VICTIM APPEAL:
HOW TO ADDRESS MANIFESTLY INADEQUATE SENTENCES

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Executive summary

Victim appeal is an innovative reform designed to:

• Increase public confidence in the judiciary; and
• Increase the satisfaction of victims of crime with the criminal justice process.

Victim appeal would give victims of crime the right to instruct the Director of Public Prosecutions (DPP) to seek leave to appeal against a sentence handed down by a District or County Court or Supreme Court.

This right would be in addition to the existing discretion of the Director Public Prosecution or, in some states, the Attorney-General, to appeal against sentences.

Unlike Crown appeals in most states, victim appeals would go to a leave hearing at the Court of Appeal, which would determine whether the appeal can proceed.

The DPP would advise the victim of the chances of a successful appeal and bear the costs of the appeal.

Australians have consistently reported low confidence in the judiciary.

Public confidence in the judiciary is driven by:

• The perception of leniency; and
• Access to information about crime trends and specific cases.

Over the past decade and across jurisdictions, sentencing patterns in Australia have been stable. For serious crimes like homicide, assault, and sexual assault, judges have sentenced offenders to prison at approximately the same rate and for the same periods of time.

However, over the same period, the number of Crown appeals against ‘manifestly inadequate’ sentences has fallen. In 2008-09, there were 138 such appeals in the mainland states. In 2016-17, this had fallen to 85.

This is despite the fact that these types of rare, sensational cases, in which judges fail to apply community standards continue to occur and to attract disproportionate media attention. This media attention in turn damages the reputation of the judiciary.

Victim appeal provides a new mechanism for correcting these rare cases. Its introduction will help mitigate their effect on the public’s confidence in the judiciary.

Victim appeal also builds upon the existing practice of allowing victims to read Victim Impact Statements at sentencing hearings. This practice has been shown to have some therapeutic effect for victims. However, many victims continue to report feeling a lack of agency in the system. Victim appeal provides victims with a real and consequential decision to make as part of the criminal justice process.

Lastly, victim appeal should be preferred to more dramatic reforms like mandatory sentencing, which increases the risk of disproportionately severe sentences, and giving victims separate representation in criminal trials, which undermines our traditional adversarial criminal justice system.
Introduction

This paper recommends that victims of crime be given the right to instruct the Director of Public Prosecutions (DPP) to seek leave to appeal sentences that they, the victims, find unjustly lenient. The primary goal of this reform is to address community concern that the judiciary is out-of-touch with community standards regarding both how harm to victims and society is construed and how severity of punishment is to be measured. A secondary benefit of the reform is that it will increase the agency of victims within the criminal justice system, increasing both their satisfaction with the process and the community’s confidence that victims’ interests are secured by the system.

Over the past decade, Australians have consistently reported low confidence in the judiciary. This is despite any clear evidence that the judiciary is more lenient than the community expects, or that it has become more lenient over time. It is argued in this report that this lack of confidence is driven, at least in part, by rare but high-profile cases in which judges imposes sentences that fall short of the community’s understanding of justice. Studies suggest that the public’s beliefs about the operation of the criminal justice system are shaped by media reporting. These sensational cases attract widespread interest and contribute to the public’s impression that the judiciary should not be trusted. The proposed reform aims to limit the damage that such cases do to the reputation of the judiciary and to reduce the number of such decisions by increasing the sensitivity of judges to community standards.

Sensational cases

Every year, a number of cases are finalised with judges imposing sentences that depart from common sense. These cases often attract considerable negative attention. In 2014, for example, a notorious New South Wales case was finally brought to an end when Kieran Loveridge, convicted of a spate of attacks that included the one-punch killing of Thomas Kelly, saw his original sentence doubled on appeal by the DPP. Loveridge had been sentenced to serve just five years and two months in prison but the Court of Criminal Appeal doubled this to more than 10 years.1 More recently, the Victorian DPP announced an appeal against the sentence handed to Jonathan Cooper, convicted of the murder of war veteran Kenneth Handford, following a petition being delivered to Attorney-General Martin Pakula with 30,000 signatures.2 This year, in Queensland the Attorney-General announced an appeal against the sentence given to convicted rapist James Ronald Lennox. His four-and-a-half-year sentence was to be suspended after just 14 months.3 And the Victorian DPP announced that it would appeal the reduction of a sentence, from 26.5 years to 18 years, for Akon Guode who was convicted in 2015 of killing three of her children and attempting to kill the fourth.4

Cases such as these often lead to legislative change. For example, the Loveridge case led to the introduction of mandatory sentences for one-punch killings in New South Wales. In Victoria, mandatory sentencing laws were tightened following two assailants convicted of assaulting a

2 Olivia Shying (2017), “Public prosecutor to appeal sentence given to war veteran murderer” The Courier 19 May 2017
4 Melissa Iaria (2018), “DPP appeals Court of Appeal’s decision to cut child-killing mum’s term” 14 September 2018
paramedic escaping jail.\textsuperscript{5} But the unusualness of these cases means that they broad-based reforms are an overreaction. What is required is a reform that increases the system’s ability to correct sensational cases such as these.

**Fewer state appeals against sentence in recent years**

The ability of the DPP (and in some states, the Attorney-General) to appeal against manifestly inadequate sentences is the system’s failsafe mechanism. However, as demonstrated by the Cooper case, triggering this failsafe often follows public outrage, meaning that the damage to the reputation of the judiciary is already done. Not only does the public lack confidence in the judiciary, it lacks confidence in the system to correct its mistakes.

This lack of confidence is supported by data showing that across the country, there are fewer state appeals against sentence than there were 10 years ago. In 2006-7 there were 128 such appeals across the five mainland states. In 2016-17 this number was just 85.\textsuperscript{6}

Extending the right to trigger appeals against sentence from the DPP and/or the Attorney-General to victims would help to reverse this trend. It would also give the public confidence that the decision to appeal (or not appeal) is not solely in the hands of members of the legal community, but also with the average member of the public. Victim appeal uses victims as a proxy for community attitudes to increase the connection between the judiciary and common sense.

**Victim appeal in the context of victims’ rights**

It is often said that hard cases make bad laws. For this reason, sensational cases do not justify a revolution in the way that we, as a community, administer justice.

Since at least the publication of William Blackstone’s *Commentaries on the laws of England* in 1765, it has been understood that the criminal law embodies community judgement of moral rights and wrongs. This moral judgement gives crime a public dimension that is lacking from the civil law. Crime has therefore traditionally been prosecuted by the state, in recognition that crime harms not only the victim but society itself.\textsuperscript{7} In recent decades, Western countries have sought in various ways to integrate victims into public prosecutions. This has included minor procedural changes like granting victims the right to be consulted by prosecutors, as now encoded in the law of every Australian jurisdiction, to more dramatic institutional changes, like allowing victims to be represented in criminal trials by their own counsel, as is now permitted in the United States federal court system.

Victim appeal should be understood in this context as a modest reform. It is a proportionate response to the identified problem, and, it is argued, mitigates many of the concerns of those who would seek more expansive changes. Victim appeal preserves the adversarial system and judicial independence in favour of reducing, in one specific way, the discretion of the public prosecutor. This reform obviates the need not only for institutional changes to the criminal justice system but further-reaching legislative interventions like mandatory sentencing.

\textsuperscript{5} Richard Willingham and James Oaten (2018), “Victorian Government to overhaul sentencing laws, promising more criminals will go to jail” ABC News 22 May 2018

\textsuperscript{6} Data for the other jurisdictions was not available back this far.

\textsuperscript{7} Sir William Blackstone (1893), *Commentaries on the laws of England in four parts* p.54, p. 93
This report is structured as follows. The first section outlines the proposed reform, including how it will work, its rationale, and how its risks can be mitigated. The second section provides a statistical analysis demonstrating the likelihood that rare sensational cases contribute disproportionately to the public’s lack of confidence in the courts. A brief discussion of the downsides of mandatory sentencing is included. The third and final section is a discussion of victim appeal in the context of victims’ rights. While victim appeal is argued to have some potential therapeutic benefits for victims, this is a subsidiary consideration and insufficient justification for a broader victims’ rights agenda.
Giving victims the right to appeal manifestly inadequate sentences

**KEY POINTS**

» Under the current system, the DPP reviews every sentence handed down in cases in which it has acted and determines whether an appeal is in the public interest and has a reasonable prospect of success.

» In Queensland, Western Australia, and Tasmania, the Attorney-General can direct the DPP to appeal.

» The proposed reform would extend this decision-making power to victims of crime (and in homicides, their next of kin). Victims, having been briefed by the DPP, would be able to direct the DPP to seek leave to appeal.

» This reform would increase victims’ agency within the system, which has been correlated with enhanced satisfaction.

» Importantly, it would also have two communicative benefits: first, it would communicate community standards to the judiciary and the DPP; secondly, it would communicate to the public that the decision to appeal or not has been taken with the victim’s approval, increasing confidence in the representativeness of the criminal justice system.

The purpose of the criminal justice system is to deliver punishments that are proportional in their severity to the harm caused by the crimes being punished, while reducing crime overall by deterring and correcting criminal behaviour. In Australia and other democracies, this system of punishment takes place within a system of individual rights, which are rules that have emerged over time to allow communities to live together and individuals to pursue their own lives. As such, the vindication of these rights and the assessment of the harms of crimes are inseparable.

This in turn means that along with defending the community against harm, one of the objects of the criminal justice system is the satisfaction of the victims of crime, meaning those individuals whose legal rights have been violated. While our criminal justice system is defined by a contest between the state, representing the community, and the defendant, it is legitimate to seek procedures that also satisfy victims, not only for the value that they themselves derive from that satisfaction, but to demonstrate to the community that the state properly understands what is at stake in the prosecution of criminals and the fight against crime.

The aim of victim appeal is to both increase the sensitivity of the system to community standards and increase victims’ satisfaction with the process. By extending the right to appeal too-lenient sentences from the state to the victim, we can reinforce the role that community standards play in sentencing and thereby strengthen the ability of the courts to deliver justice.
1-1: How it would work

The concept of the reform is simple: victims should be given the right to direct that the DPP seek leave to appeal against sentences victims deem unjust. There are however a number of complexities to how this right would operate in practice, which are outlined below.

1-1-1: Who can appeal and in what circumstances?

At the moment, in most jurisdictions in Australia, the DPP has the right to appeal sentences that are “manifestly inadequate”. This means that the sentence has to be one that a court might find was outside the sentences available to the sentencing judge, being so far removed from the normal sentences imposed in similar cases. In Queensland, this power resides with the Attorney-General.8 In Western Australia, either the Attorney-General or the DPP can initiate an appeal.9

State appeals against sentences are made under legislation that limits them to sentences that are in error.10 In Victoria, for example, section 287 of the Criminal Procedure Act 2009 provides that the DPP may appeal to the Court of Appeal if the DPP both “considers that there is an error in the sentence” and “is satisfied that an appeal should be brought in the public interest”.11 When considering whether an error has been made, the appeal court will decide whether there is a matter of principle that needs to be established so as to avoid manifest inadequacy or inconsistency in sentencing.12

Guidelines for appeals across the country reflect the settled law. Appeals against sentence are to be rare, involve matters of public interest, and operate to protect public confidence in the criminal justice system.13 For example, Victorian DPP policy states that the DPP will only bring an appeal if the DPP is satisfied that “all applicable statutory criteria are established” and “there is a reasonable prospect that the appeal will succeed”.14 In determining whether the public interest test is met, the DPP will consider a range of factors including “whether the offence is of considerable public concern”, “the attitude of the victim to a prosecution”, “community protection” and “deterrence, both specific and general”. Importantly, another factor to consider is “the need to maintain public confidence in the basic constitutional institutions such as the Parliament and the courts”.15 Several states’ guidelines state explicitly that DPP appeals against sentence are to be “rare” (New South Wales) or “used sparingly” (South Australia, Tasmania).

Under victim appeal, the victim would not appeal on his or her own behalf. Victim appeal would instead give the victim the right to direct the DPP to appeal the sentence, just as the Attorney-General can so direct in certain states. The proposed victim right would be in addition to the existing right of the DPP and/or the Attorney-General to launch an appeal. This is because the aim

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11 Criminal Procedure Act (VIC) 2009 s 287
13 For links to DPP guidelines, please refer to the references section at the end of this document.
14 Office of Public Prosecutions Victoria (2016), Policy of the Director of Public Prosecutions for Victoria pp. 37-8
15 Ibid p. 2
of the reform is not to undo or interfere with existing processes but to create an additional avenue to appeal so that sentencing judges are more aware that their decisions can be reviewed by a higher court.

1-1-2: What role would the DPP play?

The office of the DPP would make itself available to consult with the victim. In South Australia, victims already have the right to request that the DPP consider an appeal against sentence. The DPP is committed by law to consult with victims, which commitment falls under the oversight of the Commissioner for Victims Rights.

Around the country, all sentences are typically reviewed by the DPP as a matter of course. This advice should be provided to victims on request. The possibility that this advice could be used by defence lawyers against the DPP in proceedings following the victim’s exercise of this right would likely shape the DPP’s advice, incentivising the DPP to adopt the victim’s point of view, or giving more weight to that view among other considerations.

If the victim directs the DPP to seek leave to appeal, the application would be drafted by the office of the DPP and public prosecutors would appear at the hearing. The victim would not have separate representation. The office of the DPP would bear the costs of the appeal, in order to:

- Ensure equal access to the exercise of this right;
- Incentivise the DPP to properly advise victims; and
- Maintain the public nature of prosecutions.

1-1-3: To which offences would victim appeal apply?

It is proposed that the right should be exercisable in at least all cases involving serious indictable offences. The right could be extended to proceedings involving minor indictable offences heard by Magistrate’s Courts if government determined that doing so was worthwhile or necessary for consistency across the courts. The reform would likely be costlier if extended to minor indictable offences.

In homicide cases, the right would be exercised by next of kin, consistent with the practice of Victim Impact Statements. In cases involving victims who are minors, the parents or legal guardians would exercise the right.

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16 Eg NSW ODPP guidelines state that “The prosecutor in any case conducted by the ODPP should assess any sentence imposed”. Office of the Director of Public Prosecutions (NSW) (2007), Prosecution guidelines of the Office of the Director of Public Prosecutions p. 53

Queensland guidelines state that “In every case the prosecutor must assess the sufficiency of the sentence imposed”. Office of the Director of Public Prosecutions (Queensland) (2016), Director’s guidelines p. 59
1-1-4: What about guilty pleas and plea agreements?

In Australia, plea agreements do not limit judicial discretion in sentencing. Any submission made by the prosecution regarding sentencing is merely an opinion and the sentencing judge cannot base his or her sentencing order on such a submission. Sentencing recommendation provided by prosecutors therefore have little relevance to the operation of victim appeal.

To avoid the DPP submitting such recommendations that may later be contradicted by an appeal ordered by a victim, as in South Australia, victims should be given the right of consultation regarding plea agreements struck by the DPP. Victim appeal incentivises the public prosecutor to take this responsibility seriously.

1-1-5: Are there any precedents for this reform?

This would be a novel reform.

In Germany, victims can appeal when courts decide not to proceed to trial, but they cannot appeal the results of the trial.

In India, the Criminal Procedure Code grants victims the right to appeal acquittals, convictions for lesser offences, and orders that impose “inadequate compensation”, but the state reserves the right to appeal for “sentence enhancement”. This right goes much farther than the proposal here, but nonetheless does not provide a precedent for giving victims the right to appeal inadequate sentencing. The justification, however, is similar. Victims’ appeal in India was introduced in 2006 as part of the implementations of the recommendations of the Malimath Committee on Criminal Justice Reforms, which were in part inspired by the need to “restore the confidence of the common man in the Criminal Justice System”. The Committee recommended that the appeal right extend to sentencing.

South Australia provides victims with the right to request that the DPP make such an application. This right does not trigger an appeal, but does commit the DPP to consulting in regards to the request. It is enforceable by the Commissioner for Victims’ Rights under the Victims of Crime Act 2001 (SA).

In considerations of victims’ rights in terms of direct involvement in criminal proceedings, it is notable that in New South Wales, victims have limited standing to appeal against pre-trial rulings that involve confidential information. As discussed in Section 3-2, giving victims standing goes further than the limited right of victim appeal proposed here.

17 Barbaro v R; Zirilli v R [2014] HCA 2
18 Principle 15 of the Declaration of principles governing treatment of victims reads:
   “A victim who is dissatisfied with a determination (for example the sentence) made in relation to the relevant criminal proceedings (being a determination against which the prosecution is entitled to appeal) may request the prosecution to consider an appeal against the determination. A victim must make this request within 10 days after the making of the determination. The prosecution must then give due consideration to that request.” Commissioner for Victims’ Rights (2001), Declaration of principles governing treatment of victims
19 Susanne Walther (2006), “Victims’ rights in the German court system” Federal sentencing reporter 19(2) pp. 113-118
20 Sikha Barman (2017), ”Victims’ right to appeal under Indian criminal justice system” MSSV Journal of Humanities and Social Sciences 1(2) p. 91
21 Government of India, Ministry of Home Affairs (2003), Committee on reforms of criminal justice system Volume 1 p. 3
22 Ibid p. 36
23 Criminal Appeal Act 1912 (NSW) s 5F(3AA)-(3AB)
1-2: Benefits of the reform

Giving victims the right to direct the DPP to appeal against inadequate sentences would have three important effects. It would:

- force the DPP to consult in good faith with victims regarding the likelihood of such an appeal succeeding, in turn encouraging the DPP to give more weight to victims’ views;
- communicate to sentencing judges that they need to consider victims’ views if they want to avoid their sentences being appealed more frequently; and
- communicate to the community that the courts do consider victims’ interests in sentencing and the grounds on which inadequate sentences are reviewed, thereby increasing confidence in the courts.

In addition, this reform gives victims an active role in sentencing, which is likely to increase their satisfaction with the outcomes of the system. One consideration of any victims’ rights reform is the benefit that a sense of satisfaction and closure gives to victims’ recovery. The victim’s right to appeal would also likely satisfy community concerns that manifestly inadequate sentences are harmful to victims.

The therapeutic value of the reform for victims should be considered a subsidiary but important reason for the reform. Increasing the satisfaction of victims sends a valuable message to the community about the connection between the judiciary and community standards of justice.

One final virtue of victim appeal in this respect is that it would increase the transparency of DPP decision-making. The DPP’s reasons for not pursuing an appeal would need to be communicated to the victim. This would reassure the public that when appeals do not proceed, this is because the victim is satisfied by the DPP’s advice. When leave is not granted for an appeal, this too would serve to communicate to the public how these decisions are made. Given that the public’s confidence in the courts is determined in part by its knowledge of how courts’ decision-making operates, this increase in transparency could have the benefit of improving the courts’ reputation.

In these ways, this reform would address the two identified problems (as outlined in the introduction and as illustrated in more detail in Sections 2 and 3):

1. that despite stable performance at the aggregate level, the reputation of the courts continues to be adversely affected by exceptional cases in which judges impose sentences wildly out-of-step with community standards; and
2. the desirability of increasing victims’ satisfaction derived from the criminal justice system.

Lastly, victim appeal is designed to work within the bounds of existing criminal justice procedure. The discretion of the judiciary in sentencing would not be affected, nor would the independence of prosecutors. Instead, victim appeal forces those actors to be sensitive to the needs of victims, whose apprehension of the harm they have suffered is relevant to sentencing both directly and as indicative of how community standards have been infringed.24 Victim appeal has the virtue of not being a far-reaching change to criminal justice procedure.

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24 A similar rationale has been offered for giving victims a veto over plea agreements struck by prosecutors. This reform would not however place any pressure on the judiciary, nor address the fact that it is a minority of cases that give rise to concerns about community standards not being met.

1-3. Risks and mitigation

1-3-1: Frivolous appeals

The main risk of this reform is that it will lead to a number of appeals being launched by victims against the advice of the DPP, tying up DPP and court resources to very little effect.

As it stands, the system of state appeals against sentence is designed to keep appeals rare. This reflects the settled law which is based on the premise that they place defendants at risk of double jeopardy. But it should be noted that many jurisdictions in Australia have moved to limit the application of double jeopardy, following a 2007 agreement by the Council of Australian Governments.\textsuperscript{25} Preserving judicial discretion in sentencing is another cited reason to keep the number of Crown appeals against sentence low. This is indeed an important principle. However, as cited in the South Australian DPP guidelines, King CJ of the South Australian Supreme Court had it right in 1982 when he wrote, in \textit{R v Osenkowski}, that prosecution appeals have the important function, among other functions, of enabling “idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected”\textsuperscript{26}

The risk of overburdening appeal courts with frivolous appeals can be mitigated by following the example of South Australia. In that state, the DPP must seek leave to appeal against a sentence. A hearing is held before a three member panel of the Criminal Court of Appeal.\textsuperscript{27} Similarly, appeals triggered by the victim’s exercise of this right should not proceed directly to the appeal court but rather should cause a hearing to take place in which the court considers the merits of the appeal before it proceeds. This would minimise the costs of unrealistic appeals.

This risk is also mitigated by the role that the DPP will continue to play in advising victims of the likelihood of success of an appeal against sentence.

Moreover, the success of the appeals is not the entire purpose of the reform. Increasing the number of appeals against inadequate sentences will also increase the sensitivity of the system to victims’ interests and the transparency of the system to the benefit of the public. As outlined in Section 2 below, it is likely, based on stable sentencing statistics at the aggregate level over time and across jurisdictions, that low public confidence in the courts, also stable over time, is in part based on exceptional cases in which sentencing judges depart egregiously from community standards. Appeals against sentence are apparently too rare to raise public confidence in sentencing. Pointing this out is not to dismiss the values that the state and the law points to in keeping such appeals rare. It is, rather, to make the claim that the damage to public confidence caused by this infrequency should be addressed. The goal of reformers concerned about this problem should be to rebalance these interests.

\begin{footnotesize}
\textsuperscript{25} Elizabeth Byrne (2016), “Why Australia ‘watered down’ its double jeopardy laws” ABC News 7 May 2016
\textsuperscript{26} Director of Public Prosecutions South Australia (2014), Statement of prosecution policy and guidelines p. 27
\textsuperscript{27} Director of Public Prosecutions South Australia (unknown year), Understanding appeals in criminal court matters
\end{footnotesize}
1-3-2: Difficulties in exercising the right

The converse risk is that very few victims choose to exercise the right. But this would simply mean that the anticipated systemic effect is limited only to the processes by which the DPP or Attorney-General decides against an appeal. It would not negate the positive effect of the reform entirely.

A related concern is that the media and public attention attracted by unjustly lenient sentences would be focused on the victim. This seems unlikely, though, because the proposed right is in addition to the right of the DPP and/or the Attorney-General, which means that those offices would still be subjected to pressure to exercise their rights—indeed, the victim’s ability to trigger the appeal would likely increase the scrutiny of the DPP and/or Attorney-General.

In circumstances where the victim’s identity is suppressed, the consultations between the DPP and the victim would have to remain confidential. Victims who wanted it known that the appeal was their decision would be at liberty to reveal that. If an appeal is triggered by the victim, this will be disclosed at the leave hearing as the defence would likely have a right to know what advice the DPP provided to the victim.
2 Addressing the public’s low confidence in the courts

KEY POINTS:

- This section argues for victim appeal based on the need to address the public’s lack of confidence in the courts.
- This lack of confidence has been consistently reported in several surveys over the past decade or more.
- Over that period, courts have not changed their sentencing practices, with the use of prison as a punishment and the length of sentences imposed remaining very stable across jurisdictions.
- One factor that has changed is that there are far fewer Crown appeals against sentence than there were a decade ago.
- Increasing the frequency with which sentences are tested by appeals is a modest reform that would increase the sensitivity of the judiciary to community standards.
- This is to be preferred to the heavier-handed intervention of reducing judicial discretion by passing mandatory sentencing laws, which increase the possibility of sentences that are disproportionately severe.

Victim appeal is designed to restore, in part, the public’s confidence in the courts by reassuring them that the standards applied in sentencing are based on common sense and the interests of victims. It is argued in this section that sensational cases in which judges are too lenient drive down confidence in the courts. And yet, the number of appeals against such sentences has fallen over the past decade. Victim appeal ameliorates this problem by providing an immediate means of recourse against unusually bad sentences. In jurisdictions that are consistently more lenient than others, victim appeal may help by contributing to an increase in punishment severity (noting though that the goal of sentencing is proportionality and not harshness per se).
2-1: Public confidence in the courts

Public confidence in the judiciary is essential to the operation of the criminal justice system. Judges operate with the imprimatur of the state, which represents the interests of the public. There is therefore a direct connection between the authority of the courts and their embodiment of the shared moral norms of the community. High profile lenient sentences inflame the public sentiment. This feeds into and reinforces Australians’ low level of confidence in the courts, especially if fewer cases are being appealed against on ground of leniency.

The 2003 Australian Survey of Social Attitudes found that just 29% of respondents have confidence in the courts and the legal system. In 2007, the same survey found that respondents reported higher levels of confidence in courts to have regard for defendants’ rights than victims’ rights. 70 percent of respondents indicated having either a “great deal of confidence” or “quite a lot of confidence” that courts would have regard for defendants’ rights, as against just 47 percent of respondents reporting the same for victims’ rights. A desire for harsher sentences was negatively correlated with lower confidence in the courts.28

A series of surveys in New South Wales between 2007 and 2014 revealed similar findings. In 2014, 66 percent of respondents reported that sentences are too lenient. This figure was 59 percent in 2012 and 66 percent in 2007. Respondents also indicated a lack of confidence in the criminal justice system to meet the needs of victims: in 2014, 44 percent of respondents were confident in this aspect of the criminal justice system, compared to 45 percent in 2012 and 35 percent in 2007. There was a rise in the number who reported confidence that the system “brings people to justice”, with 66 percent reporting that in their opinion it does in 2014 compared to just 55 percent in 2007. It should be noted that the 2014 survey found that across almost all questions, greater confidence than 2007 was recorded.29

The 2007 study found that participants were often misinformed about the criminal justice system, overestimating the proportion of crimes that involve violence and underestimating conviction and imprisonment rates for assault and burglary. Respondents with greater knowledge of crime trends were more likely to report that sentences were “about right” and were more confident about the system meeting the needs of victims. The 2014 study also found that how punitive respondents were was affected by their understanding of how prevalent violence is in crime and how accurate is their understanding of crime trends.

A 2012 follow-up study found that respondents were more knowledgeable than in 2007, and less punitive, with 59 percent reporting that sentences were too lenient.30

These findings mirror other studies that show that attitudes towards sentencing are affected by respondents’ familiarity with the system. A 2006 paper from the Victorian Sentencing Advisory

28 David Indermaur and Lynne Roberts (2009), “Confidence in the criminal justice system” Trends and issues in crime and criminal justice No. 387, Nov 2009, Canberra: Australian Institute of Criminology
Note that while this means that many members of the public have the overall impression that the courts are too lenient, the question at hand is what are the sources of this impression.

[NB: the surveys asked respondents about the criminal justice system as a whole, not just the courts. As Indemaur and Roberts point out (2009, as above) higher rates of confidence in the police may inflate confidence levels for the system as a whole.]

Council summarised domestic and international research and found that people become less punitive when they have more information about particular cases.\textsuperscript{31} A survey conducted across 2008-09 and reported in 2012 found that respondents were more likely to report that sentences for violent crimes were too lenient. That survey also showed that respondents’ punitiveness varied based on their information levels and sources.\textsuperscript{32} A 2010 survey of jurors in Tasmania also found that while jurors shared the public’s level of punitiveness in the abstract, 90 percent agreed with the sentences handed down by judges in cases in which they participated.\textsuperscript{33}

For its part, the judiciary is very confident that it plays an important role in society and in the community. According to a 2007 survey, fully 97 percent of judges and magistrates report that agree or strongly agree that their work is important to the community. The public and the judiciary are largely in agreement about the qualities that a judge should have, with legal knowledge, hard work, and life experience valued highly by both groups. However, judges and magistrates are more likely to value impartiality as the most important quality members of the judiciary should possess.\textsuperscript{34}

These surveys suggest that while the Australian public is concerned about how the judiciary performs, this concern in part stems from a lack of information about, and participation in, the criminal justice system. Survey respondents’ views tend to align with judges when better informed about trends in sentencing and criminal justice procedures. This in turn suggests dramatic changes to sentencing policy, such as mandatory sentencing (discussed in more detail in Section 2-4-2 below), are not required to satisfy public demand.

Given that the public’s main source of information about the criminal justice system is the media, and given that when informed about the particular circumstances of cases the public is less likely to report dissatisfaction with the system, the public’s low confidence in the judiciary stems in part from media reporting of the most sensational cases, which include those cases with unjustly lenient sentences. That is, while these cases may be exceptional, they likely play a disproportionate role in affecting public confidence in the judiciary by convincing the public that the judiciary is out of touch. Indeed, one way of interpreting the public’s lower interest in impartiality as a judicial value is that they expect judges to be partial to community standards. If we accept that this is an important factor in the fair and authoritative operation of our courts, then we need a system that effectively responds to these incidents.

\textsuperscript{31} Karen Gelb (2006), Myths and misconceptions: public opinion versus public judgment about sentencing Melbourne: Sentencing Advisory Council pp. 17-18

\textsuperscript{32} This survey and articles reporting on it are summarised here: Lenny Roth (2014), Public opinion on sentencing: recent research in Australia Sydney: NSW Parliamentary Research Service


\textsuperscript{34} These findings are discussed in: Sharyn Roach Anleu and Kathy Mack (2010), “The work of the Australian judiciary: public and judicial attitudes” 20 Journal of Judicial Administration (JJA) p. 3
2-2: Trends in sentencing

This section analyses data concerning sentencing by types of offences, types of sentences, and prison sentence length. The purpose of this section is to demonstrate that sentencing practices over time and across Australian jurisdictions have been stable. Read together with Section 2-1, the case can be made that this consistency in sentencing suggests that it is unusual sentences, rather than the pattern of sentencing, that should be targeted for reform in light of the public’s low confidence in the courts.

Methodological note:

The exceptional nature of sensational cases stands in contrast to the stability of sentencing practices over time and across jurisdictions. Where possible, this analysis breaks down sentencing data by court type. Most criminal offences are prosecuted in the Magistrates’ Courts; however serious indictable offences are prosecuted in the higher courts. As such, the kinds of sensational cases that affect public confidence are most likely to be heard in higher courts. Magistrates’ Courts hear some minor indictable offences, and a small number of Crown appeals against sentence originate in Magistrates’ Courts. However, by far the most common offence type heard in the Magistrates’ Courts is traffic violations, which are relatively uncontroversial.

All of which means that finding a reliable denominator for the rate of Crown appeals against sentence is complicated.

In Section 2-3, the analysis considers the number and frequency of DPP appeals against sentence. To avoid the noise created by traffic offences, we have excluded these guilty findings from the analysis of Magistrate’s Courts. A rate of sentence appeals is provided both against higher courts decisions and all guilty findings, traffic offences excluded.
2-2-1. Types of crime

Since 2008-09, higher courts have recorded guilty findings (including guilty pleas) most frequently in cases involving principal offences of assault, sexual assault, burglary, and drug offences. That is, among convicted offenders these are the most frequent principal offences.

Figure 1 below shows that apart from a growth in the share of guilty findings being in drug cases, the distribution of guilty findings across types of offending has mostly been consistent in recent years.

**Figure 1 Number of guilty findings by most serious offence as proportion of total guilty findings, higher courts 2008-09 and 2016-17**

Source: Australian Bureau of Statistics, Criminal Courts Australia 2016-17, Table 7
Figure 2 shows the same data for Magistrates’ Courts, and confirms that traffic violations make up almost half of cases in those courts. Acts intended to cause injury and drug offences are also prominent.

**Figure 2 Number of guilty findings by most serious offence as proportion of total guilty findings, Magistrates’ Courts 2008–09 and 2016–17**


Across court levels, it can be seen that over the last decade, the pattern of guilty findings by most serious offence has changed little, meaning that courts are mostly seeing the same types of offending at mostly the same rates.
2-2-2. Types of punishment

Of those found guilty, we can calculate the percentage who are sentenced to prison as their primary punishment. This data is not available for all offences and all jurisdictions; however, it is available for homicide, assault and sexual assault cases of the type that has typically outraged the community.

**Homicides**

Figure 3 shows that over the last five years, across the mainland states, 90 percent of those convicted of a homicide or related offence were sentenced to prison. There were not wide variations between jurisdictions. Homicide cases are almost always heard in the higher courts so Magistrates’ Courts data is excluded in this sub-section.

**Figure 3** Homicide and related offences – Percentage of guilty findings leading to incarceration as principal punishment (mainland states only), five-year average 2012-13 to 2016-17

When we break this down, we can see that there has not been much variation in how homicides have been treated by courts over the past five years. Figure 4 shows that average across mainland states has been within two percentage points of 90 percent each year.
Western Australia and South Australia have both had years recently in which this figure has been lower than usual, but because the absolute numbers involved are quite small (between 30 and 50 guilty findings) this might be explained by coincidence—there might simply have been an unusual number of cases warranting less severe punishments.

**Acts intended to cause injury**

Figure 5 shows that over the last five years, in higher courts, across the country the share of defendants sentenced to prison for acts intended to cause injury (the class of offences that includes assault) was consistent across the country, apart from South Australia, which imprisoned those convicted of this type of offence at a noticeably lower rate.

In the Magistrates’ Courts, which hear less serious assaults (and in greater volume), the percentages were much lower. Victorian magistrates are the most lenient by this measure. Queensland magistrates are much more likely than magistrates in the other mainland state to use prison as the principal punishment for this type of offence. This might be because of how the Queensland parliament defines indictable offences, or because of a lack of available alternative punishments, or because the nature of the offending in that state is worse, or a combination of these factors.
Figure 5  Acts intended to cause injury - Percentage of guilty findings leading to incarceration as principal punishment, by court type (mainland states only), five-year average 2012-13 to 2016-17

Source: ABS Criminal Courts (various years, various tables)

Figure 6 shows this data over time.

Methodological note:

For simplicity’s sake, the data shown in the time series in Figures 6 and 8 are the combination of higher and lower courts. This also has the advantage of eliminating the difficulty posed by the states’ different division of responsibilities between court levels.

Nationally the imprisonment rate for those convicted of acts intended to cause injury has risen from 18.9 percent in 2012-13 to 23.7 percent. All mainland states have seen rises in this category. By this measure, Queensland is consistently more punitive than the other mainland states, while Victoria is consistently more lenient. These difference are driven by decisions in the Magistrates’ Courts.
As with homicides, it is fair to say that there has been little change in this measure over time. And what change there has been has been towards severity. However, there is greater variability between states. This might be a function of different judicial attitudes but might also be explained in part by the wider variety of offending captured by this category.
Sexual assault

Statistics for the sentencing of sexual assault show even greater variation across jurisdictions. In both levels of courts, New South Wales has been most likely to use prison as the principal punishment for sexual assault. South Australian courts at both levels are less likely to sentence offenders in this category to prison, as are Victorian Magistrate’s Courts.

Figure 7 Sexual assault – Percentage of guilty findings leading to incarceration as principal punishment, by court type (mainland states only), five-year average 2012-13 to 2016-17

Note: Mainland states average used in the absence of national figures being reported for some years.

Time series figures for all courts show that these interstate differences have been persistent in recent years. Victorian courts have been the least likely to sentence offenders in this category to prison. It is not possible to know to what extent this is reflective of underlying offending patterns or different attitudes in the judiciary/magistracy. In absolute terms, Victoria has proportionally fewer guilty findings in this category than New South Wales: in 2016-17, New South Wales had more
than 21,000 guilty findings in all courts whereas Victoria had a little under 12,000. This does suggest there is some difference in the behaviour of individuals across the population, though it does not say anything about how serious are the offences that occur.

**Figure 8** Acts intended to causes injury – Percentage of guilty findings leading to incarceration as principal punishment, all courts (mainland states only), 2012-13 to 2016-17

The stability in the rates of the use of prison as principal punishment for these three types of offences suggests the judiciary is neither becoming harder nor softer in its attitude to sentencing. Other factors, especially the unique circumstances of offending in each case, are likely account for much of the small variation seen year-to-year.
2-2-3: Sentence length

Of those offenders who are sentenced to prison, ABS data shows that in some jurisdictions, the average sentence for these offenders has been stable or risen slightly in the last decade.

Methodological note:

Please note that the figures in this section include all offenders sentenced to prison by all courts, including Magistrate’s Courts.

Figure 9 shows that where there has been a decline in sentences it has been to levels more consistent with the other mainland states and the national average—as in the reduction in average sentence lengths for acts intended to cause injury (the red bars) in Victoria and South Australia.

Figure 9 Average sentence lengths for acts intended to cause injury and sexual assault by jurisdiction 2007 and 2017

Source: Australian Bureau of Statistics, Prisoners in Australia 2007, Table 29, and 2017, Table 24
If we look at the broader pattern of sentencing across all ABS classifications, we can see that the distribution of sentence lengths has remained similar over the past decade.

Figure 10 shows that most sentences are between one and 10 years, with the most common being sentences between two and five years. There has been a small shift from short sentences (less than one year) to sentences of this length, suggesting that courts are using community corrections orders more frequently for some offenders and giving lengthier sentences to others.\(^\text{35}\)

**Figure 10** Proportion of sentences by sentence range, all offences, national, 2007 and 2017

![Figure 10: Proportion of sentences by sentence range, all offences, national, 2007 and 2017](source: Australian Bureau of Statistics, Prisoners in Australia 2017, Table 26)

In 2017, this pattern was broadly similar across Australian jurisdictions. The Northern Territory has an anomalous use of short prison sentences, which may be explained by the lack of available alternative punishments. South Australia imposes life sentences more frequently than other states.

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Figure 11 Proportion of sentences by sentence range by jurisdiction, 2017

Source: Australian Bureau of Statistics, Prisoners in Australia 2017, Table 26
2-2-4: Summary of sentencing trends

These figures reviewed in this section show that over the past decade and across Australian jurisdictions, sentencing practices have been reasonably consistent. There has been little change in the rate at which offenders convicted of homicide, assault, and sexual assault are jailed, and little change in the range of prison sentences imposed on offenders. There has also been little change in the types of crimes coming before the courts. Together, these data suggest that the courts have not responded to the public’s low confidence in their performance by changing their sentencing practices.

If these consistent standards are held by the public to be too lenient, then this will contribute to their reported lack of confidence. However, the consistency of these standards combined with studies showing that media reporting and access to information about judicial decisions affects how the public views the courts also admits the possibility that it is not the overall pattern of sentencing practices that is causing the public to lose confidence, but rather sensational cases of the type identified earlier. That is, the public bases its opinion of the performance of the courts on those cases to which it is exposed, and those cases are likely to be ones that are outside the normal performance of the courts.

2-3: Crown appeals against sentence by the numbers

One way of measuring the frequency of sensational or exceptional cases is by examining the number of Crown appeals against sentence. The following data are taken from the Annual Reports of the various DPPs across the country. The aim of this section is to identify how often states and territories appeal against sentences, as a proxy for how many sentences offend against community standards.

Put another way, victim appeal is in part predicated upon the claim that sentences ought to be tested for their manifest inadequacy more frequently with Crown appeals. This raises the question of how frequent are such appeals.

The last year for which all Australian jurisdictions have reported statistics is 2016-17. Table 1 shows how many state appeals there were in each jurisdiction that year, and how many of them were successful.

**Table 1 Crown appeals against sentence by jurisdiction, 2016-17**

<table>
<thead>
<tr>
<th></th>
<th>NSW</th>
<th>Vic</th>
<th>Qld</th>
<th>SA</th>
<th>WA</th>
<th>Tas</th>
<th>NT</th>
<th>ACT</th>
<th>Aus</th>
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</thead>
<tbody>
<tr>
<td>Number of prosecution appeals</td>
<td>43</td>
<td>18</td>
<td>1</td>
<td>12</td>
<td>11</td>
<td>4</td>
<td>0</td>
<td>10</td>
<td>99</td>
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<tr>
<td>Number of successful prosecution appeals</td>
<td>22</td>
<td>11</td>
<td>0</td>
<td>7</td>
<td>6</td>
<td>-</td>
<td>0</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Source: DPP Annual Reports for each jurisdiction
As noted above, serious indictable offences are heard in the higher courts, where they are prosecuted by the DPP. To understand how infrequent are Crown appeals against sentence, we can compare the data in Table 1 against the number of guilty findings in these courts. Another possible comparison is with guilty findings in all courts, excluding traffic offences. This figure is provided for completeness but it is not necessarily the fairest comparison: most cases in the lower courts are dealt with summarily and do not raise points of law that might be tested on appeal. It is very rare for Magistrates’ decisions to be appealed by prosecutors for this reason.

Table 2 shows that compared to the number of guilty findings, the number of Crown appeals against sentence is very small: less than 1% against higher court sentence and just 0.03% when compared to all non-traffic offences. One important takeaway from this data is that concerns that victim appeal will raise the number of appeals need to be considered against the very low number of appeals we see currently. There are very few appeals, and, as Figure 12 shows, fewer now than in the recent past.

Table 2 Crown appeals against sentence by jurisdiction, 2016-17

<table>
<thead>
<tr>
<th></th>
<th>NSW</th>
<th>Vic</th>
<th>Qld</th>
<th>SA</th>
<th>WA</th>
<th>Tas</th>
<th>NT</th>
<th>ACT</th>
<th>Aus</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of prosecution appeals</td>
<td>43</td>
<td>18</td>
<td>1</td>
<td>12</td>
<td>11</td>
<td>4</td>
<td>0</td>
<td>10</td>
<td>99</td>
</tr>
<tr>
<td>Total guilty findings (higher courts)</td>
<td>4002</td>
<td>1646</td>
<td>4408</td>
<td>1197</td>
<td>2115</td>
<td>280</td>
<td>440</td>
<td>161</td>
<td>14246</td>
</tr>
<tr>
<td>Total guilty findings (all courts, minus traffic offences)</td>
<td>76599</td>
<td>55106</td>
<td>97388</td>
<td>16949</td>
<td>50675</td>
<td>5306</td>
<td>6695</td>
<td>685</td>
<td>309391</td>
</tr>
<tr>
<td>Ratio of appeals to higher court guilty findings</td>
<td>1.07%</td>
<td>1.09%</td>
<td>0.02%</td>
<td>1.00%</td>
<td>0.52%</td>
<td>1.43%</td>
<td>0.00%</td>
<td>6.21%</td>
<td>0.60%</td>
</tr>
<tr>
<td>Ratio of appeals to all court guilty findings</td>
<td>0.06%</td>
<td>0.03%</td>
<td>0.001%</td>
<td>0.07%</td>
<td>0.02%</td>
<td>0.08%</td>
<td>0.00%</td>
<td>1.46%</td>
<td>0.03%</td>
</tr>
</tbody>
</table>

Methodological note:

“Number of prosecution appeals finalised” includes an unknown number of appeals that were begun in the previous financial year or were against decisions handed-down in the previous financial year. It is not possible to track individual cases through the process to eliminate this limitation. The figure for Western Australia is the number of appeals lodged—this is for consistency in the times series below, as Western Australia did not report appeals finalised in previous years.

“Total guilty findings by higher courts” excludes appeals. As noted in the source of the data: ABS Criminal Courts 2016-17, Explanatory Note 17.
As the time series in Figure 12 demonstrates, the number of state appeals against sentence has increased in Victoria in recent years. Queensland consistently has fewer such appeals. The number of appeals in NSW dropped sharply to 2015-16 but recovered somewhat in 2016-17. The drop off may have been in part caused by a backlog of cases at the District Court. In 2016, the NSW Government announced that it would hire additional District Court judges to reduce the backlog.\(^{36}\) Figures were not available for all years for Tasmania, the Northern Territory, and the Australian Capital Territory so they have been excluded.

**Figure 12** Crown appeals against sentences (withdrawn appeals excluded)

Source: State DPPs Annual Reports

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One notable result from this time series is that the two mainland states in which the Attorney-General can order an appeal be lodged, Queensland and Western Australia, have consistently fewer state appeals against sentence than the other mainland states. One possible reason for this is that in those states, the decision to appeal or not is affected by political considerations. While it might be expected that Attorneys-General could find some political advantage by attacking the courts for perceived leniency, in reality, they are usually more risk adverse than this, likely reasoning that the benefits of appeals rarely outweigh the costs and communication risks involved.

As shown in Figure 13, the past decade has seen an overall downward trend, with the current number of Crown appeals against sentence being more than 50 percent below its peak in 2008-09. However, the number has been reasonably stable over the past five years, following a sharp drop between 2010-11 and 2011-12.

**Figure 13 Number of Crown appeals against sentence, mainland states 2007-08 to 2016-17**

This time series can be compared to time series data for the number of guilty findings in all courts. However, because the number of appeals is so small compared to the number of guilty findings, this ratio is not very responsive to changes in the number of appeals. There is a slight downward trend, which reflects the fact that the decline in the number of appeals is not caused by a decline in the number of guilty findings. The shape of the two lines in Figures 13 and 14 are notably similar, showing that the trend is not obviously affected by the number of guilty findings.
Indeed, if we look more closely at the numerator and denominator of this ratio, we can see that they do not reveal a clear relationship.

Figure 15 shows that there is a slight trend towards more guilty findings, recovering from a steep decline from 2009-10 to 2010-11, while there is a slight trend towards fewer appeals. This figure shows that there is no necessary connection between these figures, which reinforces the exceptional nature of Crown appeals against sentence: just because there are more cases, does not mean that there are more unusual cases.
That said, the key point is that there has been a decline in the number of appeals, both in absolute and relative terms. Two observations follow:

- The rate at which sentences are appealed by the Crown has been higher in the recent past, suggesting that it would not be a radical change were the rate to rise again.

- The stability in recent years suggests that the DPP and Attorneys-General are not persuaded of the need for or the viability of more appeals against sentence, community concerns notwithstanding. This reflects how stringent is the law regarding appeals against sentence; however, this law has not grown more stringent in recent years so is unlikely to explain the downward trend.

There is some evidence, then, that courts’ sentencing decisions are being challenged less frequently by the state than 10 years ago. This means that sentencing judges are more insulated from scrutiny of their decisions, and means that the Directors of Public Prosecutions are either less willing or less able to proactively enforce community standards.

2-4: Victim appeal as a response to trends in sentencing

2-4-1: The case for victim appeal based on sentencing trends

This section has shown that:

- Australians have consistently reported low confidence in the judiciary; and
- In sentencing, the judiciary has been consistent across jurisdictions and types of crime; and
- The DPP and/or Attorneys-General have been appealing fewer sentences in recent years.

Connections between these findings should not be overstated. It is also likely that if the public has a view of the judiciary and magistracy as too lenient overall, the consistency we have seen in sentencing is only likely to reinforce that view.

However, studies have shown that confidence in the courts is affected by access to information. This means that cases that attract media attention are likely to shape how the public perceives the courts. For obvious commercial reasons, the media reports on interesting, unusual cases rather than on every case or the overall pattern of cases.

The decline in the number of Crown appeals against sentence suggests that authorities are finding fewer cases with sentences that seem to dramatically depart from community standards. There is no way to know for certain whether this is justified or not. However, cases continue to appear in the media that generate widespread commentary and the perceived leniency of the courts continues to be a key issue in criminal justice, as evidenced by recent legislative moves to implement and tighten mandatory sentencing.

The argument presented here is not that victim appeal can address every reason for the public’s low confidence in the judiciary. Rather, it is that:

- to the extent that exceptional cases and subsequent media coverage contribute to the public’s lack of confidence in the judiciary, and
- to the extent that that impression is reinforced by the Crown appealing fewer sentences, and
• To the extent that the judiciary’s consistency in sentencing is in defiance of community standards and is insulated from popular opinion by the knowledge that sentences are unlikely to be challenged, then
• victim appeal is likely to have a positive effect on public confidence in the judiciary.

Victim appeal is therefore primarily a systemic tweak aimed at a systemic problem. Moreover, it is a better way to address this problem than less-subtle approaches, the most obvious of which, mandatory sentencing, warrants brief discussion.

2-4-2: Victim appeal compared to mandatory sentencing

If, as outlined above, the reputation of the courts is suffering from a few exceptional cases in which judges’ sentences depart unacceptably from community standards, it might be thought that this is reason for legislatures to assume responsibility for sentencing through legislations.

This has been an increasingly popular solution for legislatures in Australia. For example, and as noted in the introduction, in Victoria, since 2014 assaults against emergency services personnel carry mandatory prison sentences. Following a recent controversy in which two offenders were not incarcerated following their conviction for assaulting paramedics attending an emergency, the state government proposed tightening this law further, removing judges’ ability to take into account certain circumstances of the offending, including related drug abuse.

However, as infuriating as such decisions may be, mandatory sentencing is an overreaction that creates the risk of unjustly severe sentences—a risk that should also alarm those who care about the traditional standards of sentencing. Sentences are supposed to be proportional to the harm caused by the offender. Although the legislature represents the community, and therefore might be thought of as best placed to speak to community standards, legislation is too imprecise a tool, unable to capture extraordinary cases—which are, as noted above, the problem. Judicial discretion and principles derived from precedent provide a surer calibration between severity and harm. These principles develop over time and from the experience of different people and different circumstances. The legislature cannot speak to the full experience of the community as it has evolved.

The problem is not the power vested in the courts, but how courts exercise that power. Mandatory sentencing misdiagnoses the cause of the problem in question. Worse, it suggests that the public cannot and should not expect to be represented by judges and magistrates who share their values, and must instead accept that the legislature and the courts will always be in tension, if not conflict. Victim appeal is therefore the superior reform because it preserves the form of the criminal justice system and instead of interfering with the discretion of the courts, arms them with more information about community standards while also increasing their transparent accountability to the community for their decisions.

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37 Willingham and Oaten (2018), as above
38 A similar problem rules out jury sentencing as an option. While a jury could speak to the standards of society in the moment, it would not necessarily be consistent with the standards of the community over time and across cases. The point of victim appeal is not to separate sentencing from precedent but to give victims, as community members, input into the system of judge-made sentencing.
3 Victim appeal as part of the victims’ rights agenda

KEY POINTS:

- Victim appeal is also supported by its therapeutic value for victims.
- Just as the introduction of Victim Impact Statements has benefited victims, so will giving them a real decision-making capacity.
- However, there is a limit to the therapeutic value argument: following such a line of reasoning leads to unnecessary overreactions like giving victims representation in criminal trials. Such an innovation departs too far from our traditional adversarial system.

In the previous section, it was argued that victim appeal can help to address the persistent problem of the public’s low confidence in the courts. This section argues for a different benefit of the reform: that it can make the criminal justice process more satisfying for victims. In this way, victim appeal can also draw upon the same justification as existing victims’ rights reforms.

The most visible aspect of the victims’ rights agenda in Australia has been the introduction of Victim Impact Statements. It is argued in this section that victim appeal complements this reform, and may actually be superior to it in some important ways.

The paper concludes, however, by warning against the introduction of the more dramatic change of granting victims the right to their own representation in criminal trials. The therapeutic value of victim involvement in the criminal justice system does not justify abandoning our traditional adversarial system of justice. Instead, the primary reason to increase the satisfaction of victims should be the value of doing so for achieving the first goal, which was increasing public confidence in the courts.
3-1: Victim impact statements

Victim appeal is in part predicated on the desirability of providing victims with greater agency in the criminal justice system and thereby connecting the judiciary to community standards.

In recent years, governments have moved to address the first part of this concern. Jurisdictions across Australia have passed legislation entitling victims to present statements at sentencing detailing how offenders’ crimes have affected them. The justification for the introduction of Victim Impact Statements (VIS) is that they are therapeutic for victims and that they introduce new evidence into proceedings about the type and amount of harm caused by the crimes in question. For example, a 2017 review of victims’ involvement in sentencing in NSW focused almost entirely on VIS. This review summarised some of the recent research on the emotional benefits to victims of VIS, finding that the range of experiences of victims is wide, with some finding the process frustrating and others finding it to be therapeutic. However, evidence is stronger for some therapeutic effect than for disappointment.

One of the frustrations of VIS is that their therapeutic value often comes into conflict with the laws of admissibility of evidence. A Victorian Law Reform Commission review of the role of victims in criminal justice found that “Victims feel constrained by restrictions on what they can say in their victim impact statement. They often want to, and do, include information in their statement that is not admissible.” This leads to revisions having to be made to the statement or the court to exclude part of the statement. The Commission recommended that rules of admissibility be amended so as to tie the probative value of VIS to the purpose of allowing victims to explain how they have been affected by the crimes in question. This permissive view is often already adopted in practice: sentencing hearings do not have juries and judges are already in a position to minimise the prejudicial effect of VIS that do not adhere to strict rules of admissibility. But the Commission reiterated that the principles of sentencing do not permit the subjective opinions of victims to directly affect sentence severity. The Commission noted that, “Whatever a victim’s attitude towards sentencing, it is critical that an offender’s sentence does not depend on whether the victim is forgiving or punitive… A victim’s views about sentencing are considered to be opinions and are therefore not considered relevant”. It also noted that there is a concern that if the court allows objections to the content of a VIS to be heard, this stress can counteract the therapeutic benefits of VIS.

Evidence suggests that judges and magistrates consider VIS useful in sentencing. A survey by the Victorian Victims Support Agency found that 67 percent of judges and magistrates considered VIS to be significant in sentencing often or occasionally. Research from South Australia found that the introduction of VIS had not increased sentencing severity.

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41 It has been argued that critics of VIS base their criticism on victims wishing to “control the outcome of the sentencing process”, which is not possible. This however may count towards victim appeal as a better way of satisfying victims. Julian V. Roberts (2009) “Listening to the crime victim: evaluating victim input at sentencing and parole” Crime and Justice 38(1) pp. 347-412
43 NSW Sentencing Council (2017) as above p. 64
Also referred to here: Victims Support Agency (2009) A victim’s voice: Victim Impact Statements in Victoria pp. 6-7
of VIS is limited by the reluctance of judges to take them into account in sentencing.\textsuperscript{45} However, the harm caused to the victim is one element of proportionality in sentencing (along with the harm caused to the community and the severity of the punishment), and VIS is relevant to this. In this way, VIS can be seen as reinforcing a traditional retributive system of justice, in that they make plain the connection between punishment at sentencing and the harmed individual.\textsuperscript{46}

On the other hand, the limitations of VIS as a form of victim participation in criminal proceedings are significant. While judges may be able to glean from VIS details about how the offending has affected victims, placing too much weight on this personal evidence introduces an unacceptable level of subjectivity into sentencing. Sentencing should not turn on how compelling a victim is in recounting his or her experience: this is unfair to victims and offenders alike.\textsuperscript{47} This is not to say that VIS are without value. But VIS do not and cannot give victims any control over proceedings, and so do not ameliorate the effects of out-of-touch judges who are determined to ignore the community construction of the meaning of harm and the effects of crime.

All of the virtues claimed for VIS apply equally to victim appeal. Victim appeal allows victims to register their disapproval of sentences, in a way that forces judges to consider their point of view.

Moreover, victim appeal does so without the risks VIS carries for the administration of justice. Victim appeal gives victims a real decision to make. Victim appeal has a material effect on proceedings and enters into the public record the satisfaction of victims with the operation of the courts and public prosecutors. Victim appeal also avoids the procedural questions created by reliance on VIS for victim participation, such as the need for evidence to be objective and standards consistent across cases. It is therefore more effective in providing victims a role in proceedings and in protecting traditional criminal justice procedure.

That said, the goal of victim appeal is to complement VIS and other existing victims’ rights, not to replace them.

\textsuperscript{45} Tyrone Kirchengast (2013), “Victim lawyers and the adversarial criminal trial” New Criminal Law Review: an international and interdisciplinary journal 16(4)

\textsuperscript{46} Julian V. Roberts (2009), as above p. 354

\textsuperscript{47} British barrister Mark George QC has written that VIS “gives a very unfair advantage to the articulate”. Mark George (2012), “Involving victims in sentencing” The Justice Gap 12 October 2012

It should be noted that the Northern Territory, like US states Michigan, Kentucky, and Minnesota, allows victims to comment upon the sentence they believe ought to be imposed. However, this can exacerbate the frustrations outlined above. Roberts (2009) writes: “One of the most robust findings in the victim impact literature is that victims who expect their statement to have a direct influence on sentencing react with disappointment and anger once it becomes clear that their sentencing ‘submission’ will not be followed.” As above p. 360

Also, during the mid-1980s rise of the victims’ rights movement, a review of the subject argued that “the only rationale for the criminal sanction with which emphasising the particular harm [to victims] is consistent is that of retaliation”. The article also noted that the desire of victims for revenge conflicts with proportionality and equality in sentencing. Lynne N. Henderson (1985) “The wrongs of victim’s rights” Stanford Law Review 37(4) 996-1000
3-2: Victim representation in court

Victim appeal has a potential therapeutic benefit for victims. However, this benefit should not be viewed in isolation, nor should the goal of the criminal justice system be to maximise it. The therapeutic value of victim appeal should not be taken as an endorsement of a therapeutic approach to criminal justice. Such an approach can be taken too far, jeopardising our traditional conception of justice.

For example, a therapeutic approach may justify granting victims the right to their own representation in court. This three-party system would move Australian jurisdictions away from the adversarial system towards a more inquisitorial system.

Giving victims standing and representation has been presented as a way to address the weaknesses of victim impact statements. By this reasoning, representation in court allows victims to participate by moving motions, and being granted this agency is therapeutic in the way that presenting a mere statement is not. Moreover, providing victims with counsel reduces the risk that they will present evidence that is subjective, misleading, or false.48

One advocate of such a reform in Australia is the former Commissioner of Victims’ Rights in South Australia, Michael O’Connell. Following a pair of controversies regarding lenient sentences, then-Commissioner O’Connell argued that victims should be given formal representation in sentencing hearings, “moving toward equality with prosecution and defence”. His stated rationale for this innovation was that victims’ satisfaction is connected to their participation in the system.49

In South Australia, the Commissioner for Victims’ Rights is an independent advocate for the interests of victim throughout criminal proceedings. While the Commissioner cannot enforce victims’ rights directly, he or she is able to advise the Attorney-General and intercede with the DPP on behalf of victims. This role has already involved public funding for legal representation for victims in disputes with prosecutors.50

However, placing this representation in criminal courts would be a significant change. There is one precedent from a similar country: in 2004, the United States Congress passed the Crime Victims’ Rights Act, which gave victims standing to participate in trials and appeals. Courts have appointed counsel to victims who would not otherwise have been able to exercise this right.51

There are two noteworthy deficiencies with this reform. In one sense, it does not go far enough: it does not afford victims any more decision-making power in sentencing hearings. While victims must be heard in court, they cannot direct the prosecution at any stage of the proceedings. Standing for victims therefore does not solve the identified problem of tying prosecutors and sentencing judges more closely to community standards as represented by the victim. In another sense, though, this reform goes too far: granting victims standing is a distortion of the adversarial system of justice. In common law jurisdictions, justice is determined through the parties presenting competing constructions of the facts and law, with the judge ruling as to whether the prosecution has presented a case that meets the required standard of proof (in criminal cases, the standard is “beyond a reasonable doubt”). The role of the victim is therefore primarily as a witness to the crime and its harms.

48 Tyrone Kirchengast (2013) as above p. 591
49 Sean Fewster and Ben Hyde, “SA Victims’ Rights Commissioner says victims should be represented by lawyers during criminal sentencing hearings” Adelaide Advertiser 3 June 2014
The reflections of then-Commissioner O'Connell are instructive as to both these points. On the one hand, as he writes, “Victim studies and my experiences convince me that there is nothing less empowering for a victim... than being unable to influence any decision that affects him or her”. Yet he goes too far in extending this line of argument to dismissing concerns about the difference between common law and civil law jurisdictions:

Although historically victim participation has been frowned upon in common law jurisdictions that is not so in civil, inquisitorial jurisdictions... It seems to me that for there to be certainty of justice, victims must [be] integrated into criminal proceedings.52

There are significant philosophical and cultural differences between the two systems. It is beyond the scope of this essay to detail those differences, however it should be noted that they have emerged from different histories, entail different roles for all participants from police to lawyers to judges, and are based on different assumptions about the ends of justice, such as whether criminal proceedings are primarily designed to determine the truth of the matter. The piecemeal integration of ideas that are broadly incompatible with our system of justice is just as much of an overreaction as legislative interference in judicial independence.

While victims’ rights have been championed by politicians across the spectrum of politics in the United States and here in Australia, there is a fundamental inconsistency between the common law system and more expansive attempts to integrate victims into proceedings as third parties.53 The tradition of the common law holds that there are two victims in every crime: the person directly affected, and the community whose norms have been violated. In contrast, it has been argued that victims’ rights are justified by minimising the “harm” done to victims through their participation in the adversarial system; and similar logic applies to reducing other collateral harms brought about by the operation of that system as it relates to offenders and their families. This is made clear by the connection between offending and victimisation, with many offenders themselves having been on the other end of crime in their lives.54 Victims’ rights therefore threaten to undermine the connection between criminal justice and community standards, instead locating the harm of crime in the individual circumstances of particular cases.55 This individualisation of justice comes at a further cost to personal autonomy and responsibility: as victims become more the focus of the criminal justice system, victimhood becomes more broadly defined, with crimes previously considered victimless coming to be seen as contributing to societal defects and thereby as victimising the disadvantaged. This broad construction of victimisation can lead to over-criminalisation.56

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52 O’Connell (2011), as above p. 13
53 These tensions are summarised in Erez and Rogers (1999), as above pp. 217-9
55 The weakening of the public aspect of crime actually weakens the justification for criminal justice, and therefore retribution against criminals.
56 For an interesting discussion of this phenomenon and its relationship to the concept of society as a victim of crime as it has affected the rise of victims’ rights in Sweden, see Henrik Tham, Anita Rönneling and Lise-Lotte Ryterbro (2011), “The emergence of the crime victim: Sweden in a Scandinavian context” Crime and Justice 40(1) especially pp. 571-3
The individualisation of crime diminishes the role of the public prosecutor as a representative of communal moral standards, which is the opposite of what the problem diagnosed in this document requires. Indeed, victims’ rights may serve as a Trojan horse for more radical approaches to law and order that are fundamentally inconsistent with the adversarial system, individuals rights, and personal responsibility.\textsuperscript{57}

As such, victim appeal is to be preferred to victim representation because it:

- delivers real agency to victims over a specific part of proceedings directly relevant to their interests; and
- preserves the traditional procedures of our justice system.

Lastly, as stated in Section 1, the reason to increase the therapeutic value of the criminal justice system for victims is not solely, or even primarily, about the victims themselves. Instead, the chief value of doing so is to communicate to members of the public that they can have confidence that should they ever be victimised, they will be treated appropriately and their standards of justice will be reflected in the decision-making of the courts.

\textsuperscript{57} An alternative view is presented by Tyrone Kirchengast. He suggests that victim participation in criminal justice proceedings provides a potential bridge between the common law and civil law system, as both systems adapt to the need for “raising the status and agency of the victim”. He argues that victim lawyers can operate within an adversarial system. Kirchengast (2013), as above pp. 589-590
Conclusion

Since its inception in 2016, the Institute of Public Affairs Criminal Justice Project has aimed to promote reform of the criminal justice system while defending traditional standards of retribution and adversarial justice. There is a wide range of problems affecting criminal justice in this country: high and increasing rates of incarceration; burgeoning expenditure; the ever-widening scope of the criminal law; and low public confidence in the system and the safety it is supposed to provide. But the system needs reform, not revolution. Victim appeal should be seen in this context.

Victim appeal would be a small but powerful reform to the criminal justice process. Victims would have the right to direct the DPP to seek leave to appeal against sentences imposed in cases involving serious indictable offences. This right would be in addition to the existing right of the DPP (and in some states the Attorney-General) to appeal against manifestly inadequate sentences. The aim of the reform is to increase the sensitivity of judges in sentencing to community standards by increasing the number of prosecution appeals against sentence.

The main benefit of this reform is that it will address the persistent low levels of confidence that Australians report having in the courts. There is reason to believe that this low confidence is disproportionately affected by rare sensational cases in which judges depart radically from common sense notions of justice. Sentencing patterns have not changed in recent years and studies show that when provided information about cases, the public often agrees with sentences handed down by judges and magistrates. But the public is most likely to be exposed, via the news media, to unusual cases and to base their opinion of the courts on those cases. However, the failsafe mechanism for such cases is now being underused. Just a tiny fraction of sentences is appealed by the Crown. Sentences are not tested enough for the public to see the system as self-correcting when mistakes are made. Victim appeal would increase public confidence in the system by communicating to the public that manifestly inadequate sentences will be reconsidered in light of community standards. Victims can be thought of as a proxy for those standards. And the involvement of victims in the decision-making process will have a positive effect on public confidence in the system.

A secondary benefit of victim appeal is for victims themselves. Reforms like the introduction of Victim Impacts Statements have increased crime victims’ satisfaction with the criminal justice system, and this has some therapeutic benefit for them. It is reasonable to believe that providing victims with this opportunity for decision-making would have a similar benefit.

Victim appeal should also be considered relative to alternative reform options. Mandatory sentencing is an overreaction. The problem is likely not with judicial sentencing in general but with exceptional cases. Reducing judicial discretion increases the chance of disproportionately severe sentences and concedes that there is no way to reconnect the judiciary to community standards. On the other hand, the importance of victims’ rights should not be taken as justification for radical changes to our criminal justice system. Neither low confidence in the courts nor victims’ satisfaction justify the abandonment of the adversarial system.
Australians deserve criminal justice institutions and processes that they can trust. This trust can only come from the assurance that the courts (along with the police and corrections) will reflect a common sense understanding of justice that coheres with the beliefs of the people. On the rare occasions that judges simply get sentencing wrong, there needs to be a mechanism for correcting those mistakes that communicates to the public that their interests, and the interests of victims, are being respected. Victim appeal advances both of these sets of interests.
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