THE LEGAL CASE FOR MERCY

JACQUELINE GLEESON*

2024 Barry O'Keefe Memorial Lecture, 20 March 2024

Introduction

1. In my interactions with Barry O'Keefe, he was a barrister and later a judge. I was aware of his Catholic faith and knew something of his service to the public, but I did not have an opportunity to ask him about the relationship between the Christian values that he lived by and his practice of law. One particular value, which is important in the Catholic tradition, but which is often said to be distinct from the justice that is administered by courts, is mercy.

2. Mercy is a familiar idea for Catholics, as it is for adherents to all the Abrahamic religions. Every Catholic Mass includes the Kyrie Eleison: Lord have mercy, Christ have mercy, Lord have mercy. The priest calls upon God: Lord, show us your mercy and love. The congregation responds: And grant us your salvation. This conception of mercy is the gift of an all-powerful and all loving God, sparing his fallible creations from the consequences of their

---

* Justice of the High Court of Australia. I acknowledge the assistance of my associates, Jacqueline Krynda and Aiden Lerch, in the research and preparation for this lecture.

imperfection. "For God has consigned all men to disobedience, that he may have mercy upon all"[1].

3. In schools founded and operated by the Sisters of Mercy, including my high school, Monte Sant' Angelo in North Sydney, the "Mercy Tradition" is emphasised. In this context, mercy is a personal expression of compassion or hospitality. A merciful person may choose to forgive someone who has caused them harm, or they may offer kindness or concern to a person who is suffering the just consequences of their action. This kind of compassionate mercy extends to acts of kindness and generosity towards those who are in pain, regardless of the precise reason for their suffering.

4. Judges and magistrates who have sworn to administer justice according to law, but who value the expression of mercy, may find themselves grappling with the competing demands of justice and mercy. The courts must administer justice according to law in the face of evidence of disadvantage, tragedy, abuse, ill health and bad luck. Such evidence might make many of us think that the circumstances warrant merciful treatment. Judges are far from immune from the urge to relieve or mitigate suffering when it is ostensibly within their power, but their duty and their legitimacy require them to exercise that power in accordance with the law. The challenge for judicial officers is to perform their functions according

---

[1] Romans 11:32 (English Standard Version).

to law including, on appropriate occasions, responding with kindness or leniency.

The aim of this lecture

5. The aim of this lecture is to reflect on expressions of mercy in Australian law. Mercy is a contentious value in the legal landscape because it may pose a challenge to justice and the rule of law. On some views, mercy is at best irrelevant to and at worst, incompatible with, justice. A merciful approach to an individual offender may be incompatible with the important principle of equality in the operation of laws. In a particular case, mercy towards an offender may operate as an injustice to a victim whose suffering is recognised by punishment of the offender.

6. In Shakespeare's *The Merchant of Venice*, Portia identifies a dichotomy between mercy and justice, saying that "earthly power doth then show likest God's when mercy seasons justice".[2] One Justice of the High Court, Heydon J, noted that: "[t]he common law conception of a conviction is that, by it, the convicted person receives justice; the common law conception of a pardon is that, by

---

[2] William Shakespeare, *The Merchant of Venice*, IV, i, 191–2 (c. 1596–8). See also John Milton, *Paradise Lost*, X, 77–9 (1667).

it, the convicted person receives mercy, notwithstanding the demands of justice."[3]

7. My contention is that the value of mercy is not antithetical to justice but is expressed in important elements of Australian law. Although there are tensions between "justice" and "mercy", and judicial officers must be vigilant to avoid the illegitimate expression of mercy, the value of mercy informs what it means to say that courts provide justice according to law.

More about the nature of mercy

8. In his April 2015 Bull of Indiction for the Extraordinary Jubilee of Mercy, Pope Francis described the relationship between justice and mercy as "two dimensions of a single reality that unfolds progressively until it culminates in the fullness of love".[4] Pope Francis insisted that "[t]he appeal to a faithful observance of the law must not prevent attention from being given to matters that touch upon the dignity of the person". Ultimately, for Pope Francis, mercy and justice are not opposed although "mercy surpasses justice". Mercy offers the sinner "a new chance to look at himself, convert and believe".

---

[3] *Eastman v Director of Public Prosecutions (ACT*) (2003) 214 CLR 318 at 351.

[4] *Misericordiae Vultus*.

9. What role does mercy play in discourse outside of organised religion? The philosophy of humanism emphasises the values of kindness and compassion.[5] The famous humanist thinker, and one of the Founding Fathers of the United States, Thomas Paine said: [6]

> I believe in the equality of man; and I believe that religious duties [arising outside of organised religion] consist in doing justice, loving mercy and endeavouring to make our fellow-creatures happy.

10. This year, British journalist Claudia Hammond received the Rosalind Franklin Lecture Medal, which celebrates the contribution of women towards the promotion and advancement of aspects of humanism. Ms Hammond has observed that:[7]

> I think the best evidence suggests that human beings are hardwired to be kind, or at least to cooperate. Certainly, we've achieved our stunning success as a species through acting collectively and socially. Of course, we're also guilty of monstrous acts like genocide; we have terrible flaws as well as great attributes. ... the arc of human history is bending towards greater humanity. We need to lean into this positive tendency by recognising and celebrating kindness more than we do at present.

---

[5] Andrew Copson, Luke Donnellan and Richard Norman (2022). *Understanding Humanism* (1st ed.) 119-120, 132.

[6] Thomas Paine, *The Writings of Thomas Paine — Volume 4 (1794-1796): The Age of Reason* (Project Gutenberg).

[7] Humanists UK, 'The Keys to Kindness - Interview with Claudia Hammond - Rosalind Franklin Lecture Medallist 2024' (26 February 2024), <https://humanists.uk/2024/02/26/the-keys-to-kindness-interview-with-claudia-hammond-rosalind-franklin-lecture-medallist-2024/>

The prerogative of mercy

11. In any discussion of mercy in the legal system, it is appropriate to begin by considering the prerogative of mercy. That prerogative is an explicit invocation of the social value of mercy in our legal system. The power is exercised by the executive arm of government and not by the courts. For federal offences, the prerogative power is derived from s 61 of the Australian *Constitution* and is exercised by the Governor-General acting on the advice of the Attorney-General.[8] For state offences, since 1990, the prerogative of mercy has been exercised in New South Wales by the Governor on the advice of the Executive Council and state Attorney-General.[9] The power includes the grant of a free pardon to a person who has been convicted of an offence, a conditional pardon, or the remission of a sentence.

12. Most legal systems maintain power for the exercise of mercy in criminal cases to moderate the overly harsh application of law, whether it is exercised by an individual, an executive body, the executive acting with a designated minister, or under a committee structure.[10]

---

8 Attorney-General (Cth) v Huynh (2023) 97 ALJR 298 at 318 [93] (Gordon J).

9 Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004), 665.

10 Novak at 1, see also 66-91.

13. According to the 18th century text, Blackstone's *Commentaries on the Laws of England,* the Crown's power to pardon an offence was said by Saxon ancestors to be derived "a lege suae dignitatis" (that is, by right of the King's own dignity).[11] For Blackstone, the prerogative contributed to the political security of the Crown, endearing the Crown to his or her subjects and promoting "filial affection, and personal loyalty".[12] In some countries, a pardoning power continues to perform a similar function and may involve the release of thousands of prisoners annually.[13] In Biblical times, the release of Barabbas by Pontius Pilate also involved the exercise of an annual custom.

14. Blackstone also recognised the value of the prerogative of mercy "to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment".[14] As to its exercise, Blackstone explained that the Crown's power is to "extend mercy, wherever he thinks it is deserved: holding a court of equity in his

---

[11] William Blackstone, *Commentaries on the Laws of England: in four books* (4th ed, edited by James DeWitt Andrews, Callaghan and Co, 1871), Book 4, Chapter 31 at 1524.

[12] Blackstone, Book 4, Chapter 31 at 1524.

[13] Andrew Novak and Daniel Pascoe, 'Executive Clemency During the Coronavirus Pandemic: A Global Analysis of Law and Practice' (2022) 2(1) *International Criminology* 84 at 88; Mumba Malila, 'Skirting the Justice System through Presidential Clemency in Zambia: Some Critical Reflections' (2022) 30(3) *African Journal of International and Comparative Law* 402 at 416-417.

[14] Blackstone, Book 4, Chapter 31 at 1525.

own breast".[15] For Blackstone, such a power also had a public interest aspect; it is "the discretionary power of acting in the public good where the positive laws are silent".[16]

15. Blackstone observed that the power of clemency may tend to undermine the legitimacy of the laws but also that, without such a power, judges and juries might be less inclined to apply the law in a sympathetic case.[17] This concern was particularly potent while the death penalty was in force. Interestingly, Blackstone thought that the power to grant a pardon could not exist in a democracy. He believed that it would be "impolitic" for the powers of judging and pardoning to reside in the same person: citizens would not know whether an offender avoided conviction through favour or innocence.[18]

16. The prerogative played an important role in colonial New South Wales. For example, Governor Lachlan Macquarie, who was a supporter of prisoner rehabilitation for the social and economic survival of the colony, granted 1365 conditional pardons during his tenure, which freed the convict but prohibited them from leaving

---

[15] Blackstone, Book 4, Chapter 31 at 1525.

[16] As quoted in cited in *Ruddock v Vadarlis* (2001) 110 FCR 491, 539 [181] (French J).

[17] Blackstone, Book 4, Chapter 1525.

[18] Blackstone, Book 4, Chapter 31 at 1525.

the colony.[19] Many of these exercises of the prerogative were accompanied by grants of land for the petitioner. Woods writes in *A History of the Criminal Law of New South Wales* that "cruelty, principle and mercy are inescapable and recurring elements in the story of the criminal law in colonial New South Wales".[20]

17. Today, the exercise of the prerogative of mercy in favour of offenders in New South Wales, whether convicted for state or federal offences, is rare. There are no statutory constraints on the exercise of the prerogative, but convention indicates that it may be used where there has been a miscarriage of justice (but, for some reason, that miscarriage cannot be addressed through the criminal appeal process), where there are compassionate grounds, or where the petitioner is experiencing undue hardship.[21]

18. It is difficult to find information about recent exercises of the prerogative. Reasons for decisions about its use are generally not publicly available. It seems that the prerogative is most likely to be exercised in one of two cases: (1) where fresh, compelling evidence emerges that is inadmissible in court; and (2) where the offending is

---

19 Catherine Greentree, 'Retaining the Royal Prerogative of Mercy in New South Wales' (2019) 42(4) *UNSW Law Journal* 1328 at 1336.

20 Greg Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788–1900* (Federation Press, 2002) at 6.

21 New South Wales Department of Communities and Justice, 'Royal Prerogative of Mercy: Fact Sheet' (2022); *Osland v Secretary, Department of Justice (Vic)* (2008) 234 CLR 275 at 297 [47]; *Armstrong v R* [2021] NSWCCA 311.

minor and the Executive considers the sentence imposed to be too severe.[22] In November 2018, the NSW Attorney-General formally announced a policy in favour of the release of limited information in relation to petitions for mercy.[23] The publicly available information[24] shows: (1) there is a great range of offences for which petitioners have sought clemency, from the most serious (including murder) to driving offences; (2) the grounds on which review is sought also vary, from medical conditions, allegations of injustice, contrition, hardship, embarrassment, or impact on the petitioners family; (3) applications are rarely successful, with only five applications granted out of the fifty-seven lodged from 2018-2022;[25] and (4) overwhelmingly, the most frequently-cited ground for the

---

22 David Caruso and Nicholas Crawford, 'The Executive Institution of Mercy in Australia: The Case and Model for Reform' (2014) 37(1) *University of New South Wales Law Journal* 312 at 320, 323.

23 New South Wales Department of Justice, 'Policy: Release of information relating to applications for the exercise of the Royal prerogative of mercy and petitions submitted under section 76 of the *Crimes (Appeal and Review) Act 2001*" (5 October 2018).

24 NSW Department of Communities and Justice, 'Petition summary document' (2022, D23/122210); NSW Department of Communities and Justice, 'Petition summary document' (2021, D22/669555); NSW Department of Communities and Justice, 'Petition summary document' (2020, D20/2228651/DJ); NSW Department of Communities and Justice, 'Petition summary document' (2019, D19/302444/DJ); Department of Justice, 'Petition summary document' (30 October 2018).

25 Which converts to approximately 10.5 percent of all petitions.

application is hardship, whether physical, financial, or in terms of the impact on family or dependants.[26]

19. A well-known recent example of the use of the prerogative involved Kathleen Folbigg, who was convicted in 2003 of the murder of three of her children and the manslaughter of another.[27] A 2023 judicial inquiry[28] found that there was reasonable doubt as to the guilt of Ms Folbigg based on scientific evidence that was not available at the time of her initial trial. In June 2023, based on the advice of the State Attorney-General, the Governor pardoned Ms Folbigg unconditionally in relation to all four convictions. Subsequently, the NSW Court of Criminal Appeal directed verdicts of acquittal in respect of the charges for which she had previously been convicted, observing that "while the verdicts at trial were reasonably open on the evidence then available, there is now reasonable doubt as to Ms Folbigg's guilt".[29]

---

[26] 63.2 percent of the petitions lodged from 2018-2022 named 'hardship' as one of the grounds of review.

[27] *R v Folbigg* [2003] NSWSC 895; *R v Folbigg* (2005)152 A Crim R 35; *Folbigg v The Queen* [2005] HCATrans 657.

[28] See *Inquiry into the convictions of Kathleen Megan Folbigg*, July 2019 (Final Report), *Inquiry into the convictions of Kathleen Megan Folbigg* (Final Report of the 2022 Inquiry), November 2023. See also *Folbigg v Attorney General of New South Wales* [2021] NSWCA 44.

[29] *Folbigg v R* [2023] NSWCCA 325 at [29]-[30].

Mercy in the criminal justice system

20. The prerogative is the clearest example of when mercy plays a role in the justice system, but it is exercised only rarely. However, case law includes many references to the exercise of mercy, in a principled manner in the court system. I will address three contexts.

(1) Principles of sentencing

21. The role of mercy in sentencing is controversial.[30] Although sentencing is a discretionary exercise, it is constrained by legislation[31] which, for State offences, prescribes a myriad of purposes for which punishment are to be imposed,[32] and over 30 mitigating and aggravating factors to be weighed in order to come to an eventual sentence.[33] Mitigating factors as used in sentencing are more commonly thought of as relevant to what is now known

---

[30] Richard Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25(1) *Monash University Law Review* 1, 1-2.

[31] *Crimes (Sentencing Procedure) Act 1999* (NSW) ('CSPA'); *Crimes Act 1914* (Cth).

[32] CSPA, s 3A, reflecting the common law as per *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476 and *Muldrock v The Queen* (2011) 244 CLR 120. See also *Crimes Act 1914* (Cth), ss 16A(2)(j), (ja), (k) and (n).

[33] CSPA, s 21A.

as "individualised justice", rather than mercy.[34] Delineating what, if any, role mercy plays in a sentencing decision is therefore difficult.

22. At a general level, the Victorian Court of Appeal noted in *R v Micelli*[35] that "an element of mercy has always been regarded, and properly regarded, as running hand in hand with the sentencing discretion". The case involved a farmer who defrauded the Commonwealth by claiming diesel fuel rebates to which he was not entitled. When the farmer's counsel asked the sentencing judge to exercise "the judicial discretion of mercy", the judge retorted "I am not here to dispense mercy, I am here to dispense justice".[36] Justice Tadgell (Charles JA agreeing) said that the judge's retort was "in no way helpful in an intelligent understanding of the sentencing task"[37]. Justice Charles added:[38]

> "The learned judge was indeed, as he said, there to dispense justice. His Honour was also there to consider whether, on the evidence before him, a reasonable basis existed in well-balanced judgment for adopting a course

---

34 Anthony Duff, 'The Intrusion of Mercy' (2007) 4(1) *Ohio State Journal of Criminal Law* 361, 361–387. Although cf. Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing* (Oxford University Press, 2005) 178, who discuss mitigating factors as 'mercy or equity factors' (although preferring the latter term) and conclude that compassion provides part of the justification for some grounds of mitigation.

35 (1997) 94 A Crim R 327, 331.

36 Ibid.

37 Ibid, 332.

38 Ibid, 333.

> which might bear less heavily on the [offender] than if he were to receive his just desserts."

23. More specifically, in *Postiglione v The Queen,* McHugh J adopted the following explanation of the principle of totality in sentencing, which applies when an offender is being sentenced for multiple offences:[39]

> "[T]he principle... enables a court to mitigate what strict justice would otherwise indicate, where the total effect of the sentences merited by the individual crimes becomes so crushing as to call for the merciful intervention of the court by way of reducing the total effect".

24. It has been suggested that mercy can operate as a stand-alone sentencing principle in certain, exceptional circumstances. Richard Fox, an emeritus Professor at the Monash Faculty of Law, has argued that mercy can be a "meta-principle operating outside the confines of standard sentencing rules" and an additional power of remission in exceptional circumstances.[40] Professor Fox claims that:[41]

> The true privilege of mercy is to be found in the residual discretion vested in each sentence which allows a downward departure from the principle of proportionality outside the principles of mitigation. It can be utilised in exceptional circumstances to allow

---

[39] (1997) 189 CLR 295, 308, quoting unreported remarks of King CJ in *R v Rossi* (Court of Criminal Appeal of SA, 20 April 1988).

[40] Fox at 18.

[41] Fox at 13.

> weight to be given to factors which are ordinarily not regarded as relevant mitigating considerations. It allows sentencers to give effect to significant, but as yet unaccepted, circumstances which, in their opinion, warrant leniency (footnotes omitted).

However, it should not be thought that judges can reduce a sentence simply because they feel sympathy towards the offender's situation. Last year, the Western Australian Court of Appeal overturned a suspended sentence for sexual and indecent assault involving a young male university student, imposed by a judge who referred explicitly to Professor Fox's article.[42] The offender had assaulted a 21-year-old woman in her bed after end of exam celebrations. The victim repeatedly asked the offender to stop but he continued. In deciding not to impose an immediate jail term, the sentencing judge said he had chosen to show mercy to the offender, whom he described as having remorse "at the highest end".[43]

The Court of Appeal questioned this assessment, referring to comments made by the offender, lack of admissions, a late plea of guilty and minimisation of his wrongdoing to a psychologist. The Court affirmed that "exceptional circumstances" may justify the exercise of mercy in sentencing where the sentence that would

---

[42] *State of Western Australia v Rayapen* [2023] WASCA 55 at [125].

[43] *State of Western Australia v Rayapen* [2023] WASCA 55 at [117].

ordinarily be appropriate would produce a clearly unjust result.[44] The Court emphasised that mercy is "not a dispensing power, by which a judge may give effect to idiosyncratic views about punishment for particular crimes or types of crime",[45] and endorsed the following statement of the Full Court of the Supreme Court of Victoria:[46]

> ...we are not to be taken as asserting that mercy can play no part in determining the course that a court should adopt. ...justice and humanity walk together. Cases frequently occur when a court is justified in adopting a course which may bear less heavily upon an [offender] than if he were to receive what is rather harshly expressed as being his just desserts. But mercy must be exercised upon considerations which are supported by the evidence and which make an appeal not only to sympathy but also to well-balanced judgment. If a court permits sympathy to preclude it from attaching due weight to the other recognized elements of punishment, it has failed to discharge its duty.

25. The point that was made by the Victorian Full Court and affirmed by the Court of Appeal of Western Australia, is that merely feeling sympathy for the offender does not justify a lenient or merciful sentence. Instead, the mitigating factors in sentencing, which are governed by common law principles that have been developed over time and respond to particular facts, must be engaged. Examples

---

[44] *State of Western Australia v Rayapen* [2023] WASCA 55 at [204].

[45] *State of Western Australia v Rayapen* [2023] WASCA 55 at [205].

[46] *R v Kane* [1974] VR 759.

include the offender's subjective background, their moral culpability, the fact that they were previously of good character or contributed to the community,[47] and any expression of remorse.

26. The 2013 High Court decision of *Bugmy v The Queen*[48] stated an important sentencing principle about the relevance of profound childhood deprivation in the exercise of the sentencing discretion. The principle self-evidently qualifies the principle of equality in a relevant case. Mr Bugmy was on remand at Broken Hill Correctional Centre. Distressed at the prospect that his anticipated visitors might not arrive at the Centre before visiting hours closed, he violently assaulted a prison officer, causing him to lose sight in one eye.[49] Mr Bugmy's moral culpability for that offence was found to be reduced by the effects of his upbringing. He had a childhood in which violence regularly featured, including an incident where he witnessed his father stab his mother fifteen times.[50] Mr Bugmy had spent multiple periods in custody, made "repeated suicide attempts" and had long-running substance abuse issues.[51] Allowing the appeal and remitting the question of whether the relevant sentence was manifestly inadequate, the plurality in the High Court

---

[47] See Fox at 9-13.

[48] (2013) 249 CLR 571.

[49] *Bugmy* at 583 [6]-584 [11].

[50] *Bugmy* at 584 [12].

[51] *New South Wales v Bugmy* [2017] NSWSC 855, [3]-[4], [6]-[9]. Mr Bugmy also had a history of head injury and auditory hallucinations, see *Bugmy* at 584 [13].

noted that an issue for determination on the remitter would be whether the appellant's background of "profound childhood deprivation allowed the weight that would ordinarily be given to personal and general deterrence to be moderated in favour of other purposes of punishment, including rehabilitation" to the extent allowed for by the sentencing judge.[52]

27. Crimes involving the death of a child at the hands of a parent have also invoked expressions of mercy in the principled consideration that governs the sentencing process. In *Huby,* the Victorian Court of Appeal dismissed an appeal against sentence for culpable driving causing death by a father of his four-year-old daughter.[53] The offender had fallen asleep while driving under the speed limit in broad daylight in good conditions, and his previous driving had not indicated that he was aware of his fatigue. He was sleep deprived because his daughter had been waking during previous nights, and was "distraught" after the accident.[54] The Court noted that the degree of culpability was extremely low and the mitigating factors made the case an extraordinary one, calling for "a significant measure of leniency, even putting to one side the relevance of mercy in the exercise of this sentencing discretion. It would be hard

---

[52] *Bugmy* at 595-596 [46]; See the Court of Criminal Appeal's finding, on remittal, that the sentence was nevertheless manifestly inadequate: *R v Bugmy (No 2)* (2014) 247 A Crim R 556, 559 [14] (Bathurst CJ).

[53] *DPP v Huby* (2019) 88 MVR 256.

[54] *DPP v Huby* at 258, 261.

to imagine a more powerful case for mercy than presented itself."[55] In *Guode,* the Victorian Court of Appeal allowed an appeal against a sentence of imprisonment imposed upon a mother for offences involving the death of three children and an attempt to kill a fourth, in the context of a background of extreme disadvantage and hardship, and impaired mental functioning.[56] The Court adopted the statement mentioned earlier from *Miceli* and concluded that "[m]ercy permitted the applicant's extreme disadvantage and hardship, amongst others, to be recognised as a factor mitigating her sentence".[57]

(2) Summary justice

28. The second example of mercy in the Australian criminal justice system is the summary justice administered in the Local Courts of New South Wales. Summary justice can involve the exercise of broad discretions that avoid the imposition of the full consequences of offending in a particular case. One example is the power to dismiss an information or complaint without conviction, although the charge is proved, because of certain mitigating circumstances. Those circumstances include the character, antecedents, age, health or mental conviction of the person charged, the trivial nature of the offence, or the extenuating circumstances under which the offence

---

[55] *DPP v Huby* at 267.

[56] *Guode v R* [2020] VSCA 257.

[57] *Guode v R* at 18 [46].

was committed.[58] According to the NSW Bureau of Crime Statistics and Research, from July 2022 to June 2023 in the NSW Local Court, 'no conviction recorded' was the penalty imposed in 5202 instances out of 123,772 penalties imposed, comprising approximately 4 percent of all penalties imposed. This is does not include instances where, for example, the arguably similar penalties of a bond or conditional release order without conviction or supervision, no action on a breach of bond, or dismissal with caution[59] were imposed. These sentencing options comprised another 18,614, or approximately 15 percent of the overall penalties imposed by that court.[60]

29. In *Cobiac v Liddy,*[61] Windeyer J described the statutory power not to record a conviction, where the fact of the offending was proved, as a power "to extend mercy".[62] In this case, a seventy-two year old man drove his car on a public street while intoxicated, collided with another car which was parked in the street and having done so

---

[58] See *R v Ingrassia* (1997) 41 NSWLR 447 at 449 and Judicial Commission of NSW, 'Dismissal of charges and conditional discharge' in *Sentencing Bench Book* at [5-000]-[5-034].

[59] Pursuant to the *Children (Criminal Proceedings) Act 1987* (NSW).

[60] For these statistics see *NSW Criminal Courts Statistics July 2018 - Jun 2023* (NSW Bureau of Crime Statistics and Research, December 2023) at <https://www.bocsar.nsw.gov.au/Pages/bocsar_publication/Pub_Summary/CCS-Annual/Criminal-Court-Statistics-Jun-2023.aspx>

[61] (1969) 119 CLR 257.

[62] *Cobic v Liddy* at 268.

failed to stop.[63] He was subsequently prosecuted for three offences against the South Australian *Road Traffic Act*.[64] He received a fine and a disqualification from driving for the second and third offences.[65] For the first offence, driving while intoxicated, the magistrate found that the charge was proved but dismissed it without conviction. While accepting that the offence was a serious one, Windeyer J rejected a submission that it had been impliedly removed from the scope of the power to dismiss a matter without conviction, saying:[66]

> The whole history of criminal justice has shewn that severity of punishment begets the need of a capacity for mercy. ... Especially when penalties are made rigid, not to be reduced or mitigated, it might seem improbable that Parliament would not retain a means of escaping the imposition of a penalty which must follow upon conviction, that it would abolish it, not directly but by a side wind. This not because mercy, in Portia's sense, should season justice. It is that a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice.

30. Thus, Windeyer J contemplated mercy as an aspect of justice that enhanced and, indeed, was necessary for the lawful exercise of the discretionary power exercised by the magistrate in Mr Cobiac's favour.

---

63 *Cobiac v Liddy* at 261.

64 *Road Traffic Act 1967* (SA).

65 *Cobiac v Liddy* at 261-262.

66 *Cobiac v Liddy* at 269.

(3) The partial defence of provocation

31. The third example of principled expressions of mercy in the criminal justice system is the partial defence to murder of provocation. The rationale for the defence resonates with the idea of mercy: the limits of human capacity for self-control and the consequent need to make concessions to that limitation.[67] In 1976, the High Court decided the case of *Johnson,* involving the murder of a father by his two sons, aged 16 and 19, in the context of severe family dysfunction.[68] The father was a heavy drinker who assaulted his wife, as well as his children throughout their childhood and teenage years.[69] The mother of the two boys was away from the home in hospital and the father attempted to evict the boys late at night. On their account, when they refused to leave the home, the father stated that he would kill them and began to assault them, which then resulted in the sons' lethal violence.[70] The High Court ordered that the verdicts of murder be substituted with verdicts of manslaughter on the basis that there was "[t]here was material... from which the jury could have found that the acts of the deceased caused a loss of self-control of both the accused".[71] Gibbs J observed that murder could only be reduced to manslaughter on

---

[67] *Masciantonio v The Queen* (1995) 183 CLR 58 at 72 (McHugh J).

[68] *Johnson v The Queen* (1976) 136 CLR 619.

[69] *Johnson* at 623.

[70] *Johnson* at 623-627.

[71] *Johnson* at 645, also at 660, 671.

the ground of provocation if the provocation in fact had the effect of depriving the accused of the power of self-control.[72] His Honour said (footnotes omitted):[73]

> [T]he law as to provocation obviously embodies a compromise between a concession to human weakness on the one hand and the necessity on the other hand for society to maintain objective standards of behaviour for the protection of human life. ... It is still true to say, as was said in *East's Pleas of the Crown* (1803)..., in the passage quoted by Dixon C.J. in *Parker v. The Queen*: "in those cases where the mercy of the law interposes in pity to human frailty, it will not try the culprit by the rigid rule of justice, and examine with the most scrupulous nicety whether he cut off the exact pound of flesh".

32. The reasoning in *Johnson* indicates that the value of mercy informs the rationale for the defence of provocation. It is important to recognise, however, that the defence is now contentious. In three Australian states the defence has been removed by statute.[74] In Queensland, the defence was retained in a restricted form,[75] and the state commissioned a law reform review of the defence this

---

[72] *Johnson* at 656.

[73] *Johnson* at 656.

[74] In Victoria, Tasmania and Western Australia, see *Crimes (Homicide) Act 2005* (Vic) s 3; *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas) s 4; *Criminal Law Amendment (Homicide) Act 2008* (WA) s 12.

[75] *Criminal Code and Other Legislation Amendment Act 2011* (Qld) s 5; see Queensland Law Reform Commission, 'A Review of the Excuse of Accident and the Defence of Provocation', Report No 64 (2008).

year.[76] In New South Wales, there remains a statutory defence of "extreme provocation",[77] although there are consistent calls for its abolition based on the potential for the defence to excuse or undermine the gravity of gender-based and homophobic violence.[78] An important criticism of the defence is that it permits killers to excuse their actions by reference to the conduct of the victim, leading to perceptions that victims are accountable for their own deaths. This reasoning highlights an important aspect of mercy in a legal context, namely, that its exercise may have consequences for people apart from the beneficiary. Friends and family of the victim may experience mercy towards the offender as deeply hurtful. More generally, tolerance of lethal conduct may maintain problematic

---

[76] Jacqueline So, ' Queensland Law Reform Commission commences review of criminal code', *Australasian Lawyer*, 14 March 2024 < https://www.thelawyermag.com/au/news/general/queensland-law-reform-commission-commences-review-of-criminal-code/481132>.

[77] *Crimes Act 1900* (NSW), s 23. See also Parliament of NSW, Legislative Council Select Committee on the Partial Defence of Provocation, *The Partial Defence of Provocation: Final Report* (2013). The Committee's investigation was prompted by two cases of intimate partner homicide where the defence was raised successfully: *R v Won* [2012] NSWSC 855, *R v Singh* [2012] NSWSC 637.

[78] Kate FitzGibbon, 'Homicide Law Reform in New South Wales: Examining the Merits of the Partial Defence of 'Extreme' Provocation" (2017) 40(3) *Melbourne University Law Review* 769; See also Graeme Coss, 'The Defence of Provocation: An acrimonious divorce from reality' (2006) *Current Issues in Criminal Justice* 51; Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004); Law Reform Commission of Western Australia, *Review of the Law of Homicide, Project 94* (2007), 215, although cf. Andrew Dyer (2023) 'Criminal law reform and the progressives—the case of provocation' (2023) 35(1) *Current Issues in Criminal Justice* 180-195.

attitudes that contribute to more widespread harmful conduct and fail to insist on appropriate standards of self-control.

Conclusion

33. The extent to which mercy is discernible in the administration of justice may come down to definitional arguments, particularly about the true nature of mercy, and whether it is necessarily undeserved or unexpected. [79] There is also no denying that the presence of mercy may depend upon the disposition of individual judicial officers. However, when properly exercised, mercy in the law is thoughtful, and not arbitrary. As I explained in relation to the prerogative of mercy, it seeks a strong justification for its exercise and is applied only sparingly. In sentencing, mercy may be expressed only within a detailed framework of principles, statutory and common law, which are designed to promote consistency in decision-making. In summary justice, courts find many occasions for exercising discretions to act with leniency, reflecting the less serious nature of the offences dealt with and the range of mitigating circumstances that might render a harsh penalty unjust. And finally, although the partial defence of provocation is now in disfavour, its rationale shows how community attitudes can lead the law to view the most serious misconduct with considerable sympathy.

---

[79] Gerald J. Postema, *Law's Rule: The Nature, Value, and Viability of the Rule of Law* (Oxford University Press, 2023) 222.