

# CRIMINAL LAW JOURNAL

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## ARTICLES

### WHAT'S INSTINCT GOT TO DO WITH IT? A BLUEPRINT FOR A COHERENT APPROACH TO PUNISHING CRIMINALS

**Mirko Bagaric and Richard Edney**

As a result of the instinctive synthesis approach to sentencing, decisions are often based on the intuitive inclinations and sentiments of sentencers, as opposed to binding rules and principles. In particular, insufficient regard is paid to the purposes and objectives that can be achieved through a state-imposed system of punishment. Momentum is gathering for the High Court to revisit the manner in which the sentencing inquiry is undertaken. We believe that the court should use the opportunity to implement fundamental reform in sentencing and direct the sentencing process down a more transparent and forensic path. We suggest that there are seven basic steps that need to be undertaken to achieve enlightened sentencing reform. Ideally this is a role for the legislature. However, given the populist climate in which we live we have little confidence that the legislature will undertake such an exacting task – one which would almost certainly lead to a less severe sentencing regime. The judiciary offers the strongest hope that at least some of these steps will be taken. This article offers a blueprint for how such reform can be implemented. The first step is simply to assume that the institution of state-imposed punishment is justified – this has already been undertaken. The second is to select the theory which best justifies punishing wrongdoers. Thirdly, public opinion must be ignored in developing sentencing principle. Next it must be determined which objectives (such as deterrence and rehabilitation) can be achieved through sentencing. The fifth step involves matching the punishment to the crime. Step six is to critically analyse the foundation, and reassess the relevance, of the hundreds of aggravating and mitigating considerations that presently affect the sentencing calculus. Finally, sentencing law and practice should be subject to ongoing reform to take into account emerging empirical evidence concerning the positive benefits that can be achieved through sentencing. .... 119

### AN ETHICS SURVEY OF AUSTRALIAN CRIMINAL LAW PRACTITIONERS

**Ben Clarke**

The ethics of criminal lawyers is a largely unexplored area of legal scholarship. This article offers preliminary insights into the ethics of a cohort of 20 Australian criminal law practitioners. It critiques the survey responses of defence lawyers, prosecutors and

judicial officers to a series of ethics questions. The survey results suggest that criminal law practitioners deal with a variety of ethical issues in practice; regard themselves as ethical professionals; are generally not prepared to compromise their professional integrity by violating the professional conduct rules to advance the interests of a client; consider senior criminal lawyers to have a professional duty to assist junior practitioners when called upon to offer advice on ethical issues; and strongly support the inclusion of a mandatory legal ethics subject in Australian law degrees. Criminal law practitioners' perceptions of both their own professional behaviour and the adequacy of applicable professional conduct rules in addressing ethical issues that arise in the practice of criminal law, are also explored in this article..... 142

#### A PUBLIC VOICE IN SENTENCING?

##### **Ashley Halphen**

The writer has worked in the United States in law offices that represent indigent defendants on death row. There, he has observed palpable distinctions in the administration of criminal justice when compared to Australian jurisdictions. These distinctions lie in the manner by which judges are selected for judicial service and the body responsible for making sentencing decisions in capital trials. In the majority of cases, it is an elected judge who oversees the trial process and where the trial involves a capital offence, the jury has the ultimate responsibility of determining the appropriate sentence. This article considers the implementation of an "elected judge" and a "sentencing jury" to give the public a voice in sentencing and better reflect community expectations in sentencing dispositions. .... 157

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  - 5. Austin, n 4, p 56.

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  - 7. Sheehy et al, n 6 at 221.

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