their decision-making processes.

Rachel King is a Research Officer at the Australian Centre for the Study of Sexual Assault, at the Australian Institute of Family Studies. Dr King is a researcher specialising in legal responses to rape complaints. Her PhD research investigated the perceptions of women, support workers, police officers and potential jurors regarding rape, with a specific focus on the manner police officers respond to rape complaints.

Judicial Sentencing Remarks and the Re-victimisation of Victims of Sex Offences

Mr Michael O'Connell, *Commissioner for Victims' Rights, South Australia*

According to critics (Wykes & Welsh, 2009) the law perpetuates gendered stereotypes about female and male sexuality and their roles in relation to both sex and violence. Furthermore, criminal justice practitioners, including judges and magistrates, redefine and reconceptualise victims' experiences to fit that law.

Studies and commentaries reveal that courts focus on the victim's state of mind; her or his behaviour and so on that suggests the victim is on trial rather than the defendant. Jurors are asked to decide whether the victim deserves protection under law, rather than whether the victim was sexually assaulted (Clark 2008). Then judges—influenced by the myths that permeate case law and sentencing manuals—impose sentences that rarely, if ever, equate with the statutory maximums. Their sentencing remarks show too often the factors that judges take into account reflect classical understandings of sexual assault, for instance, offender-excusing; victim-blaming; acquaintance-justifying; and, that real rape is stranger-rape (Kennedy, Eastael and Taylor 2009, see also Bouhours & Daly 2008; Taylor 2004). Contrary, judges in some countries can instruct juries to ignore myths surrounding rape (eg *The Times* 2009).

Less, however, is known about the impact of judges' sentencing remarks on victims, so this paper (although not ignoring the legal re-victimisation of victims of sexual assault) will report the

views of social workers who assist victims of sexual assault during criminal proceedings. These workers have learnt that victims who have been prepared for the 'worst' court experience cope better than those who have not been prepared. Victims are frequently so relieved to hear a guilty verdict that sentencing remarks are a secondary but still a very important concern. This paper presents the findings and suggests lessons for judges and magistrates.

Michael O'Connell, the first Commissioner for Victims' Rights in South Australia, was also the inaugural Victims of Crime Co-ordinator and Victim Impact Statement Coordinator. He teaches victimology in Australia and overseas. He is a life-member and Vice-president of the World Society of Victimology, as well as editor of *The Victimologist*. He chairs the Law Week Committee for South Australia and is a member of the board for the Institute of Justice Studies. In 1995 he was awarded the Australian Police Medal for his victimological work and in 2003 a finalist in Australian of the Year 2004 (South Australia).

The Preparation and Delivery of Sentencing Remarks in Sexual Assault Cases

Judge John Nicholson, *District Court of New South Wales*

This commentary will discuss the issues raised in papers presented by other speakers and discuss the recent controversy over a judge using the term 'technical rape' in remarks made in the course of proceedings in which there was a dispute about whether the alleged victim consented but then fell asleep before the alleged act of rape occurred. The paper will consider the difficulty judicial officers face in preparing and delivering sentencing remarks orally.

John Nicholson was sworn in as a judge of the New South Wales District Court in July 2001. His Honour came to the NSW bar in 1977 after a career in teaching (1959–71) and in the industrial union of teachers from independent schools. Upon admission to the bar he first went to Wardell Chambers, where he remained until 1984, practising primarily in Industrial Law, Common Law and criminal law. Judge Nicholson was appointed as a public defender in August 1984 and took silk in November 1994. Two years later His Honour was appointed as deputy senior public defender and in 1999 he became the senior public defender. His practice was primarily Supreme Court trials and pleas, and arguing appeals before the Court of Criminal Appeal. He was instrumental in establishing a scheme to assist Indigenous lawyers to develop a legal practice by being placed at the Public Defenders Office.

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