
The Purposes of Punishment: How Do Judges Apply a Legislative Statement of Sentencing Purposes?

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Despite abundant academic debate about the justification for criminal punishment, the frequent revisiting of how to deal legislatively with the purposes of a sentence by law reform bodies and some legal analysis of appellate guidance on the purposes of sentence, little attention has been given to judges' reliance on the purposes of sentence in their sentencing remarks. This article attempts to close this gap by analysing the sentencing remarks in trials obtained for a study of jurors' views of sentencing in Victoria. Against the backdrop of the Victorian legislation, the article examines the extent to which judges advert to the purposes of sentence in their reasons and how they rank and prioritise the purposes including in cases where there was a statutory requirement to prioritise incapacitation. Explanations for judges' preferences are suggested including that purposes serve as proxies for statements about the seriousness of the crime.

Acknowledgment

This research was supported by the Australian Research Council's Discovery Projects funding scheme [Project DP 130110154]

THE DEBATE OVER PURPOSES

The justification of criminal punishment is an intractable problem that has been debated for over two thousand years. One of the most hotly contested issues is whether it is possible to devise a rational, coherent and consistent system of criminal sentencing that can accommodate multiple, and sometimes conflicting, purposes. Many philosophers, criminologists and legal academics agree that the criminal justice system should be controlled by a single overarching purpose, but disagree on what that purpose should be. So, while utilitarians champion deterrence, deontologists insist that retribution in the modern sense of 'just deserts' is the answer. Some, like HLA Hart, argue that different purposes can justify different aspects of the justice system and suggest that while the utilitarian purpose of deterrence supplies the 'general justifying aim' of the system, it is not inconsistent to adopt the goal of retribution to control the distribution of individual sentences.¹ Others have introduced goals like rehabilitation, denunciation, restoration and reparation, which complicate the question even further. In an interesting contrast, however, judges in criminal courts do not appear to spend much time on these

¹ HLA Hart, *Punishment and Responsibility* (Clarendon Press, 1968) 1-27.

debates. So, while philosophers (who rarely have to put their theories to the test by punishing others) continue to argue, judges (who routinely decide criminal punishments) leave the theories to the theorists, and get on with the task of sentencing.

Law reform bodies, policy makers and legislatures have also grappled with the issue of how to guide judges in their selection of the purpose of a sentence. Issues include: whether to introduce a legislative list of purposes or leave the task to the common law; whether to have a single overarching purpose or a ranking of multiple purposes; whether the list should be exhaustive or non-exhaustive; and whether judges should be required to consider all purposes or be left free to select one or more purpose from the list.² In Australia, and indeed in most English speaking countries, the trend has been essentially to codify the common law by opting for a legislative statement of purposes without selecting a general overarching purpose or imposing a ranking of purposes.³ Although the lists are not identical or in the same terms, they invariably include the backward-looking purpose of retribution (or just punishment) and the forward-looking purposes of deterrence, protection of the public and rehabilitation. They usually mention denunciation, and sometimes include reparation. In some instances, protection of the public (or incapacitation) is made the principal purpose for certain offences and offenders.⁴

The failure to declare a general primary rationale has attracted strong academic criticism across the common law world and most commentators are united in the view that any system which simply lists all of the possible purposes without either giving one purpose a controlling role or listing the purposes in a defined hierarchy, will produce only chaos, unfairness and inconsistency. Commenting on the English criminal justice system, Andrew Ashworth argues that offering judges a choice of purposes is inconsistent with principled sentencing. He asserts that giving judges the

² For example: Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Final Report No 103 (2006) 133-47; New South Wales Law Reform Commission, *Sentencing*, Final Report No 139 (2013) 13-40.

³ Tasmania has adopted a different approach by setting out the purposes of the statute rather than the purposes of sentencing: *Sentencing Act 1997* (Tas) s 3.

⁴ Eg, *Sentencing Act 1991* (Vic) s 6A.

freedom to select from among the various rationales, or ‘pick-and-mix’ sentencing, invites inconsistency and allows judges ‘freedom to determine policy’ rather than ‘freedom to respond to an unusual combination of facts.’⁵ Instead, Ashworth prefers the Council of Europe’s approach that has been adopted in Sweden, which first declares a primary rationale and then allows, if necessary, a different rationale for certain types of offences.⁶ In the United States, Paul Robinson also argues that the ‘laundry list’ approach provides more illusion than guidance: ‘It leaves the decision maker free to decide issues ad hoc and privately, and inconsistently, while portraying the decision making as being constrained by principle.’⁷ In Australia, Freiberg points out that the failure to declare a primary rationale leads to judicial vacillation and eclecticism, because the justifications for sentence vary between sentencers and vary from offence to offence.⁸ Mirko Bagaric has long argued that sentencing is the least principled and coherent body of law and has criticised all systems that allow sentencers to pick and choose a sentencing purpose on the grounds that this approach results in inconsistency.⁹

While these warnings have been noted by law reform bodies, parliaments in Australia have largely ignored them and have proceeded to introduce unranked lists of purposes into sentencing legislation. This article considers whether one of these unranked ‘pick-and-mix’ lists of sentencing purposes found in the Victorian *Sentencing Act 1991* has led to the predicted confusion. It presents an analysis of 140 sentences for

⁵ Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010) 76-78.

⁶ *Ibid* 77.

⁷ Paul H Robinson, *Distributive Principles of Criminal Law: Who Should be Punished and How Much?* (Oxford University Press, 2008) 5-6.

⁸ Arie Freiberg, *Fox & Freiberg’s Sentencing, State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 235; and see Sentencing Advisory Council, Victoria, *Sentencing of Offenders: Sexual Penetration with a Child under 12* (2016) 55.

⁹ Mirko Bagaric, “Sentencing: The Road to Nowhere” (1999) 21(4) *Sydney Law Review* 597-626; Mirko Bagaric, “The Negation of Venting in Australian Sentencing: Denouncing Denunciation and Retribution” (2014) 88 *Australian Law Journal* 502-19, 503; Mirko Bagaric and Richard Edney, “What’s Instinct Got to do with it? A Blueprint for a Coherent Approach to Punishing Criminals” (2003) 27 *Criminal Law Journal* 119-41, 133.

separate offenders delivered in the Victorian County Court between May 2013 and June 2014 and seeks answers to the following questions:

- To what extent do judges advert to the purpose (or purposes) of sentencing in their sentencing reasons?
- How do judges rank or prioritise purposes?
- What effect do statutory provisions requiring the purpose of protecting the community to predominate for certain offences and offenders have on sentencing practice?

The answers to these questions will provide useful information for reviews of statutory sentencing guidelines on the purposes of criminal punishment and provide material for comparing community views with those of punishment theorists. By looking at the way that judges actually use these legislative purposes in practice, the article also supplements Geraldine Mackenzie's earlier interview research that asked judges about their views on the purposes of sentence.¹⁰ More specifically, this sample of sentencing remarks provides the opportunity to analyse cases that are subject to the serious offender regime, which in Victoria not only requires judges to treat protection of the public from the offender as the principal purpose of the sentence but also gives judges a discretion to impose a disproportionate sentence. This research updates a previous study by Richardson and Freiberg which examined cases between 1994 and 2002 to determine how the courts had interpreted and applied the serious offender provisions in the *Sentencing Act 1991* (Vic).¹¹

VICTORIAN STATUTORY GUIDANCE ON PURPOSES

The statements of sentencing purpose found in sentencing legislation in Australia, England, Canada and New Zealand are broadly similar. The Victorian *Sentencing Act 1991* provides in s 5 (1) that:

The only purpose for which sentences may be imposed are –

¹⁰ Geraldine Mackenzie, *How Judges Sentence* (Federation Press, 2005) 83-134.

¹¹ Elizabeth Richardson and Arie Freiberg, "Protecting Dangerous Offenders from the Community: The Application of Protective Sentencing Laws in Victoria" (2004) 4(1) *Criminal Justice* 81-102.

- (a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or
- (b) to deter the offender or other persons from committing offences of the same or a similar character;¹² or
- (c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
- (d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or
- (e) to protect the community from the offender; or
- (f) a combination of two or more of those purposes.

The serious offender regime

Part 2A of the Act (ss 6A-6F) applies to ‘serious offenders’. Section 6D provides that if in sentencing a ‘serious offender’ for a ‘relevant offence’, the County Court or the Supreme Court considers that a sentence of imprisonment is justified, the Court: (a) *must* in determining the length of the prison sentence regard the protection of the public from the offender as the principal purpose for which the sentence is imposed and (b) *may*, in order to achieve that purpose, impose a sentence longer than that which is proportionate to gravity of the offence considered in the light of its objective circumstances. A ‘serious offender’ as defined in s 6B, means a ‘serious arson offender’, a ‘serious drug offender’, a ‘serious sexual offender’ or a ‘serious violent offender’ (also defined in s 6B). For example, a ‘serious sexual offender’ is defined in four ways and includes an offender who has been convicted of two or more charges of sexual offences which attracted a sentence of imprisonment or youth detention and who is facing a conviction for their third or subsequent offence for which a sentence of imprisonment is appropriate. The third or subsequent offence can arise in the same case as the first two convictions.¹³ It is also provided that any sentence of

¹² Even though this provision mentions the two aspects of specific and general deterrence in the same paragraph, the two purposes can point in different directions and appellate guidance tends to deal with them as separate purposes.

¹³ *Sentencing Act 1991* (Vic) s 6B(2)(a), s 6C(1). The other three ways are: an offender who has been convicted of the offence of persistent sexual abuse of a child or a course of conduct charge which attracted a term of imprisonment or detention, or a course of conduct involving a sexual offence and a violent offence which attracted a sentence of imprisonment or detention. In these cases any second sexual offence will qualify the

imprisonment for a serious offender must be served cumulatively on an uncompleted sentence unless otherwise directed by the court.¹⁴

METHOD AND SAMPLE

This research made use of the sentencing remarks which had been obtained for the Victorian Jury Sentencing Study.¹⁵ The Jury Study attempted to recruit jurors from all County Court trials which returned a guilty verdict from May 2013 until July 2014. Responses were received from 126 trials and sentencing remarks were provided by the Court for 122 of those trials. Almost two thirds of these sentencing remarks were unpublished and so the sentencing remarks obtained for the Jury Sentencing Study provided a convenient sample to analyse the way that judges use the sentencing purposes.¹⁶ The 122 trials yielded 135 sentences for separate offenders (because some trials dealt with multiple offenders).

The sentencing remarks were analysed using NVivo, a qualitative data analysis software package which supports organising and analysing large numbers of documents. Each set of sentencing remarks was coded for expressly mentioned purposes and the relative weight of each was recorded on a descending scale ranging from ‘very important’ through to ‘important’, ‘some weight’ and ‘a little weight’. Where it was possible to identify a single predominant purpose this was also coded. The range of descriptors used by the judges to indicate weight varied considerably and so there was inevitably a degree of subjectivity in interpreting the judge’s remarks. Consistency of coding was ensured by crosschecking between the researchers.

offender as a serious sexual offender: *Sentencing Act 1991* (Vic) s 6B(2)(ab)(ab) and (ac).

¹⁴ *Sentencing Act 1991* (Vic) s 6E.

¹⁵ For a description of this study, see Kate Warner et al, “Measuring Jurors’ Views on Sentencing: Results from the Second Australian Jury Sentencing Study” (Forthcoming 2016) *Punishment & Society*.

¹⁶ Searches of recent decisions in AustLII, Jade and the County Court website were made to check which decisions had been published.

Judges do not always talk about the purpose of the sentence in terms which are easy to classify using the purposes listed in s 5(1); furthermore, the purposes were sometimes dealt with in overlapping ways. For example, ‘sending a message to others that courts will deal harshly with offenders who commit these crimes’¹⁷ sounds like general deterrence (aimed at deterring other potential offenders) but it also has overtones of censure and denunciation. So, despite the insistence of academic philosophers that these goals are distinct and sometimes stand in opposition to each other, judges do make statements that tend to conflate general deterrence, just punishment and denunciation.

RESULTS AND DISCUSSION

Question 1: Do judges advert to the purposes of sentencing in their sentencing remarks?

We found that judges almost invariably explicitly refer to at least some of the six purposes¹⁸ listed in s 5 of the *Sentencing Act 1991* in their sentencing remarks. There were just eight exceptions where judges did not explicitly mention any of the statutory purposes. For example, in *Griffiths*,¹⁹ a case of arson committed by a man who was intellectually disabled and who had problems with alcohol and prior convictions including for arson, the judge focused on the treatment and supervision conditions which were attached to the Community Corrections Order but made no explicit reference to the purposes of sentencing.

Judges specifically mentioned between one to six purposes of sentence in their remarks, most commonly three or four of the purposes listed in s 5. Sometimes they started the discussion of sentencing purposes by stating that the *Sentencing Act* required them to consider the listed purposes before going on to discuss the relevance

¹⁷ *DPP v Simmons* [2014] VCC 1228.

¹⁸ Even though the statute mentions the two aspects of deterrence in the same paragraph, appellate guidance and our analysis both reveal that judges tend to use them differently.

¹⁹ [2013] VCC 1593.

of at least some of the purposes in more detail. For example, a judge would begin by saying that each of the purposes listed in s 5 must be considered, and then go on to indicate which of these purposes was a ‘consideration’ in the case and should be given weight (eg, *DPP v Tran*).²⁰

The list of six purposes for which sentences may be imposed in the *Sentencing Act 1991* (Vic) s 5(1) does not require that the sentencing judge or magistrate must give weight to all purposes. It leaves them free to select just one or more of those purposes. While judges are obliged to give reasons for sentence, the extent to which this requires them to refer explicitly to the rationale or purpose of the sentence is unclear. Cases elaborating on the need to give reasons refer to the need to record the factual basis for the sentence,²¹ to refer to aggravating and mitigating factors as well as victim impact and to the need to expose the primary factors that have influenced the instinctive synthesis.²² Nothing is explicitly stated about referring to sentencing purposes. Statements that reasons should be given (for imprisoning the offender, for example) do not seem to demand reasons in the sense of explaining the philosophical rationale.²³ Even so, it seems that the judges of the County Court, unlike judges in the UK for example,²⁴ almost always refer to the purpose or purposes of the sentence.

Question 2: How do judges rank or prioritise purposes?

This section begins with an overview of the analysis of the ranking and weighting of purposes before elaborating on each of the purposes separately and giving examples of the kinds of cases in which the purpose is prioritised.

Overview

²⁰ *DPP v Tran* [2013] VCC 2145.

²¹ *DPP v Suckling* [1999] VSCA 190, [6]

²² *Koumis v The Queen* (2008) 18 VR 434, [63].

²³ *Nevermann* (1989) 43 A Crim R 347, 350 (Malcolm CJ citing *Tame v Fingleton* (1974) 8 SASR 507, 510), 353 (Wallace J), 354 (Brinsden J).

²⁴ New South Wales Law Reform Commission, above n 2.

**Table 1 Purposes of punishment by mention and relative weight of each purpose
(Total number of cases = 135)**

Purpose	Predominant (single)	Very important	Important	Some weight	Little weight	Total
Just punishment	0	20	17	39	0	76
General deterrence	21	39	29	21	5	115
Specific deterrence	3	11	19	35	26	94
Rehabilitation	1	2	5	26	3	37
Denunciation	3	22	28	31	1	85
Protection of the public (Incapacitation)	17	9	7	6	1	40

Our analysis revealed that judges appeared to select one predominant or primary purpose in a third of cases of the cases (33.3%). More often they indicated that two or more purposes were the dominant purposes (eg, where they were mentioned as being ‘the primary purposes’, ‘principal’, ‘most important’, or ‘significant’ purposes). Judges did not always give an indication of the weight given to the mentioned purposes but it was evident that they gave them at least some weight. In other cases the judge indicated that little weight was given to a particular purpose, and, as Table 1 shows, this was usually in relation to specific deterrence.

General deterrence was the most often mentioned purpose and it was also given the most weight – it was most often the predominant purpose, the very important purpose and an important purpose. Protection of the community from the offender (incapacitation) was the second most common predominant purpose, which was not surprising given the statutory requirement for this to be the principal purpose in cases where the serious offender regime applied. In fact, all cases where protection of the community was the predominant purpose were cases where the serious offender regime required it to be the principal purpose of the sentence. However, protection of the community was second only to rehabilitation as the least mentioned purpose.

After general deterrence, denunciation was the purpose given the most weight, followed by just punishment. Rehabilitation was given the least weight and the offender's prospects of rehabilitation tended to be dealt with separately from other purposes and was mentioned more often as a mitigating circumstance rather than as a purpose of sentence in its own right.

Just punishment

The first purpose listed in the *Sentencing Act 1990* (Vic) s 5(1) is 'to punish the offender to an extent and in a manner which is just in all of the circumstances'. This purpose is the modern version of the retributive rationale for punishment known as 'just desert' theory. Under this justification, criminal punishment should be determined by and proportionate to the seriousness of the crime.²⁵ Coding for this purpose was difficult. It was coded only if it was clear that just punishment was an independent purpose for the sentence. For example, if the judge said, 'I consider that the circumstances call for a clear element of punishment as the community expression of its denunciation of such serious violence as you were part of that day' this was coded as 'denunciation' and not 'just punishment'. However, if the offence was 'deserving of strong punishment' or it was noted that 'punishment' was 'an important principle' or that the 'offender's high culpability called for proportionate punishment', then 'just punishment' was recorded as being mentioned as a purpose.

On this basis, just punishment was mentioned as a purpose in over half of the cases (76/135), but it was only an important purpose (ie, very important or important) in a little more than a quarter of all cases. Cases where just punishment appeared to be a very important purpose include: culpable driving causing death by a fatigued professional truck driver (along with general deterrence); serious cases of domestic violence (such as an axe attack on a sleeping wife and an aggravated burglary and rape case); and cases of child sexual assault.

²⁵ Andrew Ashworth, "Desert" in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing* (Hart Publishing, 1998) 141.

Cases that gave no indication of the importance or weight of ‘just punishment’ were common, and a typical example is where the judge said:²⁶

I am called upon by the *Sentencing Act* to manifest the community’s denunciation of your conduct and generally to impose a just punishment.

In other cases it was linked to general deterrence and was barely mentioned as a purpose in its own right, for example, in a case of incest, the judge said:²⁷

You exploited the vulnerability of your daughter ... and it *deserves stern punishment*, partly to *send a message* to others that the courts will deal harshly with offenders who commit these crimes. (Emphasis added.)

Occasionally, imposing a just punishment was stated in more explicit retributive terms, as in *DPP v Elliott Engineering*:²⁸

The purpose of criminal punishment is to exact retribution for past breach of the laws.

Just punishment was sometimes expressed in terms of desert, for example in cases where judges said that the offending ‘deserves stern punishment’,²⁹ or was ‘deserving of strong punishment’.³⁰ Sometimes just punishment was treated as the product arrived at after a consideration all of the other relevant purposes and factors. For example:

I am then, having balanced all of those factors, required to impose just punishment in all the circumstances.³¹

The Court of Appeal seems to have given very little guidance on the purpose in s 5(1)(a) of ‘punish[ing] the offender to an extent and in a manner which is just in all of the circumstances’ and there is no decision discussing it in any detail. In many decisions it seems to be a description of an appropriate sentence rather than being

²⁶ *DPP v JT* [2013] VCC 1635, [59].

²⁷ *DPP v Simmons* [2014] VCC 1228.

²⁸ [2014] VCC 266, [51]; see also *DPP v Yates* [2014] VCC 180, [9].

²⁹ *DPP v Simmons* [2014] VCC 1228, [26].

³⁰ *DPP v SBS* [2013] VCC 1275, [26].

³¹ *DPP v Harry* (Unreported, 18 December 2013) [39].

identified as a purpose in its own right: a just punishment is one that is necessary in order to denounce the seriousness of the offence or to deter potential offenders.³² This accords with the way in which sentencing judges invoked just punishment in our sample of cases.

Why do judges tend to shy away from just punishment as a rationale in favour of general deterrence or denunciation?

Just punishment is dealt with differently from deterrence, denunciation and even protection of the public from the offender. While it was mentioned in about half of the cases, judges appeared to shy away from emphasising it. The reasons for this are speculative. Perhaps it goes without saying that every sentence should be just and proportionate in the light of all the circumstances; and judges may see ‘just punishment’ as a limiting principle that applies in every case, rather than as a determining principle that applies only in some particular cases. In other words, broad acceptance of the principle of proportionality in *Veen’s case*³³ is so fundamental to sentencing practice that it does not require repetition or elaboration. It is also possible that the association of ‘just punishment’ with retribution, which in its everyday usage connotes a sense of vengeance, may not sit well with judges’ sense of their role as dispensers of justice. So, a reluctance to place emphasis on a non-consequentialist purpose like retribution could lead to a preference for mentioning a forward-looking purpose like deterrence that appears to offer some beneficial outcome for the community. The other alternative for judges who are disinclined to use an overtly retributive rationale is to express themselves in terms of censure, condemnation and the need to vindicate society’s values instead. In other words, judges may treat denunciation and just punishment as intertwined purposes or use denunciation as a proxy for ‘just punishment’; and the use of both expressions may simply serve as different ways of emphasising the seriousness of the crime.

³² See *DPP v Avci* (2008) 21 VR 310, 318 [26]-[27] (Maxwell P); *WCB v The Queen* [2010] VSCA 230, [37] (Warren CJ and Redlich JA); see also *R v Valentini* (1980) 48 FLR 416, 420 where retribution is described by the Federal Court as “the infliction of just punishment to express the moral outrage of the community”.

³³ *Veen v The Queen (No 2)* (1988) 154 CLR 465.

Our explanation for judges' hesitation in using 'just punishment' from s 5(1)(a) in Victoria echoes Mackenzie's findings from her interviews with judges in Queensland about their views of the identical provision in s 9 of the *Penalties and Sentences Act 1992* (Qld).³⁴ She reported that judges revealed a number of reasons for a hesitancy to refer to the provision, including: confusion as to whether the provision had any meaning apart from the other purposes; reluctance to interpret it as a reflection of just deserts theory; and a tendency to associate it with pure retribution, which was regarded as a pejorative term. At least one of the Queensland judges thought that reliance on general deterrence was really retribution in disguise. It was also evident from many of the responses that a reluctance to embrace retribution was motivated by a desire to avoid appearing to succumb to 'retributive pressure' from the community.³⁵

Another possible reason why judges are reluctant to make just punishment the most important purpose for a sentence could arise from a view that doing so could be interpreted as adopting a two-stage approach. Traditionally 'just deserts' requires the judge to make an assessment of harm and culpability as a starting point, an approach to determining sentence that has been condemned by the High Court.³⁶ So, rather than starting with 'just punishment' as an important purpose, judges tend either to acknowledge it briefly alongside other purposes or to mention it at the end, where they use it to describe the end result of balancing all of the other considerations and relevant purposes.

General deterrence

General deterrence is a forward-looking utilitarian justification for criminal punishment that is based on the 'idea that punishment is warranted by reference to its crime-preventative consequences.'³⁷ As discussed above, where judges prioritised a

³⁴ Mackenzie, above n 10, 89-94.

³⁵ Ibid 93.

³⁶ *Markarian v The Queen* (2005) 228 CLR 357; see also *Williscroft* [1975] VR 292.

³⁷ Andrew Ashworth, "Deterrence" in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing* (Hart Publishing, 1998) 44.

single purpose, it was most frequently general deterrence. General deterrence was also most frequently mentioned as both a very important purpose and as an important purpose. In other words, it was given the most weight as a sentencing purpose in the sample of sentencing remarks. In fact, it was rare for general deterrence not to be mentioned (it was mentioned in 85% of cases). Serious drug offences (trafficking, conspiracy to import, and money laundering) comprised one third of the cases in which general deterrence was the predominant purpose, even though drug trials accounted for less than 10% of trials in our sample. General deterrence was also the predominant purpose for some of the sex offence sentences including cases of child sexual assault and for a few of the violence offences including one family violence case. It was also the predominant purpose for the sentences in: one case of workplace safety where an employee died; one culpable driving case; a case of people smuggling; and in two cases of white-collar dishonesty. All were offences for which the Court of Appeal has said that general deterrence was the paramount purpose of sentence.³⁸

Academic commentators have criticised the use of general deterrence as a purpose for individual sentences; and when policy makers have been emboldened to reject general deterrence as a sentencing purpose, judges have refused to abandon it,³⁹ despite occasionally expressing reservations as to its effectiveness. It is striking that sentencing and appellate judges have such a strong preference for general deterrence in the light of the persuasive arguments against it, both empirical and moral.⁴⁰ There is no evidence to support the effectiveness of marginal deterrence as opposed to system deterrence and it is marginal deterrence (ie, the proposition that more severe penalties deter better than less severe ones) that judges tend to rely upon rather than

³⁸ *Dawid* [2013] VSCA 64, [35]: serious drug offences; *Majeed* [2013] VSCA 40, [39]: money laundering; *Orbit Drilling Pty Ltd* (2012) 35 VR 399, [2012] VSCA 82, [60]: OHS offences; *JBM* [2013] 69, [40]: child abuse; *DPP v Hill* [2012] VSCA 144, [40], [50]-[51]: culpable driving; *Portelli* [2015] VSCA 159, [30]: family violence; *Jopar v R* (2013) 44 VR 83: people smuggling; *Koch v R* [2011] VSCA 435, [55]: white-collar crimes.

³⁹ Freiberg, above n 8, 250.

⁴⁰ Ashworth, above n 5, 78-84; Anthony Doob and Cheryl Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 *Crime and Justice* 143; Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Lawbook, 2nd ed, 2015) 163-86.

system deterrence (ie, that the existence of criminal sanctions deters crime). Moreover, reliance on general deterrence as a justification for sentences in individual cases encourages the populist belief that tougher sentences are the answer to controlling crime.

Despite these criticisms, reliance upon general deterrence was more convincing in a few cases in our sample. In the case where a workplace safety breach resulted in the death of an employee, for example, the knowledge of the conviction and the penalty imposed may have led other businesses to adopt more rigorous adherence to workplace safety requirements in order to protect employees and avoid being sanctioned.⁴¹

Although judges continue to mention the importance of general deterrence, it is not clear if in fact they are lengthening the sentence on general deterrence grounds. It is possible, as Ashworth suggests, that judges' reliance on general deterrence is merely rhetoric to support proportionate sentences.⁴² Similarly, Paul Robinson argues that that much of the use of deterrence as a justification is mere 'deterrence speak'. In other words, judges can invoke deterrence without necessarily engaging in deterrence reasoning; and it has become a standard form of expression to say that the conduct must be deterred instead of saying that it is harmful or wrong.⁴³ This explanation for the reliance on general deterrence by judges coming from England and the United States is supported by a Queensland study, where some judges admitted using it despite doubting its efficacy, and admitted that 'general deterrence is a fiction' and is 'often used by judges in a less than honest intellectual manner'.⁴⁴

One practical reason why judges continue to rely on general deterrence may be because they see it as a purpose that has the endorsement of the Court of Appeal and

⁴¹ *DPP v Elliott Engineering Pty Ltd* [2014] VCC 266. However, the sentence (a fine of \$400,000) does not seem to have received any publicity in Victorian newspapers.

⁴² Ashworth, above n 5, 82.

⁴³ Paul H Robinson, above n 7, 83-85.

⁴⁴ Geraldine Mackenzie, above n 10, 100, 102.

they fear that to ignore it could invite appeal. That this fear is well founded is supported by an analysis of Crown sentencing appeals undertaken by the Victorian Sentencing Advisory Council, which revealed that the failure to give sufficient weight to general deterrence was raised as ground of appeal in 73.5% of appeals and was successful in 44% of cases.⁴⁵ This explanation is also supported by the decision of the Court of Criminal Appeal of New South Wales in *R v Miria*,⁴⁶ which held that a sentencing judge had erred by saying that the ‘general deterrent effect of any sentence is debatable, given that it will at best be published as a statistic and thus unlikely to cause anyone else to act differently.’⁴⁷ The Court said it was not open to the sentencing judge to dismiss deterrence for this reason because there is a ‘legal imperative to include general deterrence in the sentencing assessment’.⁴⁸

Mirko Bagaric and Richard Edney argue that the approach of appeal courts to general deterrence is flawed and suggest that any legislative requirement to consider general deterrence could be interpreted to mean absolute or system deterrence, which would be satisfied by the imposition of any penalty that imposes a hardship.⁴⁹ It is not clear whether relying on system deterrence would satisfy appeal courts, and consequently the desire of sentencing judges to avoid appellate intervention is understandable. However, one plausible interpretation of our results is that judges rely on general deterrence as a rhetorical device to support a proportionate sentence because the claim that the sentence is being imposed not just to punish the offender, but for some greater good, retains intuitive appeal.

Specific deterrence

⁴⁵ Donald Ritchie, Sentencing Advisory Council Victoria, *Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence* (2011)

⁴⁶ [2009] NSWCCA 68; see also Mackenzie, above n 10, 100, 105 who suggests that perceived pressure from the Court of Appeal is a reason for continued reliance on general deterrence.

⁴⁷ [2009] NSWCCA 68, [7].

⁴⁸ *Ibid* [13].

⁴⁹ Bagaric and Edney, above n 40, 185.

Specific deterrence justifies criminal punishment by setting a sentence that is sufficient to deter the particular offender from reoffending.⁵⁰ While specific deterrence was the most frequently mentioned purpose after general deterrence, it was given less weight than denunciation and just punishment (see Table 1). It was only rarely selected as the predominant purpose – in just 7% of the cases where it was possible to discern a predominant purpose and in 2% of cases overall.

Specific deterrence was the predominant purpose in a case where a partly suspended sentence was imposed to deter reoffending by a man convicted of indecent acts with children.⁵¹ In another case it was invoked to justify imposing a short custodial sentence and a community corrections order on a woman who had been convicted of causing serious injury while on parole, with the aim of persuading her to stay out of trouble.⁵² The third case where specific deterrence was singled out as the predominant purpose occurred in a case of an offender with a drug addiction and long history of prior convictions who had attacked an unarmed man in a public place.⁵³

Specific deterrence was also said to be important or very important where the offender had convictions for prior similar offences. For example, it was said to ‘loom large’ in a drug case where one offender had prior convictions for drug offences⁵⁴ and in another where the offender was convicted of a domestic violence offence and had a history of such offending.⁵⁵ A long history of offending, offending over a prolonged period, or offences committed years apart also attracted more weight to specific

⁵⁰ Andrew Ashworth, above n 37, 44.

⁵¹ *DPP v Nguyen* (Unreported, 9 November 2013). Surprisingly little emphasis was given to specific deterrence in the 18 suspended sentences in our sample.

⁵² *DPP v Walker* (Unreported, 30 August 2013).

⁵³ *DPP v Ristevski* (Unreported, 21 June 2013).

⁵⁴ *DPP v Ngo* (Unreported, 23 November 2013).

⁵⁵ *DPP v Harry* (Unreported, 18 December 2013).

deterrence.⁵⁶ Predictably, and in accordance with appellate decisions,⁵⁷ judges gave little weight to specific deterrence where the risk of re-offending was low.

While specific deterrence is not given the same prominence as general deterrence, it does, however, seem to be used genuinely in the context of assessing the risk of re-offending. Unlike the case of general deterrence, there is no evidence of window dressing – or of using it as a proxy for another unstated purpose. In conjunction with assessments of the risk of reoffending, it does appear to have an effect on the length of sentence. On the other hand, it was surprising that it was not more often expressly relied upon as a purpose in the cases where a suspended sentence was imposed.

Rehabilitation

Rehabilitation is another forward-looking rationale for punishment. Prospects of rehabilitation were mentioned in most cases in our sample but rehabilitation was rarely treated as a purpose of the sentence or discussed in the same context as other purposes. As Table 1 shows, there was only one case where it was the predominant purpose of the sentence and rehabilitation was the purpose least likely to be noted as very important or important. In *DPP v Griffiths*⁵⁸ no purposes were expressly stated; however, rehabilitation was clearly the predominant purpose behind the sentence imposing a community corrections order on the offender, a mentally disabled arsonist. Rehabilitation was considered very important in the case of an apparently isolated instance of offending committed more than 20 years earlier.⁵⁹ In another case, considerable weight was given to rehabilitation in sentencing a young sexual offender, whose age placed him only one week outside the jurisdiction of the Children's Court.⁶⁰

⁵⁶ For example: *DPP v Levett* [2014] VCC 906.

⁵⁷ *Valayamkangdathil* [2010] VSCA 260, [20]: less weight where risk of re-offending low and more weight in cases of extreme recidivism: *Saunders v R* [2010] VSCA 93, [13] (along with protection of the public).

⁵⁸ [2013] VCC 1593.

⁵⁹ *DPP v Gene* (Unreported, 6 August 2014): indecent act by a father with daughter.

⁶⁰ *DPP v Mach-Reath* (Unreported, 9 September 2013).

Sentencing judges demonstrated an awareness of the appellate guidance that requires rehabilitation to be a primary consideration in cases of young offenders.⁶¹ In the case of a young heroin addict convicted of armed robbery and aggravated burglary and sentenced to 6 years 6 months imprisonment with 4 years 2 months non-parole, rehabilitation was the only purpose expressly mentioned by the judge who said:⁶²

You are only 25 years of age now. The courts well recognise that the public is very often best protected, particularly in dealing with young persons, by facilitating their rehabilitation as much as reasonably possible.

However, given the length of the sentence, rehabilitation was by no means a dominant consideration. In a number of the cases dealing with other young offenders,⁶³ judges mentioned the need to give weight to rehabilitation and to tailor a sentence which does not destroy their prospects of rehabilitation. Another example of a case where rehabilitation was clearly given some weight was where a partly suspended sentence was said to be designed to deter and to aid reintegration.⁶⁴

In addition to the cases where rehabilitation was given at least some weight as a sentencing purpose, there were many cases in which the prospects of rehabilitation were mentioned without linking them with rehabilitation as an aim of the sentence. And occasionally, prospects of rehabilitation were linked with specific deterrence, for example, where good rehabilitative prospects were relied upon as a reason for giving less weight to specific deterrence.⁶⁵ It is perhaps not surprising that rehabilitation was rarely selected as an important purpose of sentence in our jury study cases because all of them proceeded from not guilty pleas. It is quite possible that more weight would

⁶¹ *R v Mills* (1998) 4 VR 235, 241-42; but sometimes it must give way to general deterrence and denunciation: *DPP v Hill* [2012] VSCA 144, [49]-[50].

⁶² *DPP v Murrell* [2014] VCC 335.

⁶³ For example *DPP v Derrick* (unreported) (D aged 24); *DPP v Fletcher* [2014] VCC 1290 (D aged 25).

⁶⁴ *DPP v Nguyen* (Unreported, 6 November 2013).

⁶⁵ For example: *DPP v AB* [2013] VCC 1185.

be given to rehabilitation in cases where the offender had acknowledged their offending by a guilty plea.

Denunciation

Denunciation, like specific deterrence, was rarely expressly singled out as the predominant purpose of the sentence; however, after general deterrence, it was the purpose most likely to be one of the important or very important purposes of the sentence. In a domestic violence case involving aggravated burglary and false imprisonment, the judge emphasised denunciation more than other purposes, saying:⁶⁶

I am also required to denounce your conduct and I do so absolutely. ...

Domestic violence and the imposition of the will of one person over another in circumstances such as those created by you will not be tolerated in this community.

Domestic violence is rife and you, Mr Harry, are a repeat offender. The community has a right to feel outraged by behaviour such as yours.

*DPP v Rapson*⁶⁷ is an example of a case in which denunciation was allowed to ‘utterly dominate’ along with other purposes. The judge said:

Whilst I accept many of the factors put on your behalf by your counsel in his most able plea, your unrelenting sexual exploitation of these boys was so predatory, so deliberate, so serious and represented such an incalculable breach of trust that, in my view, principles of just punishment, deterrence, condemnation and denunciation utterly dominate the sentencing exercise before me.

It was also a very important purpose in *DPP v Robinson*, where the sentencing judge said:⁶⁸

So too must denunciation [be emphasised as well as general deterrence]. The community is rightly concerned by any vigilante-style offending which involves the dispensation of summary justice, in the form of violence, during an armed invasion of the sanctity of the victim’s home. It is serious criminal conduct which is to be

⁶⁶ *DPP v Harry*, (Unreported, 18 December 2013), [37]-[38].

⁶⁷ [2013] VSCA 1625. Note that the conviction in this case was overturned on appeal and the accused was retried and convicted again in a later case.

⁶⁸ (Unreported, 16 April 2014), [65].

abhorred and which must be roundly condemned by this court on behalf of the community.

Denunciation was an important purpose (invariably along with general deterrence or some other purpose) for the following offences: arson of a prison cell; classic stranger rape; vigilante-style aggravated burglaries; domestic violence (including aggravated burglary where the victim was a former partner); child sexual abuse cases; and drug trafficking. In some cases it intersected with retribution, as in *DPP v Yates*:⁶⁹

Sexual offences of this nature are repulsive to the community and the community rightly abhors them. The court must denounce this behaviour in the strongest terms. This vile conduct is repetitive, preys on the innocence of the young ... and is physically degrading and calls for punishment to represent in part a retribution for these fundamental wrongs on behalf of the victim.

This intersection between the two backward-looking purposes of denunciation and just punishment is also apparent in appellate decisions.⁷⁰ The broad range of offences for which denunciation was either predominant, very important or important, accords with appellate court advice that sentencing judges need not be reticent to express themselves in terms of the need to meet community expectations and to reinforce the standards and values which society expects its members to observe.⁷¹

In contrast with their approach to just punishment, however, judges appear to be more comfortable elaborating on denunciation and giving it weight as an important or very important purpose. As Table 1 shows, denunciation was assessed as being an important, very important or a predominant purpose more often than just punishment (39% compared with 27%). While not necessarily increasing the sentence in order to denounce the offender's conduct, judges do seem to be genuinely putting this purpose into practice. Unlike their approach to just punishment and incapacitation, judges not only mention that the purpose of denunciation is important – they often go further to actively denounce the offender's conduct in selected categories of case. This

⁶⁹ [2014] VCC 180.

⁷⁰ *DPP v FHS* [2006] VSCA 120, [42] cited with approval in *DPP v Avci* (2008) 21 VR 310, 318 (Maxwell P).

⁷¹ *WCB v The Queen* [2010] VCA 230, [34]-[35] (Warren CJ and Redlich J).

denunciation goes beyond symbolism by highlighting the seriousness of the offence, educating members of the community about the wrongfulness of the offence, reinforcing society's shared values, and providing victims, particularly sexual assault victims, with public vindication of their rights and an acknowledgement both of the wrong done to them and the harm that they have suffered. Although analysis of our cases did not show that judges expressly acknowledge using denunciation in this way in their sentencing remarks, it is apparent that highlighting the abhorrent nature of the crime and the impact on the crime on the victim could provide vindication to victims. The fact that denunciation can be viewed as important by sentencing judges without it necessarily resulting in a higher sentence accords with a finding from Mackenzie's interviews with Queensland judges.⁷² It also suggests that the use of denunciation, like 'just punishment' and general deterrence, can often operate as another way of highlighting the seriousness of the crime. However, it must be acknowledged that the limited audience for sentencing remarks, which remain largely unpublished and unread, restricts denunciation's educative value outside the courtroom.

Protecting the community from the offender (Incapacitation)

Protecting the community is a purpose that is often referred to in sentencing debates as incapacitation.⁷³ It is another forward-looking goal that is used to justify removing offenders from the community and thereby preventing them from further offending. As Table 1 shows, protecting the community from the offender was selected as a predominant purpose in 17 (or 13%) of the cases in our sample and it was the second ranking predominant purpose. This ranking is not surprising in the light of the reach of the serious offender regime, which, provided a sentence of imprisonment is imposed, requires the court to treat protection of the public from the offender as the principal purpose, for those offences caught by the regime. As mentioned earlier, in all cases where it was *the* predominant purpose, it was a case to which the serious offender regime applied.

Incapacitation in cases not caught by the serious offender regime

⁷² Mackenzie, above n 10, 115.

⁷³ Andrew von Hirsch, "Incapacitation" in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing* (Hart Publishing, 1998) 88.

Given that all of the cases where protection of the public from the offender was the predominant purpose were also cases that were caught by the serious offender regime, it follows that in none of the other cases was protection of the public the predominant purpose. Table 1 shows that this purpose was the least often mentioned purpose. Aside from the serious offender cases, of which there were 24, it was unusual for protection of the public from the offender to be mentioned as a purpose of the sentence. Examples of cases where it was relied on as being important include violent offences like armed robbery or causing serious injury, committed when the offender was on parole or had prior convictions. It was also treated as important in a case where a pharmacist with priors for similar offences was convicted of indecent acts with a young employee.⁷⁴ In cases not subject to the serious offender regime where protection of the public from the offender was relied upon by the sentencing judge, it is invoked in a less formulaic way than it was in cases caught by the regime. So, rather than stating words to the effect that ‘I am required by the *Sentencing Act* to regard protection of the public from the offender as the principal purpose of sentence’, the judge gave the offender’s criminal record or the risk of reoffending as the reason for relying on this purpose. For example, in a case involving a violent home invasion and the abduction of an occupant at gunpoint, the sentencing judge remarked:

This was outrageous, violent and dangerous offending and the community must be afforded some protection from you. That is a consideration which must be given some real weight, given your past conviction for the same offence and the chronology of offending disclosed in the updated LEAP history.⁷⁵

The Serious Offender Regime

Is protection of the community made the primary purpose of sentence?

There were 25 cases in which the judge acknowledged that the offender’s sentence attracted the serious offender regime for at least some of the counts. Analysis of these cases revealed that in seven of these cases there was no express mention of the fact that the judge was required to consider protection of the public as the principal

⁷⁴ *DPP v Ha* (Unreported, 20 March 2014).

⁷⁵ *DPP v Booth* (Unreported, 3 April 2014).

purpose for at least some of the counts. *DPP v JT*,⁷⁶ *DPP v Simmons*,⁷⁷ *DPP v Yates*⁷⁸ all published judgments, are examples. This does not mean that the judge did not have regard to s 6D(a) or to the risk of re-offending. However, protection of the public from the offender was not even mentioned as a purpose of the sentence in *DPP v Simmons* and *DPP v Yates*, even though other purposes were emphasised. In *JT* protection of the public was mentioned as a purpose with no indication of its weight whereas general deterrence was said to be of ‘considerable importance’.⁷⁹

In the other cases at least lip service was given to s 6D(a) but it was surprising that in nine of the ten cases where some counts of the same crime were subject to s 6D(a) and some not, the same sentence was imposed for each count, suggesting that the directive had little effect on increasing the sentence within proportionate limits. One example is *DPP v Levett*⁸⁰ where the offender was found guilty of four counts of rape in respect of two separate attacks on different women committed four years apart. The two counts attracting the serious sex offender regime were given the same sentence as the two counts which were not caught by the regime. This apparent failure to give effect to the directive is understandable when the risk of re-offending is low, but is hard to understand when the risk is moderate or high and where the need to protect the public would appear to be relevant.⁸¹

⁷⁶ [2013] VCC 1635: serious sex offender on 2 of 4 incest charges; general deterrence of ‘considerable importance’, specific deterrence, just punishment, denunciation and protection of the public also mentioned.

⁷⁷ [2014] VCC 1228: incest (3), serious sex offender on third charge; desert and general deterrence mentioned as purposes;

⁷⁸ [2014] VCC 180: indecent act with a child (3); sexual penetration (9); serious sex offender on all counts because of prior convictions; general deterrence and specific deterrence said to be ‘primary’ purposes at [34]; protection of the public also mentioned at [51].

⁷⁹ [2013] VCC 1635, [57].

⁸⁰ [2014] VCC 904: offender was sentenced to eight years on each count. *DPP v Moutien* [2013] VCC 1368 is the only one of ten cases where sentences for offences subject to the serious offender regime were longer than sentences for the offences not so subject.

⁸¹ As in *DPP v Levett* [2014] VCC 904: moderate to high risk of re-offending. See also: *DPP v Simmons* [2014] VCC 1228: serious sexual offender on third charge of incest; 5 years on each charge; moderate risk of re-offending.

The serious offender regime and disproportionate sentences

In our sample there was not one case in which a disproportionate sentence was imposed under the serious offender regime. *DPP v Aksoy*⁸² was the only case where the Crown made such a request. This case demonstrates how difficult it is to satisfy the court that a disproportionate sentence should be imposed (or perhaps how rarely a proportionate sentence is insufficient to protect the public from the offender). The offender, who had prior convictions arising out of a school siege, was convicted of attacking his sleeping wife with an axe causing her serious injury. It was a crime for which a sentence of imprisonment was clearly appropriate, requiring him to be sentenced as a serious offender. The judge declined to impose a disproportionate sentence on two grounds: first, he was not satisfied beyond reasonable doubt that the prerequisites for the imposition of a disproportionate sentence had been made out given the period that had elapsed between his release from prison and the commission of the instant offence; and secondly, the offence, although involving a violent and vicious attack upon his wife, was motivated by a private grievance which the offender held against her.⁸³ A sentence of 9 years 6 months was imposed, with a 7-year non-parole period.

Following Richardson and Freiberg's earlier study, the sentencing remarks were analysed to determine the reasons for not imposing a longer than proportionate sentence. Our findings were strikingly similar: reasons were given in 68% of cases (61.9% in Richardson and Freiberg's study); reasons were terse; and the most common reason given was that a proportionate sentence was sufficient to provide protection to the community.⁸⁴ We also found that in the majority of cases the judges noted that the prosecution had not requested that a disproportionate sentence be imposed; and in six cases judges did not elaborate or give any other reasons for their

⁸² (Unreported, 21 March 2014).

⁸³ The judge seems to be saying that the rest of the community was not at risk from the offender, an interpretation noted in Richardson and Freiberg, above n 11, 94.

⁸⁴ Richardson and Freiberg, above n 11, 93.

decision not to impose a disproportionate sentence – a strategy described by Richardson and Freiberg as a ‘novel technique of resistance’.⁸⁵

Judges are reluctant to give effect to s 6D

Clearly judges resist the statutory reorientation of sentencing purposes which requires them to give most weight to protection of the public. Similarly they are reluctant to exercise the discretion to impose a disproportionate sentence. It is understandable that judges are cautious in exercising the power to impose a disproportionate sentence because this caution is required by appellate decisions. It has been emphasised that that the power should be confined to ‘very exceptional cases’ and a number of requirements have been imposed by decisional law that add to the statutory pre-conditions.⁸⁶ Moreover, courts have indicated that the objective of protection will generally be satisfied by a sentence which is proportionate to the gravity of the offence.⁸⁷ Sentencing judges clearly follow appellate guidance in this respect. Richardson and Freiberg found in their sample, drawn from 553 eligible serious offender cases, that a disproportionate sentence was imposed in just 1.98% of cases, noting that this rate of disproportionate sentences was comparable to the UK experience.⁸⁸ Henham, for example found that in a similar size sample of cases collected over a 6-month period in England, only 0.9% of the sentences were longer than commensurate.⁸⁹ This reluctance of judges to exercise their discretion to impose disproportionate sentences stands in contrast to their reported willingness to engage with a different kind of dangerous offender regime, namely post sentence supervision and detention orders, particularly supervision orders. These are frequently used by

⁸⁵ Ibid 94.

⁸⁶ See the discussion of the case law in Freiberg, above n 8, [3.95].

⁸⁷ *R v Robertson* (1995) 82 A Crim R 292, 298; *DPP v Papworth* [2005] VSCA 77; *R v Cass* [2005] VSCA 77; *R v McIntosh* [2006] VSCA 106, [23].

⁸⁸ Richardson and Freiberg, above n 11, 91.

⁸⁹ Ralph Henham, “The Policy and Practice of Protective Sentencing” (2003) 3(1) *Criminal Justice* 57-82.

judges in Australia including in Victoria, despite the fact that these orders represent a departure from proportionality.⁹⁰

The need for caution in imposing disproportionate sentences does not explain the failure of judges to give real effect to the requirement in s 6D(a) to treat protection of the public as the principal purpose of sentence. But it is consistent with the Court of Appeal's view in *R v LD*⁹¹ that there is little scope in practice for the provision in s 6D(a) to have an effect on a sentence:

Since protection of the community is always a relevant consideration in sentencing [s 5(1)(e)], the directive in s 6D(a) will ordinarily have little impact on the determination of the appropriate sentence. Its main purpose, we would think, is to make sure that sentencing judges give proper consideration to the question of community protection, and undertake the requisite risk assessment. Seemingly, the only circumstance in which compliance with the directive might directly affect sentence would be where protection of the community required a longer sentence but where mitigating factors called for a shorter sentence. In that circumstance, it would seem, s 6D(a) contemplates that the dictates of protection should take precedence.

Another possibility is that judges are willing to take into account the risk of re-offending but prefer to do this in the name of specific deterrence. Risk assessment makes more sense in this context where it is allowed to be something that weighs in the offender's favour as well as against.⁹² This is supported by the fact that, putting aside the cases caught by the serious offender regime, specific deterrence is a much more popular sentencing purpose than protecting the public from the offender. It is also possible that reluctance to give effect to the statutory re-orientation of sentencing

⁹⁰ Arie Freiberg, Hugh Donnelly and Karen Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Report for the Royal Commission into institutional responses to child sexual abuse, 2015, 180-85. Note that judges in the UK embraced IPP sentences (imprisonment for public protection) to such an extent that they became unworkable and were abolished: see Andrew Ashworth, *Sentencing and Criminal Justice*, (Cambridge University Press, 6th ed, 2015) ??

⁹¹ [2009] VSCA 311, [27].

⁹² Making protection of the community the primary purpose of sentence has not been allowed to advantage the offender when the risk of re-offending is minimal: *DPP v Guest* [2014] VSCA 29, [28].

purposes reflects judicial disapproval of the wide reach of the serious offender regime and a distaste for legislative interference with the sentencing discretion.

Acknowledging the primacy of protecting the public from the offender in cases caught by the serious offender regime is a box that has to be ticked. But it can be ticked and then ignored; and it has a minimal effect on sentencing practice.⁹³

Conclusion: what is the purpose of purposes?

This analysis of the sentencing remarks from 140 sentences delivered between May 2013 and June 2014 shows that judges in the Victorian County Court almost invariably mention at least one of the six legislated purposes of punishment and most commonly refer to three or four.

Despite academic criticism of the efficacy of using general deterrence as a justifying purpose for individual sentences, general deterrence is the dominant sentencing purpose mentioned by Victorian County Court judges. It is, however, difficult to see whether this emphasis on general deterrence does in fact lead to any lengthening of sentences; it is possible that judges are either referring to deterrence as a way of avoiding appealable error or are using deterrence as a rhetorical device for supporting a proportionate sentence. Specific deterrence was the second most frequently mentioned purpose, but it was only rarely mentioned as the predominant purpose. Rehabilitation is rarely treated as a dominant sentencing purpose, but prospects of rehabilitation are treated as relevant to the purpose of specific deterrence. The notion of ‘just punishment’ is rarely invoked as a sentencing purpose, but it is used in the more traditional way to justify imposing a proportionate response to the crime and is often used as a way of summing up the final sentence that results from balancing the other relevant purposes. Judges frequently linked just punishment with denunciation (in both a symbolic and an active form) and it may be that denunciation functions as a more acceptable alternative to ‘just deserts’ because it allows the judge to avoid any

⁹³ This finding is not surprising in the light of Richardson and Freiberg’s study (above n 11) and the more recent Sentencing Advisory Council’s research on sentencing in cases of sexual penetration of children under 12 which, focusing on the presumption of cumulation of sentences in such cases, found that the regime had minimal influence on sentencing practice for this particular offence (Sentencing Advisory Council, Victoria, *Sentencing of Offenders: Sexual Penetration with a Child under 12* (June 2016) xii.

connotations of retribution and revenge. Incapacitation and the serious offender regime appear to have no observable effect on sentencing practice and while judges do mention this purpose, they rarely make use of the power to impose a disproportionate sentence.

It is not possible to quantify the effect of any of these purposes on any given sentence because of the High Court's condemnation of the 'two stage' approach to sentencing and the requirement to engage in an 'instinctive synthesis' of all relevant purposes and factors. Academic commentators have castigated both the use of the instinctive synthesis approach to sentencing and the introduction of an unranked legislative list of purposes on the grounds that both will lead to confusion and unfairness. However, although the judges frequently mention several purposes in their sentencing remarks, we found no evidence that their use of a number of different forward and backward looking purposes led to inconsistency or chaos. There are observable patterns in the use of the purposes and it appeared that in most cases, the judges were using the purposes to support the imposition of a proportionate sentence that was appropriately adapted to the circumstances of individual offenders. The use of general deterrence, just punishment and denunciation can all be linked with the seriousness of the crime: so, the more serious the crime, the greater was the stated need to deter others and to denounce the crime by imposing a just punishment. Similarly, the purposes of rehabilitation and specific deterrence were linked to the need to individualise the sentence and take account of the particular offender's prospects of reform and the degree to which the offender posed a risk of offending in the future. These patterns are consistent with traditional common law sentencing practice and appear to be controlled by and adapted to the dominating principles of proportionality, parsimony, parity and totality.

These conclusions suggest that the legislative statement of the purposes of criminal punishment in Victoria has not led judges in the County Court into incoherence. Rather, it appears that they have adapted those purposes to fit into the patterns that were already established by traditional common law sentencing practice. However, the ease with which these purposes can be adapted to fit into a sentencing regime based on proportionality and the recognised aggravating and mitigating factors, raises the question of whether we need these purposes of punishment at all. If the purposes

simply function as proxies for the seriousness of the crime as measured by the culpability of the offender and the harm caused to the victim and as reminders that in certain cases, judges should recognise the particular personal attributes and circumstances of the offender, then we could construct a more open and transparent sentencing system, simply by excluding the legislative ‘purposes of punishment’ from the courts altogether and leaving them where they belong, in the domain of philosophers and rhetoricians.