

# Common Law Sentencing of Mentally Impaired Offenders in Australian Courts: A call for coherence & consistency

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**Abstract:** *This paper discusses the common law sentencing of mentally impaired offenders in Australian courts. In Part A, the author discusses the significant correlation between mental impairment and crime. In Part B the author considers how courts have used different sentencing purposes (incapacitation, rehabilitation, deterrence and proportionate retribution) in determining appropriate sentences for this class of offender. The author highlights the inconsistencies that have developed within and between jurisdictions. In Part C the author argues that the inconsistencies have arisen as a result of the theoretically incoherent use of general deterrence, rather than proportionality, as a site for the consideration of diminished offender culpability.*

The mental health of an accused offender is an issue which might arise for consideration at various stages of the criminal justice process. As a procedural matter, it has gatekeeper relevance for the accused's fitness to stand trial.<sup>1</sup> Substantively, the accused's mental health may have relevance to the element of specific intent<sup>2</sup> and, more obviously, to defences such as insanity<sup>3</sup> and diminished responsibility.<sup>4</sup> Comparatively, the relevance of mental impairment to sentencing receives less academic attention, despite the broader range of potentially relevant mental conditions and the larger number of accused persons potentially affected.<sup>5</sup>

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<sup>1</sup> *Eastman v R* (2000) 203 CLR 1. For example, see: *Mental Health (Criminal Procedure) Act 1990* (NSW) s 5; and *Criminal Code* (Qld) s 613.

<sup>2</sup> *Hawkins v R* (1994) 179 CLR 500, 517.

<sup>3</sup> *M'Naghten's Case* [1843-1860] All ER Rep 229; *Stapleton v R* (1952) 86 CLR 358.

<sup>4</sup> *Veen v R (No 2)* (1988) 164 CLR 465; *Byrne* [1960] 2 QB 396.

<sup>5</sup> *R v Verdins*; *R v Buckley*; *R v Vo* (2007) 169 A Crim R 581, (*R v Verdins*), 585; *Scognamiglio* (1991) 56 A Crim R 81; *R v Smallbon* [2002] NSWCCA 37.

Sentencing is frequently described as the most demanding of judicial duties.<sup>6</sup> If that is true, then the sentencing of mentally impaired offenders must rate as the sentencer's most challenging task.<sup>7</sup> This paper will consider the common law approach to sentencing as applied to mentally impaired offenders. This is the approach underpinned by traditional sentencing theory with its emphasis on achieving a just balance between various competing sentencing purposes.<sup>8</sup>

In Part A of this paper, the issue of mental impairment among offenders will be contextualised. The prevalence of mental impairments among offenders will be considered along with the converse, that is, the prevalence of offending by those who suffer from mental impairments. There is a considerable body of evidence demonstrating a strong correlation between offending and mental impairment.<sup>9</sup> However the relationship between the two factors is complex and is confounded by various mediating factors, including, in particular, comorbid substance abuse.<sup>10</sup>

Throughout this paper, the author will use the term "mental impairment" to encompass the concepts of mental illness, mental disorder, and intellectual impairment. In sentencing, these terms bear a broader meaning than when used to consider an accused's fitness to stand trial or for the purposes of the

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<sup>6</sup> Geraldine Mackenzie *How Judges Sentence* (2005) 29; Ivan Potas "Sentencing the mentally disordered offender in Australia" (1981) 4 *International Journal of Law and Psychiatry* 107, 107.

<sup>7</sup> Ivan Potas "Sentencing the mentally disordered offender in Australia" (1981) 4 *International Journal of Law and Psychiatry* 107, 107.

<sup>8</sup> *Veen v R (No 2)* (1988) 164 CLR 465, 476.

<sup>9</sup> Paul Mullen *A review of the relationship between mental disorders and offending behaviours and on the management of mentally abnormal offenders in the health and criminal justice services*, (2001) Criminology Research Council, <http://www.aic.gov.au/crc/reports/mullen.html>, 14-15.

<sup>10</sup> Susan Henderson *Mental Illness and the Criminal Justice System* (2003) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 6-7; Paul Mullen *A review of the relationship between mental disorders and offending behaviours and on the management of mentally abnormal offenders in the health and criminal justice services*, (2001) Criminology Research Council, <http://www.aic.gov.au/crc/reports/mullen.html>, 16-17.

defences of insanity or diminished responsibility.<sup>11</sup> The meanings are also distinct from medical understandings of the terms. Freeman argues that the medical definition of mental illness is broader than the legal definition because the former involves 'rigorously identifying a cluster of symptoms according to a standardised diagnostic classification system ... designed to provide consistency in psychiatric diagnosis'.<sup>12</sup> However, as far as sentencing is concerned, it is the legal usage that is probably broader, because courts have refused to prescriptively define the terms or to delimit the types of mental impairment which might relevantly be considered.<sup>13</sup> Accordingly, a diverse range of conditions have been considered, including cases where an accurate diagnosis has been impossible<sup>14</sup> and where the relevant condition could only be identified as falling within a broad class of disorders.<sup>15</sup>

Part B will consider the relevance of mental impairment to sentencing under the common law and the ways in which mental impairment can have mitigating or aggravating tendencies. This section will consider how the rules on sentencing mentally impaired offenders are applied under the traditional purposive approach that embraces considerations of incapacitation, rehabilitation, deterrence and proportional retribution. Inconsistencies are revealed within and between jurisdictions especially around whether the impairment needs to be "serious" and whether it needs to be causally related to the offending conduct.

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<sup>11</sup> Richard Fox (1986) cited in Sally Traynor "Sentencing Mentally Disordered Offenders: The Causal Link" (2002) 23 *Sentencing Trends*, <http://www.judcom.nsw.gov.au/st/st23/index.html>.

<sup>12</sup> Karen Freeman "Mental Health and the Criminal Justice System" (1998) 38 *Crime and Justice Bulletin* 1, 1-2.

<sup>13</sup> Richard Fox (1986) cited in Sally Traynor "Sentencing Mentally Disordered Offenders: The Causal Link" (2002) 23 *Sentencing Trends*, <http://www.judcom.nsw.gov.au/st/st23/index.html>; *R v Verdins* (2007) 169 A Crim R 581, 585.

<sup>14</sup> *Scognamiglio* (1991) 56 A Crim R 81, 84, 85.

<sup>15</sup> *R v Smallbon* [2002] NSWCCA 37.

Finally, in Part C, this paper will question whether, in light of the cases, the common law has achieved coherence in its approach to sentencing mentally impaired offenders. Even though proportionality is the dominant sentencing purpose,<sup>16</sup> it is argued that there is an observable failure in many cases to give adequate consideration to the diminished culpability of mentally impaired offenders. Instead, case law requires that mental impairment is a factor which is predominantly relevant to the weight of general deterrence.<sup>17</sup> The author argues that inconsistencies in this area of sentencing demonstrate the law's lack of coherence in the way the principles are applied and create a risk of injustice to this class of offender.

#### **A. The relationship between mental illness and offending**

The relationship between mental impairment and offending is strongly correlative, and yet far from straightforward.<sup>18</sup> On the one hand, there are, undoubtedly, a disturbing number of offenders who suffer from some type of mental impairment. In 2001 Butler and Allnut conducted a large scale study of the prevalence of mental impairment among NSW prisoners.<sup>19</sup> Approximately 1500 prisoners were assessed by mental health professionals using formal psychiatric screening instruments.<sup>20</sup> The sample of male and female prisoners were drawn from both the sentenced and remand populations.<sup>21</sup> The study

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<sup>16</sup> *Veen (No 2) v R* [1988] HCA 14, [8].

<sup>17</sup> *R v Cook; ex parte Attorney-General* (Qld) [2007] QCA 100, [15]; *Thompson v R* (2005) 157 A Crim R 385, 396; *R v Fahda* [1999] NSWCCA 267, [42]; *R v Tsiaris* [1996] 1 VR 398, 400; *Engert* (1995) 84 A Crim R 67, 71; *R v Letteri* (unreported, NSWCCA, 18 March 1992); *Scognamiglio* (1991) 56 A Crim R 81, 86; *Anderson* (1980) 2 A Crim R 379, 384; *Mooney* (unreported, VCCA, 21st June 1978).

<sup>18</sup> Paul Mullen *A review of the relationship between mental disorders and offending behaviours and on the management of mentally abnormal offenders in the health and criminal justice services*, (2001) Criminology Research Council, <http://www.aic.gov.au/crc/reports/mullen.html>, 14, 16, 28.

<sup>19</sup> Tony Butler and Stephen Allnut *Mental Illness among NSW Prisoners* (2003) Corrections Health Service, [www.justicehealth.nsw.gov.au/2nd\\_level/pubs.html](http://www.justicehealth.nsw.gov.au/2nd_level/pubs.html), 48.

<sup>20</sup> *Ibid* 9-10.

<sup>21</sup> *Ibid* 8.

found that 74% of inmates suffered from at least one *psychiatric disorder* in the previous twelve months compared to a prevalence of 22% in the general population for the same period.<sup>22</sup> "Psychiatric disorders" were defined broadly to include personality disorders and substance use disorders.<sup>23</sup> The category of "mental disorders" was narrower; it excluded both of those conditions, and had a prevalence of 42% among prisoners compared with 15% in the general community.<sup>24</sup>

An earlier study examined the prior psychiatric histories of over 4000 individuals convicted in Victoria's higher courts between 1993 and 1995. This study found that over 25% of offenders had a history of contact with mental health services.<sup>25</sup> That figure is consonant with a 2003 Victorian Department of Justice report which claims that 28% of Victorian inmates report that they had previously been diagnosed with a mental illness.<sup>26</sup>

In 2001 Professor Mullen conducted a meta-analysis of several Australian and international studies and concluded that major mental disorders are typically found in male prisoners at rates between two and four times that found in the general population. When substance abuse and personality disorders were included, the rates became even more dramatically disparate. Further, levels

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<sup>22</sup> Ibid 48.

<sup>23</sup> Conditions falling within the category of "psychiatric disorders" included psychosis, affective disorder, anxiety disorder, substance use disorder, personality disorder and neurasthenia: *ibid* 48.

<sup>24</sup> Conditions falling within the category of "mental disorders" included psychosis, affective disorder and anxiety disorder: *ibid* 48.

<sup>25</sup> Paul Mullen *A review of the relationship between mental disorders and offending behaviours and on the management of mentally abnormal offenders in the health and criminal justice services* (2001) Criminology Research Council, <http://www.aic.gov.au/crc/reports/mullen.html>, 11, citing Wallace et al (1998) 'Serious criminal offending and mental disorder: A case linkage study' 172 *British Journal of Psychiatry* 477.

<sup>26</sup> Corinne Henderson *Why people with a mental illness are over-represented in the criminal justice system* (2006) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 3.

of mental disorders among female inmates were even higher than among males.<sup>27</sup>

High rates of mental impairment have also been identified among NSW inmates identified as minor offenders.<sup>28</sup> Of this category of offenders, more than 44% of males and 60% of females have been diagnosed with some mental disorder.<sup>29</sup> Mullen suggests that minor offenders with mental illness may be more likely to be incarcerated than their mentally well counterparts for a range of reasons. It might reflect a greater willingness to incarcerate for certain types of offences disproportionately committed by the mentally ill, such as repeat public nuisances, minor thefts and minor drug offences. Paradoxically, an increased likelihood of imprisonment might also result from an increased likelihood by the mentally ill to breach non-custodial sentences such as supervision orders and suspended sentences.<sup>30</sup>

However, some commentators question the link between mental impairment and criminality. In a report written for the Mental Health Coordinating Council, Susan Henderson disputes the existence of an inherent link between mental illness and offending.<sup>31</sup> She cites a study which revealed a lifetime crime prevalence of 4% among a cohort of 500 psychiatric patients, a figure that

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<sup>27</sup> Ibid 14.

<sup>28</sup> Susan Henderson *Mental Illness and the Criminal Justice System* (2003) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 12.

<sup>29</sup> Susan Henderson *Mental Illness and the Criminal Justice System* (2003) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 12. "Mental disorder" includes psychosis, anxiety and affective disorders. The category of minor offenders included those convicted of summary offences or minor crimes: *ibid* 12.

<sup>30</sup> Paul Mullen *A review of the relationship between mental disorders and offending behaviours and on the management of mentally abnormal offenders in the health and criminal justice services* (2001) Criminology Research Council, <http://www.aic.gov.au/crc/reports/mullen.html>, 28.

<sup>31</sup> Susan Henderson *Mental Illness and the Criminal Justice System* (2003) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 4, 6.

Henderson claimed was 'unlikely' to be any higher than for the general population.<sup>32</sup>

Similarly, Corinne Henderson, also writing for the Mental Health Coordinating Council, disputes the inference of any connection between mental illness and crime. She cites a 1983 study which found "no relationship" between mental illness and crime when "controlled for age, race, socio-economic status and previous hospitalisation or imprisonment".<sup>33</sup> Both Hendersons claim that these studies demonstrate that other variables must account for the high correlation between mental illness and incarceration.<sup>34</sup>

The claim of 'no relationship' is one that should probably be treated with caution. In 2000 Mullen conducted a study of 1000 Victorian male schizophrenia patients and found that over 20% had convictions for at least one criminal offence, compared to 8% of controls matched for age, gender and area of residence.<sup>35</sup> An earlier companion study into patients with major affective disorders revealed significantly higher rates of offending than among the matched control group and the disparity was even higher among those patients with a diagnosis of comorbid substance abuse.<sup>36</sup>

Overseas studies have also found a strong association between mental impairment and offending. Birth cohort studies in Denmark have revealed

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<sup>32</sup> Study by Gunn (1987) cited in A.S. Henderson (1988), 123, cited in Susan Henderson *Mental Illness and the Criminal Justice System* (2003) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 4.

<sup>33</sup> Monahan (1983) cited in Corinne Henderson *Why people with a mental illness are over-represented in the criminal justice system* (2006) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 2.

<sup>34</sup> Susan Henderson *Mental Illness and the Criminal Justice System* (2003) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 4-5; Corinne Henderson *Why people with a mental illness are over-represented in the criminal justice system* (2006) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 2, 4.

<sup>35</sup> Paul Mullen *A review of the relationship between mental disorders and offending behaviours and on the management of mentally abnormal offenders in the health and criminal justice services* (2001) Criminology Research Council, <http://www.aic.gov.au/crc/reports/mullen.html>, 8.

<sup>36</sup> *Ibid* 8.

higher levels of arrests for criminal offences generally and violent offences in particular, than among demographically matched controls from the cohort.<sup>37</sup> Rates of arrest for both general and violent offences were even more significantly disparate among those suffering from mental impairment and comorbid substance abuse.<sup>38</sup>

A birth cohort study in New Zealand compared the rate of violent offending over the previous twelve months among 21-year-old men suffering from various mental disorders. The control group (those without a psychiatric disorder) violently offended at the rate of 3.8%. Among the group with psychiatric disorders as a whole, 18% committed at least one violent offence. Broken down by category of impairment, that figure included 33% of sufferers of schizophrenia; 34% of sufferers of substance abuse disorder; and 95% of sufferers of schizophrenia who also suffered from comorbid substance abuse, who committed violent offences in the previous twelve month period.<sup>39</sup>

Mullen cites a number of similar studies but, again, the results need to be treated with caution.<sup>40</sup> Whether the correlation between mental illness and offending equates to a causal relationship remains a contentious issue among scientists.<sup>41</sup> That is because the relationship is confounded by a number of mediating factors. Henderson argues that the prevalence of offending among the mentally ill is properly to be seen as unremarkable in light of the disadvantaged context of their lives.<sup>42</sup> The mentally ill suffer from increased incidences of childhood sexual abuse, poor educational outcomes, unemployment, and poverty. These factors are significantly correlated with

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<sup>37</sup> Ibid 14.

<sup>38</sup> Ibid 14, 15.

<sup>39</sup> Ibid 15.

<sup>40</sup> Ibid 4, 14, Appendix III.

<sup>41</sup> Ibid 4.

<sup>42</sup> Susan Henderson *Mental Illness and the Criminal Justice System* (2003) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 11.



criminality, independently of any questions of mental health.<sup>43</sup> Indeed, it is a notorious fact that people who are homeless or living in poverty are generally 'more vulnerable to the operations of the criminal justice system'.<sup>44</sup> Henderson illustrates how seemingly unrelated matters can trigger the susceptibility of the mentally ill to other risk factors for criminality. For example, the paucity of community mental services may affect consistency of treatment and hence compromise symptom management. In turn, this can increase the likelihood of instability in working and residential arrangements, thus increasing rates of unemployment, homelessness and ultimately poverty among the mentally ill.<sup>45</sup>

However, without doubt, the most significant factor mediating criminality among the mentally impaired is comorbid substance abuse.<sup>46</sup> It now seems clear that people with psychiatric illnesses are more likely than others to also have a substance abuse disorder. It also seems clear that people with a substance abuse disorder are more likely to be mentally ill. While the

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<sup>43</sup> Susan Henderson *Mental Illness and the Criminal Justice System* (2003) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 11; Corinne Henderson *Why people with a mental illness are over-represented in the criminal justice system* (2006) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 4; Paul Mullen *A review of the relationship between mental disorders and offending behaviours and on the management of mentally abnormal offenders in the health and criminal justice services* (2001) Criminology Research Council, <http://www.aic.gov.au/crc/reports/mullen.html>, 24.

<sup>44</sup> Tamara Walsh (2007) *No Vagrancy: An examination of the impact of the criminal justice system on people living in poverty in Queensland*, <http://www.law.uq.edu.au/dr-tamara-walsh#>, 18; Monica Taylor and Tamara Walsh (2004) *Nowhere to Go: The Impact of Police Move-On Powers on Homeless People in Queensland*, <http://www.law.uq.edu.au/dr-tamara-walsh#>, 29.

<sup>45</sup> Susan Henderson *Mental Illness and the Criminal Justice System* (2003) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 9, 11.

<sup>46</sup> Paul Mullen *A review of the relationship between mental disorders and offending behaviours and on the management of mentally abnormal offenders in the health and criminal justice services* (2001) Criminology Research Council, <http://www.aic.gov.au/crc/reports/mullen.html>, 23; Susan Henderson *Mental Illness and the Criminal Justice System* (2003) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 6-7; David Castle and Velma Ho "Substance Use in Psychosis: What can be done about it?" (2003) 10(1) *Psychiatry, Psychology and the Law* 144, 144.

correlations are clear, the issue of causality is much less so.<sup>47</sup> Engenderment aside, the measured rates of substance abuse among the mentally ill are certainly disturbing. Mullen cites studies in the mid-1990s that found rates of concurrent substance abuse to be 35% and trending upwards,<sup>48</sup> a trend confirmed in the findings of other researchers.<sup>49</sup> Research cited by NSW Health reports comorbidity rates of between 20% and 75%, depending on the particular psychiatric illness, but the author of that report expresses concern that even these high rates reflect an under-reporting of the problem.<sup>50</sup> Other studies have found lifetime comorbidity rates among those with psychotic illnesses to be between 40 – 60%.<sup>51</sup> Perhaps the most rigorous recent examination of this issue was that conducted by Andrews et al. The authors concluded that among mental disorders as a generalised class, there is a demonstrable rate of 45-55% of comorbid substance abuse disorders.<sup>52</sup>

From a clinical standpoint, sufferers of comorbidity suffer increased behavioural problems, more extreme symptoms, more frequent psychotic relapses, reduced effectiveness of medication, stronger side effects and generally, a worse illness trajectory than their counterparts.<sup>53</sup> From a legal

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<sup>47</sup> NSW Health (2000) *The Management of People with a Co-existing Mental Health and Substance Use Disorder - Discussion Paper*, [www.health.nsw.gov.au/health-public-affairs/publications/mhsubuse/index.html](http://www.health.nsw.gov.au/health-public-affairs/publications/mhsubuse/index.html), 3.

<sup>48</sup> Paul Mullen *A review of the relationship between mental disorders and offending behaviours and on the management of mentally abnormal offenders in the health and criminal justice services* (2001) Criminology Research Council, <http://www.aic.gov.au/crc/reports/mullen.html>, 17.

<sup>49</sup> NSW Health (2000) *The Management of People with a Co-existing Mental Health and Substance Use Disorder - Discussion Paper*, [www.health.nsw.gov.au/health-public-affairs/publications/mhsubuse/index.html](http://www.health.nsw.gov.au/health-public-affairs/publications/mhsubuse/index.html), 6.

<sup>50</sup> Ibid 6.

<sup>51</sup> David Castle and Velma Ho "Substance Use in Psychosis: What can be done about it?" (2003) 10(1) *Psychiatry, Psychology and the Law* 144, 144.

<sup>52</sup> Gavin Andrews, Cathy Issakidis and Tim Slade "Ch 3: How Common is Comorbidity?" in M. Teesson & H. Proudfoot (Eds), *Comorbid mental disorders and substance abuse disorders: Epidemiology, prevention and treatment* (2003) National Drug and Alcohol Research Centre, <http://www.health.gov.au/internet/wcms/publishing.nsf/Content/phd-comorbidity-pubs>, 26.

<sup>53</sup> Susan Henderson *Mental Illness and the Criminal Justice System* (2003) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 7; David Castle and Velma Ho "Substance Use in Psychosis: What can be done about it?" (2003) 10(1) *Psychiatry, Psychology and the Law* 144, 144.

standpoint, substance abuse dramatically increases the rates at which the mentally ill come into contact with the criminal justice system. Mullen cites data from a 1998 study of those convicted by Victoria's higher courts with prior contact with public mental health services. That study showed that men with schizophrenia and comorbid substance abuse were 12 times more likely than men in the general population to offend; compared with schizophrenics without substance abuse disorders who were only two times more likely. Similarly, men with comorbid affective disorders were 13.5 times more likely than men in the general population to offend; compared with a factor of 2.6 among their counterparts.<sup>54</sup>

## **B. Sentencing mentally disordered offenders – the common law approach**

Most of Australia's sentencing legislation has nothing specific to say about the principles to be applied in sentencing mentally impaired offenders. The issue has therefore been left to be resolved in accordance with the common law.

It is well-understood that at common law sentencing is a balancing process; the court considers all the relevant circumstances and crafts a sentence appropriate to achieve one or more of a limited class of sentencing purposes. These purposes are retribution (just deserts), deterrence (general and specific), rehabilitation and societal protection (incapacitation).<sup>55</sup> As explained by the High Court in *Veen (No 2)*:

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<sup>54</sup> C. Wallace, P.R. Mullen, P. Burgess, S. Palmer, D. Ruschena and C. Browne, "Serious Criminal Offending and Mental Disorder: A Case Linkage Study British" (1998) 172 *British Journal of Psychiatry* 477, cited in Paul Mullen *A review of the relationship between mental disorders and offending behaviours and on the management of mentally abnormal offenders in the health and criminal justice services* (2001) Criminology Research Council, <http://www.aic.gov.au/crc/reports/mullen.html>, 11, 13.

<sup>55</sup> Ivan Potas "Sentencing the mentally disordered offender in Australia" (1981) 4 *International Journal of Law and Psychiatry* 107, 112; Geraldine Mackenzie, *How Judges Sentence* (2005), 83.

[T]he troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case.<sup>56</sup>

These purposes flow from two distinct theoretical bases which are said to underpin sentencing. The first is utilitarianism. This theory calls for sentencing practices that promote the greatest amount of community utility.<sup>57</sup> It supports a forward-looking approach to sentencing by examining the likely future consequences of a sentencing decision. Utilitarianism is thus concerned with the capacity of a sentence to prevent crime by deterring the particular offender or others, by rehabilitating the offender or by incapacitating the offender from offending in the future through lengthy imprisonment.<sup>58</sup>

The second theoretical base is just deserts retributivism. This Kantian theory asserts that criminals deserve punishment and punishment is thereby justified, because of the moral wrongness of the criminal's act. The severity of the punishment is limited by the just deserts principle which provides that punishment must be proportionate to the crime and to the offender's culpability.<sup>59</sup> Under this theory, punishment is just and should be imposed even when the sentencer is virtually certain that consequentialist goals such as deterrence and rehabilitation will fail.<sup>60</sup> Thus, no matter how certain the

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<sup>56</sup> *Veen v R (No 2)* (1988) 164 CLR 465, 476.

<sup>57</sup> Mirko Bagaric and Kumar Amarasekara "Errors of Retributivism" (2000) 24 *Melbourne University Law Review* 125; Mirko Bagaric "Sentencing: The Road to Nowhere" (1999) 21 *Syd L Rev* 597, 598.

<sup>58</sup> Mirko Bagaric and Kumar Amarasekara "Errors of Retributivism" (2000) 24 *Melbourne University Law Review* 125.

<sup>59</sup> Mirko Bagaric "Sentencing: The Road to Nowhere" (1999) 21 *Syd L Rev* 597, 601; David Dolinko "Three Mistakes of Retributivism" (1992) 39 *UCLA Law Rev* 1623, 1626.

<sup>60</sup> Mirko Bagaric and Kumar Amarasekara "Errors of Retributivism" (2000) 24 *Melbourne University Law Review* 125.

likelihood of future offending, proportionality sets the ceiling.<sup>61</sup> The notion of a quantum of punishment that is both just and ascertainable is certainly attractive - however, the theory seems unable to explain the trend identified by a number of observers<sup>62</sup> towards increasingly punitive sentences for comparable offences.<sup>63</sup>

A number of commentators have expressed concerns about the capacity of these two justificatory theories to work together to produce a body of principled and coherent sentencing decisions.<sup>64</sup> The result, according to Ashworth, is a 'cafeteria system' where sentencers choose whichever sentencing rationale suits the case at hand.<sup>65</sup> Potas, on the other hand, considers that utilitarianism is the 'defining principle' which allows the precise sentence to be pinpointed within the range set by just deserts, the latter acting merely as the 'limiting principle'.<sup>66</sup> Descriptively, that analysis is persuasive because the High Court has repeatedly emphasised that proportionality represents the outer limits of any sentence.<sup>67</sup> However, in terms of guiding or predicting decisions, Potas' analysis may not be too far removed from Ashworth's cafeteria.

In practice, the tendency of sentencing purposes to conflict gives rise to a notorious paradox.<sup>68</sup> The High Court in *Veen (No 2)* continued:

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<sup>61</sup> I.G. Campbell "Justice and Utility in Sentencing: Gascoigne Revived?" (1981) 12(1) *University of Queensland Law Journal* 43, 72.

<sup>62</sup> Andrew Von Hirsch and Andrew Ashworth, *Proportionate Sentencing* (2005), 75, 78.

<sup>63</sup> Australian Law Reform Commission *Sentencing of Federal Offenders - DP70*, (2005) <http://www.alrc.gov.au/publications/publist/dp.htm>, [4.5].

<sup>64</sup> Mirko Bagaric "Sentencing: The Road to Nowhere" (1999) 21 *Syd L Rev* 597, 597.

<sup>65</sup> Andrew Ashworth *Sentencing and Criminal Justice* (1995) 331, cited in Mirko Bagaric "Sentencing: The Road to Nowhere" (1999) 21 *Syd L Rev* 597, 597.

<sup>66</sup> Ivan Potas "Sentencing the mentally disordered offender in Australia" (1981) 4 *International Journal of Law and Psychiatry* 107, 115-116; Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2<sup>nd</sup> Ed, 1999) 206.

<sup>67</sup> See for example: *Veen v R (No 2)* (1988) 164 CLR 465, 472; *Chester v R* (1988) 165 CLR 611, 618.

<sup>68</sup> Richard Fox (1999) "Competition in Sentencing: The rehabilitative model versus the punitive model" 6(2) *Psychiatry, Psychology and the Law* 153, 153; Stuart Ross and

[The sentencing purposes] are guideposts to the appropriate sentence but sometimes they point in different directions, And so a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter.<sup>69</sup>

It is worthwhile to consider how courts have employed various sentencing purposes in relation to mentally impaired offenders and how the tensions are resolved in practice.

### ***Incapacitation***

Sentences which incapacitate mentally impaired offenders often resonate well with the public because of widespread fears and misconceptions about the nature of mental illness.<sup>70</sup> Robert Veen probably exemplified those fears. Veen stabbed a man more than 50 times with a knife and was convicted of manslaughter on the basis of diminished responsibility. He suffered from an untreatable mental condition which, when Veen was intoxicated and under stress, caused him to behave with uncontrollable aggression.<sup>71</sup> The trial judge ordered a life sentence so that the community could be protected from Veen's violent urges. That sentence was reduced on appeal to twelve years because of Veen's reduced culpability. Barely ten months after his release, Veen killed again under hauntingly similar circumstances.<sup>72</sup>

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Jeanette Lawrence "Sentencing mentally disordered offenders: factors that predict sentencers' decisions about treatment" (2005) 12(1) *Psychiatry, Psychology and the Law* 174, 175.

<sup>69</sup> *Veen v R (No 2)* (1988) 164 CLR 465, 476-477.

<sup>70</sup> Karen Freeman "Mental Health and the Criminal Justice System" (1998) 38 *Crime and Justice Bulletin* 1, 1; Susan Henderson *Mental Illness and the Criminal Justice System*, (2003) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 5.

<sup>71</sup> *Veen v R (No 2)* (1988) 164 CLR 465, 479-480.

<sup>72</sup> *Veen v R (No 2)* (1988) 164 CLR 465, 468. The first killing under discussion was the subject of *Veen v R (No 1)* (1979) 143 CLR 458.

While incapacitative sentences may sooth public fears, they also have the potential to produce plainly oppressive outcomes. *Clarke*<sup>73</sup> was a case where a 23 year old woman had maliciously broken a flowerpot valued at £1 and was sentenced to 18 months imprisonment.<sup>74</sup> She suffered from mental impairment, probably derived from a childhood bout of encephalitis. Doctors disagreed about the precise diagnosis and about whether further treatment could assist her. Even so, various hospitals where she had previously been admitted refused to have her back.<sup>75</sup> Her behaviour during past treatment matched her behaviour in the community: she was eccentric, antisocial, sexually uncontrolled and, occasionally, she engaged in minor episodes of physical violence. Naturally, she had a lengthy criminal history - mostly for minor social nuisance offences rather than serious crimes - despite sincere efforts by police to divert her into appropriate health services.<sup>76</sup> In relation to the broken flowerpot, and in light of the woman's history, the sentencing judge felt that it was his duty to protect the public by passing a sentence involving a substantial period of imprisonment.<sup>77</sup>

The English Court of Appeal overturned the sentence, holding that the punishment should fit the crime.<sup>78</sup> Lawton LJ declared that:

Her Majesty's Courts are not dustbins into which the social services can sweep difficult members of the public. Still less should Her Majesty's judges use their sentencing powers to dispose of those who are socially inconvenient. If the Courts became disposers of those who are socially inconvenient the road ahead would lead to the destruction of liberty. It should be clearly understood that Her Majesty's judges stand on that road barring the way. ... This Court has no intention of filling [gaps in the health and welfare systems] by sending people to prison when a prison sentence is wholly inappropriate. We ask ourselves, what was the

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<sup>73</sup> *R v Clarke* (1975) 61 Cr App R 320.

<sup>74</sup> *Ibid* 320-321.

<sup>75</sup> *Ibid* 321, 323.

<sup>76</sup> *Ibid* 321, 322.

<sup>77</sup> *Ibid* 322.

<sup>78</sup> *Ibid* 322.

appropriate sentence for breaking a flowerpot? The answer is a fine of £2.<sup>79</sup>

In *Roadley*<sup>80</sup> a Victorian court suffered an even more challenging dilemma. An intellectually disabled man with the mental and functional age of a 5 or 6 year old was charged with the anal penetration of an 8-year-old boy.<sup>81</sup> He had a history of sexual pre-occupation with children (although no criminal history) and the professional view was that he suffered from paedophilia. The experts considered that he had only minimal appreciation of the consequences of his actions and that he may not be capable of regulating his behaviour.<sup>82</sup> The sentencing judge considered non-custodial options but there were waiting lists for both accommodation and counselling services. Moreover, the professional view was that Roadley lacked sufficient comprehension to consent to any order containing conditions as a term of its grant.<sup>83</sup> Evidence was adduced of a suitable secure unit for mental health prisoners which could accommodate up to 5 prisoners with severe impairments. Relying on Corrective Services' assurances that this prisoner would be housed in that facility, the judge sentenced Roadley to six years imprisonment, with no minimum term, and despite his plea of guilty.<sup>84</sup> The judge remarked:

I am left with the totally obnoxious and deplorable conclusion that I must send to gaol a five to six year old in an adult body; that I must first sentence you to a term of imprisonment before you will become entitled to obtain the appropriate care and attention that you require. I find this task totally obnoxious and a disgrace for our society. That this situation can be permitted to happen in 1990 is a damning indictment of our system of community welfare.<sup>85</sup>

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<sup>79</sup> Ibid 322, 324.

<sup>80</sup> *Roadley* (1990) 51 A Crim R 336.

<sup>81</sup> Ibid 337, 339. For purposes of sentencing, intellectual disability is equated with mental illness: 343.

<sup>82</sup> Ibid 339.

<sup>83</sup> Ibid 341. At 339, the Court of Appeal questioned the applicant's fitness to plead.

<sup>84</sup> Ibid 340.

<sup>85</sup> Ibid 341.



The Victorian Court of Criminal Appeal (VCCA) acknowledged the extraordinary difficulty of the sentencing task in this case, but held that the decision involved two errors. First, a sentence cannot go beyond that which is proportionate to the crime merely to protect society from further offending by the prisoner (which the VCCA agreed would undoubtedly be likely in Roadley's case).<sup>86</sup> Second, the absence or inadequacy of appropriate social services was not justification for imposing a custodial sentence.<sup>87</sup> Despite this prohibition, a number of commentators believe that mentally impaired offenders often end up in prison because courts can find no viable alternative placement options.<sup>88</sup>

In *Gascoigne*<sup>89</sup> Hanger J emphasised that the error of principle sometimes involved in incapacitative sentencing was sentencing the offender *because* of his or her mental condition.<sup>90</sup> A fundamental tenet of the rule of law, the principle of legality, requires that the law punishes criminal acts, not the criminogenic characteristics of the offender.<sup>91</sup> While the character of a prisoner is a proper sentencing consideration, especially insofar as it indicates likelihood to reoffend, the central focus of the sentence must be the offence itself, not the offender.<sup>92</sup>

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<sup>86</sup> Ibid 342, 343.

<sup>87</sup> Ibid 342.

<sup>88</sup> Paul Mullen *A review of the relationship between mental disorders and offending behaviours and on the management of mentally abnormal offenders in the health and criminal justice services*, (2001) Criminology Research Council, <http://www.aic.gov.au/crc/reports/mullen.html>, 35; LeRoy Kondo "Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill" (2001) 28(3) *American Journal of Criminal Law* 255, 272, 318.

<sup>89</sup> *Gascoigne* [1964] Qd R 539.

<sup>90</sup> I.G. Campbell "Justice and Utility in Sentencing: *Gascoigne* Revived?" (1981) 12(1) *University of Queensland Law Journal* 43, 45.

<sup>91</sup> A vital premise underpinning the principle of legality: *nulla poena sine lege* (there should be no punishment without law) is that the law punishes criminal acts, not criminal types: Michelle Edgely "Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia" (2007) 33 *University of Western Australia Law Review* 351, 384.

<sup>92</sup> I.G. Campbell "Justice and Utility in Sentencing: *Gascoigne* Revived?" (1981) 12(1) *University of Queensland Law Journal* 43, 45.

## **Rehabilitation**

Rehabilitation has a long pedigree as a sentencing aim, although some commentators believe that its popularity with sentencers and legislators has declined.<sup>93</sup> However, the goal of providing offenders with treatment seems to represent a humane approach towards mentally impaired offenders as well as potentially serving the interests of society to the extent that offenders with improved clinical outcomes do not reoffend or reoffend at lower rates.

Courts in most jurisdictions have a range of options available that can be directed towards rehabilitative aims. Courts can frame treatment orders as conditions attached to sentencing instruments, such as intensive correction orders, community based orders or even as bail conditions supported by an adjournment of sentence proceedings.<sup>94</sup>

The mere presence of a mental impairment is not, however, sufficient to support a treatment order without special statutory powers.<sup>95</sup> The offender must also consent to treatment. Courts have no common law powers to order treatment for offenders against their wishes, whether inside prison or without.<sup>96</sup> Furthermore, the court must consider that there is a causal

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<sup>93</sup> Richard Fox "Competition in Sentencing: The rehabilitative model versus the punitive model" (1999) 6(2) *Psychiatry, Psychology and the Law* 153, 155; Susan Hayes "Sentencing of people with mental disorders" (2005) 86 *Reform* 24, 24; Diana Fitzgibbon and Angus Cameron "Working with mentally disordered offenders: government policy, NOMS and inaction" (2007) 9(1) *British Journal of Forensic Practice* 4, 4.

<sup>94</sup> Richard Fox "Competition in Sentencing: The rehabilitative model versus the punitive model" (1999) 6(2) *Psychiatry, Psychology and the Law* 153, 156.

<sup>95</sup> See for example, *Sentencing Act 1991* (Vic) ss 93, 93A.

<sup>96</sup> *Channon v R* [1978] 20 ALR 1, 8; Richard Fox "Competition in Sentencing: The rehabilitative model versus the punitive model" (1999) 6(2) *Psychiatry, Psychology and the Law* 153, 158.

relationship between the mental impairment and the offence before a treatment condition can be attached to an order.<sup>97</sup>

The concept of rehabilitation presumes a sentence built around a medical model. In turn, medical models aim to treat, not just the symptoms, but the underlying causes of a condition. As Professor Fox points out, effective mental health treatments often take a considerable amount of time.<sup>98</sup> However, a sentence built around treatment needs is not permitted to be longer or more onerous than the appropriate proportionate sentence.<sup>99</sup> The sentence therefore ends, not when the offender's mental health has improved, but when the proportionate term expires.<sup>100</sup>

The *Channon*<sup>101</sup> case illustrates the principle. The appellant commenced work at a building site in a remote part of the Northern Territory. Two days later he was at a pub with a workmate when some light-hearted teasing degenerated into a heated argument. Blows were exchanged; the appellant then left and burned down the workmate's company-supplied accommodation hut along with a nearby hut used by other workers. No-one was endangered by the fire, but \$600 damage was done to the huts and the workers' personal effects.<sup>102</sup>

The sentencing judge heard evidence that Channon had a difficult childhood and spent a number of his formative years in institutions. In his youth, he committed a small number of fairly minor offences, although none for the two decades preceding the offence at hand. He had never married, had no family

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<sup>97</sup> Stuart Ross and Jeanette Lawrence "Sentencing mentally disordered offenders: factors that predict sentencers' decisions about treatment" (2005) 12(1) *Psychiatry, Psychology and the Law* 174, 176; *Channon v R* [1978] 20 ALR 1, 10.

<sup>98</sup> Richard Fox "Competition in Sentencing: The rehabilitative model versus the punitive model" (1999) 6(2) *Psychiatry, Psychology and the Law* 153, 157.

<sup>99</sup> *Channon v R* [1978] 20 ALR 1, 11, 21.

<sup>100</sup> Richard Fox "Competition in Sentencing: The rehabilitative model versus the punitive model" (1999) 6(2) *Psychiatry, Psychology and the Law* 153, 158.

<sup>101</sup> *Channon v R* [1978] 20 ALR 1.

<sup>102</sup> *Channon v R* [1978] 20 ALR 1, 14-15.

ties and seldom remained in any job or town for more than a month or two.<sup>103</sup> The sentencing judge did not have the benefit of any pre-sentence or other psychiatric reports; however, he concluded that the accused did suffer from 'some deep-seated psychiatric problem'.<sup>104</sup> Accordingly, he sentenced him to 3 years imprisonment with a direction that, while he was in prison, he should 'receive such psychiatric treatment as may be thought to be appropriate'.<sup>105</sup>

The full Federal Court decreased the sentence to two years imprisonment, holding that a rehabilitative sentence could not legitimately exceed that calculated by reference to other sentencing purposes.<sup>106</sup> Interestingly, neither judge who directly addressed this point limited rehabilitation just by reference to proportionality. Instead, Brennan J referred to staying within limits assessed by reference to 'other principles of sentencing'.<sup>107</sup> Deane J stated that rehabilitation must remain 'within the confines of *larger* considerations or objectives which are properly relevant'.<sup>108</sup>

It is the view of many commentators that, in practice, rehabilitation is given the least emphasis of all sentencing purposes.<sup>109</sup> Even with the benefit of legislation which allows for treatment-based sentences,<sup>110</sup> there is a view discernible from sentencing remarks that treatment-based sanctions are perceived to be lenient and imposing them is a sign of weakness.<sup>111</sup>

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<sup>103</sup> Ibid 13-14.

<sup>104</sup> Ibid 3.

<sup>105</sup> Ibid 2.

<sup>106</sup> Ibid 11, 21-22.

<sup>107</sup> Ibid 11.

<sup>108</sup> Ibid 21-22 (emphasis added). Toohey J noted that rehabilitation could not increase a sentence beyond its 'proper' limits: 28-29.

<sup>109</sup> Susan Hayes "Sentencing of people with mental disorders" (2005) 86 *Reform* 24, 24; Richard Fox "Competition in Sentencing: The rehabilitative model versus the punitive model" (1999) 6(2) *Psychiatry, Psychology and the Law* 153, 157; Sally Traynor "Sentencing Mentally Disordered Offenders: The Causal Link" (2002) 23 *Sentencing Trends*, <http://www.judcom.nsw.gov.au/st/st23/index.html>.

<sup>110</sup> For example: *Sentencing Act 1991* (Vic) ss 93, 93A.

<sup>111</sup> Richard Fox "Competition in Sentencing: The rehabilitative model versus the punitive model" (1999) 6(2) *Psychiatry, Psychology and the Law* 153, 156.

At least one commentator has called for rehabilitation to be abandoned as a sentencing objective because it confounds the primary judicial function of dispensing justice and apportioning blame.<sup>112</sup> Potas has argued that:

[A]ny disposition which is based on a treatment rather than on a punitive model belongs under the aegis of mental health or welfare rather than criminal justice systems - to those agencies that are in the business of treatment rather than punishment. In this regard the call for both law and psychiatry "to return to their historic roles", to stop encroaching on each other's territory and to establish "a true division of labour" would truly simplify the sentencing process and confine the criminal law to more traditional and realistic objectives.<sup>113</sup>

### **Deterrence**

Deterrence refers to the capacity of a sentence to deter the offender or others from committing similar offences. In relation to the offender, the concept is referred to as 'specific' or 'personal' deterrence; in relation to others, it is referred to as 'general' deterrence. The tendency of a sentence to have a deterrent effect arises because the offender and the community are made aware of the undesirable consequences of offending. People, as rational actors, are presumed to be motivated to avoid choices with adverse consequences, and hence, will eschew criminal conduct.<sup>114</sup>

Therefore, the need for a sentence to have a deterrent effect tends towards a heavier sentence. In relation to mentally impaired offenders, there is

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<sup>112</sup> Ivan Potas "Sentencing the mentally disordered offender in Australia" (1981) 4 *International Journal of Law and Psychiatry* 107, 117, 118.

<sup>113</sup> Ibid 122.

<sup>114</sup> Sally Traynor "Sentencing Mentally Disordered Offenders: The Causal Link" (2002) 23 *Sentencing Trends*, <http://www.judcom.nsw.gov.au/st/st23/index.html>; Mooney (unreported, VCCA, 21st June 1978) per Lush J, cited in *Anderson* (1980) 2 A Crim R 379, 384.

widespread judicial acceptance that deterrence is a factor which should be given less weight.<sup>115</sup>

In *Fahda*,<sup>116</sup> the NSW Court of Criminal Appeal quoted the following oft-cited dictum with approval:

There is ample authority for the proposition that in the case of an offender suffering from a mental disorder or abnormality, general deterrence is a factor which should be given relatively less weight than in other cases because such an offender is not an appropriate medium for making an example to others.<sup>117</sup>

On that basis, one might expect that the deterrence factor would not mitigate per se, but that it would prevent the mentally impaired offender from being subject to the aggravating effects that deterrence would otherwise require. There is dictum to suggest that the deterrence factor is actually ‘a basis for reduction of sentence’.<sup>118</sup> But the dominant view is that it is the weight of general deterrence which is reduced and the effect of that on the sentence is merely another factor to be “balanced”.<sup>119</sup> That seems to leave the court with a good deal of flexibility, but the lack of judicial clarity has arguably given rise to confusion about precisely when deterrence is given less weight so as to work in favour of a mentally impaired offender.

In *Maddeford*,<sup>120</sup> the South Australian Court of Criminal Appeal considered this issue in relation to a respondent convicted of taking a court reporter hostage during a sentence hearing and holding her at knifepoint for two

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<sup>115</sup> *Thompson v R* (2005) 157 A Crim R 385, 396; *Engert* (1995) 84 A Crim R 67, 71; *Scognamiglio* (1991) 56 A Crim R 81, 86; *R v Tsiaris* [1996] 1 VR 398, 400; *R v Cook; ex parte Attorney-General (Qld)* [2007] QCA 100, [15].

<sup>116</sup> *R v Fahda* [1999] NSWCCA 267.

<sup>117</sup> *R v Letteri* (unreported, NSWCCA, 18 March 1992) (Badgery-Parker J), cited in *R v Fahda* [1999] NSWCCA 267, [42]. Similar sentiments were expressed by Young CJ in *Mooney* (unreported, VCCA, 21st June 1978), cited in *Anderson* (1980) 2 A Crim R 379, 384.

<sup>118</sup> *R v Fahda* [1999] NSWCCA 267, [41].

<sup>119</sup> *Thompson v R* (2005) 157 A Crim R 385, 396; *Engert* (1995) 84 A Crim R 67, 71; *R v Verdins* (2007) 169 A Crim R 581, 586-7.

<sup>120</sup> *Maddeford* (2001) 120 A Crim R 497.

hours.<sup>121</sup> The respondent suffered from severe anxiety and obsessive-compulsive disorder, the latter condition manifesting with a fixation on the supposedly ubiquitous presence of germs and how that problem could be managed in his prison environment. As a result of this condition he was extremely distressed, abnormally agitated and suicidal at the prospect of returning to prison.<sup>122</sup>

The Court held that, in relation to serious crime, general deterrence would 'necessarily be the dominant factor affecting the construction of the sentence' and, almost inevitably, that would result in a heavier sentence of imprisonment. Hence, there would be 'limited scope for giving effect to matters personal to the offender' such as the offender's mental impairment.<sup>123</sup>

The Court cited with approval the following dictum:

The existence of a mental disorder is always a relevant factor in the sentencing process, but its impact upon that process and the various issues that arise in sentencing will vary considerably according to the circumstances of the individual case. An assessment of the severity of the disorder is required. ... The gravity of the criminal conduct is also an important consideration. It is not difficult to understand that the element of general deterrence can readily be given considerably less weight in the case of an offender suffering from a significant mental disorder who commits a minor crime, particularly if a causal relationship exists between the mental disorder and the commission of such an offence. In some circumstances, however, the mental disorder may not be serious or causally related to the commission of the crime, and the circumstances of the crime so grave, that very little weight in mitigation can be given to the existence of the mental disorder and full weight must be afforded to the element of general deterrence. In between those extremes, an infinite variety of circumstances will arise in which competing considerations must be balanced.<sup>124</sup>

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<sup>121</sup> Ibid 498.

<sup>122</sup> Ibid 500, 503.

<sup>123</sup> Ibid 501.

<sup>124</sup> *Wiskich* (2000) LSJS 431, 457, (Martin J, SACCA), cited in *Maddeford* (2001) 120 A Crim R 497.

This dictum exemplifies the areas which have become contentious. Courts have been unable to agree whether, in relation to reducing the weight of general deterrence, there is a need for the mental impairment to be causally related to the offence or whether the mental impairment needs to be “serious”.

In *Letteri*,<sup>125</sup> the New South Wales Court of Criminal Appeal (NSWCCA) held that the weight of general deterrence should be reduced even when the offender’s mental condition was not a contributory factor inducing the commission of the offence.<sup>126</sup>

In *Heather*,<sup>127</sup> the NSWCCA dealt with a case involving three counts of aggravated sexual assault on a child of eleven by an offender who suffered from a variety of mental disorders, including schizophrenia.<sup>128</sup> The Court was unable to identify any causal nexus between the offender’s mental impairments and the offending conduct. Newman J could see no reason why the full weight of general deterrence should not be applied to the sentence when the disorder had not contributed to the offence. He distinguished *Letteri*, but considered that the case should be the subject of a review at a suitable time.<sup>129</sup>

The causation issue remains unresolved in New South Wales, as highlighted in two conflicting decisions from 2006. In *Benitez*, the appellant was convicted of two counts of soliciting the murder of his estranged wife and her lover.<sup>130</sup> The appellant suffered from depression, which the sentencing judge found

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<sup>125</sup> *R v Letteri* (unreported, NSWCCA, 18 March 1992) BC9202733.

<sup>126</sup> *Ibid* 12.

<sup>127</sup> *R v Heather* (unreported, NSWCCA, 1 August 1995), cited in Sally Traynor "Sentencing Mentally Disordered Offenders: The Causal Link" (2002) 23 *Sentencing Trends*, <http://www.judcom.nsw.gov.au/st/st23/index.html>.

<sup>128</sup> *Ibid* 4, cited in Sally Traynor "Sentencing Mentally Disordered Offenders: The Causal Link" (2002) 23 *Sentencing Trends*, <http://www.judcom.nsw.gov.au/st/st23/index.html>.

<sup>129</sup> *Ibid* (Newman J, at 4), cited in Sally Traynor "Sentencing Mentally Disordered Offenders: The Causal Link" (2002) 23 *Sentencing Trends*, <http://www.judcom.nsw.gov.au/st/st23/index.html>.

<sup>130</sup> *Benitez v R* (2006) 160 A Crim R 166.



was not causally related to the accused's offending conduct.<sup>131</sup> The NSWCCA held that the illness was relevant to the weight to be given to general deterrence, even in the absence of any nexus with the offence. However, in considering the extent of the reduction of the weight of deterrence, it was appropriate to consider the seriousness of the offence against the severity of the impairment.<sup>132</sup>

In *R v Z*,<sup>133</sup> the respondent pleaded guilty to charges of possession of a large commercial quantity of ecstasy and a money-laundering conspiracy charge. He was an Israeli national who suffered from post-traumatic stress disorder and depression as a result of a suicide-bombing incident.<sup>134</sup> The sentencing judge found that these conditions were causally related to the offending conduct.<sup>135</sup> The NSWCCA held that, even in cases where the offence was causally related to the mental disorder, the primary question was whether the offender knew what he was doing and acted despite knowledge of the gravity of that criminal conduct. If so, full weight should be given to the need for general deterrence, regardless of the accused's mental condition.<sup>136</sup> New South Wales courts have also noted that, although the weight of general deterrence is usually only a significant factor in cases of serious mental impairment, the principle is not predicated on the seriousness of the condition.<sup>137</sup>

In Victoria, it has been clear since *Tsiaras*<sup>138</sup> that a mentally impaired offender is not considered to be 'an appropriate vehicle for general deterrence, whether or not the impairment played a part in the commission of

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<sup>131</sup> Ibid 172.

<sup>132</sup> Ibid 175.

<sup>133</sup> *R v Z* (2006) 167 A Crim R 436.

<sup>134</sup> Ibid 436.

<sup>135</sup> Ibid 452.

<sup>136</sup> Ibid 452.

<sup>137</sup> *Krempin* (2003) 142 A Crim R 56, 66; *Wright* (1997) 93 A Crim R 48, 50.

<sup>138</sup> *R v Tsiaras* [1996] 1 VR 398.

the offence'.<sup>139</sup> However, there have been a number of conflicting decisions around the need for the mental condition to be "serious".<sup>140</sup> In 2007 the Victorian Court of Appeal in *Verdins*<sup>141</sup> clarified that the general deterrence principle is not limited to cases involving serious psychiatric illnesses. Instead, it applies to a wide variety of mental conditions, including to cases where the specific condition cannot be identified.<sup>142</sup> The court emphasised that the classification of the condition is not the issue. Rather, the court should direct attention to the question of how the mental condition was likely to have affected the offender during the lead up to and at the time of offending and in the future.<sup>143</sup> Victorian courts have also recognised that mental illness can play an instrumental role in offending conduct, even when an offence is carefully planned and executed and the offender knew exactly what he or she was doing and that it was wrong.<sup>144</sup>

In Western Australia the principle is recognised that general deterrence should be given less weight when sentencing mentally impaired offenders, but only when there is a causal link between the condition and the offence.<sup>145</sup> The principle only applies to serious disorders; severe depression has been held insufficient to invoke the principle,<sup>146</sup> even when coupled with intellectual impairment.<sup>147</sup> Moreover, in cases where general deterrence is given reduced weight, it is only taken into account in the fixing of the non-parole period, not the head sentence.<sup>148</sup> Similarly, in South Australia general deterrence is only

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<sup>139</sup> Ibid 400.

<sup>140</sup> In *R v Verdins* (2007) 169 A Crim R 581, the court conducted a thorough survey of the cases on this point at 583-586.

<sup>141</sup> *R v Verdins* (2007) 169 A Crim R 581.

<sup>142</sup> Ibid 584, 585.

<sup>143</sup> Ibid 586.

<sup>144</sup> *Man* (1990) 50 A Crim R 79, 83.

<sup>145</sup> *Watson v R* [2000] WASCA 119, [88]; *R v Western* [2001] WASCA 194, [41].

<sup>146</sup> *R v Richards* [1999] WASCA 105, [44], [45].

<sup>147</sup> *Watson v R* [2000] WASCA 119, [89].

<sup>148</sup> *Lauritsen* (2000) 114 A Crim R 333, 350; *Parnis* (1993) 49 FCR 304, 307.

given reduced weight when the mental impairment has causally contributed to the offending conduct and when that impairment is serious.<sup>149</sup>

In Queensland, there has not been any recent and detailed consideration of the principles to be applied in sentencing mentally impaired offenders. The need for a causal link between the mental impairment and the offence has been denied in persuasive obiter,<sup>150</sup> however the causal link remains a focus of inquiry in many cases.<sup>151</sup> It seems that in Queensland too, general deterrence will be of less significance only when the mental condition is serious.<sup>152</sup>

The question of the role of personal deterrence in sentencing mentally impaired offenders is less contentious. The notion of personal deterrence presupposes an offender's capacity to make a rational cost-benefit analysis in relation to offending.<sup>153</sup> It is also accepted that personal deterrence might be harder to achieve among this class of offender because of impaired capacity to exercise control over their own actions.<sup>154</sup>

### **Retribution**

The primary rule flowing from the theory of just deserts retributivism is that the punishment must be commensurate with the seriousness of the offence and the degree of culpability of the offender.<sup>155</sup> The sentence is imposed for the purpose of punishment, but the quantum of punishment is directly correlated to the degree of wrongdoing by the offender. Evidence of an offender's mental

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<sup>149</sup> *R v Tomlinson* [2007] SASC 222, [52], [54]; *Maddeford* (2001) 120 A Crim R 497, 502.

<sup>150</sup> *R v Neumann; ex parte Attorney-General (Qld)* [2005] QCA 362, [27].

<sup>151</sup> *R v Cook; ex parte Attorney-General (Qld)* [2007] QCA 100, [8], [14]; *R v Reid* [2001] QCA 301.

<sup>152</sup> *R v Adams* [2006] QCA 312, [17]; *R v Turner* [2006] QCA 133, [18].

<sup>153</sup> *Thompson v R* (2005) 157 A Crim R 385, 396; *R v Z* (2006) 167 A Crim R 436, 448.

<sup>154</sup> *R v Tsiaras* [1996] VR 398, 400; *R v Israil* [2002] NSWCCA 225, [25].

<sup>155</sup> Ivan Potas "Sentencing the mentally disordered offender in Australia" (1981) 4 *International Journal of Law and Psychiatry* 107, 114.

impairment might have a direct bearing on the question of culpability, in which case it can only have one impact on the calculation of a retributive sentence, which is to reduce the quantum of punishment below that which would be proportionate based on the objective facts of the offence.<sup>156</sup>

Issues such as fitness for trial and the defence of unsound mind are excluded from consideration at sentencing, because the fact of conviction confirms the offender's criminal responsibility for the offence.<sup>157</sup> Criminal responsibility thus implies a bright line bifurcation, but, arguably, as discussed below, the issue of diminishment of the relevant capacities has a continuing role to play in assessing culpability.<sup>158</sup>

The potential for an offender's mental impairment to reduce culpability is generally extremely well-accepted by the courts.<sup>159</sup> There are however significant differences in how courts apply that principle. One line of cases, prominent in South Australia and Western Australia, suggests that culpability is only reduced when there is a clear causal connection between the mental impairment and the commission of the offence.<sup>160</sup>

[M]oral culpability would only be lessened where there is a causal connection between the psychiatric illness and the commission of the offence or offences, in the sense that the psychiatric condition must have contributed to the commission of the offence ... It must necessarily be the case that, the greater the contribution of the psychiatric illness, the more

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<sup>156</sup> I.G. Campbell (1981) "Justice and Utility in Sentencing: Gascoigne Revived?" 12(1) *University of Queensland Law Journal* 43, 44; Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (2007) 99.

<sup>157</sup> Sally Traynor "Sentencing Mentally Disordered Offenders: The Causal Link" (2002) 23 *Sentencing Trends*, <http://www.judcom.nsw.gov.au/st/st23/index.html>.

<sup>158</sup> *R v Neumann; ex parte Attorney-General (Qld)* [2005] QCA 362; *R v Milini* [2001] QCA 424.

<sup>159</sup> *R v Israil* [2002] NSWCCA 255, [23]; *R v Henry* (1999) 46 NSWLR 346, 394; *Benitez v R* (2006) 160 A Crim R 166, 174; *R v Tsiaras* [1996] 1 VR 398, 400; *R v Verdins* (2007) 169 A Crim R 581, 588; *Lauritsen* (2000) 114 A Crim R 333, 346; *R v Neumann; ex parte Attorney-General (Qld)* [2005] QCA 362, [27]; *Channon v R* (1978) 20 ALR 1, 4.

<sup>160</sup> *Thompson v R* (2005) 157 A Crim R 385, 396; *R v Tomlinson* [2007] SASC 222, [51], [52]; *R v Western* [2001] WASCA 194, [41].

the moral culpability will be lessened. To the extent that there is a moral lessening of culpability, that should be reflected in the penalty imposed.<sup>161</sup>

Another line of cases has refused to impose any requirement of a causal relationship between the mental disorder and the offence.<sup>162</sup> In *Engert*<sup>163</sup> Gleeson CJ clearly preferred to avoid the imposition of prescriptive rules which could fetter discretion in an area where ‘the interplay of the considerations relevant to sentencing may be complex and on occasion even intricate.’<sup>164</sup> He held that it would therefore be ‘erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances’.<sup>165</sup>

In other cases, culpability seems to have been assessed by reference to diminishment of the same capacities which would be relevant to an insanity defence.<sup>166</sup> In *Israil*,<sup>167</sup> Spigelman CJ observed that:

an offender's inability to understand the wrongfulness of his actions, or to make reasonable judgments, or to control his or her faculties and emotions, will impact on the level of culpability of the offender, even where the illness does not amount to an excuse at law.<sup>168</sup>

Spigelman CJ cited with approval the judgment of Wood CJ in *Henry*,<sup>169</sup> who explained that the rationale for the principle was that:

the offender who suffers from a mental disorder or abnormality is less in control of his or her cognitive facilities or emotional restraints, and in some instances lacks the ability to make reasoned or ordered judgments.

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<sup>161</sup> *Thompson v R* (2005) 157 A Crim R 385, 396 (Steytler P).

<sup>162</sup> *Engert* (1995) 84 A Crim R 67, 71; *Benitez v R* (2006) 160 A Crim R 166, 174; *R v Neumann; ex parte Attorney-General (Qld)* [2005] QCA 362, [27].

<sup>163</sup> *Engert* (1995) 84 A Crim R 67.

<sup>164</sup> *Ibid* 68.

<sup>165</sup> *Ibid* 68.

<sup>166</sup> The insanity defence is available when the accused was, at the time of committing the offence, deprived of the capacity to know the nature or quality of the act he or she was doing or, if he or she did know it, was deprived of the capacity to appreciate its wrongfulness: *McNaghten's Case* (1843-1869) All ER Rep 229, 233; *R v Porter* (1933) 55 CLR 182, 189.

<sup>167</sup> *R v Israil* [2002] NSWCCA 255.

<sup>168</sup> *Ibid* [23]. See also *R v Pitt* [2005] NSWCCA 304, [25].

<sup>169</sup> *R v Henry* (1999) 46 NSWLR 346.

Almost invariably there is a limited appreciation of the wrongfulness of the act, or of its moral culpability, which although falling short of avoiding criminal responsibility does justify special consideration upon sentencing.<sup>170</sup>

Echoes of that approach can be found in numerous cases.<sup>171</sup> Recently, in *R v Z*, the NSWCCA held that, even when an offender's mental impairment has a causal relationship with the offence, it will have only minimal bearing on culpability if the offender nonetheless understood the gravity of his or her criminal conduct.<sup>172</sup> In dissent, Adams J opined that:

If an offender's psychological condition results in his or her failing to fully appreciate the extent of the criminality involved in an offence, that is clearly a significant mitigating factor. However, where there is a link reasonably thought to be present between the commission of the offence and the compromised psychological state of the offender so that the offender's judgment about involvement is adversely affected as, for example, where he or she is less able to resist pressures to commit the offence, then the presence of the psychological vulnerability is also relevant and should be taken into account. Of course, the extent to which it affects the culpability of the offender is very much a matter of fact and degree but I do not think that, merely because an offender is aware of the seriousness of the crime he or she commits, his or her psychological condition is immaterial or necessarily of slight significance.<sup>173</sup>

Adams J's approach accords with the broader approach now favoured in Victorian courts. In *Verdins*<sup>174</sup> the Court of Appeal undertook a thorough survey of the relevant authorities and, building on the Court's earlier decision in *Tsiaras*,<sup>175</sup> held that an offender's impaired mental functioning may reduce culpability if, at the time of the offence, it had the effect of:

(a) impairing the offender's ability to exercise appropriate judgment;

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<sup>170</sup> Ibid [254], cited in *R v Israil* [2002] NSWCCA 255, [23].

<sup>171</sup> *Wright* (1997) 93 A Crim R 48, 51; *R v Yaldiz* (1998) 2 VR 376, 383; *Wiskich* (2000) 207 LSJS 431, 457; *R v Pitt* [2005] NSWCCA 304, [25].

<sup>172</sup> *R v Z* (2006) 167 A Crim R 436, 448.

<sup>173</sup> *R v Z* (2006) 167 A Crim R 436, 458-459.

<sup>174</sup> *R v Verdins* (2007) 169 A Crim R 581.

<sup>175</sup> *R v Tsiaras* [1996] 1 VR 398.

- (b) impairing the offender's ability to make calm and rational choices, or to think clearly;
- (c) making the offender disinhibited;
- (d) impairing the offender's ability to appreciate the wrongfulness of the conduct;
- (e) obscuring the intent to commit the offence; or
- (f) contributing (causally) to the commission of the offence.<sup>176</sup>

The court noted that the list was not intended to be exhaustive.<sup>177</sup>

Mental impairment can also be relevant in another way to the ascertainment of a proportionate sentence. Courts in NSW and Victoria have held that any additional onerousness of a prison sentence is a factor to be considered in determining a proportionate sentence.<sup>178</sup> It is reasoned that, if a prison sentence is likely to weigh more heavily on an offender because of his or her mental impairment, proportionality requires consideration, not only of the length of confinement, but the harshness of the circumstances.<sup>179</sup> Hence, proportionality implies that the duration should be reduced if the sentence will be more onerous. This principle is not uniformly applied throughout Australia. In Queensland, courts frequently refuse to apply the principle when faced with what are considered to be serious offences<sup>180</sup> and Western Australian courts have expressed doubts about whether the principle applies at all in that state.<sup>181</sup>

<sup>176</sup> *R v Verdins* (2007) 169 A Crim R 581, 588-589 (footnote references omitted).

<sup>177</sup> *R v Verdins* (2007) 169 A Crim R 581, 589.

<sup>178</sup> *R v Verdins* (2007) 169 A Crim R 581, 589-590; *R v Tsiaras* [1996] 1 VR 398, 400; *R v Vardouniotis* [2007] VSCA 62, [30]; *R v Z* (2006) 167 A Crim R 436, 448; *R v Israil* [2002] NSWCCA 225, [26]; *Wright* (1997) 93 A Crim R 48, 54-55.

<sup>179</sup> *R v Verdins* (2007) 169 A Crim R 581, 589; *Vardouniotis* [2007] VSCA 62, [30]; *Wright* (1997) 93 A Crim R 48, 54-55.

<sup>180</sup> For example: *Leigh* (1996) 86 A Crim R 261, 267, which involved charges of indecent dealing with children; and *R v La Rosa; ex parte Attorney-General (Qld)* [2006] QCA 19, [28] which involved charges of stealing as a servant.

<sup>181</sup> *R v Lippiatt*, (unreported, WACCA, No. 980065, 17 Feb 1998) 10; *Symonds v R* (unreported, WACCA, No. 206 of 1997, 28 October 1998) 9; *Lauritsen* (2000) 114 A Crim R 333, 349.

### C. A coherent and consistent approach?

The courts have struggled to explain why an offender's mental impairment is specifically relevant to consideration of the utilitarian goal of general deterrence. The rationale for the rule most often quoted in modern cases was originally delivered by Young CJ of the Victorian Court of Criminal Appeal:

General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others.<sup>182</sup>

Young CJ elaborates:

The mental condition of an offender may be taken into account when passing sentence, but whether the evidence establishes legal insanity or mental illness stopping short of legal insanity, *the question to be answered is whether the interests of society permit or the interests of the offender require that the sentence to be passed be reduced from what would otherwise be appropriate rather than whether the offender's responsibility for the offence should be regarded as having been reduced.*<sup>183</sup>

A number of other judges have also attempted to explain why mental impairment is relevant to general deterrence. In *Mooney*,<sup>184</sup> Lush J reasoned that:

The concept of the deterrence of others by the punishment of an offender is that an understanding that an offence is followed by substantial adverse consequences will prevent others from committing the offence. Regard to this consideration must, I think, be relevant to the use of the law as an instrument of social administration. Its *significance in a*

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<sup>182</sup> *Mooney* (unreported, VCCA, 21st June 1978), cited in *Anderson* (1980) 2 A Crim R 379, 384. Also cited in: *Scognamiglio* (1991) 56 A Crim R 81, 86; *Engert* (1995) 84 A Crim R 67, 71 (Gleeson CJ); *Wright* (1997) 93 A Crim R 48, 50; *R v Harb* [2001] NSWCCA 249, [36]. *R v Verdins* (2007) 169 A Crim R 581, 586; *R v Neumann; ex parte Attorney-General (Qld)* [2005] QCA 362, [27]; *Lauritsen* (2000) 114 A Crim R 333, 346; *R v Tomlinson* [2007] SASC 222, [46]

<sup>183</sup> *Mooney* (unreported, VCCA, 21st June 1978), cited in *Anderson* (1980) 2 A Crim R 379, 384 (emphasis added).

<sup>184</sup> *Mooney* (unreported, VCCA, 21st June 1978).



*particular case will, however, at least usually be related to the kindred concept of retribution or punishment in which is involved an element of instinctive appreciation of the appropriateness of the sentence to the case. A sentence imposed with deterrence in view will not be acceptable if its retributive effect on the offender is felt to be inappropriate to his situation and to the needs of the community.*<sup>185</sup>

Almost two decades later, Allen J in the NSWCCA opined that:

It must be emphasised that general deterrence is directed to deterring others. So one must look to the impact upon others. Even in a case where an offender has a mental disability which is unrelated to the commission of the crime the sympathy which his condition must attract in the eyes of others in the community generally may be such that to sentence him with full weight given to general deterrence might have no impact at all upon others. Human sympathy would say: "Well, you would not expect him to get the same sentence as someone else."<sup>186</sup>

Also in the NSWCCA, Hunt CJ at CL explained:

The reason for the principle is that the interests of society do not require such persons to be punished as severely as persons without [mental impairment] because such severity is inappropriate to their circumstances. The full understanding of the authority and requirements of the law which is attributed to the ordinary individual of adult intellectual capacities cannot be expected of a person whose intellectual function is insufficient to have that understanding. The means by which the courts give effect to that principle (as an instrument of social administration) is to moderate the consideration of general deterrence to the circumstances of the particular case.<sup>187</sup>

Arguably, and with the utmost respect, these explanations have conflated the concepts of deterrence and retribution. It is often said that general deterrence is the primary purpose of punishment.<sup>188</sup> While some judges have candidly

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<sup>185</sup> *Mooney* (unreported, VCCA, 21st June 1978), cited in *Anderson* (1980) 2 A Crim R 379, 384 (emphasis added).

<sup>186</sup> *Engert* (1995) 84 A Crim R 67, 72.

<sup>187</sup> *Wright* (1997) 93 A Crim R 48, 51 (footnotes omitted). The same rationale was expressed in *R v Henry* [1999] NSWCCA 111, [254] (Wood CJ at CL) and *R v Matthews* (2004) 145 A Crim R 445, 450.

<sup>188</sup> *Western Australia v Walley* [2008] WASCA 12, [16]; *Radich* [1954] NZLR 86, 87; *Walden v Hensler* (1987) 163 CLR 561, 569; *Williscroft* [1975] VR 292, 298; Geraldine Mackenzie, *How Judges Sentence* (2005) 98, 100.

expressed doubts about the efficacy of marginal deterrence,<sup>189</sup> the judiciary as a whole continues to depend heavily on deterrence to underpin its sentencing jurisprudence.<sup>190</sup>

In the emphasised section of the quote (above) from Young CJ's decision in *Mooney*, His Honour conflates the interests of society and the interests of the offender in a reduced sentence into a single question.<sup>191</sup> Young CJ doesn't explain how these disparate interests can be resolved in a coherent way under the rubric of the utilitarian concept of general deterrence. Furthermore, His Honour then asserts that this question should take precedence over any question of the offender's reduced responsibility for the offence. To the extent that reduced responsibility equates with reduced culpability and hence suggests a lower proportionate sentence, His Honour does not explain how sentencing in accordance with this method would be consistent with the primacy of proportionality prescribed in *Veen (No 2)*.<sup>192</sup>

Lush J considers that retribution or punishment is a 'kindred concept' of deterrence.<sup>193</sup> That is a curious statement because retribution and deterrence have theoretically quite distinct underpinnings. Just deserts retribution is justified on the basis that the criminal has chosen to break society's rules and thus deserves punishment, but only to an extent which is commensurate with the degree of wrongdoing. Punishment involves the deliberate infliction of suffering, but it is justified because it responds with equivalence to the offender's own culpable choices; any benefit that accrues to society is purely

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<sup>189</sup> Geraldine Mackenzie, *How Judges Sentence* (2005) 100; *Pavlic* (1995) 5 Tas R 186, 190; Richard Edney & Mirko Bagaric, *Australian Sentencing* (2007) 58 - 62; Richard Fox and Arie Frieberg, *Sentencing: State & Federal Law in Victoria* (1999) 209.

<sup>190</sup> Geraldine Mackenzie, *How Judges Sentence* (2005) 99; Richard Edney & Mirko Bagaric, *Australian Sentencing* (2007) 54 - 55.

<sup>191</sup> *Mooney* (unreported, VCCA, 21st June 1978), cited in *Anderson* (1980) 2 A Crim R 379, 384.

<sup>192</sup> *Veen v R (No 2)* [1988] HCA 14, [13].

<sup>193</sup> *Mooney* (unreported, VCCA, 21st June 1978), cited in *Anderson* (1980) 2 A Crim R 379, 384 (emphasis added).

incidental.<sup>194</sup> Deterrence, on the other hand, is a utilitarian Benthamite concept which claims that the primary purpose of punishment must be to prevent crime by deterring future offending by the offender or others. Punishment is justified, despite the suffering of the offender, because of the societal benefits of reductions in crime.<sup>195</sup>

Lush J accepts that a deterrent sentence must be subject to its appropriate retributive effect, but adds that the needs of the community are also a limiting factor. In *Veen (No 2)* the High Court determined that an appropriate sentence is limited by proportionate retributivism; deterrence and other community benefit factors should be considered where relevant, but only within those limits.<sup>196</sup> Lush J does not explain how the needs of the community can be coherently factored into the ascertainment of an appropriate proportionate sentence when the High Court has maintained that the role of proportionality is to set limits within which a deterrent sentence should be fixed.<sup>197</sup>

Hunt CJ clearly explains the circumstances relevant to the reduced culpability of mentally impaired offenders and then explains that it would be “inappropriate” to punish these offenders as severely as others and that the ‘instrument of social administration’ used to implement this principle is the moderation of deterrence.<sup>198</sup>

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<sup>194</sup> David Dolinko. ‘Three Mistakes of Retributivism’ (1992) 39(6) *UCLA Law Review*, 1623,1626-1627; Kevin Carlsmith, John Darley & Paul Robinson, ‘Why do we Punish? Deterrence and Just Deserts as Motives for Punishment’ (2002) 83(2) *Journal of Personality and Social Psychology* 284, 284-5.

<sup>195</sup> Kevin Carlsmith, John Darley & Paul Robinson, ‘Why do we Punish? Deterrence and Just Deserts as Motives for Punishment’ (2002) 83(2) *Journal of Personality and Social Psychology* 284, 285; David Dolinko. ‘Three Mistakes of Retributivism’ (1992) 39(6) *UCLA Law Review*, 1623,1626.

<sup>196</sup> *Veen v R (No 2)* [1988] HCA 14, [9].

<sup>197</sup> *Veen v R (No 2)* [1988] HCA 14, [9].

<sup>198</sup> *Wright* (1997) 93 A Crim R 48, 51 (footnotes omitted). The same rationale was expressed in *R v Henry* [1999] NSWCCA 111, [254] (Wood CJ at CL) and *R v Matthews* (2004) 145 A Crim R 445, 450.

As a matter of logic, it is difficult to see why the consideration of mental impairment in sentencing is subsumed within utilitarian deterrence considerations. The dictum of Allen J, quoted above, suggests that “human sympathy” does not demand strongly deterrent sentences for mentally impaired offenders. Implicitly, at the heart of that sympathy could be the idea that the community accepts that these offenders may have a reduced level of moral responsibility for their offending conduct. Reduced moral culpability is therefore more properly relevant to proportionate retributivism. By contrast, public sympathy is irrelevant to deterrence. Even disproportionately harsh sentences would theoretically serve the utilitarian function of deterrence, provided the offender committed the actus reus of the offence.

The offender’s moral culpability is a factor squarely relevant to the assessment of a proportionate sentence. Andrew Ashworth has described proportionality as involving two principal dimensions: the objective seriousness of the offence and the moral culpability of the offender.<sup>199</sup> Moral culpability encompasses notions of intent and recklessness and also the mental state that supports some narrowly-defined defences, such as insanity, duress, mistake of fact and provocation, even when those defences cannot be completely made out.<sup>200</sup> Therefore, if mental impairment is related to the offending, it is clearly a culpability factor which should be taken into account in assessing a proper proportionate sentence.<sup>201</sup>

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<sup>199</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (2000, 3<sup>rd</sup> Ed.) 96, 123; Richard Edney & Mirko Bagaric *Australian Sentencing: Principles and Practice* (2007), 99; Richard Fox & Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (1999), 225.

<sup>200</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (2000, 3<sup>rd</sup> Ed.) 96, 124.

<sup>201</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (2000, 3<sup>rd</sup> Ed.) 96, 124; Richard Fox & Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (1999), 226; Richard Edney & Mirko Bagaric *Australian Sentencing: Principles and Practice* (2007), 99.

This principle has received judicial recognition. In *Way*<sup>202</sup> the NSWCCA held that:

Some of the relevant circumstances which can be said “objectively” to affect the “seriousness” of the offence will be personal to the offender at the time of the offence but become relevant because of their causal connection with its commission. This would extend to matters of ... mental state (for example, intention is more serious than recklessness), and mental illness, or intellectual disability, where that is causally related to the commission of the offence, in so far as the offender’s capacity to reason, or to appreciate fully the rightness or wrongness of a particular act, or to exercise appropriate powers of control has been affected ... Such matters can be classified as circumstances of the offence and not merely circumstances of the offender.<sup>203</sup>

In other words, when mental impairment has a causal relationship with the offending conduct, it is part of the objective circumstances of the offence and should be considered when assessing the proper proportionate limits of the sentence. Arguably, a ‘causal relationship’ should be considered broadly in this context because the court has referred to impairment that affects the offender’s capacities to reason and to exercise self-control and to differentiate right from wrong. That approach would cohere with the approach favoured by the VCA in *Verdins*, which, in addition to the above impacts, also expressly includes consideration of impaired ability to exercise appropriate judgment, impaired ability to think clearly and rationally and the engenderment of general disinhibition which can break down the psychological barriers to offending.<sup>204</sup>

It is important that the nature of the relationship between mental impairment and the offence be considered broadly because, in many cases, a causal link might not be able to be identified with technical precision.<sup>205</sup> The question

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<sup>202</sup> *R v Way* [2004] NSWCCA 131.

<sup>203</sup> *R v Way* [2004] NSWCCA 131, [86] (references omitted).

<sup>204</sup> *R v Verdins* (2007) 169 A Crim R 581, 588-589 (footnote references omitted).

<sup>205</sup> Paul Mullen *A review of the relationship between mental disorders and offending behaviours and on the management of mentally abnormal offenders in the health and criminal justice services* (2001) Criminology Research Council, <http://www.aic.gov.au/crc/reports/mullen.html>, 4; *R v Neumann; ex parte Attorney-General (Qld)* [2005] QCA 362, [20], [26].

might also be confounded by comorbid substance use which, as noted above, is a widespread problem, and can make issues of causation extremely complex.<sup>206</sup> And, while it is clear that there must be a firm evidentiary foundation before a court can take mental impairment into account,<sup>207</sup> if an offender's condition was undiagnosed at the time of the offence, the courts arguably should take into account the challenges of retrospective diagnosis and the difficulties of identifying in hindsight the precise effect of an impairment.<sup>208</sup>

The High Court has made it clear that sentencing is not to be approached as a mathematical or a two-stage task where increments are deducted from some nominal starting point.<sup>209</sup> Instead, the preferred process is to take account of all the relevant material, including those elements in conflict with each other, and arrive at a sentence through a process of "instinctive synthesis".<sup>210</sup> In many cases where mental impairment has been put forward on the offender's behalf as a relevant factor, judges have not expressly discussed the nature or extent of the offender's impairment or considered the nature of the nexus with the offending conduct.<sup>211</sup> Arguably, it is important for transparency and accountability that these matters be consciously considered and expressly referred to in sentencing remarks. Even without stipulating a mathematical value, the express consideration of the relevant features and impact of an offender's impairment would undoubtedly aid consistency and provide reassurance that mentally impaired offenders are not being subject to disproportionately harsh sentences.

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<sup>206</sup> *R v Israil* [2002] NSWCCA 255, [27]; *R v Verdins*; *R v Buckley* (2007) 169 A Crim R 581, 593-4; *R v Sebalj* [2006] VSCA 106, [13].

<sup>207</sup> *Channon v R* (1978) 20 ALR 1, 13.

<sup>208</sup> *R v Neumann; ex parte Attorney-General (Qld)* [2005] QCA 362, [20]; *R v Verdins*; *R v Vo* (2007) 169 A Crim R 581, 598.

<sup>209</sup> *Wong v R*; *Leung v R* (2001) 207 CLR 584, 611.

<sup>210</sup> *Wong v R*; *Leung v R* (2001) 207 CLR 584, 611-612.

<sup>211</sup> *R v Tomlinson* [2007] SASC 222, [10]; *R v Yaldiz* [1998] 2 VR 376, 383; *R v Turner* [2006] QCA 133, [17] - [18].

## D. Conclusion

This paper has considered the common law's purposive approach to sentencing, as applied to cases involving mentally impaired offenders. The applicable principles were discussed and inconsistencies were revealed in the way sentencing principles are applied, both within and between jurisdictions. It has also been argued that the rules for taking mental impairment into account in sentencing are not logically or doctrinally explicable by reference to the sentencing theory which underpins those rules.

Sentence hearings potentially pose a number of difficulties for mentally impaired offenders. In the absence of formalised mental health screening in the early stages of contact with the criminal justice system, the fact of an offender's mental impairment is liable to escape the notice of the courts.<sup>212</sup> Offenders might lack insight into their own impairment or be unable to provide appropriate instructions to legal counsel.<sup>213</sup> If no psychiatric or psychological report has been obtained, the courts are constrained from taking impairment into account, even when an impairment seems obvious from the offender's presentation and the facts of the offence.<sup>214</sup> Moreover, if a report was not obtained until some months after the offence was committed, psychiatrists can face difficulties in retrospectively diagnosing the operative condition and postulating the precise impact it had on the offender at that time.<sup>215</sup> Under those circumstances, courts may have little choice but to fall back on the objective circumstances of the offence to determine a proportionate sentence.

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<sup>212</sup> James Ogloff, Michael Davis, George Rivers and Stuart Ross, 'The identification of mental disorders in the criminal justice system' (2007) 334 *Trends and Issues in Crime and Criminal Justice* 2-3.

<sup>213</sup> Tiffany Conduit and Karen Heseltine, 'Lawyers: A role to play in the detection of mental impairment?' (2005) 12(1) *Psychiatry Psychology and Law* 50, 50.

<sup>214</sup> *Channon v R* (1978) 20 ALR 1, 20.

<sup>215</sup> *R v Neumann; ex parte Attorney-General (Qld)* [2005] QCA 362, [7], [20], [26].

The result for the offender might be a sentence which is unduly severe, given the offender's reduced culpability.

In addition, in relation to mentally impaired offenders who suffer from comorbid substance abuse disorder, questions of causation are complex and sometimes, unresolvable.<sup>216</sup> Ross and Lawrence found that in these cases, judges are less likely to make orders with treatment conditions and will often fall back on the rules that apply to intoxicated offenders.<sup>217</sup>

This is a formidable list of practical and procedural challenges which have the potential to impede sentencing justice for the mentally impaired. However, as demonstrated within this paper, there are additional challenges posed by substantive sentencing law. When relevant, mental impairment is usually taken into account predominantly for the purpose of considering the deterrence function of a sentence.<sup>218</sup> However, as argued above, mental impairment is a matter more properly relevant to culpability, and hence it is an objective circumstance of the offence which is required to be considered in ascertaining the appropriate proportional sentence. It has been argued that the failure to consider mental impairment as part of proportionality risks sentencing mentally impaired offenders with undue severity. These challenges could be ameliorated through the adoption of rules which cohere with sentencing theory and subsequently applying those rules in a consistent manner both within and between all Australian jurisdictions. A reconsideration of the applicable principles by the High Court would be a welcome development.

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<sup>216</sup> Susan Henderson *Mental Illness and the Criminal Justice System* (2003) Mental Health Coordinating Council, <http://www.mhcc.org.au>, 8; *R v Verdins* (2007) 169 ACrimR 581, 594.

<sup>217</sup> Stuart Ross and Jeanette Lawrence, 'Sentencing Mentally Disordered Offenders: Factors that predict Sentencers' decisions about Treatment' (2005) 12(1) *Psychiatry Psychology and Law* 174, 180.

<sup>218</sup> *Thompson v R* (2005) 157 A Crim R 385, 396; *Engert* (1995) 84 A Crim R 67, 71; *Scognamiglio* (1991) 56 A Crim R 81, 86; *R v Tsiaris* [1996] 1 VR 398, 400; *R v Cook*; *ex parte Attorney-General* (Qld) [2007] QCA 100, [15].



Frequently it is said that consistency is one of the hallmarks of a just sentencing system.<sup>219</sup> The sufferers of mental impairment are a vulnerable group and, when they come before the courts as offenders, it behoves all involved in the criminal justice system to ensure that they are treated justly.

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<sup>219</sup> Geraldine Mackenzie 'Achieving Consistency in Sentencing: Moving to Best Practice?' *University of Queensland Law Journal* 22(1) (2002) 74, 76.