*Limiting Sentencing Discretion: Has there been a paradigm shift?**

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Introduction

The desirability of limiting judicial sentencing discretion has been one of the issues which has dominated sentencing discourse over the last twenty five years (Freiberg 1995). Yet despite similar influences the sentencing reform developments in this area in North America and Australia have taken different paths.

For almost two decades, official sentencing inquiries in Australia have examined a rational case for structuring or guiding sentencing discretion (ALRC 1980a; Victorian Sentencing Committee 1988; ALRC 1988; NSWLRC 1996a & b). Public confusion and resentment about the gap between sentences announced and sentences served, apparent disparity in the treatment of similar offences committed by similarly circumstanced offenders and the just deserts theory with its emphasis on consistency and fairness, were all influential in these inquiries.

But significantly, apart from the introduction of so-called "truth in sentencing" and some other relatively marginal recommendations for change – consolidation of sentencing laws, better sentencing information (Potas et al 1998), judicial education, broad statutory guidance (which invariably preserved discretion)[2] – Australian jurisdictions did not respond to the perceived concerns with the same vigour and determination to abridge judicial discretion as their US counterparts.

In North America the reaction to unjustifiable disparity (as to which there was considerable empirical evidence) (Frankel 1972; Gottfredson et al 1978; Hogarth 1971; Partridge & Eldridge 1974; Canadian Sentencing Commission 1987) has been to embrace sentencing guidelines in various forms in many jurisdictions (Forst 1982; Blumstein et al 1983; von Hirsch 1995; Reitz 1998).

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2 For example, permissible sentencing purposes; factors to be considered in sentencing; preferred sanction hierarchy; principle of parsimony; whether or not to record a conviction; directions regarding the use of various orders such as indefinite sentences, community-based orders, dismissals, discharges and adjournments; priority as to restitution over fines. See Freiberg 1998:10. One could add: statutory directions to courts to grant discounts for guilty pleas and for co-operating with the authorities, see Zdenkowski 1994:171-4.

Contrast the situation in Australia where the lack of extensive research has allowed the existence of unwarranted disparity to be the subject of continuing scepticism. For example, the New South Wales Law Reform Commission (NSWLRC) concluded that despite 'the considerable body of literature in other jurisdictions purporting to establish widespread disparities in sentencing practice in relation to the "same case"' and the identification of disparities in hypothetical sentencing exercises in Australia 'it cannot be inferred that widespread unjustifiable disparity exists' (NSWLRC 1996b:8-11).

The consensus in North America in support of a substantial reduction in judicial discretion via sentencing guidelines emerged as a result of the convergence of a disparate coalition of interests. Conservatives were concerned about undue leniency; liberals contended that wide discretion produced unjust disparities; and academics were critical of the efficacy of utilitarian approaches to punishment (Frase 1995). It should be observed – because the position is regularly misunderstood in Australia – that the range of US sentencing guideline schemes and their detailed operation varies significantly. Some jurisdictions (for example, Utah, Michigan, Wisconsin and Delaware) have voluntary guidelines; others have presumptive guidelines created by a Sentencing Commission (e.g. Minnesota); in yet other cases the presumptive guidelines are directly imposed by statute (e.g. Alaska). Until very recently,[3] Australian jurisdictions have steadfastly resisted any suggestion of sentencing grids or matrices (Victorian Sentencing Committee 1988:170-3; ALRC 1988:98; NSWLRC 1996b:7).

In 1990 in *Young*, the Victorian Court of Criminal Appeal emphatically endorsed the 'intuitive synthesis' spelt out in the earlier Victorian decision of *Williscroft* which accorded primacy to the court's discretion to select sentencing purpose(s) considered appropriate for the particular case. This phrase has almost become a mantra for judicial sentencing discretion. As recently as 1996, the NSWLRC rejected:

> ...any approach to the 'reform' of sentencing law which would constrain the exercise of judicial discretion either by codification of common law principles, the creation of sanction hierarchies, or the specification of tariffs (especially for terms of imprisonment) for each offence (NSWLRC 1996b:7).

Intriguingly, Australian jurisdictions apparently affected by similar winds of change absorbed these influences without a dramatic impact on judicial discretion compared with their North American counterparts. It is sometimes claimed that this has been possible because of a more vigorous and effective system of appellate review of sentencing decisions in Australia (Ashworth 1983; Thomas 1979). This may provide a partial explanation. However, the key appears to lie in the cultural resistance to modification of judicial discretion within the judiciary and the legal profession generally (ALRC 1980b). This is sometimes couched in terms of judicial independence. Such judicial concern is succinctly captured by Justice Michael Adams of the NSW Supreme Court:

> To my mind, a grid sentencing scheme introduces a new and significant limitation on the independence of the judiciary in its vital role of standing between the state and the individual as well as attempting to do justice by reference to standards which are generally accepted in the community and responsive to the particular circumstances of each case. Where there is a need for guidelines to be established, the appropriate body for doing so is the independent Court of Criminal Appeal, as the *Jurisic* case demonstrates.[4] With the greatest respect for the parliament, grid sentencing, I think, places a political thumb on the

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3 See discussion below, **Judicial Discretion Under Challenge**, as to sentencing grid legislation in Western Australia.

4 Justice Adams was a member of the CCA in *Jurisic*.

> scales in a way which is foreign to **our conceptions of the rule of law and which will have continuing repercussions for the role of the independent judiciary** (emphasis added) (Adams 1999:257).

As Ashworth has pointed out, the construction of attempts to guide judicial discretion as attacks on judicial independence are misconceived (Ashworth 1992). It is wrong to suggest that (whatever may be said about their desirability) even mandatory sentences are a constitutionally impermissible intrusion on judicial independence.[5] Indeed the very comment by Justice Adams is really about 'acceptable' and 'unacceptable' modes of regulating discretion.

Judicial Discretion Under Challenge?

For the first time, in an Australian context, there are potentially serious encroachments on judicial discretion. The genesis of these developments lies not, primarily, in an elaboration of notions of consistency and fairness derived from just deserts theory but rather from a perception that sentence severity should be escalated. This perception is principally driven by law and order populism (Hogg & Brown 1998; Bottoms 1995; Ashworth 1998a:410-3). Recent developments include mandatory sentencing laws, judicial sentencing guidelines and sentencing grids.

Mandatory sentencing

Mandatory sentencing laws have included Western Australia's 'three strikes' legislation in 1992,[6] NSW's mandatory life sentence laws[7] and the Northern Territory's mandatory minimum imprisonment laws for property offenders.[8] The official rationale for the WA measure (which provides for a minimum period of imprisonment following a third conviction for a relevant offence) was to reduce the number of high speed pursuits (and corresponding deaths) involving stolen motor vehicles. However, Morgan demonstrates that the law has operated harshly, has proved to be an ineffective deterrent and has discriminated against Aboriginal offenders (Morgan 1999a; see also Broadhurst & Loh 1995).

Many jurisdictions in Australia have had mandatory life sentences for some time (following the abolition of capital punishment), mostly for murder. However, such penalties have only been nominally mandatory. In practice, the court was required to impose a life term but the sentence was rarely served in full because of conditional release mechanisms.

In 1989 the law in NSW was amended so that life imprisonment meant for the term of the person's natural life.[9] Significantly, natural life imprisonment was a maximum penalty as sentencing discretion was preserved. In 1996, despite the recommendations of the NSWLRC[10], the NSW government introduced mandatory life penalties for designated types of murder and drug trafficking.[11] This particular reform had more to do with popular symbolism and political rhetoric than real change. As the NSWLRC said: 'it is difficult to refer to a "mandatory" sentence in any meaningful sense when a co-existing provision

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5 *Palling v Corfield*. Flynn, however, disputes this: Flynn 1999.

6 *Crime (Serious and Repeat Offenders) Act* 1992 (WA).

7 *Crimes Act* 1900 (NSW) s31B.

8 Ss 78A and 78B *Sentencing Act* 1995 (NT) (for adults, ie persons 17 years and over); and s 53AE *Juvenile Justice Act* 1996 (NT) (for people aged 15 and 16).

9 *Crimes (Life Sentences) Amendment Act* 1989 (NSW) s19A; see also s33A *Drug Misuse and Trafficking Act* 1985 (NSW) which was introduced at the same time.

10 NSWLRC1996a.

expressly preserves the discretion to pass a lesser sentence' (NSWLRC 1996a:112).[12] Although the natural life penalty imposed on certain drug traffickers is mandatory (unlike the murder provision), the prospects of such a penalty actually being imposed are quite remote because of the thicket of stipulated preconditions which the crown must satisfy.[13] This could, as the NSWLRC remarked, ironically limit the court's scope to award a life sentence:

> The gravity of the conduct required before a life sentence becomes mandatory is exceptionally high. If the criteria come to be treated as a code, there is a danger that this may make it harder to impose a life sentence on someone who would otherwise be deserving of one but whose circumstances do not fall precisely within the legislative provisions. Under these circumstances, it may be doubtful whether the resort to life sentences for drug trafficking could ever be more frequent than it is at present (NSWLRC 1996a:113).

By contrast, the Northern Territory's mandatory sentencing laws are having a dramatic and widespread effect. Introduced as part of the government's 'law and order' platform,[14] the laws provided for mandatory minimum prison terms for adults (persons 17 and over) for a first conviction and for juveniles (15 or 16 year olds) on a second conviction of designated property offences. Escalating mandatory minimum prison terms are provided for subsequent convictions for adults. The regime, which came into effect on 8 March 1997, has inevitably operated harshly, resulting in imprisonment for trivial property offences which would not otherwise have attracted such penalties: for example stealing a can of beer; breaking a light; pouring water onto an electronic cash register, for example (Zdenkowski 1999a). It has survived legal, including constitutional, challenges (Zdenkowski 1999a:308-10; cf Flynn 1999) and potentially violates Australia's human rights obligations (Blokland 1997; Flynn 1997; Flynn1999; Bayes 1999; Antrum 1998; ALRC & HREOC 1997).

As with any mandatory measure, criticism has been directed at its inflexibility and consequent potential: for capricious and Draconian operation; to shift discretion to prosecutors (with resulting lack of opportunity for review); and for fewer guilty pleas and resulting cost and delay (Zdenkowski 1999a; Schetzer 1998; Flynn 1997; Flynn 1999; Tonry 1996; Morgan 1999; Antrum 1998; Hunyor & Goldflam 1999). In this particular case there is also a discriminatory impact on the indigenous community (Schetzer 1998; Flynn 1997; Flynn 1999; Goldflam & Hunyor 1999). Although there is considerable doubt as to the efficacy of the mandatory sentencing regime, there is no unequivocal evidence either way to date (Zdenkowski 1999a), but there is significant evidence elsewhere that mandatory penalties do not have the hoped for effect of crime reduction (Tonry 1992).

Since the introduction of the legislation in 1997 several important developments have taken place. Amendments were introduced in 1998 which clarified its interpretation. Further amendments in 1999 extended the categories of designated offences to include sexual and other forms of violent assault. [15]

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11 *The Crimes Amendment (Mandatory Life Sentences) Act* 1996, s 431B came into effect on 30 June 1996. The Attorney-General had been given NSWLRC DP 33 prior to the passage of the legislation. In its final report, the NSWLRC recommended its repeal: (NSWLRC 1996:207;210-1). For a useful discussion see Cowdery 1999.

12 Section 431B(3) *Crimes Act* 1900 (NSW) preserves s.442 which allows a sentencing judge to pass a sentence less than life where the Act makes an offender liable for such punishment.

13 Section 431B (2) (4) *Crimes Act* 1900 (NSW).

14 Attorney-General Burke, Northern Territory Parliamentary Record, Seventh Assembly First Session No 27, 17 October 1996, p 9688.

15 In practical terms this had less impact than it had in the area of property offences as these forms of assault would have often attracted prison terms under a discretionary sentencing regime.

Two important developments have recently taken place. The NT Chief Minister had introduced to parliament amendments to the legislation which would provide for minimal discretion but would extend mandatory prison terms to other offences including assault and sexual assault.[16] At the same time, a private member's bill – The Abolition of Compulsory Imprisonment Bill 1998 – was introduced in the federal parliament, which, if passed, would override the NT regime.[17] In respect of adult first offenders (charged with a single count) a very restrictive discretion was introduced (see Goldflam & Hunyor 1999).

In late 1998 Greens Senator Bob Brown introduced a private member's bill - The Abolition of Compulsory Imprisonment Bill 1998 - which sought to override the NT regime.[18] However, because the political prospects of such a measure attracting support in the House of representatives were not propitious, Senator Brown modified his proposal. On 1 September 1999 he introduced the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999. This proposed legislation sought to prohibit mandatory imprisonment of juveniles only[19], but, unlike his earlier bill, would have an operation Australia-wide.[20] Politically, it was felt (by Senator Brown) that a bill limited to juvenile offenders would attract greater parliamentary support.

Following the introduction of this bill to the Senate, debate was adjourned pending an inquiry by the Senate Legal and Constitutional References Committee. This inquiry, after conducting widespread consultations, reported in March 2000 (Senate Legal and Constitutional References Committee 2000). Although the committee was unanimously critical of mandatory sentencing, it was divided over the desirability of federal intervention to override State and Territory laws, in particular the mandatory sentencing laws of NT and WA. The majority concluded that such intervention was appropriate while the minority dissented on this issue.

Following passage of the bill in the Senate,[21] it was defeated in the House of Representatives when the government used its numbers to impose a gag on debate. The Senate Inquiry, the report and its aftermath have been accompanied by an avalanche of media comment and controversy. The debate reached a crescendo when a 15 year old Aboriginal boy died in custody, apparently from suicide, while serving a mandatory term of 28 days (see Johnson & Zdenkowski 2000).

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16 *The Sentencing Amendment Act* (No2) 1999 (NT).

17 Under s122 *Commonwealth Constitution*, the Federal Parliament can enact laws for the NT. It is by no means clear, however, that the Bill would secure majorities in both houses. For a discussion of this initiative by Greens Senator Bob Brown (modelled on the federal measure which overrode the *Right of the Terminally Ill Act* 1995 (NT), see Zdenkowski 1999b. At the time of writing, a modified strategy was being contemplated, namely the introduction of the Human Rights (Sentencing of Juvenile Offenders) Bill. This would apply to all states and territories and be constitutionally based on the external affairs power (the implementation of the United Nations Convention of the Rights of the Child). The effect would be to nullify (via s109 *Commonwealth Constitution*) the provisions of the NT mandatory minimum imprisonment regime applicable to juveniles.

18 This was modelled on the federal measure which overrode the *Rights of the Terminally Ill Act* 1995 (NT) and relied on s122 *Commonwealth Constitution* which empowers the federal parliament to enact laws for the territories, including the NT. The bill sought to prohibit mandatory imprisonment of adults and juveniles (defined as persons under 18) and was restricted to the NT. For a detailed discussion see Zdenkowski 1999b.

19 Because it specified a definition of juvenile as a person under 18, this included 17 year olds in the NT who were subject to the adult provisions of the mandatory regime.

20 Constitutionally, as far as the States were concerned, the bill depended for its validity on the external affairs power and the legislative implementation of international treaties to which Australia was a signatory, notably the Convention on the Rights of the Child (CROC) and the International Covenant on Civil and Political Rights (ICCPR).

21 The Greens received support from the ALP, Democrats and independent senator, Peter Andren.

At the time of writing, Prime Minister Howard has sought to broker a "compromise" with the NT government (who had hitherto steadfastly resisted any suggestion that there should be federal intervention of any kind) which involved the NT government raising the age of adulthood to 18 and implementing diversionary programs for juveniles in return for five million dollars in Commonwealth funding. This does not appear to have mollified critics who point out that the problematic legislation remains intact; and the diversionary program option will shift even greater discretionary power to police.

Judicial sentencing guidelines

The phenomenon of judicial sentencing guidelines whereby appellate courts formulate general rules for the purpose of providing guidance to trial courts has been in operation in England for over 20 years (Fox 1987; Ashworth 1998b: 228-229). Similar guidelines have been handed down by appeal courts in Canada and New Zealand (NSWLRC 1996a). The promulgation of such guidelines is an incremental development from the traditional appellate role of developing common law principles as to sentencing. However, it involves the additional step of formally stipulating appropriate sentencing starting points or ranges and of factors relevant to departure from them.

Until recently, Australian appellate courts were content to confine their role to ruling on appeals against severity or leniency. Occasionally, this would involve 'guidance' as to relevant factors or as to relevant sentencing ranges (Morgan & Murray 1999).[22] In 1995, Western Australia introduced legislation authorising the referral of cases to the Court of Criminal Appeal for the express purpose of the formulation of a judicial sentencing guideline.[23] The Director of Public Prosecutions has requested the WA Court of Criminal Appeal to issue guideline judgments four times but the court has, in its discretion, declined to do so. The reasons proffered by the court[24] have been described as having 'limited force and (which) generally do not stand up to rigorous scrutiny'.[25] Morgan and Murray argue that the court has, in effect, failed to seize an opportunity to formulate suitable guidelines and attribute this failure to a judicial culture which reflects 'tensions as to the very nature of sentence decision-making' (Morgan & Murray 1999:105). Moreover, they claim that the judicial reluctance to respond positively to the 1995 legislation has been influential in the introduction of sentencing matrix legislation in WA, for the first time in Australia (Morgan & Murray 1999:106) (see below).

In NSW, the Court of Criminal Appeal delivered the landmark decision of *Jurisic*[26] in October 1998. This is the first case in Australia in which a court has issued a formal sentencing guideline judgment. Unlike the situation in WA, there was no statutory basis for this development. However, shortly after the delivery of the judgment, the NSW government introduced legislation[27] which permits the Attorney General to request that the Court of Criminal Appeal consider providing guidelines without the need for a pending

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22 Note also the practice of the Full Court of the SA Supreme Court which promulgates sentencing standards in the form of an 'appropriate sentencing range' departure from which is not, however, an error: *Police v Cadd; King; Bini.*

23 *Sentencing Act* 1995 (WA) s.143.

24 Lack of experience in relation to a new offence; lack of error in the court below; self-evident nature of the proposed guideline; restrictive formulation of proposed guideline; inappropriateness of proposed guideline; high degree of factual variation.

25 Morgan & Murray 1999: 105.

26 A case involving dangerous driving causing death.

27 The *Criminal Procedure (Sentencing Guidelines) Act* 1998 which amended the *Criminal Procedure Act* 1986.

appeal.[28] This legislation has been criticised by Director of Public Prosecutions, Nick Cowdery QC (who was not originally given a role in such hearings)[29] because 'imposing sentences in a vacuum will produce a meaningless result'. Moreover, he claimed that the legislation was not only unworkable – it was also unnecessary because of the common law system of sentencing guidelines established by *Jurisic* (McWilliams 1998).

The political context in which the legislation was introduced is significant. With an election in the offing, the Coalition Opposition had announced a sentencing grid proposal. The legislation represented the government's response: a moderate measure to enhance sentencing consistency which did not have the inflexibility of a grid system and which, importantly, did not trespass on the heartland of the judicial process.[30] This legislation has not been invoked to date. In the light of the embrace of judicial sentencing guidelines by the Court of Criminal Appeal,[31] the prospects of frequent resort to such referrals are remote.

It is clear from recent extra-curial remarks by Chief Justice Spigelman that 'in the near future the Court of Criminal Appeal will devote considerable effort and energy to determining whether guideline judgements are appropriate in a number of different spheres of sentencing' (Spigelman 1999). To date the court has considered dangerous driving causing death (*Jurisic*); armed robbery (*Henry*); break, enter and steal (*Ponfield*); commercial drug trafficking (*Wong & Leung*). It will shortly be asked to rule on guidelines as to sentencing discounts for guilty pleas.

While the structuring of sentencing discretion[32] and enhancement of consistency and public confidence in the sentencing system have been cautiously welcomed (Morgan & Murray 1999; Spears 1999; McWilliams 1998; Adams 1999; Zdenkowski 1998b), some reservations have been expressed: '...the introduction of such guidelines may also be seen as an unacceptable engagement by the judiciary with populist views and as an institutional acknowledgment of the law and order crisis' (Spears 1999; Byrne 1999). The perceived need for greater consistency should not be conflated with an escalation of severity levels (Morgan & Murray 1999:95; Zdenkowski 1999a). This has now been expressly acknowledged by Chief Justice Spigelman (Spigelman 1999:14). Logically, sentences can be consistently lenient, consistently moderate or consistently severe. *Jurisic* glossed over this issue.[33]

The release of the judgment involved an unusual (but refreshing) departure from convention: the Chief Justice published an article in a major daily newspaper explaining the decision and also distributed a detailed information package (referring to the role and purpose of guideline judgments and appending academic literature on this theme), primarily

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28 Following recent amendments, this legislation now allows the Attorney-General to apply for guidelines in respect of any offence or category of offences (such applications were previously limited to indictable matters): see s37 *Crimes (Sentencing Procedure) Act* 1999.

29 This has now changed, see: s39 *Crimes (Sentencing Procedure) Act* 1999.

30 The Attorney General had previously announced that he was content with the *Jurisic* decision and characterised the referral legislation as complementary to that development: Zdenkowski 1998b.

31 The second guideline judgment which strongly reaffirmed the desirability of issuing such judgments in appropriate cases was delivered on 12 May 1999: *R v Henry and ors*. The Director of Public Prosecutions has indicated an intention to refer several other offences to the CCA in the near future.

32 The guidelines are 'indicative' and non-binding.

33 In *Jurisic* and *Henry and ors*, the CCA increased severity levels. Although it is too early to judge it should be noted that in the UK, most guideline judgments have also involved harsher penalties. *Begum Bibi*, a case dealing with drug offences, advocated more lenient sentences in carefully specified circumstances. The Chief Justice has noted that guideline judgements operate in both directions (Spigelman 1999:31).

for the benefit of the legal profession and the media. The court's attempt to respond to public opinion is, however, fraught with problems (see below).

Sentencing grids

Finally, we should note briefly Australia's first sentencing matrix legislation. A sentencing grid or matrix usually involves a two dimensional graph whose axes reflect 'offence seriousness' and 'prior criminal record'. The penalty level is usually determined by reference to the sentencing range to be found in the cell of the grid/matrix which corresponds to the offender's offence and his/her prior record. There is sometimes provision for departure from the range for good reason. However, it is generally conceded that this mode of sentencing guidance can be quite restrictive. It should however be mentioned that not all schemes are prescriptive and that they vary widely in their detail. As mentioned, these reforms were introduced in the US following trenchant criticism of indeterminate sentencing in order to provide greater consistency and certainty. Over 20 out of 50 US jurisdictions have now embraced this reform although the source, scope and enforceability of the rules and the roles assigned to discretion and appellate review vary considerably (Frase 1995).

Although judicial resistance to such reforms in Australia has been unwavering, sentencing grids attracted the interest of politicians in two states for the first time in 1998. In June, the NSW Coalition Opposition announced as part of its criminal justice policy for the next election (scheduled for March 1999) a 'US-style sentencing grid' without specifying any detail (Zdenkowski 1998a). Following the guideline judgment in *Jurisic*, the Shadow Attorney-General said the Opposition proposed to press on with its grid policy on the basis that judicial guidelines placed undue pressure on the courts and that parliament should be accountable for creating guidelines (Zdenkowski 1998c). By this time the Opposition had announced its grid would embrace the basic features of the Minnesota model.[34] The proposal lapsed when the Opposition lost the election.

In October 1998, the Western Australian government introduced legislation authorising a sentencing matrix system, apparently modelled on that in Oregon.[35] The official explanation for this measure was to provide greater accountability, transparency and consistency. However, it has been claimed that it really

> appears to be driven primarily by political considerations, underpinned by strident criticism of the courts. A crucial element of the debate has been an unrelenting political and media portrayal of the judiciary as out of touch, unresponsive and unaccountable (Morgan 1999b:260,263).

The Bill establishes a complex three-stage framework for the development of sentencing standards via delegated legislation. Crucial elements have been developed to the bureacratic process. Decisions by the Executive, although the subject of token parliamentary scrutiny, will effectively prevail.

As Morgan describes it:

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34 However, when questioned by the author, the Shadow Attorney General, Mr John Hannaford, conceded that unlike Minnesota, prison capacity would not be factored in. Moreover, crucially, the process for constructing the guidelines would be fundamentally different. There would be nothing like the two-year consultation process which preceded the Minnesota guidelines and which involved a diverse range of expertise and stakeholders.

35 *Sentencing Legislation Amendment and Repeal Bill* 1998 (WA).

> The Matrix legislation heralds a breathtaking shift in power away from the courts and into the realm of statutory 'regulations'. In summary, the legilsation would permit regulations to:
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> •prescribe the offences which ar subject to the new regime (whether as reporting, regulated or controlled offences);
> •set the detailed requirements for sentencing reports for all three categories of offence;
> •in the case of regulated offences, prescribe the method by which the indicative sentence is to be determined;
> •in the case of controlled offences, determine what factors are relevant to sentencing and the weight, if any, to be attached to such factors;
> •extend the matrix approach from adult courts to the Children's Court;
> •abolish or amend regulations in the future (Morgan 1999b:278).

The development of the WA matrix has been fundamentally different from the US models which supposedly inspired it. The Bill has been drafted hastily and subjected to minimal scrutiny. Key stakeholders – including prosecution authorities, defence lawyers, the Parole Board and judicial officers – have been totally sidelined (Morgan 1999b). The ad hoc approach which would allow offences to be selected for regulation in this manner differs significantly from most grid schemes which purport to be comprehensive, at least at the serious end of the offence scale. It paves the way for selective incapacitation. Moreover, prescription by regulation, ironically in view of the apparent concern with transparency and accountability, ensures that the measures will not benefit from the normal debate (and, importantly media attention) which accompanies the introduction of legislation. The net result is likely to be a judicial straitjacket for selected offences by relative stealth. There may well be more debate and amendment before the Bill is enacted. Nevertheless, it is a key development in sentencing policy for WA with potential implications for all Australian states and territories.

Collectively, these developments – mandatory sentencing, judicial sentencing guidelines and sentencing grids – appear to represent an unprecedented shift away from judicial discretion in Australia and clearly deserve careful scrutiny in the future. In 1998, at an international comparative sentencing conference in Minnesota, Freiberg remarked 'the process of Coca-colonising Australian criminal justice, while not yet a fait accompli, has more than a little commenced' (Freiberg 1998:41).[36]

An argument could be mounted that these developments have idiosyncratic explanations and that there is not a global nexus. It would go something like this. Northern Territorian ('one strike') and Western Australian ('three strikes') laws are anomalous parochial reforms which will not be emulated elsewhere. The NSW mandatory life law is merely symbolic for the reasons canvassed earlier. Judicial sentencing guidelines represent a pre-emptive strike against sentencing grids / matrices and such guidelines have a rosy future because they are an incremental development and have strong judicial and professional support. The WA sentencing grid is atypical, will prove complex and problematic and will not be emulated. However, although there is considerable force in the view that local influences are crucial to the emergence, success and direction of sentencing reforms (Tonry 1995:274-8), it would be churlish to deny the general imperatives abroad in Australia which seek to curtail judicial sentencing discretion to some degree.

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36 The author, who claimed at the conference that Freiberg may have been exaggerating the North American influence on Australian criminal justice developments, may yet have to eat his words.

Severity Levels

Despite the eclipse of capital punishment, there appears to be a consistent public clamour for escalation of severity levels and policy responses to reflect this. Whether such public concern objectively exists or not and whether it has a rational basis or not, these are serious issues for those concerned with the formulation and implementation of sentencing policy. Influential to an understanding of this area - with little prospect of abatement in coming years – are 'law and order' and the role of public opinion, in both cases filtered through the media.

Law and order

A major consideration in public policy which has the potential to skew, if not hijack, the sentencing debate is the politics of law and order. This usually involves an intensification of punishment levels and an exploitation of fear (Ashworth 1998a:410). Examples of such regimes have already been discussed. An interesting illustration of the disparity between victimisation levels and fear levels is the situation of older people. Though easily the least victimised group in the community, fear levels are as high as those for other groups. Vicious attacks on older people while infrequent are very shocking and often feature in law and order rhetoric and media portrayals of crime (Gilbert & Zdenkowski 1997).

Despite claims about crime reduction, calls for increased severity of penalties often have a different focus:

> ...the stridency of the political rhetoric, the vagueness of the proposals for sentencing reform and their proximity to elections are the clearest indications of what is really at stake. They usually represent the latest attempt to lift the bar in the law and order high jump. The rationale for such measures is less an instrumental one of reducing crime than it is the symbolic one of tapping and harnessing punitive public opinion behind a new program of draconian penal measures (Hogg 1999:264; see also Hogg & Brown 1998).

The iconic force of particular horrific murders[37] is so powerful that they are frequently invoked by politicians and the media without any need for explanation or analysis. Old resentments can be rekindled and generalised to a new grotesque crime. Due process, constitutional principles and human rights of offenders are marginalised or rendered nugatory in popular discourse (Ackland 1999; cf Enderby 1999; Doherty 1999). This political and popular response certainly reflects resentment of crime and criminals but also reflects a wider anxiety about other marginalised groups and social groups for whom offenders become convenient scapegoats (Ashworth 1998a:412-6; Milburn 1999 and studies there cited).

To the extent that this accurately reflects a lack of concern for the intricacies and paradoxes which bedevil discussion about cost, humanity and efficacy and the relevance of conventional penal goals, it presents formidable challenges both for contesting the content of sentencing policy and for the politics of sentencing reform. This will involve deconstructing law and order rhetoric, whose potency derives in large part from its acceptance as conventional wisdom.[38]

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37 For example in NSW the murders of Anita Cobby, Virginia Morse and Nicole Hanns.

38 Hogg and Brown succinctly and perceptively analyse 'law and order commonsense' (soaring crime rates / it's worse than ever: law and order nostalgia / soft on crime: the criminal justice system does not protect its citizens / we need more police with greater powers / we need tougher penalties / victims should be able to get revenge through the courts): Hogg & Brown 1998:18-44.

One commentator has suggested penologists should confront the law and order phenomenon head on: by recognising it for what it is; by taking into account the potential impact of law and order in the reform process by assessing the implications of law and order for the specific context in question; and by conducting appropriate research which will explicate the historical and political genesis of such policies (Ashworth 1998a:417-9).

Public opinion

However, a critique of 'law and order' imperatives and their impact on sentencing policy does not solve another crucial question. To what extent should public opinion legitimately influence sentencing policy? Although there is no reason why this question should not arise in relation to the whole gamut of sentencing policy issues, it commonly crops up in the context of debate about severity levels.

Bottoms reminds us of the caution required in distinguishing public opinion from 'populist punitiveness' which he characterises as 'the notion of politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance' (Bottoms 1995:40; Windlesham 1998). Public opinion about sentencing is a vexed and much debated issue, not least because of the difficulties in ascertaining reliable information about it (Walker & Hough 1988).

When carefully constructed surveys have been undertaken, it has generally been found that people underestimate the severity levels of penalties imposed by the courts (Hough & Roberts 1998; Canadian Sentencing Commission 1987; Indermaur 1987) and the more information people have about specific crimes and offenders the less punitive they are likely to be (Bottoms 1995:40).

There is evidence of an increasing desire by the courts to take account of public opinion. In NSW's first guideline judgment in *Jurisic*, Chief Justice Spigelman said: 'The courts must show that they are responsive to public criticism of the outcome of sentencing processes. Public criticism of particular sentences for inconsistency or excessive leniency is sometimes justified' (at 268). Leaving aside the complaints about inconsistency, this comment about justifiable public concerns about 'excessive leniency' begs several questions. How should public opinion be ascertained? How well informed should it be in terms of knowledge of actual sentencing practice? If such opinion is 'sometimes' relevant, what criteria does a court apply to determine when it is/is not? If it is relevant (and assuming it is possible to obtain scientifically rigorous information about it), to what extent should it influence the outcome?

On this last question (and also on the significance of the role of the media), Justice Michael Adams, who sat on the Court of Criminal Appeal bench in *Jurisic*, sounded a salutary note of caution:

> The media ... plays a vital role in communicating both what happens in and the judgments of the courts ... the methods of journalism ... give overwhelming predominance to the sensational aspects of the case ... It is self-evident that a couple of brief columns or a two minute statement dominated by the "newsworthy" elements of the case will almost never convey sufficient information to enable an informed judgment to be made about it .. we must treat with care assertions about what might be the public perception about this or that issue. Nor can publicity about a particular case or cases deflect a Court ever from doing justice according to law. To do so would be, amongst other things, to betray the trust that the overwhelming majority of citizens place in the court to stand as a bulwark against prejudice and unreason (at 302)[39].

The recent evidence does not suggest a leniency crisis in the courts. A NSW study of trends in convictions and penalties between 1990 and 1997 concluded:

> ... despite the largely media driven perception of court leniency, the NSW court system is not generally acquitting people, and penalties have, if anything become heavier since 1990. The courts also deal more harshly with offenders who commit serious crimes and who have serious criminal records (Baker 1998:9).

Constitutional issues

The High Court has traditionally taken a non-interventionist stance to appellate review of sentencing policy.[40] However, the prospect of constitutional challenges to sentencing laws is likely to assume increasing significance. Federally, parliament has the constitutional power to enact laws which prohibit or restrict certain forms of punishment.[41] A constitutionally valid federal law which purports to cover the field will override an inconsistent state law.[42]

But legislation prohibiting or restricting penalties can be repealed in the normal way.[43] The question remains as to whether there are any constitutional inhibitions on forms of punishment.

There are certainly no express constitutional provisions at either state or federal level. To what extent could reliance be placed on an implied prohibition on, for example, cruel or unusual punishment?[44] The High Court eschewed the issue in *R v Sillery* when a majority construed what appeared to be a mandatory life penalty as a discretionary maximum. However, Murphy J, although agreeing with the majority judges as to the statutory construction, raised the constitutional argument briefly in obiter dicta (at 234).

At state level, the prevailing view is that the plenary powers conferred by the peace, order and good government formulae are generally unfettered[45] and the only constraints on parliamentary sovereignty are political.[46] In the Union Steamship case, the High Court left open a faint prospect of an argument that state constitutions might contain implied

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39 Chief Justice Spigelman has now elaborated on this issue, extra-curially, noting that 'allegations of systematic leniency in sentencing decisions which so frequently appear in the media, is often not well-informed criticism' (Spigelman 1999:17-8).

40 Occasional departures include: *Lowe v R; R v Veen (No2) ; Neal v R* .

41 Constitution s51 (xxxix); implied powers in s51, 52; s61. See *R v Kidman ; Victoria v Commonwealth* . See also the external affairs power, s51 (xxix) and Australia's international obligations pursuant to the ICCPR.

42 S109 Constitution. For example, the *Human Rights (Sexual Conduct) Act* 1994 (Cth) was introduced to override provisions of the Tasmanian Criminal Code which prohibited certain consensual sexual activities between adults. The federal legislation was introduced following an adverse report from the Human Rights Committee in response to a communication by Nicholas Toonen under the First Optional Protocol to the ICCPR.

43 For example, capital punishment has been outlawed in all jurisdictions and corporal punishment in most jurisdictions. But there is no domestic legal barrier to reinstatement. Recently a Darwin businessman called for reintroduction of flogging for break and enter offences: ABC Radio, 14 June 1999. Although such a law may violate Australia's international human rights obligations, there is no constitutional bar.

44 The embryonic jurisprudence as to implied constitutional guarantees might lend some support to this approach: *Dietrich v R* per Deane and Gaudron JJ (implied guarantee not to be tried unfairly); *Australian Capital Television v Commonwealth* (implied guarantee of political free speech); *Polyukhovich v The Commonwealth and Anor* (retrospective penalties).

45 Subject to specific manner and form requirements as to constitutional amendments, exclusive federal powers and s109 conflicts.

46 *Building Construction Employees and Builders' Labourers Federation v Minister for Industrial Relations*; *Union Steamship Co of Australia v King*.

guarantees not to violate fundamental human rights. However, this argument fell on barren ground in both the lower courts and the High Court in a constitutional challenge to NSW's ad hominem preventive detention legislation, the *Community Protection Act* 1994 (NSW).[47] That statute was struck down not because of any human rights violations (although the courts all expressly acknowledged the extent to which the law bristled with them) but rather because the legislation purported to confer on a state Supreme Court (a repository of the judicial power of the Commonwealth) powers regarded as incompatible with the exercise of the judicial power of the Commonwealth.[48]

The scope of *Kable* is unclear. The Victorian Court of Appeal has ruled that it is no impediment to conferral on a court of power to impose, in circumscribed circumstances, indefinite detention following conviction and sentencing to a fixed term.[49] But what of mandatory sentencing? Prior to *Kable* the High Court had ruled[50] that removal of judicial discretion via legislative prescription of the penalty was constitutionally permissible. A similar conclusion was reached by the Western Australian Court of Criminal Appeal in *Re S (A Child),* a case involving a challenge to the *Crime (Serious and Repeat Offenders) Sentencing Act* 1992 (WA) which required a court to impose a fixed sentence followed by an indefinite term in certain defined conditions.

Following *Kable* the provisions of the Northern Territory's mandatory sentencing laws were challenged in the High Court in *Wynbyne v Marshall.* Margaret Wynbyne, a 23 year old Aboriginal first offender, had pleaded guilty to unlawful entry and stealing (a can of beer) and was sentenced to the mandatory minimum term of 14 days imprisonment by a Magistrate who indicated that a lesser penalty would have been imposed but for the law. The High Court refused special leave.

Flynn has argued that we have not heard the last word on this matter (Flynn 1999). While it is clear that the High Court believes that removal of judicial discretion does not infringe 'judicial power' nor compromise the power of a state court to exercise the judicial power of the Commonwealth, what 'if a judge undertook a task that was integral to the executive function and exposed the judge to the direction of the executive?' (Flynn 1999:283). Relying on the *Hindmarsh Island* case,[51] Flynn asks: '[I]s there any less danger to the standing of the integrated Australian judicial system if a State Court is compelled to do the bidding of the legislature and impose a penalty that is manifestly unjust under the guise of a function that, historically, has been an integral part of the judicial branch of government?'(Flynn 1999:283) Although there is no clearly discernible outcome at this stage it would seem, given the advent of mandatory sentencing regimes and sentencing grid legislation that constitutional challenges to sentencing laws will continue.[52]

International Human Rights

It is now accepted that the interpretation of Australia's domestic law (both common law and statute) may be influenced by international law in cases of ambiguity or uncertainty. However, where the domestic law is clear in its meaning it shall prevail notwithstanding any potential violation of international law principles. [53]

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47 *Kable v Director of Public Prosecutions (NSW).*

48 The *Kable* decision is a complex one and this cryptic summary does not do justice to the differing views of the members of the court. For a fuller analysis see: Johnson & Hardcastle 1998; Flynn 1999; Zdenkowski 1997.

49 *Moffatt.*

50 *Palling v Corfield.*

51 *Wilson v Minister for Aboriginal Affairs and Torres Strait Islander Affairs.*

52 As to the prospects of such a challenge in relation to the WA sentencing grid law, see Morgan 1999b.

Although it would appear arguable, for example, that the Northern Territory mandatory sentencing regime may infringe aspects of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory (Blokland 1997), the regime unambiguously declares its intentions. Accordingly, the only available remedy in relation to an infringement of the ICCPR is a petition (strictly 'a communication') by the aggrieved individual to the Human Rights Committee under the procedure established pursuant to the First Optional Protocol to the ICCPR (for a detailed discussion see Pritchard and Sharp 1997).

Two successful petitions have been lodged by Australian individuals to date: *Toonen* (a challenge to Tasmania's criminal laws prohibiting certain consensual sexual activity between adults) and *A v Australia* (concerning the protracted detention of asylum seekers).[54] Blokland (Blokland 1997) argues that the Northern Territory mandatory sentencing regime may infringe the international principle of proportionality and specifically analyses the implications of Articles 7, 9, 10, 14 and 15 of the ICCPR in this context. There is no space here to pursue these interesting and provocative arguments. As far as juvenile offenders are concerned, the violation of international law principles is clear cut. Several provisions of the United Nations Convention on the Rights of the Child (CROC), to which Australia is a signatory, are manifestly infringed (Blokland 1997; Bayes 1999). It should be noted, however, that there is no individual grievance procedure under this international treaty, so violations can only be taken into account in the UN reporting process with such political opprobrium as this may engender.

Other sentencing legislation which has potentially violated Australia's international human rights obligations includes: Western Australia's 'three strikes' law, the *Crime (Serious and Repeat Offenders) Act* 1992 (WA) (Wilkie 1992); the NSW preventive detention legislation, the *Community Protection Act* 1994 (NSW);[55] the mandatory life sentencing of juveniles in NSW;[56] and the *Sentencing (Life Sentences) Amendment Act* 1993 (NSW).[57] On a couple of occasions, proposals have been put forward for retrospective legislation prohibiting the release of designated offenders sentenced to life imprisonment.[58] These were politically motivated attempts to convert life sentences which had been imposed prior to January 1990 (and which were therefore subject to applications for redetermination and, ultimately, parole eligibility) into natural life sentences. If enacted such laws would

53 *Dietrich v The Queen* (at 305); *Jago v The District Court of NSW; Jumbunna Coal Mine NL v Victorian Coalminer's Association , Mabo v State of Queensland.*

54 *Toonen v Australia*, Views of the Human Rights Committee, Fiftieth Session, concerning Communication No 488/1992, 25 December 1994; *A v Australia*, Views of the Human Rights Committee, Fifty-ninth Session concerning Communication No 560/ 1993, 30 April 1997.

55 Although virtually each judge in the appeal process expressed misgivings at the statute's violations of human rights, no judge ruled that this, per se, entailed invalidity. When the statute was ultimately struck down by the High Court – *Kable v Director of Public Prosecutions (NSW)* – it was on the different basis that, given CH III Commonwealth Constitution, and its creation of an 'integrated judicial system', State courts (which are potential repositories of the judicial power of the Commonwealth) should not be required to exercise powers which are incompatible with the exercise of the judicial power of the Commonwealth. For a detailed discussion of the human rights issues involved, see: Zdenkowski 1997; NSWLRC 1996b:235-8; NSWLRC 1996a:140-5.

56 The Crimes Amendment (Mandatory Life Sentences) Bill 1995 (NSW) originally provided for a mandatory life sentence for juveniles. This violated Art 37 Convention on the Rights of the Child which requires at least stipulation of a minimum term as part of a life sentence for persons under 18. Following criticism in a parliamentary enquiry, this provision was subsequently removed so that the statute only applied to adults. Indeed, the provisions relating to juveniles were somewhat bizarre given that the substantive parts of the legislation made it clear that it only applied to one person – Gregory Wayne Kable – who was unquestionably an adult.

appear to violate the prohibition on retrospective criminal laws in international law[59] and at common law.[60] None of these attempts has been successful to date. Although it is technically possible to avoid its reach, the *Kable* decision doubtless provides a rallying point for opponents of such laws or an excuse for those who are lukewarm about them.

Concluding Remarks

Discretion, disparity, desert, severity and veracity will continue to permeate sentencing policy, popular discourse and reform projects. There are, and will continue to be, contradictory vectors in punitive practices. Harsh mandatory regimes, selective incapacitation, escalating sentencing guidelines and grids (driven by populist punitiveness) will sit alongside community-based sanctions, restorative justice schemes and measures designed to reduce penalties via summary courts and the expansion of administrative punishments such as infringement notices. This pluralism of punitive practices reflects both an accommodation of principled variation in punishment values and goals in the wider community and a pragmatic adjustment to more prosaic concerns with cost and efficiency. Although recent developments appear to herald a new era, discretion is likely to prove resilient in the sentencing process notwithstanding reforms aimed at contracting, streamlining, guiding or, indeed eliminating, its exercise. Judicial sentencing guidelines will become an accepted part of the sentencing landscape in NSW because they represent an incremental development from appellate sentencing practice and constitute a modest rather than radical attempt to improve consistency in sentencing practice. As Chief Justice Spigelman recently put it:

> ... guideline judgements 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.[61]

The community is likely to embrace the process of guideline judgments with greater confidence than a politically driven grid system for several reasons. The guidelines are indicative and flexibility is retained. The courts' experience of the intricacies of the process is vastly superior to that of the legislature. And the courts are, and should be, robustly independent from the whims of popular prejudice.

But several related challenges remain for the courts: devising a means of taking account of public opinion in an appropriate manner; explaining its guideline decisions in an accessible way; and resisting the temptation to conflate consistency and severity. The Court

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57 This amended s13A of the *Sentencing Act* 1989 (NSW) to provide, in s13A(8), that the Supreme Court has power to prevent (either ever again or for a specified term) re-application for a redetermination where an offender has been sentenced to life imprisonment. In essence, such an order could convert a fixed term with the possibility of parole into a natural life sentence, a more severe penalty than that originally imposed Arguably, this violates Art 15.1 of the International Covenant on Civil and Political Rights. See NSWLRC, 1996a:123-4 and material cited in notes 187 and 190.

58 For example, Life Sentence Confirmation Bill 1997. See Second Reading Speech of Shadow Attorney-General John Hannaford, 15 October 1998.

59 See Art 15.1 ICCPR.

60 *Polyukhovich v The Commonwealth and Anor.* See also Bagaric & Lakic 1999.

61 Spigelman 1999:5-6.

of Criminal Appeal's initiative in the area of explanation to date are laudable. However, the court has yet to come to terms with the other two challenges. The Chief Justice's recent extra-curial remarks on both matters represent a promising start.[62]

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62 Chief Justice Spigelman acknowledged both of these problems in Spigelman 1999.

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