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ARTICLES

Injustice Arising from the Unnoticed Power of Priming: How Lawyers and Even Judges can be Misled by Unreliable Transcripts of Indistinct Forensic Audio – *Helen Fraser and Yuko Kinoshita*

Current law allows police transcripts to assist juries in understanding the content of indistinct forensic audio – with a number of legal safeguards intended to mitigate any risk that an inaccurate transcript might mislead the jury. The problem is that the safeguards rely on lawyers and judges gaining a sense of personal confidence that they hear words suggested by the transcript. The present article describes a new experiment showing that personal confidence is a poor indicator of perceptual accuracy, since listeners can be easily and unwittingly "primed" to hear words suggested by an inaccurate transcript. This confirms previous research suggesting current safeguards are inadequate, adds new findings regarding the effect of an alternative suggestion, and supports the need for an evidence-based process ensuring all indistinct forensic audio used in court is accompanied by a reliable transcript. It also indicates there is an urgent need to change legal procedures for admission of transcripts of indistinct forensic audio used as evidence in criminal trials. 142

Check Your Privilege: The Foundation of Legal Professional Privilege within the Commonwealth Director of Public Prosecutions – *Adam Murphy*

The position of the Commonwealth Director of Public Prosecutions (CDPP) occupies an important and unique role in the Australian legal system. This article assesses the state of the law concerning the circumstances in which the CDPP is entitled to claim legal professional privilege. It finds that the CDPP may, for the purposes of a privilege claim, be regarded as either or both a client and a lawyer. As a result, the outcome of any privilege claim made by or involving the CDPP is subject to the identification of the powers being exercised by the CDPP in relation to the subject matter of the claim itself. This complex and unusual outcome is the product of the unique statutory context of the CDPP, but it also reflects a public policy in favour of the extension of the privilege to prosecutorial agencies. 153

The Use of Victim Impact Statements in Sexual Offence Sentencing: A Critique of Judicial Practice – *Rhiannon Davies and Lorana Bartels*

This article analyses the sentencing remarks in 100 sexual offence cases from four Australian jurisdictions, supplemented by key findings from interviews with six sexual offence victims who submitted a victim impact statement and 15 professionals who work with victims. We critically evaluate judicial practice in the cases examined and identify a range of approaches that judges take to acknowledge victims in their remarks. We also use a series of examples to explore judicial practice from a victim-focused perspective.

The article concludes by making two recommendations for educative processes that will assist judges to develop an understanding of how best to acknowledge victims, while still balancing the other requirements of sentencing. Specifically, we call for the publication of a victim-focused benchbook and introduction of victim-focused pre-sentencing hearings in sexual offence cases. 168

CONTEMPORARY COMMENT

Affirmative Consent in New South Wales: Progressive Reform or Dangerous Populism? – *Andrew Dyer*

This comment discusses the New South Wales (NSW) government's decision to "go further" with its reforms to s 61HE of the *Crimes Act 1900* (NSW) than the NSW Law Reform Commission recommended. It argues that that government's proposal to prevent non-consensual sexual offence defendants from relying on honest and reasonable mistake of fact unless they have "said or done something" to ascertain whether the complainant was consenting, is both populist and objectionable. If enacted, the government's proposal will come very close to transforming serious offences into crimes of absolute liability. It will certainly facilitate the conviction of morally innocent actors. Accordingly, those academic and practising lawyers who regard such reforms as "progressive" and/or "sound in principle" are wrong. This is yet another instance of a State government using rhetoric about the interests of crime victims and community protection to justify a serious departure from fundamental criminal law principles. 185

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