

CRIMINAL SENTENCING – the geographical lottery

By David Field



The continuing differences in the criminal sentencing provisions of the various Australian states and territories show that the time is long overdue for federal guidelines.

'POSITION, POSITION, POSITION'

It is one of the Holy Grails of our criminal law that:

'Where the facts and circumstances of crimes and the subjective factors of those who commit them are the same, arguably equal justice requires that there be an identity of, and not different, outcomes in the punishment that they receive.'¹

This time-honoured axiom of 'parity in sentencing' is, however, under threat from the continued organisation of Australian criminal justice along state and territory lines. The punishment actually received for any given crime in Australia is as much the product of the precise geographical location in which it is committed as it is the mood of the judicial officer passing sentence. There is no federal

sentencing authority in Australia, and little opportunity or enthusiasm for guidance at High Court level. Consequently, so far as concerns the mechanisms for deterring and punishing crime, the states and territories have failed to progress beyond the status of independent colonies under the British Crown.

‘THIS IS NOT A SENTENCING COURT’

The High Court has consistently declined to act as the ultimate arbiter of what is, and what is not, an appropriate sentence in any given category of case. In *Dinsdale v The Queen*,² the Court confirmed that it will interfere only in cases in which the sentencing agency³ has demonstrated error of principle or mistake of fact, has taken into account irrelevant factors, has failed to take relevant factors into account, or has passed a sentence which is manifestly inadequate or excessive.⁴

This has left the states and territories free to develop their own approaches to the sentencing process, and to devise and implement their own policies regarding punishment of specific crimes. They are constitutionally empowered to do so.⁵

Although the High Court has been instrumental in its role as the ‘apex’ court for Australian common law in laying down national benchmarks on matters of criminal law, such as the admissibility of confessions⁶ and evidence of an accused person’s previous convictions,⁷ it has exercised little nationwide authority in matters of criminal sentencing.

‘INTUITIVE’ OR ‘TWO-STAGE’ APPROACH?

This non-interventionist stance has even extended to the methodologies to be employed in sentencing, of which there are basically two. The first is the so-called ‘intuitive’ approach,⁸ which involves the sentencing agency ‘weighing all the relevant factors’.⁹ The second is the more transparent ‘two-stage’ approach that requires the sentencing agency to begin with a ‘head sentence’,¹⁰ and then increase or decrease it by reference to ‘aggravating’ or ‘mitigating’ factors.¹¹

The High Court has sent out mixed messages regarding which of the two methodologies is to be preferred. In *Wong*,¹² the majority Court criticised the ‘two-stage’ approach as ‘...not only apt to give rise to error, [but] ... an approach which departs from principle’. However, in *Markarian*,¹³ the majority, while confirming the generality of what had been laid down in *Wong*, conceded that the two-stage approach might be appropriate in a ‘simple’ case involving only a few relevant factors, and might ‘better serve’ the desired objectives of transparency in sentencing, and accessible reasoning. Kirby J, in dissent,¹⁴ went so far as to suggest that, given the number of circumstances in which state and territory legislation now makes provision for specific factors to be not only taken into account, but actually referred to in ‘sentencing remarks’, a two-stage process might be increasingly appropriate.¹⁵

In fact, the states and territories had by then become so committed to their own policies of allowing sentence discounts for various factors, and *announcing during the sentencing process that they had done so*, that they were

reluctant to revert to an instinctive synthesis process. Immediately following *Markarian*, some intermediate appeal courts began issuing judgments justifying a continuation of the ‘two-stage’ approach.¹⁶

‘GENEROUS DISCOUNTS ON OFFER – BUT CHECK YOUR LOCATION FIRST’

The ‘utilitarian’¹⁷ value to the criminal justice system of a plea of guilty is recognised in the legislation of every state and territory, although the precise advantage that it will give an accused varies according to the prevailing practice within the relevant jurisdiction.¹⁸

Under Commonwealth legislation,¹⁹ the difficulties are exacerbated by the fact that sentencing is customarily carried out by the appropriate court of the state or territory in which the offence was committed, thus importing jurisdictional imperatives and practices into a sentencing regime which, theoretically and ideally, ought to be consistent throughout Australia.

By way of illustration, in a 2006 paper,²⁰ Brian Opeskin, Deputy President of the Australian Law Reform Commission, produced a table showing that on a given date in December 2004, prisoners convicted of the federal offence of drug importation were serving median sentences varying from 71 months in South Australia to 216 months in the Northern Territory. On the same theme, a survey across jurisdictions conducted in 1995 by the Australian Institute of Judicial >>



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Administrators²¹ showed the range of discounts for pleas of guilty to be potentially as wide as 25 per cent to 50 per cent.

One's chances of being jailed at all also vary dramatically from jurisdiction to jurisdiction. Figures from the Australian Bureau of Statistics²² reveal that as at 30 June 2011, prisoner numbers per 100,000 adult population were as high as 762 in the Northern Territory, and lower than 150 in Victoria and the ACT.

The lack of realistic authority exercised by the High Court, or for that matter any other federal agency, in this regard is further underlined by the fact that in *Cameron v The Queen*,²³ the majority in the High Court ruled that discounting a sentence for 'utilitarian' reasons, unconnected with any willingness on the part of the offender 'to facilitate the course of justice', was discriminatory to those who exercise their right to trial.²⁴ Not only did this not lead to any change in legislative policy by the states or territories, but the Courts of Appeal in South Australia and NSW²⁵ effectively defied the Court by confirming that they would continue to discount for utilitarian reasons, immunised from *Cameron v The Queen* by the constitutional inviolability of state legislation.

The same 'similar, but different' approach prevails in the matter of discounting sentences for a defendant's 'willingness to assist the authorities', or to 'facilitate the course of justice'.²⁶ In Queensland, NSW and Western Australia, the sentencing agency is required to quantify the discount, by stating what the sentence would otherwise have been,²⁷ while the courts in Victoria, the ACT and the Northern Territory, as well as the Commonwealth courts, need not quantify the discount. Only Tasmania gives no statutory discount for such assistance.

WHERE DOES ONE START?

Regardless of the methodology employed, the starting point in the determination of any sentence must be the *maximum* prescribed by legislation. Even allowing for the fact that this maximum should ordinarily be reserved for 'the worst possible case of its kind',²⁸ it still operates as a subconscious 'ceiling', and sends a subtle message to sentencing agencies regarding the opinion that prevails within a particular community about the heinousness of any given crime. A high 'ceiling' indicates that condign consequences are expected in order to fulfil the 'deterrence' and 'denunciation' elements of sentencing.

Here again, the precise geographical location of a crime can influence the outcome. Some states and territories, but not all, impose mandatory sentences for certain types of crime. For example, murder carries a mandatory life sentence

With no federal sentencing authority in Australia, punishment for any given crime is dictated as much by the precise geographical location in which it is committed as by the mood of the judicial officer passing sentence.

in Queensland,²⁹ whereas it is prescribed as the maximum, but not automatic, penalty for the same offence in NSW,³⁰ Victoria,³¹ Tasmania³² and the Northern Territory.³³ Western Australia,³⁴ the ACT³⁵ and South Australia³⁶ sit on the fence with legislation which prescribes a life sentence for murder, but with the possibility of a lower sentence in suitable cases.

The jurisdictions also vary in the maxima for given offences and in their classifications of offender 'types'. Some offences in Queensland may qualify the offender as a 'serious violent offender',³⁷ while under the NSW Act³⁸ it is possible to become categorised as a 'serious' sexual, drug or arson offender. South Australian sentencing courts recognise 'serious repeat' offenders³⁹ of various types of

crime, while in the Northern Territory the description 'violent offender' is given to any person even threatening violence in the commission of an offence which carries a life sentence.⁴⁰ All of these are liable to an increased prison term, but the detailed consequences vary considerably. To complicate the picture even further, some jurisdictions have experimented with 'non-parole' periods,⁴¹ while others have made provision for the issuing of 'guideline judgments'⁴² or 'sentencing guidelines'⁴³ by their superior courts.

In addition, state and territory governments have become increasingly sensitive to electorate denunciation of what it perceives to be 'soft sentencing' that does not meet community expectations. In an attempt to keep their ears open to public sentiment, the governments of New South Wales, Victoria, Tasmania and Queensland have in recent years established Sentencing Advisory Councils whose general terms of reference involve community engagement on matters of sentencing policy. They have begun to report back on matters as varied as arson,⁴⁴ standard non-parole periods,⁴⁵ and sexual offences against children.⁴⁶ However, it seems that strict fiscal control is given a higher priority than justice in Queensland, whose Sentencing Advisory Council was closed down earlier this year for economic reasons. Such initiatives can only result in more diversity and discrepancies between state and territory sentencing policies. The only federal studies so far in this area have been those published by the Australian Law Reform Commission,⁴⁷ and these have dealt solely with issues relating to the sentencing of those convicted of Commonwealth offences.

In the absence of any movement at the federal level to establish a nationwide regime of sentencing guidelines, 'position, position, position' will continue to dominate punishment for crime as much as it does the marketing of real estate. ■

This article has been peer reviewed in accordance with standard academic practice.

Notes: **1** McHugh J in *Cameron v The Queen* (2002) 209 CLR 339, at [353]. **2** (2000) 202 CLR 321, at [324-5], per Gleeson CJ and Hayne J. **3** This term is used to encompass not only sentencing judges, but also intermediate state and territory courts of appeal. **4** Note, however, the observation of Kirby J in *Makarjian v The Queen* (2005) 228 CLR 357, at [393], that '... the gateway to this Court in appeals [regarding allegedly excessive or inadequate sentences] is almost always barred and locked, and the key is rarely found'. See also the majority, at [376], that 'This Court is not a sentencing court'. **5** See, for example, *Constitution Act 1867* (Qld), s2, and *Constitution Act 1902* (NSW), s5. As McHugh J acknowledged, in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, at [600], 'That power is preserved by s107 of the Commonwealth Constitution'. **6** *R v Swaffield* (1998) 192 CLR 159, at [202]. See also *Foster v The Queen* (1993) 66 A Crim R 112, *Tofilau and Ors v The Queen* (2007) 231 CLR 396 and *Em v The Queen* (2007) 232 CLR 67. **7** *Pfennig v The Queen* (1995) 182 CLR 461, at [481]. **8** Also referred to as 'instinctive synthesis'; see *Makarjian* (note 4), at [373]. **9** *Ibid.* **10** A 'head sentence' is what might be termed 'the going rate' for a particular crime committed in particular circumstances, by reference to cases which have previously been decided. **11** A typical 'aggravating' factor would be previous convictions for the same offence, while 'mitigating' factors include a guilty plea, assistance given to the authorities and a genuine expression of remorse. **12** *Wong v The Queen* (2001) 207 CLR 584, at [611]. **13** Note 4, at [375]. At [373], the two-stage approach was said by the majority to depart from principle '... because it does not take account of the fact that there are many conflicting and contradictory elements which bear upon sentencing an offender.' **14** *Ibid.*, at [407]. **15** However, he counselled that sentencing agencies must still '...express their obedience to' the instinctive synthesis approach, and that 'It might be prudent for them to avoid mention of "two stages..."'. This hedging of bets at the highest judicial level has not passed unnoticed; see, for example, Edney 'Still Plucking Figures Out of the Air? *Makarjian* and the Affirmation of Instinctive Synthesis' (2005) 1 *High Court Quarterly Review* 50, at 53. **16** For Tasmania, see *Dennison v Tasmania* (2005) 15 Tas R 50; and for Western Australia, see *Chivers v WA* [2005] WASC 97. In South Australia the relevant authority is *R v Place* (2002) 81 SASR 395, while for New South Wales, see *R v Sharma* (2002) 130 A Crim R 238, at [244] and *R v Whyte* (2002) 134 A Crim R 53, at [58]. More recently, in *Trajkovski v The Queen* [2011] VSCA 170, at [90], the Victorian Court of Appeal, while paying due 'obedience' to the preference for 'instinctive synthesis', left the door open for a 'two-tier' approach in appropriate cases. **17** Kirby J in *Cameron v The Queen* (above note 1), at [360], citing *R v Winchester* (1992) 58 A Crim R 345 at [350]. **18** Compare the *Penalties and Sentences Act 1992* (Qld) (hereafter 'the Queensland Act'), s13; the *Sentencing Act 1995* (WA) (hereafter 'the WA Act'), s8; the *Crimes (Sentencing Procedure) Act 1999* (NSW) (hereafter 'the NSW Act'), s22; the *Sentencing Act 1991* (Vic) (hereafter 'the Victorian Act'), s5(2)(e); the *Sentencing Act* (NT) (hereafter 'the NT Act'), s5(2)(j); the *Crimes (Sentencing) Act 2005* (ACT) (hereafter 'the ACT Act'), s35; and the *Criminal Law (Sentencing) Act 1988* (SA) (hereafter 'the SA Act'), s10(1)(g). Tasmania is now unique among the states and territories in not statutorily acknowledging the possibility of a discount for a guilty plea, see the *Crimes (Sentencing) Act 2005* (Tas) (hereafter 'the Tasmanian Act'). **19** *Crimes Act 1914* (Cth) (hereafter 'the Commonwealth Act'), s16A(g). **20** Delivered to the National Judicial College/ANU College of Law Annual Conference in February 2006. **21** Mack and Anleu, *Pleading Guilty: Issues and Practices* (1995). In *Cameron* (above note 1), at [342], Gaudron, Gummow and Callinan JJ noted that under the practice then current in Western Australia, the 'discount' might vary from 20 per cent to 35 per cent, depending upon circumstances. **22** Australian Bureau of Statistics, 4517 - *Prisoners in Australia, 2011*, Canberra 8/12/2011 <www.abs.gov.au/ausstats/abs@.nsf/mf/45170/> **23** Above note 1, at [343]. **24** See Field, 'Plead Guilty Early and Convincingly to Avoid Disappointment' (2002), 14 (2) *Bond Law Review*, at 251. **25** *R v Place* (above note 17) for South Australia, and *R v Sharma*

(above note 17) in NSW. **26** Compare s13A of the Queensland Act, s23 of the NSW Act, s5(2AB) of the Victorian Act, s32A(3) of the SA Act, s8(5) of the WA Act, s36 of the ACT Act, s5(2)(h) of the NT Act, and s16A(2)(h) of the Commonwealth Act. **27** It is difficult to envisage a more defiant application of the 'two-tier' process. **28** *Veen v The Queen (No 2)* (1988) 164 CLR 465, per Gaudron J at 498. **29** *Criminal Code 1915* (Qld), s305. **30** *Crimes Act 1900* (NSW), s19A. **31** *Crimes Act 1958* (Vic), s3. **32** *Criminal Code* (Tas), s158 (per Schedule 1 to the *Criminal Code Act 1924* (Tas)). **33** *Criminal Code* (NT), s157 (per Schedule 1 to the *Criminal Code Act* (NT)). **34** Under s279 of its *Criminal Code*. **35** *Crimes Act 1900* (ACT) ss12 and 32. **36** *Criminal Law Consolidation Act 1935* (SA), s11. **37** *Penalties and Sentences Act 1992* (Qld), s161A. **38** *Crimes (Sentencing Procedure) Act 1999* (NSW), s6A. **39** SA Act, s20B. **40** NT Act, s65. **41** NSW Act, Part 4, Division 1; Victorian Act, s11; SA Act, Part 3, Division 2; ACT Act, Part 5.2; NT Act, s53. **42** Queensland Act, Part 2A; NSW Act, Part 3, Division 4; Victorian Act, Part 2AA; WA Act, s143. **43** SA Act, Part 2, Division 4. **44** Tasmanian Sentencing Advisory Council Consultation Paper No 1, 20 December 2011. **45** NSW Sentencing Council Report, November 2011; Queensland Sentencing Advisory Council Final Report, September 2011. **46** Queensland Sentencing Advisory Council Final Report, January 2012; Sentencing Advisory Council of Victoria Report, September 2009. **47** *Australian Law Reform Commission*, Report 15 (1980); Report 44 (1988); Issues Paper 29 (2005); Report 103 (2006).

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