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Abstract

The doctrine of proportionality seeks to limit arbitrary and capricious punishment in order to ensure that offenders are punished according to their ‘just desert’. Proportionality goes some way toward achieving this ‘balanced’ approach by requiring a court to consider various and often competing interests in formulating a sentence commensurate with offence seriousness and offender culpability. Modification of sentencing law by the introduction of victim impact statements or the requirement that sentencing courts take explicit account of the harm done to the victim and community has generated debate, however, as to the extent to which offenders may be now subject to unjustified, harsher punishments. This article proposes that in order to overcome the controversy of the modification of offender and victim rights in sentencing, sentencing courts adhere to a doctrine of proportionality which is explicitly sensitive to the needs of victims and offenders in a model of restorative justice that focuses on the consequences of crime as against the individual, rather than the state. The extent to which proportionality, as the current constitutive principle of Australian sentencing law, may be modified to better encourage a dialogue between victim and offender is discussed.

Proportionality in Sentencing and the Restorative Justice Paradigm: 'Just Deserts' for Victims and Defendants Alike?

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I INTRODUCTION

Proportionality in sentencing emerged in the 1970s as a response to the failings of those rationales of punishment that sought lengthier terms of imprisonment for offenders. Historically, proportionality was not a central principle of sentencing given that most offenders were sentenced to determinate, prescribed sentences of death or life imprisonment. As courts moved away from such harsh practices to take into account the circumstances of the offence and offender, other, more ameliorative ideals began to inform sentencing doctrine. This included a focus on the offender's rehabilitation, despite lengthy sentences still being informed out of the need to seek retribution on the offender. Sentencing courts adhering to the requirements of retributivism were more likely to sentence an offender to lengthier terms of imprisonment, beyond that which may satisfy an offender's 'debt to society'. Retributivism requires this out of the need to demonstrate to the prisoner and society that harsh punishments will follow a wrong, often justified by talionic conceptions of an 'eye for an eye' or harm for harm equivalence. Rehabilitation may require a lengthier sentence in order to expose the offender to corrective technologies in the attempt to minimise potential recidivism. On the other hand, rehabilitation may call for a shorter sentence to give the offender a chance at a 'new start'. As proportionality became the central doctrine of sentencing, however, courts were increasingly required to determine an offender's sentence by balancing these and other competing interests, such that the final sentence is commensurate with the totality of the subjective and objective circumstances of the offence.

In essence, therefore, proportionate sentencing is designed to limit unfair or unjust sentencing outcomes. The notion of 'just deserts' captures the idea that the sanction imposed ought to reflect the degree of moral reprehensibility of the offender's wrongdoing. von Hirsch and Ashworth¹ argue that this also resolves the issue of whether punishment ought to favour the social interest or the interests of defendants. The criminal law of each state proscribes a list of offences that are weighted in terms of blameworthiness, particularly in terms of aggregate offence seriousness and nominal offender culpability. In a strict sense, such weightings ensure that each offender is punished only to the extent that one may be morally responsible for the harm occasioned as a result of the offence. This logic clearly informs parliament's desire to prescribe maximum sentences across the calendar of offences recognised, as can be found across the jurisdictions of Australia. While murder can carry a maximum sentence of 25 years to life, simple larceny, by comparison, being an offence of significantly lesser harm and therefore moral blameworthiness, carries a maximum sentence of 5 years imprisonment.² This method of weighting harm and seriousness in a model that prescribes maximum penalties available to sentencing courts ensures that the final punishments imposed are no more than what public censure would allow for the expected degree of harm and blameworthiness, warranted for a particular offence.

Proportionality, moreover, seeks to prescribe order amongst sentencing practices within a particular jurisdiction.³ In this way, proportionate sentencing practices eschew a focus on other objectives of sentencing, including, as demonstrated in *R v Veen [No. 1]* (1979) 143 CLR 458 and *R v Veen [No. 2]* (1988) 164 CLR 465, the need to incapacitate the offender out of the desire to protect society from potential recidivism. This is particularly the case where a lengthier sentence is only supported by mere speculation that an offender may re-offend. Current sentencing practices, including prescribing lengthier sentences where the victim is

¹ A von Hirsch and A Ashworth, *Proportionate Sentencing: Exploring the Principles* (2005).

² NSW examples have been used. See *Crimes Act 1900* (NSW) ss 18, 19A, 117.

³ See *R v Geddes* (1936) 36 (NSW) SR 554; *R v Dodd* (1991) 57 A Crim R 349.

one of status, such as a police officer or judge, or the prescribing of an additional term where the offender is recognised as a particular class of highly recidivist offender, such as an habitual or sex offender, deviates from the logic of proportionate sentencing. However, proponents of such sentencing regimes argue that such practices may well still reflect a proportionate sentence given that such increases in punishment are reserved for highly dangerous or known recidivist offenders, as based on proof, and not for the ordinary class of recidivist offender.⁴

Other deviations from the doctrine of proportionality include the setting of standard non-parole periods pursuant to s 54A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). This section provides standard non-parole periods for prescribed offences, where the recommended non-parole period applied for offences reflects the middle of the range of objective seriousness for offences prescribed. Nominal murder carries, for instance, a recommended non-parole period of 20 years' imprisonment. Although this seems to significantly fetter judicial discretion to set a proportionate sentence, s 54B(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) allows the sentencing court to set a higher or lower non-parole period than that recommended in accordance with those aggravating and mitigating circumstances set out under s 21A of the same Act. Section 21A sets out a range of circumstances regarding the objective features of the offence and subjective qualities of the offender, which, at common law, any judge would ordinarily be entitled to consider in sentencing. As such, the setting of standard non-parole periods may still reflect the requirement that the final sentence be proportionate to a range of circumstances and an offender's 'just desert'.

Although a proportionate sentence is now generally taken to be one that weights a number of competing interests, the factoring of the interests of the victim into the sentence of the offender has been a difficult one across the jurisdictions of Australia, and internationally. Most of the states and territories of Australia have grappled with the extent to which victim impact statements, for example, ought to legitimately impact on the sentence of an offender.⁵ Various jurisdictions have also made explicit reference to victims of crime in sentencing legislation such that sentencing courts are now directed to consider the harm occasioned to the victim when formulating sentence.⁶ At common law, judges have always considered the harm done to the victim as part of an appropriate sentence.⁷ In *R v P* (1992) 64 A Crim R 381, a Crown appeal against sentence following a trial in Supreme Court of the Australian Capital Territory, the full court of the Federal Court of Australia per Burchett, Miles and O'Loughlin JJ observed:

... because in our adversarial system of criminal justice the victim is not directly represented and has no more right to be heard in the sentencing process than in the trial, a difficulty arises as to how information relating to the effect on the victim is to be gathered and presented to the court. That reliable information of that nature should be presented is in the public interest, not only in the interest of the injured victim (or of the accused, if the victim has escaped relatively unharmed), since a proper

⁴ Above n 1, 84-85.

⁵ *R v FD*; *R v FD*; *R v JD* (2006) 160 A Crim R 392; *R v Previtara* (1997) 94 A Crim R 76; *R v Slack* [2004] NSWCCA 128; *R v Birmingham (No 2)* (1997) 69 SASR 502; *R v Penn* [1994] 19 MVR 367; *R v Miller* [1995] 2 VR 348; *Dale Robert Mitchell & Ors v The Queen & Anor* [1998] WASCA 334; *Staats v R* (1998) 123 NT 16; *R v Singh* [2006] QCA 71.

⁶ *Sentencing Act 1991* (Vic) s 5(2)(daa-db); *Sentencing Act 1995* (WA) s 6(2)(b); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g); *Sentencing Act* (NT) s 5(2)(b); *Criminal Law (Sentencing) Act 1988* (SA) s 7; *Sentencing Act 1997* (Tas) s 3(h); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g); *Penalties and Sentences Act 1992* (Qld) s 9(2)(c)(i).

⁷ *Siganto v The Queen* (1998) 194 CLR 656.

sentence should not be based on a misconception or ignorance of salient facts. There is not necessarily any unfairness or impropriety in the representative of the Crown assisting in this regard. The prosecutor appears in the public interest and has the role of assisting the court in reaching a fair decision rather than exclusively advocating a particular interest: see *Whitehorn v The Queen* (1983) 152 CLR 657; *R v Apostilides* (1984) 154 CLR 563.⁸

There is nothing new about the need to consider the injuries sustained by the victim as a relevant component of sentence and all injuries sustained by the victim ought to comprise that evidence. However, as alluded to in *R v P*, it is not so much the need to consider the victim but the perspective on the injuries occasioned and weight accorded to them that is now at issue. It is a well-founded principle that at common law, the victim makes a poor source of information or evidence from which to infer offence seriousness and offender culpability.⁹ Essentially, the victim ought not be trusted as a reliable source of information on the basis that their perspective is likely to be a private, possible vengeful one, which if factored into sentence, may lead to the handing down of a manifestly excessive sentence contrary to an offenders 'just desert'.

Restorative justice, however, presents the possibility of moving beyond debates as to the trustworthiness of the victim in an evidential sense by indicating the various therapeutic benefits to both offender and victim in nuanced programs that bring these 'stakeholders of justice' together in new ways. These programs may include conferences, forums, compensation and reparation, or even acts of shaming. They differ from normal sentencing proceedings before a judge alone as they encourage participation from victims and offenders in a direct, interpersonal way, such that the focus is shifted from a judicial inquiry into offence seriousness to focus on crime as against the individual. The focus is thus shifted from the exclusive need to construe all circumstances objectively, as offences against the state and community, allowing for the views of victims, offenders and other interested parties, such as the police and corrections, to weigh into an assessment of the offence and suitable modes of restoration:

The 'hard treatment' component within desert theory is also problematic on a number of counts. One major shortcoming is that it ties the expression of censure and denunciation to a relatively limited range of retributive-style punishments, the primary purpose of which is to inflict some form of deprivation on offenders. This has undesirable consequences from the victim's point of view because few such punishments do anything to redress the personal loss or injury that they may have experienced. Even those that do (such as compensation orders) are only capable of addressing part of the harm that is caused by an offence: comprising the physical injury or loss or damage to property. However, they are likely to do little to repair any emotional or psychological upset that is caused by an offence, or to restore the moral equilibrium that has been disturbed by undermining the victim's presumption of personal security (Watson et al 1989). Once again, the attraction of restorative justice processes is that they facilitate the negotiation of much more flexible forms of reparation that should, in principle, be capable of responding more appropriately to more of the particular harms that victims may have experienced.¹⁰

The debate over the extent to which restorative justice may be integrated into proportionate sentencing has resulted in the examination of restorative justice as a proportionate response to the harm occasioned as a result of an offence. In this context, debate abounds as to whether

⁸ *R v P* (1992) 64 A Crim R 381, 384.

⁹ *R v RKB* [1992] NSWSC (unreported, Badgery-Parker J, 30 June 1992).

¹⁰ J Dingan, 'Toward a Systematic Model of Restorative Justice', in A von Hirsch, J Roberts and AE Bottoms (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (2003), 144.

restorative justice ought to be proportionate or not.¹¹ This article will move beyond this issue to consider whether an openness to restorative interventions, as programs constitutive of or adjunctive to nominal sentencing options, ought to be a relevant subjective circumstance of sentencing relevant to the determination of a proportionate sentence.

The question this article considers then, in terms of integrating the otherwise disconnected approaches of proportionality and restorative justice, is whether the restoration of the victim and offender ought to be relevant to the determination of a proportionate sentence. If this is argued in the affirmative, in that there may be some relevant connection between the two, then the availability of the victim and offender to restorative processes, whatever form they take, ought to be a factor relevant to a proportionate sentence and the *capacity to engage in restorative processes* should be included as a factor each sentencing judge takes into account in determining a sentence proportionate to all ends of justice. Thus, actual or likely outcomes of an offender's willingness to engage in processes of restorative justice ought to be relevant to determining whether a particular punishment is consistent with an offender's 'just desert'.

II THE DOCTRINE OF PROPORTIONALITY IN AUSTRALIAN SENTENCING LAW: THE UNFORTUNATE CASE OF ROBERT CHARLES VINCENT VEEN

The issue confronted by the integration of victim rights into sentencing is thus one of the determination of a proportionate sentence *a priori*. *Veen (No. 1)* and *Veen (No. 2)* indicate how central the doctrine of proportionality is within Australian sentencing law. The 1988 case allowed the High Court of Australia to reflect upon its earlier 1979 decision that sought to overturn the ruling of the New South Wales Court of Criminal Appeal ('NSWCCA').

The 1979 case saw the Aboriginal accused, Veen, acquitted of murder for manslaughter on the basis of diminished responsibility. Veen met his victim, Terry Ward, in Kings Cross in 1975. The pair returned to Ward's residence in Croydon where they had sex. Following some heavy drinking, Veen expected payment and when the money was not forthcoming, Veen stabbed Ward in the arm and then several more times in the arm and chest, and then repeatedly until Ward collapsed, and died. Veen had cut himself in the fracas and reported to hospital for treatment the next day. Following police enquiries, Veen confessed the crime. At trial, the prosecution called for the opinion of a psychiatrist who indicated that Veen did not suffer from any mental illness or abnormality of mind. The defence called a psychologist who, to the contrary, found that Veen did suffer from a mental impairment. Evidence was led on a 1971 offence, when Veen was 16 years old, where, following heavy drinking, Veen stabbed his landlady and was later convicted of malicious wounding. Contemplating the suitability of the life sentence handed down by the sentencing judge and endorsed by the NSWCCA, Jacobs J forms the opinion that such a term was not suitable but that a lengthy fixed-term of imprisonment be substituted:

The killing was undoubtedly a very grave crime; but the question is whether it was a crime which warranted not only severe punishment but the most severe punishment which could be awarded. The applicant was aged twenty at the time of his criminal act. He had a record of comparatively minor offences not involving violence with the one exception, the conviction for malicious wounding when he was aged sixteen. This, as well as the crime for which he is now sentenced, shows that he has a propensity to violence and account must be taken of that fact. On the other hand, there was considerable provocation even if it did not amount to a defence within s. 23 of the Crimes Act. It can

¹¹ P Pettit and J Braithwaite, 'Republicanism in Sentencing: Recognition, Recompense and Reassurance', in A von Hirsch and A Ashworth (eds.) *Principled Sentencing: Readings on Theory and Policy* (1998), 317-335.

certainly be stated that there was no premeditated violence. He used a weapon which happened to be at hand when he wholly lost control of himself. On the other hand, the attack was prolonged from the moment of first striking and was extremely violent. It was followed by conduct designed to effect an escape from the consequences, though in all the dreadful circumstances it is doubtful whether this is of great significance. Underlying these factors is the background of the applicant. I have already stated the summary of the trial judge, but I would repeat his words:

This crime, very grave as it was, was not in the category of the most grave cases of unlawful killing short of murder. A life sentence under New South Wales conditions, coupled with repeated judicial pronouncements that if he were released, he would probably kill again, those pronouncements being based on an inference from the jury's verdict rather than upon the cogency of the psychiatric evidence, was too severe a punishment to impose on the applicant.

One course which would now be open would be to remit the matter to the Court of Criminal Appeal for the taking of further evidence upon the question whether the applicant, if ever released, would, unless his condition had been remedied, be likely again to kill or violently injure. I have considered that course but I do not think that it would be appropriate in the light of Dr. Schmalzbach's evidence and I do not think that the applicant's history is such that any punishment should be awarded which is not strictly proportionate to the gravity of the offence. In my opinion there should be a heavy sentence for a fixed term. No non-parole period should be fixed, the reason for not fixing such a period being in order that the case of the applicant can be the subject of executive review so that at a suitable time if the applicant effects a rehabilitation of himself and his personality and if his mental condition is considered stable, consideration can be given to the question of his release on licence. I would fix a term of twelve years.¹²

Veen was released from prison on 20 January 1983. On 27 October of that same year Veen again killed a man who had invited him back to his apartment for sex. Veen had stabbed the victim repeatedly with a bread knife. Veen was charged with murder but the prosecution accepted a plea of guilty to manslaughter on the basis of diminished responsibility. On this occasion, Hunt J sentenced Veen to life imprisonment and this sentence was upheld before the NSWCCA. Veen appealed to the High Court, which took the opportunity to clarify the principles and authority of *Veen (No. 1)*. The majority of Mason CJ, Brennan, Dawson and Toohey JJ dismissed the appeal, affirming Veen's life sentence. Their Honours consider the reasoning of Jacobs J in *Veen (No. 1)*, specifically what informed his Honour's decision to reduce the sentence of life imprisonment to a fixed-term of imprisonment of 12 years. Mason CJ, Brennan, Dawson and Toohey JJ indicate:

...To identify the principles, it is necessary to make a brief analysis of the reasons given for reviewing the sentence and for determining what substituted sentence was appropriate. Jacobs J. (at pp 487-489) referred to three features of the case which gave rise to concern: first, the possibility that the jury found manslaughter on the ground of provocation as well as on the ground of diminished responsibility; second, a misdirection on provocation; and third, the sparsity of evidence to base a conclusion that the prisoner would in the future kill or seriously injure someone. These features, and the trial judge's view that it was not the gravest case of manslaughter, led Jacobs J. to the conclusion that the sentence should be reviewed.¹³

Jacobs J's decision to review the life sentence imposed on Veen was therefore informed by standard considerations which any sentencing authority, at that time, ought to consider. This, as indicated by the majority in *Veen (No. 2)*, include the fact that at the time of *Veen (No. 1)*, there was a sparsity of evidence that Veen would kill again. Hindsight, arguably, would prove to the contrary, but on the evidence available to the High Court in *Veen (No. 1)*, Jacobs J determined that life sentence was disproportionate to the seriousness of the offence and culpability of the offender. The majority in *Veen (No. 2)* note that the material difference

¹² *Veen v The Queen (No. 1)* (1979) 143 CLR 458, 490-491.

¹³ *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 471.

between the majority and minority judgements in *Veen* (No. 1) related to the evidence supporting what could be considered a proportionate sentence in the circumstances:

The basic difference between the majority and the minority in *Veen* (No.1) lay in the differing assessments of what was the appropriate proportionate sentence. No judgment would have given support to a sentence exceeding what was truly proportionate. The majority were satisfied that the sentence of life imprisonment was “too severe a punishment to impose on the applicant” (per Jacobs J. at p 490) whereas the minority could not determine on the unsatisfactory evidence “what is the appropriate penalty to be imposed in this case” (per Mason J. at p 472). But all Justices other than Murphy J. accepted that, in a case where a verdict of manslaughter is returned on the ground of diminished responsibility, the risk that the offender’s mental abnormality may lead him to kill again is a material factor in determining the sentence to be imposed.¹⁴

The sparsity of evidence that *Veen* may re-offend aside, the High Court in *Veen* (No. 2), in clarifying and affirming the principle of proportionality espoused in *Veen* (No. 1), also had to deal with circumstances in which it may be permissible to pass a sentence greater than that proportionate to all the circumstances of the offence and offender. Examining the then English practice of extending a prisoner’s sentence on the basis of the need for ongoing psychiatric assessment, the High Court in *Veen* (No. 2) rule that, in the circumstances of the then lack of psychiatric facilities in NSW prisons, that such a deviation from principle is unwarranted:

The sentencing principle which his Honour laid down is that a sentence should be “proportionate to the gravity of the offence” unless, perhaps, the applicant’s history warrants some departure from the principle. He then determined the appropriate proportionate sentence by reference to all the circumstances of the case. The principle of proportionality was not the point of divergence between the majority and minority, however, for that principle was embraced expressly by Mason J. (with the agreement of Aickin J.) at p 468. The majority decision in *Veen* (No.1) reflected their Honours’ assessment of the particular circumstances of the case; it did not depend on the absence of psychiatric services in New South Wales gaols. Jacobs J. referred to the absence of psychiatric services in order to reject as inapplicable to New South Wales a principle developed in England “that an indeterminate sentence of life imprisonment may be desirable even in a case where the whole of the circumstances of the offence do not on general principles warrant such a sentence”: p 477. In his Honour’s view the English development, which permitted a sentence greater than the principle of proportionality would allow, proceeded from two bases which were interrelated: (1) the prisoner’s mental condition could be kept under constant review and treatment under English conditions; and (2) a longer sentence is required for the protection of the community. As the New South Wales facilities for reviewing and treating mentally abnormal prisoners did not reproduce the English conditions, the first basis could not be matched in New South Wales. But there is nothing in the majority judgments which suggests that the English development should be adopted in this country if and when comparable facilities for the review and treatment of mentally abnormal offenders become available.¹⁵

Mason CJ, Brennan, Dawson and Toohey JJ reject the notion that a sentence may be extended beyond that which is proportionate to offence seriousness and offender culpability on the basis that the offender be kept for treatment, observation or review of a psychiatric condition connected to their offending.¹⁶ The second issue, also relevant to *Veen*’s offending, considers the extent to which an offender’s sentence may be extended in order to protect society from potential future offending:

¹⁴ *Veen v The Queen* (No. 2) (1988) 164 CLR 465, 474.

¹⁵ *Veen v The Queen* (No. 2) (1988) 164 CLR 465, 472.

¹⁶ Today, in NSW and elsewhere, specialist authorities such as the Mental Health Review Tribunal cater for the needs of such prisoners, potentially extending incarceration for relevant offenders who are a danger to themselves or others, as a forensic patient of the state. This mode of imprisonment is distinct from the term of imposed by a sentencing court. See *Mental Health (Forensic Provisions) Act 1990* (NSW) s 55.

The principle of proportionality is now firmly established in this country. It was the unanimous view of the Court in *Veen (No.1)* that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender: see pp 467,468,482-483,495....¹⁷

It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.¹⁸

The High Court is clear in their delineation of the need to protect of society as a factor relevant to the constitution of a proportionate sentence from the extension of an offender's sentence in order to protect society. The latter, Mason CJ, Brennan, Dawson and Toohey JJ conclude, is a form of preventative detention, not permitted under Australian law. The High Court indicate that the difference between the consideration of the need to protect society from potential recidivism and the improper detention of the prisoner by extending a sentence beyond what may otherwise be proportionate to harm and culpability comes down to the acumen of the sentencing judge in their duty to balance competing interests, over the tendency to focus on one of the more aggravating or potentially mitigating factors that may also be relevant to sentence. An intuitive synthesis of the salient issues is thus required:

The plea has been heard by the courts of this country, by adopting the principle of proportionality and by having regard to the protection of society as a factor in determining a proportionate sentence. It must be acknowledged, however, that the practical observance of a distinction between extending a sentence merely to protect society and properly looking to society's protection in determining the sentence calls for a judgment of experience and discernment.¹⁹

The result is a complex task of balancing competing interests such that the final punishment is proportionate to all the characteristics of the offence and offender. This means that a court cannot focus on one or more of the rationales of sentencing, such as rehabilitation, denunciation, general or specific deterrence, or the need to protect society, should that focus not reflect the balance of the competing objects of sentencing. Sentencing proportionately, then, requires the court to consider the full range of issues potentially relevant to sentence. Select factors or circumstances may not be ignored for an emphasis on others, also of material relevance. This, arguably, justifies the fixed-term sentence substituted by the High Court in *Veen (No. 1)* as well as the life sentence imposed by the Supreme Court of NSW and later, by majority, endorsed by the High Court, in *Veen (No. 2)*.

III RECOGNISING VICTIMS' RIGHTS AS MORE THAN POLITICAL IMPERATIVE

The move to integrate the victim into sentencing in a statutory sense is founded upon initiatives fostered in the 1990s to better recognise victims and accord them a prescribed, official status in sentencing law. The impetus behind these changes resides in the greater recognition of crime victims following an offence, both within the justice system, and criminal law more specifically. The 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power brought victim's rights to the fore for many

¹⁷ *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 472.

¹⁸ *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 473.

¹⁹ *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 474.

state and territory governments.²⁰ This is evidenced by the fact that all state and territory jurisdictions have now enacted into legislation a Charter of Victim's Rights or set of guidelines for the treatment of victims in the criminal justice system. The Commonwealth government has recently indicated their intention to provide victims statutory rights in sentencing, specifically with regard to victim impact statement provisions for Commonwealth offences, consistent with those rights available for victims in state offences.²¹ Prospects for a Commonwealth Charter of Victim's Rights has also been raised. This evidences a wholesale movement toward the recognition of victim rights beyond those traditionally recognised at common law.

Courts are also being directed to explicitly consider the victim and the harm occasioned to them not as a matter of general reflection of the part of the sentencing judge, but, at least in terms of the provisions of victim impact statements, through the words of the victim themselves. Issues of the veracity of victim testimony aside,²² this raises specific issues as to how victims may be integrated into sentencing proceedings, especially in the context of those valid arguments concerning the rights of the accused to the determination of a sentence proportionate to the actual harm occasioned to both the victim and society in an objective, factual and unemotional way. However, the interpersonal consequences of an offence may not be able to be easily 'removed' for the purpose of sentencing. Victim interests continue to weigh on the minds of sentencing judges, who continue to grapple with the extent to which they should factor those interests into a proportionate sentence.²³ A question arises, therefore, as to whether the interests of the victim and defendant may be better integrated under a model of restorative justice that calls for the direct participation of both parties as a process relevant to sentence.

IV PROPORTIONALITY IN SENTENCING AND THE RESTORATION OF THE VICTIM

More recently, debate has turned to the extent to which principles of restorative justice ought to inform the sentencing process. Restorative justice has been described variably. It is, however, generally seen to be an alternative process whereby victim and offender are brought together *inter alia* to increase victim participation in a system from which they are otherwise removed. This is said to provide the victim some personal redress and chance of reconciliation, as well as restoring the offender, by exposing them to processes of judgement and sanction, other than those prescribed by the state.²⁴ Examples include victim-offender mediation, youth conferencing, reintegrative shaming, or associated programs of sentencing,

²⁰ GA Res 40/34, Annex, 40 UN GAOR Supp (No 53), 96th Plenary Meeting, 214, UN Doc A/Res/40/53 (1986).

²¹ The Hon Bob Debus, Speech delivered at the *Sentencing Conference 2008*, National Museum of Australia, Canberra, 9 February 2008. Currently, the *Judiciary Act 1903* (Cth) s 68(7-8) provides that the state practice be adopted with regard to Commonwealth offences prosecuted in state courts.

²² Tyrone Kirchengast, 'Victim Influence, Therapeutic Jurisprudence and Sentencing Law in the New South Wales Court of Criminal Appeal' (2007) 10 *Flinders Journal of Law Reform* 143, 143-159.

²³ See, for example, the weighting of the views of the victim as appropriate to sentence in *R v Newman, R v Simpson* [2004] NSWCCA 102. The views of victims become especially problematic where the victim forgives their offender. In such instances, the relevant perspective is that of the community. See *R v Bradford* (NSWCCA, unreported, 6 May 1988) per Street CJ 'It does not of course lie in the hands of a victim to determine what punishment should be meted out for a criminal offence. Punishment can properly be tempered in the light of the victim's attitude. But the community's interest in ensuring law abiding conduct by its citizens must be given due weight when determining the sentence in a case such as this.'

²⁴ L Wolhunter, N Olley and D Denham, *Victimology: Victimisation and Victims' Rights* (2008), 215-232.

such as circle or forum sentencing.²⁵ von Hirsch and Ashworth note that restorative justice is a problematic concept as its aims and outcomes are often so nebulous, that it is difficult to determine whether the bringing together of the offender and victim is successful or not.²⁶ This section will first consider the disconnect between restorative justice and deserts based sentencing before turning to the development of new responses to offending, offered in a model of sentencing constituted in terms of an offender's capacity to engage in processes of restorative justice.

The Rigidity of Deserts Based Sentencing

The problem with the integration of the principles of restorative justice into the sentencing process is that much of the restoration that occurs responds to conditions and circumstances, and involves questions and considerations, not traditionally seen as relevant, least in terms of those considerations indicated in *Veen (No. 1)* and *Veen (No. 2)*. Put differently, restorative justice is not wholly compatible with sentencing within a 'just deserts' model, as programs of restorative justice often require a dialogue between victim and offender that does not fit with conventional techniques of sentencing that requires an independent, objective assessment of the whole of the circumstances of the offence, offender and victim, as construed by an independent judicial officer. Arguably, the requirement of finality in criminal justice versus the need, often, for a lengthier course of assessment in restorative justice, further disconnect the two approaches.

This is not to discount the viability of programs of restorative justice, but rather to comment on the compatibility of current sentencing practices and the ability to include the victim via programs of restoration that bring victim and offender together in novel ways. Much disagreement exists as to the requirement that restorative justice programs be proportionate,²⁷ or even where programs have been designed with proportionality in mind, the extent to which the benefit of restorative justice is compatible with desert based sentencing,²⁸ given the need for expediency and finality in determining a sentence that responds to all 'relevant' circumstances. Many of these circumstances take the view of the community and state, which do not explicitly entertain an individual perspective, such as those of the victim or offender. Any relevant dialogue between victim and offender is thus generally excludable as not fitting those circumstances deemed relevant to objectively proportional sentencing. Tensions therefore exist between individual assessments as to seriousness and culpability, and punishment being seen to manifest the will of the state against offending individuals.

The apparent disconnect between discourses of restorative justice and proportionality therefore lie in the way proportionality calls for fairer, more determinate penalties by restraining punishments that are determined according to arbitrary, inconsistent, subjective or shifting standards of moral blameworthiness. Proportionality thus seeks to limit punishment by reference to characteristics universally accepted as relevant to sentence, while restorative justice may be seen to explore possibilities of individual communication between persons to allow for restorative process which emphasise individual accountability, and which involve reconciling victim interests in ways not necessarily connected to an assessment of the

²⁵ As to Forum Sentencing, see Criminal Procedure Regulation 2005 (NSW) Sch 5.

²⁶ Above n 1, 110.

²⁷ Above n 11.

²⁸ See generally above n 1.

seriousness of the original offence.²⁹ Parity between offences and offenders is thus not a central issue, contrary to proportional sentencing doctrine. An assessment of the requirements of proportionality thus assists our understanding of the possible disconnect between restorative justice and sentencing law, as a means by which we may include victims in the sentencing process. The limiting requirements of proportionality take shape through a set of requirements that call for the consideration of the offence on one hand, and the punishment on the other.

The Ordinal and Cardinal Measurement of Proportionality

In the United States,³⁰ these requirements have been evaluated in terms of a bipartite process of ordinal and cardinal proportionality. Ordinal proportionality requires that like crimes be punished similarly. Cardinal proportionality requires that sentencing options be ranked according to the seriousness of the crime. In short, ordinal proportionality ensures parity between like offences, while cardinal proportionality ranks the sentencing options against the seriousness of each offence. This bipartite process of sentencing, assessing offence seriousness before gauging the most appropriate sentencing option, is assessed by Fox in the context of the development of Australian approaches to sentencing.³¹ It is important to note that von Hirsch represents the development of an American jurisprudence which has not wholly gained favour of the courts in Australia, where courts tend to favour a ‘whole of the circumstances’ or ‘instinctive synthesis’ approach to sentencing.³²

Debate has emerged as to the extent to which desert theory may guide the ordinal ranking of punishment relative to similar offences. Norval Morris,³³ for instance, has suggested that proportionality ought to set the outer bounds, or minimum and maximum punishments, that apply to a particular offence. It is then for the sentencing judge to determine, in the particular circumstances of the case, whether the proportionate maximum or proportionate minimum is applied. In this perspective, it is possible for a sentencing court to exercise considerable flexibility in the ordering of a particular sentence. A judge could order the maximum proportionate sentence to allow rehabilitation or the protection of society, which could be still considered proportionate to a similar offender who requires less rehabilitation, or constitutes no continuing threat to society. Arguably, this perspective allows for the integration of the principles of restorative justice out of the need to recognise the individual circumstances of victim and offender in the context of a program of restorative justice, say conferencing,

²⁹ Above n 1, 113.

³⁰ Above n 1, 75.

³¹ Richard G Fox, ‘The Meaning of Proportionality in Sentencing’ (1994) 19 *Melbourne University Law Review* 489, 507-510.

³² See *R v Williscroft* [1975] VR 292; As to the High Court’s reluctance to rule over the validity of a two stage sentencing process, see *Bugmy v The Queen* (1990) 169 CLR 525, [6], ‘Before us, much of the applicant’s argument focused on the purposes of sentencing, with particular reference to what had been said by this Court in *Veen v. The Queen (No.1)* [1979] HCA 7; (1979) 143 CLR 458 and in *Veen v. The Queen (No.2)* [1988] HCA 14; (1988) 164 CLR 465. Counsel suggested that, since *Veen (No.2)*, a method of sentencing, described as a two-step approach, has developed in the courts. This approach, it was said, involves first determining the outer limit of the sentence and then applying mitigating factors, if any, so as to arrive at an appropriate sentence. It was further suggested that had his Honour adopted such an approach he would have been less likely to fall into error. Such an approach was firmly rejected by the Victorian Court of Criminal Appeal in *The Queen v. Young, Dickens and West* (unreported, 1 March 1990). In the view of that Court, this Court in *Veen (No.2)* “did not have in mind that a sentencer might, let alone should, proceed to arrive at the sentence to be imposed by a staged or structured approach”: at p 11.’

³³ N Morris, *The Future of Imprisonment* (1974); N Morris and F Zimring, *Deterrence and Corrections* (1969).

which meets their individual needs. Within such a perspective on ordinal proportionality, such a sentence would still be considered acceptable, in a judicial sense.

von Hirsch and Ashworth are critical of Morris' perspective on proportionality, however, given the possibility of significantly different punishment for like offences. von Hirsch and Ashworth's perspective seems to leave little room for the flexibility required to sentence according to the ideals of restorative justice. Rather, von Hirsch and Ashworth prefer a model of ordinal proportionality, divisible into three sub-requirements, namely: parity, rank-order, and spacing. Parity requires that like offences receive equal (or at least comparable) penalties. Rank-order requires that punishments be ranked according to the level of severity of the offence. Spacing requires that a court acknowledge the relative gravity of a particular offence against other similar or different offences. Thus if one particular offence is more serious than another similar offence, there should be a larger space between the penalties to reflect that gravity. Cardinal proportionality fits here as a restraint upon arbitrary and capricious punishment out of recognition that harsh punishments, such as life imprisonment without the possibility of parole, ought to be reserved for the most serious violent offences. Alternatively, dismissal of charges may be reserved for low level, minor offences.

This significance of this bipartite approach is it restrains a system of higher-level punishments of significant devaluation being anchored to the less serious offences. It does this out of recognition that such disproportionate linking of punishments would encourage disrespect toward these higher-level punishments, and punishment more generally, such that higher-level punishments may indeed fail to deter lower level offending. Desert theory thus provides a framework in which the different types of punishments may be scaled according to impact on liberty, and correlated against the ordering of offences in terms of offence seriousness and culpability.

Gauging Seriousness, Culpability and Severity of Punishment

The integration of the principles of restorative justice into a sentencing framework constituted under the doctrine of proportionality is further constrained by a deserts model of ordinal and cardinal proportionality. Each perspective on proportionate sentencing requires strict adherence to the gauging of the seriousness of the offence and matching that to an appropriate punishment, offered on a scale of appropriate sentencing options. The changeability of programs of restorative justice does not fit well within this rhetoric.

Restorative justice aims to reconcile harms occasioned to the victim by exposing the offender to the consequences of their wrongdoing. The exact scope of the techniques and programs used to reintegrate offenders, in terms of the way such programs often respond to individual circumstances of offending, may thus differ significantly between each case. Whether restoration be by way of shaming an offender in public, or by private mediation between victim and offender, the exact nature of the process will vary depending on the commitment of the offender to the aims of the program, level of participation of the victim, the seriousness of the original offence, and the seriousness of the harms occasioned to the victim and others. Whether restorative justice as an ameliorative program is indeed taken seriously against or alongside other harsher, non-voluntary or imposed punishments, such as incarceration, may also play a role. The possibility exists, therefore, that the objects of restorative justice may be quite onerous for one offender, and not for another. This goes toward the difficulty of coalescing programs of restorative justice, and the likely effects of them, with factors

informing offence seriousness and offender culpability, currently recognised under the doctrine of proportionality.

This means that in order to integrate the victim into a sentencing model that explicitly takes the needs of the victim into account, the aims of restorative justice must be made relative to the ambit of the doctrine of proportionality as the constitutive principle of the sentencing process. This is certainly the perspective which informs our current integration of victim rights into the sentencing process. Proportionality requires the court to consider the harm occasioned to the victim as one of the factors that is relevant to the final sentence to be imposed upon the offender. An assessment of the specific harms and injuries occasioned to the victim is directly relevant in order to gauge the level of seriousness of the offence. An assessment of the general harms occasioned, such as harm done to the community as a result of the offence, is also relevant. The issue for victims, however, is not so much that harm is relevant or not – it is a widely accepted point that any sentencing court is under a general duty to consider the level of harm occasioned to the victim. The issue for victims goes toward the extent to which the assessment of harm may be informed by the victim themselves. This is currently considered through testimony adduced at trial as to those injuries and traumas the victim has suffered, or by a victim impact statement adduced after conviction but before sentencing.

Responding to the needs of victims, von Hirsch and Ashworth articulate a framework for gauging seriousness and culpability as related to ‘living standards’. The general premise of proportionality requires that penalties are determined in accordance with the seriousness of the offence. As to the ranking of the seriousness of offences, von Hirsch and Ashworth indicate that consensus exists as to the comparative gravity of most offences.³⁴ There is weaker consensus as to the comparative gravity of types of punishment as they attach to particular levels of seriousness.³⁵ Offence seriousness is partly resolved by the substantive aspects of the criminal offence. Whether an offence is commissioned with intent, recklessness or negligence will provide clues as to the relative gravity of the wrongdoing. For the purpose of sentencing, however, finer qualifications need to be drawn as to the consequences and impact of the criminal behaviour. Indeed, the substantive criminal law offers little assistance to an assessment of relative degrees of harm as it applies to offence seriousness. von Hirsch and Ashworth indicate that harm may be assessed in terms of that rank proffered by Nils Jareborg – a ranking of harm in terms of the extent to which it detracts from a victim’s living standard.³⁶ von Hirsch and Ashworth indicate how the victim is central to such a model:

The suggested analysis begins with parcelling out the various kinds of interest dimensions that offences typically involve; after these are thus identified, their importance is judged by assessing their significance for the living standard. Most victimizing offences involve more or more of the following interest dimensions: (1) physical integrity, (2) material support and amenity, (3) privacy, and (4) freedom from humiliation.³⁷

von Hirsch and Ashworth indicate that in order to best assess harm, a judicial officer must consider each criterion of harm successively. This will allow harm to be construed in terms of the extent to which it interferes with a victim’s sphere of physical and personal liberty, compared to more minor offences which may interfere with a victim’s right to peace or

³⁴ Above n 1, 143.

³⁵ Above n 1, 147.

³⁶ Above n 1, 144; A von Hirsch and N Jareborg, ‘Gauging Criminal Harm: A Living-Standard Approach’, (1991) *Oxford Journal of Legal Studies* 11, 1-38. Also see above n 31, 499.

³⁷ Above n 1, 145.

personal property. Thus, a steal from the person which may involve no physical interference with the person may be adjudged less severe than a robbery which involves an assault and larceny, and at least a degree of putting fear, physical interference or injury to the person.

Gauging the gravity of sentencing options as correlates of levels of offence seriousness is less certain. The issue is not whether types of punishments can be ranked in terms of their relative punitiveness. Incarceration for life is generally seen to be more severe than a lengthy fixed-term sentence of imprisonment, which would be considered more severe than periodic or home detention, or a suspended sentence or non-custodial term. von Hirsch and Ashworth argue for an 'interests analysis' ranking the degree to which the punishment intrudes upon the interests of the offender. von Hirsch and Ashworth indicate:

The more important the interests intruded upon by a penalty are, on this theory, the severer it is. Penalties would be ranked according to the degree to which they typically affect a punished person's freedom of movement, choice regarding his activities, choice of associates, privacy and so forth.³⁸

Proportionality therefore provides opportunities for the victim so long as the interests of the victim are factored into or made relevant to those characteristics related to the assessment of the seriousness of the offence and offender. There definitely seems to be room for such considerations in terms of assessments of offence seriousness, and even in terms of ranking the gravity of penalties, which focus on the impact of the penalty on the offender *a priori*. Victim interests could be said to be directly relevant to the ranking of penalty where the penalty or sentence is of material relevance to the victim. Imprisonment, for example, may be partially justified by the need to incapacitate an offender to stop them from interfering with a victim, or from engaging in a course of future offending. Other penalties may integrate victim interests in a more direct way. Intervention programs, for example, may connect the victim with the offender in a conference or act of restitution. The increased use of such interventions as potentially proportionate restorative processes of sentencing is discussed below.

It is clear that victim interests may be at least partially relevant to the determination of offence seriousness and the choice of penalty attached to it. It seems that courts already consider the perspective of the victim when determining the most appropriate sentence for an offender. This is most aptly demonstrated where the victim forgives their offender, calling for the reassessment of both seriousness and relevant penalty. In *R v Bradford* (NSWCCA, unreported, 6 May 1988), for instance, the victim as wounded by her husband when she indicated that she was going to leave him. The husband also slashed his own throat and wrists in an attempt to commit suicide. The husband recovered and was charged with the malicious wounding of his wife. He was successfully prosecuted, but the couple reconciled before sentencing. Bradford's wife forgave him and they resumed living together. In sentencing the offender, Street CJ indicated that although the attitude of the community ought to prevail, there was room, in these circumstances, to consider the attitude of the victim as a circumstance relevant to sentence.

Proportionality and Restorative Justice Combined

A reoccurring problem in restorative justice is the extent to which such programs be seen to constitute the actual sentence of the offender. Should restorative interventions be characterised as an adjunct to the sentence imposed from a sentencing court, then there is no

³⁸ Above n 1, 147.

requirement that the program agreed to by victim and offender be proportionate to the seriousness of the offence and culpability of the offender in the first instance. In effect, a voluntary program of restorative justice agreed to by victim and offender, such as mediation, need not be proportionate as it sits in addition to the actual sentence imposed by the state. In this sense, the program agreed to is neither a sentence nor a punishment, as conventionally understood. Should, however, a program of restorative justice comprise all or part of the actual sentence imposed by a sentencing court the issue arises as to the veracity of the restorative justice process as proportionate to the moral blameworthiness of the offender. Braithwaite has indicated that processes of restorative justice need not be proportionate to offence seriousness and offender culpability, and in any event,³⁹ debate abounds as to whether processes of restorative justice ought to be characterised as ‘punishment’ in the first instance, and thus subject to the requirements of proportionality.⁴⁰

The issue as to whether a particular program of restorative justice, as a program factored into the actual sentence of the offender, is proportionate to offence seriousness and offender culpability has been addressed by von Hirsch and Ashworth (with Clifford Shearing), under the self-titled model ‘Making Amends’. The characteristics of this model attempt to bring balance between the competing ideas of restoration and proportionality either not addressed, or deemed not relevant, to other models of sentencing comprising restorative ideals. The mechanics of this model are constituted by a negotiation between the offender and victim which involves: a) an explicit acknowledgement of fault; and b) an apology from offender to victim, generally conveyed through some reparative task. The model does not seek to impose a punishment or censure on the offender, and as such does not technically fit within the concept of punishment developed under ‘desert’ theory. The punishment, or rather, negotiated outcome and act of reparation, is not determined nor imposed authoritatively by a sentencing court. The type of reparation to which an individual offender is exposed to would thus vary, potentially significantly, between offences. The issue here is one of dialogue and restoration. As a result, von Hirsch and Ashworth claim that this model ought to be considered a form of proportionate moral discourse, one that connects offender and victim in the negotiation of an act of reparation, significant to both parties involved. An act of reparation would, for von Hirsch and Ashworth, indicate concern for the interests of the victim rather than provide an opportunity for pecuniary gain or settlement, discharging the offender of their moral obligation. Importantly, an act of reparation would see a dialogue develop between victim and offender that is not limited to a once-off hearing or conference.

The significance of the ‘Making Amends’ model for von Hirsch and Ashworth is that unlike other restorative justice programs which may be voluntary, and thus not required to be proportionate to the moral blameworthiness of the offender, ‘Making Amends’ would be imposed on the offender. This imposition is valuable as it would require the offender to acknowledge fault and in so doing, offer an act of reparation that would involve an act of deprivation on the part of the offender, either in terms of property or personal freedom. Should the offender not wish to comply with the model, they would face whatever course of judicial action ordinarily facing them – a sentencing process in which the full array of sentencing options is available to the court. Arguably, von Hirsch and Ashworth are proposing a mode of alternative dispute resolution based on the principles of restorative justice. This model does go some way toward recognising moral culpability and as such has the potential to be proportionate to the level of moral blameworthiness of the criminal act or

³⁹J Braithwaite, ‘Principles of Restorative Justice’, in A von Hirsch, J Roberts, E Bottoms and M Schiff (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (2003), 1-20.

⁴⁰Above n 10, 136-156.

incident to which it responds. von Hirsch and Ashworth indicate, however, there are limits to which this model may be subject to an evaluation in terms of the ordinal and cardinal proportionality requirements of punishment and issues persist as to the degree to which a 'Making Amends' model may be appropriate for anything more than lower level, petty offences.

V INTEGRATING THE VICTIM IN COMMON LAW AND STATUTE

The states and territories of Australia have each enacted various means by which victim interests may be factored into sentencing in an explicit way. Both involve legislative reiteration or amendment of the common law, which has always recognised that the harm done to the victim is an important factor, to be represented in a proportionate sentence.⁴¹ The issue here is that this harm must be constituted by the judicial officer sentencing the offender on that occasion, such that the sentence ought not be informed by the victim personally. An issue remains, however, as to the extent to which the interests of the victim ought to be weighted into a sentence and whether this weighting, if disproportionate to the other factors of the offence and offender to be considered, is permissible on the basis of a statutory modification of the common law.

Three main initiatives have been endorsed by the states and territories to better reflect victim interests in sentencing. The first, the availability of victim impact statements tendered after conviction but before sentencing.⁴² The second, explicit reference in the sentencing legislation of each state and territory to the harm caused to the victim.⁴³ And third, the inclusion of the victim in circle or forum sentencing.⁴⁴ These modes of integration will be considered in terms of their capacity to encourage a restorative response within traditional approaches to sentencing, with a particular focus on the NSW context.

Victim Impact Statements

Much has been written on the scope of victim impact statements internationally and I will only seek to highlight the characteristics of this debate here. All common law and code jurisdictions of Australia, New Zealand, Canada, the United States, England and Wales and Ireland allow for the tenure of victim impact statements ('victim personal statements' in England and Wales) after conviction but before sentencing. Victim impact statements provide primary victims, or family victims in cases of homicide, the opportunity to indicate the stress, trauma and injury an offence has caused, in their own words. The ability to draft an impact statement has thus been said to provide victims an opportunity to inform the sentencing court as to the broader injuries sustained as a result of the offence, information that may otherwise not be in evidence.⁴⁵

⁴¹ *Siganto v The Queen* (1998) 194 CLR 656.

⁴² *Sentencing Act 1991* (Vic) s 95A; *Sentencing Act 1995* (WA) s 26; *Crimes Act 1900* (ACT) s 343; *Sentencing Act* (NT) s 106B; *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Sentencing Act 1997* (Tas) s 81A; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28; *Criminal Offences Victims Act 1995* (Qld) s 14.

⁴³ See above n 6.

⁴⁴ See below n 54.

⁴⁵ See above n 22.

Victim impact statements are usually written by the victims themselves, who may be assisted by a witness assistance or court services officer, counsellor, social worker, or psychologist. The prosecution will usually tender the statements before the court, who may seek to modify the content of the statement to exclude comments or remarks that are likely to detract from the merit or gravity of the statement. Examples include instances where the victim recommends a particular punishment, such as that the offender should be imprisoned, or that they serve a lengthy sentence. With the exception of the Northern Territory where such recommendations are expressly permitted,⁴⁶ such decisions are generally left for the sentence court. As a result of the uncertain evidential status of impact statements, most jurisdictions are now moving toward the position that statements be sworn by the victim, who may be subject to potential cross-examination should new facts be presented to the court which, when taken into account, aggravate the sentence of the offender.

The therapeutic benefits of the tenure of victim impact statements are widely realised in the academic literature.⁴⁷ Such restorative benefits are also realised at common law, though such therapeutic benefits may not be taken into account in sentencing.⁴⁸ Erez outlines the general benefits of tendering an impact statement as including the participation of the victim who may otherwise be removed from proceedings altogether. In certain jurisdictions such as NSW, this now includes the ability to read a statement aloud to the court, on the direction of the sentencing judge.⁴⁹ Anecdotal evidence suggests, however, that therapeutic benefits are likely to be increased where the court actually takes the impacts elaborated upon into account in sentencing the offender.⁵⁰ This raises an issue central to this article: whether it is possible to consider the restorative benefits of victim impact statements as part of a proportionate sentence? Is an offender's capacity to respond to discourses of restorative justice something that ought to be part of a proportionate sentence, and can a victim impact statement indicate this capacity? Due to the nature of current sentencing proceedings victim impact statements are limited as a form of evidence that tells of the harm occasioned to the victim, from their perspective. It does allow for the personal input of the victim, but does not allow for any personal engagement between victim and offender. This may be appropriate given that impact statements can be submitted for extremely serious offences, such as sexual assault and homicide offences, where the victim (or their family) may not wish to confront the offender.

It is also worth noting that a strictly doctrinal approach would argue against the possibility that victim impact statements ought to change the head sentence of the offender on the basis of a supposed therapeutic benefit. The doctrinal perspective, in particular that adopted in NSW with regard to homicide offenders, argues against any modification of sentence on the basis that a family victim impact statement is presented.⁵¹ While this ruling is not endorsed by the other states and territories of Australia, all jurisdictions grapple with the extent to which such statement ought to contribute to the determination of an appropriate sentence.

⁴⁶ *Sentencing Act* (NT) s 106B(5A).

⁴⁷ E Erez, 'Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings' (2004) 40 *Criminal Law Bulletin* 5, 483, 491-498; I Edwards 'Victim Participation in Sentencing: The Problems of Incoherence' (2001) 40 *The Howard Journal of Criminal Justice* 1, 43; T Booth, 'The Dead Victim, the Family Victim and Victim Impact Statements in New South Wales' (2000) 11 *Current Issues in Criminal Justice* 3, 292, 296.

⁴⁸ *R v FD; R v FD; R v JD* (2006) 106 A Crim R 392.

⁴⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A.

⁵⁰ Above n 47, 491-498.

⁵¹ See *R v Previtera* (1997) 94 A Crim R 76, 86.

Express Statutory Recognition

Each of the states and territories of Australia have moved to explicitly refer to the harm occasioned to the victim of crime as an appropriate consideration in sentencing. It is arguable whether the legislative inclusion of the victim seeks to raise any new grounds for considering the due punishment of the offender. Rather, general reference to the harm occasioned to the victim may merely remind a sentencing court that it is now 'politically' appropriate to refer to victim interests in sentencing. The extent to which general reference to the victim, included in the introductory sections of each of the statutes consolidating sentencing law across the states and territories of Australia,⁵² modifies the common law requiring a court to take account of the harms occasioned to the victim in an objective way, is debatable. Other sections have been included indicating the extent to which harm done to particularly vulnerable victims, such as children, or where a high degree of harm is occasioned, be taken to be an aggravating feature of sentence. Again, however, the extent to which the common law would ordinarily regard such evidence as aggravating, or whether such express statutory recognition presents something new to be considered by sentencing courts, is arguable.

In terms of the NSW reference to the victim, general reference to the harm done to the victim and community falls under s 3A(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW):

3A Purposes of sentencing

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

...

(g) to recognise the harm done to the victim of the crime and the community.

The inclusion of this section in the *Crimes (Sentencing Procedure) Act 1999* (NSW) has raised issues as to the extent to which harm to the victim may now be considered part of the harm done to the community and has brought to the fore the potential relevance of victim impact statements provided by family members in homicide cases. *R v Previtara* (1997) 94 A Crim R 76 prohibits the use of victim impact statements in homicide cases out of respect to the equality of human life, ruling that deceased victims ought not be accorded some special or higher value because an impact statement is tendered in sentencing proceedings. *R v Berg* [2004] NSWCCA 300 and *R v Tzanis* [2005] NSWCCA 274 challenge this assumption on the basis of the modification of sentencing law in 2002 by the introduction of s 3A(g) has raised concerns that *Previtara* may now need to be revisited on the basis that family impact statements may be taken to represent the community's reaction to crime, and thus be relevant to an objective and proportionate assessment of the harm caused as a result of the offence. Whether s 3A(g) actually modified sentencing law or not has yet to be determined by the NSWCCA.

Otherwise victims are accorded status within NSW sentence legislation on the basis of the recognition of harms that ought to aggravate sentence. Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) refers to victims in various contexts. It seeks to draw a courts attention the vulnerability of various types of victims (for example, because of the age of the victim) or victims of special status (for example, where the victim was a police officer, emergency services worker, correctional officer, etc.) or for other reasons (for example,

⁵² See above n 6.

because the injury, emotional harm, loss or damage caused by the offence was substantial). The various subsections referring to the interests of the victim are extracted below:

21A Aggravating, mitigating and other factors in sentencing

(2) Aggravating factors The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

(a) the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work,

...

(cb) the offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance,

...

(eb) the offence was committed in the home of the victim or any other person,

...

(g) the injury, emotional harm, loss or damage caused by the offence was substantial,

...

(h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),

...

(k) the offender abused a position of trust or authority in relation to the victim,

(l) the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant),

(m) the offence involved multiple victims or a series of criminal acts,

The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.

Reference to the victim in this context encourages appropriate weight to be given to victims in sentencing, particular where the harm done to the victim increases the nominal seriousness of the offence. There is nothing included in s 21A that would not otherwise be available as a factor aggravating sentence at common law, but the statutory inclusion of victims in this way does seek to highlight the plight of the crime victim in a sentencing process that may otherwise focus on the culpability and seriousness of the defendant, including circumstances that may mitigate sentence, without recognising the various detailed ways in which harm may be aggravated by reference to the vulnerability or status of certain victims.

Whether this reference to victims is enough to bring victim interests into the sentencing process is questionable. Certainly, s 21A goes some way toward recognising the various vulnerabilities of victims but does little to modify the common law approach that calls for the court's assessment of the harms occasioned to the victim without any input from victims

personally. Other than evidence of the harms occasioned as provided in evidence at trial, or through impact statement on sentencing, the s 21A considerations may be satisfied by reference to harm adduced through forms of evidence that do not involve victims at all, let alone call for their assessment or input on the impact of the crime upon them. Engagement between the victim and offender is not provided for other than the possibility of the offender being confronted by those harms to the victim that they have not otherwise contemplated or realised as flowing from the course of their offending.

Forum and Circle Sentencing

As a result of the need for certainty, most sentencing courts only deal with restorative justice as a factor relevant to sentencing when such programs are offered as an intervention program.⁵³ Innovative sentencing programs, such as circle or forum sentencing,⁵⁴ also encourage the participation of victims. Such forms of sentencing replace the traditional sentencing hearing. Rather, offenders are invited to participate in a sentencing ‘conference’ inclusive of the police, victim and other relevant members of the community. In the case of circle sentencing, this also involves Aboriginal elders. The sentencing process is thus extended to include a conference of relevant participants such that the sentencing process itself may well aid the restoration of offender and victim, but would otherwise provide for a sentence that includes the input of the offender personally, rather than a removed adversarial process prescribing an appropriate punishment.

Circle or forum sentencing is predicated on the basis of encouraging a dialogue between victims and offender, allowing the court to make more definitive judgements as to the state of the offender’s contrition, rehabilitation and likely level of recidivism as a result of their willingness to discuss their offence openly, with contrition. These types of assessments fit well with the requirements of proportionality, even the more restrictive version of ordinal proportionality put forward by von Hirsch and Ashworth. Many of these types of intervention programs, however, do not engage a dialogue between victim and offender that is ongoing unless a separate act of reparation bringing offender and victim together is agreed to, and approved by the magistrate. This is in no way seen to be a limitation of such a program, which contributes significantly toward establishing a dialogue between victim and offender compared to traditional processes of sentencing before a judicial officer sitting alone. At the very least, such modes of sentencing encourage participation from a variety of sources, the victim included, and encourage the participation of the victim as an active agent of justice able to participate on their own motion. The requirement in *R v P* that the victim act through a prosecutor appearing in the public interest is overcome.⁵⁵ The therapeutic benefits of appearing before a circle or forum are generally assumed as benefiting the victim. It should be noted, however, that just as the capacity to draft and read aloud an impact statement has at least some recognised therapeutic benefits for victims,⁵⁶ the participation of the victim in these alternative modes of sentencing may also encourage therapeutic results. The issue

⁵³ In NSW, intervention programs may be offered under s 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Section 11 allows a court to adjourn sentencing proceedings for up to 12 months while the offender attend an intervention program, such as alcoholics anonymous, road safety classes, or anger management, to provide the offender the opportunity to show the court, upon final sentencing, that the offender is indeed committed to their rehabilitation and is making progress toward that ideal. These types of programs, depending on their scope and context, may or may not fit the general definition of restorative justice.

⁵⁴ Attorney-General’s Department (NSW), *Forum Sentencing: Facing up to Crime* (2008).

⁵⁵ See above n 8.

⁵⁶ See E Erez, above n 47. Though only to the extent that a victim’s statement is taken seriously by the court.

remains, however, as to the extent to which the potentially subjective content of victim input may be deemed relevant to sentence and further still, the extent to which the forum, or intervention plan arising out of the forum, actually constituted the sentence of the offender.

The operating procedure on forum sentencing provided by the Attorney-General's Department NSW indicates that the 'intervention plan' agreed to by participants at the forum (specifically between offender and victim) may constitute the sentence of the offender once it is approved or affirmed by a magistrate.⁵⁷ Following successful negotiation before the forum, a magistrate may approve an intervention plan and formally sentence an offender using the following sentencing options available under the *Crimes (Sentencing Procedure) Act 1999* (NSW):

When the Magistrate has considered and approved the draft intervention plan, he or she makes an "intervention plan Order".

The Court (via the Court Officer) is to notify the Program Administrator of the terms of any intervention plan Order, which will include the date by which the plan must be completed.

An intervention plan Order can be any of the following Orders:

- (a) a grant of bail that is subject to a condition referred to in section 36A (20)(b) (i) on the Bail Act 1978
- (b) an Order referred to in section 10 (1) (c) of the Crimes (Sentencing Procedure) Act 1999,
- (c) an Order referred to in section 11 (1) (b2) of the Crimes (Sentencing Procedure) Act 1999, or
- (d) an Order providing for an offender to enter into a good behaviour bond that contains a condition referred to in section 95A (1) of the Crimes (Sentencing Procedure) Act 1999

In other words, the intervention plan Order may be an actual sentence (such as a bond) or a further deferral of sentencing.⁵⁸

However, little guidance is given in terms of the proportionality requirements of such interventions, other than that the victim, offender or magistrate may not be willing to agree to an intervention plan that is disproportionate to the harm occasioned as a result of the offence. Otherwise, given that repeat offenders or serious offences are excluded from the program in the first instance,⁵⁹ most intervention programs agreed to would not be responding to offences of a high level of seriousness or recidivist offenders. Offences such as those including acts of violence, serious drug offending or homicides are excluded from the program. This means that the interventions agreed to may not need to be strictly proportionate given that it is more likely that an offender will over-commit if willing to participate, given that they would otherwise be facing a term of imprisonment, and that the final order of a dismissal of charges with a bond restriction or a 12 month intervention program would generally be unavailable.

Having said this, new programs such as forum sentencing are a step in the right direction if the discourses of restorative justice and proportionality are to be connected. Forum sentencing will generally only be considered as a relevant option where the offender is likely to be sentenced to a term of imprisonment. The fact that, following the negotiation of a reasonable intervention plan, an offender is then sentenced to a dismissal of charges with a bond or intervention order is indicative of the fact that the offender's *capacity to respond to discourses of restorative justice* has been factored into a proportionate sentence. As a case in

⁵⁷ Attorney-General's Department (NSW), *Forum Sentencing Operating Procedure* (2008).

⁵⁸ *Ibid*, 29.

⁵⁹ Criminal Procedure Regulation 2005 (NSW) Sch 5, cl 7. For a list of offences for which intervention programs are appropriate, see *Criminal Procedure Act 1986* (NSW) s 348.

point, forum sentencing demonstrates how such disparate measurements of punishment, restoration and proportionality, can be seen as an appropriate response for lower level offences where a term of imprisonment may have been originally contemplated.

VI PROPOSING A RESTORATIVE MODEL OF PROPORTIONALITY

Proportionality considers competing interests that go toward ranking the conduct of the offender on a calendar of potential criminal offending. As such, only ‘worst case’ offences are deserving of the severest punishments. *Veen (No. 1)* and *Veen (No. 2)* reiterates the significance of this balanced approach to sentencing. As a result, it is a decision which is both widely respected and applied. Out of concerns over highly recidivist offenders such as habitual or repeat sexual offenders not prone to rehabilitation, the doctrine of proportionality has been modified to allow for a particular focus on the protection of the community. In such instances, extending a period of imprisonment to incapacitate such ‘dangerous’ persons may be warranted and indeed be seen as proportionate, given that the evidence which warrants the extended period of detention needs to be, in terms of the test outlined in *Veen (No. 2)*, more than sparse or anecdotal. As a result, even supposed deviations from the principle of proportionality may well be proportionate, in all the circumstances of the offender.

Having said this, the integration of victim interests alongside those of the accused has been diminished by the need to construe offence seriousness and offender culpability in an objective and proportionate way. This has certainly plagued the use of victim impact statements as a scheme designed to help integrate the interests of the victim into sentencing. The harm occasioned to the victim is deemed relevant, but only so long as that harm is consistent with a detached, independent view of the nature of the injuries sustained. Thus victim impact statements have run into trouble as acceptable forms of evidence as they present the sentencing court with potentially subjective viewpoints on injuries and traumas that are not consistent with a balanced approach to sentencing. Evidence from victims may also be unduly punitive, with a tendency to seek punishments that may be informed by a desire for revenge or retribution. As such, victims have been deemed poor sources of information upon which to construe a sentence that is proportionate to all ends of sentencing, because of their proximity to and subjective perspective on the offence.⁶⁰

In order to move beyond these debates, this article proceeded on the basis that the capacity of the offender to engage in processes of restorative justice, connecting victim and offender in a personal context, is an important aspect of criminality to be factored into sentence. Capacity to enter into a restorative intervention ought to be a circumstance relevant to the determination of a proportionate sentence. This emphasis on restoration eschews a focus on the state as the constitutive site of criminality, for an interaction between the offender, victim and other relevant parties, to constitute criminality as between various relevant agents of justice. This may mean that information and evidence otherwise readily excludable from ordinary sentencing proceedings, information from the victim as to the impact of the offence upon them for example, may now be considered relevant to a process of restoration connecting victim and offender. This process, and the terms of any condition that results, could be considered relevant to the choice of punishment and, specifically, whether that punishment is a proportionate response to the offending in the first instance.

⁶⁰ See above n 9.

The means through which an offender's openness to processes of restoration may be factored into sentencing may vary. Despite being limited to minor offences, processes of circle and forum sentencing provide an opportunity through which offender and victim may be engaged directly, in a constructive way. For more serious offences, the victim impact statement scheme may suffice, given the need to take more care where the harms caused are more devastating to victims. In such instances, it may not be appropriate to conference the victim with the offender, although even mediation for family members of homicide has proven therapeutic.⁶¹ For other offences to the person, such as sexual and indecent assault, conferencing may be less desirable given the highly personal and confronting nature of the offending. This presents a difficulty in the current approaches adopted, least in terms of offering a general principle of sentencing coalescing proportionality and restorative justice. It seems that currently, two 'conventional' sentencing processes are open to offenders and victims, specifically, conferencing as an intervention program for less serious offences, and victim impact statements for more serious offences.⁶²

For less serious offences, where the intervention program may well constitute the entire sentence of the offender, the immediate issue regarding the integration of proportionate sentencing and restorative justice goes toward the extent to which restorative interventions are proportionate to the harm occasioned to the offender. This is a highly relevant consideration if we are to consider restorative interventions as appropriate sentencing options, rather than adjuncts to the sentencing process. For more serious offences, the processes through which victim impact statements may be presented, however, preclude any interaction of victim and offender. In such instances, until the suitability of conferencing or forum sentencing is resolved for serious offences, any response an offender has to the content of an impact statement may be taken as indicating their capacity to appropriately respond to restorative discourse. In this sense, the response of the offender convicted of a serious offence (whether presented personally or through counsel) may be factored into sentence much like genuine contrition is seen to mitigate sentence, in appropriate circumstances. Although this process may not compare equally to conferencing, it may be the most appropriate means by which an offender's capacity to engage in restorative processes is assessed for the time being. Further research into the appropriateness of conferencing for serious interpersonal offending is clearly needed, and the debate as to the appropriateness of restorative justice interventions for such offences is ongoing.⁶³

Given that restorative interventions clearly take varying forms, it may be more appropriate to consider, in determining an appropriate sentence in a consistent way, *the extent to which an offender is open to the possibility of a restorative intervention*. The actual sentence of the offender, as a sentence proportionate to all relevant circumstances, can then be determined with regard to restorative discourses that bring various stakeholders of justice together. This

⁶¹ See JW Kay, 'Murder Victims' Families for Reconciliation', in D Sullivan and L Tiffit (eds) *Handbook of Restorative Justice* (2008) 231.

⁶² Note that victim impact statements can be tendered for certain minor offences, although a conference or intervention would obviate the need for such a statement. The other means of integrating victim interests, for example, under ss 3A(g) or 21A of the *Crimes (Sentencing procedure) Act 1999* (NSW), do not call for the direct participation of the victim.

⁶³ For example, disparity characterises the debate as to the appropriateness of conferencing and other alternative means of restoration for victims of child sexual assault. See C Daly, 'Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases', (2006) 46 *British Journal of Criminology* 2, 334-356; A Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 3, 359-378; C Daly, 'Setting the Record Straight and a Call for Radical Change: A Reply to Annie Cossins on Restorative Justice and Child Sex Offences' (2008) 48 *British Journal of Criminology* 4, 359-378.

makes for a sentencing regime that is open, rather than closed, to the possibility to individual as well as state-based assessments of liability. The benefit of this model is that the restorative intervention can take any number of varying forms. The difficulty in this approach is gauging the extent to which an offender is genuinely open to restorative processes and the weight this be accorded in the whole of the circumstances of the offence.

Capacity to engage in restorative justice, as a circumstance relevant to a proportionate sentence, would however take the focus off the type of restorative intervention and thus overcome the current dilemma between different approaches for less and more serious offences. This may be the restorative intervention itself, or for more serious cases, a nominal 'punishment' plus the act of restoration agreed to by the offender. Should the offender be not willing to consider a restorative intervention, then they would not be able to take advantage of the sentencing discount that is deemed appropriate in the totality of the circumstances of the case. As the focus is on the capacity to engage in restorative discourse, offenders convicted of serious interpersonal offences in the higher courts could be sentenced according to the same principles as those convicted of petty offences in the local court. Consistency in sentencing, across different offences as dealt with by different courts, is thus preserved on a principled basis.

The final issue to consider is the extent to which restorative justice ought to be a characteristic of a proportionate sentence where an offender is not open to it. That is, where an offender does not enter a guilty plea, is convicted, and despite that conviction, continues to shows little contrition for the offence and in any event does not want to engage in a restorative intervention with the victim(s). In such circumstances, assuming an appropriate process of restorative justice is available to the offender, should an offender's lack of willingness be factored into sentence? We must proceed most carefully here. Would a lack of willingness be a circumstance that calls for a heavier sentence? On one view, a heavier sentence, say a lengthier term of imprisonment, may give the offender a longer time to consider the relevance of restorative justice which, if taken up, may then be factored into parole. Having said this, the High Court has indicates that sentencing courts ought not extend a sentence to 'educate possible offenders in the penalties attached to proscribed conduct'.⁶⁴

The High Court has addressed this issue in the context of a sentence imposed merely to educate the public against a criminal act, in the case of *Walden v Hensler*, of an Aboriginal person keeping protected fauna without a licence:

But when a law proscribes conduct which an ordinary person without special knowledge of the law might engage in in the honest belief that he is lawfully entitled to do so, the secondary deterrent purpose - that is, the purpose of educating both the offender and the community in the law's proscriptions so that the law will come to be known and obeyed - must be invoked to justify the imposition of a penalty for breach. In such a case, care must be taken in imposing a penalty lest the offender be made to shoulder an unfair burden of community education.⁶⁵

Some room to proscribe an additional penalty where an offender is not willing to undertake a course of restorative justice may be available under *Walden v Hensler*, on the limited basis that it is a community expectation that an offender be open to some process of restoration, following their crime. This would be consistent with an offender showing a lack of contrition, which any sentencing judge is entitled to take into account in determining an appropriate

⁶⁴ *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 472.

⁶⁵ *Walden v Hensler* (1987) 163 CLR 561, [13].

sentence. However, much like the added burden of community education raised by Brennan J in *Walden v Hensler*, it may not be fair to expect that an offender engage with their victim with a view to agreeing to some restorative process or outcome, even if it comes to be widely expected on the part of the community. Indeed, such requirements may be counterproductive for both offender and victim.

Save concurrence with the principles of restorative justice as detailed here, there is no principled basis upon which to extend an offender's sentence beyond that which is proportionate to all circumstances. Also, given that detailed programs connecting restorative justice and proportionality are just emerging into Australian sentence courts, and are inconsistent across the states and territories to any extent, offenders ought to be afforded the benefit of the doubt and their sentence not increased to reflect non-participation. This means that the 'modified' doctrine of proportionality put forward here would need to be subject to an immediate caveat, to perhaps be reviewed at a later time when restorative processes are adopted universally, or at least more broadly. Even then, it may be more appropriate to view participation in restorative justice as a circumstance limiting sentence. This clarification aside, the potential benefit of restorative discourse within the traditional approaches to punishment and sentencing extend to various agents of justice the capacity to participate in a process that has otherwise marginalised them, for the good of victims, offenders and the community at large.