SUPREME COURT OF QUEENSLAND

CITATION:	*R v O'Sullivan; Ex parte Attorney-General (Qld); R v Lee; Ex parte Attorney-General (Qld)* [2019] QCA 300
PARTIES:	**In CA No 232 of 2018:** **R** **v** **O'SULLIVAN, William Andrew** **(respondent)** **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** **(appellant)** **In CA No 63 of 2019:** **R** **v** **LEE, Annemarree Louise** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 232 of 2018 CA No 63 of 2019 SC No 681 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeals by Attorney-General (Qld)
ORIGINATING COURT:	In CA No 232 of 2018: Supreme Court at Brisbane – Date of Sentence: 30 August 2018 (Holmes CJ) In CA No 63 of 2019: Supreme Court at Brisbane – Date of Sentence: 20 February 2019 (Dalton J)
DELIVERED ON:	17 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	14 June 2019
JUDGES:	Sofronoff P and Gotterson JA and Lyons SJA
ORDERS:	**In CA No 232 of 2018:** **1. Appeal allowed.** **2. Sentences imposed on 30 August 2018 be quashed.** **3. The respondent is sentenced to imprisonment for**

12 years for the offence of manslaughter.

4. **There be no further punishment for the offence of cruelty.**

In CA No 63 of 2019:

Appeal dismissed.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where both respondents pleaded guilty to one count of manslaughter and one count of cruelty to a child under 16 – where all offences were domestic violence offences – where all offences concerned the same victim, 22 month old Mason Jet Lee – where the respondent O'Sullivan was sentenced to nine years imprisonment for the manslaughter offence and a concurrent sentence of one year imprisonment for the cruelty offence – where the learned sentencing judge set a parole eligibility date for O'Sullivan of 29 July 2022 and declared 762 days of pre-sentence custody as time served – where the respondent Lee was sentenced to nine years imprisonment for the manslaughter offence and a concurrent sentence of three and a half years for the cruelty offence – where the learned sentencing judge set a parole eligibility date for Lee of 19 July 2019 and declared 936 days of pre-sentence custody as time already served – where the Attorney-General appeals the sentences imposed on both respondents on the ground that they are manifestly inadequate – where the Attorney-General submits that the cases relied upon by the learned sentencing judges to establish a range of sentences for manslaughter where the victim was an infant did not take into account subsequent significant legislative changes – where legislative changes expressly intended to result in sentences that were more severe than those previously imposed – whether the range of appropriate sentences that was established by the cases relied upon at first instance can still be regarded as useful for the purposes of comparison – whether the learned sentencing judges failed to consider the effect of legislative changes upon the range of appropriate sentences – whether the sentences were manifestly inadequate

Criminal Code (Qld), s 564(2), s 564(3A), s 572(1A), s 669A
Criminal Law (Domestic Violence) Amendment Act 2015 (Qld)
Criminal Law (Domestic Violence) Amendment Act 2016 (Qld)
Domestic and Family Violence Protection Act 2012 (Qld), s 8
Penalties and Sentences Act 1992 (Qld), s 9, s 12A, s 13, s 161B(5)
Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010 (Qld), s 7
Penalties and Sentences (Serious Violent Offences)

Amendment Act 1997 (Qld)

Dinsdale v The Queen (2000) 202 CLR 321; [2000] HCA 54, applied
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22, cited
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
Phillips v The Queen (2012) 37 VR 594; [2012] VSCA 140, considered
R v Chard; Ex parte Attorney-General (Qld) [2004] QCA 372, distinguished
R v Hall; Ex parte Attorney-General (Qld) [2002] QCA 125, distinguished
R v Irvine & Attorney-General of Queensland [1997] QCA 138, distinguished
R v JV [2014] QCA 351, cited
R v Kilic (2016) 259 CLR 256; [2016] HCA 48, cited
R v Lacey; Ex parte Attorney-General (Qld) (2009) 197 A Crim R 399; [2009] QCA 274, applied
R v M (CA) [1996] 1 SCR 500, explained
R v MacDonald, unreported New South Wales Court of Criminal Appeal, 12 December 1995, explained
R v Nemer (2003) 87 SASR 168; [2003] SASC 375, cited
R v Nichols (1991) 57 A Crim R 391, cited
R v Randall [2019] QCA 25, not followed
R v Riseley; Ex parte Attorney-General (Qld) [2009] QCA 285, distinguished
R v Ross [1996] QCA 411, distinguished
R v Smith [2019] QCA 33, not followed
R v Walsh, unreported, Queensland Criminal Court of Appeal, No 85 of 1986, 12 June 1986, distinguished
R v WAO [2012] QCA 56, cited
R v WAV [2014] 2 Qd R 255; [2013] QCA 345, cited
R v Whyte (2004) 7 VR 397; [2004] VSCA 5, cited
Ryan v The Queen (2001) 206 CLR 267; [2001] HCA 21, cited
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: M R Byrne QC for the appellant
S J Keim SC, with R M O'Gorman, for the respondent O'Sullivan
M J Copley QC for the respondent Lee

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Fisher Dore for the respondent O'Sullivan
Legal Aid Queensland for the respondent Lee

[1] **THE COURT:** At a quarter to one on the morning of 11 June 2016, paramedics attended a home in Caboolture where they found a dead boy, Mason Jet Lee, aged 22 months.

[2] Most of the facts are common to both appeals. Mason had been punched in the abdomen and the results of that blow were catastrophic. His duodenum was perforated and his proximal jejunal mesentery was torn. The duodenum and the jejunum are the first parts of the small intestine. The mesentery attaches the intestine to the abdominal wall. These ruptures led to chemical and bacterial peritonitis, that is to say, inflammation and septicaemia – or blood poisoning. These consequences would not have been fatal with medical treatment. However, there was no treatment. The medical signs showed that Mason lay untreated for four or five days after being punched. He suffered until he died. Within hours of being hit he was vomiting. He became dehydrated. He was in pain. The peritonitis caused a fever. It should have been obvious to any adult observer that Mason was in urgent need of medical attention. After a time, Mason descended into a state of shock. His organs began to fail and he lost consciousness and, finally, he died.

[3] Mason was the youngest of five children of one of the respondents, Annemarree Louise Lee. She lived in Caboolture in a house about a kilometre from the house where Mason's body was found. She had been in a relationship with the other respondent, William Andrew O'Sullivan, for about a year and it was in O'Sullivan's house that Mason died.

[4] Unfortunately it is necessary to explain in detail Mason's sufferings in order to appreciate the case. On 17 January 2016 Lee took Mason to see a general practitioner in Caboolture. She told the doctor that Mason had sustained some injuries during rough play with one of his siblings. He had a bruise to his forehead and damage to his lip. He had a tender left shin. He could not bear weight on his left leg. The doctor was concerned that Mason's leg may be fractured. He gave a referral to Lee so that she could take Mason to hospital. That did not happen. Mason's autopsy later showed that his left tibia had been broken.

[5] On 5 February 2016 O'Sullivan took Mason to another general practitioner. This time the doctor was told that Mason had a rash in his mouth that needed treatment. On 12 February 2016 Lee called the National Home Doctor Service and a practitioner came to her home and examined Mason. He saw that Mason's lower left leg was red and swollen. The redness was spreading up towards his thigh. The doctor observed a macerated and moist peri-anal area. Macerated skin is skin that is wrinkled from too much exposure to wetness. He called an ambulance and Mason was taken to Caboolture Hospital.

[6] Lee did not give any information to doctors about the state of Mason's anal area. When questioned she said that Mason had constipation with hard stools and that he would cry when trying to defecate. She gave a history of hard pellet-like stools that tore his anus. She said that the tear in his anus refused to heal and that she had been to a general practitioner about it three times and had been told that the condition was nappy rash. This was not true. She told a paediatrician at the hospital that Mason had passed some plastic beads. She was aware, she said, that blood and a mucous discharge had been present in his bowel motions. She repeated her falsehoods that she had consulted several doctors all of whom, she said, had reassured her that Mason was just suffering from nappy rash.

[7] In fact, Mason was suffering from deep skin loss on both sides of the peri-anal region. The skin loss was so deep that it resembled a burn injury. The edges of the areas were rolled over, which showed that Mason's condition had been chronic. The ulcerated lesions were much more severe than anything the paediatrician had seen in forty years of practice.

[8] Mason's left leg was swollen and he had cellulitis above and below his right knee. The cellulitis was severe and needed surgical treatment.

[9] Mason was taken from Caboolture Hospital to Lady Cilento Children's Hospital in Brisbane. He underwent surgery for treatment of his right calf abscesses and for his cellulitis. Doctors inserted a urinary catheter and a rectal tube. They gave him blood transfusions. Mason had two anal fissures. Constipation and passing hard stools can cause these. However, constipation is a common childhood condition and it need not result in the kind of injuries that Mason had. Ordinary over-the-counter medicines are able to treat this. He had two fistulas, or small tunnels, with an opening inside the anal canal and another in the skin near the anus itself. These were at opposite sides of his anus. Fissures like these are caused when an anal abscess does not heal. They showed that his inflammation had been chronic. He was suffering from extensive infection and inflammation. Dermatologists diagnosed him as suffering from Severe and Erosive Jacquet's dermatitis, a rare condition. The primary cause of this is irritation of the perianal skin by faeces and urine. Infrequent nappy changes can also cause this as can diarrhoea and a failure to clean the area. The condition is exacerbated if nutritional deficiencies exist and if there is a secondary infection with candida, a parasite, or other parasites. Mason's skin was infected by candida. After Mason's death, investigators at O'Sullivan's house found bags of dirty and blood-stained nappies.

[10] Mason was in so much pain that he needed narcotics.

[11] Mason spent 22 days at Lady Cilento Children's Hospital. He was transferred back to Caboolture Hospital on 5 March 2016 and then, on 8 March 2016, the Department of Child Safety decided to let him be discharged back into the custody of Lee.

[12] Before Mason died a general practitioner saw him one more time. He was behind in his immunisation injections. The doctor told Lee of the importance of ensuring that Mason had all of his immunisation shots. A further appointment was made but she did not keep it because, by then, Mason was dead.

[13] Mason's autopsy showed chronic injuries to his anus and surrounding skin. There was circumferential redness and fibrous thickening of the peri-anal skin which extended to the medial buttocks. Within this area there were areas of ulceration. He now had four anal fissures. Two of these were 4 millimetres deep and involved both the anal skin and the distal rectal mucosa, the lining of the rectum. Mason's rectum had partially prolapsed due to the increased pressure on his abdomen. His buttocks were mildly wasted, which was evidence of malnutrition. His left tibia showed a healed fracture. The fracture would have caused pain and Mason would not have been able to stand on that leg.

[14] There were other injuries. There was a separation of the subcutaneous tissue of the scalp with the bridging tissue hair strands. This showed that somebody had

forcefully pulled or rubbed Mason's hair. The injury was probably inflicted four or five days before Mason died.

[15] Mason had a fractured tailbone. This fracture was probably caused several days before Mason died. A moderate to severe force was needed to break Mason's coccyx. A kick would do it.

[16] Mason had a bruise to his right forehead within the hairline and he had a bruise to his left jaw. There were numerous bruises on his chest and abdomen and there was a concentration of bruises to his mid and lower abdomen. These were consistent with having been caused by fingertips. He had focal bruising to his buttocks and bruising on his left upper thigh. These were consistent with somebody grabbing him there. All of these bruises were greater than could be expected from normal childhood activity.

[17] Mason's blood contained methylamphetamine and amphetamine at low levels.

[18] There was evidence about the last days of Mason's life. O'Sullivan was a heavy user of methylamphetamine. Mason spent most of his last days of life in O'Sullivan's bedroom. It was there that he must have ingested the drugs found in his blood. At around the time that Mason died, Mission Australia, an organisation devoted to helping the disadvantaged, offered support to Lee. An "Intensive Family Support Practitioner" was assigned to her case. This practitioner tried to contact Lee over a period of three weeks before 6 June 2016. She went to Lee's home and left notes for her, asking her to make contact. Lee did not reply. At that time, Mason was at O'Sullivan's house. The practitioner asked the Department of Child Safety to check on Lee.

[19] On Monday 6 June 2016 a witness heard Mason crying inside O'Sullivan's house and heard O'Sullivan saying, "Oh, shut up". The crying continued and intensified and then suddenly stopped. Mason could be heard crying during Monday afternoon. At about 6 pm O'Sullivan was heard shouting at Mason.

[20] On Tuesday 7 June 2016 a friend of Lee's saw Mason in O'Sullivan's car. She said that Mason "didn't look well". He looked "really white" as though "he hadn't been allowed outside in sunlight". At 9 am on the same day sounds consistent with vomiting could be heard inside O'Sullivan's house. At around midday on the same day, a Constable saw O'Sullivan with Mason at the Morayfield Shopping Centre. He observed that Mason "generally looked like he was unwell". He was crying. This was consistent with Mason having been struck the blow to his stomach that killed him on the day before when he was in O'Sullivan's care.

[21] Later that day Lee and O'Sullivan had an argument. O'Sullivan had erected a closed circuit television recorder at his house which recorded some of the events now to be recounted. Just after 1 pm Lee walked out of his house carrying two bags. She and O'Sullivan had a violent argument at the front door. She left leaving Mason behind. He was then in urgent need of medical attention. She came back just before 2 pm but left again taking some of her belongings but leaving Mason. She came back again that evening at about 8 pm. She and O'Sullivan argued again:

> "O'S: What do you fucking want?
>
> L: I have come to get Mason.

O'S: No, he is fucking asleep.

L: You told me to come and get him.

O'S: No he is fucking asleep, just fuck off.

L: But I just walked here?

O'S: You are a fucking lying, deaf cunt.

…

O'S: Why did you fuck off so early. You couldn't even wait. You didn't even wake up did you?

L: You said you were getting up to go get your meds. Can I have my son please?

O'S: No.

L: Really? Alright.

O'S: No, go call the cops cunt.

Le: Yeah I am gonna.

O'S: Go on do it, you fucking dog. Be the last thing you ever do trust me.

O'S: Why don't you go and sit on some more cock?

L: I won't.

O'S: Go on cunt.

L: Just give me my son.

O'S: Fuck you. Every time you crack the shits you do this cunt. I will bring him back first thing in the morning. If you don't like it then go call the fucking cops you dog cunt. Why don't you call Ads? You fucking maggot."

[22] A young man named Hodson was O'Sullivan's housemate. On Wednesday 8 June 2016 a friend of Hodson's, a woman named Low, saw Mason. He was pale and dehydrated. His eyes were dark as if he had not been sleeping. He was staring ahead blankly. Low was of the opinion that he needed medical attention. She told O'Sullivan and Hodson to take Mason to the hospital. Between 12.30 pm and 2.32 pm Lee was at O'Sullivan's home where Mason lay.

[23] At 3.30 pm on the same day, a representative of the Department of Child Safety visited Lee at her home. This was probably in response to the request from the representative of Mission Australia. Mason was not there, of course. He was at O'Sullivan's house.

[24] Lee told the Departmental officer that she was 13 and a half weeks pregnant with another child, her sixth. She said that she was in a "domestic violence situation" and asked how she could get out of it without the police finding out. She said that O'Sullivan was violent and that he had taken away her mobile phone. She did not

say where Mason was and there is no evidence that there was any inquiry about him.

[25] On the following day, Thursday 9 June 2016, Low saw Mason again at O'Sullivan's house. He now had vomit on his face and in his eyes. She told O'Sullivan that if he didn't take Mason to hospital then she would.

[26] Lee had contacted the Departmental officer and asked to meet her. They met at 11.30 am at the Morayfield Medical Centre. Lee said that O'Sullivan was extremely violent and that he was an 'ice' user. She said that she loved him but that she wanted to make a plan to get out of the relationship. The officer arranged to take Lee to a domestic violence centre at 3 pm on the next day.

[27] At about 2 pm O'Sullivan picked up Lee at her home. He had Mason with him. They spent some hours together at O'Sullivan's house and then Lee left at about 5 pm. She took one of O'Sullivan's children with her but she left Mason behind with O'Sullivan. The closed circuit television recorder recorded the sounds of Mason weeping and vomiting. At about 9 pm Lee texted O'Sullivan asking about Mason, "What's Mason doing?" He replied, "Nearly asleep".

[28] Later on Thursday night and into the early hours of Friday 10 June, Lee and O'Sullivan texted each other about having sex.

[29] At 8.15 am on Friday 10 June 2016, Lee asked O'Sullivan to get some grocery items for her children's school lunches. O'Sullivan spent some of the morning at Lee's house. He left Mason at home. That morning Low came to O'Sullivan's house but he was not there. She could hear Mason inside the house crying. O'Sullivan returned home and at 12.15 pm Lee texted him to say that she had a 2.30 pm appointment with a representative of Mission Australia. She invited him to have lunch with her. At 12.30 pm Lee met with the Departmental representative and arranged to meet her again at 3 pm as discussed on the previous day so that she could be taken to a refuge. At 1 pm O'Sullivan replied to Lee's text saying that he was changing Mason's nappy and that he would come over.

[30] Lee met the Departmental representative as arranged. She said that O'Sullivan knew about the meeting. She said that he had dropped her off at the meeting place and that he would pick her up again after collecting the children from school. She said that she was very scared but that she could not go to the refuge. She expressed no concerns about Mason.

[31] She then sent a text to O'Sullivan, "Finished, babe". She sent another text to Hodson asking him to let O'Sullivan know that she was finished.

[32] Hodson saw Mason just after 9 pm as he was about to leave the house. Mason was lying on the floor in O'Sullivan's bedroom, wrapped in a towel. His lips were blue. He made a grunting sound. O'Sullivan was asleep on his bed.

[33] That night O'Sullivan and Lee spoke to each other by phone on three occasions and they also exchanged text messages. After 10 pm O'Sullivan went to Lee's house. Again, he left Mason behind.

[34] At 10.50 pm O'Sullivan came back home. That morning he had taken a photo of Mason apparently asleep. There was a puppy lying on Mason's back and there was

vomit on his face. He sent the photo to Lee at 10.56 pm. Lee responded, "Maybe an axident [*sic*]? He ok? Y is he still up?"

[35] At 11.32 pm a man called Gruber came to O'Sullivan's house. At 12.38 am Gruber called 000 and, six minutes later, paramedics arrived and found Mason dead.

[36] O'Sullivan gave a statement to police. The agreed statement of facts at the sentence hearing said:

> "O'Sullivan's account to police on 11 June 2016 was that upon his return home in the afternoon/evening of Friday, Mason was lying in bed. He had "spewed" over himself and over the bed sheet. He cleaned him up. Mason otherwise remained in the bedroom throughout the entire evening. He gave Mason a bottle … He claimed that he grabbed Alex and Mason and went around to Lee's house to find out where Hodson was, however that was not true. That he took Alex and Mason with him is a lie.
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> O'Sullivan said that around the time that Gruber arrived he was in the process of changing Mason's nappy. Mason had done a big poo which was everywhere on O'Sullivan's bed. He said whilst this was happening the power went out. He picked Mason up and put him on a mat on the floor and went to make a bottle for him. He then put Mason back on the bed without a nappy or a shirt and gave him the bottle. The temperature at 11pm around the time that there was a power loss was between 11 and 14 degrees.
>
> O'Sullivan said that Gruber arrived at his house and they sat around the kitchen table. He said that he heard a noise from Mason like he was coughing. He thought he may have been coughing on bones. When he heard the noise a second time he went into Mason. He said that he could see some milk coming out of Mason's nose. He went to grab the bottle from Mason's mouth however it was stuck. Mason was "comping down on it". His mouth was clamped down on the bottle and his lips were blue. He said that it sounded like Mason was choking on the milk. He was trying to get air in but was gargling. O'Sullivan said that he picked Mason up and took him into the lounge where Gruber was. He tried to stick his fingers in Mason's mouth to try to make him "spew". He thought that he may have choked on some lego which was on the bed. He said that Gruber got straight onto 000. O'Sullivan then commenced CPR on Mason. He said that when he breathed into Mason his stomach filled up to the point where he thought he was going to pop. He said that Mason's "bum was like out" which he thought was because of the pressure inside his stomach. He said that he put his fingers in Mason's bum to see if any air would come out. Nothing happened.
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> O'Sullivan went on to say that he heard Mason cough and went to grab the bottle from his mouth, the power was still out at this stage. That puts O'Sullivan finding Mason dead or near-dead prior to 12.16am. It is not until 12.38am (at least 22 minutes later) that 000 was called.
>
> …

> Gruber stated that when the power came on O'Sullivan went into his bedroom to change a nappy. He came out around one minute later holding Mason in his arms saying "help me". Gruber states that Mason was naked, his stomach was swollen, his lips were a very dark purple. He appeared to be clenching a bottle in his mouth. There was vomit on his face. His eyes were open but not blinking. He appeared to be dead to Gruber. Gruber says that he called 000 immediately. If Gruber's account of calling 000 immediately upon O'Sullivan carrying Mason and saying "help me" is accepted then O'Sullivan spent some twenty-two minutes in his bedroom with Mason who was most likely dead.
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> O'Sullivan claimed that he loved Mason. He said that there was nothing that he did that could have caused Mason's death. At most he "smacked his arse".
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> On 8 July 2016 O'Sullivan was placed in a cell with a covert police officer. He told the officer about Mason's death. He said that his 12 year old step-daughter was beating Mason. He described her as evil and calculating. He said that she started with his puppies and then moved onto the other children "like serial killers do". He said that she had hit Mason in the stomach and caused internal injuries which caused his stomach to blow up like a balloon. He claimed to have done CPR on Mason for 25 minutes. He said that Mason died in his arms 3 minutes before the ambulance arrived. He attempted to blame the paramedics by saying that the paramedics should be questioned as to why they took 25 minutes to respond to the 000 call when he had Mason breathing for 20 minutes.
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> …
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> He said that the police were saying that he was negligent and so was Mason's mother. He denied that, saying that he took Mason to the doctors, he called 000. He couldn't understand how he was negligent. He said police were saying that he should have taken Mason to the hospital at an earlier time however he says that he wasn't sick. He again blamed Mason's older 11 year old sister for his death saying that she would hurt the other kids "24/7". She'd only stop if someone came around such as the Department of Child Safety. Again he said that Mason died in his arms after he performed CPR for 22 minutes before the ambulance arrived three minutes later.
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> PMK is the oldest child of Anne-Maree Lee. PMK was 10 years of age at the time of Mason's death. This is the child O'Sullivan was referring to when he spoke to the undercover police officers and attempted to shift the blame to her."

[37] Lee also gave an account. The agreed statement of facts said this:

> "Lee was interviewed by police on 15 July 2016. She said that throughout her relationship with O'Sullivan he made her feel like a failure as a mother. He was always taking Mason and wouldn't let

her change him or bath him. She said that O'Sullivan would take Mason into his room and do whatever he wanted to do with him.

Lee said that she and O'Sullivan would argue. … She described on one occasion at the beginning of the relationship that O'Sullivan got up off the lounge with a baseball bat threatening to "smash" her face in. She said as the relationship turned nasty she wasn't allowed a phone, she wasn't allowed a bank card. If she went to the park with her children she would be accused of sleeping with someone else. … Text messages between Lee and O'Sullivan confirm that O'Sullivan was extremely jealous and often accused her of sleeping with other men.

At some point Lee said she decided that she wanted out of the relationship but she didn't know how to do it. She said that she was too scared to ring the police. She ended up speaking to Child Safety and telling them that she needed to get out of the relationship in the week leading up to Mason's death. She couldn't explain why she waited so long to speak to someone. She knew that O'Sullivan was using "crack" however she didn't know that he was using it around the children. When he would arrive at her house her children who were with her would run into their rooms. Despite this she thought that he was good with Mason.

On the day that she was meeting Child Safety (Friday 10 June 2016) she said that O'Sullivan picked her and her children up. He did not have Mason with him. She was told that Hodson (who she knew was a drug user) was watching him. O'Sullivan dropped her off at the meeting and then dropped her children at school before picking her up after the meeting and dropping her home.

…

The last time she saw Mason was on Thursday when she attended at O'Sullivan's house. She said that Mason was sitting on O'Sullivan's bed. When she went to pick him up O'Sullivan took him off her and told her to get out of the room. …

Lee said that on Friday night after O'Sullivan had attended at her house at around 10pm she telephoned Hodson. That call was made at 10.16pm. She spoke to Sheila Low on the phone. Low said to her that Mason didn't look well, that he'd been throwing up. Lee asked Low to go and pick Mason up for her. Low refused to do so as she had her own children to look after. Lee said that she told Low that she was going to get her son back the following day.

…

Low told Lee that if she wanted to get Mason back she should call the police. Lee responded "I'm no dog, last time I told Will I was leaving he said he would kill Mason". Lee said that she had never seen O'Sullivan as angry as when he attended her house at 10pm that night. He was threatening that he was going to get a shotgun and kill her and Hodson. …

> In relation to the peri-anal injuries, Lee said that O'Sullivan had taken Mason to the doctor and that the doctor had said that it was nappy rash. She described the injuries as looking painful and sore to her. She said that she realised that it wasn't nappy rash. She had five children so she knew what nappy rash was. O'Sullivan took Mason to another doctor and again reported that it was nappy rash. Again she told him it wasn't nappy rash. The third doctor O'Sullivan took Mason to said that it was hand, foot and mouth disease which again she didn't believe. She said she intended to take Mason to the doctors herself however O'Sullivan became sick so couldn't drive her to the doctors. Eventually she arranged a home doctor to attend because Mason had developed a lump on his leg which turned out to be cellulitis. She also noticed that Mason had a limp so O'Sullivan had taken him to the doctor. She said that O'Sullivan told her that the doctor had said if it didn't get better in two days to take him for a scan.
>
> Lee said she was aware that the Department of Child Safety were involved after Mason's admission to hospital. She knew that they were investigating medical neglect. She ultimately said that if the Department had done their job properly "none of this would've happened".
>
> Lee said that getting out of the relationship wasn't as easy as ringing the police because O'Sullivan would have killed her. She said that she didn't think that he would hurt one of her children."

[38] When asked by Departmental officers why she had delayed getting treatment for Mason, Lee said that she had not known what to do. She falsely said that everyone, including several doctors, had said it was just nappy rash and to put cream on "it". She falsely said that a doctor had diagnosed Mason's fractured tibia as a sprained ankle which only required strapping and to take him to hospital if it did not improve.

[39] Lee and O'Sullivan were both charged with one count unlawfully killing Mason Jet Lee. The offences were charged as domestic violence offences as a circumstance of aggravation. They were both also charged with one count of cruelty to a child, Mason Jet Lee, by failing to provide him with adequate medical treatment, when it was available to them and when they ought reasonably have known that the failure to provide treatment would cause him harm. These offences were also charged as domestic violence offences as a circumstance of aggravation. Lee and O'Sullivan both pleaded guilty.

[40] On 28 August 2018, the Chief Justice sentenced O'Sullivan to imprisonment for nine years for the offence of unlawful killing. Her Honour set a parole eligibility date of 29 July 2022 and declared 762 days of pre-sentence custody as time already served. On the charge of cruelty, her Honour imposed a concurrent sentence of imprisonment for one year.

[41] On 20 February 2019, Dalton J sentenced Lee to imprisonment for nine years for the unlawful killing offence. Her Honour set a parole eligibility date of 19 July 2019 and declared 936 days of pre-sentence custody as time already served. For the

offence of cruelty, her Honour imposed a sentence of imprisonment for three and a half years. The sentences were to be concurrent.

[42] The Attorney-General has appealed against these sentences on the ground that they were manifestly inadequate. The Attorney-General also raises an additional ground in respect of each respondent, namely: that the Chief Justice erred in applying a two-stage process to sentencing O'Sullivan rather than an integrated process; and, that Dalton J gave too much weight to the plea of guilty and to "other matters relevant to mitigation" in respect of Lee.

William O'Sullivan

[43] O'Sullivan's criminal history was lengthy. His prior offences were the result of his drug addiction and suggested that he had a disposition for violence or cruelty.

[44] The prosecutor submitted that the appropriate sentence was one of "not less than 10 years". She submitted such a sentence would give credit for O'Sullivan's guilty plea. The prosecutor referred to three cases which, she submitted, were useful as comparable sentences. These cases were *Hall*,[1] *Chard*[2] and *Riseley*.[3] It will be necessary to consider these cases in detail in due course. The prosecutor referred to s 161B(5) of the *Penalties and Sentences Act* 1992 (Qld). She submitted that this provision, which was inserted by an amending Act in 2010,[4] required the court to take into account as an aggravating factor that the victim was a child aged less than 12 years. The prosecutor submitted that this amendment post-dated the cases that had been cited as comparable sentences. She submitted that this factor warranted the making of a serious violent offence declaration and that the plea of guilty should be taken into account by making the sentences on the two counts concurrent.

[45] O'Sullivan's parents separated when he was an infant. His mother remarried in his early years of primary school. His step-father was a violent man who had problems with alcohol, drugs and gambling. He took out his anger on members of his family, including the respondent. When the respondent was 15 he was "kicked out of home" and placed in the care of Children's Services. His education ceased shortly afterwards. He was housed in an institution called "Teen Challenge" and there he began to use drugs. Soon, he was living on the streets. His drug use escalated. He used cannabis and methylamphetamine and he admitted that he continued to be a "large user" methylamphetamine until his arrest for this offence.

[46] He married in 2008 and has four children by that union. He and his wife separated in 2014. One of his children lived with him until his arrest for these offences. Sometime after the separation he met his co-accused, Annemarree Louise Lee. She had several children of her own, one of whom was Mason. According to O'Sullivan, she was also a user of methylamphetamine, but she denies that.

[47] When the indictment was presented the respondent still did not accept that he had inflicted Mason's fatal injuries. There was to be a contested sentence but, on the day of the hearing, he instructed his counsel to accept the facts as stated in the Crown's Agreed Statement of Facts. It was accepted that he changed his instructions so that his children did not have to give evidence. He nevertheless

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1 [2002] QCA 125.
2 [2004] QCA 372.
3 [2009] QCA 285.
4 *Penalties and Sentences (Sentencing Advisory Council) Amendment Act* 2010 (Qld), s 7.

maintained that he had no recollection of inflicting injuries upon Mason. Through his counsel, the respondent said that he "recognise[d] the seriousness of his behaviour, especially in the week leading up to Mason's death". In the same way, he expressed his remorse for Mason's death.

[48] At sentence it was submitted that his plea was timely in that it negated the need to call several witnesses, including his children. It was submitted that his plea of guilty was consistent with remorse. While he was imprisoned on remand he had attempted suicide and was admitted to a mental health ward.

[49] His counsel submitted that, having now undergone a period of enforced sobriety, O'Sullivan had gained insight into the "woefulness of his behaviour" and was extremely remorseful. She submitted that the circumstances of the offence of cruelty arose out of ignorance of good parenting rather than from malice towards Mason. She submitted that the period of imprisonment that her client would serve would be more burdensome for him than for other prisoners because he would have to be kept in isolation to avoid violent retribution at the hands of other inmates because of the offences against an infant. In fact, he had already been the victim of such retribution which had resulted in serious injury. This included bleeding on the brain, broken fingers, a fracture to the skull, a fractured cheekbone, severe bruising and the amputation of part of a finger. It was common ground that the respondent would have to be kept in a protective unit in order to avoid assaults by other prisoners upon him. It was submitted to the sentencing judge that the circumstances of this case did not place it "outside 'the norm' for offences of manslaughter of a child".

[50] His counsel referred the learned sentencing judge to *Hall*, *Chard*, *Riseley* and a further case, *Ross*.[5] She submitted that *Chard* was the most useful of the decisions for the present case and that, "using the starting point of eight to 10 years" that was referred to by Williams JA at paragraph [23] of that case, a sentence of nine years would be appropriate when the plea of guilty, the instructions not to cross-examine his children and the assault on remand were all taken into account as mitigating factors. She submitted that a declaration of a serious violent offence ought not be made because "this case isn't one which would necessarily fall outside the norm for offences of this kind".

[51] In her sentencing remarks, the Chief Justice referred to the facts as set out earlier and to the mitigating factors. Her Honour then referred to two cases concerning the cruelty offence[6] and then said:

> "Of the manslaughter cases cited to me, I regard *Chard* as the most closely comparable. Like that respondent you engaged in deliberate assault and cruelty. *Chard* would suggest that a sentence of 10 years imprisonment for the manslaughter, before allowance for your plea of guilty, is well within range. There is, though, to be taken into account the compounding effect of the earlier episode of cruelty. The two cruelty cases cited to me involve a greater level of culpability than yours in respect of that count, partly because the child in *WAO* was left untreated for a much longer period and the injuries in *WAV* were so grave, but mainly because those applicants

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5 [1996] QCA 411.

6 *WAO* [2012] QCA 56; *WAV* [2014] 2 Qd R 255.

> were both parents and both primarily responsible for the care of the children involved. You were not in that position in January and February 2016, although that changed when you chose to keep Mason with you and without his mother in June 2016."

[52] Her Honour then referred to the factors in mitigation and continued:

> "The overall criminality of the earlier cruelty and this final lethal cruelty should be reflected in the head sentence with adjustment to be made in the setting of that sentence, rather than in the form of earlier parole eligibility, for the timely plea. I also take into account in setting that sentence your own unfortunate background and your lack of any experience of proper male parenting. I am going to set that head sentence at nine years imprisonment with a concurrent sentence of 12 months imprisonment in relation to the cruelty count."

[53] Having determined upon the length of the head sentences for both offences and having decided that they should be served concurrently, her Honour set out the reasons why a declaration was unwarranted:

> "There is then the question of whether a violent offence declaration ought to be made in relation to the manslaughter conviction. In that respect, the fact that it involved the killing of a small child is both a statutory and an obvious aggravating factor. I have come to the conclusion that the declaration ought not to be made but that in order to achieve proper denunciation and general deterrence and in the result a just sentence, you ought to be required to serve a period of six years in actual custody; which is not greatly less than if the declaration were made."

Two step process

[54] The Attorney-General submits that the learned sentencing judge's approach to the exercise of discretion to make a serious violence offence declaration reveals legal error. The error was to engage in a two-step process that involved, first, making a decision about the length of the head sentences for the two offences and then only to consider whether or not to make the declaration. The error is said to be evident in the words quoted in the preceding paragraph of these reasons. The Attorney-General submits that there is nothing to distinguish the error in the present case from the error found by a unanimous court in *Smith*.[7]

[55] Having accepted the Attorney-General's submissions about the inadequacy of the sentences that were imposed on O'Sullivan, it is unnecessary to consider this ground.

Manifest inadequacy

[56] In the case of appeals by the Attorney-General, there are several propositions that must be kept in mind. First, in any appeal against the exercise of the sentencing discretion, an appellant must demonstrate actual error.[8] Second, s 669A of the *Criminal Code* creates an exceptional right of appeal because, to some degree, it cuts across the long established principle that a person should not be exposed to

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7 [2019] QCA 33.

8 *House v The King* (1936) 55 CLR 499, at 505.

double jeopardy.[9] Third, such appeals should be rare because the Attorney-General should only appeal when an appeal is necessary to establish a matter of principle or in order to ensure the maintenance of public confidence in the administration of justice.[10] Fourth, as a consequence, when the Attorney-General exercises her right to appeal against a sentence, she is normally obliged to demonstrate clearly the error that grounds the appeal.[11] In *Dinsdale v The Queen*[12] Gleeson CJ and Hayne J said:

> "Manifest inadequacy of sentence, like manifest excess, is a conclusion. A sentence is, or is not, unreasonable or plainly unjust; inadequacy or excess is, or is not, plainly apparent. It is a conclusion which does not depend upon attribution of identified specific error in the reasoning of the sentencing judge and which frequently does not admit of amplification except by stating the respect in which the sentence is inadequate or excessive. It may be inadequate or excessive because the wrong type of sentence has been imposed (for example, custodial rather than non-custodial) or because the sentence imposed is manifestly too long or too short. But to identify the type of error amounts to no more than a statement of the conclusion that has been reached. It is not a statement of reasons for arriving at the conclusion. A Court of Criminal Appeal is not obliged to employ any particular verbal formula so long as the substance of its conclusions and its reasons is made plain. The degree of elaboration that is appropriate or possible will vary from case to case."

[57] In both of these appeals the Attorney-General has submitted that the cases relied upon below, to establish a range of sentences for manslaughter cases in which the victim is an infant, are cases that did not take into account significant legislation that was enacted after those cases were decided. She has submitted that, when that legislation is taken into account, it is apparent that the range that was considered by the learned sentencing judges to be appropriate can no longer be accepted and that a significantly higher penalty is called for in such cases. In order to consider whether that submission has merit it is necessary to consider those cases and then to consider the legislation upon which the Attorney-General relies.

Comparable Cases

[58] *Walsh*[13] was decided in 1986. The appellant was a 24 year old man who had killed the 16 month old daughter of the woman with whom he was then living. He had shaken the child violently in a fit of anger and he had then punched her, or somehow otherwise applied great force, to her abdomen. The girl suffered severe injury as well as acute infra-cranial trauma from some kind of a blow to her head. She died after lying for some days in a hospital. The appellant said that, although he was devoted to the child and although he loved her, he had simply lost control. He was charged with murder but the Crown accepted a plea of guilty to manslaughter. The appellant was sentenced to imprisonment for nine years and he appealed against that sentence. The Court heard that the sentencing range for

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9 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, at [62].
10 *ibid.* at [6]; *cf. Everett v The Queen* (1994) 181 CLR 295, at [3].
11 *Dinsdale v The Queen* (2000) 202 CLR 321, at [62] per Kirby J.
12 *ibid*. at [6].
13 Unreported, Queensland Criminal Court of Appeal, No 85 of 1986, 12 June 1986.

"manslaughter of this kind" was between five and 10 years and concluded that the sentence was at the upper end of the range but that it would not interfere.

[59] *Ross*[14] was a 1996 decision in which the 21 year old single mother of a six week old baby suffocated it to death. She had been charged with murder but the Crown accepted a plea of guilty to manslaughter, there being some doubt about intent. The Court of Appeal referred to *Walsh* and to two other cases of male offenders who had killed their partner's baby.[15] The Court observed that there was a difference in which a man kills a very young child in the course of "systematic gratuitous abuse", like *Walsh*, and cases involving a disturbed young mother. The Court refused leave to appeal against a sentence of six years.

[60] *Hall*[16] was decided in 2002. It was an Attorney-General's appeal. The respondent was a 40 year old man with a significant criminal history that included offences of violence. His victim was a 19 day old baby that he shook so hard that it suffered brain damage. The respondent took the baby to a hospital some hours after injuring it but some months later, the baby died. He was sentenced to imprisonment for four years. The sentencing judge had been referred to *Irvine*,[17] an Attorney-General's appeal in another baby shaking case, in which the Court of Appeal had declined to increase a sentence for manslaughter of five years imprisonment with a non-parole period of nine months. The appellant in that case was a young man who immediately sought medical treatment for his victim and who had no previous criminal history. The Court allowed the appeal and increased the sentence from four years to six years. The Attorney-General also submitted that a serious violent offence declaration ought be made. However, the declaration was refused because it had not been asked for at first instance.

[61] *Chard*[18] was a manslaughter case decided in 2004. de Jersey CJ described the killing of the seven week old baby as an offence that had been preceded by sustained cruelty. The offender, who was the respondent to an Attorney-General's appeal, had contrived occasions to be alone with the baby during which he inflicted injury. He had then tried to blame others. Chard was sentenced on a plea of guilty to imprisonment for six years and with eligibility for parole after 18 months. The baby had suffered multiple rib fractures, fractures of his right and left tibia and a flattening of one of his vertebra. He suffered brain damage and it was this injury that killed him. The Court took into account the appellant's plea and the fact that his criminal history was less serious than that of the offender in *Hall*. Williams JA said:[19]

> "[23] The prolonged abuse of a baby of this age would call for a head sentence at least in the range eight years to 10 years; the offence is far more serious than the isolated instance of shaking in *Hall*. The main discounting factor in this case is the timely plea to manslaughter after the prosecution agreed not to pursue the charge of murder with which the respondent was initially indicted. When all the relevant factors are taken into

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14 [1996] QCA 411.
15 *R v Korin*, unreported, Queensland Court of Criminal Appeal, No 85 of 1986; *R v Mills* [1986] 1 Qd R 77.
16 [2002] QCA 125.
17 [1997] QCA 138.
18 [2004] QCA 372.
19 [2004] QCA 372.

> consideration the appropriate sentence in this case for the manslaughter of the infant was seven years."

[62] The Court set aside the sentence of six years and imposed one of seven years which, for reasons that are not presently material, rendered him eligible for parole after four years.

[63] *Riseley*[20] was decided in 2009. The appellant was a 22 year old man who had killed a 19 day old baby, the child of the woman with whom he was living. The appellant had inflicted severe brain injuries upon this baby which were consistent with blunt force applied to both sides of the baby's head. The baby had other injuries consistent with violent shaking. The appellant persistently denied responsibility until he finally pleaded guilty. Even then he did not reveal how he had inflicted the injuries. He had no relevant criminal history and had a good work record. He was sentenced to imprisonment for eight years with a serious violent offence declaration. The Court allowed the appeal to the extent of setting aside the declaration and fixing a parole eligibility date. Keane JA, with whom McMurdo P and Holmes J agreed, said:

> "[48] In any event, I am unable to see how any of the considerations relevant to the sentencing of the respondent can justify the much more severe penalty imposed on the respondent than was imposed on the offenders in *Hall* and *Chard*. In *Hall*, after mitigating circumstances and the offender's plea of guilty were taken into account, the offender was sentenced to six years imprisonment which meant that he was obliged to serve three years imprisonment before becoming eligible for consideration for parole. The sentence imposed on the respondent in this case obliges him to serve 6.4 years in actual custody before he will become eligible for consideration for parole. In my respectful opinion, a disparity of this order is not justifiable by any of the considerations which bear upon sentence. Even if one were to regard the criminality of the offending in this case as closer to that involved in *Chard* than in *Hall* a sentence which obliged the respondent to serve three and a half years in custody before becoming eligible for parole would be appropriate especially bearing in mind the desirability of affording the respondent the benefit of a lengthy period of supervision on parole.
>
> [49] I conclude that the sentence imposed on the respondent was manifestly excessive. In my opinion, a proper sentence requires the removal of the serious violent offence declaration and the fixing of a parole eligibility date at about the three and a half year mark."

[64] A very recent case is consistent with those earlier sentences. In *Randall*[21] the appellant was the father of a 10 week old baby boy. In a fit of frustration, while alone and looking after his son, and unaffected by alcohol or drugs, the appellant delivered a single hard punch to his son's midriff and killed him. The power of the

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20 [2009] QCA 285.
21 [2019] QCA 25.

blow burst several of the baby's organs. Randall tried to evade his responsibility by telling a series of lies, including ones that implicated the emergency 000 operator in the death. He showed no remorse at any time for what he had done. Randall was sentenced on his plea of guilty to imprisonment for nine years, with eligibility for parole after five years. He appealed that sentence, arguing that it was excessive. His appeal was dismissed.

[65] A short time later, the Court heard the appeal in *Smith*.[22] That appellant had been sentenced on his plea of guilty to imprisonment for nine years with a serious violent offence declaration. He appealed his sentence on the ground that the making of the declaration rendered the sentence excessive. Smith's victim was his 17 week old baby son whom he killed by a violent shaking after episodes of "prior gratuitous violence". *Chard* and *Riseley* were cited in the Court of Appeal as was a more recent case, *R v JV*,[23] in which a range of eight to nine years imprisonment was again seen to be applicable in cases of "protracted, cruel harm to an infant child which has resulted in fatality".[24] In *Smith* it was noted that there appeared to be no case in which a sentence longer than nine years could be found.[25] The Court allowed the appeal and reduced the appellant's sentence by removing the declaration and ordering a parole eligibility date after he had served five years of his sentence.

[66] These recent decisions, therefore, have continued the approach that began with *Walsh* 33 years ago. In neither *Randall* nor *Smith* were any submissions made about whether various statutes about sentencing, that have been enacted in the three decades since *Walsh* was decided, might have rendered *Walsh*, and the cases based upon it, irrelevant.

[67] The sentence that was imposed upon O'Sullivan was consistent with the range of sentences that can be derived from these cases.

Changes in sentencing legislation

[68] Like cases should be treated in a like manner because the administration of equal justice according to law means that there must be reasonable consistency in sentencing. The discernment of patterns of sentencing in similar cases are useful tools to achieve consistency.[26] For this reason, consistency with previous comparable sentences is important. However, previous sentences are not precedents. They are not common law authorities to which the principle of *stare decisis* and the doctrine of precedent apply.[27] Nor do the rules apply according to which intermediate courts of appeal do not depart from decisions of co-ordinate courts unless convinced that the decision is plainly wrong.[28]

[69] There have been significant statutory changes since these cases were decided yet *Walsh*, which appears to have set the range of sentences that are now being applied, was decided in 1986, years before the enactment even of the *Penalties and*

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22 [2019] QCA 33.
23 [2014] QCA 351.
24 *ibid*. at [31].
25 *Smith*, *supra*, at [30].
26 *Wong v The Queen* (2001) 207 CLR 584, at [6]-[7].
27 *cf*. J Lockhart, 'The Doctrine of Precedent, Today and Tomorrow' (1987) 3 *Australian Bar Review* 1; *Wong*, *supra*, at [57].
28 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, at [134].

Sentences Act in 1992. That statute made significant changes to the law of sentencing. A single example will suffice to demonstrate the point. Until that act was passed, a plea of guilty was significant only to the extent that it demonstrated remorse. It was said that it is "the indication of remorse which is the substance of the matter … [t]his is not always shown by a plea of guilty".[29] Section 13 of the *Penalties and Sentences Act* provides that a sentencing judge "must" take into account a guilty plea and there "may" be a reduction in the sentence that is otherwise appropriate having regard to a guilty plea or to the point at which such a plea was first indicated to the prosecuting authority. Ever since, even in the absence of any remorse, the sheer utility of such a plea is taken into account by way of mitigation in all but rare cases. The statute requires the sentencing judge to state in open court that the plea has been taken into account and, if the plea did not result in a reduction of the sentence, the judge must say so in open court and explain the reasons for that result.

[70] In 1997 Parliament enacted the *Penalties and Sentences (Serious Violent Offences) Amendment Act* 1997. This Act inserted Part 9A into the *Penalties and Sentences Act*. The effect of the amendment was, relevantly, that if an offender is sentenced for certain offences, including manslaughter, to imprisonment for between five and 10 years the sentencing judge has a discretion whether to make a "serious violent offence" declaration. If made, such a declaration engages s 166 of the *Corrective Services Act* 1988 (Qld), which was amended by the same Act, with the result that the offender had to serve the lesser of either 80 per cent of the sentence or 15 years. The Act provided no criteria for the exercise of the discretion.

[71] Section 9(2)(a) of the *Penalties and Sentences Act* provides:

> "In sentencing an offender sentencing an offender, a court must have regard to—
>
> principles that—
>
> (i) a sentence of imprisonment should only be imposed as a last resort; and
>
> (ii) a sentence that allows the offender to stay in the community is preferable."

[72] Before 3 April 1997, s 9 of the Act also contained the following two sub-sections:

> "(3) A court may impose a sentence only if the court, after having considered all available sentence options, is satisfied that the sentence—
>
> (a) is appropriate in all circumstances of the case; and
>
> (b) is no more severe than is necessary to achieve the purposes for which the sentence is imposed.
>
> (4) A court may impose a sentence of imprisonment on an offender who is under the age of 25 years and has not previously been convicted only if the court, having—

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[29] *R v Cox* [1972] QWN 54, a decision of the Court of Criminal Appeal, per Hanger CJ with whom Skerman and Hart JJ agreed.

(a) considered all other available sentences; and

(b) taken into account the desirability of not imprisoning a first offender;

is satisfied that no other sentence is appropriate in all circumstances of the case."

[73] Those two provisions were repealed by the *Penalties and Sentences (Serious Violent Offences) Amendment Act* and replaced by the following two provisions:

"(3) However, the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender for any offence—

(a) that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or

(b) that resulted in physical harm to another person.

(4) In sentencing an offender to whom subsection (3) applies, the court must have regard primarily to the following—

(a) the risk of physical harm to any members of the community if a custodial sentence were not imposed;

(b) the need to protect any members of the community from that risk;

(c) the personal circumstances of any victim of the offence;

(d) the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence;

(e) the nature or extent of the violence used, or intended to be used, in the commission of the offence;

(f) any disregard by the offender for the interests of public safety;

(g) the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed;

(h) the antecedents, age and character of the offender;

(i) any remorse or lack of remorse of the offender;

(j) any medical, psychiatric, prison or other relevant report in relation to the offender;

(k) anything else about the safety of members of the community that the sentencing court considers relevant."

[74] Section 9(1) was amended at the same time. Previously, s 9(1)(d) of the Act had provided that one of the purposes of sentencing was to make it clear that the community, acting through the court, "does not approve of" the offending conduct. That expression was repealed and replaced by the stronger term "denounces". In

the context in which it appears, the word "denounce" means to declare publicly that a thing is evil or wicked. The word connotes righteous indignation.[30]

[75] The evident purpose of the enactment of these provisions in 1997 was to reflect the Parliament's judgment that the community expected that crimes of violence were to be punished more severely by the courts than they had been until then.

[76] In 2010 the legislature enacted the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act* 2010 (Qld). The primary objective of the legislation was:

> "… to strengthen the penalties imposed upon … offenders who commit violence upon a young child and/or who cause the death of a young child".[31]

[77] The Explanatory Memorandum said:

> "***Violence to young children***
>
> The community rightly has a keen interest in the penalties imposed upon offenders who commit violence upon a young child and/or who cause the death of a young child. These cases generate a strong emotive response. The intention is to ensure that sufficient weight is placed upon the age of the victim and genuine recognition made of their special vulnerability. The disproportionate position of an adult to that of a young child and the comparative level of force needed to cause significant harm to a young child as distinct from another adult, must be recognised by the court in deciding whether to declare the offender to be convicted of a serious violent offence."[32]

[78] The objective was to be achieved by:

> "Amending section 161B to ensure that in the case of an offender convicted of an offence of violence against a young child or an offence that caused the death of a young child, the court must treat the age of the child as an aggravating factor in deciding whether to declare the offender to be convicted of a serious violent offence.
>
> …
>
> ***Violence to young children***
>
> The amendment will strengthen, when appropriate, the penalties imposed upon offenders convicted of an offence of violence against a young child or an offence that caused the death of a young child, without fettering judicial discretion in deciding whether to declare the offender to be convicted of a serious violent offence. Maintaining judicial discretion in this process is essential given that there will be cases where the community, despite the tragic consequences of the conduct, would not expect such a severe sanction.

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30 *cf. Oxford English Dictionary*, definition 6.a.

31 Explanatory Memorandum, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010.

32 *ibid*.

> The reference to a *child under 12 years* is consistent with the approach adopted in the Criminal Code where certain offending is aggravated by virtue of the victim being under twelve years and where a child under twelve years is legally incapable of giving consent. These provisions acknowledge the special vulnerability of young children and the need to legislatively protect them."[33]

[79] During the course of his Second Reading Speech, the Attorney-General said:

> "The second part of this reform bill aims to strengthen the penalties imposed upon repeat offenders, those who commit sexual offences against children, and offenders who are violent to young children or who cause the death of a young child. Two judicial sentencing principles currently applied by the Queensland courts will be inserted into the Penalties and Sentences Act. There is significant utility in adopting existing common law sentencing principles into statute, primarily to place beyond all doubt the intent of the parliament that courts must adopt and apply such principles in all appropriate cases. By enshrining these principles in statute law, the parliament is sending a clear message to the courts and to offenders as to the expectations of the community in this regard while also giving the community greater certainty and confidence as to the principles courts must apply in sentencing offenders."[34]

[80] The amending Act inserted a new sub-section s 161B(5) which added an aggravating factor in the exercise of the discretion whether to make a serious violent offence declaration:

> "(5) For subsections (3) and (4), if an offender is convicted on indictment of an offence –
>
> (a) that involved the use, counselling or procuring the use, or conspiring or attempting to use, violence against a child under 12 years; or
>
> (b) that caused the death of a child under 12 years;
>
> the sentencing court must treat the age of the child as an aggravating factor in deciding whether to declare the offender to be convicted of a serious violent offence."

[81] Offences against children continued to engage the attention of the legislature. In 2012 the *Domestic and Family Violence Act* 1989 (Qld) was repealed and replaced by the *Domestic and Family Violence Protection Act* 2012 (Qld). The new Act was passed with bipartisan support. The Act expanded the meaning of domestic violence to include a much wider range of actions. The Act also stated as one of its express objects "to prevent or reduce domestic violence and the exposure of children to domestic violence". In the course of the Second Reading Speech, the Minister said that in the period since the beginning of that year, 2011, until the day of the Second Reading Speech in September 2011, there had been 23 "domestic and family violence related homicides in Queensland". The Minister also pointed to something which many older members of the community well remember:

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33 *ibid*.

34 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 August 2010, 2308 (Cameron Dick, Attorney-General and Minister for Industrial Relations).

> "In the old days, in the 80s, there was a sense that domestic violence was a private family matter; that you did not intervene. Police did not like to go, and I guess they still do not like to go… These issues were dealt with in many cases in the privacy of the home. People felt a silence and a stigma around these issues."

[82] In 2014 the government established the Special Taskforce on Domestic and Family Violence in Queensland. The Taskforce delivered its report in 2015. One of its recommendations was that an offence was committed in a domestic setting should be a factor taken into account as an aggravating factor "so that penalties are commensurate to the crimes".[35] The Taskforce had reported that there had been an increase in reported occurrences of domestic and family violence each year between 2010 and 2014. On average, 181 incidents of domestic and family violence were reported to police each day. Of the 49 homicides that were committed in Queensland in the year 2013 to 2014, 17 were "domestic and family violence related".[36] As a result of this report, a number of Acts were amended.

[83] The long title of the *Criminal Law (Domestic Violence) Amendment Act* 2015 (Qld) was "An Act to amend the Criminal Code, the Domestic and Family Violence Protection Act 2012, the Evidence Act 1977, the Justices Act 1886 and the Penalties and Sentences Act 1992 to implement a number of criminal law reforms recommended by the Special Taskforce on Domestic and Family Violence in Queensland". This Act inserted a novel definition into s 1 of the *Criminal Code* as follows:[37]

> "***domestic violence offence*** means an offence against an Act, other than the *Domestic and Family Violence Protection Act 2012,* committed by a person where the act done, or omission made, which constitutes the offence is also-
>
> (a) domestic violence or associated domestic violence, under the *Domestic and Family Violence Protection Act 2012,* committed by the person; or
>
> (b) a contravention of the *Domestic and Family Violence Protection Act 2012,* section 177(2).
>
> *Note—*
>
> Under the *Domestic and Family Violence Protection Act 2012*, section 177(2), a respondent against whom a domestic violence order has been made under that Act must not contravene the order."

[84] The operative definition is found in s 8 of the *Domestic and Family Violence Protection Act*:

> "(1) ***Domestic violence*** means behaviour by a person (the ***first person***) towards another person (the ***second person***) with whom the first person is in a relevant relationship that—

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35 Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland*, 28 February 2015, at 15 and see recommendation 118, at 39.

36 *ibid*. at 47.

37 Section 4 of the *Penalties and Sentences Act* was amended to insert a definition of "domestic violence offence". This definition referred to the definition in the *Criminal Code*.

(a) is physically or sexually abusive; or

(b) is emotionally or psychologically abusive; or

(c) is economically abusive; or

(d) is threatening; or

(e) is coercive; or

(f) in any other way controls or dominates the second person and causes the second person to fear for the second person's safety or wellbeing or that of someone else.

(2) Without limiting subsection (1), domestic violence includes the following behaviour—

(a) causing personal injury to a person or threatening to do so;

(b) coercing a person to engage in sexual activity or attempting to do so;

(c) damaging a person's property or threatening to do so;

(d) depriving a person of the person's liberty or threatening to do so;

(e) threatening a person with the death or injury of the person, a child of the person, or someone else;

(f) threatening to commit suicide or self-harm so as to torment, intimidate or frighten the person to whom the behaviour is directed;

(g) causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the person to whom the behaviour is directed, so as to control, dominate or coerce the person;

(h) unauthorised surveillance of a person;

(i) unlawfully stalking a person."

[85] A new sub-section s 564(3A) of the *Criminal Code*, which concerns the contents of indictments, provided:

> "3(A) An indictment for an offence may also state the offence is a domestic violence offence."

[86] The Court itself was empowered by a new sub-section 572(1A) of the *Criminal Code* to *order* the amendment of the indictment so that it stated that the offence charged is a domestic violence offence.[38] This is a significant intrusion into the traditional refusal by judges to accept any role in formulating the terms upon which a prosecution is to be conducted and constitutes a conspicuous indication of Parliament's intention to emphasise, for sentencing purposes, the seriousness of violent offences that have been committed within the domestic setting.

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38 There was a similar amendment to empower Magistrates in the same way: *Justices Act*, s 48(2).

[87] Another new provision was inserted into the *Penalties and Sentences Act* that stigmatised a person convicted of an offence that was a domestic violence offence. It required a court to order that a conviction for an offence of that character be recorded as such:

> "**12A Convictions for offences relating to domestic violence**
>
> (1) Subsections (2) to (4) apply if-
>
> (a) a complaint or an indictment for a charge for an offence states the offence is also a domestic violence offence; and
>
> (b) the offender is convicted of the offence.
>
> (2) If a conviction is recorded in relation to the offence, it must also be recorded as a conviction for a domestic violence offence."

[88] Sub-sections 12A(4) to (6) even made provision for the record of *past* convictions to be changed to add to them in a criminal record a reference to the fact that that offence was a domestic violence offence. These changes, which created a new statutory designation for existing offences when the aggravating factor was made out, would have significance for the application of s 9(3)(g) of the Act, which makes "the past record of the offender" a matter to which a court "must have regard primarily" when considering a sentence for an offence involving violence. Additionally, s 9(10) of the Act will be engaged. That sub-section provides:

> "(10) In determining the appropriate sentence for an offender who has 1 or more previous convictions, the court must treat each previous conviction as an aggravating factor if the court considers that it can reasonably be treated as such having regard to-
>
> (a) the nature of the previous conviction and its relevance to the current offence; and
>
> (b) the time that has elapsed since the conviction."

[89] Under those provisions, a criminal history that includes previous offences that have been designated as domestic violence offences will have significant weight in sentencing. This designation of certain offences as "domestic violence offence" with the result that a sentencing judge may regard that feature as "an aggravating factor"[39] is unique.

[90] The *Criminal Code* has always provided for the possibility of an offence being rendered more serious by reason of the existence of a "circumstance of aggravation". That expression is defined in s 1 of the Code to mean a circumstance whose existence renders an offender is "liable to a greater punishment" than would apply if the existence of the circumstance is not proved. If the Crown wishes to rely upon such a circumstance upon sentence then it must be charged in the indictment.[40] It must be admitted as part of a guilty plea or found by a jury as part of a guilty

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39 *Penalties and Sentences Act*, s 9(10).

40 *Criminal Code*, s 564(2).

verdict. A circumstance of aggravation in the statutory sense operates to provide for a higher maximum penalty if the circumstance is found to exist. An example is the offence of robbery, which carries a maximum sentence of 14 years.[41] If it is pleaded and proved that the robbery was committed, for example, in company, the maximum penalty is imprisonment for life.[42] The treatment of an offence as a "domestic violence offence" as an "aggravating factor" is not of that character.

[91] The significance of the nature of an offence as a domestic violence offence is to bring into existence a factor in aggravation of penalty in the common law sense. It is a factor that a sentencing judge *may* take into account in imposing a more severe sentence than might be imposed in the absence of that factor.

[92] In 2016, this consideration was expanded beyond previous convictions to specifically treat the current domestic violence offence as an aggravating factor. The *Criminal Law (Domestic Violence) Amendment Act* 2016 (Qld) inserted a new sub-section s 9(10A) of the *Penalties and Sentences Act* 1992 as follows:

> "In determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that it is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.
>
> *Examples of exceptional circumstances—*
>
> 1 the victim of the offence has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender
>
> 2 the offence is manslaughter under the Criminal Code, section 304B."

[93] This sequence of legislative changes since 1997 puts it beyond question that the legislature has made a judgment about the community's attitude towards violent offences committed against children in domestic settings. The amendments constitute legislative instructions to judges to give greater weight than previously given to the aggravating effect upon a sentence that an offence was one that involved infliction of violence on a child and that the offender committed the offence within the home environment.[43]

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41 *Criminal Code*, s 411(1).

42 *Criminal Code*, s 411(2).

43 Not only have there been changes to statutes that directly affect sentencing in a case like this one, but also sentencing laws have been changed in significant ways in general. For example, s 650 of the *Criminal Code* as it applied in 1986, which confers power upon a judge to sentence an offender, was amended substantially in 1989: see s 53 of the *Criminal Code, Evidence Act and Other Acts Amendment Act* 1989 (Qld). The same Act inserted novel provisions into the *Evidence Act* concerning sentencing. The annotations in *Carter's Criminal Code* reflect these changes. The annotations to s 650 in the 5th edition, published in 1979, deal entirely with common law cases about sentencing. The annotations to the same section in the current, 22nd edition, heavily reference various sentencing statutes that did not exist when the 5th edition was published. The annotation about "Changes in sentencing regime" states that, "Changes in the sentencing regime and substantial increases in maximum penalty from 2003 have been significant. It is to be expected that they would produce a general increase in the severity of sentences, rendering the earlier cases of little comparative utility – although an increase in maximum penalty should not necessarily be reflected in proportionate increases in sentences."

[94] The significance of these legislative events has to be taken into account when sentencing. There must be consistency of sentencing but consistency is constituted by the consistent application of principles and not by adherence to a previously established range of penalties in disregard of the applicable law.[44] The sentences imposed in earlier cases are useful only insofar as they can be used to identify the unifying principles that should be applied.[45] When applicable legislation changes, the laws as changed must be applied faithfully and a previous range of sentencing may no longer be useful.

[95] *Hall* can be taken as an illustrative example. In 2002, when Hall was resentenced, the general provisions of the *Penalties and Sentences Act* applied but the Act did not yet contain s 9(2A), which, in cases involving violence, excludes the application of the principle that a sentence of imprisonment should be imposed only as a last resort. Nor did the Act yet contain s 9(10A), which provided that the court *must* treat the fact that an offence is a domestic violence offence as an aggravating factor.[46] In addition, the Court of Appeal was at that time bound to apply the principle that, when resentencing an offender on a successful appeal by the Attorney-General, the new sentence should be at the lower end of a range. *Hall* could not be decided in the same way today.

[96] It might be said that, even without legislative prescription, a sentencing judge would, as a matter of orthodox sentencing practice, have regard to violence and the fact that the victim was a child as relevant factors. It might also be observed that, even without the changes to the *Penalties and Sentences Act*, it was open to a sentencing judge to delay parole eligibility beyond the statutory default period of 50 per cent of the sentence.

[97] However, the amendments that have been referred to cannot be regarded as merely declaring the existing law. On the contrary, as the Minister's Second Reading Speech to the 1997 statute made clear, the intent of the amendments was to have the matters listed in s 9(3) regarded as "primary".[47] In aid of this legislative purpose, the existing s 9(4), which obliged the court to impose a sentence of imprisonment upon an offender aged under 25 years only when satisfied that no other sentence would be appropriate, was also repealed. Successive governments since 1997 have left these provisions in place. Consequently, these provisions cannot be regarded as being merely declaratory of the pre-existing law and as having no effect upon the legislative *status quo*. They were expressly intended to result in sentences that were more severe than those which had been imposed in the past and must be regarded as statutory amendments that were the result of Parliament's judgment about current community values.[48]

Changes to the common law

[98] Common law sentencing principles have also undergone huge changes in the thirty years since *Walsh* was decided. As *Walsh* itself shows, until cases like *Wong* and

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44 *Hili v The Queen* (2010) 242 CLR 520, at [49].

45 *ibid*. at [59].

46 subject to certain presently immaterial exceptions.

47 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 596 (Denver Beanland, Attorney-General and Minister for Justice).

48 Explanatory Memorandum, Criminal Law (Domestic Violence) Amendment Bill (No 2) 2015; Queensland, *Parliamentary Debates*, Legislative Assembly, 2 December 2015 (Yvette D'Ath, Attorney-General and Minister for Justice and Minister for Training and Skills).

Markarian[49] established the modern approach to sentencing some 15 and 20 years later, there was a tendency on the part of judges to rely heavily upon numbers when sentencing:

> "The sentence of 9 years' imprisonment is within what we have been told today is the range for manslaughter. We all know that depending upon the circumstances manslaughter may call for punishment which is outside this suggested range in both directions. The death of this child was an offence committed against a helpless human being by a person in whose care she was, and whether uncontrolled frenzy is the right description, it is conceded that the child was struck in anger and it seems to me that the learned judge was entitled to take the view in all these circumstances that the offence to which the appellant pleaded guilty called for the imposition of a penalty at the upper end of the range of, as it were, the tariff for manslaughter, if it be accurate to say that 5 to 10 years does represent the tariff."[50]

[99] There has been another important change, one that affects Attorney-General appeals against sentence. *Hall*, described above at paragraph [60], was an extraordinary case because the offender had already once been convicted of having assaulted a 15 day old baby, fracturing several of its ribs. He had also been convicted of two other assaults. The Court of Appeal increased the sentence for manslaughter from four years to six years. The court referred to a statement in *Walsh* that a sentence of nine years imprisonment was "at the upper end of the range" and said that a sentence "in the range eight to nine years would ordinarily be called for".[51] However, the court then took into account that it was deciding an Attorney-General's appeal and concluded that, for that reason, "moderation is called for".[52] The six year sentence, at the lower end of the five to 10 year range, was the result of this.

[100] In 2009 the Court of Appeal decided *R v Lacey; Ex parte Attorney-General (Qld)*.[53] In that case the Court held that there is no rule which requires the Court of Appeal, on an Attorney-General's appeal, to impose a sentence at the lower end of the otherwise applicable range.[54] However, that principle that was applicable in 2002 and in *Hall* it resulted in the imposition of a sentence that was more moderate than it might have been only because it was imposed in an appeal by the Attorney-General.

Public expectations

[101] Public clamour about a particular case has to be ignored by a sentencing judge because it is not a reliable indicator of legitimate public expectations of the system of justice or of anything else relevant to sentencing. But community attitudes, standards and expectations are things that a sentencing judge must somehow take

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49 (2005) 228 CLR 357.
50 *Walsh*, *supra*, at 5-6 per Connolly J.
51 *Hall*, *supra*, at [20] per Williams JA; with White JA agreeing, at [39].
52 *ibid*. at [16] per Williams JA.
53 [2009] QCA 274.
54 *ibid*, at [150]-[153] per de Jersey CJ, Keane, Muir and Chesterman JJA and at [270] per McMurdo P; the orders of the Court of Appeal were overturned on appeal to the High Court in *Lacey v The Queen* (2011) 242 CLR 573 but this point was not the subject of challenge.

into account because, in general, sentences are supposed to reflect a community's values. That is one reason why "denunciation" is a factor in sentencing.

[102] In *Markarian*[55] McHugh J said:

> "Public responses to sentencing, although not entitled to influence any particular case, have a legitimate impact upon the democratic legislative process. Judges are aware that, if they consistently impose sentences that are too lenient or too severe, they risk undermining public confidence in the administration of justice and invite legislative interference in the exercise of judicial discretion. For the sake of criminal justice generally, judges attempt to impose sentences that accord with legitimate community expectations."[56]

[103] Being sensitive to the community's attitude about a particular kind of offence is part of the exercise of judicial discretion. In *R v Kilic*,[57] Bell, Gageler, Keane, Nettle and Gordon JJ said:

> "The requirement of currency recognises that sentencing practices for a particular offence or type of offence may change over time reflecting changes in community attitudes to some forms of offending. For example, current sentencing practices with respect to sexual offences may be seen to depart from past practices by reason, inter alia, of changes in understanding of the long-term harm done to the victim. So, too, may current sentencing practices for offences involving domestic violence depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations."

[104] One source from which judges might discern *legitimate* community expectations is from the content of statutes that change the law governing offences and their penalties. When *Walsh* was decided in 1986 the concept of "domestic violence" as a possible aggravating factor in crimes of violence was simply unknown. It was only in 1989 that a statute was enacted in Queensland that, for the first time, had as its object the protection of (most commonly) women and children from violence.[58]

Other evidence of community values

[105] Mr Byrne QC invited the Court to have regard to another source of information about legitimate community expectations in sentencing. On 31 October 2018 the Sentencing Advisory Council published a report at the request of the Attorney-General that reviewed the penalties imposed for criminal offences arising from the death of a child.[59] The Attorney-General submitted that, although the report was published after these sentences were imposed, the report is a "relevant resource in determining whether the sentence imposed was unreasonable and plainly unjust".

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55 *supra*, at [82].

56 *cf. R v Kilic* (2016) 259 CLR 256, at 21.

57 (2016) 259 CLR 256, at [21].

58 This was the *Domestic Violence (Family Protection) Act* 1989 (Qld) which established a system in which victims of violence of that kind could obtain protective orders from the Magistrates Court.

59 Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child: Final Report*, 31 October 2018.

[106] Neither of the respondents has objected to the Court's receipt of the report although both respondents challenge its utility.

[107] Although the whole report may be very valuable for many purposes, its content cannot assist in deciding these proceedings. For example, understandably, the report does not reveal the individual circumstances in the cases that constituted the data. The data includes cases in which there were pleas of guilty and also pleas of not guilty without distinguishing them. The data also cover a range of legislative regimes over time.[60] Mr Byrne directed the Court's attention to the Report's evaluation of community attitudes by reference to what was expressed by people who were selected to constitute "focus groups".

[108] In *R v Nemer*[61] Doyle CJ said:

> "The courts administer justice on behalf of the community. But they administer justice according to law. The sentencing process is governed by the Sentencing Act and other relevant laws. A judge cannot simply impose the sentence that the judge would like to impose, or that the judge thinks would satisfy the public. To do either thing would be contrary to law.
>
> The judge can take account of public attitudes to the type of crime in question, and public concern about the prevalence of a type of crime or about its effects. In this general way public opinion is relevant. A sentencing judge can also have regard in a general way to a public expectation that serious crime will attract severe punishment. But it is not lawful for a judge to try to identify and then impose the sentence that the public expect. The judge must sentence according to law, not according to the public expectation. In any event, there is no way of knowing reliably what the public as a whole want or expect in a particular case."

[109] For these reasons also, the views expressed by selected members of the Queensland community who formed focus groups cannot assist in the task of sentencing an individual offender. Nor can the statistics that are gathered in the report bear upon the question of what is a just sentence to be imposed upon these two offenders.

Conclusion

[110] The previous sentencing decisions that were relied upon at first instance to determine the sentences in this case concerned sentences that were imposed under a different statutory regime. There have been the successive legislative changes to the laws that must be applied in the exercise of the sentencing discretion in these cases.[62] The range for appropriate sentences that was established by cases like *Chard* can no longer be regarded as useful for purposes of comparison because in none of them were the presently applicable legislative provisions taken into account. They were also not considered in the sentences under appeal.

[111] Accordingly, the sentences imposed upon O'Sullivan should be set aside.

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60 *cf. R v Way* (2004) 60 NSWLR 168, at [142]; *Powell v Tickner* (2010) 203 A Crim R 421, at [101] per Buss JA; and see per King CJ in *Yardley v Betts* (1979) 22 SASR 108, at 110.

61 (2003) 87 SASR 168, at [13]-[14].

62 see *R v Kaye* (1986) 22 A Crim R 366, discussed in *Director of Public Prosecutions (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428, at [57] per Kiefel CJ, Bell and Keane JJ.

[112] The objective circumstances of O'Sullivan's offences have been set out already. As have the circumstances that operate in mitigation of his sentence.

[113] While account must be taken of the respondent's plea of guilty and his acceptance of the facts relied upon by the Crown, the Crown case was overwhelming. Further, the nature of the offence, the killing of a baby when it was in O'Sullivan's care, after his prolonged and cruel neglect of it, leading to the baby's suffering of pain from various causes that could so easily have been avoided, reduces the significance of the respondent's personal circumstances.

[114] The fact that this killing took place in the home means that there was little scope for means to protect Mason from the ill-treatment that he suffered and from the ultimate act or acts that killed him. Offences committed at home and within the privacy of family are, in many cases, hard to detect and, in cases like the present, almost impossible to prevent. Although Mason was seen by health care professionals, and was noticed by a police officer because of how ill he looked, none of these interactions was adequate to protect him against the respondent.

[115] In terms of s 9(3) of the *Penalties and Sentences Act*, the relevant factors to which the court must *primarily* have regard are:

(a) the personal circumstances of Mason: s 9(3)(c);

(b) the nature and extent of the violence used in the commission of the offence: s 9(3)(e); and

(c) the offender's remorse or lack of remorse: s 9(3)(i).

[116] This was alleged to be, and was, a domestic violence offence. Section 9(10A) requires the court to treat that as an aggravating factor.

[117] The personal circumstances of Mason have been recounted. He was not yet two years old and at the time that O'Sullivan meted out the violence that killed him, Mason was, therefore, utterly vulnerable in O'Sullivan's hands and entirely dependent upon him for his well-being and his life. He was lodged in O'Sullivan's house, from which O'Sullivan would not let Mason's mother take him, in which his dreadful state could not be seen by any person in authority, and in which O'Sullivan had the necessary privacy in which to maltreat him and, finally, to kill him.

[118] O'Sullivan had applied "moderate to severe" force to Mason's abdomen. The precise nature and extent of the violence that O'Sullivan used on this infant will never be known because he had never told anybody what he actually did. He has only admitted doing the act that killed Mason by his formal plea of guilty. He gave no instructions to his counsel at sentence that permitted any insight into the actual act or acts that constituted the unlawful killing. However, the precise force that was used and how it was applied does not matter. It is enough to know that it was fierce enough to tear Mason's insides.

[119] The history of this case, so far as it bears upon the existence of remorse, is largely contained in O'Sullivan's statement to police at paragraph [36] above. However, there are several factors that should be specifically considered.

[120] On the morning of 28 August 2018, when the sentence hearing was to begin, the respondent conferred with his lawyers and, as a result of that conference, his

counsel informed the Chief Justice that the respondent now accepted that he had delivered the fatal blow. Her Honour was told that it was only on that morning that the respondent knew that his children would be called to give evidence on the contested sentence and that, not wishing them to undergo that experience, he had agreed to accept the Crown case as the basis for his plea of guilty.

[121] The respondent's counsel at sentence submitted in writing that he was "profoundly remorseful for his death". In oral submissions his counsel said that he instructed her that:

> "… he does recognise the woefulness of his behaviour and the extent of his ice addiction, the altering of his behaviour and his judgements, particularly in the period leading up to Mason's death. He says that he is appalled by some of the matters that have been reported to him as being on the surveillance footage and that he is extremely remorseful for causing Mason's death."

[122] The respondent's mother, Ms Sharon Walker, furnished a very moving letter in which she said:

> "After Mason's death William came to live with me. He was unable to sleep, eat and cried for days sobbing 'Mum I miss him, I just want him back'."

[123] The respondent tried to hang himself and was admitted to Caboolture Hospital for treatment. Ms Walker said:

> "… whilst on remand [her son] has reflected on the impact this has had on his life and the life of those around him. With this I believe has come a deep sense of acknowledgement and remorse."

[124] The respondent's younger sister, Courtney Walker, also furnished a letter, in which she said:

> "I see William on a regular basis. He continues to express deep sadness and remorse for the events that have occurred and seems to reflect and show more and more insight with each visit."

[125] The respondent's aunt, Ms Sharon Wintour, said in a statement that was tendered:

> "Andrew is extremely remorseful and regrets what has happened … I know that Andrew has developed and made good progress towards living a much more fulfilling life. This process started with Andrew reflecting on the past, listening, taking responsibility, and being prepared to be challenged so that he can move beyond barriers he has faced through life ... Andrew is moving forward with his life and wants to help others so that they can make good choices as well."

[126] The Crown did not challenge the truth of the statements made by the respondent's mother, sister and aunt. The content of those statements should therefore be accepted. Their significance is another matter.

[127] In the course of her sentencing remarks, the Chief Justice said:

> "You must, however, be given credit for your timely plea of guilty. This was to be a contested sentence but you resiled from that position when you realised that two of Ms Lee's children would be called to give evidence. Allowance must be made for your cooperation with the administration of justice, which has saved at least a number of witnesses, including those children, from having to give evidence. I accept that it does also reflect some level of remorse."

[128] The *Oxford English Dictionary* defines "remorse", relevantly for sentencing, as "a feeling of deep regret and repentance for a sin or wrong committed". The *Macquarie Dictionary* defines it as "deep and painful regret for wrongdoing". However, as Winneke P observed in *R v Whyte*,[63] remorse should not be confused with self-pity or with a self-centred determination to put the offence "behind me".

[129] A rarely considered question is why remorse should matter at all to the severity of a sentence.[64] It can matter for two reasons. The first is that remorse may demonstrate less of a need to give weight to specific deterrence as a factor in sentencing. A person who repents having committed an offence has insight into the offending and understands why it was wrong to commit it. Such a person can be regarded as less likely to reoffend than one who has no such insight. Such a person does not need any additional punishment to serve as personal deterrence against future offending. For that reason, remorse may serve to mitigate a penalty.

[130] The second reason why remorse may be relevant is that the weight to be given to denunciation as a factor in punishment may be reduced. This is because there may not be as great a need for a punishment to act as denunciation in the case of a person who, as part of the sentencing process itself, has demonstrated contrition which the community can accept as genuine.

[131] As has already been said, s 9(1)(d) of the *Penalties and Sentences Act* was amended in 1997 so as to remove the provision that said that one of the purposes of sentencing was to make it clear that the community, acting through the court, "does not approve of" the offending conduct. That expression was replaced by the stronger term "denounces". It makes sense to say that the community "denounces" the conduct by which a baby has been killed unlawfully. It would be an unsupportable understatement to say of such an act only that the community "does not approve of" it.

[132] Consequently, as in other jurisdictions,[65] in appropriate cases a just sentence should also operate as a denunciation of the offence.

[133] Denunciation, as well as its correlative, retribution, has a long history in the theory of punishment. In his 1853 book, *A General View of the Criminal Law of England*, Sir James Stephen voiced the then prevailing view about the efficacy of severe and

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63 (2004) 7 VR 397, at [21].

64 Remorse was not always relevant to establishment for crimes. Before the modern period, remorse was immaterial to punishment as were all factors that were personal to the offender. Every guilty person was punished for the same offence in the same way to demonstrate the displeasure of the monarch that the Royal peace had been broken; Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin Books, 1991) 47-54.

65 *Crimes (Sentencing) Act* 2005 (ACT), s 7(1)(f); *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 3A(f); *Sentencing Act* 1995 (NT), s 5(1)(d)*; Sentencing Act* 1991 (Vic), s 5(1)(d); see also *Channon v The Queen* (1978) 20 ALR 1.

harsh punishment to deter offenders and to satisfy the moral affront that the offence caused to the community:

> "Gross violations of plain moral duties: Crimes of violence and dishonesty are the commonest acts of this class. The prevention of such acts by terror is a matter of undisputed importance. Their prevention by the solemn sanction which criminal law gives to the horror which they inspire, and the deliberate satisfaction which it affords to the desire for vengeance which they excite, is at least equally necessary and, probably, far more effectual."[66]

[134] In *Ryan v The Queen*[67] McHugh J discussed retribution in the context of sentencing a convicted paedophile who, apart from his sexual offences against children, otherwise had a good character:

> "Thus, the existing principles require many sentences to be retributive in nature, a notion that reflects the community's expectation that the offender will suffer punishment and that particular offences will merit severe punishment. The "persistently punitive" attitude of the community towards criminals means that public confidence in the courts to do justice would be likely to be lost if courts ignored the retributive aspect of punishment. In the middle of the twentieth century, the need for sentences that were conducive to the rehabilitation of the prisoner was much emphasised. Less attention was then paid to the retributive aspect which was often ignored by an embarrassing silence. But under the notion of giving the offender his or her "just deserts", the retributive aspect has re-asserted itself in recent years. In the case of offences by paedophiles, it is currently the most important factor in the sentencing process because their crimes are committed against one of the most vulnerable groups in society and they almost invariably have long term effects on their victims. According to current community standards, it is proper that paedophiles should be severely punished for their crimes."

[135] It may be that McHugh J was using "retribution" as a synonym for "denunciation". In *R v Nichols*[68] Lee AJ said that in serious crime the court "must show its denunciation of the crime". This was so, his Honour said, in order to "take into account the moral outrage of the community". The Full Court of the Federal Court in *R v Valentini* expressed the same ideas.[69]

[136] An academic writer has expressed the view that denunciation (together with retribution), as an object of sentencing, is subsumed in the concept of proportionality and that "reliance upon these rationales is misguided".[70] However, sentencing judges are bound to apply the law as it actually is. Having regard to s 9(1)(d) of the *Penalties and Sentences Act*, as well as the many cases, including in the High Court, that have asserted the continuing relevance of denunciation in

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66 James Fitzjames Stephen, *A General View of the Criminal Law of England* (Macmillan and Co, 1863) 99.
67 (2001) 206 CLR 267, at [46].
68 (1991) 57 A Crim R 391, at 395, per Bowen CJ, Muirhead and Evatt JJ.
69 (1980) 48 FLR 416.
70 Professor Mirko Bagaric, *The Negation of Venting in Australian sentencing: Denouncing denunciation and retribution* (2014) 88 ALJ 502, at 518.

sentencing, judges are bound to take denunciation into account as an object of sentencing in appropriate cases. For that reason, judges should know what is involved in the concept.

[137] In *R v MacDonald*[71] Gleeson CJ, Hunt CJ at CL and Kirby P said:

> "In a case such as the present, it is important to bear in mind the denunciatory role of sentencing. Manslaughter involves the felonious taking of human life. This may involve a wide variety of circumstances, calling for a wide variety of penal consequences. Even so, unlawful homicide, whatever form it takes, has always been recognised by the law as a most serious crime. (See *R v Hill* (1981) 3 A Crim R 397 at 402.) The protection of human life and personal safety is a primary objective of the system of criminal justice. The value which the community places upon human life is reflected in its expectations of that system.
>
> … Society was entitled to have the conduct of the respondent denounced at least in that fashion."

[138] In *R v King*[72] the New South Wales Court of Criminal Appeal[73] said that in cases involving serious offences "[s]ociety is entitled to have the sentence imposed denounce the criminal conduct of the offender and, if the sentence does not do so, there has been an error in the exercise of the sentencing discretion". This statement about denunciation reflects the dicta of McHugh J about retribution.

[139] It is said that denunciation reflects the community's reaction to a serious offence.[74] However, that statement cannot assist a judge in how to arrive at a just sentence. Further, whatever denunciation might be as part of the process of sentencing, it does not involve the abdication of a judicial temperament by a sentencing judge in favour of an emotional reaction.[75] Nor can it be the law that a harsh penalty serves to satisfy public clamour about a particular offender or a particular offence. That being so, what is "denunciation" and what is its purpose in sentencing?

[140] An indication of the nature of the concept appears in the authorities. In *MacDonald*,[76] cited above, the Court referred to the "value which the community places upon human life" as a consideration in any discourse about denunciation. In *King* the Court referred to society's *entitlement* to denunciation as part of sentencing. In *Ryan* Kirby J cited a Canadian case, *R v M (CA)*.[77] That was an appeal against a sentence for a horrific series of violent sexual offences against children. In the context of a case of that kind, the Supreme Court of Canada had to consider how the concepts of retribution and denunciation, as well as the totality principle, might affect the discretion to impose a cumulative sentence of 25 years when the various offences in question each carried maximum sentences of five, 10 and 14 years.

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71 Unreported, New South Wales Court of Criminal Appeal, 12 December 1995.
72 [2009] NSWCCA 117, at [1].
73 McLellan CJ at CL, Grove and Howie JJ.
74 See eg. *Ryan*, *supra*, at [118] per Kirby J.
75 *cf. Ryan*, *supra*, at [134] per Hayne J.
76 *Supra*.
77 [1996] 1 SCR 500, at 558 per Lamer CJ.

[141] Lamer CJ, writing for the Supreme Court,[78] distinguished between retribution and denunciation. His Honour said:

> "Retribution, as an objective of sentencing, represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender. … retribution is integrally woven into the existing principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be "just and appropriate" under the circumstances. Indeed, it is my profound belief that retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions."[79]

[142] His Honour emphasised that retribution, in the context of sentencing, was not the same as vengeance:

> "However, the meaning of retribution is deserving of some clarification. The legitimacy of retribution as a principle of sentencing has often been questioned as a result of its unfortunate association with "vengeance" in common parlance. … But it should be clear from my foregoing discussion that retribution bears little relation to vengeance, and I attribute much of the criticism of retribution as a principle to this confusion. As both academic and judicial commentators have noted, vengeance has no role to play in a civilized system of sentencing. … Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more."[80] (citations omitted)

[143] However, his Honour also distinguished retribution and denunciation:

> "Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. The objective of denunciation mandates that a sentence <u>should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our</u>

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78 La Forest, L'Heureux-Dube, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

79 *R v M (CA)*, *supra*, at [79].

80 *ibid*. at [80].

> society's basic code of values as enshrined within our substantive criminal law. … The relevance of both retribution and denunciation as goals of sentencing underscores that our criminal justice system is not simply a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the offender must bear in committing an enumerated offence. Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code.*" [81] (emphasis added)

[144] The rational connection between sentencing, denunciation and the moral sense of the community has to be explored further in order to understand the role played by s 9(1)(d) of the *Penalties and Sentences Act*. The late Professor Jean Hampton offered an explanation for the relationship between these ideas.[82] Professor Hampton distinguished between wrongs that result only in loss or harm to an individual and wrongs that, whether or not they also cause loss or harm, violate moral standards in a way that constitutes an affront to a victim's value or dignity. Such an affront causes a moral injury. A wrongful act might result in compensable loss but might also be morally excusable – particularly if the wrongdoer accepts responsibility and immediately offers recompense. On the other hand, when a wrong is constituted by an action that treats the victim as worth less as a human being than the offender, or treats the victim as entirely worthless, the commission of the wrong is both an affront to the victim's dignity and an affront to shared community values. The wrong done to the victim constitutes an insult to the community because it disparages one of the community's essential values, namely the value placed upon each precious individual. If permitted, such affronts might eventually corrode general acceptance of such values. Even in a case of an act that does not cause any damage, such as attempted murder, there is still an affront of this nature and, therefore, a moral injury to the community's shared values.

[145] Denunciation is intended to vindicate the community values that have been insulted by the wrongful act. It works to confirm the validity of those values by an act of judicial government that repudiates the offending conduct. A denunciatory sentence works to defeat the wrongdoer's own repudiation of the community value and works to restore the correct moral relationship between wrongdoer and victim. However, a denunciatory punishment must not be disproportionate to the seriousness of the offence. A disproportionate punishment might satisfy the community's need for vindication of the values that the wrongdoer has insulted, but it would itself constitute an affront to the shared moral value that requires every punishment to be a just punishment. In its excess it would constitute unjust retribution.

[146] This analysis accords with the *dicta* cited earlier. It conforms to the statement of the Court of Criminal Appeal of New South Wales in *MacDonald* that the value which the community places upon human life is reflected in its expectations of the

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81 *ibid*. at [81].

82 'Correcting Harms Versus Righting Wrongs: The Goal of Retribution' (1992) 39.6 *UCLA Law Review* 1659.

criminal justice system and that, for that reason, the community is entitled to have the conduct of the offender denounced by means of the sentence imposed. It also conforms to Lamer CJ's statement in *R v M (CA)* that a sentence that constitutes a denunciation is "a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law".

[147] Lamer CJ's *dictum* was precise in relating denunciation to an offender's *conduct* and not to the *offender*. Denunciation is a response to what somebody did and not to a person's character. An offender's actions conflict with a community's expectations about how members of the community should behave and it is, therefore, those actions that must be denounced.

[148] Denunciation and remorse therefore occupy different realms because remorse is something personal to the offender. This explains why, in *Phillips v The Queen*,[83] Redlich JA and Curtain AJA said that in some cases the gravity or aggravating features of the *offending conduct* are of such an order, and the enormity of an offender's criminality may be such, that the mitigating effect of remorse or a guilty plea must yield to such factors as the protection of the public or the maintenance of the rule of law. The reference to the "maintenance of the rule of law" can be understood, in this context, as a reference to the vindication of community values enshrined in the criminal law. In cases of that kind, the need for the sentence to serve the object of denunciation that is required by s 9(1)(d) will mean that remorse, as factor in sentencing, becomes secondary.

[149] This analysis of the nature of denunciation in sentencing also accords with s 9(1)(d) of the Act which states that one of the purposes of sentencing is to make it clear that the community, acting through the court, denounces "the sort of conduct in which the offender was involved".

[150] Remorse, if it is to be relied upon, must be proved as a fact and it should not always be taken as having been sufficiently proved just because a submission has been made that the offender is remorseful.

[151] A guilty plea may be evidence of remorse but that is not necessarily so. In *Phillips* Redlich JA and Curtain JA said:[84]

> "[69] While it is always a question for the sentencing judge whether the subjective criteria of remorse, acceptance of responsibility and a willingness to facilitate the course of justice should be inferred from a plea of guilty, courts should not be reluctant to identify criteria of contrition as inhering in the proffering of a plea of guilty. The plea is usually seen as providing some indication of the presence of these subjective criteria, frequently because it complements other indicia of remorse. The conduct and statements of the offender over time provide a more informative and precise guide than the plea alone as to whether genuine and deep contrition exists. Where a judge concludes that these subjective criteria do not exist, either having rejected the evidence or submissions which

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83 (2012) 37 VR 594.

84 *supra*.

> suggest such criteria are present or because of an absence of such evidence, no allowance will be required within the discount for these subjective criteria.http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2013/95.html - fn11 Where there is a finding that the subjective criteria are only present to a limited extent, the supposed discount that would otherwise have been allowed for these subjective criteria may be reduced. Where the judge, without qualification, is prepared to act upon evidence or a submission that the plea reflects the presence of these subjective criteria, the discount should fully reflect the subjective criteria." (citations omitted)

[152] In the same case[85] Harper JA said:

> "[98] Where remorse is relied upon by an offender, and its existence or extent is challenged by the prosecution, the burden of proving its existence or extent falls upon that offender.
>
> [99] It is true, as Redlich JA and Curtain AJA state at [68] above, that '[t]he common law has long recognised the sentencing principle that a plea of guilty is an expression of real contrition'. That principle was established, however, at a time when the offender would almost certainly not know, when the decision to plead was made, whether it would result in a discernible discount from the sentence which would otherwise be imposed. Now, given the role of s 6AAA of the Sentencing Act, that discount will always be known; and, because it is known that it will be known, there is an incentive in the guilty to plead guilty – if only to attract the discount which, as the judgments in this case make clear, must be allowed for its utilitarian benefit.
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> [100] It follows that such a plea may have little if any component of remorse. Yet remorse is frequently put forward as a mitigating circumstance in the expectation that the sentencing judge will simply accept that, because a plea of guilty has been entered, remorse must be present. That expectation ought not to be encouraged."

[153] Weight must be given to the utility of O'Sullivan's early plea of guilty as a mitigating factor.[86] However, he was not prepared to plead guilty upon the basis that he had delivered a blow to Mason which caused the injuries that killed him. He contested the central fact in the case against him. That contest resulted in the prosecution having to prepare to call child witnesses because it was known to authorities that O'Sullivan put the responsibility for the killing blow upon his 10 year old daughter. Consequently, until the morning of the sentence hearing, when O'Sullivan finally withdrew his denial of the Crown case, his plea reflected nothing more than the existence of a strong Crown case of manslaughter by negligence and reflected no acknowledgement of his real misconduct.

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85 *ibid*.

86 *cf*. *Cameron v The Queen* (2002) 209 CLR 339, at [73]-[74] per Gaudron, Gummow and Callinan JJ.

[154] It is also true that the respondent attempted suicide. Sometimes an attempted suicide is the result of deep feelings of remorse. It is true that O'Sullivan told his mother, in tearful terms, that he missed Mason and wanted him back. That is hardly a statement of repentance. The genuineness of the belief of the respondent's mother, sister and aunt that he is remorseful should be accepted. What is not apparent is whether their belief about his state of mind is justified. Ms Walker's statement that the respondent expresses deep sadness and remorse for the "events that have occurred" and Ms Wintour's statement that the respondent is "remorseful and regrets what has happened" suggests that the perspective is that of a person looking at "events that have occurred" rather than the perspective of a person with insight into his own culpability for the awful things that he did to Mason. Further, a determination by a person who has committed a serious offence to be "moving forward with his life" implies nothing about remorse and a great deal about self-regard.

[155] The result is that, as the Chief Justice found, there is "some" remorse. But there is not much of it and, having regard to the nature of the offending conduct, it can be given only the slightest weight. However, the evidence about the respondent's state of mind does demonstrate that his risk of reoffending is very low and there has been no suggestion to the contrary. That is an important matter that must be give its due weight in mitigation of the penalty.

[156] The beating that he endured is also of significance. The perverse morality that exists in prisons means that offenders convicted of crimes against children are liable to suffer brutal attacks. The respondent was attacked by two inmates while in prison. The attack left him unconscious. He suffered some serious injuries, including broken bones and a skull fracture. He had to undergo surgery and a stay in hospital. He fears that he will be attacked again. The assault happened in March 2018 when the respondent was in prison on remand. It will be the duty of the Department of Corrective Services to keep the respondent, as a prisoner serving a sentence, safe from such assaults. Commonly, this is done by keeping such a prisoner in a protected section of the prison. There was no evidence before the primary court or before this Court to suggest that such methods will be ineffective to protect him or that being kept in protection in that way will mean that the respondent's time in prison will be more onerous.[87] Account must be taken of the added suffering of the respondent because he has been assaulted and the greater hardship that is involved by having to serve a sentence in protective custody. That must function to mitigate his sentence.

[157] In this case, the respondent's fatal assault on Mason was preceded and then followed by a cruel neglect of Mason's pain and his self-evidently urgent needs. The successive amendments to the *Penalties and Sentences Act*, as well as to the other legislation discussed, demonstrates the community's deep repugnance and its intolerance of actions which cause the death of a child, particularly one like Mason, whose tender age left him absolutely vulnerable within the respondent's home and without any chance of being saved from death by the intervention of outside witnesses. That is one of the reasons why the fact that an offence is a domestic violence offence is an aggravating factor that must be taken into account.

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[87] *cf*. The mitigatory effect of being held in a protected part of a prison depends upon proof that incarceration in such a place is, for particular reasons, more onerous than being kept in the general population of a prison: see *R v Males* [2007] VSCA 302.

[158] For these reasons, the sentence must serve the purpose of denunciation in a demonstrable fashion.[88]

[159] These circumstances mean that, having regard to the applicable provisions of the Act to which reference has been made at length, a just sentence must be one that is significantly more severe than the sentences that have customarily been imposed in the past in similar cases.

[160] Further, the offence of manslaughter was accompanied by the separate and distinct offence constituting the respondent's sustained cruelty to Mason before and after the respondent's assault on him that led to death. That offence of cruelty exacerbates the offence of manslaughter and must be taken into account as part of the totality of the offending.

[161] As McHugh J said in *Everett v The Queen*,[89] inadequate sentences give rise to a sense of injustice in the general public and are also likely to undermine public confidence in the ability of the courts to play their part in deterring the commission of crimes. One of the bases upon which a prosecution appeal against sentence is justified is when, as here, it is brought in order to establish the correct principles upon which the sentencing discretion should be exercised in the future. In her submissions concerning O'Sullivan, the prosecutor, Ms Loury QC, pointed to the changes to the legislation and submitted that a sentence of not less than 10 years imprisonment should be imposed when the guilty plea is taken into account. On this appeal, Mr Byrne submitted that the proper sentence was one of 10 to 12 years imprisonment.

[162] Taking into account the factors in mitigation, particularly the early plea of guilty, the sentence for the offence of manslaughter should be 12 years imprisonment. This takes into account the seriousness of an offence that was constituted by the deliberate infliction of fatal violence by an adult male upon an infant in his care. The sentence takes into account the utility of the respondent's plea of guilty and his decision not to contest the facts alleged by the prosecution. It also takes into account, as an important factor in mitigation, the savage beating that he suffered while on remand. It takes into account the respondent's wretched violent upbringing, which is yet another instance that the Court has seen of society's failure to protect a child against violent abuse that has then led, indirectly, but almost inexorably to the child, as an adult, being imprisoned for a serious crime. It takes into account the fact that it is not possible to reflect these mitigating factors in the most desirable way, by setting an earlier parole eligibility date.

[163] It is usually wrong to attempt to try to put forward a mathematical formula to explain the degree to which factors in mitigation of sentence have affected a penalty that would otherwise have been imposed in their absence. However, there are cases[90] in which such an explication serves a purpose. This is such a case because it is necessary to explain as fully as possible the effect of the legislative changes that have been discussed upon the range of sentences that have been wrongly accepted as a basis for sentencing. But for the mitigating factors that have been referred to, a just sentence for the offence of unlawfully killing Mason, taking into account the

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88 *cf. R v Hoerler* (2004) 147 A Crim R 520, at [42] per Spigelman CJ, the killing of a seven month old baby by beating, resulting in a sentence of 14 years imprisonment; see also, as to the retributive element of sentencing, *R v Gordon* (1994) 71 A Crim R 459.

89 (1994) 181 CLR 295, at [3].

90 *cf. Markarian*, *supra*, at [39].

cruelty offence as part of the overall criminality, would have been 15 years imprisonment.

[164] The appropriate orders in this appeal are:

1. Appeal allowed.
2. Sentences imposed on 30 August 2018 be quashed.
3. The respondent is sentenced to imprisonment for 12 years for the offence of manslaughter.
4. There be no further punishment for the offence of cruelty.

Annemarree Lee

[165] The second appeal concerns Mason's mother, Annemarree Lee. The objective circumstances of her offending have already been set out. It remains necessary to consider her personal circumstances, as well as the proceedings at first instance.

[166] This respondent's culpability in the offence of killing Mason lay in her neglect of him. Her circumstances at the time of the offence were, unfortunately, not unusual in such cases. The respondent was the youngest of four children. Her mother left the family when she was aged two. She recalls being the victim of her father's sexual abuse, sometimes of a violent nature, from about the age of five. The abuse was by a range of sexual acts from touching to sexual intercourse. She was also the victim of her father's physical assaults, which included beatings with instruments, burnings and choking. The respondent also saw these things done to her siblings. Later, she was sexually abused by one of her brothers. After she was nine years old, her older siblings reported these matters to police and the children were removed from the father's care. Her father was charged, convicted and imprisoned. This inevitably resulted in a wholly disrupted upbringing, a loss of any chance of education and a turning to drugs and sexual relations as a means of palliation. For a time the respondent was homeless.

[167] The respondent became pregnant for the first time when she was 15 years old. Her then partner was violent and controlling. She did not complain to police about him, fearing his retribution. All but one of her ensuing partners was the same kind of man and the respondent's relationship with O'Sullivan continued this pattern. He insisted that she break off relationships that she had with other people. He was frequently violent towards her. She made some ineffectual attempts to protect her young children from O'Sullivan's violence but she always submitted to his will in the end. He continually told her that she was a failure as a mother and that she was unable to care for her son, and she was too scared and timid to stand up to him. In the months before Mason's death, she was making efforts to leave O'Sullivan with the help of staff from the Department of Child Safety. While doing so, she was still submitting to sexual intercourse with O'Sullivan in order to avoid his suspicions about her intentions.

[168] The respondent says that Mason had been in O'Sullivan's care for most of the time during which his physical condition deteriorated. She denied knowing that O'Sullivan had mistreated Mason. She denied seeing O'Sullivan hit Mason. She used cannabis at O'Sullivan's insistence but denied using other drugs.

[169] A pre-sentence report by Dr Josephine Sundin, a psychiatrist, says that in the period leading to Mason's death the respondent was suffering from post-traumatic stress disorder and an unspecified mood disorder. Her upbringing gave rise to a frame of mind in which she believed that intimate attachments would always be accompanied by fear, apprehension, coercion and exploitation. For Lee, submission to the control inflicted upon her by O'Sullivan was normal.

[170] As Dr Sundin explained, this situation and the respondent's frame of mind meant that her "emotional field of vision narrowed to the point that she did not recognise the threats to Mason's wellbeing and did not register in the last week that he was gravely ill". Her delegation of Mason's care to O'Sullivan was consistent with her subordination of herself, her rights, her interests and her opinions to a dominant and violent man.

[171] Her initial account to police was largely consistent with the history obtained by Dr Sundin.

[172] The case of manslaughter against this respondent was based, in part, upon her knowledge in June 2016 that O'Sullivan's treatment of Mason in the early part of that year had resulted in his hospitalisation. She knew that O'Sullivan was a heavy user of methylamphetamine and that he was given to paranoia and to violent rages against her and against her young children. Nevertheless, she let O'Sullivan keep Mason in his house. In the days after Mason was fatally injured the respondent must have known that he was gravely ill but she did nothing. She was talking to officers of the Department of Child Safety at about that time and she could have asked for their help. Even when she was at O'Sullivan's house on 8 June, at a time when Mason needed urgent medical treatment, she did nothing for him. When someone else repeated this warning on the following day she still did not act. Instead, she left Mason with O'Sullivan.

[173] In sentencing the respondent, Dalton J decided to impose a sentence for manslaughter that would reflect the respondent's overall criminality and to impose a concurrent sentence for the cruelty offence. Nobody challenges the correctness of that approach and it was, with respect, one that was open to her Honour. As a result, her Honour imposed a sentence of imprisonment for nine years for the offence of manslaughter and a concurrent sentence of three and a half years for the cruelty offence. Her Honour set a parole eligibility date of 19 July 2019. Having regard to time that had already been served in prison by the respondent, this was a date set at the one-third point of the sentence of imprisonment for manslaughter. This was done to reflect the early plea of guilty and, as her Honour noted, the contents of Dr Sundin's report.

[174] A mother's neglect of her child, which results in her child's death, is an appalling offence. However, manslaughter constituted by neglect, even when it is the terrible neglect in this case, is not to be compared with an unlawful killing of a child by a deliberate violent act. In cases of neglect the offender's personal circumstances can become very important in determining a just sentence. Those circumstances might explain why a mother acted in ways that is so inconsistent with normal expectations. Such explanations may reduce an offender's moral culpability because it explains the causes of the failures to act that constitute the offence.

[175] In this case, the unchallenged evidence proved that the respondent was simply unable to protect her son against O'Sullivan. While she was sometimes moved to

recover her son from O'Sullivan's custody, his dominance over her meant that she could do nothing without his permission and he refused to give her his permission. An appeal by her to police for assistance when she was in constant fear of physical retribution was out of the question for her. Her consultations with Departmental officers were ineffectual even to protect herself. She could change nothing. Dr Sundin's explanation is that the respondent's criminal neglect of Mason was due to the same disabilities that made her incapable of doing anything to get away from the sphere of influence of a violent and controlling man. The genuineness of the respondent's remorse for her role in her son's death and the effect of her guilty plea as evidencing that remorse have not been challenged and rightly so.

[176] The same statutory circumstances of aggravation are present in this case as in O'Sullivan's case except for the absence of any violent act by the respondent. This was also a domestic violence offence involving the death of a child but it was not the respondent's violence.

[177] The facts that constitute the circumstances of aggravation are not the same in their implications for the respondent. A mother's grievous neglect of her child leading to the child's death is an affront to community values but an understanding of the reasons for the neglect lessens the sense of indignation that is felt. The respondent's personal circumstances, as O'Sullivan's victim in an oppressive relationship and as the victim of her own upbringing, operate heavily in mitigation of her moral culpability for Mason's death. A severe head sentence was warranted in this case but an early parole eligibility date was apt to give effect to Lee's personal circumstances as well as to her early plea and her true remorse, a remorse which is really the permanent burden she will bear because she caused her son's death. There was no error made by the learned sentencing judge in the weight given to mitigating factors.

[178] Having regard to the factors that the legislation requires to be taken into account, and having regard to the relative culpability of O'Sullivan and of the respondent, the sentence imposed upon Lee, when compared with the sentence of 12 years imprisonment that has now been imposed upon O'Sullivan, was not inadequate and bears appropriate parity to his sentence.

[179] In those circumstances, it has not been shown that the sentence imposed upon the respondent was wrong and the appeal should be dismissed.