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Report 76

Proof of Disputed Facts
on Sentence

November 2001
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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6 November 2001

Dear Ministers

I am pleased to present to you Report 76 of the Law Commission *Proof of Disputed Facts on Sentence*, which we submit to you under section 16 of the Law Commission Act 1985.

Yours sincerely

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President

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Minister Responsible for the
Law Commission
Parliament Buildings
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Preface

IN OUR REPORT *Some Criminal Defences with Particular Reference to Battered Defendants*, we recommended that:

- Life imprisonment for murder should cease to be the mandatory sentence, but should continue to be the appropriate sentence unless the circumstances of the offence or the offender make that clearly unjust.
- The partial defence to murder of provocation should be abolished, and provocation should be taken into account in the exercise of the discretion on sentence, as it is in relation to other crimes.¹

The first of these recommendations accords with the policy of the Government and is to be given effect in the Sentencing and Parole Reform Bill, which was introduced into Parliament on 7 August 2001.² The second recommendation has been deferred for further consideration.³

In NZLC R73 we stated that we would issue a supplementary report on the onus and standard of proof as to disputed facts on sentence; in particular, as these might relate to provocation. This was prompted by a concern that our twin recommendations might deprive an offender of that level of protection which the partial defence of provocation affords at a murder trial under the law as it is.

The concern, as we expressed it in paragraph 171 of NZLC R73, was this:

Currently, if the defence can point to evidence that the killing may have been induced by provocation, the onus is on the prosecution to disprove it beyond reasonable doubt. Submitters have expressed concern that if provocation became a matter of mitigation, the onus

¹ Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants: NZLC R73* (Wellington, 2001), see paras 154 and 120 respectively.

² Sentencing and Parole Reform Bill 2001, no 148-1 (first reading on 14 August 2001), cl 91.

³ Hon Phil Goff (19 July 2001) “Goff on Law Commission Report on Battered Defendants” Media Statement.

would be on the defendant to prove that he or she was provoked to commit the homicide.⁴

In this report we propose that the law governing proof of disputed facts on sentence be stated, simply and coherently, as part of the Sentencing and Parole Reform Bill now under debate. There is presently no statutory statement of the law; nor can a complete statement be found in the case law. Such a statement, we suggest, is desirable in itself, whether or not the partial defence of provocation is retained for murder trials.

Much of what we say in this report in chapter 1 takes its detail from the Criminal Justice Act 1985, proposed to be superseded wholly or partly by the Sentencing and Parole Reform Bill. That prospect does not affect our analysis, as the issues, at their most basic, are constant.

In NZLC R73 we undertook to issue a position paper for comment before making a further report. This proved impossible. (If the law governing proof of disputed facts ought sensibly to be codified, the Sentencing and Parole Reform Bill is the natural place for that to happen.) Instead, we have sought comment from a range of persons and bodies, whose views in their totality are likely to be representative.

We wish to thank Judith Ablett Kerr QC (and a group from the New Zealand Law Society's Criminal Law Committee whom she consulted); Nicola Crutchley, Deputy Solicitor-General; Simon Eisdell Moore, Crown Solicitor, Auckland; Geoffrey Hall, Associate Professor of Law, University of Otago; and Gerald Orchard, Professor of Law, University of Canterbury, for their expressions of opinion on the Preface and chapters 1 and 3, and appendices A and C, then in draft; chapter 3 of which has since been extensively revised. Naturally, we accept final responsibility for the conclusions we now express.⁵

The Commissioner responsible for advancing this project was Judge Patrick Keane. The research was undertaken by Janet November and Meika Foster, to whom we express our appreciation.

⁴ In Appendix A we set these concerns within a more detailed context.

⁵ We also wish to thank Geoffrey Hall, on whose text *Hall's Sentencing* (Butterworths, Wellington, 1993–) we have relied and Gerald Orchard, for his letter to the Commission “Establishing the Factual Basis for Sentencing”, dated 19 March 2001.

1

The sentencing task

- 1 **W**HERE THE SENTENCE TO BE IMPOSED for an offence is discretionary,⁶ the judge must accomplish an elusive synthesis.
- 2 The sentence which the judge imposes must fairly reflect how serious the offence is and how culpable the offender. It must recognise and reconcile contrasting, even contending, public and private values or interests.⁷ It must be consistent with sentences imposed on like offenders and for like offences.
- 3 To sentence accurately, the judge needs to know, as fully and precisely as possible, how the offence came to be committed, what part the offender played, what effect the offence had on any victim, and much about the offender.

THE SENTENCING MATERIALS

- 4 On sentence the judge is likely to have a wide and diverse range of materials relating to the offence, to the offender, and to any victim. These will usually include:
- a summary of facts, depositions, or trial evidence;
 - a victim impact statement and perhaps an emotional harm report;

⁶ As we have recommended it ought to be for murder as for other offences.

⁷ Clause 7 of the Sentencing and Parole Reform Bill 2001 no 148-1 sets out a variety of alternative purposes for which a sentence may be imposed, including: offender accountability, reparation and recognition of victim interests, denunciation, deterrence, protection of the community, and rehabilitation of the offender; or a combination of these purposes.

Clause 8 of the Sentencing and Parole Reform Bill sets out the principles of sentencing. These mainly reflect a just deserts/proportionality philosophy of sentencing, in essence that the penalty should be commensurate with the gravity of the offence and the culpability of the offender. Leading proponents of the “just deserts” approach include A von Hirsch (author of *Doing Justice* (1 ed, Hill & Wang, New York, 1976) and with Andrew Ashworth, editors of *Principled Sentencing: Readings on Theory and Policy* (2 ed, Hart Publishing, Oxford, 1998).

- a list of any previous convictions;
- a pre-sentence report and perhaps a reparation report;
- other reports: for example, a psychiatric report, a psychological report, or an alcohol and drug assessment; and
- letters from the offender or his or her family, friends, employers, or referees.

5 The facts narrated in these materials, whether about the offence, the offender, or the victim, are likely to range in cogency from direct, admissible, and neutral evidence to multiple hearsay or expressions of opinion, some of which can be highly emotive.

6 Usually, on sentence, this diversity does not cause any great difficulty. Counsel mostly either dispose by agreement of doubtful or disputed assertions or attack them wholesale in their submissions. The judge remains the ultimate arbiter.⁸

7 But sometimes more is called for. Assertions about the offence or the offender, or by or about the victim, can spring from any one of the materials in the judge's hands or from submissions, and can be so central to sentence that any dispute has to be resolved by the taking of evidence.⁹

8 The narrative on which the prosecution relies to describe the offence can be expected to describe also what the offender did and what was the effect on any victim. This is the context in which disputes about the facts proper to the offence usually arise. But that narrative does not stand alone. The various reports about the offender and any victim can also touch on the facts of the offence.

9 To give a more complete sense of the sentencing task, we identify in this part of our report the various ways in which the facts can be asserted and disputed on sentence. As will be apparent, the law can differ in detail with the context.

FACTS OF OFFENCE

10 How completely the judge will have the facts of the offence (or indeed those relating to the offender) will depend in the first

⁸ In *R v White* [1988] 1 NZLR 264, 267 (CA) McMullin J acknowledged this reality:

In . . . [the sentencing] process, a Judge acts not only on sworn testimony and admitted facts but also on pre-sentence and psychiatric reports, counsel's submissions, and, not least of all, his own experience and judgment.

⁹ No better example could be imagined than the assertion of provocation.

instance on how the offender's responsibility for the offence came to be established formally.

- 11 Where an offender is convicted of a summary offence, the position is relatively simple. If the offender has pleaded guilty, the judge will have a statement of facts, prepared by the prosecution, which summarises the evidence to have been called. If the judge has found the offender guilty of the offence after a hearing, he or she will have the evidence itself.¹⁰
- 12 Where an offender is convicted of an indictable offence¹¹ or one in respect of which there is an election for trial,¹² there are further possibilities.
- 13 If the offender pleads guilty prior to, or during, depositions,¹³ the judge will have, as in a summary case, a statement of facts, supplemented by any statements received, or evidence taken, at depositions. If the offender pleads guilty after depositions but before trial,¹⁴ or on arraignment at trial,¹⁵ the judge will have the depositions. If the offender pleads guilty during trial, the judge will have whatever evidence there is; and, if the offender is found guilty at trial, the judge will have all the Crown's evidence and perhaps evidence given by or for the offender.
- 14 Thus, on sentence, the judge may have at one extreme a summary of facts, usually relatively brief and general, and at the other a body of sworn evidence, sometimes considerable. Even in the latter case, significant disputes of fact are not unknown and may call for the taking of evidence.

FACTS RELATING TO THE OFFENDER

- 15 The facts relating to the offender are likely to be even more various in quality than those relating to the offence; and on sentence, a judge cannot escape having to assess statements of hearsay or opinion. The reports, which the law envisages, and on which the judge has to rely, call for and implicitly authorise such statements.

¹⁰ Summary Proceedings Act 1957, s 67.

¹¹ Summary Proceedings Act 1957, s 2.

¹² Summary Proceedings Act 1957, s 66.

¹³ Summary Proceedings Act 1957, s 153A.

¹⁴ Crimes Act 1961, s 321.

¹⁵ Crimes Act 1961, s 355.

Cultural reports

- 16 Even where the facts are uncontroversial, an offender is entitled to request the judge to hear any person called by the offender, to speak to:
- . . . the ethnic or cultural background of the offender, the way in which that background may relate to the commission of the offence, and the positive effects that background may have in helping to avoid further offending.¹⁶
- 17 The judge must accede to any such request, unless satisfied that what is likely to be said will prove unhelpful either because the sentence to be imposed is fixed by law or because it would be profitless for some other “special reason”.¹⁷
- 18 What the judge then hears is not evidence: there is no need for the person called to make an oath or affirmation.¹⁸ Yet what the judge might receive is an opinion as to why it was that the offender offended as he or she did; and this could give rise to a dispute of fact so central to the offender’s culpability that it could only be resolved on evidence.

Pre-sentence reports

- 19 Pre-sentence reports can have the same potential, even though they call more definitely for an expression of opinion about the offender rather than the offence.¹⁹
- 20 Thus, section 15(1) of the Criminal Justice Act 1985 says:
- . . . a probation officer may, and shall if required to do so by the court, —
- (a) Report to the court on the *social circumstances*, and (where appropriate) the *personal history* and *personal characteristics*, of the offender; . . . [italics our emphasis]²⁰
- 21 Distilled in a pre-sentence report can be many layers of hearsay and opinion. The opinions which an officer has to express can be

¹⁶ Criminal Justice Act 1985, s 16(2).

¹⁷ Criminal Justice Act 1985, s 16(1).

¹⁸ *Wells v Police* [1987] 2 NZLR 560 Smellie J.

¹⁹ Criminal Justice Act 1985, s 15(1). The content of a pre-sentence report is not prescribed directly; it flows rather from the terms in which a probation officer’s duty is prescribed.

²⁰ The ultimate task of the probation officer is to advise on the options for sentence (s 15(1)(b)), which can include recommending how the case is to be disposed of (s 15(5)).

assembled in no other way. As with cultural reports, these may commence with the offender, but can soon go to the offence. Any expression of opinion about the offender may be incomplete unless that happens. But, finally, there must be secure facts; and the offender has a formal right of challenge and the right to call evidence in rebuttal.²¹

- 22 Often enough, furthermore, reports set out the offender's version of the facts; and this can differ significantly from that to which he or she may seem to have acceded on plea. In an extreme case, this could prompt a strong prosecution challenge and call for the taking of evidence.

FACTS RELATING TO THE VICTIM

Victim impact statements

- 23 The purpose of a victim impact statement is, as defined in section 8(1) of the Victims of Offences Act 1987:

... to ensure that a sentencing Judge is informed about any physical or emotional harm, or any loss of or damage to property, suffered by the victim through or by means of the offence, and any other effects of the offence on the victim.²²

- 24 This envisages that the statement should speak primarily about the victim and only in passing about the offender and the offence.²³ Statements, in reality, frequently stray beyond those boundaries, influenced by those who prepared them and how much needs to be known about the context of the offence to describe fully its effect on the victim.

²¹ Section 17(3) provides:

The offender or his or her counsel may tender evidence on any matter referred to in any report, whether written or oral, that is submitted to a court by a probation officer, or by any other person under section 23 of this Act.

²² Note that the Victims' Rights Bill 1999 no 331-2 was reported back to Parliament on 23 August 2001 and, if it is passed, will replace the 1987 Act. See clauses 17–27 concerning victim impact statements.

²³ As McKay J said in *R v G* (15 August 1991) unreported, Court of Appeal, CA 77/91, 4, speaking of section 8(2):

Subsection (2) suggests that what is contemplated is a relatively brief description of the impact on the victim, and not a detailed investigation or enquiry by the Court. What is contemplated is a broad description which will ensure that the sentencing Judge is aware when sentencing of the victim's situation, and is able to take it into account.

- 25 Victims are not expected to prepare statements about themselves. Section 8 allows the prosecutor to make an oral statement, or a written one, in either form “about the victim”.²⁴ Nevertheless, victims occasionally do prepare their own statements; and even where, as is more normal, the statement is prepared by the officer in charge of the case, the victim’s voice is often still to the fore. The result can be a loss of objectivity.²⁵
- 26 In a simple case, a victim impact statement can be confined readily to the effect on the victim – the effect can be predicted from the offence. The more complex the context, and the more serious the offence, the more difficult that can be. To speak accurately about the effect on the victim, may call for more than a passing reference to the offender and the offence.²⁶
- 27 The sentencing judge, faced as he or she may well be with a clash between what a report narrates and the primary version of facts, is urged to be pragmatic.²⁷ Sometimes, however, pragmatism will not

²⁴ Victims of Offences Act 1987, s 8(2) and (4).

²⁵ In *R v Haddon* (1990) 6 CRNZ 508, 511 (CA), the Court said:

While the Act’s reference to a written statement about the offender may suggest that it is to be prepared by another person, that may not always be feasible. Where the statement is to be the victim’s own, the police officer responsible must be ready to proffer guidance, even control, in its preparation; and if appropriate to provide additional material from an objective source so that the Court is not entirely dependent on the victim’s own statements, which cannot be expected to be always balanced and impartial.

²⁶ Contrast a street assault, involving a single blow, in which the offender and the victim are strangers, with a sustained assault by a husband on a wife, by a variety of means, against a background of previous assaults and intimidation.

²⁷ In *R v G*, above n 23, 5, McKay J continued to say:

Where there is disagreement with any of the facts or assessments contained in the victim impact report, one can expect these to be referred to by counsel for the accused. The sentencing Judge must then assess the position, just as the Judge must assess the information contained in a Probation Report. . . . The sentencing Judge can be expected to take into account the fact that some parts of a report are disputed and, if appropriate, those parts can be put to one side. It will be rare that the disputed matters are so material that the Judge will find it necessary to seek some further report to resolve such questions.

serve, and a further report will not suffice. Then the judge may have no alternative but to hear evidence.²⁸

Reparation and emotional harm reports

28 To explore whether the offender can make reparation for emotional harm or loss or damage to property, the court may:

... order a probation officer, or any other person designated by the court for the purpose, to prepare a report for the court in accordance with section 23 of this Act on all or any of the following matters:

- (a) In the case of emotional harm, the nature of that harm:
- (b) In the case of loss of or damage to property, the value of that loss or damage: ...²⁹

29 Reparation reports record either the terms of any agreement between the victim and the offender or a failure to agree, and they are only likely to be contentious when, in the latter case, the officer must express an opinion about the loss or damage the victim suffered.

30 Emotional harm reports, like victim impact statements, go rather to the offence and the offender and have the same capacity to stimulate a dispute of fact, which might only be able to be determined by the taking of evidence.

²⁸ See the discussion in *Curtis v Police* (1993) 10 CRNZ 28, 31 where Thomas J cited the dictum of Lord Alverstone CJ in *R v Campbell* (1911) 6 Cr App R 131: “If the prisoner challenges any statement it is the duty of the judge to enquire into it; if necessary he should adjourn the matter, and if it is of sufficient importance he may require legal proof of it”. (Also cited by the Court of Appeal in *R v Bryant* [1980] 1 NZLR 264, 271.)

²⁹ Criminal Justice Act 1985, s 22. The other topics to which a report may relate concern the means of the offender to make reparation.

2

The sentencing hearing

- 31 **T**HE SENTENCING HEARING is partly inquisitorial and partly adversarial, and the extent to which it is one or the other depends on whether and how far the facts about the offence, the offender, and the victim are accepted or in dispute.³⁰
- 32 The fundamental issue (whether the offender is guilty of the offence) has been resolved either by plea or by process of trial. The prosecution and defence no longer stand opposed so formally as advocates. The prosecutor's duty at trial to act impartially and neutrally,³¹ and to assist the court to a just result,³² is even more pronounced at sentencing.³³
- 33 The strict rules of evidence as they apply at trial do not prevail. The hearsay rule, in particular, does not apply.³⁴ The judge has a wide latitude as to the sources and types of evidence upon which to base the sentence to be imposed.

³⁰ By "adversarial" we mean a hearing in which the judge is akin to an umpire. The conduct of the proceedings is left largely to the parties who present their cases as they think fit, with the result that the information available to the judge is limited to that produced by the parties. By "inquisitorial" we mean a hearing in which the judge actively elicits information from the parties and others. See, for example, M Allars "Neutrality, the Judicial Paradigm and Tribunal Procedure" (1991) 13 Sydney LR 377, 379, for a discussion of the central features of both systems. See too, GEP Brouwer "Inquisitorial and Adversarial Procedures – A Comparative Analysis" (1981) 55 ALJ 207.

³¹ See *R v Thomas (no 2)* [1974] 1 NZLR 658, 659 and BK Grossman "Disclosure by the Prosecution: Reconciling Duty and Discretion" (1987–1988) Crim LQ 346, 347 regarding the role of the prosecutor as "minister of justice".

³² *R v Thursfield* (1838) 8 Car & P 269.

³³ Lord Bingham CJ has said that the role of the prosecutor at sentencing is one of *amicus* (or impartial advisor): *R v Tolera* [1999] 1 Cr App R (CA) 29, 32.

³⁴ *R v Gardiner* (1983) 140 DLR (3d) 612, 648. See too, Australian Law Reform Commission *Sentencing* (Report No 44, Australian Government Publishing Services, Canberra, 1988) para 188. The Commission favoured an inquisitorial approach to allow for flexibility. See also, J Jackson and S Doran *Judge without*

- 34 The judge has a right to inquire into any issue germane to sentence and to seek further information, and he or she is under a duty to do so if the offender challenges any fact significant to the prosecution's submissions as to the sentence to be imposed.³⁵
- 35 When a fact which is relevant to the sentence to be imposed is disputed, and this dispute cannot be resolved by submissions, either because counsel cannot agree or because the judge is left unpersuaded, the formality of the trial is reasserted.³⁶ The rights of the offender, in particular the liberty interests of the offender, and procedural fairness come to the fore.³⁷
- 36 Judges in the common law jurisdictions have always accepted that the decision whether a disputed fact exists must, as at trial, be made to a proper and predictable standard.³⁸ To what standard must the judge be satisfied? As the overseas cases show, there is no single answer.
-

Jury: Diplock Trials in the Adversary System (Clarendon Press, Oxford, 1995) who noted that the judge's role at sentencing changes from resolving conflict to problem solving, cited in the South African Law Commission *Simplification of Criminal Procedure* (Discussion Paper 96, Project 73, Pretoria, 2001), also supporting the inquisitorial role of the sentencing court, para 3.11. See too, *S v Siebert* [1998] 1 SACR 554 (A) 558i–559a, cited in the same Discussion Paper, para 3.11.

³⁵ See Viscount Caldecote LCJ in *R v Van Pelz* [1943] 1 KB 157, 29 Cr App R 10, and Lord Alverstone CJ in *R v Campbell* (1911) 6 Cr App R 131, 132.

³⁶ Compare JA Olah "Sentencing: The Last Frontier of the Criminal Law" 16 CR 3d (1980) 97.

³⁷ *R v Gardiner* above n 34, 648.

³⁸ See Appendix B for a definition of burdens and standard of proof at trial and on sentence.

3

Disputed facts: the present law in New Zealand, England, Canada and Australia

NEW ZEALAND

- 37 **I**N 1980, in *R v Bryant*,³⁹ the Court of Appeal, after reviewing the law in England and Australia, held that an offender, who pleads guilty to an offence, admits by that plea no more than the elements of the offence set out in the information or indictment.⁴⁰
- 38 The offender does not by his or her plea, the Court said, admit what is narrated in any statement of facts. Nor, where there are depositions, oral or by written statement, is he or she to be taken to have admitted their truth.⁴¹ Nor, indeed, where there has been a trial, is he or she necessarily bound by every aspect of the evidence before the jury.

³⁹ *R v Bryant* [1980] 1 NZLR 264 (CA). In this case B and three others pleaded guilty to rendering two police constables incapable of resistance, by violent means, in order to avoid arrest for an offence of unlawfully taking a motorcycle. The police summary alleged that it was B who struck one constable on the head with a sledge hammer, fracturing his skull, and the sentencing judge sentenced B to prison for seven years on this basis. B had, however, denied striking the constable with the hammer. The Court held that the sentencing judge was bound to disregard the disputed allegation about the hammer unless the Crown had established its truth by evidence admissible against B by legal proof (270–271).

Bryant has been referred to in *R v Winton* (9 July 1991) unreported, Court of Appeal, CA 142/92, *Curtis v Police* (1993) 10 CRNZ 28, *Oldeman v Official Assignee* (19 September 1994) unreported, High Court, Tauranga Registry, AP 33/94, *R v French* (18 November 1991) High Court, Christchurch Registry, T 42/91), and *Autocrat Sanyo Ltd v Customs Department* [1987] 1 NZLR 186, for example.

⁴⁰ *R v Bryant*, above n 39, 269.

⁴¹ *R v Bryant*, above n 39, 269.

- 39 Thus, where an offender denies some fact, alleged in a statement of facts, or to be found in depositions or the evidence at trial, or which is asserted independently, on which the prosecution wishes to rely (typically as a fact aggravating the offence), the prosecution must establish its truth by “evidence admissible against [the offender] in accordance with ordinary legal principles”.⁴²
- 40 In *Bryant*, the Court did not say to what standard the prosecution must establish any fact which is aggravating. It spoke rather of “proper legal proof”.⁴³ Implicit in that, however, and in the judgment as a whole, is that the standard of proof, where the prosecution raises aggravating facts which are disputed, is beyond reasonable doubt.⁴⁴
- 41 The Court did not need to consider how far this duty might extend, or how it might relate to proof or disproof of disputed mitigating facts. Must the prosecution, for instance, also displace by the same means, and to the same standard, every fact that the offender asserts, and which it disputes; or might the prosecution’s duty to rebut relate only to those facts which contradict its case? Might the defence carry some onus when it propounds facts that the prosecution disputes? As to such questions as these, the case is silent.

ENGLAND

- 42 In *R v Newton*,⁴⁵ Lord Lane CJ said that where a dispute of fact has not been, and cannot properly be, resolved by the jury, the judge can do one of two things once the trial is over. The first is:

... to hear the evidence on one side and another, and come to his own conclusion, acting so to speak as his own jury on the issue which is the root of the problem.⁴⁶

The second is:

... to listen to the submissions of counsel and then come to a conclusion. But if he does that, then, ... where there is a substantial

⁴² *R v Bryant*, above n 39, 270.

⁴³ *R v Bryant*, above n 39, 271.

⁴⁴ *Select Rent Registry Ltd v Stevens* [1990] 2 NZLR 588 Thorp J, relying also on *R v Chamberlain* [1983] 2 VR 511 (SC).

⁴⁵ *R v Newton* (1982) 4 Cr App R(S) 13 (CA).

⁴⁶ *R v Newton*, above n 45, 15, known in subsequent cases as a “*Newton*” hearing.

conflict between the two sides, he must come down on the side of the defendant. In other words where there has been a substantial conflict, the version of the defendant must so far as possible be accepted.⁴⁷

43 In the 1993 case *R v Kerrigan*, the Court of Appeal held:

It is clear beyond any argument and well-established by authority, that in a *Newton* type hearing the judge has to approach the questions of fact which he has to decide in accordance with the criminal onus and standard of proof.⁴⁸

44 Thus, as at trial, the prosecution must prove beyond reasonable doubt any fact going to the offence, or the offender's part in the offence, on which it relies as aggravating, and that the offender contests. Any reasonable doubt must be resolved in favour of the offender.⁴⁹ The prosecution must generally rebut any contrary fact relating to the offence, or the offender's part in it, likely to be less aggravating or actually mitigating, that the offender asserts in reply.⁵⁰

45 The prosecution has only to rebut a contrary fact asserted by the defence, however, if the fact is consistent with any verdict and is credible – that is, worthy of consideration. Otherwise, the sentencing judge may dismiss what the offender asserts as inconsistent with the jury's verdict, as wholly implausible, or as manifestly false.⁵¹

⁴⁷ *R v Newton*, above n 45, 15.

⁴⁸ *R v Kerrigan* (1993) 14 Cr App R(S) 179, 181 (CA); affirmed in *R v Tolera* [1999] 1 Cr App R(S) 29, 33, and this is as the law is stated to be in *Halsbury's Laws of England* (4 ed, Butterworths, London, 1990 reissue) vol 11(2), Criminal Law, Evidence and Procedure, (x) Proceeding after Plea of Guilty, paras 1049–1051.

⁴⁹ See for example *R v Newton*, above n 45; *R v Taggart* (1979) 1 Cr App R(S) 144, *R v Ball* (1982) 4 Cr App R(S) 351, 353, and *R v McGrath and Casey* (1984) 5 Cr App R 460, 463; and see Archbold, *Criminal Pleading, Evidence and Practice*, (Sweet & Maxwell, London, 2001 edition) para 5-9 and paras 5-18–5-20.

⁵⁰ *R v Kerrigan* is a pointed example of the general rule. K pleaded guilty to causing grievous bodily harm with intent. The prosecution alleged that he attacked unprovoked. He denied this, and claimed that he acted in defence of a friend, whom his victim had threatened with a knife. The Court of Appeal held that at a "*Newton*" hearing, the prosecution still carried the onus that it carried at trial, and had to exclude the offender's account. The sentence imposed, the Court said, should have been determined, "... on the basis that the account which was given to the learned judge by the appellant might have been true".

⁵¹ *R v Hawkins* (1985) 7 Cr App R(S) 351 (CA); see also *R v Taggart* (1979) 1 Cr App R(S) 144 (CA): the judge is not bound to accept the factual basis advanced by the offender.

- 46 Also, there are facts asserted by the offender on sentence which the prosecution never has to rebut in discharge of its onus of proof. The offender must prove to the balance of probabilities any fact on which he or she relies that is “extraneous”.⁵² We take extraneous to mean:
- any fact beyond the immediate facts of the offence, or the offender’s part in it, and which does not contradict any that the prosecution asserts; and
 - is outside the prosecution’s knowledge and ability to refute.⁵³

CANADA

- 47 In Canada the underlying premise, prior to an amendment to the Canadian Criminal Code in 1995, which we set out in Appendix C to this report,⁵⁴ was that the trial process does not end with the trial: the balance at trial between prosecution and defence continues to apply, analogously, at sentence.
- 48 In 1982, Dickson J, in the leading case of *R v Gardiner*,⁵⁵ speaking for the majority,⁵⁶ after making an exhaustive review of the then English and Australian authorities, as well as Canadian provincial cases, stated:

Sentencing is part of a fact-finding, decision making process of the criminal law. Sir James Fitzjames Stephen, writing in 1863 said that

⁵² *R v Broderick* (1994) 15 Cr App R (S) 476, 479 (CA); *R v Guppy* 16 Cr App R (S) 25 (CA). See Archbold, above n 49, 512–513, para 5-20, as to the propositions that the cases establish where facts put forward by the defence do not contradict the prosecution evidence.

⁵³ *R v Broderick*, above n 52, illustrates both exceptions to the prosecution’s duty of rebuttal. There, a woman who imported cocaine into the United Kingdom from Jamaica, did not contest the Crown’s account, but asserted that she had thought it cannabis and that she had been placed under duress in Jamaica. The Court of Appeal held that the sentencing judge was right to have rejected her assertion as to her belief as wholly implausible and to have decided that the prosecution had no duty to rebut the extraneous claim of duress.

Contrast *R v Tolera*, above n 48, where, on the issue of duress, the Court of Appeal held, in effect, the prosecution had a duty to rebut extraneous facts that did not contradict the Crown’s case. The Court’s decision is founded on *Kerrigan*, above n 48, and does not refer to *Broderick*. The distinction between the two cases may be factual, that the time and place of the alleged duress was crucial to whether or not it was considered “extraneous”.

⁵⁴ Appendix C to this report contains sections 723–724 of the Canadian Criminal Code RSC 1985 c.C-46.

⁵⁵ *R v Gardiner* (1983) 140 DLR (3d) 612.

⁵⁶ The Court divided four to three on the issue of jurisdiction; the three in dissent expressed no view about the present point.

“the sentence is the gist of the proceedings. It is to the trial what the bullet is to the powder”. . . . The statement is equally true today.

One of the hardest tasks confronting a trial judge is sentencing. The stakes are high for society and for the individual. Sentencing is the critical stage of the criminal justice system, and it is manifest that the judge should not be denied an opportunity to obtain relevant information by the imposition of all the restrictive evidential rules common to a trial. Yet the obtaining and weighing of such evidence should be fair. A substantial liberty interest of the offender is involved and the information obtained should be accurate and reliable.⁵⁷

- 49 The issue in *Gardiner* (as in *Bryant*)⁵⁸ was specifically: what standard of proof must the Crown sustain when advancing contested aggravating facts? The majority, on behalf of whom Dickson J spoke, held this to be the standard of beyond reasonable doubt. Dickson J said:

If the facts are contested the issue should be resolved by ordinary legal principles governing criminal proceedings including resolving relevant doubt in favour of the offender.

To my mind, the facts which justify the sanction are no less important than the facts which justify the conviction; both should be subject to the same burden of proof. Crime and punishment are inextricably linked.⁵⁹

- 50 Dickson J did not state the corollary, that it is for the prosecution to negate beyond reasonable doubt any directly contrary fact asserted by the defence. Nor did he consider whether the defence might carry any onus to prove any mitigating facts that are extraneous to the offence or the offender’s part in the offence.

- 51 Until 1995, when the Criminal Code was amended to state comprehensively the law as to facts on sentence, undisputed and disputed, the position as to mitigating facts relating to the offence,

⁵⁷ *R v Gardiner*, above n 55, 648. Dickson J found the American authorities unhelpful. He said at 647 “Due process bears a very different meaning in Canada than that which has been accorded the phrase in the United States”.

⁵⁸ *R v Bryant*, above n 39.

⁵⁹ *R v Gardiner*, above n 55, 649. Dickson J rejected the Crown’s argument that “there is a sharp demarcation between the trial process and the sentencing process”. In Dickson J’s view, retention of the criminal standard is the more necessary because on sentence, by contrast with trial, the hearing is informal, and the judge has a wide discretion to exercise.

or the offender's part in it, or extraneous to both, remained indefinite.⁶⁰

- 52 The Code now stipulates that a disputed fact, aggravating or mitigating, can only be relevant for the purpose of sentence if established to a minimum general standard of reliability. The sentencing judge may only rely on a disputed fact if satisfied to the balance of probabilities that it exists.⁶¹
- 53 The Code also imposes a correlative, apparently no less general and unqualified, burden of proof on the proponent of a disputed fact. It is specific in one respect: the prosecution must prove any disputed aggravating fact beyond reasonable doubt. In that, it confirms the decision in *Gardiner*.⁶²
- 54 The Code does not distinguish disputed mitigating from disputed aggravating facts. Instead, the effect of the Code is that if the offender asserts a disputed fact (which can be expected to be less aggravating or actually mitigating), that is for the offender to prove to the balance of probabilities.
- 55 On a literal reading, therefore, the Code does not recognise, as does English law and as the majority in *Gardiner* may have conceivably, that the prosecution's duty to prove aggravating facts relating to the offence, or the offender's part in the offence, can include a duty to

⁶⁰ In *R v Holt* (1983) 4 CCC (3d) 32, 52 (CA (Ontario)), the Court said that the effect of *R v Gardiner* was that:

[I]f the Crown advances contested aggravating facts in a sentencing proceeding for the purpose of supporting a lengthier sentence, it must prove those aggravating circumstances beyond a reasonable doubt. But that case does not support the reverse proposition – that in the absence of such proof all possible mitigating facts must be assumed in favour of the accused.

Contrast *R v Brown* (1991) 2 SCR 518, 522 (SCC) and *R v Cooney* (1995) 98 CCC (3d) 196, 202–203 (CA (Ontario)), neither of which made any reference to *Holt* or the qualification which it introduced.

⁶¹ Canadian Criminal Code RSC 1985 c.C-46 (as amended by SC 1995, c 22, s 6), s 724(3)(d), which is subject to s 724(3)(e).

⁶² This has been noted in a number of cases which discuss s 724(3)(e) of the Code including *McDonnell v R* (1997) 145 DLR (4th) 577, 597 per Sopinka J: “*R v Gardiner* . . . held that each aggravating factor in a sentencing hearing must be proved beyond reasonable doubt. Such an approach is confirmed by Parliament in the new s 724(3)(e) of the Criminal Code (as amended by SC 1995, c 22, s 6)”.

rebut contrary facts advanced by the defence. Instead, it imposes on the offender a duty to prove to the balance of probabilities every disputed mitigating fact, not just those which are extraneous.⁶³

56 We assume, for the purpose of this report, that the Code is to be taken literally and that the laws of England and Canada have parted company on the proof or disproof of mitigating facts.

AUSTRALIA

The present law

57 The law in Australia has evolved only after a sustained debate.⁶⁴ The High Court of Australia did not speak definitively until 1999 in *R v Olbrich*.⁶⁵ It will be enough to state the prior and contrasting positions in South Australia and Victoria.

58 In South Australia the law was, as in England, that the prosecution had to prove beyond reasonable doubt any contested aggravating matters, and thus to disprove any directly contradictory matters raised by the defence. Bray CJ articulated this in a series of cases. In the 1971 case *Weaver v Samuels*, for example, he said:

The defendant must be given the benefit of any reasonable doubt on matters of penalty, as well as on matters of guilt or innocence, in the absence of any statutory provision to the contrary. The plea of guilty

⁶³ Whether that was intended to be the effect of the Code may be open to question. In the Proceedings of the Standing Senate Committee, issue no 45 of 27 June 1995, discussing the Bill, C-41, to amend the Criminal Code in relation to sentencing, it was assumed that the law had been settled since *Gardiner*, above n 55, with regard to proof of an aggravating factor which was contested by the offender. See Senate, Standing Committee on Legal and Constitutional Affairs *Report on Bill C-41* no 45, 27 June 1995, 46–47.

None of the cases we have found on s 724(3) consider the proof of mitigating facts except for *R v Holder*, 84 OTC 161, a case very similar to *Broderick*, above n 52. *Holder* suggests that the difference between English and Canadian law in practice may be not as great as a literal reading of the Code would suggest. There, a woman, under sentence for importing cannabis from Jamaica into Canada, asserted that she was unaware that the substance was cannabis and that she had been coerced in Jamaica. The sentencing judge, responding as did the judge in *Broderick*, applied not merely the Code but the English authorities.

⁶⁴ Kennedy J helpfully reviewed the State authorities as part of a wider survey in *Langridge v R* (1996) 87 A Crim R 1 CCA (WA) 4–17. See also RG Fox and MB O'Brien “Fact-Finding for Sentencers” (1975) 10 Melb U LR 163, referred to in *Bryant*, above n 39, 271.

⁶⁵ *R v Olbrich* (1999) 108 A Crim R 464 (HCA).

admits no more than the bare legal ingredients of the crime. Any dispute as to anything beyond this must be resolved on ordinary legal principles, including the presumption of innocence.⁶⁶

59 Bray CJ allowed that where an offender alleges any fact in mitigation “peculiarly within his knowledge which the prosecution is not in a position to negative” his or her version must be accepted but only “within the bounds of reasonable possibility”.⁶⁷ He stopped short of imposing any onus on the offender.

60 In 1998, however, in *R v Storey*,⁶⁸ the Court of Appeal of the Victorian Supreme Court, when asked to align the trial and sentencing phases of the criminal justice process as completely, declined by a majority, stating:

... when a judge comes to sentence an offender, there is no general issue joined between the Crown and the offender as there is on the trial of that offender. It is not for the Crown to undertake some general burden of proving all facts relevant to sentence.

And equally:

There can be no question of either party’s undertaking any onus of proving any further fact unless and until it is suggested that there are matters beyond the bare elements of the offence (elements that are established by the verdict or plea) which the judge should take into account in passing sentence.⁶⁹

61 The *Storey* majority said that if there were a dispute about a particular fact, what was important was the use the judge would make of the fact – was it adverse to the offender or in the offender’s favour? – and the degree of satisfaction the judge had to have before using the fact in determining the sentence.⁷⁰

⁶⁶ *Weaver v Samuels* [1971] SASR 116, 119–120. See also *Law v Deed* [1970] SASR 374. In *R v Anderson* (1993) 177 CLR 520, the High Court had agreed that these decisions were still good law in Australia. As to whether it spoke more generally, contrast *Langridge v R*, above n 64, 21 and *R v Storey* [1998] 1 VR 359, 363 (CA).

⁶⁷ *Weaver v Samuels*, above n 68, 119 following *Law v Deed*, both above n 66.

⁶⁸ *R v Storey* [1998] 1 VR 359 (CA), the Court dividing four to one, Callaway JA dissenting.

⁶⁹ *R v Storey*, above n 68, 367.

⁷⁰ *R v Storey*, above n 68, 367–368. The Court considered that: “Neither of these questions requires consideration of which party bears the onus of proving the matter”. In the Court’s view, the question was what was the standard of proof to be met.

62 The majority rejected the notion that the prosecution must disprove any mitigating factors which it disputes. They reiterated that the prosecution carries no general onus on sentence, and said:

[T]o require the Crown to disprove factors which go in mitigation leads to unacceptable, if not absurd, results. If it is alleged that the offender committed the crime because he or she was a drug addict and it is for the Crown to prove, beyond reasonable doubt, that that is not so, what use is the judge to make of the conclusion if, not being persuaded that the offender probably was a drug addict he or she is, nevertheless, not persuaded that the matter is free from reasonable doubt? Is the judge then to sentence the offender on the basis that the assertion (of which the judge is unpersuaded on the balance of probabilities) is true? That is, is the judge to sentence the offender on the basis of some assumed “facts” of which the judge is not persuaded?⁷¹

63 The majority did accept that “the sentencing decision is commonly no less important to the offender than the decision about guilt or innocence”;⁷² and affirmed, therefore, that:

The judge may not take facts into account in a way that is *adverse* to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account *in favour* of the accused, it is enough if those circumstances are proved on the balance of probabilities.⁷³

64 This conclusion was adopted by majority of the High Court of Australia unreservedly in *R v Olbrich*,⁷⁴ with the effect that it became definitive throughout Australia.

⁷¹ *R v Storey*, above n 68, 369.

⁷² *R v Storey*, above n 68, 369.

⁷³ *R v Storey*, above n 68, 369: the majority defined adverse as “any circumstance which the judge proposes to take into account adversely to the interests of the accused – ‘adversely’ in the sense that it is ‘likely to result in a more severe sentence than would otherwise be the case’”; a notion wider than “circumstances which aggravated the offence”.

⁷⁴ *R v Olbrich*, above n 65, 464, 471. The Western Australian Court of Criminal Appeal, for example, in *R v Lauritsen* (2000) 114 A Cr R 333, 340 followed *Olbrich*.

65 In *R v Olbrich*,⁷⁵ the High Court majority took as their stance that of the majority in *R v Storey*⁷⁶ without seeking greatly to elaborate it, stating:

References to onus of proof in the context of sentencing would mislead if they were understood as suggesting that some general issue is joined between prosecution and offender in sentencing proceedings: there is no such joinder of issue. Nonetheless, it may be accepted that if the prosecution seeks to have the sentencing judge take a matter into account in passing sentence it will be for the prosecution to bring that matter to the attention of the judge and, if necessary, call evidence about it. Similarly, it will be for the offender who seeks to bring a matter to the attention of the judge to do so and, again, if necessary, call evidence about it.⁷⁷

66 This is what the Canadian Criminal Code requires on a literal reading.

Dissenting voices

67 In *Storey*, Callaway JA defended a position akin to that in England. The trial and sentencing processes comprise, he contended, a continuum. The punishment imposed on sentence is a consequence of guilt established at trial, and is an implicit but contested purpose or effect of the trial. The basal values should be constant and should on sentence, as at trial, favour the offender.⁷⁸

68 Where the prosecution disputes a fact mitigating the offence that is, as Callaway JA put it, “not extraneous” to it, His Honour considered the prosecution should exclude that fact in discharge of its general onus to prove the facts on which it relies.⁷⁹ The most that the offender should have to do, he considered, is to discharge the evidential onus,⁸⁰ that is, show that the fact asserted is credible.

⁷⁵ *R v Olbrich*, above n 65. The Court divided four to one, Kirby J dissenting. The issue in the case (whether the offender, an importer of Class A drugs, was a principal as well as a courier), the majority thought unhelpful for the purpose of sentence. Kirby J considered that it was crucial. This may be why the majority saw no need to address in more detail the principles on which a sentencing judge is to approach disputed issues of fact.

⁷⁶ *R v Storey*, above n 68.

⁷⁷ *R v Olbrich*, above n 65, 471. The Court continued: “We say ‘if necessary’ because the calling of evidence would be required only if the asserted fact was controverted or if the judge was not prepared to act on the assertion”.

⁷⁸ *R v Storey*, above n 68, 378.

⁷⁹ *R v Storey*, above n 68, 378–379.

⁸⁰ *R v Storey*, above n 68, 379.

69 The consequence of requiring the Crown to rebut contrary facts, when proving aggravating facts, could be, Callaway JA agreed with the majority, that the sentencing judge might be constrained to accept the offender's less aggravating or actually mitigating version only because the prosecution could not exclude it, even where the fact asserted by the offender is improbable.⁸¹ But, he argued, it most accords with fundamental principle, and is still practical, to require the sentencing judge "to take the most favourable view, both of the circumstances of the offender and of the offence, that is *reasonably* open on the material before the court".⁸²

70 Callaway JA was at one with the majority that the offender should prove mitigating facts, extraneous to the offence or the offender's part in it, on the balance of probabilities.⁸³

71 Kirby J, in dissent in *R v Olbrich*,⁸⁴ took a similar stance. He described the sentencing hearing as the final part of "an uncompleted criminal trial", and said:

It is fundamental that in any such proceeding, without clear statutory authority, the accused person cannot be obliged to prove a fact. The criminal trial process does not cease to be accusatorial after the conviction is recorded and during the proceedings relevant to the determination of the sentence.⁸⁵

72 Kirby J did not rule out the possibility that the offender may carry a burden as to mitigating facts that is persuasive and not merely evidential. He was careful to qualify it, however, stating:

The accused who stands for sentence once convicted following a plea, is certainly not obliged to disprove matters which would tend to aggravate the seriousness of the circumstances of his or her offence. He or she may

⁸¹ *R v Storey*, above n 68, 376–377. Callaway JA acknowledged the force of the majority's argument. At 376 he said:

... if circumstances of mitigation must be disproved beyond reasonable doubt, with the prisoner bearing only an evidentiary burden, it may appear that the judge is being required to treat as certain something in respect of which there may be no more than a reasonable possibility. Indeed the judge may be satisfied, on the balance of probabilities that the relevant circumstances of mitigation did not obtain. It is that consideration which leads their Honours to describe the position in England and South Australia as bordering on the absurd.

⁸² *R v Storey*, above n 68, 378 and 380.

⁸³ *R v Storey*, above n 68, 379–380.

⁸⁴ *R v Olbrich*, above n 65.

⁸⁵ *R v Olbrich*, above n 65, 479.

seek (where the Crown contests an assertion) to adduce facts aimed at convincing the sentencing judge of circumstances relevant to the mitigation of the offence and thus to the diminution of punishment.⁸⁶

- 73 The position the minority voices defend appears essentially to be that which has evolved in England.

CONCLUSION

- 74 As will be apparent, what the New Zealand Court of Appeal said in *R v Bryant*⁸⁷ about proof of disputed aggravating facts is consistent in result with the law in the main Commonwealth jurisdictions. But, as will also be evident, the principle on which that result rests is critical when the issue is where the onus should lie if a mitigating fact is asserted and disputed.

⁸⁶ *R v Olbrich*, above n 65, 480–481. Kirby concluded as to the issue on the appeal, whether the offender was a principal or merely a courier:

. . . where the Crown asserts that the case constitutes an aggravated example, it must prove beyond reasonable doubt the facts that demand that conclusion. Here, whether or not the Crown explicitly asserted the circumstances of aggravation (that the respondent was a “principal”), it undoubtedly secured the benefit of that conclusion not by such proof but simply because the sentencing judge rejected the attempt of the respondent to prove a mitigating circumstance. Neither logic nor law warranted that result. Failure by one to prove fact A does not constitute proof by another of fact B. The sentence imposed . . . was flawed as a consequence.

⁸⁷ *R v Bryant*, above n 39.

4

Should the law be codified?

75 **M**OST OF OUR COMMENTATORS saw no present need to codify the law as to proof of disputed facts on sentence for the following reasons:

- The present law is effective and flexible.
- Codification could encourage disputes and lead to an increase in the number of hearings.⁸⁸
- Codification could lead to more protracted hearings.⁸⁹
- Codification would diminish the value of a guilty plea.

76 However, most commentators saw a need for the law to be stated definitively if the Sentencing and Parole Reform Bill is enacted, including as it does the proposed change in the sentence for murder,⁹⁰ if only to clarify the burden of proof in that one instance.

77 The Crown commentators thought the Canadian legislation was fair and balanced in respect of proof of both aggravating and mitigating facts, thus agreeing that the offender should prove, to the balance of probabilities, any mitigating facts on which he or she wished to rely.

78 Defence bar and academic commentators considered that if the Canadian model were followed, and the partial defence of provocation became a mitigating factor only,⁹¹ there would be a significant increase in the severity of the law for murder.⁹² Their consensus was, more generally, that the offender should only ever carry an evidential burden.

⁸⁸ This would increase the emotional stress for victims and offenders, judicial time and financial resources.

⁸⁹ This would adversely impact upon witnesses, particularly victims.

⁹⁰ See clauses 91 and 92 of the Sentencing and Parole Reform Bill 2001 148-1.

⁹¹ Note that none of our commentators favoured abolition of provocation as a partial defence to murder.

⁹² There is presently only an evidential onus on an accused raising the defence of provocation.

- 79 We recommend that the law relating to proof of disputed facts be stated simply but comprehensively in the Sentencing and Parole Reform Bill for the following reasons:
- At present, sentencing hearings are prevalent overseas and do take place in New Zealand; and the issue in New Zealand as overseas can be significant.⁹³ There is no defined procedure for proof of disputed facts.
 - The Bill lists, non-exclusively, aggravating and mitigating facts, but does not allow for the ambiguities latent in that distinction or prescribe burdens and standards of proof.⁹⁴
 - If, as we have recommended, provocation becomes a mitigating factor at sentence rather than a partial defence to murder, the need for legislation to clarify the law relating to the onus of proof for disputed facts, aggravating as well as mitigating, will become more pressing.
- 80 The question is, we consider, how best, in principle and practice, to strike a proper balance between the State and the offender, the public interest and the liberty of the individual.

⁹³ See, for example, *R v Schofield* (24 April 2001), unreported, High Court, Auckland Registry S 5/01. This was a case where S pleaded guilty to manslaughter after he had lit his colleague's grass skirt at a party, so causing the death of his colleague and serious burns to another. There had been a number of earlier incidents where S had lit clothing of other guests, and the Crown's version of these incidents was challenged. Hansen J heard evidence for two full days and a part of a third day as to the disputed facts. Some of these demonstrate the "eye of the beholder" phenomenon. For example, the Crown saw the earlier incidents as aggravating the offence, while the judge agreed with the offender's counsel that they were to some extent mitigating, in the sense that they caused no harm, were in the context of general revelry and hilarity, and could have lessened the offender's consciousness of the danger of what he was doing. See Appendix B, paras B8–B11, of this report regarding the latent ambiguities in the terms aggravating and mitigating.

⁹⁴ Compare s 718.2 of the Canadian Criminal Code where the introduction of statutory lists of aggravating factors (non-exhaustively) was accompanied by the codification of standards of proving disputed facts.

5

A sentencing procedure code

CHOICES

- 81 **I**N THEORY, the choices for a code range from the adversarial (the sentencing hearing as an extension of the trial, focusing on the proponent of a contested fact) to the inquisitorial (the sentencing hearing as distinct from the trial, focusing on the judge as the decision-maker with power to elicit information).⁹⁵
- 82 The choices made in England, Canada, and Australia lie between these extremes. They differ as to their point of reference. The dividing lines derive from the presence or absence of burdens and standards of proof and how these are allocated.

Adversarial variants

- 83 In the first and most extreme of the adversarial variants, the prosecution must prove beyond reasonable doubt any disputed aggravating fact that it asserts about the offence, the offender's part in the offence, or the offender, and must rebut any contrary, less aggravating or mitigating fact which the offender asserts. The offender need do no more than discharge an evidential burden: assert a fact which is credible – that is, worthy of belief. None of the jurisdictions discussed has adopted this “continuation of trial” approach absolutely.⁹⁶
- 84 In the second variant, the prosecution retains the overall burden of proof just described, but the offender assumes a reverse onus to prove

⁹⁵ See above n 30 for the distinction between inquisitorial and adversarial.

⁹⁶ However, some cases have appeared to conform with it quite closely: see *Law v Deed* [1970] SASR 374, 377–378 and *Weaver v Samuels* [1971] SASR 116, 120. See also *R v Kerrigan* (1993) 14 Cr App R(S) 179, 181–182 (CA), *R v Tolera* [1999] 1 Cr App R 29.

on the balance of probabilities any mitigating fact “extraneous” to the offence or the offender’s part in it.⁹⁷ This variant recognises that normally only the offender knows such facts. The prosecutor does not know them and so does not have the ability to refute them.

- 85 In the third variant, the prosecution must prove any aggravating disputed fact beyond reasonable doubt, but the offender must prove any disputed mitigating fact to the balance of probabilities.⁹⁸ This variant abandons the distinction between disputed mitigating facts, which relate to the offence, or to the offender’s part in it, and those which are “extraneous”.

Inquisitorial variant

- 86 In this final variant neither prosecution nor offender has a burden of proof as such, but the judge has to be “satisfied” of all facts he or she takes into account on sentence.⁹⁹
- 87 This approach allows the sentencing judge the most discretion. He or she need only “reach a clear conclusion” that a substantial ground exists to support the contention at issue.¹⁰⁰ Thus, the procedural protection of the offender’s rights lies with the judge.

⁹⁷ This approach is most clearly articulated by Callaway JA in *R v Storey*, [1998] 1 VR 359, 379–380. See also *R v Guppy* 16 Cr App R(S) 25 (CA); *R v Broderick* (1994) 15 Cr App R(S) 476 (CA); *R v Palmer* (1994) 15 Cr App R(S) 123 (CA); *R v Holder* 84 OTC 161.

⁹⁸ See s 724(3)(d) and (e) of the Canadian Criminal Code in Appendix C to this report.

⁹⁹ The Australian cases of *Olbrich* (1999) 108 A Crim R 464 and *Storey* above n 97 come closest to this model in philosophy; the focus being on the judge taking into account facts adverse to or in favour of the interests of the offender. The Australian Law Reform Commission tentatively favoured an inquisitorial approach to sentencing in its *Sentencing Procedure* (Discussion Paper 29, Australian Government Publishing Services, Canberra, 1987) 40. The Australian Law Reform Commission Report *Sentencing* (Report No 44, Australian Government Publishing Services, Canberra, 1988), para 188, recommended that legislation governing the standard of proof should do no more than require that the court be “satisfied” of the relevant fact. This was to allow flexibility. Compare the South African Law Commission, *Simplification of Criminal Procedure* (Discussion Paper 96, Project 73 Pretoria 2001).

See also for New Zealand, s 75(2) of the Criminal Justice Act 1985 (re the sentence of preventive detention) and *R v White* [1988] 1 NZLR 264, 267 (CA): the phrase “is satisfied” does not import a beyond reasonable doubt standard, followed in *R v Leitch* [1998] 1 NZLR 420, 428.

¹⁰⁰ See *Angland v Payne* [1944] NZLR 610, 626, cited in *R v White*, above n 99.

COMMENTATORS' PREFERENCES

- 88 Defence bar and academic commentators prefer the first variant, as best preserving the values of the trial process and the balance that now obtains should provocation cease to be a partial defence to murder and become a factor on sentence.
- 89 The Crown commentators prefer the third variant because the guilt of the offender is established and the presumption of innocence no longer applies, and thus, they say, the prosecution should no longer carry a general onus of proof.

OUR PREFERENCE

- 90 We prefer the second variant, first, because it is one of the three variants that recognises that when a dispute of fact erupts on sentence, that issue must be resolved adversarially. Secondly, of the three variants in which that is recognised, it strikes, we consider, the best balance between the public interest and the values inherent in the trial process: the liberty interests of the offender¹⁰¹ and procedural protections.¹⁰²

An adversarial answer

- 91 In the vast majority of cases, the sentencing process is in essence inquisitorial. But immediately there is a significant dispute of fact, the prosecution and defence become, just as at trial, formal adversaries. The judge cannot begin to exercise his or her discretion on sentence, wide though it is, to tailor the sentence to be imposed to the offence and the offender, without first resolving the dispute.

¹⁰¹ *R v Gardiner* (1983) 140 DLR (3d) 612, 648 per Dickson J, and see JA Olah "Sentencing: The Last Frontier of the Criminal Law" 16 CR 3d, (1980) 97, 103–110, "perhaps the most vital consideration in this debate is our cherished belief in the sanctity of individual liberty". The symbolic purpose of the reasonable doubt rule is to express commitment to the values of individual liberty and freedom: see B Underwood "The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases" 86 Yale LJ 1299 at 1323 (1977).

¹⁰² As to the procedural protections see: *R v Gardiner*, above n 101, 649 per Dickson J. An offender has the right to the rules of natural justice and the opportunity to cross-examine prosecution witnesses and challenge adverse evidence: see *R v Bodmin JJ, ex parte McEwan* [1947] 1 KB 321; [1947] 1 All ER 109, *Lawrence v R* [1933] AC 699 (PC), *R v Carey* [1952] OR 1, 13, cited in JA Olah above n 101.

- 92 A possible answer, we accept, might be to adopt the inquisitorial variant: to authorise the judge to resolve the dispute in the exercise of his or her discretion as to sentence. Then the judge would need only to be “satisfied” as to the existence of the fact.
- 93 This variant is inapt, we consider, to the issue. Usually, when deciding what sentence is proper, the judge must assess how relevant a fact may be, how influential it ought to be, and whether it is aggravating or mitigating. These are issues of discretion inherently. When a fact is disputed, by contrast, the judge is confronted with a prior and different issue: whether the fact exists. To decide this, the judge must function instead as a tribunal of fact, and, we consider, to a definite standard.
- 94 We favour a comprehensive regime, like the Canadian Code, which governs explicitly, by rules, the hearing of any evidence necessary before the judge considers and imposes sentence. We would adopt much of the Canadian Code but we differ as to the variant of proof which ought to apply.

Choice of burden and standard

- 95 Common to all but the inquisitorial variant is the principle that it is for the prosecution to prove beyond reasonable doubt any disputed aggravating fact which it asserts, whether that relates to the offence, the offender’s part in it, or the offender. This is our present law.
- 96 We would then, as do the English, impose on the prosecution, in discharge of its onus to prove any aggravating fact, a duty to rebut any contrary fact advanced by the offender, as long as that fact is proximate to that asserted by the prosecution, is credible, and is not inconsistent with any verdict.
- 97 In this, we do not ignore the reasons for the Australian variant:¹⁰³
- that the offender’s guilt has been established by process of trial or plea and the presumption of innocence no longer applies;
 - that there is no general joinder of issue in respect of which the prosecution must bear a corresponding onus; and
 - that on sentence many facts may be undisputed and those in dispute relatively confined.
- 98 But, we consider, when there is a significant dispute of fact on sentence, the need to achieve a just result should be accorded the

¹⁰³ To which the Canadian Criminal Code variant is very similar.

highest priority. The sentencing process, like the process of trial, must, we consider, be ordered to the fullest extent possible so as to avoid any risk of injustice.

- 99 A just result on sentence is one in which the sentence imposed is proportionate to the seriousness of the offence and the offender's part in it, and is appropriate to the offender.¹⁰⁴ Any sanction which is in excess of what is commensurate with the offence is, to that extent, arbitrary and unjustifiable. This is especially so where the offender is by sentence deprived of his or her liberty.¹⁰⁵
- 100 Disputes of fact relating to the offence, the offender's part in it, or to the offender, arise precisely because they bear intimately on what sentence is proportionate and just. Who then should carry the risk of any error?
- 101 At trial, the offender is protected from the risk of error by the breadth and height of the onus of proof imposed on the prosecution and by the presumption of innocence. The accused mostly carries no more than an evidential onus. On sentence, the offender should be protected equally, where the existence of any aggravating fact relating to the offence, or the offender's part, is in dispute.
- 102 This logic should continue to hold, we consider, when the offender, instead of just denying any fact asserted by the prosecution, typically aggravating, counters it with a less aggravating or actually mitigating fact. Where there is an outright collision, the prosecution must rebut the offender's fact if only to prove the aggravating fact it asserts. Even where the collision is not outright and the prosecution only disputes the offender's mitigating fact, we consider, it should still have to sustain, beyond reasonable doubt, the version of facts on which it relies, shorn of the mitigating fact.
- 103 As at trial, however, there is a limit to what the prosecution can be expected to prove. Where there is such a conflict, the prosecution should be required only to negate proximate, credible, contrary facts not inconsistent with any jury verdict. To that extent, the offender should carry an evidential onus.

¹⁰⁴ See A von Hirsch and A Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy* (2 ed, Hart Publishing, Oxford, 1998) and also the Sentencing and Parole Reform Bill 2001, 148-1, cl 8.

¹⁰⁵ *R v Gardiner* above n 101, 648, per Dickson J. A main facet of the offender's liberty interest is the avoidance of excessive punishment. The question is usually how long the offender will be in prison rather than will a prison sentence be imposed, but much is at stake here for the individual concerned: see R Hussein "The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof" [1990] U Chi L Rev 1387 at 1407.

- 104 No less, we consider, the offender should carry a reverse onus as to facts about himself or herself, which only he or she can be expected to know reliably, and which the prosecution is likely to be incapable of refuting.
- 105 The consequence of this variant, we accept, is that there is no general minimum standard to which a fact must be proved before the judge may or must rely on it on sentence. There is the possibility that a sentencing judge may have to rely on a less aggravating or actually mitigating fact, asserted by the offender, merely because the prosecution has been unable to exclude it beyond reasonable doubt. We do not see this difficulty as fatal.
- 106 Where the less aggravating or mitigating fact goes to the offence, or the offender's part in it, and contradicts a fact asserted by the prosecution, the prosecution is already obliged to exclude it in order to prove the fact, or version of facts, which it asserts. Where the fact is "extraneous" and peculiarly within the knowledge of the offender, the offender would carry a reverse onus.

Provocation

- 107 The second variant would not, we accept, preserve completely the present balance between prosecution and offender, where sentence is to be imposed for murder, if provocation as a partial defence to murder were to be abolished and were to become a factor on sentence. However, the balance then resulting would not, we consider, impose an inappropriate or undue onus on the offender.¹⁰⁶
- 108 Where on sentence the prosecution asserts that an offender is answerable for murder "in cold blood" and the offender claims to have been provoked, the prosecution will have to negate any fact relating to the offence, or the offender's part in it, that is consistent with provocation and runs contrary to the prosecution case. As presently, the offender would carry only an evidential onus.
- 109 Where the offender asserts some extraneous fact supporting the likelihood of provocation, he or she would carry for the first time a reverse onus to the balance of probabilities. But, at trial now,

¹⁰⁶ This is leaving aside the separate question of who is to carry the onus as to whether a life sentence would be manifestly unjust, as proposed in clause 91 of the Sentencing and Parole Reform Bill.

even in the absence of a persuasive onus of proof, the offender must always advance a credible narrative;¹⁰⁷ and, if the facts on which the offender relies are peculiarly within his or her knowledge, is it unjust to require that he or she carry a reverse onus?

Aggravating and mitigating facts

- 110 The ambiguities latent in the distinction between aggravating and mitigating facts, which we describe in Appendix B, should not cause difficulty in practice, we consider, if the Australian approach were adopted.¹⁰⁸
- 111 That approach recognises that whether a fact is aggravating or mitigating, neutral or irrelevant, will depend on the context and how the prosecution or defence, and finally the judge, wish to use it.
- 112 The ultimate issue is practical: does the fact, if it exists, justify in the mind of the judge a more severe sentence than might otherwise be appropriate; or, conversely, might it justify a lesser sentence? This test, we consider, has a place in the regime we recommend.

Proposed sentence for murder

- 113 We make no recommendation beyond that made in NZLC R73 as to who should carry any onus of proof, or to what standard, if, as is proposed in the Sentencing and Parole Reform Bill, the sentence for murder is to be a life unless that would be “manifestly unjust”. In this report we confine ourselves to the prior question: how is any dispute of fact to be resolved?

Recommendations

- 114 In summary, we recommend that provisions modelled on sections 723–724 of the Canadian Criminal Code be incorporated in the Sentencing and Parole Reform Bill 2001, varied where necessary to include the following principles:¹⁰⁹
- Where the prosecution asserts on sentence an aggravating fact, which the defence disputes, relating to the offence, the offender’s part in the offence, or the offender, the prosecution must prove the fact asserted beyond reasonable doubt.

¹⁰⁷ *R v Anderson* [1965] NZLR 29 and *R v Mita* [1996] 1 NZLR 95, 99.

¹⁰⁸ This is the Australian approach adopted in *R v Olbrich* (1999) 108 A Crim R 464 and *R v Storey* [1998] 1 VR 359.

¹⁰⁹ In Appendix D we set out, indicatively, provisions modelled on the Canadian Code with these variations.

- The prosecution, in proving any disputed aggravating fact, must also rebut any contrary fact asserted by the defence, where that fact is proximate to that which the prosecution asserts, is credible, and is not inconsistent with any jury verdict.
 - Where the offender asserts any fact about himself or herself, which the prosecution disputes, not directly related to the offence, or the offender's part in it, and not contradicting any assertion by the prosecution, the offender must prove that fact to the balance of probabilities.
 - Whether a disputed fact is aggravating or mitigating in a given context will depend on whether the sentencing judge regards the fact, if it exists, as one that justifies a more severe or less severe sentence than that which might otherwise be appropriate.
-

APPENDIX A

Provocation

- A1 **I**N NZLC R73, WE RECOMMENDED that provocation cease to be a partial defence to murder and become instead mitigating on sentence, as that seemed to us the best way to reconcile two fundamental public values: the need to preserve human life and the need to allow compassion its due place in the administration of justice.¹¹⁰
- A2 The partial defence, we said, is highly technical and anomalous, and we saw no need for it if the sentence for murder became, as we also recommended, discretionary.¹¹¹
- A3 In this report it is right that we acknowledge the consequence of our recommendation: that provocation would cease to be the feature that has dominated many trials for murder, and could become instead critical to the sentence finally imposed.¹¹²
- A4 Provocation as a matter of mitigation for lesser crimes of violence has presented no evident difficulty. The sentencing judge may have been invited to take it into account as the most prominent mitigating factor; but that has not led invariably to disputes of fact requiring the taking of evidence.¹¹³
- A5 In the case of murder, however, we consider evidence will almost inevitably be called for if provocation is asserted directly for the first time on sentence and is disputed by the Crown.

¹¹⁰ Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants: NZLC R73* (Wellington, 2001), para 118.

¹¹¹ Law Commission, above n 110, paras 88, 110 and 114–117.

¹¹² More especially as none of the commentators on this report favour the abolition of provocation as a partial defence to murder.

¹¹³ *R v Laga* [1969] NZLR 417 Woodhouse J is the only case in which, so far as we are aware, this topic has been discussed; and it is a ruling in the course of trial and contains no discussion of issues of proof.

- A6 The common law has long linked murder and provocation. Murder is the ultimate offence of violence, whatever the sanction, and carries a unique stigma. Provocation has figured as a recurring excuse, so significant that it was long ago elevated to a partial defence to murder.¹¹⁴
- A7 More basically, if the law becomes as we have recommended and as is proposed, the stakes will be higher on sentence than under the law as it is. The maximum sentence, life, may well be the presumptive sentence; not, as it is for manslaughter, a wholly discretionary sentence.
- A8 Also, the offender will wish to avoid the minimum sentences proposed by the Government, which the sentencing judge must consider imposing: 10 years in the usual case or 17 years in a case with aggravating features.¹¹⁵
- A9 The offender will not have the benefit of evidence taken at trial unless provocation has been coupled with an argument about lack of intent. The only certain way in which the offender will be able to argue for a sentence less than life, without a minimum term, will be by adducing any evidence that might have been led at a trial, going both to the circumstances of the offence and to his or her own personality and history.

¹¹⁴ Provocation as a complete answer to malice aforethought became established in the late sixteenth century: Sir James Fitzjames Stephen *A History of the Criminal Law of England* (MacMillan & Co, London 1883), vol 3, ch XXVI, 63. See also *R v Mawgridge* (1707) Kelyng 166 (Holt CJ).

In *Woolmington v DPP* [1935] AC 462, 482, Viscount Sankey LC said:

When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where the death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused the death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.

¹¹⁵ See The Sentencing and Parole Reform Bill 2001, 148-1, cls 92 and 93.

- A10 This consequence should not of itself, we consider, dictate the form of the general sentencing regime we are to recommend. Nor do we recommend in this report a special regime where provocation is raised in mitigation for the crime of murder.
- A11 Under the general regime that we do propose, however, the only onus of proof which the offender will carry will be in respect of mitigating facts unrelated to the offence, or his or her part in it, which in all likelihood only he or she can know.
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APPENDIX B

Definitions

BURDEN OF PROOF AND EVIDENTIAL BURDEN

- B1 **I**N THIS REPORT we have not generally ascribed to burdens of proof their usual generic names. Instead we have ascribed to them a content and a standard in the hope this will be clearer. In this appendix we relate the two.
- B2 The term “burden of proof” now¹¹⁶ refers to the persuasive or legal burden of proving (or disproving) a fact in issue at a trial, either beyond reasonable doubt or to the balance of probabilities.¹¹⁷ Examples are:
- In a criminal trial, it is the prosecution’s burden of proving the elements of the offence – mens rea (guilty mind) and actus reus (guilty act) – beyond reasonable doubt and of disproving any denial of mens rea, or a defence, to the same standard.¹¹⁸
 - By analogy, at sentencing it could be that the prosecution has a burden of proving an aggravating factor (such as cruelty or that the offender was a principal) beyond reasonable doubt, and of disproving to the same standard any denial of cruelty or assertion that the offender was a minor participant.¹¹⁹

¹¹⁶ The term has had more than one meaning during its history: see J Thayer “The Burden of Proof” (1890) IV Harv L Rev 45, 46–48 for the classic differentiation between the persuasive burden of proof (Thayer’s “duty of establishing a proposition against all counter-argument and evidence”) and the evidential burden (Thayer’s “duty of bringing forward argument or evidence”).

¹¹⁷ DL Mathieson (ed) *Cross on Evidence* (Butterworths, Wellington, 1996) para 4.3 (updated March 2001).

¹¹⁸ See *Woolmington v DPP* [1935] AC 462, 481 for Viscount Sankey’s famous “golden thread” speech, that it is the duty of the prosecution to prove the prisoner’s guilt. This is a corollary of the presumption of innocence.

¹¹⁹ Note that this is a hypothetical example only and not to be taken as pre-empting the choice for New Zealand. See an alternative position in para B3 below.

B3 The accused in a criminal trial has the onus of proving, on the balance of probabilities, insanity and any statutory “reverse onuses”¹²⁰ and also of rebutting, on the balance of probabilities, any presumptions in favour of the prosecution.¹²¹ Examples are:

- It is a defence if an accused proves he had a lawful excuse to have “his face masked or blackened or disguised by night . . . (the proof of which shall lie on him)”: section 244(1)(c), Crimes Act 1961.
- By analogy, an offender could have the persuasive burden of proving at sentencing a mitigating circumstance (such as being a minor participant, or remorse) on the balance of probabilities.¹²²

B4 The evidential burden, on the other hand, is not a burden of proof.¹²³ It has been described as “the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.¹²⁴ There must be a “credible narrative” of events making the defence version a serious possibility.¹²⁵ So, for example:

- In a criminal trial, an accused who relies on self-defence or provocation will need to adduce evidence sufficient to make the defence a live issue such that the judge will let the jury consider it.
- By analogy, an offender at sentencing will need to produce a “credible narrative” of facts asserted in mitigation (for example, that he or she was a courier of drugs acting under threat) before the judge needs to consider them.¹²⁶

¹²⁰ See Viscount Sankey LC cited in *Woolmington*, above n 118. There are numerous such exceptions to the “golden thread” (*Woolmington* principle): see, for example, ss 244 and 229 of the Crimes Act 1961, s 29 of the Summary Offences Act 1981, and s 30 of the Misuse of Drugs Act 1975.

¹²¹ See, for example, s 66 of the Arms Act 1983 and s 6(6) of the Misuse of Drugs Act 1975.

¹²² Note again that this is a possible alternative but not to be taken as pre-empting the choice for New Zealand. See para B2 above for another option.

¹²³ See Glanville Williams “The Evidential Burden: Some Common Misapprehensions” (1977) NLJ 156; see also *Jayasena v R* [1970] 1 AC 618, 623 (PC).

¹²⁴ DL Mathieson (ed) *Cross on Evidence* (Butterworths, Wellington, 1996) para 4.4 (updated March 2001).

¹²⁵ *R v Anderson*, [1965] NZLR 29 and *R v Mita* [1996] 1 NZLR 95, 99. In a jury trial, the judge has a duty to put the defence to the jury if the evidence as a whole, adduced by both prosecution and accused, is sufficient to raise the issue.

¹²⁶ See, for example, regarding the defence of provocation, *R v Anderson*, above n 125, where the Court of Appeal, adopting the words of the Privy Council in

B5 In all jurisdictions, judges have used the language of burdens of proof when discussing disputed facts on sentence, although less so in the recent Australian cases.¹²⁷

AGGRAVATING AND MITIGATING FACTS¹²⁸

B6 The Sentencing and Parole Reform Bill 2001 lists, non-exclusively, aggravating and mitigating facts which a judge can take into account.¹²⁹ It does not, however, make clear to what standard such facts need be proved if there is a dispute. It may be assumed that the prosecution will undertake the burden of proving any aggravating circumstances,¹³⁰ but it is not clear whether the offender will have any burden of proving contested mitigating facts.

B7 Judges and writers on sentencing have avoided defining aggravating or mitigating circumstances. “Aggravation” is defined in *The Oxford Companion to Law*¹³¹ as “that which increases the seriousness of a crime”. Conversely “mitigation” would be that which decreases the seriousness of the crime. A “plea in mitigation” is defined as “a statement made suggesting why a penalty should be moderated”.¹³²

B8 There are ambiguities latent in the distinction between aggravating and mitigating facts. Whether a particular fact is one or the other cannot be decided in abstract on the apparent tendency of the fact.

Lee Chun-Chuen v R [1963] AC 220, said there must be: “a credible narrative of events suggesting the presence of the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation”.

¹²⁷ See *Olbrich* [1999] 108 A Crim R 464, 471 and *R v Storey* [1998] 1 VR 359, 368: there is no joinder of issues at sentencing analogous to the joinder of issues at trial, so, the Courts said, it is not altogether appropriate to ask which party bears the burden of proof.

¹²⁸ This report retains the terms aggravating and mitigating facts, partly because the cases mentioned mostly use those terms and partly because the Sentencing and Parole Reform Bill gives legislative recognition to those terms in clause 9.

¹²⁹ See clause 9.

¹³⁰ According to our commentators this is presently the case and the beyond reasonable doubt standard applies.

¹³¹ DM Walker *The Oxford Companion to Law* (Clarendon Press, Oxford, 1980) 41.

¹³² DM Walker, above n 131, 845.

So much depends on the context in which the fact is found.¹³³ For example, good standing in the community may appear to be mitigating, but can aggravate an offence like fraud (where there is an abuse of trust).¹³⁴

B9 In the same way, an issue (although not the same exact fact) can be seen by an offender to be mitigating and by the prosecution as aggravating. So a disputed issue could be whether the offending drug importer was a principal (aggravating the offence) or a courier (if not mitigating the offence then excluding that aggravating feature).¹³⁵ Who then should carry any onus of proof and to what standard?

B10 There is the added complication that the absence of an aggravating factor can be seen as the presence of a mitigating factor and vice versa.¹³⁶ In *R v Wolland*¹³⁷ the New Zealand Court of Appeal found

¹³³ Geoffrey Hall has warned that it is often misleading to isolate individual factors and label them as either aggravating or mitigating as such factors cannot be viewed in isolation: Hall's *Sentencing* (Butterworths, Wellington, 1993) updated 15 July 2001, 1.4.3, B/106.

¹³⁴ This is an example given by the Victorian Supreme Court in *Storey* [1998] 1 VR 359, 371. Evidence of previous good character is listed as a mitigating factor in clause 9(2) of the Sentencing and Parole Reform Bill. Callaway JA in *Storey* at 376 said that aggravating and mitigating circumstances can be called "bi-polar" as they depend upon how the evidence is interpreted.

¹³⁵ Note that in *R v Olbrich* (1999) 108 A Crim R 464, 468–469 (HCA), the Australian High Court said that it was not always necessary for a judge to inquire into such matters as whether the offender was a courier or a principal for purposes of sentencing for the offence of importing drugs. Categorisation of the acts which constituted the importation will not always be relevant.

¹³⁶ This has been called the "eye of the beholder" problem by the US Supreme Court in *Apprendi v New Jersey* 120 S Ct 2348 (2000) per O'Connor J at 2390, cited in S Bibas "Judicial Fact Finding and Sentence Enhancements in a World of Guilty Pleas" [2001] Yale LJ 1097, 1136. Bibas says: "It is child's play to redefine aggravating facts as mitigating facts". O'Connor J in *Apprendi* gave an example of the punishment for arson being less severe according to the Wisconsin legislation if "there was no person lawfully in the dwelling house". Thus prima facie the absence of a person was a mitigating feature. But the Wisconsin Supreme Court treated the presence of a person as an aggravating feature.

¹³⁷ *R v Wolland* (11 September 1996), unreported, Court of Appeal, CA 69/96. On the other hand, the Court held that his youth and disadvantaged upbringing were correctly identified as mitigating factors in that case.

that the sentencing judge had erroneously accepted the fact that the offender had *not* stalked or preyed upon his victim as mitigating.¹³⁸

- B11 The opposite of a mitigating factor is not necessarily aggravating; it may be merely neutral.¹³⁹ Youth, for example, is often a mitigating factor but lack of youth is neutral.
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¹³⁸ See the Sentencing and Parole Reform Bill 2001 for lists of aggravating and mitigating factors proposed in clause 9. Aggravating factors include actual or threatened violence or use of a weapon, previous convictions, and vulnerability of a victim, whereas mitigating factors include good character evidence, remorse, and relevant conduct of the victim. The Report of the Canadian Sentencing Commission on *Sentence Reform: A Canadian Approach* (Department of Justice, Ottawa, 1987) contained similar lists of suggested aggravating factors and mitigating factors to be adopted as primary grounds to justify departures from sentencing guidelines at 27–28. Clearly, it is possible to set out such lists but the so-called “eye of the beholder” problem can be seen immediately.

¹³⁹ A Ashworth *Sentencing and Criminal Justice* (3 ed, Butterworths, London, 2000) 134.

APPENDIX C
Sections 723–724 of the
Canadian Criminal Code RS
1985, c.C-46

- 723.(1) Before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed.
- (2) The court shall hear any relevant evidence presented by the prosecutor or the offender.
 - (3) The court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.
 - (4) Where it is necessary in the interests of justice, the court may, after consulting the parties, compel the appearance of any person who is a compellable witness to assist the court in determining the appropriate sentence.
 - (5) Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person
 - (a) has personal knowledge of the matter;
 - (b) is reasonably available; and
 - (c) is a compellable witness.
- 724.(1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.
- (2) Where the court is composed of a judge and jury, the court
 - (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
 - (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.
 - (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
 - (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
 - (b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;

- (c) either party may cross-examine any witness called by the other party;
 - (d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
 - (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.
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APPENDIX D

Our proposed code

1. (1) Before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed.
 - (2) The court shall hear any relevant evidence presented by the prosecutor or the offender.
 - (3) The court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.
 - (4) Where it is necessary in the interests of justice, the court may, after consulting the parties, compel the appearance of any person who is a compellable witness to assist the court in determining the appropriate sentence.
 - (5) Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person—
 - (a) has personal knowledge of the matter;
 - (b) is reasonably available; and
 - (c) is a compellable witness.
2. (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.
 - (2) Where the court is composed of a judge and jury, the court—
 - (a) shall accept as proved all facts, express or implied, that are essential to the jury's verdict of guilty; and
 - (b) may find any other relevant fact that was disclosed by evidence at the trial to be proved, or hear evidence presented by either party with respect to that fact.
 - (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,—
 - (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
 - (b) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any disputed aggravating fact, and must negate any contrary fact asserted by the offender in reply, which the court is satisfied relates proximately to that asserted by the prosecutor and is not wholly implausible or manifestly false;

- (c) the offender must establish, by proof to the balance of probabilities, the existence of any disputed mitigating fact;
 - (d) either party may cross-examine any witness called by the other party.
- (4) For the purposes of this section—
- (a) “aggravating fact” means any fact relating to the circumstances of the offence for which the offender is for sentence, or to the offender’s part in the offence, or to the offender, which:
 - (i) the prosecutor asserts as a fact justifying an increase in the sentence that might otherwise be appropriate for the offence; and
 - (ii) the court accepts is a fact which may, if established, have such an effect on the sentence to be imposed.
 - (b) “mitigating fact” means any fact relating to the offender, not directly related to the circumstances of the offence for which the offender is for sentence, or to the offender’s part in the offence, which:
 - (i) the offender asserts as a fact justifying a decrease in the sentence that might otherwise be appropriate for the offence; and
 - (ii) the court accepts is a fact which may, if established, have such an effect on the sentence to be imposed.
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