

SOME ASPECTS OF SENTENCING

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1 INTRODUCTION

The Legal Studies syllabus includes components on enforcing the law through punishment, the sentencing process and penalties – and matters connected with sentencing generally. The day before a State election, it is perhaps timely to consider some aspects of this process that politicians on all sides seem to think is the answer to the problem of crime in the community; but which criminal law practitioners know is a severely imperfect cure – if a cure at all.

There is a need for any community served by a criminal justice system (which is part of the government of the community) to have confidence in the operation of that system. Without the support of the community, or at least acceptance by the majority, we in criminal justice are largely wasting our time and the resources at our disposal. There may then develop a risk of vigilante action by those aggrieved, in place of the orderly processes properly entrusted to the relevant government agencies (however imperfect they may be).

2 SENTENCING – PURPOSES AND CONSISTENCY

One of the aims of a criminal justice process that relies upon punishment as a means of enforcing the law must be to seek to achieve consistency in sentencing – or at least to avoid any systemic impediments to it (accepting that individual sentencing aberrations will occur from time to time). That is necessary in order to avoid claims of unequal justice or of unfairness in the operation of a compulsory process, contrary to the rule of law itself. Claims of that kind can do great harm to community confidence in and therefore acceptance of the criminal justice system itself. It is important that like offences and offenders are treated in like manner.

However, consistency must also be balanced against individual justice in the particular case at hand and it is the tension between those requirements that can create difficulties in the public perception.

Sir Anthony Mason (later to become Chief Justice of Australia) said in *Lowe v The Queen* (1994) 154 CLR 606 at 610-611:

“Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an

erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.”

The purposes of sentencing – denunciation, retribution (or revenge), incapacitation (or protection of the community), rehabilitation (or reform) and deterrence (both specific and general) – are well known. The extent to which sentences achieve any of those purposes to any real level of satisfaction is problematic; however, in organised, humane societies it is the only mechanism we have for dealing with criminal offenders and trying to secure general compliance with the law and we must try to make it work to general public satisfaction.

In *Weininger v The Queen* (2003) 212 CLR 638 Chief Justice Gleeson of the High Court of Australia described the sentencing task as:

“... a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour into the mathematics of units of punishment usually expressed in time or money.”

(Is it any wonder, then, that there remain enormous difficulties in trying to punish people into goodness?)

In *Johnson v The Queen* [2004] HCA 15 Gummow, Callinan and Heydon JJ said:

*“Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision [citing *House v The King* (1936) 55 CLR 499]. It is, then, all the more important that proper principle be applied throughout the process.”*

In an address to the New South Wales (“NSW”) Parole Authorities Conference on 10 May 2006 which attracted media interest at the time, NSW Chief Justice Spigelman said:

As is the case with respect to the task judges face when they come to sentence a convicted criminal, what is involved [in making parole decisions] is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not point in the same direction. These tasks – whether sentencing or release on parole – involve a difficult process of weighing and balancing such matters.

[And in an admonition to those who agitate unreasonably in the community for different approaches, he added:] *Long experience has established that such tasks are best done by independent, impartial and experienced persons, who are not subject to the transient rages and enthusiasms that attend the so frequently ill informed, or partly informed, public debate on such matters.”*

In an earlier article [(1999) 73 ALJ 876] the Chief Justice had added the observation, in relation to sentencing: *“Specifically, the requirements of justice, in the sense of just*

deserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy.”

The criminal justice process is relied upon to reduce levels of crime, particularly serious and violent crime, and to demonstrate the community’s “toughness” on crime on its behalf – public denunciation of criminal offending. [For my own part, I do not know of many law abiding people who are not tough on crime – but, since there will always be crime, I would rather see approaches taken to it that are effective in reducing its incidence and reforming offenders than approaches that merely temporarily satisfy the urge for revenge.] Real questions arise as to the restrictions to be properly imposed by government on the sentencing task of the judges, especially amid talk of mandatory and minimum sentences and the like.

3 LEGISLATION

In NSW the *Crimes (Sentencing Procedure) Act 1999* now regulates sentencing. It was a consolidation of sentencing procedures, supposedly based on the 1996 NSW Law Reform Commission Report No 79 on *Sentencing*. The Commission said in that report (pp 6-7):

“We, therefore, rejected any approach to the ‘reform’ of sentencing law which would constrain the exercise of judicial discretion either by the codification of common law principles, the creation of sanction hierarchies, or the specification of tariffs (especially for terms of imprisonment) for each offence. The Commission strongly reaffirms this approach, which was supported in many of the submissions which we received and, overwhelmingly, in our consultations.

The importance which the Commission attaches to doing justice in the individual case does not mean that we are unmindful of the desirability of obtaining consistency in sentencing.”

But not all of that admonition was heeded for long and the 1999 Act was amended first by the *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Act 2002* [first inserting section 21A which has proven to be somewhat problematic] and then by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* which came into force on 1 February 2003. The amendments were intended to promote consistency in sentencing by “guiding” judicial discretion and some of the provisions are addressed below. But first...

4 SOME STATE HISTORY

In the 1870s and 1880s in NSW, politicians and the media were very vocal about the perceived leniency of sentencing by judges and magistrates in the colony. (Not much has changed in 130 years in that respect.) Various proposals were advanced in Parliament for mandatory minimum sentences in a succession of Bills. On one such occasion in 1882 one Member said that *“the curse of the country had been the practice of judges in inflicting light sentences. If it were thought advisable to flog a man, or to inflict any severe punishment for any offence, no discretion ought to be allowed to the judges.”*

In further debate in 1883 the same Member said: “... *I should be inclined to take from the judges all discretionary power, forcing them to inflict a certain sentence, and leaving it to the Executive to redress any wrong which may be done*”. It mattered not that this notion had been rejected by the Law Reform Commission in 1871 – the legislation was passed and the *Criminal Law Amendment Act* became law on 26 April 1883.

It provided mandatory minimum sentences for five categories of prescribed maximum sentences for a variety of crimes:

- penal servitude for life (eg. garrotting): seven years;
- penal servitude for 14 years (eg. forging a deed or will): five years;
- penal servitude for ten years (eg. embezzlement): four years (or three years imprisonment);
- penal servitude for seven years (eg. breaking and entering a dwelling-house with intent to commit a felony therein): three years (or two years imprisonment);
- penal servitude for five years (eg. simple larceny): one year imprisonment.

Cases rapidly arose where injustice was apparent and the unreasonableness of such sentencing became obvious. A public outcry ensued, letters were written to the newspapers and the legal profession condemned the lack of flexibility in the new regime. It was feared that jurors were compromising their oaths – knowing that harsh penalties would flow from conviction, they were either acquitting or convicting of lesser alternative offences. Public meetings were held. Petitions were presented.

The Sydney Morning Herald editorialised on 27 September 1883:

“We have the fact before us that in a case where a light penalty would have satisfied the claims of justice, the judge was prevented from doing what he believed to be right, and was compelled to pass a sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion.”

Parliament was forced to act. The *Sentences Mitigation Act* became law on 22 May 1884. The mandatory minimum sentence legislation, which it abolished, had been in force for one year and three weeks.

Among the speeches in support of the repealing legislation, the Attorney General said: “*It is of no use passing a law for the punishment of crime if you leave untouched the existence of a public sentiment which doubts the justice of your tribunals*”.

5 MINIMUM SENTENCING

Minimum sentencing may take several forms – the description is used loosely in some places. The Australian experience has included the following.

- 1 For specific offences or repeat offences, mandatory minimum penalties may be prescribed.

- 2 For specific offences or repeat offences, minimum penalties may be prescribed, but with discretion reserved to the court to depart from them on terms.
- 3 “Standard” minimum penalties for specific offences of a certain severity may be prescribed, also with discretion reserved to the court to depart from them on terms.
- 4 “Guideline” penalties may be set for specific offences, also with discretion reserved to the court to depart from them on terms.

In other jurisdictions (such as the USA), minimum penalties may also come about by the application of “grids” or matrices to the cases. Minimum penalties for repeat offending there sometimes go under the description of “three strikes” laws.

1. The **first category** includes penalties imposed for regulatory (such as less serious driving) offences. A monetary penalty (fine) may be prescribed, or a fixed period of suspension or disqualification of a licence. All jurisdictions accept the mandatory nature of such penalties, even when a mandatory minimum penalty (such as a term of licence suspension) is included. Our discussion lies elsewhere.

Mandatory minimum penalties have been legislated in Western Australia (“WA”) and the Northern Territory (“NT”) at various times. In WA there was a regime prescribing mandatory minimum terms of imprisonment for 12 months for property offences by juveniles. Indeterminate detention was prescribed at one time for persons involved in high speed motor vehicle pursuits – in fact, the number of such events had declined just before the legislation was passed (but after the main public outcry that followed the death of a pregnant woman in a collision) and the number actually increased after the legislation came into force. There was a change of government and at present the only mandatory terms prescribed in WA are for driving offences (as above), murder (being life – but subject to remission) and burglary by a repeat offender (where the mandatory minimum term is 12 months imprisonment).

In the NT property offenders were subject to mandatory and increasing minimum periods of imprisonment upon conviction (14 days for a first offence, 28 days for a second and 120 days for a third). The legislation was repealed upon a change of government a few years ago, but not before an Aboriginal teenager, imprisoned for stealing a can of drink from a store, hanged himself in custody.

In Australia we have nine legal jurisdictions and each has a Director of Public Prosecutions. We correspond and meet regularly. All DsPP are opposed to this form of mandatory minimum sentencing. The grounds for opposition include the following.

- (a) Mandatory penalties exclude the operation of judicial discretion and thereby prevent the court from being able to give proper consideration to the subjective circumstances surrounding the offender. That can lead to injustice. Penalties (especially for serious offences) must be tailored to fit the crime and the criminal – justice must be individualised and penalties fixed in advance by Parliament cannot achieve this.
- (b) To have the legislature fixing penalties detracts from the independence of the judiciary and the principle of the separation of powers. People are deprived of

their liberty not in accordance with a public balancing process that is individually accountable, but arbitrarily in accordance with penalties fixed in advance without regard for the individual circumstances. It may even be, especially in Australia, that such penalties would be unconstitutional. In *Nicholas v The Queen* (1998) 193 CLR 173 at 188 Chief Justice Brennan said:

“A law that purports to direct the manner in which the judicial power should be exercised is constitutionally invalid. However, a law which merely prescribes a Court’s practice or procedure does not direct the exercise of the judicial power in finding facts, applying law or exercising an available discretion.”

- (c) They result in fewer pleas of guilty and therefore place additional strain on the courts, prosecution and legal aid bodies and all the services associated with them. Backlogs increase and remand populations grow.
- (d) They impose additional pressures on prosecutors to negotiate with the defence and agree (perhaps inappropriately, for pragmatic reasons) to pursue lesser charges. That process is not transparent or readily accountable and can be unsatisfactory also for victims of crime.
- (e) It is not a reliable method of treatment of offenders. A past criminal record can often be a poor predictor of future offending.
- (f) They are not effective. They rest upon a theory of selective incapacitation; but it is unlikely that the criminal justice system can identify, apprehend and imprison for long periods sufficient numbers of high rate offenders at the right time in their criminal careers so as to substantially reduce the crime rate. They have been shown not to have a general deterrent effect on offending.
- (g) They expand prison populations. That has a cost – in funding and in the detrimental effect of prison on many inmates. Where the sentences are short, alternative dispositions would usually be more appropriate and effective. [Indeed, in WA sentences of six months or less have been abolished entirely and that option has been considered in other Australian jurisdictions. The NSW Sentencing Council has reported on it to the Attorney General.]
- (h) They impact disproportionately on the young, on women and on the indigenous population.
- (i) Serious or persistent offenders will receive heavier penalties, in any event, under existing legal regimes, than the mandatory minimum penalties usually enacted.

New South Wales has not had any such penalties since 1884.

2. The **second category** is a scheme that is really little more than the legislature’s indicating the severity with which certain offences are viewed by it and exhorting the courts to be appropriately severe in their treatment of them. The NSW Law Reform Commission referred to such a practice in its Discussion Paper 33, *Sentencing*, April 1996:

“... it might reasonably be argued that, at a time when the common law has come under criticism, a restatement of the law by the legislature operates to support and reinforce the law and the courts which have an independent constitutional duty to ascertain and apply it. In this context it may matter little that the criticism is ill-informed or inappropriate: the legislature might

reasonably consider that it has a responsibility to lend its weight to supporting the law as applied by the courts.”

That argument applies also to legislative increases in maximum penalties.

There is a risk, however, in leaving it to individual judges to interpret the meaning of terms such as “substantial” and “compelling” circumstances that may be used in some instances. That is just an invitation for the appellate courts to intervene to set the standard to be applied and to correct the inevitable inconsistencies that will arise.

[In NSW there was a short-lived example of the reverse approach to such a regime. It is possible under section 19A of the *Crimes Act 1900* (enacted in 1989) for a court to impose a sentence of “life meaning life” or imprisonment for the whole of one’s remaining life (ie. without the possibility of release on parole) for murder and under other legislation for some drug offences. That is prescribed by the relevant sections as the maximum (not mandatory) penalty available. Additional legislation in 1996 (section 431B of the *Crimes Act 1900*) was framed in such a way as to seek to prescribe it as, in effect, the mandatory penalty for the worst examples of such offences.

For murder that sentence was to be imposed “*if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence*”. By leaving to the courts, however, discretion not to find such circumstances and so to impose lesser penalties, the legislation proved to be self-defeating (which some argued was the real political intention, in any event). Section 431B was never used and it was repealed from 2000.]

The courts have imposed and continue to impose whole of life sentences using general sentencing principles under section 19A of the *Crimes Act 1900* and there have been about 33 such prisoners, only one a female. Two have died in custody.

3. In NSW the **third category** is exemplified in the (misnamed) *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*. The Act is misnamed because it does not prescribe minimum sentences, either mandatory or discretionary – it sets out standard non-parole periods to be imposed for a list of specific offences, to those examples of such offences “in the middle of the range of objective seriousness”, but it leaves open mechanisms for departing from those periods. This regime seems to be unique to NSW (in Australia, at least) and has both benefits and pitfalls that should be considered.

The principal objects of the Act are stated to be:

- *to establish a scheme of standard minimum sentencing [called “standard non-parole periods” in the Act, in contrast to the short title of the Act] for a number of serious offences; and*
- *to constitute a New South Wales Sentencing Council to advise the Attorney General in connection with sentencing matters.*

The Act adds to the traditional purposes of sentencing a statutory purpose being: denunciation and “to recognise the harm done to the victim of the crime and the community”. (In relation to the latter, courts are required to take into account victim impact statements that now must be in writing but may be orally presented.)

The Act also lists aggravating, mitigating and other factors to be taken into account in determining the appropriate sentence for an offence – applying to all offences in all courts – and section 44 sets all non-parole periods from the bottom up, but preserving the former presumptive ratio between the terms of 3:1, non-parole period to parole period. The considerations in section 21A (the aggravating, mitigating and other factors to be considered) are stated to be “*in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law*”.

In his Second Reading speech of the Bill the Attorney General said:

“At the outset I wish to make it perfectly clear: the scheme of sentencing being introduced by the government today is not mandatory sentencing. The scheme being introduced by the government today provides further guidance and structure to judicial discretion. It does not replace judicial discretion. These reforms are primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process.

By preserving judicial discretion we ensure that a just, fair and humane criminal justice system is able to do justice in the individual case. This is the mark of a criminal justice system in a civilised society.

By preserving judicial discretion we ensure that when in an individual case extenuating circumstances call for considerations of mercy, considerations of mercy may be given.

A fair, just and equitable criminal justice system requires that sentences imposed on offenders be appropriate to the offence and the offender, that they protect the community and help rehabilitate offenders ... The imposition of a just sentence ... requires the exercise of a complex judicial discretion. The sentencing of offenders is an extremely complex and sophisticated judicial exercise.”

Nevertheless, as DPP I strongly opposed this legislation as unnecessary and undesirable, as did the NSW Bar Association, the Law Society of NSW and the Public Defenders. Too much “guidance and structure” provided to judicial discretion can eliminate the discretion entirely, or at least unreasonably restrict its scope with unjust consequences. However, I find consolation now in the fact that, like the mandatory life sentencing legislation in 1996, so many let-outs have been provided for the courts by the legislation as interpreted by the Court of Criminal Appeal that the exercise of judicial discretion has remained largely intact (although the regime has resulted in increased levels of sentences for most of the offences listed). Section 21A allows pragmatism to pay some respect to principle.

The NSW Government has included in its policies for this election the addition of ten new offences to the table of standard non-parole period offences and eight aggravating factors to section 21A.

STANDARD NON-PAROLE PERIODS

The new Division 1A of Part 4 of the Act provides for standard non-parole periods for a number of offences listed in the Table when they are prosecuted on indictment (section 54D(2)). It does not apply to summary disposal, to life or other indeterminate periods, nor to detention under the *Mental Health (Criminal Procedure) Act 1990*. It applies to offences committed on or after 1 February 2003.

Section 54A(2) provides that “*For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle range of objective seriousness for offences in the Table to this Division*”. The court is to set that non-parole period “*unless the court determines that there are reasons for setting a non-parole period that is longer or shorter*”. Some of the reasons that the court may find to depart from the standard periods are those listed in section 21A, which has lists of aggravating and mitigating factors. The court must record its reasons for departing from the standard non-parole period and identify each factor taken into account.

Given the closing words of section 21A(1), it might be argued that the only thing that has changed in practice is the process to be undergone and recorded by the sentencer in court and recent judgments tend to reinforce that view.

However, the starting point now for offences listed in the Table is the identification of where in the “range of objective seriousness” the offence falls. Prosecutors now have to make this assessment, as well as the sentencing court, for reasons to do with the jurisdictions of the various courts in NSW.

SOME DIFFICULTIES

1 There may be a temptation on the part of prosecutors to negotiate lesser and perhaps inappropriate charges in order to dispose of matters in the Local Court. (Such temptation can be resisted; but prosecutors are human, after all.) The transfer in effect of sentencing discretion from the bench to prosecutors, where its exercise is not as transparent and accountable, is to be avoided.

2 The Table of standard non-parole periods contains 6 offences in Table 1 under Chapter 5 of the *Criminal Procedure Act 1986* (ie. to be disposed of summarily unless either party elects for indictment) and one offence in Table 2 (ie. to be disposed of summarily unless the prosecution elects for indictment). The shortest prescribed standard non-parole period is 3 years, one year more than the jurisdictional limit of the Local Court for a single offence. Therefore, where only one offence is being dealt with, prosecutors will need to assess where in the range of objective seriousness the offence falls in order to know whether to elect for indictable proceedings. If it is in a position being between some undetermined point below the middle of the range up to the most serious, then an election will have to be made (because the Local Court jurisdiction may be too low to adequately address the criminality involved). If it is

below that undetermined point, then no election should be made. The identification of this point may be an extraordinarily difficult exercise to undertake in a conscientious, reasoned and accountable manner, even if all the relevant material is available from police (which usually is not the case when the election decision typically has to be made). Prosecutors have not welcomed this additional role in the sentencing process. The easy way out for them would be to make an election in every such case which increases the time, cost and inconvenience of disposing of the matter; but that temptation has also been resisted.

3 The legislation reversed the previous scheme of top-down sentencing to prescribe a bottom-up approach. Now the non-parole period must be fixed first, with the balance of the sentence to be limited to no more than one third of the non-parole period, unless the court decides that there are special circumstances for making it more. Those special circumstances may therefore warrant varying the statutory ratio and fixing the non-parole period, in the result, at less than 75% of the total sentence (section 44, *Crimes (Sentencing Procedure) Act 1999*). [Recently special circumstances were being found in 87% of cases – one wonders what is required for circumstances to be “special”.]

4 Another of the difficulties created by this legislation is the anomalous treatment of the offences and penalties in the Table. It is highlighted by the way in which the offence under section 61M of the *Crimes Act 1900* has been treated (see “Annexure A”); but the proportions that the prescribed standard non-parole periods are of the maximum sentences prescribed vary widely from 28% to 71%.

It is fair to say that judges have been quite ingenious in finding ways to avoid being unnecessarily constrained by the legislation, so (in my view, at least) the legislation has failed to contribute much to either consistency or transparency in sentencing. Its operation is to be reviewed in the near future.

4. The **fourth category** is exemplified in the NSW guideline sentencing judgment regime. This was an initiative of Chief Justice Spigelman, faced with threats by both sides of politics in an earlier election campaign to introduce mandatory minimum sentences. He borrowed the idea from the UK, where such measures had been practised since the 1970s. It was a highly effective deterrent to the politicians.

In the article referred to above [(1999) 73 ALJ 876] the Chief Justice stated:

“... guideline judgments are a mechanism for structuring discretion, not for restricting discretion. The continued existence of sentencing discretion is an essential component of the fairness of our criminal justice system.

Unless judges are able to mould the sentence to the circumstances of the individual case then, irrespective of how much legislative forethought has gone into the determination of a particular regime, there will always be the prospect of injustice. No judge of my acquaintance is prepared to tolerate becoming an instrument of injustice. Guideline judgments are preferable to the constraints of mandatory minimum terms or grid sentencing.”

He emphasised the need for “*both consistency and individualised justice*”.

Guideline judgments were initially a device employed by the courts without the backing of specific legislation; however, when some benefits were realised, Parliament enacted Division 4 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999* and it now deals with sentencing guidelines.

A guideline judgment is defined in section 36 of the Act as:

“a judgment that is expressed to contain guidelines to be taken into account by courts sentencing offenders, being:
- *guidelines that apply generally, or*
- *guidelines that apply to particular courts or classes of courts, to particular offences or classes of offences, to particular penalties or classes of penalties or to particular classes of offenders (but not to particular offenders).”*

Guideline sentencing judgments have been delivered on:

- dangerous driving causing death or grievous bodily harm: (before Division 4 of the Act) *R v Jurisic* (1998) 45 NSWLR 209; (after Division 4) *R v Whyte* [2002] NSWCCA 343;
- armed robbery: *R v Henry* (1999) 46 NSWLR 346;
- drug importation: *R v Wong; Leung* (1999) 48 NSWLR 340; see also *R v Wong; Leung* [2001] HCA 64;
- break, enter and steal: *Re: Attorney General’s Application (No 1); R v Ponfield et ors* (1999) 48 NSWLR 327;
- guilty plea: *R v Thomson; Houlton* [2000] NSWCCA 309;
- application to children: *R v SDM* (2001) 127 A Crim R 318;
- Form 1 (taking other offences into account when sentencing for the principal offence/s): *Attorney General’s Application (No 1) of 2002* [2002] NSWCCA 518;
- high range PCA (prescribed concentration of alcohol) driving offences: *Road Transport (Safety and Traffic Management) Act 1999*, [2004] NSWCCA 303.

Guidelines have been given that nominate variously:

- the starting point of appropriate sentences;
- the range of appropriate sentences; or
- the salient factors to be taken into account on sentence.

They are in “narrative”, rather than “numerical”, form.

Section 37 of the Act enables the Attorney General to apply for a guideline judgment. The CCA may also give a guideline judgment on its own motion (section 37A). The CCA has discretion whether or not to issue a guideline judgment in any case. The DPP may apply and may be heard in all such matters, as may the Senior Public Defender.

Under section 40 of the Act, nothing in Division 4:

“(a) limits any power or jurisdiction of the Court to give a guideline judgment that the Court has apart from this Division, or

(b) requires the Court to give any guideline judgment under this Division if it considers it inappropriate to do so.”

The Court when considering a guideline judgment is not limited as to the evidence or other matters that it may take into consideration and the Court may inform itself as it sees fit (section 42). Guideline sentencing judgment applications, therefore, are extremely resource-intensive for the parties and require a great deal of work by the Court as well.

In the article referred to above [(1999) 73 ALJ 876] Chief Justice Spigelman stated:

“The new system of guideline judgments has been well received by the public. It has also been well received in legal commentary... insofar as I have received commentary from trial judges, that has also been supportive.”

The system’s successes have been demonstrated and reported by the Judicial Commission of NSW:

- in bringing a greater measure of consistency to sentencing for dangerous driving offences – *“Sentencing Dangerous Drivers in New South Wales”*, Monograph Series 21 (2002); and
- in reducing the “systematic excessive leniency and inconsistency in sentencing practice” for offences of armed robbery – *“Sentencing Trends for Armed Robbery and Robbery in Company: The Impact of the Guideline in R v Henry”*, Sentencing Trends & Issues, No 26, February 2003; and
- in arresting declining penalties for high range percentage of alcohol offences – *“Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW”*, Sentencing Trends and Issues, No 35, September 2005.

It is fair to say, however, that although the regime has been successful in several respects, the Court’s and the litigants’ enthusiasm for guideline judgments has waned considerably and some applications for guideline sentencing judgments have been refused.

6 DIVERSIONARY PROCEDURES

Something may be said here about alternatives to traditional sentencing procedures, because they are becoming used increasingly in NSW.

I CIRCLE SENTENCING

Circle sentencing was introduced on a trial basis at Nowra in February 2002.

It is a concept that originated in Canada in 1992 for the sentencing of indigenous offenders (so it is not strictly a diversionary program). It is now practised in various forms also in South Australia, Queensland, Western Australia and Victoria. The Canadian model has been adapted by the Aboriginal Justice Advisory Council to suit the needs of Aboriginal people in NSW with the effect that it actively engages the Aboriginal community in the sentencing process, reduces the number of people

coming into contact with the criminal justice system and involves victims of crime. The result is sufficiently flexible to allow local Aboriginal communities to adapt processes to meet their own local culture and experiences.

Circle sentencing deliberations are typified as power-sharing arrangements. The community is recognised as holding the key to changing attitudes and providing solutions.

An offence is eligible for the process if it can be finalised in the Local Court, carries a term of imprisonment and that is judged by the magistrate as the likely outcome.

A Review and Evaluation of Circle Sentencing (dated October 2003) is available from the NSW Judicial Commission. The Executive Summary is as follows.

Circle sentencing was introduced in New South Wales on a trial basis at Nowra in February 2002. This report reviews and evaluates the first 12 months of the trial's operation. The Judicial Commission of New South Wales and the NSW Aboriginal Justice Advisory Council have worked together to produce this monograph with a view to describing the nature of circle sentencing, how it operates in practice, and the impact it has had on the cases dealt with by the circle court.

The evaluation reveals that circle sentencing at Nowra has succeeded on a number of levels. For example, this novel procedure:

- * reduces the barriers that currently exist between the courts and Aboriginal people*
- * leads to improvements in the level of support for Aboriginal offenders*
- * incorporates support for victims, and promotes healing and reconciliation*
- * increases the confidence and generally promotes the empowerment of Aboriginal persons in the community*
- * introduces more relevant and meaningful sentencing options for Aboriginal offenders, with the help of respected community members*
- * helps to break the cycle of recidivism.*

The penalties imposed by the circle are no less onerous than those imposed for similar offences in conventional courts. However as the procedure is less formal, the offender is more likely to "sit up and take notice" and appreciate the harm caused to the victim. In this regard there is generally an acceptance of responsibility as well as an apology for the offending behaviour — a platform upon which rehabilitation can be built.

Members of the community participate, not only in the sentencing decision, but with a preparedness to assist offenders develop pride in their culture and confidence in themselves long after they leave the circle.

A survey of the key participants (offenders, victims, lawyers, community representatives and support persons) revealed a high level of satisfaction with circle sentencing.

Ultimately, circle sentencing provides a recipe for changing offending behaviour and reclaiming offenders who might otherwise pursue a life of crime.

Having succeeded in Nowra it seems appropriate that circle sentencing should now be expanded to other regions of the State where there are viable Aboriginal communities and offenders with ties to those communities.

The trial has been extended to Dubbo (where it appears to be working well, especially in terms of reducing re-offending) and to Brewarrina, Walgett and Bourke and other places. (The possibility of a “Koori court” is being considered for the Downing Centre – cf. *Magistrates Court (Koori Court) Act 2002 (Vic.)*)

II DIVERSIONS – RESTORATIVE JUSTICE

Academic writers have observed that in recent times the traditional orthodoxy of the sentencing process that requires guilt, conviction and sentence before the execution of a sanction has been weakened. This has occurred for generally laudable purposes in the context of various diversionary programs; but issues of principle are raised and there can be conceptual and practical confusion. The dividing line between bail and sentence, for instance, has become blurred.

(1) An example of this is in the *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002* (amending the *Criminal Procedure Act 1986*, *Bail Act 1978* and *Crimes (Sentencing Procedure) Act 1999*). It commenced on 24 February 2003 and introduced “intervention programs” (to be declared by regulations) which may be implemented after arrest but before trial or after a finding of guilt or conviction.

A person may be referred to an intervention program:

- after charge, as a condition of bail;
- during a court adjournment, as a condition of bail;
- after a plea or finding of guilt but before sentence, as a condition of bail; or
- after discharge or the imposition of a good behaviour bond (section 9, 10 or 12 of the *Crimes (Sentencing Procedure) Act 1999*), as a condition of the discharge or bond.

There are some specified (and generally serious) offences and some persons in respect of which or whom an intervention program may not be conducted.

Circle sentencing seems to be the only intervention program to have been prescribed by regulation to date.

(2) The MERIT (Magistrates Early Referral into Treatment) program for persons with illicit drug use problems is analogous, but applies at the bail stage of proceedings before plea and is covered in the *Bail Act 1978* (see section 36A). It is presently operating at over 50 Local Courts in NSW. An evaluation in 2003 found that most magistrates think it should be a post-plea option.

A plea of guilty may be entered at any time and at final sentencing the magistrate is provided with a report on the defendant's participation in treatment. Lack of success should not attract any additional penalty, the program being voluntary.

[There is a proposal under discussion to extend the MERIT program to persons with alcohol use problems and to trial it at the Bathurst and Orange Local Courts.]

(3) Youth Justice Conferences under the *Young Offenders Act 1997* are available in some circumstances. The Act provides procedures for warnings, cautions, youth justice conferences and court proceedings in ascending order of severity. The literature describes conferences in this way:

“A youth justice conference is based on the idea that when a young person offends, they cause hurt, loss or damage to members of the community. At a conference the young offender and members of their community meet to help the young person take steps towards repairing the harm they have caused and taking responsibility for their actions. Youth justice conferences bring the offender(s), their family and supporters together, face-to-face, with the victim(s) and their support people. Together they must agree on a suitable outcome that can include an apology, reasonable reparation to victims and steps to link the young person back into the community.”

Participation must be voluntary, after the offence is admitted. It must be considered that a caution is not appropriate because of the seriousness of the offence, degree of violence, harm caused to the victim or the offender's criminal history. My Office acts as gatekeeper in some circumstances, where police and the Specialist Youth Officer disagree on the need for a conference.

Conferences as a sentencing option have been extended to some young adult offenders charged with nominated offences.

(4) The Traffic Offenders Program had its genesis in the work of a Blacktown ambulance officer, Graham Symes, about ten years ago. After five years another such program was established in the Sutherland area by Senior Constable Michelle Druery in collaboration with the Probation and Parole Service. More recently the management and supervision of the Sutherland program has been taken over by the Police and Community Youth Clubs and a fee is payable.

Similar programs have been established at Broadmeadow, Mt Penang, Lake Macquarie, Maitland, Singleton, Tweed Heads, Dubbo, Queanbeyan, Nowra and Campbelltown. The program differs in detail from place to place, but the Sutherland program may serve as an example.

The program is voluntary and is performed following plea of guilty. It consists of eight weekly, night time lectures. There is a fee payable. The lectures cover the NSW Police Force, driving in the law and legal system, awareness and prevention of spinal chord injury, insurance, abuse of alcohol and other drugs, defensive driving, the Ambulance Service and sentencing options and victims of traffic incidents. A written assignment must be completed from each lecture and handed in at the next lecture.

There needs to be a fairly high level of commitment to complete the program. On completion an assessment of the participant's performance is forwarded to the relevant court. That may be taken into account on sentence. It may be some measure of contrition and rehabilitation.

(5) The *Pre-Trial Diversion of Offenders Act 1985* ("Cedar Cottage" program) provides for a treatment program for sexual assault offenders against their child, spouse's child or *de facto* spouse's child. Certain categories of offenders may be diverted from the sentencing process, before conviction, into a 2-3 year treatment program. A conviction is recorded if an offender is assessed as suitable and enters an undertaking. Satisfactory completion of the program after two years results in no further legal requirement. A breach of the undertaking results in the conviction/s being referred to the District Court. Exclusion from the program by the court results in sentencing without discount for participation in the program.

(6) While not strictly a diversionary program, the Corrective Services Department maintains a Restorative Justice Unit which works with victims of crime, offenders and the community for "reconciliation and healing". It was set up in 1999 as a three year pilot and is still going, carrying out Victim-Offender Family Group Conferencing and Protective Mediation under the guidance of trained coordinators and community facilitators. The Department's Victims Register is situated in the Unit.

Prosecutors are generally supportive of diversionary schemes that are principled and publicly acceptable; but after sufficient "trial" or "pilot" periods and after positive evaluation, they should be extended statewide (if they are not to be abandoned). Serious issues of equity and of access to justice arise if they are left to run for long periods with limited application on a provisional basis.

My Office supports:

- extending the Adult Drug Court Pilot;
- continuing compulsory drug (and perhaps alcohol) treatment programs;
- rolling out the MERIT scheme statewide;
- extending circle sentencing;
- making periodic detention and home detention more generally available outside metropolitan areas;
- using more extensively electronic monitoring in conjunction with home detention;
- increasing the availability of CSOs outside metropolitan areas;
- establishing bail and probation hostels;
- promoting educational and work skills programs that address drug and alcohol abuse and mental illness;
- strengthening the regime that makes prison the punishment of last resort;
- implementing some recommendations for indigenous offenders;
- continuing community justice conferencing for young adult offenders; and
- educating the community on the value of alternative strategies.

7 CONCLUSION

All proposals for mandatory minimum sentences or any other forms of mandatory sentencing (for all but minor regulatory offences) are objectionable in principle because they remove or inappropriately limit judicial discretion and impede the attainment of individual justice. Proportionality of the punishment to the offending cannot be achieved, punishment cannot be made to fit the criminal (as well as the crime) and unjust and (paradoxically) unequal penalties result. The proper objectives of punishment cannot be achieved. The result is often not fair, just or effective.

The modern historical objective of sentencing in our system is to make the punishment fit the crime and the criminal. It is not possible for the relevant sentencing considerations to be identified accurately and comprehensively in advance of the offending (as Parliament would have to do in order to be able to fix just sentences in legislation). There must be left scope for discretion, to be exercised in a judicial fashion (and not arbitrarily or capriciously). The alternative is not justice.

Courts must remain alert to preserve and apply the discretions that are essential to the dispensing of justice. Capable judicial officers must be appointed to ensure this happens and the process must be appropriately superintended. An important inclusion in the sentencing armoury, to facilitate the sentencing purpose of reform (or rehabilitation) is the range of diversionary dispositions referred to above.

In an address to the Annual Colloquium of the Judicial Conference of Australia on 6 October 2006 Chief Justice Gleeson of the High Court said:

“The uncertainty of some aspects of the law [including sentencing], reflected in diversity of judicial opinion in the highest courts, or in the scope for normative judgment involved in particular legal rules or standards, cannot be ignored. These are inescapable features of a rational, tolerably flexible, system of law, capable of adjusting to the demands of circumstances. But they can shake confidence unless people understand that, in its nature, law requires the exercise of judgment, and issues for judgment are often contestable. It is a mark of political maturity and sophistication that the Australian community accepts that the law is not rigid and inflexible, and that judges are not automatons.”