

ADDRESSING THE CURIOUS BLACKSPOT THAT IS THE SEPARATION BETWEEN THE PRINCIPLE OF LEGALITY AND SENTENCING

MIRKO BAGARIC* AND THEO ALEXANDER**

The principle of legality has evolved into a clear and entrenched jurisprudential mechanism for protecting common law rights and freedoms. It operates as a shield to preserve the scope of application of fundamental rights and freedoms. In recent years it has been increasingly applied by the courts to limit the scope of legislative provisions which potentially impinge on human rights and fundamental freedoms. Yet there is one domain where the principle of legality is conspicuously absent: sentencing. Ostensibly, this is paradoxical. Sentencing is the realm where the legal system operates in its most coercive manner against individuals. In this article, we argue that logically the principle of legality has an important role in the sentencing system given the incursions by criminal sanctions into a number of basic rights, including the right to liberty, the freedom of association and the deprivation of property. By way of illustration, we set out how the principle of legality should apply to the interpretation of key statutory provisions. To this end, we argue that the objectives of general deterrence and specific deterrence should have less impact in sentencing. It is also suggested that judges should be more reluctant to send offenders with dependants to terms of imprisonment. Injecting the principle of legality into sentencing law and practice would result in the reduction in severity of a large number of sanctions, thereby reducing the frequency and extent to which the fundamental rights of offenders are violated. The methodology set out in this article can be applied to alter the operation of a number of legislative sentencing objectives and rules.

I INTRODUCTION

One of the key mechanisms by which fundamental rights and freedoms are protected in Australia is the principle of legality. In recent years, the High Court has entrenched and clarified the application and scope of this principle. The principle of legality has been described in numerous ways. In *X7 v Australian Crime Commission*, Kiefel J succinctly and clearly set out the principle in the following terms:

The requirement of the principle of legality is that a statutory intention to abrogate or restrict a fundamental freedom or principle or to depart from

* Professor and Dean of Law, Deakin University.

** Lecturer, Deakin University.

the general system of law must be expressed with irresistible clearness. That is not a low standard. It will usually require that it be manifest from the statute in question that the legislature has directed its attention to the question whether to so abrogate or restrict and has determined to do so.¹

At its core, the principle of legality protects fundamental rights and freedoms, irrespective of the sphere of law in which they operate. Case analysis demonstrates that the principle has been applied in a variety of different contexts, including constitutional law, evidence, immigration law, substantive criminal law and criminal procedure. However, one subject area which has not been affected by the principle of legality is sentencing. Ostensibly, it is curious that the concept of legality would be (nearly) totally absent from sentencing jurisprudence. The mystery deepens the more closely one analyses the issue. On closer reflection it is verging on somewhat remarkable that sentencing judges have steered clear of the principle in the development of sentencing law and practice.

Sentencing law in all Australian jurisdictions has a statutory foundation and hence there is considerable scope and need for legislative interpretation in this domain. Moreover, sentencing is the sharp end of the criminal law and the realm where the state acts in its most authoritative manner against its citizens. The interests targeted by criminal sanctions include a number of well-established rights and freedoms, including the right to liberty, property, privacy and freedom of association. More than 500 000 Australians annually are subjected to criminal sanctions.² The most severe criminal sanction in our system of law is imprisonment. This sanction is now imposed by Australian courts more frequently than at any time in Australia's recorded history. The increase in the incarceration rate is also at a record high — the Australian prison population has reached 30 000 for the first time.³

In the language of rights, more Australians are now deprived of their right to liberty and freedom of association through the process of state-imposed sanctions than at any time in Australia's history. While there are a number of different criminal sanctions, the focus of this article is on imprisonment given that it is in relation to this hardship where the infringement of rights is the most profound and manifest.

The penalty that a court imposes on an offender is heavily contingent upon the interpretation accorded by the court of a potentially large number of statutory provisions, including the purpose of punishment and the applicability of mitigating and aggravating considerations. As with all areas of law, there are many interpretive maxims which guide judicial interpretation and analysis of sentencing statutes,⁴ but one maxim which has not been invoked in the sentencing realm is the principle of legality.

1 (2013) 248 CLR 92, 153 [158] (citations omitted).

2 See Australian Bureau of Statistics, *Criminal Courts 2009–2010* (27 January 2011) <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/4AF5F0DDDDA509BFCA25782300154372/\\$file/45130_2009-10.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/4AF5F0DDDDA509BFCA25782300154372/$file/45130_2009-10.pdf)>.

3 See further, the statistics in pt 3 of this article.

4 The leading Australian text on this issue remains D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014).

This article argues that the separation between sentencing and the principle of legality is logically and jurisprudentially unsound. The doctrine of legality ought to assume considerable prominence in guiding the interpretation and application of statutory sentencing provisions. Sentencing statutes necessarily impact heavily on fundamental rights and freedoms, particularly through the sanction that is imposed.⁵ Many aspects of a sentencing statute are relevant to the ultimate choice of sanction. Hence, the manner in which the principle of legality can apply to shape the interpretation and application of sentencing statutes is infinite. It is not therefore tenable to describe how legality should influence every aspect of sentencing law. However, by way of pragmatic illustration, we examine several key sentencing provisions and describe how the application of the principle of legality would considerably change the manner in which they are currently understood and applied. This methodology, it is argued, can be applied to all statutory sentencing law provisions. Thus, this article does not attempt to definitively and exhaustively define how the principle of legality should impact on sentencing law. It is, in essence, an issue-raising paper which aims to highlight a disconnect in the law with the aim of merging two areas of jurisprudence.

In the next part of this paper, we describe and analyse the principle of legality. In doing so, we speculate on reasons why the two streams of jurisprudence have thus far not merged. Key to our explanation is that criminal sanctions imposed by courts have not traditionally been viewed through the lens of a human rights taxonomy. This is followed, in Part 3, by an overview of sentencing law and practice in Australia with an emphasis on the key statutory provisions. In the last substantive part of the article, Part 4, we provide an illustration of the impact that the principle of legality should have in the sentencing realm. Our analysis focuses on the key sentencing objectives of general deterrence and specific deterrence. The effect of approaching these objectives from the perspective of the principle of legality is profound. General deterrence would in the federal sentencing realm be abolished as a sentencing objective and in all other jurisdictions it would no longer be used as a basis for increasing penalty severity. Specific deterrence would, in most jurisdictions, carry far less weight in the sentencing calculus. We also argue that the principle of legality inclines in favour of offenders with dependants being subjected to less harsh consequences than is currently the situation. In the concluding remarks we summarise the key findings in the article and provide an overview of the likely future impact of the principle of legality in the sentencing domain.

5 The greatest impact is on the interests of the offender. Victims too can be affected, however, the focus of this article is on offenders given that they are the target of criminal sanctions and the bulk of sentencing statutory provisions are directed at the appropriate sentence that should be imposed.

II THE RISE AND RISE OF THE PRINCIPLE OF LEGALITY

A Statement of the Principle of Legality

Judges⁶ and legal scholars⁷ attribute the origins of the principle of legality in Australian jurisprudence to the following passage by O'Connor J in the decision of *Potter v Minahan* over a century ago:

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.⁸

The principle has remained relatively dormant until the last decade, although it did receive some passing references by justices of the High Court before that period. Thus, the doctrine was briefly discussed in 1987 by Brennan J in *Re Bolton; Ex parte Beane*,⁹ and by Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ in the 1990 decision of *Bropho v Western Australia*.¹⁰ However, it was not until 1994 that the High Court in *Coco v The Queen* systematically analysed its earlier decisions and United Kingdom authorities regarding the operation and scope of the principle of legality.¹¹ In *Coco v The Queen*, Mason CJ, Brennan, Gaudron and McHugh JJ described the principle in the following terms:

The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature

6 See, eg, *DPP v Kaba* [2014] VSC 52 (18 December 2014) [166]; Chief Justice Robert French, 'Protecting Human Rights Without a Bill of Rights' (Speech delivered at the John Marshall Law School, Chicago, 26 January 2010) 29.

7 See, eg, Dan Meagher, 'The Common Law Principle of Legality' (2013) 38 *Alternative Law Journal* 209, 209; Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36 *Sydney Law Review* 413, 418.

8 (1908) 7 CLR 277, 304 quoting Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) 122. The case focused on the meaning of the term 'immigrant' in the *Immigration Restriction Acts 1901* (Cth) and the *Commonwealth Constitution* in the context of whether a person who was born in Australia could re-enter after living in another country (China) for a period of time. The above passage has been cited often, see, eg, *X7 v Australian Crime Commission* (2013) 248 CLR 92, 132 [86] (Hayne and Bell JJ).

9 (1987) 162 CLR 514. His Honour stated: '[u]nless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation': at 523.

10 (1990) 171 CLR 1. Their Honours stated:
it is 'in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used': at 18, quoting *Potter v Minahan* (1908) 7 CLR 277, 304.

11 (1994) 179 CLR 427.

has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.¹²

The above passage is in similar terms to perhaps the most well-known expression of the principle, which is by Lord Hoffmann, in *R v Secretary of State for the Home Department; Ex parte Simms*, who stated:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.¹³

In short, the principle of legality means that statutes will not be interpreted as attenuating fundamental rights, freedoms or immunities unless there is a clear intention to curtail such interests.¹⁴

B Rationale for the Principle of Legality

The exact rationale for the principle of legality has been expressed in a number of ways, but the justifications generally have a shared underpinning, which is the view that a pro-rights interpretation of statutes is in keeping with community expectations of the roles of Parliament and the courts and is ultimately democracy-enhancing.

12 Ibid 437 (citations omitted).

13 [2000] 2 AC 115, 131. For an examination of the operation of the principle of legality in other jurisdictions and internationally, see Guy Cumes, 'The *Nullum Crimen, Nulla Poena Sine Lege* Principle: The Principle of Legality in Australian Criminal Law' (2015) 39 *Criminal Law Journal* 77.

14 There is no clear answer for the increasing reliance on the principle of legality, however, it has been suggested it stems from the growth of human rights discourse since the Second World War and the increase in the amount of legislation passed by Parliament: Meagher, 'The Common Law Principle of Legality', above n 7; Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449. See also Justice J Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769.

To this end, the rationale for the principle was articulated by Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v The Queen* in the following terms:

curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.¹⁵

The association between respecting rights and enhancing democracy was again emphasised by French CJ in *Momcilovic v The Queen* in the following passage:

The common law in its application to the interpretation of statutes helps to define the boundaries between the judicial and legislative functions. That is a reflection of its character as ‘the ultimate constitutional foundation in Australia’. It also underpins the attribution of legislative intention on the basis that legislative power in Australia, as in the United Kingdom, is exercised in the setting of a ‘liberal democracy founded on the principles and traditions of the common law’. It is in that context that this Court recognises the application to statutory interpretation of the common law principle of legality.¹⁶

In a similar vein, in *Lee v New South Wales Crime Commission*, Gageler and Keane JJ, stated that the principle of legality:

respects the distinct contemporary functions, enhances the distinct contemporary processes, and fulfils the shared contemporary expectations of the legislative and the judicial branches of government. As put by Gleeson CJ in *Electrolux Home Products Pty Ltd v Australian Workers’ Union*, in terms often since quoted with approval, the principle ‘is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted’.¹⁷

C Uncertainty Regarding the Rights and Freedoms Coming within the Scope of the Legality Principle

One of the key issues regarding the principle of legality is the *exact* rights and freedoms to which it applies. French CJ in *Momcilovic v The Queen* noted the descriptors of ‘fundamental rights’ and ‘commonly accepted’ rights are sometimes used in an attempt to demarcate the scope of the principle. His Honour stated:

The principle of legality has been applied on many occasions by this Court. ... The range of rights and freedoms covered by the principle has frequently been qualified by the adjective ‘fundamental’. There are

15 (1994) 179 CLR 427, 437–8 [11].

16 (2011) 245 CLR 1, 46 [42] (citations omitted).

17 (2013) 251 CLR 196, 309–10 [312] (citations omitted).

difficulties with that designation. It might be better to discard it altogether in this context. The principle of legality, after all, does not constrain legislative power. Nevertheless, the principle is a powerful one. It protects, within constitutional limits, *commonly accepted 'rights' and 'freedoms'*.¹⁸

More recently, in *Lee v New South Wales Crime Commission*, Gageler and Keane JJ referred to the concept of 'fundamental principles' and interests that are 'important' pursuant to our system of government and the 'rule of law' as being relevant to defining the scope of the principle. Their Honours stated:

Application of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the protection of *fundamental principles* and systemic values. The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are *important within our system of representative and responsible government under the rule of law*; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.¹⁹

As the above passages indicate, the rights and freedoms to which the principle of legality applies are broad. The criteria set out in the above passages to demarcate the scope of the principle arguably inject more confusion than clarity.²⁰ The concepts of '*commonly accepted rights and freedoms*' and '*rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law*' invoke phrases that are too non-specific to form the basis of directional legal standards.²¹

More clarity regarding the interests to which the principle of legality applies can be ascertained by drawing on the specific rights and freedoms which the High Court has indicated come within the scope of the principle. To this end, the High Court has indicated that the principle is applicable in relation to the following interests:²²

- spousal privilege;²³

18 (2011) 245 CLR 1, 46–7 [43] (emphasis added) (citations omitted).

19 (2013) 251 CLR 196, 310 [313] (emphasis added).

20 See also Meagher, 'The Common Law Principle of Legality in the Age of Rights', above n 14, 456–64 who notes that there is no clear basis for identifying rights and freedoms which are 'fundamental common law' rights or freedoms, or which are otherwise simply relevant common law rights: at 459.

21 For an analysis of the difficulty in securing a coherent methodology in this regard, see Meagher, 'The Principle of Legality as Clear Statement Rule', above n 7, 430–9.

22 The High Court did not necessarily uphold the right or principle in question because on some occasions it was negated by clear statutory language, but it was not doubted that the particular right or interest was covered by the principle of legality.

23 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 622 [181]–[182].

- the presumption of innocence;²⁴
- privilege against self-incrimination;²⁵
- the right to a fair trial;²⁶
- the right to not be subjected to retrospective laws;²⁷
- the right to procedural fairness;²⁸
- access to the courts;²⁹
- the open court principle;³⁰
- the detention of unlawful non-citizens;³¹
- the freedom of political communication;³²
- the freedom of speech;³³ and
- the right to property.³⁴

The Victorian Court of Criminal Appeal also noted that the principle applies to legal professional privilege.³⁵

French CJ in *Momcilovic v The Queen* noted that the ‘liberty of the subject’ is also an interest to which the principle of legality applies.³⁶ While this was in the context of explaining why the principle applies to the presumption of innocence, there is no reason that it does not equally apply to judicial decisions directly impacting on whether an offender is sentenced to imprisonment.

The above rights and freedoms are not exhaustive of those to which the principle of legality applies. As is made clear in the passages above, the principle potentially

24 *Momcilovic v The Queen* (2011) 245 CLR 1, 46–52 [43]–[55] (French CJ), 175 [441] (Heydon J).

25 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 217–8 [29] (French CJ), 306–7 [305] (Gageler and Keane JJ); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 152–3 [157]–[159] (Kiefel J). See also *Zhao & Jin v Commissioner of the Australian Federal Police* [2014] VSCA 137 (27 June 2014) 23–4 [53]–[55].

26 *The Application of the A-G (NSW)* [2014] NSWCCA 251 (6 November 2014) [29].

27 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 134–5 [30] (French CJ, Crennan and Kiefel JJ). See also *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213, 225–6 [24]; *WBM v Chief Commissioner of Victoria Police* (2012) 43 VR 446; *Lodhi v R* (2006) 199 FLR 303, 311 [30]–[31].

28 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47]–[48] (French CJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.

29 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30].

30 The open court principle is also discussed in *Hogan v Hinch* (2011) 243 CLR 506, 535 [27].

31 *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19] (Gleeson CJ). See also *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1.

32 *Monis v The Queen* (2013) 249 CLR 92, 112–13 [20], 116–17 [28], 127–8 [59] (French CJ), 209 [331] (Crennan, Kiefel and Bell JJ); *Tajjour v New South Wales* (2014) 313 ALR 221, 235 [31] (French CJ).

33 *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 67–8 [151].

34 *A-G (NT) v Emmerson* (2014) 307 ALR 174, 196 [86]; *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

35 *DPP (Cth) v Galloway* [2014] VSCA 272 (30 October 2014) [38].

36 (2011) 245 CLR 1, 47 [44]. See also *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J).

applies to all ‘fundamental common law rights, freedoms and immunities’. While there is no definitive list of such common law interests, further insight is gained into this issue by the fact that Chief Justice French (writing extra-judicially) has catalogued a number of fundamental rights and freedoms which are recognised at common law. The list he endorses stipulates the following interests:

- the right of access to the courts;
- immunity from deprivation of property without compensation;
- legal professional privilege;
- privilege against self-incrimination;
- immunity from the extension of the scope of a penal statute by a court;
- freedom from extension of governmental immunity by a court;
- immunity from interference with vested property rights;
- immunity from interference with equality of religion;
- the right to access legal counsel when accused of a serious crime;
- no deprivation of liberty, except by law;
- the right to procedural fairness when affected by the exercise of public power; and
- freedom of speech and of movement.³⁷

Several of these obviously overlap with the rights and freedoms which the courts have expressly recognised as attracting the operation of the principle of legality.

An even more expansive assessment of the scope of the principle of legality stems from the observations of Bell J in the decision *Director of Public Prosecutions v Kaba*.³⁸ This judgment is the most expansive and detailed consideration of the operation and scope of the legality principle by an Australian judge. Bell J states that the rights and freedoms covered by the principle should be those set out in the *International Covenant on Civil and Political Rights*.³⁹ After considering the origin and foundation for the principle of legality, Bell J states:

Applying these principles, treating the rights and freedoms in the *ICCPR* as fundamental rights and freedoms for the purposes of the principle of legality would, I think, be a natural and appropriate step to take. It would reflect the close relationship between common law rights and freedoms and those recognised in the *ICCPR*. It would be consistent with the widespread

37 French, above n 6, 26–7.

38 (2014) 69 MVR 137.

39 Ibid 174 [144]; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (*ICCPR*). In this manner, the principle of legality coheres with the principle of consistency (eg the harmony between international law and domestic law). For a discussion of this principle, see Dan Meagher, ‘The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)’ [2012] *New Zealand Law Review* 465, 479–81.

acceptance of the *ICCPR* in the Australian legal system. It would fit well into the constitutional relationship between parliament and the judiciary. It would not represent backdoor importation of an unincorporated convention into Australian law. It would bring a greater measure of certainty to the identification of the rights covered by the principle without limiting those already covered or inhibiting the capacity of the common law to develop in this regard. In relation to the issue of limitation of rights, it would fit with the way in which, under the existing principle, legislation is read down (where appropriate) so as to be compatible with human rights.⁴⁰

Several important points emerge from the above discussion regarding the operation of the principle of legality. The first is that the principle is now an established doctrine of Australian jurisprudence. The foundation of the principle of legality is not, at the theoretical level, incontestable. The provenance and existence of interests in the form of rights remain in dispute,⁴¹ and it could be contended that the principle of legality is an unjustified judicial incursion into the sovereignty of parliament.⁴² However, despite these possible caveats it is clear that the principle of legality has unequivocal endorsement from the High Court and hence it is unlikely to be abolished or meaningfully curtailed in the foreseeable future.

Secondly, the scope of the principle in terms of the rights and freedoms to which it applies is not settled. The scope can be ascertained in two ways. The narrowest perspective is by reference to the interests to which it has been applied by the courts. More broadly, it can be defined on the basis of extension by analogy or similarity of doctrinal underpinning with rights and freedoms which clearly come within the scope of the principle.⁴³ As noted above, it has been suggested that a number of other rights and freedoms come within the scope of the principle beyond those which have been subjected to express judicial application. The exact reach of the principle of legality, though admittedly not resolved, does not need to be settled for the purposes of this article. In either approach or construction it is clear that the rights and freedoms affected by imprisonment are covered by the principle of legality.

Imprisonment involves the deprivation or curtailment of several rights. The most obvious are the right to liberty and freedom of association. Other less obvious deprivations include:

40 *DPP v Kaba* (2014) 69 MVR 137, 185 [181]. See also David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) *Oxford University Commonwealth Law Journal* 5.

41 Jeremy Bentham, *The Works of Jeremy Bentham* (William Tait, first published 1843, 1962 ed) vol 2, 489–535. Bentham noted the rights are 'nonsense upon stilts': at 523–4.

42 See, eg, James Allan, *Democracy in Decline: Steps in the Wrong Direction* (Connor Court Publishing, 2014); James Allan, 'What's Wrong About a Statutory Bill of Rights' in Julian Leaser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Menzies Research Centre, 2009) 83; Dyzenhaus, Hunt and Taggart, above n 40.

43 Meagher also suggests that the principle of proportionality could be incorporated into the framework: Meagher, 'The Principle of Legality as Clear Statement Rule', above n 7, 439–42.

- the deprivation of goods and services;⁴⁴
- the deprivation of heterosexual relationships;⁴⁵
- the deprivation of autonomy;⁴⁶
- the deprivation of security;⁴⁷ and
- the deprivation of privacy.

It is unclear whether all or any of these latter five interests are protected by the principle of legality. Certainly, the right to privacy and the right to autonomy would be covered under the approach endorsed by Bell J, given that they are contained in the *ICCPR*.⁴⁸ The same applies in relation to the freedom of association.⁴⁹ However, once again, this is not an issue that requires definitive resolution for the purposes of this article. It is clear that imprisonment involves the denial of at least one fundamental interest which is protected by the principle of legality, namely: liberty.

D Summary of the Operation of the Legality Principle so far as it Relates to the Hardship that is Imprisonment

The above points can be summarised as follows:

1. The principle of legality is the view that legislative provisions will not be interpreted in a manner which infringes fundamental rights, freedoms or immunities unless there is a clear intention to curtail such interests.
2. The principle has received unequivocal endorsement by the High Court of Australia in a large number of decisions over the past decade and hence the principle of legality is now an entrenched aspect of Australian jurisprudence.
3. There is uncertainty regarding the scope of the operation of the principle. In particular, it is not clear exactly which precise rights and freedoms come within the application of the principle of legality.
4. Criminal sanctions affect a large number of rights and freedoms, including liberty, privacy and property rights. It is not clear whether they all come within the scope of the legality principle.
5. There is no question that the key interest that is limited by imprisonment (liberty) is a right protected by the principle of legality.

44 Gresham M Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton University Press, 1958) 67–70.

45 *Ibid* 70–2.

46 *Ibid* 73–6.

47 *Ibid* 76–8. See also Robert Johnson and Hans Toch (eds), *The Pains of Imprisonment* (Sage Publications, 1982).

48 *ICCPR* arts 1, 17.

49 *ICCPR* art 22.

6. It follows, that the principle of legality is applicable to statutes that provide for the imprisonment of offenders.
7. It is not clear to what extent the principle of legality is applicable to legislative provisions that permit or require the imposition of other forms of criminal sanctions, such as fines and community-based orders.⁵⁰ This issue is not relevant for the purposes of this article, given that the objective of the article is to establish a foothold for the principle of legality in sentencing. Considerations relating to scope of application of the principle of legality in sentencing merit discussion once the threshold issue of relevance is demonstrated — which is the aim of the remaining aspect of this article.

E Speculation as to Reasons for the Disconnect between Legality and Imprisonment

In light of the above, it is somewhat curious that the principle of legality has not been acutely applied to sentencing. To that end, there are a number of pertinent observations that can be made. The first is that separation between the principle and sentencing is not total. The High Court has in fact mentioned the principle in the sentencing context in two cases.

In *Green v The Queen*, French CJ, Crennan and Kiefel JJ noted that the principle had a peripheral relevance to the operation of the parity principle.⁵¹ Their Honours stated:

‘Equal justice’ embodies the norm expressed in the term ‘equality before the law’. It is an aspect of the rule of law. It was characterised by Kelsen as ‘the principle of legality, of lawfulness, which is immanent in every legal order’. It has been called ‘the starting point of all other liberties’. It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that like cases be treated alike.⁵²

Also, in *Lacey v Attorney-General (Qld)* the High Court applied the principle of legality in narrowly interpreting the scope of the power by the Court of Appeal to increase a sentence upon an appeal by the Attorney-General.⁵³ The Court held that the sentence could only be increased if there was a demonstrated error in the decision of the sentencing judge. In doing so, the High Court stated:

In construing a statute which provides for a Crown appeal against sentence, common law principles of interpretation would not, unless clear language required it, prefer a construction which provides for an increase

⁵⁰ These are discussed further in pt 3 of this article.

⁵¹ (2011) 244 CLR 462. Parity in sentencing is the principle that offenders who are party to the same offence should, all things being equal, receive the same sanction: see *Lowe v The Queen* (1984) 154 CLR 606, 609.

⁵² (2011) 244 CLR 462, 472–3 [28] (citations omitted).

⁵³ (2011) 242 CLR 573.

of the sentence without the need to show error by the primary judge. That is a specific application of the principle of legality. It is reflected in, and reinforced by, the decisions of this Court. Such a construction also has the vice that it deprives the sentencing judge's order of substantive finality. It effectively confers a discretion on the Attorney-General to seek a different sentence from the Court of Appeal without the constraint of any threshold criterion for that Court's intervention. Such a construction tips the scales of criminal justice in a way that offends 'deep-rooted notions of fairness and decency'. It is not therefore a construction lightly to be taken as reflecting the intention of the legislature.⁵⁴

These observations are obviously perfunctory and do not constitute a detailed examination and application of the principle of legality in the sentencing context.⁵⁵ The firmest indication that the principle applies to statutes which encroach on the right to liberty stems from 'passing' statements by the Victorian Court of Appeal, which include that the principle of legality has a 'particularly strong application in the context of a subject's liberty'.⁵⁶

The obvious issue is why the current disjunction exists between sentencing law and the principle of legality. There is no clear answer to this and to some extent the answer is irrelevant. Moreover, any attempt to address this issue involves a degree of speculation. Accordingly, it is not an issue which requires (nor perhaps one that permits) considered examination. However, as a matter of interest there are three possible explanations.

The first is that sentencing is not an area that has traditionally been viewed through the prism of human rights. Following the Second World War there has been a considerable increase in human rights discourse⁵⁷ and, at the domestic level, has resulted in legislation expressly protecting the rights of disadvantaged groups, including women,⁵⁸ the disabled,⁵⁹ and religious and ethnic minorities.⁶⁰ Moreover, the specific traits and interest groups that are the focus of the Human Rights Commission are Aboriginal and Torres Strait Islanders, asylum seekers, disability, age, children, race, sex discrimination and sexual orientation, sex and gender identity.⁶¹

54 (2011) 242 CLR 573, 583–4 [20] quoting *Malvaso v The Queen* (1989) 168 CLR 227, 234.

55 The only academic discussion connecting sentencing and the principle of legality is by Guy Cumes, above n 13, where it is suggested that the principle of legality should apply in the context of preventive detention.

56 In *NOM v DPP (Vic)* (2012) 38 VR 618 the Victorian Court of Appeal stated that the principle of legality has a 'particularly strong application in the context of a subject's liberty': at 641 [69]. In *Bowden v The Queen* (2013) 240 A Crim R 59 the Court assumed that the principle applied to the making of an order requiring a convicted sex offender to report to authorities: at 69. See also *Nigro v Secretary to the Department of Justice* (2013) 41VR 359.

57 See Conor Gearty, *Can Human Rights Survive?* (Cambridge University Press, 2006).

58 See, eg, the *Sex Discrimination Act 1984* (Cth).

59 See, eg, the *Disability Discrimination Act 1992* (Cth).

60 See, eg, the *Racial Discrimination Act 1975* (Cth).

61 Australian Human Rights Commission, *Home* <<https://www.humanrights.gov.au/>>.

Criminal offenders and prisoners have largely missed the human rights wave. The categorisation of an individual as an ‘offender’ seems to have justified the imposition of harsh sanctions, thereby perhaps discouraging a probing and rigorous analysis of the exact circumstances and precise types of deprivations of rights and freedoms which are justified. To the extent that human rights dialogue has infused the sentencing realm it has been largely confined to the treatment of offenders *once they have been sentenced to prison*; not the decision-making process governing *whether they should be in fact sentenced to a prison term at the outset*.⁶² In this regard, the greatest focus has been on harsh prison conditions and especially those in super-maximum prisons — facilities which normally consist of ‘jails within prisons’.⁶³ There is no uniformity to such conditions, but in general they involve ‘incarcerating inmates under highly isolated conditions with severely limited access to programs, exercise, staff, or other inmates’.⁶⁴ In Australia there are at least nine such facilities.⁶⁵ Human rights bodies have criticised such regimes. For example, the United Nations Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in a report issued in 2008, stated that it was

concerned over the harsh regime imposed on detainees in ‘super-maximum prisons’ [in Australia]. In particular, the Committee [was] concerned about the prolonged isolation periods to which detainees ... are subjected and the effect such treatment may have on their mental health.⁶⁶

However, the concept of imprisonment per se as an infringement of human rights has not gained conventional acceptance. This is despite the fact that commentators have occasionally pointed out that excessive punishment equates to punishing the innocent,⁶⁷ which is an egregious breach of human rights.

Secondly, criminal statutes expressly stipulate that imprisonment is a sentencing option for a large number of criminal offences.⁶⁸ As a result, an implied assumption

62 See, eg, Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths, 2009) ch 15.

63 Chase Riveland, ‘Supermax Prisons: Overview and General Considerations’ (National Institute of Corrections US Department of Justice, January 1999) 1.

64 *Ibid.* They have also been defined as:
a freestanding facility, or a distinct unit within a freestanding facility, that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or seriously disruptive behavior while incarcerated. ... [T]heir behavior can be controlled only by separation, restricted movement, and limited access to staff and other inmates.

Riveland, above n 63, 3 quoted in Roy D King, ‘The Rise and Rise of Supermax: An American Solution in Search of a Problem?’ (1999) 1 *Punishment and Society* 163, 170.

65 Supermax Prisons, *Prisons with Supermax Facilities* <<http://supermaxprisons.blogspot.com.au/>>. They are the Alexander Maconochie Centre (Australian Capital Territory); Alice Springs Correctional Centre (Northern Territory); Barwon Prison (Victoria), Brisbane Correctional Centre (Queensland), Casuarina Prison (Western Australia), Goulburn Correctional Centre (New South Wales), Port Phillip Prison (Victoria), Risdon Prison (Tasmania), Yatala Labour Prison (South Australia).

66 Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture*, 40th sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008) 7 [24].

67 R A Duff, *Trials and Punishments* (Cambridge University Press, 1986) 154–5.

68 See the discussion in pt 3 of this article.

could be that in fact the legislature has clearly expressed an intention to negate fundamental common law rights and freedoms and hence there is no scope for the application of the principle of legality. However, such an understanding would be erroneous. While imprisonment is a possible criminal sanction in relation to many criminal offences, ascertaining the *exact situations* when imprisonment is justifiable and the length of a prison term requires a detailed examination of a number of, sometimes conflicting, objectives which themselves are subject to differing legislative interpretations.⁶⁹ And it is in this realm where there is considerable scope for the application of the principle of legality.⁷⁰

Thirdly, as discussed below, sentencing is not a precise legal domain. In relation to any particular offence, there is no single sentence which is correct. Sentencing involves a degree of discretion and judgment, upon which reasonable minds can differ. This degree of vagueness might give the impression that the sentencing calculus is not amenable to the precise articulation and application of principles which seek to protect fundamental rights and freedoms. While sentencing does involve a degree of discretion, the *individual variables* which impact on this judgment need to be properly and precisely informed and calibrated. Thus, even in this domain the principle of legality has a potentially important role.

Irrespective of the exact reason for the discord between sentencing and the principle of legality, this article argues that a greater fusion of sentencing law and the principle of legality is necessary. The analysis below demonstrates the cardinal role that the principle should play in sentencing law and practice.

III SENTENCING: OVERVIEW

A *The Nature of Sentencing Law*

Sentencing is the system of law through which offenders are punished. The key aspect of this definition is that punishment signifies suffering. Thus, Jeremy Bentham simply declared that ‘all punishment is mischief: all punishment in itself

69 See further the discussion in pt 3 of this article.

70 Further, the fact that imprisonment is a sentencing option for many offences does not signify a preference for this sanction as opposed to other sanctions. In fact, some jurisdictions prescribe that imprisonment should be a last-resort option: see, eg, *Crimes Act 1914* (Cth) s 17A(1); *Crimes (Sentencing) Act 2005* (ACT) s 10(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(2); *Sentencing Act 1991* (Vic) s 5(4). At common law there is authority which provides that there should be parsimony in the imposition of a term of imprisonment as a sanction. The notion of parsimony also extends to the length of imprisonment involved, and that the sentence of imprisonment imposed should be no more than necessary to achieve the particular sentencing objectives sought through the imposition of the penalty: *Thorn v Laidlaw* [2005] ACTCA 49 (16 December 2005) [30]. See also *NOM v DPP (Vic)* (2012) VR 618, 640–1 [68]. However, some authorities cast doubt over the existence of the principle of parsimony: see *Blundell v The Queen* (2008) 70 NSWLR 660, 665–7 [39]–[47]; *Foster v The Queen* [2011] NSWCCA 285 (20 December 2011) [50]–[53] (Adams J).

is evil'.⁷¹ Ten states that punishment 'involves the infliction of some unpleasantness on the offender, or it deprives the offender of something valued'.⁷² Punishment has also been described as 'pain delivery',⁷³ and similarly it has been asserted that '[t]he intrinsic point of punishment is that it should *hurt* — that it should inflict suffering, hardship or burdens'.⁷⁴ Walker is somewhat more expansive regarding the type of evils which can constitute punishment: punishment involves 'the infliction of something which is assumed to be unwelcome to the recipient: the inconvenience of a disqualification, the hardship of incarceration, the suffering of a flogging, exclusion from the country or community, or in extreme cases death'.⁷⁵ In order for punishment to hurt most offenders, it is necessary for it to target widely held human interests. For this reason the deprivation of liberty is the cornerstone of the sentencing system.

The main issues which must be addressed by any sentencing regime are the types of sanctions that are appropriate for particular offences. Sentencing in each of the nine Australian jurisdictions (the six states, the Northern Territory, the Australian Capital Territory and the federal jurisdiction) is governed by a combination of legislation⁷⁶ and the common law.

B Key Legislative Regimes

There are differences between the structure and content of the principal sentencing statutes in each jurisdiction, but they also share many commonalities, both in form and substance, especially in relation to the fundamental and overarching objectives of the sentencing system. Each statute deals with three main dimensions of sentencing. First, it sets out the purposes and aims of sentencing. Typically, these include deterrence, community protection, rehabilitation and denunciation.⁷⁷ While these objectives are often clearly set out, they are often contradictory (especially in relation to the goals of rehabilitation and incapacitation) and there is no attempt to prioritise which aim is the most important.

71 J H Burns and H L A Hart (eds), *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Athlone Press, 1970) 158.

72 C L Ten, *Crime, Guilt and Punishment: A Philosophical Introduction* (Oxford University Press, 1987) 2.

73 Nils Christie, *Limits to Pain* (Martin Robertson, 1982) 19, 48.

74 Antony Duff, 'Punishment, Citizenship and Responsibility' in Henry Tam (ed), *Punishment, Excuses and Moral Development* (Ashgate Publishing, 1996) 17, 18 (emphasis in original).

75 Nigel Walker, *Why Punish?* (Oxford University Press, 1991) 1.

76 The main statutes that deal with sentencing in each jurisdiction are the *Crimes Act 1914* (Cth) pt IB; *Crimes (Sentencing) Act 2005* (ACT); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act (NT)*; *Penalties and Sentences Act 1992* (Qld); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1997* (Tas); *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA).

77 *Crimes Act 1914* (Cth) s 16A. Section 16A does not specifically mention general deterrence, however, the common law injects this consideration: see, eg, *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370. *Crimes (Sentencing) Act 2005* (ACT) s 7 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5; *Sentencing Act 1995* (WA) s 6 (which lists community protection).

The second main issue dealt with by the sentencing statutes are factors relating to the nature and severity of the appropriate sanction. A clear statement of the principle of proportionality is found in the High Court case of *Hoare v The Queen*:

a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.⁷⁸

In *Veen v The Queen*,⁷⁹ and *Veen (No 2) v The Queen*,⁸⁰ the High Court stated that proportionality is the primary aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection, which at various times has also been declared as the most important aim of sentencing.⁸¹ Proportionality has also been given statutory recognition in all Australian jurisdictions.⁸² However, a number of statutory incursions into the proportionality principle have occurred. They mainly stem from the trend towards tougher sentences. In Victoria, for example, serious sexual, drug, arson or violent offenders may receive sentences in excess of that which is proportionate to the offence.⁸³ Indefinite jail terms may also be imposed on offenders convicted of 'serious offences',⁸⁴ where the court is satisfied 'to a high degree of probability that the offender is a serious danger to the community ...'⁸⁵ Similar provisions to those operating in Victoria regarding serious violent and sexual offenders,⁸⁶ and indefinite sentences also exist in other jurisdictions.⁸⁷ The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) goes one step further and allows for preventive

78 (1989) 167 CLR 348, 354 (emphasis altered).

79 (1979) 143 CLR 458, 467–8.

80 (1988) 164 CLR 465, 472.

81 See, eg, *Channon v The Queen* (1978) 20 ALR 1, 5.

82 The *Sentencing Act 1991* (Vic) provides that one of the purposes of sentencing is to impose just punishment, and that in sentencing an offender the court must have regard to the gravity of the offence and the offender's culpability and degree of responsibility: ss 5(1)(a), (2)(c)–(d). The *Sentencing Act 1995* (WA) states that the sentence must be 'commensurate with the seriousness of the offence': s 6(1). The *Crimes (Sentencing) Act 2005* (ACT) provides that the sentence must be 'just and appropriate': s 7(1)(a). In the Northern Territory and Queensland, the relevant sentencing statutes provide that the punishment imposed on the offender must be 'just in all the circumstances': *Sentencing Act year* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a). In South Australia the emphasis is on ensuring that 'the defendant is adequately punished for the offence': *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j). The need for a sentencing court to 'adequately punish' the offender is also fundamental to the sentencing of offenders for Commonwealth matters: *Crimes Act 1914* (Cth) s 16A(2)(k). The same phrase is used in *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a).

83 See, *Sentencing Act 1991* (Vic) pt 2A, especially s 6D(b). Serious offenders are essentially those who have previously been sentenced to jail for a similar type of offence, except in the case of serious sexual offenders, where the offender must have two prior sexual matters or a sexual and violent prior arising from the same incident.

84 *Sentencing Act 1991* (Vic) ss 18A–18P. Serious offences include certain homicide offenders, rape, serious assault, kidnapping and armed robbery: s 3. The constitutionality of the indefinite sentencing provisions was confirmed in *R v Moffatt* (1998) 2 VR 229.

85 *Sentencing Act 1991* (Vic) s 18B(1).

86 *Penalties and Sentences Act 1992* (Qld) s 163; *Sentencing Act* (NT) s 65; *Criminal Law (Sentencing) Act 1988* (SA) s 23; *Sentencing Act 1997* (Tas) s 19; *Sentencing Act 1995* (WA) s 98.

87 See, eg, *Penalties and Sentences Act 1992* (Qld) pt 10; *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Sentencing Act* (NT) ss 65–78; *Sentencing Act 1995* (WA) ss 98–101; *Criminal Law (Sentencing) Act 1988* (SA) pt 2 div III; *Sentencing Act 1997* (Tas) s 19.

detention of offenders who have completed their sentence if there is a high degree of probability that they are a serious danger to the community.⁸⁸

Aggravating and mitigating considerations, respectively, operate to increase or decrease the sentence. There is a considerable degree of variation in the extent to which these factors are set out in the statutory schemes. These considerations are set out most expansively in the *Crimes (Sentencing Procedure) Act 1999* (NSW),⁸⁹ which lists 30 relevant factors. Most sentencing statutes deal sparsely with these considerations, however, that is not indicative of a legal divergence between the respective jurisdictions. Aggravating and mitigating factors are mainly defined by the common law, which continues to apply in all jurisdictions.⁹⁰

There are well over one hundred mitigating and aggravating factors.⁹¹ The mitigating factors can be divided into four categories.⁹² The first are those relating to the offender's response to a charge and include pleading guilty,⁹³ co-operating with law enforcement authorities,⁹⁴ and remorse.⁹⁵ The second relate to the circumstances of the offence which contribute to, and to some extent explain, the offending. These include mental impairment,⁹⁶ duress,⁹⁷ and provocation.⁹⁸ The third category includes matters personal to the offender, such as youth,⁹⁹

88 Section 13. The constitutional validity of this Act was upheld by the High Court in *Fardon v A-G (Qld)* (2004) 223 CLR 575. For a discussion of the Queensland provision, see Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 210–11. See also *Criminal Law (Sentencing) Act 1988* (SA) s 23.

89 See ss 21A, 24.

90 See *Bui v DPP (Cth)* (2012) 244 CLR 638 with particular reference to the federal sentencing regime.

91 Joanna Shapland identified 229 factors: Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Kegan Paul, 1981) 55. Douglas in a study of Victorian Magistrates' Courts identified 292 relevant sentencing factors: R Douglas, *Guilty Your Worship: A Study of Victoria's Magistrates' Courts* (1980). For an overview of the operation of mitigating and aggravating factors, see Mackenzie and Stobbs, above n 88, ch 4; Richard G Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd ed, 1999); Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters 3rd ed, 2014) chs 4–6.

92 Hyman Gross, *A Theory of Criminal Justice* (Oxford University Press, 1979), 453–4, as cited in the Victorian Sentencing Committee, 'Sentencing' (Report, April 1988, Victorian Attorney-General's Department) 256–7.

93 See *Cameron v The Queen* (2002) 209 CLR 339, 357–60.

94 See *R v Cartwright* (1989) 17 NSWLR 243, 252 (Hunt J and Badgery-Parker J); *R v El Hani* [2004] NSWCCA 162 (21 May 2004) [66] (Howie J); *TXT v Western Australia* (2012) 220 A Crim R 266, 270–1 [28].

95 *R v Whyte* (2004) 7 VR 397 403 [21]; *Barbaro v The Queen* (2012) 226 A Crim R 354, 364 [32]; *Phillips v The Queen* (2012) 37 VR 594.

96 See *R v Tsiaras* (1996) 1 VR 398, 400; *Muldrock v The Queen* (2011) 244 CLR 120, 139; *R v Verdins* (2007) 16 VR 269, 276.

97 *Tiknius v The Queen* (2011) 221 A Crim R 365, 374 [32].

98 *Va v The Queen* (2011) 37 VR 452, 460.

99 *R v Neilson* [2011] QCA 369 (16 December 2011) [22]; *R v Kuzmanovski; Ex parte A-G (Qld)* [2012] QCA 19 (24 February 2012) [11].

previous good character,¹⁰⁰ old age,¹⁰¹ and good prospects of rehabilitation.¹⁰² The impact of the sanction is the fourth broad type of mitigating factor and includes considerations such as onerous prison conditions,¹⁰³ poor health,¹⁰⁴ and public opprobrium.¹⁰⁵

Important aggravating factors are: prior criminal record;¹⁰⁶ significant level of injury¹⁰⁷ or damage caused by the offence;¹⁰⁸ high vulnerability of victim;¹⁰⁹ high level of planning;¹¹⁰ offences committed while on bail or parole;¹¹¹ offences committed with others — gangs;¹¹² breach of trust and monetary motive for the crime.¹¹³

The large number of aggravating and mitigating factors is one of the key reasons it is not possible to predict with confidence the exact sentence that will be imposed in any particular case. Only two factors attract a numerical discount. An earlier guilty plea can, in most jurisdictions, attract a 25 per cent discount,¹¹⁴ while a guilty plea coupled with assistance to authorities can result in a 50 per cent reduction in penalty.¹¹⁵

- 100 Although it has limited weight in relation to white collar offenders: *R v Coukoulis* (2003) 7 VR 45, 59.
- 101 *Gulyas v Western Australia* (2007) 178 A Crim R 539, 456–7 [33]–[35]; *R v RLP* (2009) 213 A Crim R 461, 476 [39].
- 102 *R v Osenkowski* (1982) 30 SASR 212; *R v Skilbeck* [2010] SASFC 35 (24 September 2010) [35]; *Elyard v The Queen* (2006) 45 MVR 204, 407 [18]–[19].
- 103 *Western Australia v O’Kane* [2011] WASCA 24 (4 February 2011) [68]; *R v Puc* [2008] VSCA 159 (28 August 2008); *Tognolini v The Queen (No 2)* [2012] VSCA 311 (14 December 2012) [29].
- 104 *Dosen v The Queen* [2010] NSWCCA 283 (29 November 2010) [23]–[24]; *AWP v The Queen* [2012] VSCA 41 (8 March 2012) [12].
- 105 *Ryan v The Queen* (2001) 206 CLR 267, 284–5.
- 106 *R v Field* [2011] NSWCCA 13 (16 February 2011); *Saunders v The Queen* [2010] VSCA 93 (15 April 2010) [12].
- 107 *DPP v Marino* [2011] VSCA 133 (13 May 2011) [14].
- 108 *R v Halls* [2008] NSWCCA 251 (3 November 2008) [29]; *Porter v The Queen* [2008] NSWCCA 145 (26 June 2008) [82]–[83].
- 109 *R v Tran* (2002) 4 VR 457, 466; *DPP v Grabovac* (1998) 1 VR 664, 674; *R v Eisenach* [2011] ACTCA 2 (17 February 2011) [94]; *Royer v Western Australia* [2009] WASCA 139 (6 August 2009) [41]; *R v El-Chammas* [2009] NSWCCA 154 (2 June 2009) [15].
- 110 *R v Yildiz* (2006) 160 A Crim R 218, 225; *R v Douglas* (2004) 146 A Crim R 590.
- 111 *R v Gray* [1977] VR 225, 230; *R v Basso* (1999) 108 A Crim R 392, 397–8; *R v AD* [2008] NSWCCA 289 (9 December 2008) [76].
- 112 *R v Quin* [2009] NSWCCA 16 (17 February 2009) [46].
- 113 *DPP v Truong* [2004] VSCA 172 (24 September 2004) [20]; *Carreras v The Queen* (1992) 60 A Crim R 402, 408; *A-G (Tas) v Saunders* [2000] TASSC 22 (22 March 2000) [11]; *Hill v The Queen* [1999] TASSC 29 (19 March 1999) [12]; *R v Ottobriano* [1999] WASCA 207 (14 July 1999) [9]; *R v Black* [2002] WASCA 26 (18 February 2002) [21]. See further, Freiberg, above n 91, chs 4–5.
- 114 This is similar in each jurisdiction: see, eg, *Crimes (Sentencing) Act 2005* (ACT) s 36; *Crimes (Sentencing) Procedure Act 1999* (NSW) s 23; *Sentencing Act 1995* (NT) s 5(2)(h); *Penalties and Sentences Act 1992* (Qld) s 9(2)(h); *Criminal Law (Sentencing) Act 1988* (SA) ss 10(1)(h), 10A. There is also a similar provision at the Commonwealth level: see *Crimes Act 1914* (Cth) s 16A(2)(g).
- 115 For an example of where a 50 per cent discount was allowed, see *R v Johnston* (2008) 186 A Crim R 345, 349–51 [15]–[21], 352 [30] (Nettle JA). For an application of these principles, see *Wang v The Queen* [2010] NSWCCA 319 (17 December 2010) [31]–[43] (Schmidt J); *Ma v The Queen* [2010] NSWCCA 320 (17 December 2010) [32]–[38] (Schmidt J); *R v Nguyen* [2010] NSWCCA 331 (21 December 2010) [51]. This contrasts with the decision in *R v Sahari* (2007) 17 VR 269, 276–7 [19]–[21] (Kellam JA), where it was held undesirable to specify a particular discount for cooperating with authorities.

The third main aspect covered by the sentencing statutes is the type of sanctions that can be imposed on offenders. These are similar across Australia.¹¹⁶ Typically, there are many sanctions, however, in essence, there are four different types of sanctions. The least serious is a finding of guilt without any further harshness being imposed on the offender apart from a promise to the sentencing court not to reoffend during the period of the sanction. These sanctions include a dismissal, discharge or bond. The second, and most common sanction imposed in Australia is a fine, which is a monetary exaction against the offender. The third and harshest form of punishment in Australia is imprisonment. The fourth general form of sanction consists of what are collectively known as intermediate punishments. They are generally imposed when the offence is too serious to be dealt with by a fine, but is not serious enough to warrant a term of imprisonment. Intermediate sanctions often involve a work component and an order to undertake some form of counselling or training, which is designed to have a rehabilitative effect. They come under various labels including community service orders, home detention, suspended sentences and intensive corrections orders.¹¹⁷ While all of these sanctions to some degree involve interference with widely accepted rights, including property, reputation, privacy and the freedom of association, as noted earlier, the focus of this article is on the harshest sanction in our system of law: imprisonment.

C Sentencing Decision-Making Methodology

The other important point of convergence regarding sentencing is the methodology for determining a sanction in a particular case. The overarching methodology and conceptual approach that sentencing judges undertake in making sentencing decisions is the same in each jurisdiction. This approach is known as ‘instinctive synthesis’. The term originates from the Full Court of the Supreme Court of Victoria decision of *R v Williscroft*,¹¹⁸ where Adam and Crockett JJ stated:

Now, ultimately, every sentence imposed represents the sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process.¹¹⁹

The general methodology for reaching sentencing decisions has been considered by the High Court on several occasions, and the Court has consistently adopted the ‘instinctive synthesis’ approach and rejected the alternative, which is normally referred to as the two-step approach.¹²⁰ The alternative approach involves a court setting an appropriate sentence commensurate with the severity of the offence then making allowances up and down, in light of the relevant aggravating and mitigating circumstances.

116 For a further discussion, see Mackenzie and Stobbs, above n 91, ch 6; Freiberg, above n 91, ch 1.

117 Ibid.

118 [1975] VR 292.

119 [1975] VR 292, 300 (Adams and Crockett JJ).

120 See *Wong v The Queen* (2001) 207 CLR 584, 611–12; *Makarian v The Queen* (2005) 228 CLR 357, 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Muldrock v The Queen* (2011) 244 CLR 120.

In *Wong v The Queen*,¹²¹ most members of the High Court saw the process of sentencing as an exceptionally difficult task with a high degree of 'complexity'.¹²² Exactness is supposedly not possible because of the inherently multi-faceted nature of the activity.¹²³ As a result of this approach, there is no single sentence which is accurate in a particular case. In *Freeman v The Queen*¹²⁴ it was observed that:

It is a basic principle of sentencing law that there is no single correct sentence in a particular case. On the contrary, there is a 'sentencing range' within which views can reasonably differ as to the appropriate sentence.¹²⁵

The instinctive synthesis approach applies even where the legislature has set statutory 'standard penalties',¹²⁶ or mandatory minimum penalties.¹²⁷

While the instinctive synthesis leads to a degree of inconsistency in outcome, the High Court has on a number of occasions stated that it is consistency in the application of legal principles which is to be achieved. In *Hili v The Queen*,¹²⁸ French CJ, Gummow, Hayne, Crennan, and Kiefel JJ stated that:

consistency that is sought is consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence. Consistency in sentencing federal offenders is achieved by the proper application of the relevant statutory provisions, having proper regard not just to what has been done in other cases but *why* it was done, and by the work of the intermediate courts of appeal.¹²⁹

Thus, in broad terms, in setting a particular sentence the judge is required to ascertain which objectives of sentencing are the most applicable (for example, general deterrence and/or rehabilitation); determine the relevance of any aggravating and mitigating factors and then set an appropriate penalty cognisant of the fact that it should normally be proportionate to the gravity of the crime. The penalty that is imposed needs to be selected from the range of available sentencing options and cannot exceed the maximum penalty for the offence under consideration.

121 (2001) 207 CLR 584.

122 Ibid 612 [77] (Gaudron J, Gummow and Hayne JJ).

123 See the dicta of McHugh J who notes the difficulties of any 'attempts to give the process of sentencing a degree of exactness which the subject matter can rarely bear': *AB v The Queen* (1999) 198 CLR 111, 120 [13].

124 [2011] VSCA 214 (27 July 2011).

125 Ibid [6].

126 *Muldock v The Queen* (2011) 244 CLR 120, 133.

127 *Bahar v The Queen* (2011) 45 WAR 100.

128 (2011) 242 CLR 520.

129 Ibid [18].

D Trends in Sentencing

The overarching trend in Australian sentencing is towards the imposition of harsher penalties. Imprisonment statistics in Australia, in terms of both the number of offenders presently incarcerated and the growth in numbers, are now at a record high — and by a considerable margin. Incarceration rates have fluctuated considerably since Federation. At the turn of the 20th century, the imprisonment rate per 100 000 of the (adult) population was relatively high: 126 persons per 100 000 adults.¹³⁰ During the next quarter of a century there was a considerable reduction in prison numbers. In 1925, the rate was 55 per 100 000 population,¹³¹ and remained relatively steady for over 80 years apart from spikes in the mid-1930s and early 1970s. In 1930, the rate was 71 per 100 000, falling back to 51 by 1940.¹³²

The rate rose to 80 in 1970 but dropped back to 66 per 100 000 by 1985.¹³³ The national imprisonment rate increased to 87 per 100 000 by 1995, and the last two decades have seen more than a doubling of the prison population: an unprecedented occurrence in Australian history.¹³⁴ The imprisonment rate broke through the 30 000 mark for the first time on 30 June 2013, at which point the rate of imprisonment was 170 prisoners per 100 000 adults.¹³⁵ The current imprisonment rate is 196 per 100 000 people.¹³⁶

Compared to most other developed countries,¹³⁷ Australia now has a relatively high imprisonment rate. In terms of prisoners per 100 000 adult population, the rate in Canada is 118 and in the United Kingdom it is 149.¹³⁸ The Australian imprisonment rate is approximately three times that of Scandinavian countries.¹³⁹

The changes that have resulted in the increased penalties come in four main forms — most of which have a legislative origin. The key relevant legislative

130 Adam Graycar, *Crime in Twentieth Century Australia* (25 January 2001) Australia Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4524A092E30E4486CA2569DE00256331>>.

131 Ibid.

132 Ibid.

133 Ibid.

134 Ibid. It took nearly 50 years for the rate to go from 50 per 100 000 (in 1940) to 100 per 100 000 (in 1998).

135 Australian Bureau of Statistics, *4517.0 — Prisoners in Australia* (2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4517.0main+features42013>>.

136 Australian Bureau of Statistics, *4512.0 — Corrective Services, September Quarter 2015* (3 December 2015) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0>>.

137 The obvious exception is the United States, which has the highest incarceration rate on earth. More than two million Americans are in jail, which equates to over 700 per 100 000 of the adult population: see E Ann Carson and Daniela Golinelli, *Prisoners in 2012: Trends in Admissions and Releases 1991–2012* (Bulletin, 19 December, 2013, Bureau of Justice Statistics) <<http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>>.

138 *World Prison Brief*, Institute for Criminal Policy Research <<http://www.prisonstudies.org/world-prison-brief>>.

139 Ibid. Per 100 000 adult population, the rate of imprisonment in Norway is 72, in Finland it is 58 and in Sweden it is 67.

changes are an increase to the maxima for many types of offences;¹⁴⁰ express legislative incursions into the proportionality principle facilitating harsher penalties in relation to certain offenders, especially repeat offenders and serious offenders,¹⁴¹ and a greater number of fixed or standard penalties.¹⁴² In addition to this, there has been a tariff increase for many offences imposed by the courts. The changes which have been most manifest are in relation to drug, fraud and child sexual offences.¹⁴³ For reasons set out below, it is argued that injecting the legality principle into the sentencing domain is likely to reverse the trend of increasingly severe punishment.

IV THE PRINCIPLE OF LEGALITY AS MODERATING THE HARSHNESS OF SANCTIONS

We now provide examples of how the principle of legality can operate in the sentencing realm. In doing so, we focus on two key objectives of sentencing and also single out mitigating factors which could assume considerably greater significance.

A Softening General Deterrence from Marginal to Absolute General Deterrence

1 Marginal and Absolute General Deterrence

General deterrence is one of the principal objectives of sentencing. There are two forms of general deterrence. *Marginal general deterrence* concerns the correlation between the *severity* of the sanction and the *prevalence* of an offence. *Absolute general deterrence* concerns the threshold question of whether there is any *connection* between criminal sanctions, of whatever nature, and the *incidence* of criminal conduct.¹⁴⁴

General deterrence operates to increase the severity of the sanctions imposed on offenders by reference to its effects on people other than the offender. As noted below, the form in which general deterrence appears in the sentences of courts is as marginal general deterrence.¹⁴⁵ In this form, it has long enjoyed a cardinal role in sentencing law and practice; widely endorsed as the paramount objective

140 See, eg, Ian Leader-Elliott, 'Sentencing by Weight: Proposed Changes to the Commonwealth Code's Serious Drug Offences' (2012) 36 *Criminal Law Journal* 265. See also, Mackenzie and Stobbs, above n 91, 238–49.

141 See, eg, *Sentencing Act 1991* (Vic) ss 6D, 18A–18P; *Penalties and Sentences Act 1992* (Qld) s 163; *Sentencing Act* (NT) s 65; *Criminal Law (Sentencing) Act 1988* (SA) s 23; *Sentencing Act 1997* (Tas) s 19; *Sentencing Act 1995* (WA) s 98.

142 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A; *Criminal Law (Sentencing) Act 1988* (SA) s 32A; *Sentencing Act 1995* (WA) s 90; *Sentencing Act 1995* (NT) s 53A.

143 See Mackenzie and Stobbs, above n 91, ch 8.

144 Franklin E Zimring and Gordon J Hawkins, *Deterrence: The Legal Threat in Crime Control* (University of Chicago Press, 1973) 14.

145 William Young, 'The Effects of Imprisonment on Offending: A Judge's Perspective' (2010) 1 *Criminal Law Review* 3.

of sentencing. Nearly, half a century ago the New Zealand Supreme Court in *R v Radich* stated:

one of the main purposes of punishment ... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civili[s]ed countries, in all ages, [deterrence] has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment.¹⁴⁶

This passage has been cited with approval in numerous cases,¹⁴⁷ and deterrence remains a key sentencing concept in each Australian jurisdiction.¹⁴⁸ Most importantly for the purposes of this article, general deterrence has a statutory foundation in all Australian jurisdictions except in the federal jurisdiction and Western Australia.¹⁴⁹

2 Statutory Foundation for General Deterrence

The *Sentencing Act 1997* (Vic) s 5(1), for example, states:

The only purposes for which sentences may be imposed are:

- (b) to deter the offender or other persons from committing offences of the same or a similar character.¹⁵⁰

In a similar vein, s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides:

The purposes for which a court may impose a sentence on an offender are as follows:

- (b) to prevent crime by deterring the offender and other persons from committing similar offences.¹⁵¹

Section 3(e)(i) of the *Sentencing Act 1997* (Tas) provides in the following terms:

146 [1954] NZLR 86, 87.

147 See, eg, *Walden v Hensler* (1987) 163 CLR 561 in which Brennan J stated that the ‘chief purpose of the criminal law is to deter those who are tempted to breach its provisions’: at 569. See also, *R v Willisroft* [1975] VR 292, 298–9; *R v Porter* (1933) 55 CLR 182, 186; *Lambert v R* (1990) 51 A Crim R 160, 171.

148 *Sentencing Act 1991* (Vic) s 5(1)(b); *Criminal Law (Sentencing) Act 1988* (SA) s 10(i); *Sentencing Act 1995* (NT) s 5(1)(c); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c).

149 However, this is an aim derived from the common law in Western Australia, see, eg, *Rodi v Western Australia* (No 2) [2014] WASCA 233 (15 December 2014) [26]; *Pitassi v Western Australia* [2014] WASCA 231 (12 December 2014) [36].

150 The *Penalties and Sentences Act 1992* (Qld) s 9(1)(c) is effectively the same. The *Sentencing Act* (NT) s 5(1)(c) is in identical terms except ‘discourage’ is used instead of ‘deter’.

151 The *Crimes (Sentencing) Act 2005* (ACT) s (1)(b) is in identical terms.

The purpose of the Act is to:

- (e) help prevent crime and promote respect for the law by allowing Courts to:
 - (i) impose sentences aimed at deterring offenders and other persons from committing offences.

Section 10(1)(i) of the *Criminal Law (Sentencing) Act 1988* (SA) states:

In determining the sentence for an offence, a court must have regard to such of the following factors and principles as may be relevant:

- (i) the deterrent effect any sentence under consideration may have on the defendant or other persons.

The allegiance of the courts to general deterrence theory is so steadfast that judges have refused to renounce it even in the face of apparent legislative disavowal of it as a sentencing objective. General deterrence is not specifically mentioned as one of the relevant sentencing factors in the *Crimes Act 1914* (Cth).¹⁵² This was apparently in response to a recommendation by the Australian Law Reform Commission that it not be adopted as a sentencing objective because sentences should be commensurate with the seriousness of the offence committed. It was considered unfair to impose a heavier sanction on a particular accused because of the effects it might have on the behaviour of others.¹⁵³

However, in *Director of Public Prosecutions (Cth) v El Karhani*,¹⁵⁴ (while noting that general deterrence is one of the ‘fundamental principle[s] of sentencing, inherited from the ages’),¹⁵⁵ the Court attributed the legislative omission of general deterrence to a ‘legislative slip’.¹⁵⁶ The Court stated that general deterrence is still an important sentencing consideration and no less important than the other factors expressly mentioned, even though it is absent from the detailed list of relevant sentencing criteria.¹⁵⁷

3 The Cardinal Importance of General Deterrence

General deterrence is relevant to sentencing for most offences including: where the offence is prevalent;¹⁵⁸ public safety is at issue;¹⁵⁹ the offence is hard to detect;¹⁶⁰ it involves a breach of trust;¹⁶¹ or where vulnerable groups need protection.¹⁶²

152 See ss 16A(1)–(2), however, specific deterrence is in s 16A(2)(j).

153 Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) 18.

154 (1990) 21 NSWLR 370.

155 *Ibid* 378.

156 *Ibid*.

157 *Ibid*. See *Crimes Act 1914* (Cth) s 16A.

158 *R v Williscroft* [1975] VR 292, 299; *R v Taylor* (1985) 18 A Crim R 14, 18.

159 *Dixon-Jenkins v The Queen* (1985) 14 A Crim R 372, 376, 379.

160 *R v Jamieson* [1988] VR 879, 888; *Pantano v The Queen* (1990) 49 A Crim R 328, 338.

161 *Hawkins v The Queen* (1989) 45 A Crim R 430, 436.

162 *Kumantjara v Harris* (1992) 109 FLR 400, 409; *R v Kane* (1987) 29 A Crim R 326, 329; *DPP v D’Alessandro* (2010) 26 VR 477, 483.

It is particularly important in relation to offences involving a material benefit to the offender. Thus, in relation to drug distribution offences and tax and social security frauds, it has been held to be the most important factor in determining a sentence.

In the context of large scale drug offences, in *Tulloh v The Queen*,¹⁶³ the Court approved the observations in *Aconi v The Queen* that:

It can ... be accepted that the applicant had an important role in the distribution chain, having access, for distribution purposes, to relatively large quantities of high grade heroin. In those circumstances this was a case in which the starting point for the sentencing of the applicant could be expected to be severe. As was pointed out by Kennedy J in *Serrette [v The Queen [2000] WASCA 405]* at [2], it has frequently been said that those who engage in the illicit drug trade, whatever their role in the enterprise, must expect heavy sentences in which *general deterrence will be the principal purpose of the punishment*. This is especially so where an offender plays an important role in the distribution process.¹⁶⁴

In *R v Riddell*,¹⁶⁵ it was noted that:

Courts have also long recognised the importance of general deterrence in sentencing in respect of drug importation offences. In *R v Cheung* (Supreme Court of New South Wales, 22 March 1991, unreported) Sully J said:

The importation of heroin into this country in any amount and at any time constitutes a deliberate threat to the wellbeing of the Australian community ... The importation or the attempted importation of, and the trafficking or attempted trafficking [of heroin] ... is in a very real sense a declaration of war upon this community. ... In the face of such challenges each of the institutional supports of our society has a role to play. That of the [c]ourts is to punish and deter according to law. Obviously, the [c]ourts alone cannot meet adequately, let alone defeat, the challenge of which I have been speaking. What the [c]ourts can do is to punish drug-related crime in a way which signals plainly to drug traffickers, especially foreign drug traffickers, that the [c]ourts are both able and willing to calibrate their sentences until a point is reached at which, to a significant extent even if never perfectly, fear of punishment risked will neutralise the greed which is the only possible motive of those who ... engage in drug-related crime when they are themselves not drug dependent.¹⁶⁶

163 (2004) 147 A Crim R 107, 112 [25].

164 [2001] WASCA 211 (25 July 2001) [18] (emphasis added).

165 (2009) 194 A Crim R 524.

166 (2009) 194 A Crim R 524, 537 [57]. The Court noted 'this passage has been cited with approval on numerous occasions. Its relevance is not restricted to the importation of the particular drug in that case': at [58].

In the context of taxation offences, in *R v Izhar Ronen*¹⁶⁷ the New South Wales Court of Criminal Appeal said:

It has been stated time and time again and in all jurisdictions that the most important aspect of punishment in relation to frauds on the Commonwealth's revenue is general deterrence.¹⁶⁸

More recently, in a unanimous judgment of the Victorian Court of Appeal in *Director of Public Prosecutions (Cth) v Gregory*,¹⁶⁹ Warren CJ, Redlich JA and Ross AJA said that:

In seeking to ensure that proportionate sentences are imposed the courts have consistently emphasised that general deterrence is a particularly significant sentencing consideration in white collar crime and that good character cannot be given undue significance as a mitigating factor, and plays a lesser part in the sentencing process. In the case of taxation offences general deterrence is also given special emphasis in order to protect the revenue as such crimes are not particularly easy to detect and if undetected may produce great rewards. 'Deterrence looms large' as the present process of self-assessment reposes on the taxpayer a heavy duty of honesty. ... In many if not most cases, imprisonment will be the only sentencing option for serious tax fraud in the absence of powerful mitigating circumstances.¹⁷⁰

The same enthusiasm for general deterrence applies in relation to social security offences. Over a decade ago Underwood J in *Hrasky v Boyd*¹⁷¹ stated:

For many years now, Australian courts have emphasised the importance of general deterrence when imposing sentence for what is loosely referred to as social security fraud. In *Laxton v Justice* (1985) 38 SASR 377, Olsson J said at 381:

(1) Offences of this type are now prevalent. The offence is difficult to detect and penalties should reflect a concern for the protection of the revenue.

(2) Frauds of this kind must be viewed seriously because they threaten the basis of the social security system which is designed to provide financial security for those in the community who are in need. A deterrent penalty is called for.¹⁷²

167 (2006) 161 A Crim R 300.

168 Ibid 316 [66]. See also *R v Peterson* [2008] QCA 70 (28 March 2008) [22].

169 (2011) 34 VR 1.

170 (2011) 34 VR 1, 15–16 [53]–[54] (citations omitted). The central role of general deterrence in the sentencing of tax offenders has been noted in numerous decisions. See, eg, *R v Nicholson*; *Ex parte DPP (Cth)*; *R v Hyde-Harris*; *Ex parte DPP (Cth)* [2004] QCA 393 (22 October 2004) [18]; Sheller JA in *DPP v Hamman* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Sheller JA, Levine and Barr JJ, 1 December 1998) 29–30; *DPP (Cth) v Rowson* [2007] VSCA 176 (31 August 2007) [24].

171 (2000) 9 Tas R 144.

172 Ibid 149 [20].

These comments were expressly endorsed in *Emms v Barr*,¹⁷³ and have been adopted in numerous decisions since.¹⁷⁴

Thus, general deterrence has been and remains an important consideration in the sentencing calculus. In relation to some categories of offences it is even the most important sentencing variable. When general deterrence is factored into the sentencing equation it operates to increase the severity of the penalty. The central and repeated rationale offered by the courts for pursuing this objective is that it will deter other people from committing crime.

It is clear that general deterrence is an important sentencing objective and, as is manifest from the quotes set out above, when it is applied its effect is to make the sentence harsher than it would have been without its application. Therefore, the form of general deterrence applied by the courts is marginal general deterrence. When general deterrence is applied, the extent to which it actually makes the penalty more severe is not tenable to ascertain given the opaque nature of instinctive synthesis. However, as general deterrence is often declared to be an important sentencing consideration and it increases penalty severity, it logically entails that applying this objective must on occasions mean the difference between a custodial and non-custodial disposition. At other times, a longer custodial sentence is imposed than would have otherwise been the case. In short, the application of marginal general deterrence to the sentencing calculus limits the human rights and freedoms of offenders.

Despite the discussion above, there has never been a considered analysis by the courts (nor legal scholars) regarding the extent to which the operation of general deterrence is impacted by the principle of legality. This is a fundamental judicial oversight. A rigorous and more probing examination of the legislative provisions that prescribe general deterrence as a sentencing objective, and the empirical data regarding the efficacy of sentencing to achieve the goal of general deterrence, lead to the conclusion that it should only be endorsed in the context of absolute general deterrence and, in the federal sphere, abolished altogether.

4 Three Limbs to the Argument that Absolute, Not Marginal, General Deterrence Should be Pursued

There are three limbs to this argument. The first is that the legislative provisions which enshrine general deterrence do not distinguish between the two forms of general deterrence. As noted above, the provisions simply use broad phrases in the form of ‘deterring’ or ‘discouraging’ other persons from committing crime. Accordingly, the precise form of general deterrence being endorsed by the legislature remains to be determined; it is an open issue.

173 (2008) 187 A Crim R 390, 396 [33]–[34].

174 See, eg, *Ivanovic v The Queen* [2009] NSWCCA 28 (3 February 2009) [13]. However, this does not exclude the need to give weight to other considerations, such as rehabilitation, especially in respect to young offenders: see, eg, *R v Wyley* [2009] VSCA 17 (19 February 2009) [24]; *DPP v Lawrence* (2004) 10 VR 125, 129 [15]; *R v PJB* (2007) 17 VR 300, 306 [26]; *R v Mills* (1998) 4 VR 235, 242.

The second limb to the argument is that marginal general deterrence is a flawed theory.¹⁷⁵ The existing data show that in the absence of the threat of *any* punishment for criminal conduct, the social fabric of society would diminish because crime would greatly escalate. Thus, general deterrence works in the absolute sense: there is a *connection* between the existence of some form of criminal sanctions and criminal conduct. However, there is insufficient evidence to support a direct correlation between higher penalties and a reduction in the crime rate. The US National Academy of Sciences notes:

The incremental deterrent effect of increases in lengthy prison sentences is modest at best. Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation.¹⁷⁶

The fallacy that is marginal general deterrence is highlighted by the fact that nearly 90 per cent of criminologists believe that it does not work,¹⁷⁷ which is similar to scientific consensus relating to the causes of global warming,¹⁷⁸ yet legislatures and courts continue to fanatically use this as a rationale for setting high penalties, to the point that they have adopted it *a priori* as an article of faith. In *Yardley v Betts* the Court stated: ‘the Courts *must assume*, although evidence is wanting, that the sentences which they impose have the effect of deterring at least some people from committing crime’.¹⁷⁹ Similarly, in *R v Fern*, King CJ held that:

Courts are *obliged to assume* that the punishments which Parliament authorises will have a tendency to deter people from committing crimes. The administration of criminal justice is based upon that assumption.¹⁸⁰

175 For an overview of the literature, see Nigel Walker, *Sentencing in a Rational Society* (Allen Lane, 1969) 60; John K Kochran, Mitchell B Chamlin and Mark Seth, ‘Deterrence or Brutalization? An Impact Assessment of Oklahoma’s Return to Capital Punishment’ (1994) 32 *Criminology* 107; Dale O Cloninger and Roberto Marchesini, ‘Execution and Deterrence: A Quasi-Controlled Group Experiment’ (2001) 33 *Applied Economics* 569; Paul R Zimmerman, ‘State Executions, Deterrence, and the Incidence of Murder’ (2004) 7 *Journal of Applied Economics* 163; Dieter Dölling et al, ‘Is Deterrence Effective? Results of Meta-Analysis of Punishment’ (2009) 15 *European Journal of Criminal Policy Research* 201; Anthony N Doob and Cheryl Marie Webster, ‘Sentence Severity and Crime: Accepting the Null Hypothesis’ (2003) 30 *Crime and Justice* 143; Steven D Levitt, ‘Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not’ (2004) 18 *Journal of Economic Perspectives* 163; Richard Berk, ‘New Claims About Executions and General Deterrence: Déjà Vu All Over Again?’ (2005) 2 *Journal of Empirical Legal Studies* 303; National Research Council, *The Growth of Incarceration in the United States: Exploring the Causes and Consequences* (National Academies Press, 2014) 90.

176 National Research Council, above n 175, 5.

177 Michael L Radelet and Traci L Lacock, ‘Recent Developments: Do Executions Lower Homicide Rates? The Views of Leading Criminologists’ (2009) 99 *Journal of Criminal Law and Criminology* 489, 503.

178 Brian Evans, *A Clear Scientific Consensus that the Death Penalty Does Not Deter* Amnesty International: Human Rights Now (18 June 2009) <<http://blog.amnestyusa.org/us/a-clear-scientific-consensus-that-the-death-penalty-does-not-deter/>>.

179 *Yardley v Betts* (1979) 1 A Crim R 329, 333 (emphasis added). See also *R v Dixon* (1975) 22 ACTR 13, 18.

180 *R v Fern* (1989) 51 SASR 273, 274 (emphasis added).

The basis of the imperative to pursue general deterrence (in form of marginal general deterrence) as a sentencing goal is unclear. It is not as if there are no other sentencing objectives which the courts can invoke to justify punishing wrongdoers: incapacitation, retribution and denunciation to name a few.¹⁸¹ Even if there were not, to the extent that the law pretends to logical consistency, it would seem preferable to abandon punishment altogether, than to punish criminals on the basis of a flawed rationale.

It is only on rare occasions that the Courts have expressed equivocation regarding the efficacy of harsh penalties to deter crime. In *Pavlic v The Queen*,¹⁸² Green CJ stated that:

general deterrence is only one of the factors which are relevant to sentence and must not be permitted to dominate the exercise of the sentencing discretion to the exclusion of all the other factors which the law requires a judge to take into account. Secondly, although a court is entitled to proceed on the basis that there is a general relationship between the incidence of crime and the severity of sentences, there is no justification for the view that there exists a direct linear relationship between the incidence of a particular crime and the severity of the sentences which are imposed in respect of it, such that the imposition of heavier sentences in respect of a particular crime will automatically result in a decrease in the incidence of that crime.¹⁸³

Most recently in *Glascott v The Queen*,¹⁸⁴ the Victorian Court of Appeal observed that punishment will not deter offenders who are ‘emotionally wrought or otherwise irrational’ at the time of offending.¹⁸⁵ Of course, this observation still works on the presumption that offenders *would* be deterred *if* they were in control of their faculties at the time of offending.¹⁸⁶

Arguments noting the illusory nature of marginal general deterrence were noted (without any hint of objection) by the Northern Territory Court of Criminal Appeal in *R v Renwick & Johnston*, yet the Court then ignored these arguments and stated:

we agree with the appellant that general deterrence is the major sentencing principle governing commercial drug supplies. Further, general deterrence is required as a matter of law, when sentencing offenders in the Northern Territory.¹⁸⁷

181 These are discussed in Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007).

182 (1995) 5 Tas R 186.

183 *Ibid* 190. See also *R v Dube* (1987) 46 SASR 118.

184 [2011] VSCA 109 (29 April 2011).

185 *Ibid* [152].

186 In *DPP v Russell* [2014] VSCA 308 (2 December 2014) the Court took a somewhat more critical view about the efficacy of sentencing to achieve the goal of general deterrence and noted that for punishment to deter, it requires that sentences are publicised to the community: at [5].

187 *R v Renwick & Johnston* [2013] NTCCA 3 (21 February 2013) [51].

In *R v Vella*, the sentencing judge expressly stated that he is reluctant to endorse the objective of (marginal) general deterrence (because of the empirical data dispelling its efficacy), but felt compelled to do so. His Honour stated:

Notwithstanding my strong reservations and reluctance, my oath of office requires me to accept decisions of the [C]ourt of Criminal Appeal as binding upon me and to apply the doctrine of general deterrence as a factor in the intuitive synthesis process.¹⁸⁸

Despite these reservations, the courts still unequivocally apply general deterrence in the form of marginal general deterrence.

The third limb of the argument as to why courts should no longer increase penalties to pursue the objective of general deterrence involves the principle of legality. The statutory provisions which expressly advocate the goal of general deterrence should be interpreted through the rights and freedom respecting lens inherent in this principle.

Absent a clear statutory intention to apply these provisions in a manner which embraces the theory of marginal general deterrence, the courts should adopt an interpretation that will result in less encroachment on important rights and freedoms. The interpretation that would achieve this is to make clear that the form of general deterrence that is being prescribed in the respective legislative provisions is absolute marginal deterrence; not marginal general deterrence. This interpretation is tenable simply from the fact that this is the form of deterrence which will result in fewer rights' infractions. The interpretation is not only tenable, but forceful when the interpretive approach is broadened to accommodate the empirical data regarding the attainability of marginal general deterrence. In short, the principle of legality requires the courts to not pursue unattainable objectives which necessarily involve infractions of important rights and freedom when a less severe approach is available consistent with the words of the statute.

In the federal domain, the above approach can be used to ground a strong argument for the abolition of general deterrence altogether as a sentencing consideration. If *Director of Public Prosecutions (Cth) v El Karhani*¹⁸⁹ was revisited and considered from the perspective of the principle of legality, the suggestion that the omission of a rights and freedoms diminishing sentencing objective was a 'legislative slip' would be manifestly weak — if not misconceived. This is especially so given the express rejection of general deterrence in the Law Reform Commission Report underpinning the relevant legislative provision and failure of harsh penalties to deter crime.

188 [2012] NSWDC 263 (2 March 2012) [36].

189 (1990) 21 NSWLR 370.

B Specific Deterrence is Less Malleable

While the principle of legality applies to water down the impact of general deterrence in the sentencing realm, it is arguably less effective when it comes to specific deterrence — even though this too is a flawed theory.

1 Specific Deterrence Has a Statutory Foundation in Most Jurisdictions

Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions and, thereby, convincing them that crime does not pay.¹⁹⁰ It ‘attempts to dissuade offenders from reoffending by inflicting an unpleasant experience on them (normally imprisonment) which they will seek to avoid in the future’.¹⁹¹ Specific deterrence is a central common law sentencing objective and is given express statutory recognition in all Australian jurisdictions,¹⁹² except in Western Australia.¹⁹³ Specific deterrence applies most acutely in relation to serious offences¹⁹⁴ and to offenders with significant prior convictions,¹⁹⁵ since it is assumed previous sanctions have failed to stop their offending behaviour. Conversely, it has little application where an offender has voluntarily desisted from further offending,¹⁹⁶ or where the offender was suffering from impaired intellectual or mental functioning at the time of the offence.¹⁹⁷

Where specific deterrence is applicable to the sentencing of an offender, it operates to increase the severity of the sanction. As with general deterrence it is not feasible to ascertain the exact weight that is accorded to specific deterrence given the instinctive synthesis approach to sentencing, however, logically it can operate to extend the length of a prison term or convert what would have otherwise been a non-custodial sanction into a term of imprisonment.¹⁹⁸

190 See Daniel S Nagin, Francis T Cullen and Cheryl Lero Jonson, ‘Imprisonment and Reoffending’ (2008) 38 *Crime and Justice* 115.

191 Mirko Bagaric and Theo Alexander, ‘The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn’t Work, Rehabilitation Might and the Implications for Sentencing’ (2012) 36 *Criminal Law Journal* 159, 159.

192 *Crimes Act 1914* (Cth) s 16A(2)(j); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(b); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(b); *Sentencing Act* (NT) s 5(1)(c); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(i); *Sentencing Act 1997* (Tas) s 3(e) (i); *Sentencing Act 1991* (Vic) s 5(1)(b).

193 Where it applies as a matter of common law.

194 See, eg, *DPP v Zullo* [2004] VSCA 153 (6 September 2004) [23]; *DPP v Lawrence* (2004) 10 VR 125, 132 [22].

195 See, eg, *Saunders v The Queen* [2010] VSCA 93 (15 April 2010) [13].

196 *R v Pickett* [2010] NSWCCA 273 (25 November 2010) [82].

197 *R v Verdins* (2007) 16 VR 269, 276; *Melham v The Queen* [2011] NSWCCA 121 (2 June 2011) [60]; *R v HBA* [2010] QCA 306 (5 November 2010) [31]; *R v Goodger* [2009] QCA 377 (8 December 2009) [21]; *Startup v Tasmania* [2010] TASCCA 5 (10 May 2010) [6].

198 *Field v R* [2011] NSWCCA 70 (21 April 2011); *Saunders v The Queen* [2010] VSCA 93 (15 April 2010).

2 Specific Deterrence (Also) Does Not Work

The available empirical data suggests that specific deterrence does not work. There is nothing to suggest that offenders who have been subjected to harsh punishment are less likely to re-offend than identically-placed offenders who are subjected to lesser forms of punishment. Thus, there is no empirical basis for pursuing the goal of specific deterrence.¹⁹⁹

Despite this, the courts cannot ignore it in the sentencing calculus. This is because the goal is expressly and clearly set out in the respective sentencing statutes. The relevant statutory provisions,²⁰⁰ state, in broad terms, that an aim of sentencing is to impose sanctions that deter the offender.

Yet, the principle of legality has scope even in this context. As noted above, an aspect of the instinctive synthesis is that it is for judges to determine the amount of weight to be accorded to sentencing considerations.²⁰¹ There is no effective fetter to prevent courts from giving, say, 40 per cent or two per cent weight to a particular sentencing consideration. As noted in *DPP v Terrick*:

The proposition that too much — or too little — weight was given to a particular sentencing factor is almost always untestable. This is so because quantitative significance is not to be assigned to individual considerations.²⁰²

It follows that as a result of the application of the principle of legality, specific deterrence should be accorded considerably less emphasis in the determination of an appropriate sentence. The relevant statutory provisions should be expressly interpreted as acknowledging the marginal relevance of specific deterrence to decisions relating to sentence type and sentence length.

C Broader Application of Legality Principle: Specific Mitigating Considerations

As noted earlier, there are several hundred considerations that can either mitigate or aggravate penalty. Many of them have a statutory foundation. By way of illustration, we discuss the manner in which the principle of legality ought to apply to the interpretation and application of one mitigating factor.

199 See D Farrington, 'Age and Crime' in Michael Tonry and Norval Morris (eds), *Crime and Justice: An Annual Review of Research* (1986) vol 7, 189; Daniel S Nagin, David P Farrington and Terrie E Moffitt, 'Life-Course Trajectories of Different Types of Offenders' (1995) 33 *Criminology* 111; Nagin, Cullen and Jonson, above n 190; Donald Ritche, *Does Imprisonment Deter? A Review of the Evidence* (Victorian Sentencing Advisory Council, April 2011); Donald P Green and Daniel Winik, 'Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders' (2010) 48 *Criminology* 357; Bruce A Jacobs, 'Deterrence and Deterrability' (2010) 48 *Criminology* 417.

200 Which are extracted in pt 4.1 of this article. The same legislative provisions which prescribe general deterrence also entrench the specific deterrence.

201 *Pesa v The Queen* [2012] VSCA 109 (11 May 2012).

202 (2009) 24 VR 457, 459 [5]; *Pesa v The Queen* [2012] VSCA 109 (11 May 2012) [10].

Hardship to family members of the accused is a well-established mitigating factor.²⁰³ We focus on this consideration because it applies relatively frequently and there is divergence of opinion regarding the manner in which it should be operated.

The origin of the rule that hardship to the dependants of an offender can mitigate penalty is derived from the common law. However, the rule is also expressly recognised in two statutory regimes. Section 10(1)(n) of the *Criminal Law (Sentencing) Act 1988* (SA) provides that when a court is sentencing an offender, it must have regard to the ‘probable effect any sentence under consideration would have on dependants of the defendant’. In a similar vein in the Commonwealth sphere, s 16A(2)(p) of the *Crimes Act 1914* (Cth) provides that in sentencing an offender, the court must take into account ‘the probable effect that any sentence or order under consideration would have on any of the person’s family or dependants’.

While hardship to others can mitigate penalty, the courts have applied this test with a degree of reluctance and have demanded that the hardship reach extreme levels before it can moderate penalty: exceptional hardship must be demonstrated.²⁰⁴ The reasons for this are set out in *Markovic v The Queen* as follows:

The case law reveals that the ‘exceptional circumstances’ test was developed in response to several considerations, as follows. First, it is almost inevitable that imprisoning a person will have an adverse effect on the person’s dependants.

Secondly, the primary function of the sentencing court is to impose a sentence commensurate with the gravity of the crime. Thirdly, to treat family hardship as the basis for the exercise of leniency produces the paradoxical result that a guilty person benefits in order that innocent persons suffer less. Fourthly, to treat an offender who has needy dependants more leniently than one equally culpable co-offender who has none would ‘defeat the appearance of justice’ and be ‘patently unjust’. Hence it is only

203 In *R v MacLeod* [2013] NSWCCA 108 (13 May 2013) the Court held that, in principle, hardship to non-family members (in this instance, employees of the offender) could mitigate a penalty. However, on the facts of the case, the hardship was not sufficiently severe: at [55].

204 In some instances, the test for hardship to others to be taken into account has been held to be at the level of the ‘truly exceptional’: see *R v Day* (1998) 100 A Crim R 275, 277 (Wood J) quoting *R v Edwards* (1996) 90 A Crim R 510, 516 (Gleeson CJ). Another manner in which this test has been expressed has been to confine the relevance of hardship to others for the purpose of sentence to what have been termed ‘extreme cases’, which would justify a departure from the general prohibition precluding consideration of matters of hardship to others: *Boyle v The Queen* (1987) 34 A Crim R 202, 206 (Burt CJ); *R v T* (1990) 47 A Crim R 29; *R v Adami* (1989) 51 SASR 229, 233. The reference to ‘extreme’ cases may also include what could be termed ‘unusual’ situations that arise in the context of hardship to others. This was evident in the case of *R v Lieu Thi Le* (1999) 107 A Crim R 355 where an appeal was allowed. In the period between the date of sentence and the hearing of the appeal the appellant’s husband, who had been caring for the couple’s two young children, died and Grove J noted that the ‘unusual’ circumstances of the case would permit the release of the appellant so she could take care of her children: at 357. See also *R v Richards* (2006) 160 A Crim R 120, 124–5; *Hull v Western Australia* (2005) 156 A Crim R 414, 419.

in the exceptional case, where the plea for mercy is seen as irresistible, that family hardship can be taken into account.²⁰⁵

The trend of decisions demonstrates that courts have indeed applied the test strictly.²⁰⁶ For example, in *R v Nagul* the Court held that family hardship in the form of the offender's wife being diagnosed with cancer and their son completing secondary school did not cross the threshold to constitute a mitigating consideration.²⁰⁷

While it is generally accepted that in order for hardship to family to be mitigating it must be exceptional,²⁰⁸ there is some authority that, in the context of the *Crimes Act 1914* (Cth) 'normal' hardship is sufficient. Beech-Jones J in dissent in *R v Zerafa* stated:

If in other contexts [c]ourts are bound to consider the impact of their orders on innocent third parties ... why is the impact on children of any sentence under consideration to be excluded unless their hardship is only exceptional? The primary objects in sentencing of 'retribution, deterrence [and the] protection of society' described by Wells J in *Wirth*, can still be given effect to without requiring sentencing courts to divide the forms of hardship occasioned to an offender's family into those which meet the description 'exceptional' and those which do not. The assessment of probable hardship to family members is a task that sentencing courts are perfectly able to undertake, and no doubt they do. In any event, the words of the section and the secondary materials indicate a clear policy choice on the part of the legislature on this topic.²⁰⁹

A strict interpretation of the test required to satisfy hardship to others limits the range of circumstances in which this mitigating factor will apply. It logically follows that this will result in harsher penalties being invoked with more offenders being sentenced to imprisonment and, when they are sentenced to imprisonment, serving longer periods than would have been the case if family hardship mitigated penalty in a wider range of circumstances. Thus, it follows that the current approach to interpreting family hardship infringes on fundamental rights and freedoms.

205 (2010) 30 VR 589, 591–2 [6]–[7] (citations omitted). In this case, the Court held that there is no residual discretion of mercy that can mitigate penalty for hardship if the exceptional circumstances test is not satisfied.

206 *DPP (Cth) v Gaw* [2006] VSCA 51 (15 March 2006) [19]–[21] (Callaway JA).

207 [2007] VSCA 8 (16 January 2007) [46]. Family hardship was also a mitigated penalty in *DPP (Vic) v Coley* [2007] VSCA 91 (14 May 2007); *MGP v The Queen* [2011] VSCA 321 (20 October 2011) [15]; *R v Rach* [2012] QCA 143 (1 June 2012). Where the offender is a female and is pregnant or has a very young child, this is a mitigatory factor, see *HJ v The Queen* [2014] NSWCCA 21 (28 February 2014) [76]; *R v Togiass* (2001) 127 A Crim R 23.

208 It should be noted that family hardship which is not exceptional can mitigate penalty if knowledge of the hardship causes additional distress to the offender, making his time in imprisonment more onerous: *Markovic v Queen* (2010) 30 VR 589, 595 [20].

209 (2013) 235 A Crim R 265, 298 [140] (citations omitted). This is consistent with the approach in the Australian Capital Territory. For a discussion of the approaches in the respective jurisdictions, see *R v Zerafa* (2013) 235 A Crim R 265, 287–8; *Sakovits v R* [2014] NSWCCA 109 (20 June 2014) [22].

The current interpretation of the family hardship provisions seems less tenable if viewed through the lens of the principle of legality. Clear and unequivocal language is not used to compel a narrow interpretation of the relevant provisions. Moreover, the rationales offered above in *Markovic v The Queen* do not irresistibly require a narrow interpretation.

First (dealing with rationales in the same order as set out in *Markovic v The Queen*), it is not inevitable that imprisoning an offender will have an adverse effect on an offender's dependants, given that not all offenders have dependants. Further, the fact that imprisoning offenders with dependants is almost certain to cause hardship to the dependants says nothing about whether this hardship should be minimised. Secondly, while it is established that a main function of the sentencing court is to impose proportionate sentences, it has never been used as a basis for abolishing or diminishing the operation of aggravating and mitigating factors. Thirdly, there is no patent absurdity or injustice in punishing the guilty less in order to minimise the suffering of the innocent. Orthodox sentencing practice takes into consideration a range of interests beyond those of the accused and the community in determining the sentence, including the views of the victim.²¹⁰ There is no reason that the perspective of the dependants of the offender should be totally ignored. Fourthly, it is speculative to assert that to punish offenders with needy dependants less harshly would 'defeat the appearance of justice'. Offenders are punished less severely for a number of reasons that have nothing to do with the crime or the intrinsic aspects of the profile of the offender.

Most importantly, the arguments in favour of a strict interpretation of mitigating a criminal sanction because of hardship to others need to be assessed by reference to the starting position that the provision impacts on the extent to which the fundamental rights and freedoms of an offender are infringed. When this perspective is adopted it is likely the preferred approach is that suggested by Beech-Jones J. This would result in offenders with dependants being imprisoned less commonly and, when they are imprisoned, they would be imprisoned for shorter periods than is currently the situation.

VI CONCLUDING REMARKS

The principle of legality is a forceful interpretive technique which has the potential to reshape the scope and operation of common law rights and freedoms. The principle is so cardinal that one commentator has stated it has 'transformed a loose collection of rebuttable interpretive presumptions into a quasi-constitutional common law bill of rights'.²¹¹ Sentencing is the area of law where the courts most clearly impinge on fundamental rights and freedoms, yet the principle of legality has not been applied in this domain. This article has explored this disconnect. The reason for the gulf is not evident, however, it is clear there is no logical reason for the separation between these two areas of jurisprudence. In fact, arguably,

210 See *Marsh v The Queen* [2011] VSCA 6 (12 January 2011).

211 Meagher, 'The Principle of Legality as Clear Statement Rule', above n 7, 413.

sentencing is the area of law where there is most scope for the application of the principle of legality.

This article has set out the reasons for injecting sentencing law with the principle of legality. It has also illustrated by way of example the manner in which the principle can reshape important areas of sentencing law. This examination is, however, by no means exhaustive. The principle of legality potentially applies to a plethora of sentencing issues. This article aims to accelerate the process.

The exact manner in which the principle of legality will guide the development of discrete sentencing provisions is unclear. The likely net result of the application of the principle to the sentencing domain is that it will reduce the harshness of sanctions. Of course, this result could be averted if the legislature makes it manifestly clear that the sentencing principles and rules should operate in a manner broadly akin to the current orthodoxy. However, this would at least require a reassessment of the current sentencing objective, practices and methodologies, which of itself would be a desirable outcome given the gap in sentencing between theory and practice.