Sentencing and the Criminal Law:

Address at the University of Tasmania Faculty of Law Graduation Ceremony

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Mr Chancellor, other distinguished offers of the University, distinguished guests, graduates, ladies and gentlemen.

In an address delivered last year to the Colloquium of the Judicial Conference of Australia, Chief Justice Gleeson of the High Court of Australia spoke of the public perception that it is essential for decision makers including judges to be "in touch", that is aware of and conspicuously responsive to community values. Nowhere is this more apparent than in respect of the criminal law. The Chief Justice observed that the charge of being out of touch is most frequently levelled at judges by way of complaint about the sentencing of offenders. If all this means is that in some cases individual judges impose inadequate or excessive sentences His Honour said the charge was hardly worth making or answering, for the appeal system allowed for correction in appropriate cases. On the other hand, what needed to be taken seriously would be a plausible charge that sentencing principles and practice systemically failed to reflect community attitudes towards crime and punishment. He noted that Parliaments have a large input into sentencing, not only by prescribing maximum and sometimes minimum penalties but also by detailed legislative prescription of the principles to be applied in sentencing; but the ultimate discretion and therefore the ultimate responsibility is usually with the judiciary.

I wish today to make a few observations about one aspect of sentencing which is particularly susceptible to controversy over whether or not the judiciary has failed to reflect community attitudes. It is the significance of the impact of crime upon the victim as a consideration in determining the quantum of sentence.

It has long been recognised that the consequences of a criminal act should be taken into account even though no particular consequence is a

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* Sentencing and the Criminal Law: Address at the University of Tasmania Faculty of Law Graduation Ceremony, Monday 12th December 2005. Address by the Honourable William Cox AC, RFD, ED, Governor of Tasmania who was conferred with an Honorary Doctorate at this ceremony.

constituent part of the crime. Thus when the offence of driving in a manner dangerous to the public was proven – that being a charge which does not require proof of any actual as opposed to potential harmful consequence, the fact of resulting harm to a member of the public was accepted by the Courts as an aggravating factor. Where however there exists an offence an ingredient of which is injury (for example, dangerous driving causing death or dangerous driving causing grievous bodily harm) the principle laid down in De Simoni v R (1981) 147 CLR 383 requires that an offender's sentence for dangerous driving simpliciter should not be augmented by the presence of a factor which is an ingredient of another offence with which the offender has not been charged, or of which, if charged, he has been acquitted.

Whether injurious consequences which are not foreseeable by the offender may be taken into account in Tasmania for offences against State law is still uncertain, although the Commonwealth Crimes Act sec 16A(2)(e) requires a court imposing sentence for a Commonwealth crime to take into account "any injury, loss or damage resulting from the offence". No exception is provided in this statutory formulation for unforeseeable injury, loss or damage.

This issue certainly led to considerable controversy in the case of Inkson [(1996) 6 Tas R1] where the offender inflicted the initial injury which caused grievous bodily harm and which was potentially fatal but where death actually resulted from an additional injury inflicted by another person. One member of the court took the view that the fatal consequences could be taken into account either because death ought to have been foreseen as a consequence of the accused's conduct or because death, whether reasonably foreseeable or not, had in fact been a consequence. The second judge held that death was too remote a consequence in the circumstances to be taken into account and expressly left open whether or not unforeseeable consequences are relevant, while the third judge held that it was not reasonably foreseeable that some other person might inflict further potentially lethal violence and for that reason alone adopted the view of Gowans J. in the Victorian case of Boyd (1975 VR 162) that death could not be taken into account. The circumstances of the case excited considerable public outrage as the victim was a highly respected and totally innocent local identity who fell victim to the unprovoked violence of some drunken louts. What is clear however is that the court reviewing the initial sentence was clearly obliged to exclude that sense of outrage from its consideration of the legal principles governing the effect of unforeseeable consequences on the assessment of an appropriate sentence. As Gleeson C.J. again observed in the address to the Colloquium "No one believes that judges should decide cases by responding to the roar of the crowd".

Prior to the passing of the *Sentencing Act 1997* and the commencement of the 2002 amendment thereto which added sec 81A there was no statutory provision for the presentation to the sentencing court of a victim impact statement. That is not to say that courts did not take into account the impact of a crime on the victim as revealed by the evidence during any trial or as outlined by the prosecutor on conviction and, if challenged, verified by evidence. However the amendment has now given a victim the opportunity not only to make a Victim Impact Statement on the court finding a person guilty of an indictable offence but to actually read the same to the court in person or by his or her nominee if the victim makes a request to that effect at the time of furnishing the statement to the court. Rules of court made under the *Criminal Code Act*, authorised to be made for the purposes of sec 81A provide that the victim who wishes to furnish such a statement must deliver it to the Director of Public Prosecution with copies for the prosecutor and counsel for the offender and must indicate at that time whether he or she wishes to read the statement to the court. The Director must supply a copy to the presiding judge and advise if the victim wishes to read it to the court. If that request has been made the statement must be read to or by the court before the judge passes sentence. The court has a power to exclude irrelevant material in the statement and to prohibit its being read out. To avoid prolixity, save with the leave of the judge the statement may not be longer than 20 pages including medical reports and annexures. I was surprised to read, in a recent Hobart editorial complaining that victims of sexual abuse were not given an adequate voice, the claim that in respect of victim impact statements "generally just small sections are read out to (the) Court". Clearly the legislation permits a victim to read that document in person or through the medium of another person nominated by him or her. No doubt there are cases where the victim, while wanting the court to be fully informed of the impact of the offence, does not wish it to be broadcast at large. The amendment enabling the furnishing of a Victim Impact Statement does not derogate from sec 81 of the *Sentencing Act* which authorises the reception by the court of such information as it thinks fit provided the offender has knowledge of and the opportunity to challenge that information. In the event of a challenge to the truth of that material the court may require it to be proved in the same manner as if it were to be received at a trial.

"Victim" in respect of an offence is defined as (a) a person who has suffered injury, loss or damage as a direct consequence of the offence and (b) a member of the immediate family of a deceased victim of an offence. There is room for argument as to what sort of injury is a direct consequence of a crime. For example, it was suggested in the case of Ellis a female school teacher who had a prolonged sexual relationship

with a 15-year-old male student that although the boy's mother suffered sufficient injury as a direct consequence of the offences to justify the appellation of "victim" and the reception of a Victim Impact Statement from her, some of the injuries complained of may have resulted from the estrangement between her and her son in consequence of her decision to call the police in before discussing the matter with her son. However it seems to me that this is too fine a distinction and that the mother's distress at her son's condonation of the offender's conduct and at his resentment of his mother's reaction to it could fairly be regarded as a direct consequence of the offences.

The reactions of victims to this kind of behaviour do vary. In some cases the boys in question feel a sense of betrayal and loss of dignity and self esteem. On the other hand, as in the Ellis case, the boy sought to minimise any adverse effect on him and claimed that a gaol sentence on the offender would cause a sense of guilt in him. Such cases, particularly in a small community, expose all participants and their families to the glare of sensational publicity and as Justice Callaway delivering the leading judgment in the appeal said "Young men and women are unlikely to develop a responsible attitude to sex, and to relations between the sexes, if such conduct is encouraged by those to whose care, supervision or authority they and their well-being are entrusted." As in every exercise of the sentencing discretion it is a matter of balancing all factors and in some cases the impact on the victim will be accorded varying degrees of weight.

Perhaps the area of most controversy is in the weight to be given to the impact of violent crime, whether voluntary or, more markedly, involuntary. In respect of the latter, few judges have not agonised over the sentencing of an otherwise respectable member of the community who involuntarily causes the death of an innocent victim in a motor vehicle collision caused through his or her momentary but nonetheless criminal negligence.

The death of a loved one in such circumstances impacts tremendously on his or her immediate family but again there can be wide variations of reaction. Some families have a spiritual fortitude which enables them to cope with resignation and to move on; others can suffer pathological grief amounting to psychiatric illness for which there is no cure. Again the court has to pass a sentence which, while taking the impact into account, cannot give disproportionate weight to extreme reactions.

I have referred to the definition of victim. It is a broad definition and embraces anyone who has suffered injury, loss or damage as a direct consequence of whatever kind of crime the offender has committed. Thus householders who have been burgled or victims of any offence of

dishonesty or injury to property are entitled to make a victim impact statement. I imagine few people would wish to take advantage of this opportunity and the Sentencing Act does provide that in respect of stolen goods orders for restitution thereof to the owner may be made, while in respect of any offence the Court may order compensation to be paid by the offender to any person who has suffered injury as the result of the offence, so victims who suffer only property damage may well be content to avail themselves of these remedies without submitting a victim impact statement. However it is not hard to imagine examples of home invasions committed solely in order to steal property which nevertheless result in psychological damage which the victim may wish to have taken into account in respect of sentence.

I do not believe there is any systemic failure on the part of the judiciary to reflect community attitudes towards crime and punishment or to accord to the impact of crime upon individual victims a disproportionately small or great weight. The present law enables victims to articulate the effect upon them of crime while preserving the right of the prisoner to dispute exaggerated claims. Under our system of justice victims are not parties to criminal proceedings but I believe this opportunity to be heard on sentence is one cherished by many victims and has gone a considerable way to redressing the perception that the court is more concerned with the rights of the culprit than of the community and the individual victim.

Before leaving the topic of the rights of victims could I again refer to the editorial I mentioned earlier. It asserted that under Section 194K of the Tasmanian *Evidence Act* victims of sexual crimes are prohibited from being identified and speaking out about their experiences. If there were an absolute prohibition on this occurring notwithstanding any wish to the contrary on the part of a victim capable of making a responsible and adult decision on the matter there would be cause for concern because there are doubtless instances where the public shaming of an offender would give the victim a measure of satisfaction which would adequately compensate for his or her embarrassment at being identified. However it should be borne in mind that the relevant section of the *Evidence Act* does empower the court to authorise such publication with or without specified conditions provided the court is satisfied that it is in the public interest to do so. The Act is not helpful in determining whether it is in the public interest that an individual victim should be enabled to speak out in circumstances which will identify him or her. It is interesting to note that although conformity in respect of the law of evidence was sought to be achieved throughout the Commonwealth in the Federal and State Acts passed for this purpose, this prohibition is not contained in the Commonwealth Evidence Act (nor in several at least of the Evidence Acts of the other States and Territories). It would seem to me that

reconsideration of this section is warranted so as to permit the identification of victims who are capable of a mature decision in that respect and who in fact give it without requiring them to seek a court order.