

**NSW PARLIAMENTARY LIBRARY  
RESEARCH SERVICE**



**Mandatory and Guideline  
Sentencing: Recent  
Developments**

by

Honor Figgis

**Briefing Paper No 18/98**

## **RELATED PUBLICATIONS**

- Sentencing Guidelines and Judicial Discretion: A Review of the Current Debate by Gareth Griffith, Briefing Paper No 15/94
- Crimes Amendment (Mandatory Life Sentences) Bill 1995 by Gareth Griffith, Bills Digest No 3/95
- Dangerous Offenders Legislation: An Overview by Honor Figgis and Rachel Simpson, Briefing Paper No 14/97

**ISSN 1325-5142**

**ISBN 07313 1608 2**

October 1998

© 1998

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this document may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, with the prior written consent from the Librarian, New South Wales Parliamentary Library, other than by Members of the New South Wales Parliament in the course of their official duties.

## **NSW PARLIAMENTARY LIBRARY RESEARCH SERVICE**

Dr David Clune, Manager . . . . . (02) 9230 2484

Dr Gareth Griffith, Senior Research Officer,  
Politics and Government / Law . . . . . (02) 9230 2356

Ms Honor Figgis, Research Officer, Law . . . . . (02) 9230 2768

Ms Rachel Simpson, Research Officer, Law . . . . . (02) 9230 3085

Mr Stewart Smith, Research Officer, Environment . . . . . (02) 9230 2798

Ms Marie Swain, Research Officer, Law/Social Issues . . . . (02) 9230 2003

Mr John Wilkinson, Research Officer, Economics . . . . . (02) 9230 2006

**Should Members or their staff require further information about this publication please contact the author.**

Information about Research Publications can be found on the Internet at:

**<http://www.parliament.nsw.gov.au/gi/library/publicn.html>**

## CONTENTS

### Executive Summary

1.	Introduction . . . . .	1
2.	Sentencing in New South Wales . . . . .	2
3.	‘Grid’ Sentencing Guidelines - The United States Experience . . . . .	8
4.	Guideline Judgments . . . . .	13
5.	Recommendations of The New South Wales Law Reform Commission . . . . .	15
6.	Arguments For And Against Guideline Judgments, Sentencing ‘Grids’ And Mandatory Sentences . . . . .	17
6.1	Guideline judgments . . . . .	17
6.2	Sentencing ‘grids’ . . . . .	19
6.3	Mandatory sentences . . . . .	21
7.	Recent Developments . . . . .	22
7.1	New South Wales . . . . .	23
7.2	Northern Territory . . . . .	28
7.3	Western Australia . . . . .	32
7.4	United Kingdom . . . . .	35
8.	Conclusion . . . . .	36

## APPENDICES

Appendix A - Extract from New South Wales Law Reform Commission, *Sentencing*,  
Discussion Paper 33

Appendix B - Minnesota Sentencing Guidelines Grid as at 1 August 1996

Appendix C - *Crime and Disorder Act 1998* (UK) sections 80 and 81

## EXECUTIVE SUMMARY

- Judges and magistrates have a fairly wide discretion to determine what sentence an offender should receive. This discretion is exercised within legislative boundaries that set maximum penalties. The sentencing discretion is also structured by common law sentencing principles and doctrines (pages 2-6).
- There is some public concern in New South Wales about undue **leniency** in sentencing, and the existence of unjustified **sentencing disparities** (that is, cases where an offender receives a sentence that is significantly more lenient or harsher than an offender in those circumstances would normally receive). There may be a degree of sentencing disparity in New South Wales, although the extent and significance of any disparities is not clear. Some argue that a major source of sentencing disparity is the wide judicial sentencing discretion, combined with different penal philosophies among judges (pages 5-7).
- There are several methods of limiting judicial discretion. They include guideline judgments, presumptive sentencing guidelines, and mandatory sentencing. These measures vary widely in their details, their objectives, and their effects. **Guideline judgments** are decisions handed down by appeal courts setting out the principles of sentencing and the range of penalties that may be applied to a given offence (pages 13-15). **Presumptive sentencing guidelines** (commonly called 'grid sentences') are contained in or based on legislation. They set out a range of penalties for an offence based on the seriousness of the offence, and the offender's criminal history. Other factors, such as aggravating or mitigating circumstances, may be included in the guidelines (pages 8-13). Judges may be able to depart from the guidelines in particular circumstances, or upon giving reasons for a departure). **Mandatory minimum sentences** are minimum sentences prescribed for a particular offence. The minimum sentence may be determined by the offender's criminal record, as well as by the offence. Judges must sentence between the minimum and maximum penalties (p 8). These different reform measures each have advantages and disadvantages (pages 17-22).
- The New South Wales Law Reform Commission in its comprehensive 1996 report on sentencing recommended against limiting judicial sentencing discretion by grid sentencing or by minimum sentences. In the Commission's view, efforts to reduce any sentencing disparity should concentrate on the review of sentences by appeal courts, the Judicial Commission's sentencing information system, and the provision of clear reasons for sentences by the sentencing court (pages 15-17).
- **New South Wales** has introduced mandatory life sentences for murder and certain drug trafficking offences where a court is satisfied that the level of culpability is extreme. The judicial sentencing discretion is also affected by the recent decision of the New South Wales Court of Criminal Appeal to issue its first formal guideline

judgment. To promote the development of further guideline judgments, the NSW Government has indicated it is considering allowing the Court to establish guidelines without linking them to individual cases (pages 23-28).

- The **Northern Territory** has recently implemented mandatory minimum terms of imprisonment for some property offences; for adults, the sentences range from 14 days prison for a first offence, to 12 months for a third or more offence (pages 28-32). **Western Australia** has also implemented mandatory minimum terms of 12 months imprisonment for third (or more) repeat home burglaries. The Western Australian Government is also planning to introduce a presumptive sentencing 'matrix' in the near future (pages 32-34). In the **United Kingdom** legislation in 1997 introduced mandatory minimum prison sentences (with limited exceptions) for certain repeated offences: an automatic life sentence on a second conviction for a serious sexual or violent offence; and a mandatory minimum seven-year sentence for serious three-time repeat drug dealers (pages 35-36).

---

## 1. INTRODUCTION

Recently the New South Wales Liberal Party and National Party have both put forward proposals that would limit substantially the discretion of judges to determine sentences for convicted offenders. The Leader of the Liberal Party, Hon Peter Collins MP, has announced plans to introduce legislation based on the sentencing guidelines systems adopted in a number of States in the USA,<sup>1</sup> and the Leader of the National Party, Hon Ian Armstrong MP, is considering adopting mandatory minimum sentences as National Party policy.<sup>2</sup> Either of these plans would be a major departure from current sentencing practices in New South Wales. The Attorney General has rejected the Coalition's proposed sentencing guidelines system.<sup>3</sup> Meanwhile, the NSW Court of Criminal Appeal appears to be moving of its own volition towards the use of 'guideline judgements', which direct trial judges to an appropriate range of punishments for certain offences.<sup>4</sup>

The judicial discretion to determine sentences was discussed in a 1994 New South Wales Parliamentary Library briefing paper, *Sentencing Guidelines and Judicial Discretion: A Review of the Current Debate*<sup>5</sup> (the Sentencing Guidelines Briefing Paper). This present briefing paper, which builds on that earlier paper, focuses on recent developments in mandatory sentences and sentencing guidelines. It begins with an overview of the basic objectives and principles that currently govern sentencing in New South Wales. The paper then looks at sentencing guidelines or 'grid sentencing' in the United States, and guideline judgments by the Court of Appeal in the United Kingdom. This is followed by an outline of the position taken by the New South Wales Law Reform Commission on mandatory and guideline sentences in its comprehensive 1996 report on sentencing.<sup>6</sup> The arguments for and against these sentencing measures are then set out. The final section deals with recent developments in mandatory sentences and sentencing guidelines in Australia and the United Kingdom.

---

<sup>1</sup> Hon P Collins MP, *Winning back the streets: the Coalition's Five Point Plan for a safer community*, 13/5/98; Hon P Collins MP, 'Collins announces anti-crime battle plan', Media Release, 13/5/98; Hon J Hannaford MLC, 'Grid Sentencing - The U.S. Experience', Media Release, 14/5/98.

<sup>2</sup> Hon I Armstrong MP, 'Armstrong looking at mandatory sentencing for NSW', Media Release, 27/7/98; 'Carr must accept blame for weak drug laws in NSW', *Media release*, 28/10/97; 'Four years minimum for 'small' drug deals', *Media release*, 9/9/97. The National Party is currently revising its sentencing policies and does not have concrete proposals.

<sup>3</sup> Hon J Shaw MLC, 'Grid sentencing - A failed US experiment', Media release, 14/5/98; Speech by the Hon J Shaw MLC, forum on 'Rethinking Law and Order', Parliament House Theatre, 1/7/98.

<sup>4</sup> *R v Jurisic* (unrep, NSW CCA, Spigelman CJ, Wood CJ at CL, Sully J, B M James J, Adams J, 12/10/98).

<sup>5</sup> G Griffith, New South Wales Parliamentary Library Briefing Paper No 15/94.

<sup>6</sup> New South Wales Law Reform Commission, *Sentencing*, Report 79, December 1996.

## 2. SENTENCING IN NEW SOUTH WALES

The earlier Parliamentary Library Sentencing Guidelines Briefing Paper explained that Australian courts have traditionally enjoyed a largely unfettered discretion to determine sentences.<sup>7</sup> The boundaries of the judicial discretion are set by legislation that specifies the maximum penalty for particular offences, and shapes the sentences imposed by the courts.<sup>8</sup> Within these legislative boundaries, the sentencing discretion is further structured by common law principles and precedents. As Street CJ has explained, ‘Although the discretion left to the judge is wide, the doctrines and principles established by the Common Law in regard to sentencing provide the chart that both relieves the judge from too close a personal involvement with the case in hand, and promotes consistency of approach on the part of individual judges’.<sup>9</sup>

The process by which a judge decides on a sentence has been described by the Victorian Court of Criminal Appeal as an ‘intuitive synthesis of all the various aspects involved in the punitive process’ to reach ‘what is essentially a subjective judgment’.<sup>10</sup> Each judge considers and weighs the objectives of punishment and the principles of sentencing, in all the circumstances of the case, to determine a sentence that is just. The High Court has explained that ‘sentencing is not a purely logical exercise ... the purposes overlap and none of them can be considered in isolation ... They are guideposts to the appropriate sentence’.<sup>11</sup>

The fundamental sentencing purposes and principles derived from the common law were outlined by the New South Wales Law Reform Commission in a discussion paper preliminary to its 1996 report on sentencing. The basic principles of sentencing law identified by the Commission include:

- **Proportionality:** Proportionality is the most fundamental and important principle in Australian sentencing law. It requires that offenders should receive a punishment that is in proportion to the gravity of their offence, neither too harsh nor too lenient. Grave wrongs merit severe penalties, and minor ones deserve lenient penalties.<sup>12</sup> In

---

<sup>7</sup> Griffith, n 5, pp 8-10, citing Lovegrove A, ‘Sentencing Guidance and Judicial Training in Australia’, in Munro C and Wasik M (eds) *Sentencing, Judicial Discretion and Training*, Sweet & Maxwell, 1992.

<sup>8</sup> For example, the *Sentencing Act 1989* (NSW) provides that in general, when sentencing a person to imprisonment for an offence, a court must set a minimum non-parole term of imprisonment, and an additional term during which the person may be released on parole; the additional term must not exceed one-third of the minimum term, unless the court decides there are special circumstances

<sup>9</sup> *R v Rushby* [1977] 1 NSWLR 594 at 597.

<sup>10</sup> *R v Williscroft* [1975] VR 292 at 300.

<sup>11</sup> *R v Veen (No 2)* [1988] 64 CLR 465 at 476.

<sup>12</sup> Findlay M, Odgers S and Yeo S, *Australian Criminal Justice*, Oxford University Press, 1994 p 216.



determining the gravity of the offence, it is relevant to consider a range of factors relating to the degree of harmfulness of the conduct, and the extent of the offender's culpability or blameworthiness.<sup>13</sup>

- **Consistency:** The courts should aim for consistency in sentencing, so that particular sentences fall within the range of sentences appropriate to the objective gravity of the offence and the subjective circumstances of the offender.<sup>14</sup>
- **Totality:** Where an offender is convicted of more than one offence in relation to a criminal event, the offender receives a sentence for each offence. The total of the sentences should reflect the totality of the offending, so that the aggregate sentence is just and appropriate to the totality of the criminal behaviour.<sup>15</sup>

Turning to the purposes of sentencing, the New South Wales Law Reform Commission identified five major objectives of punishment: retribution, deterrence, rehabilitation, incapacitation and denunciation.<sup>16</sup>

- **Retribution:** Retribution is the notion that the guilty ought to suffer the punishment that they deserve. It is a fundamental, intuitive reaction to wrongdoing.<sup>17</sup> Retribution as a philosophical basis for punishment has experienced a revival in the last two decades, particularly in the United States. The objective of retribution is now often expressed in the concept of 'just deserts'. 'Just deserts' requires that offenders should receive a punishment that corresponds to their culpability. Culpability is determined by both the seriousness of the offence in question, and by individual characteristics of the offender.<sup>18</sup>

The NSW Law Reform Commission took the view that the basic theory of 'just deserts' as accepted in Australia is 'merely a reflection of the common law concept

---

<sup>13</sup> New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33, April 1996, pp 62-64.

<sup>14</sup> *Ibid*, p 66.

<sup>15</sup> *Ibid*, p 67.

<sup>16</sup> *Ibid*, pp 44 ff. The Commission noted that 'reparation' is sometimes given as a purpose of punishment, but in the Commission's view reparation is an adjunct or ancillary part of the sentencing process, not a primary rationale.

<sup>17</sup> Ashworth A, 'Sentencing', in M Maguire, R Morgan and R Reiner, *The Oxford Handbook of Criminology*, Oxford University Press, 1994, p 819.

<sup>18</sup> The NSW LRC observed that the 'just deserts' theory has become associated with a particular view of sentencing which has emerged in some United States jurisdictions. That view seeks to confine a wide sentencing discretion by focussing on the objective gravity of offences, largely excluding reference to the individual circumstances of offenders. In the LRC's view, this particularly American approach to 'just deserts' was not applicable in New South Wales or Australia generally, where the 'just deserts' philosophy incorporates a consideration of factors relevant to the offender: NSW LRC Discussion Paper, n 13, pp 45-46.

of proportionality'. The Commission observed that the 'just deserts' philosophy has been accepted as the overriding sentencing objective in a number of Australian and overseas inquiries into sentencing.<sup>19</sup> Legislation in a number of Australian jurisdictions appears to accept 'just deserts' as one of the governing purposes of punishment,<sup>20</sup> or as the primary principle of punishment.<sup>21</sup>

- **Deterrence:** Deterrence aims to prevent future criminal activities. There are two kinds of deterrence: first, *specific deterrence*, which aims to dissuade the offender from committing further crime; and secondly, *general deterrence*, which aims to dissuade others, who have been made aware of the punishment inflicted upon the offender, from committing crime. Deterrence is specifically set out as an objective of sentencing in some Australian legislation.<sup>22</sup>
- **Rehabilitation:** Rehabilitative theories involve a philosophy that the offender's behaviour can be changed by using the opportunity of punishment to address the particular social, psychological, psychiatric or other factors which have influenced the offender to commit the crime.<sup>23</sup> The type of sentence handed down is accordingly regarded as a therapeutic measure tailored to the specific needs of each offender. Several Australian jurisdictions expressly refer to rehabilitation as an objective of sentencing.<sup>24</sup>
- **Incapacitation:** An offender may be imprisoned for the purpose of preventing him or her committing further offences during the period of incarceration, in order to protect the community.<sup>25</sup> Incapacitation may involve taking special protective measures against individual offenders or groups of offenders (usually recidivists)

<sup>19</sup> NSW LRC Discussion Paper, n 13, p 46, citing: Canada, Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, Canadian Government Publishing Centre, 1987; Australian Law Reform Commission, *Sentencing*, ALRC 44, 1988; Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee*, Melbourne, 1988; Ireland, Law Reform Commission, *Consultation Paper on Sentencing*, Dublin, March 1993.

<sup>20</sup> *Sentencing Act 1991* (Vic) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Sentencing Act 1995* (NT) s 5(1)(a); *Sentencing Act 1995* (WA) s 6(1).

<sup>21</sup> *Crimes Act 1914* (Cth).

<sup>22</sup> *Sentencing Act 1991* (Vic) s 5(1)(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c); *Sentencing Act 1997* (Tas) s 3(e)(i); *Young Offenders Act 1993* (SA) s 30(2a); *Sentencing Act 1995* (NT) s 5(1)(c); *Crimes Act 1900* (ACT) s 429A(1)(i).

<sup>23</sup> NSW LRC Sentencing Report, n 6, p 332.

<sup>24</sup> *Sentencing Act 1991* (Vic) s 5(1)(c); *Penalties and Sentences Act 1992* (Qld) s 9(1)(b); *Sentencing Act 1995* (NT) s 5(1)(b); *Crimes Act 1900* (ACT) s 429(2)(a); *Crimes Act 1914* (Cth) s 16A(2)(n); *Sentencing Act 1997* (Tas) s 3(e)(ii).

<sup>25</sup> NSW LRC Sentencing Report, n 6, p 332.

identified as likely to do serious harm in the future.<sup>26</sup> Incapacitation is listed in some Australian sentencing legislation as one of the purposes of punishment.<sup>27</sup>

- **Denunciation:** A court may aim, in sentencing an offender, to make a public statement that the behaviour constituting the offence will not be tolerated by society either in general, or in the specific instance.<sup>28</sup> Denunciation is expressly included in some State laws among the purposes for which a sentence may be imposed.<sup>29</sup>

It can be seen that these five objectives of punishment are not entirely consistent with each other, and can lead to widely different sentencing outcomes. Consider, for example, the case of a mentally unstable drug addict convicted of selling drugs to support his addiction.<sup>30</sup> A court aiming to deter other potential drug dealers would impose a long term of imprisonment; a court aiming to assist the offender to recover from his addiction would direct him to a drug treatment program; a court aiming to punish the offender according to his deserts would impose a sentence that took into account both the seriousness of drug dealing and the offender's mitigating circumstances. Any one of these sentences could be rationally justified - which kind of sentence is imposed depends on the approach taken by the particular judge.

New South Wales sentencing legislation does not set out any primary objective of sentencing for judges, or place the objectives of sentencing in a hierarchy. Within the range of sentences proportional to the offender's wrongdoing, it is up to the courts to determine what approach should be adopted in each particular case. The common law principle of proportionality acts as a form of upper and lower boundary in sentencing. The absence of any legislative statement about the main purpose of punishment seems to reflect the diverse attitudes towards punishment in the general community. Weatherburn has asserted that the absence of any consensus on the primary rationale of sentencing has resulted in a tendency to advocate a 'mixed bag' of purposes, with unfortunate consequences: 'The problem lies in the fact that many of them are incompatible, leading on the one hand to a compounding

<sup>26</sup> The theoretical and practical issues surrounding the use of incapacitation to prevent serious violent crimes are set out in Figgis H and Simpson R, *Dangerous Offenders Legislation: An Overview*, NSW Parliamentary Library Briefing Paper No. 14/97. See also Zimring F and Hawkins G, *Incapacitation: Penal Confinement and the Restraint of Crime*, Oxford University Press, 1995.

<sup>27</sup> *Sentencing Act 1991* (Vic) s 5(1)(e); *Penalties and Sentences Act 1992* (Qld) s 9(1)(e); *Sentencing Act 1995* (NT) s 5(1)(e); *Crimes Act 1900* (ACT) s 429(2)(a); *Sentencing Act 1997* (Tas) s 3.

<sup>28</sup> NSW LRC Sentencing Report, n 6, p 332. The NSWLRC Discussion Paper gave instances of decisions of NSW Courts expressly referring to the denunciatory functions of sentences.

<sup>29</sup> *Sentencing Act 1991* (Vic) s 5(1)(d); *Sentencing Act 1997* (Tas) s 3(e)(iii); *Penalties and Sentences Act 1992* (Qld) s 9(1)(d).

<sup>30</sup> See Robinson PH, 'One Perspective on Sentencing Reform in the United States', (1997) 8(1) *Criminal Law Forum* 1 at 4.

of the problem of sentencing disparities and on the other to a confusion over the formal role of the prison'.<sup>31</sup>

Ashworth also makes this point, saying that 'It is fairly well established that a major source of disparity in sentencing is different penal philosophies among judges and magistrates.' He points out that there are three possible approaches to the problem of differing sentencing philosophies: (1) to declare a single rationale; (ii) to allow sentencers a fairly free choice among several rationales [the New South Wales position]; or (iii) to declare a primary rationale, and to provide that in certain types of case one or another rationale might be given priority.<sup>32</sup>

**Sentencing disparities:** There have been troubling questions in New South Wales and elsewhere as to whether there are unjustified disparities in sentencing - that is, cases where an offender receives a sentence that is significantly more lenient or harsher than an offender in those or similar circumstances would normally receive. Some evidence and arguments relating to disparities in New South Wales were dealt with in the earlier Parliamentary Library Sentencing Guidelines Briefing Paper.<sup>33</sup> In particular, that briefing paper discussed the findings of a 1994 report by the NSW Bureau of Crime Statistics and Research that there were real concerns about marked differences between individual District Court Criminal judges in their readiness to imprison convicted offenders.<sup>34</sup>

The New South Wales Law Reform Commission addressed the question of sentencing disparity in its 1996 sentencing report. Ultimately, the Commission concluded that there was some evidence of disparities, but it could not be inferred that widespread unjustifiable evidence of disparities exists.<sup>35</sup> However, the Commission was prepared to assume that there was some degree of unjustifiable disparity, and that it was appropriate to seek to minimise if not eliminate it.

---

<sup>31</sup> Weatherburn DJ, 'Sentencing for what?' in Findlay M, Egger SJ and Sutton J, *Issues in criminal justice administration*, Allen & Unwin, Sydney, 1983, p 126. See also Lovegrove A, 'Sentencing Guidance and Judicial Training in Australia' in Munro and Wasik, n 7.

<sup>32</sup> Ashworth A, *Sentencing and Criminal Justice*, Weidenfeld and Nicolson, London 1992, pp 58-59. Ashworth notes that this third approach operates in Sweden, with desert or proportionality as the primary rationale, and it was also the approach of the UK *Criminal Justice Act 1991*, (since amended) with desert as the primary rationale, incapacitation having priority in certain types of case, and rehabilitation relevant in others. In Tasmania, the *Sentencing Act 1997* s 3(b) promotes 'protection of the community as a primary consideration in sentencing offenders'.

<sup>33</sup> Griffith, n 5, pp 5-10 and 15. See also Parliament of NSW, Legislative Council Standing Committee on Law & Justice, *Report on the Crimes Amendment (Mandatory Life Sentences) Bill 1995*, Report No 1, November 1995, pp 10-12.

<sup>34</sup> D Weatherburn, *Sentence Disparity and its Impact on the NSW District Criminal Court*, NSW Bureau of Criminal Statistics and Research, 1994.

<sup>35</sup> NSW LRC Sentencing Report, n 6, pp 10-12.

Since the Law Reform Commission's 1996 report, concerns about disparity have continued to emerge. Some empirical evidence of disparity is found in a 1998 report by the Judicial Commission of New South Wales, which found that there were some differences in the sentences received by juvenile offenders from different ethnic groups. The study's findings included that there were statistically significant differences in penalties received by the sample group of Aboriginal and Torres Strait Islander juveniles and Anglo-Australian juveniles, with the former group receiving harsher penalties.<sup>36</sup> On the other hand, a 1997 study of gender in juvenile sentencing conducted by the Judicial Commission found no statistically significant disparity between sentencing outcomes for male and female juvenile offenders.<sup>37</sup>

**Undue leniency:** Publicity given to sentences of perceived undue leniency by media commentators and others can give rise to impressions of disparity and overall leniency. The NSW Law Reform Commission addressed community concerns about leniency in its sentencing inquiry. In the Commission's view, there was no persuasive empirical evidence to suggest that the sentences imposed by the courts are out of step with community values.<sup>38</sup> However, the Chief Justice of the New South Wales Supreme Court has said that public criticism of particular sentences for inconsistency or excessive leniency is sometimes justified.<sup>39</sup>

**Options for reform:** The earlier Parliamentary Library Sentencing Guidelines Briefing Paper outlined some options adopted in various jurisdictions to limit or structure the exercise of the judicial sentencing discretion.<sup>40</sup> Briefly, these are:

- *Guideline judgments:* Judgments handed down by appeal courts setting out principles of sentencing and the range of penalties that may be applied to a given offence.
- *Voluntary sentencing guidelines:* Guidelines developed by the government or committees of judicial officers.
- *Presumptive sentencing guidelines ("Grid sentencing"):* Guidelines, generally supported by legislation, which set out the range of penalties for an offence based

---

<sup>36</sup> Gallagher P and Poletti P, *Sentencing Disparity and the Ethnicity of Juvenile Offenders*, No. 17, Judicial Commission of New South Wales, Sydney, 1998.

<sup>37</sup> Gallagher P, Poletti P, MacKinnell I, *Sentencing Disparity and the Gender of Juvenile Offenders*, No. 16, Judicial Commission of New South Wales, Sydney, 1997.

<sup>38</sup> NSW LRC Discussion Paper, n 13, pp 35-41; NSW LRC Sentencing Report, n 6, pp 16-17.

<sup>39</sup> *R v Jurisic* (unrep, NSW CCA, Spigelman CJ, Wood CJ at CL, Sully J, B M James J, Adams J, 12/10/98).

<sup>40</sup> Griffiths, n 5, pp 11-15.

---

on the seriousness of the offence and the offender's criminal history. A court may be at liberty to depart from the prescribed sentencing range, perhaps only in special circumstances or only after giving reasons for a departure.

- *Mandatory minimum, sentencing laws*: Legislation prescribing the minimum (as well as maximum) penalty for an offence. The court must sentence within this range.

### 3. 'GRID' SENTENCING GUIDELINES - THE UNITED STATES EXPERIENCE

Presumptive sentencing guidelines, commonly known as 'grid sentencing', were developed from the mid-1970s in the United States, in an attempt to introduce more coherence and consistency to sentencing. Sentencing in the United States at that time was quite different to current Australian sentencing practice. In the 1970s, American judges were largely unregulated in their sentencing discretion, either by statutes (except for maximum penalties) or by case law. Sentencing was generally dominated by rehabilitative ideals, which in practice led to indeterminate sentences where the parole board, rather than the sentencing judge, decided how long an offender should remain in prison and when the prisoner was ready to be released. There was very little appellate review of sentences or parole release decisions, and no body of case law on sentencing developed.<sup>41</sup>

The lack of a structure for sentencing decisions led to calls by several different groups in the mid-1970s for reforms to sentencing laws: civil rights activists were concerned by unwarranted sentencing disparities, with their potential for race and class bias; social scientists called into doubt the effectiveness of indeterminate sentences to reduce recidivism or rehabilitate offenders; political conservatives were concerned about lenient judges and supported limits on judicial discretion as a means to ensure harsher sentences.<sup>42</sup>

Many US States established sentencing commissions to recommend measures for the reform of sentencing laws. The result in a number of US States has been a set of sentencing guidelines, usually in the form of a grid drawn up by a sentencing commission and given force by legislation, that prescribes an appropriate sentence range for an offender based on the seriousness of the offence and the offender's criminal history. By 1997, 17 States and the US Federal Government had adopted some form of sentencing guidelines.<sup>43</sup> The NSW

---

<sup>41</sup> Tonry M, *Sentencing Matters*, Oxford University Press, 1996, p 6. See also Tonry, M, *Intermediate sanctions in sentencing guidelines*, U.S. Dept. of Justice, National Institute of Justice, Washington, D.C., 1997, Ch 3.

<sup>42</sup> Tonry, *Sentencing Matters*, *ibid* p 9.

<sup>43</sup> Frase R, 'Sentencing Guidelines Are 'Alive and Well' in the United States', in Tonry M and Hatlestad K (ed), *Sentencing Reform in Overcrowded Times: A Comparative Perspective*, Oxford University Press, 1997 p 12. This book describes the sentencing guidelines in several US states, as well as sentencing reforms in the UK, other European countries, New Zealand, Canada and South Africa. The different US State sentencing systems are also described in Wicharaya T, *Simple Theory, Hard Reality: The Impact of Sentencing Reforms*

Law Reform Commission's description of the Minnesota grid, the oldest and most well-known of the State sentencing guidelines, is included as Appendix A. The Minnesota grid itself is attached to this briefing paper as an example (Appendix B).

A leading American sentencing scholar, Michael Tonry, has observed that 'reduced to their core elements, all sentencing guideline grids are fundamentally the same: two-dimensional tables that classify crimes by their severity along one axis and criminal records by their extent along the other. Applicable sentences for any case are calculated by finding the cell where the applicable criminal record column intersects with the applicable offense severity row'.<sup>44</sup> There are, nevertheless, many areas where grids vary considerably.

- *Sentencing philosophy*: Some US States have expressly based their grids on retributive, or 'just deserts', theories of punishment, placing greater emphasis on the severity of the current offence and less on individual offender characteristics.<sup>45</sup> Frase comments that generally US States, unlike the US federal guidelines, leave substantial room for offender-based sentences and the pursuit of rehabilitation, incapacitation, deterrence, and other non-retributive goals.<sup>46</sup>
- *Flexibility*: Some grids allow judges to depart from the prescribed sentence range, after giving reasons for doing so, or in special circumstances. In some states the guidelines are purely voluntary. Other grids, notably the US federal guidelines, make it very difficult for judges to deviate from the prescribed sentences.<sup>47</sup>
- *Scope of grid and kinds of penalties*: Most US State guidelines systems cover felony crimes only, although some cover misdemeanours as well. In the past, guidelines generally only employed one kind of penalty - imprisonment. The guidelines prescribed whether, and how much, imprisonment is appropriate. Where imprisonment was not indicated by the grid, the judge retained full discretion as to what kind of non-custodial penalty to impose. In recent years, several guideline systems have tried to incorporate non-custodial penalties into their grids, in order to set standards for the use of different kinds of penalties. Incorporating non-

---

*on Courts, Prisons and Crime*, State University of New York Press, 1995, Ch 3.

<sup>44</sup> Tonry, *Sentencing Matters*, n 41, p 15.

<sup>45</sup> Note that the NSW LRC took the view that this US approach to 'just deserts', which focuses on the offence seriousness and the criminal record and tends to exclude other individual offender characteristics, does not accord with the philosophy of 'just deserts' as it is understood in Australia: see n 18.

<sup>46</sup> Frase, n 43, pp 15-16.

<sup>47</sup> The federal guidelines expressly prevent judges from departing from the prescribed sentence for specified reasons, including reasons relating to the offender's employment status and record, mental abnormality, home life, age, education, vocational skills, physical condition, prior good works or community ties. Judges can depart from the guidelines where, for instance, the offender has given substantial assistance to the prosecution: Tonry, *Sentencing Matters*, n 41, p 77.

custodial penalties into grids, however, raises complex issues. Several methods of prescribing non-custodial penalties have been tested, with mixed success.<sup>48</sup>

- *Level of detail:* Most grids provide a range of presumptive sentences for any offence severity/criminal record combination. Some grids, however, contain a range for 'ordinary cases' and separate ranges for cases in which aggravating or mitigating considerations are present.<sup>49</sup>
- *Severity of penalties:* US State grids vary in the severity of sentences prescribed. Some States established 'descriptive' guidelines, based on existing sentencing practices, in order to assist judges to apply existing sentencing norms more consistently. Most States, however, adopted 'prescriptive' guidelines, designed to change existing imprisonment rates. For example, Minnesota and Washington sought to increase use of imprisonment for violent and drug offences and to decrease it for property offences.<sup>50</sup>
- *Calculating criminal history:* Diverse methods of scoring criminal history are used. As described by Tonry, some grids give equal weight to all prior convictions, while some give greater weight to prior violent convictions than to prior property convictions. Some cross-tabulate so that a prior violent conviction weighs more heavily for a current violent conviction than for a current non-violent conviction. Some weight prior convictions in relation to their severity under the guidelines system's offence severity scaling for current convictions. Some use a chronological weighing of past crimes, building in 'decay' provisions in which convictions prior to some date (eg five or ten years before the current crime) are no longer taken into account, or are given less weight.<sup>51</sup>
- *Offence categories:* Although most grids divide crimes into ten or twelve categories, some use more; the US federal guidelines - the extreme case - create forty-three

---

<sup>48</sup> These issues are explored in detail in Tonry, *Intermediate sanctions in sentencing guidelines*, n 41, Ch 4. Tonry identifies several techniques used to incorporate non-custodial sanctions into grids, including: 'zones of discretion', which give judges more discretion where the offender falls into a particular zone on the grid; 'punishment units', which convert all penalties into a numerical score; 'exchange rates', which specify equivalent custodial and non-custodial sentences and allow judges to select the appropriate alternative; and 'categorical exceptions', which authorise judges to disregard otherwise applicable sentencing ranges if offenders meet specified criteria.

<sup>49</sup> Tonry, *Sentencing Matters*, n 41, p 15.

<sup>50</sup> Frase, n 43, pp 15-16; Tonry, *Sentencing Matters*, n 41, p 49.

<sup>51</sup> Tonry, *Sentencing Matters*, n 41, p 69. The effects of two different methods of calculating criminal history scores are examined in von Hirsch A, 'Proportionality and Parsimony in American Sentencing Guidelines: The Minnesota and Oregon Standards' in Clarkson C and Morgan R (eds), *The Politics of Sentencing Reform*, Clarendon Press, Oxford, 1995.



levels of offence severity.<sup>52</sup> There are also major variations in severity ranking of offences among the US State and federal grids.<sup>53</sup>

- *Relationship with mandatory minimum sentences:* Mandatory minimum sentences are common in US jurisdictions. In most US States, the sentence ranges in the grids are set without regard for the mandatory minimum penalties, but where an offender is subject to a mandatory penalty, the mandatory penalty overrides the grid sentence. The US Federal sentencing guidelines have taken a different approach, incorporating the mandatory minimum penalties into the grid, scaling all other penalties around the mandatory sentences. This has had the effect of increasing sentencing severity levels across the board.<sup>54</sup>

The considerable variations among the different United States sentencing guidelines mean that it cannot be said that ‘grid sentencing’ in itself is successful or not in promoting consistency and fairness in decision-making. Much depends on the design and characteristics of each guideline system. Matters of seeming technical detail in the construction of grids can make a large difference in sentencing outcomes. As von Hirsch has explained, matters such as the placing of the imprisonment/non-imprisonment zones in the grid, the emphasis given to the previous criminal record, the manner in which that record is scored, and the recognised types of aggravating and mitigating circumstances, determine how much imprisonment is employed, and to what degree the system imposes proportionate sanctions.<sup>55</sup>

Tonry has argued that sentencing grids can be useful and rational,<sup>56</sup> but that grids have the potential to be arbitrary, complicated, or unjust ‘sentencing machines’. In his words, grids are ‘efficient devices for condensing and communicating vast amounts of information. They are also, however, blunt instruments when applied to sentencing operations for which scalpels are often needed’.<sup>57</sup> One of the main problems with sentencing grids, according to Tonry, is that they tend to reduce the sentencing process to a calculus of only two factors, offence severity and criminal history, ignoring the individual characteristics and circumstances of each particular offender. He argues that it is relatively simple to place offences and criminal records on a two-dimensional grid, but that ‘a grid axis cannot handle factors that are not linear, and many ethically relevant considerations in sentencing cannot

---

<sup>52</sup> Tonry, *Sentencing Matters*, n 41, p 15.

<sup>53</sup> Frase, n 43, pp 15-16.

<sup>54</sup> Tonry, *Sentencing Matters*, n 41, pp 96-97.

<sup>55</sup> von Hirsch A, ‘Proportionality and Parsimony’, n 51, p 167.

<sup>56</sup> Tonry refers to Minnesota, Oregon and Washington as examples of US States which have found a middle ground where presumptive guidelines set standards that most practitioners find reasonable. However, he argues that more States have failed than have succeeded in striking a balance: *Sentencing Matters*, n 41, p 181.

<sup>57</sup> Tonry, *Sentencing Matters*, n 41, p 20.

be expressed in a linear way. Their relevance at all, and whether they are aggravating or mitigating circumstances, varies depending on the case.<sup>58</sup>

Tonry asserts that sentencing guideline systems can be designed to allow judges to take account of meaningful differences between offenders and offences, by leaving room for departures from guidelines for reasons stated, and by establishing policy statements that offer guidance on how various non-linear considerations might be applicable to different kinds of cases.<sup>59</sup> Frase has cited the Minnesota sentencing guidelines as an example of a system that has achieved

a careful balance between the conflicting goals and limitations of punishment. Uniformity and retributive proportionality are given greater emphasis, but sufficient flexibility is retained (especially to mitigate sentences) to accommodate important utilitarian goals, resource limits, and individual offence and offender variations. ... These accomplishments are made possible by the sentencing commission's relative insulation from short-term political pressures, and by its detailed information base, system-wide perspective, and expertise in research, planning and policy formulation, and guidelines implementation.<sup>60</sup>

In contrast, the US Federal sentencing guidelines have been widely criticised in the US, including by a large number of the federal judges who apply them.<sup>61</sup> See Appendix A for a description of the federal guidelines by the NSW Law Reform Commission. Tonry identified several features of the federal guidelines that make them too restrictive,<sup>62</sup> including: (i) the grounds for departure are exceedingly limited, and most of the commonsense bases for distinguishing among offenders are expressly forbidden; (ii) the US Sentencing Commission took a 'law and order' approach to the setting of sentencing policy and promulgated guidelines that were intended greatly to increase the severity of federal sentencing; and (iii) the guidelines do not provide for the use of intermediate sanctions (such as weekend or home detention, or intensive probation).

---

<sup>58</sup> Ibid, pp 22-23.

<sup>59</sup> Ibid, p 23.

<sup>60</sup> Frase, R, 'Sentencing Guidelines in Minnesota and Other American States: A Progress Report' in Clarkson and Morgan, *The Politics of Sentencing Reform*, n 51, p 197. See also the South African Law Commission, *Sentencing: Mandatory Minimum Sentences*, Issue Paper 11, 1997, Ch 3.

<sup>61</sup> Freed, DJ, 'Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers' (1992) 101 *Yale Law Journal* 1681; Stith K and Cabranes J, *Fear of Judging: Sentencing Guidelines in the Federal Courts*, University of Chicago Press, 1998; Doob AN, 'The United States Sentencing Commission Guidelines: If you don't know where you're going, you might not get there' in Clarkson and Morgan; Tonry, *Sentencing Matters*, n 41, pp 76-79; Forer L, *A Rage to Punish*, WW Norton & Co, New York, 1994. See also the South African Law Commission, *Sentencing: Mandatory Minimum Sentences*, Issue Paper 11, 1997, Ch 3.

<sup>62</sup> Tonry, *Sentencing Matters*, n 41, pp 76-79.

It seems that in general, there is a fairly low rate of departures by judges from US State sentencing guidelines.<sup>63</sup> Some State guideline systems have, it appears, been able to reduce sentencing disparities, in particular, racial and gender disparities.<sup>64</sup> It is, however, possible that to some extent the reduction in disparities may be more apparent than real. Disparities may be occurring at the level of charging or plea bargaining - these disparities are less visible than disparities at the sentencing level. One effect of grid sentencing is a tendency to shift discretion from judges to prosecutors, who may use their charging or bargaining practices to reach a desired sentence range for a particular offender.<sup>65</sup>

Tonry comments that no guideline system has as yet devised a way to prevent manipulation by prosecutors.<sup>66</sup> Nevertheless, in his opinion, 'experience with presumptive guidelines in a number of states shows that judges apply them in a substantial majority of cases and that racial, sexual and other unwarranted disparities are thereby reduced... and experience with mandatory guidelines in the federal system shows that judges and prosecutors often resent and resist them and devise ways to circumvent them, with the result that disparities are not reduced.'<sup>67</sup>

#### 4. GUIDELINE JUDGMENTS

As noted earlier, guideline judgments are decisions handed down by courts of criminal appeal setting out general principles of sentencing and the range of penalties that may be applied to a given offence. Guideline judgments go beyond the facts of the particular case before the court to deal with variations of the offence, identifying aggravating and mitigating factors and suggesting appropriate types or levels of sentence. Guideline judgments were developed in the English Court of Appeal.<sup>68</sup> The New South Wales Court of Criminal

---

<sup>63</sup> Tonry, *Sentencing Matters*, n 41, pp 35-39. Von Hirsch points out that departures from guidelines tend to occur most frequently where the guideline sentences are controversial. For example, in Minnesota judges frequently depart downward from the very long terms of confinement prescribed for street-level drug dealers: 'Proportionality and Parsimony', n 51, p 167.

<sup>64</sup> Tonry, *Sentencing Matters*, n 41, pp 10; 40-49; Frase, R, 'Sentencing Guidelines in Minnesota and Other American States: A Progress Report' in Clarkson and Morgan, *The Politics of Sentencing Reform*, n 51, p 171.

<sup>65</sup> Tonry, *Sentencing Matters*, n 41, p 40.

<sup>66</sup> Tonry, *Intermediate sanctions in sentencing guidelines*, n 41, Ch 3.

<sup>67</sup> Tonry, *Sentencing Matters*, n 41, p 193.

<sup>68</sup> For information on guideline judgments in the UK, see Griffith, n 5, pp 11, 18-20. Chief Justice Spigelman in *R v Jurisic* (unrep, NSW CCA, 12/10/98), the landmark NSW guideline judgment, referred to academic literature on guideline judgments, including: Ashworth A, 'Techniques of Guidance on Sentencing', [1984] *Criminal Law Review* 519; Allen M, 'Sentencing Guidelines: Lessons to be Learned?' (1988) 39 *Northern Ireland Legal Quarterly* 315; Hall G, 'Reducing Disparity by Judicial Self-Regulation: Sentencing Factors

---

Appeal has recently issued its first guideline judgment, examined in part 7.1 of this briefing paper.

The New South Wales Law Reform Commission discussed the use of guideline judgments in its 1996 sentencing discussion paper, noting that several guideline judgements are issued each year by the English, New Zealand and Canadian courts of appeal.<sup>69</sup> Western Australia is the only State in Australia where legislation expressly allows for guideline judgments, but it seems that the WA Supreme Court has been reluctant to take up this option (see part 7.3 below). In 1988 the Victorian Sentencing Committee recommended that a system of guideline judgments should be introduced in Victoria.<sup>70</sup> Although that Committee made comprehensive recommendations for the adoption of a statutory guideline judgments procedure, accompanied by a Judicial Studies Board, no legislation was enacted to provide for guideline judgements. It has been said that judges of the Supreme Court resisted such provisions as an unnecessary restriction on discretion.<sup>71</sup>

In the United Kingdom, legislation was recently enacted setting up a formal guideline judgments procedure. These provisions, contained in the *Crime and Disorder Act 1998* (UK), address concerns that guideline judgments issued by the Court of Appeal mainly dealt with the most serious offences, with little coverage of the less serious offences that make up the bulk of the sentencing work of the lower courts.<sup>72</sup> The new provisions require the Court of Appeal to consider producing sentencing guidelines when appropriate cases come before it, and the Court is also to review existing guidelines.<sup>73</sup> The aim is to develop guideline judgments for all the major offences. The *Crime and Disorder Act* establishes a

---

and Guideline Judgments' (1991) 14 *New Zealand Universities Law Review* 211; Freiberg, 'Sentencing and Judicial Administration' (1993) 2 *Journal of Judicial Administration* 171 p 175; Dingwall G, 'The Court of Appeal and Guideline Judgments' (1997) 48 *Northern Ireland Legal Quarterly* 143; Harvey and Pease, 'Guideline Judgments and Proportionality in Sentencing' [1987] *Criminal Law Review* 96; Ashworth A and von Hirsch, A, 'Recognising Elephants: the Problem of the Custody Threshold' [1997] *Criminal Law Review* 187; Lovegrove A, *Judicial Decision-Making, Sentencing Policy and Numerical Evidence*, 1989, ch 2; Ashworth A, 'Four Techniques for Reducing Sentencing Disparity' in von Hirsch A and Ashworth A (eds), *Principled Sentencing: Readings on Theory and Policy*, 2nd ed, 1998; Lovegrove, A, "Sentencing Guidance and Judicial Training in Australia" in Munro and Wasik, n 7, ch 11.

<sup>69</sup> NSW LRC Discussion Paper, n 13, pp 251-254.

<sup>70</sup> *Sentencing: Report of the Victorian Sentencing Committee*, Attorney-General's Department, Melbourne, 1988 vol 1.

<sup>71</sup> NSW LRC Discussion Paper, n 13, p 252; *R v Jurisic* (unrep, NSW CCA, 12/10/98) per Spigelman CJ.

<sup>72</sup> See Griffith, n 5, p 11.

<sup>73</sup> *Crime and Disorder Act 1998* (UK) ss 80-81. These sections are attached in part as Appendix C. See also Baber M, *The Crimes and Disorder Bill [HL] [Bill 167 of 1997-98]: Youth Justice, Criminal Procedures and Sentencing*, House of Commons Library Research Paper 98/43, 6 April 1998.

---

sentencing advisory panel that can offer advice to the Court of Appeal, and can propose to the Court that sentencing guidelines for a particular offence should be drawn up or revised. Guidelines are to be included in a judgment of the Court at the next appropriate opportunity.

## 5. RECOMMENDATIONS OF THE NEW SOUTH WALES LAW REFORM COMMISSION

In 1995 the New South Wales Law Reform Commission received a reference from the Attorney-General, directing it to inquire into and report on the laws relating to sentencing in New South Wales. In April 1996 the Commission issued a Discussion Paper setting out its preliminary views and inviting public submissions. As part of that Discussion Paper, the Commission examined some US grid sentencing systems, and considered the arguments for and against them. Those comments are attached to this briefing paper as Appendix A.

In December 1996 the New South Wales Law Reform Commission published its final report, a comprehensive review of sentencing. In its report, the Commission affirmed its conviction that a wide judicial discretion is essential to doing justice in the individual case. The Commission noted that ‘in the United States, the experience with sentencing guidelines in various forms has enjoyed mixed success’ and that ‘the context of sentencing in the United States is very different from that in Australia’.<sup>74</sup> The Commission expressly 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’.<sup>75</sup>

As noted earlier, the Commission observed that there are five major objectives of punishment: retribution, deterrence, incapacitation, denunciation and rehabilitation. In the Commission’s view, none of these objectives is more important than the others. The Commission recommended that legislation should expressly state the purposes of punishment, but should not place them in a hierarchy. In its view, ‘the importance attached to any particular goal or goals of sentencing will vary, not only with the individual circumstances, but also over time, reflecting changes in society and community perceptions.’<sup>76</sup> It described the sentencing process as ‘a complex and intricate interplay which emerges as a compromise between these overlapping, “distinct and partly conflicting principles”’.<sup>77</sup>

---

<sup>74</sup> NSW LRC Sentencing Report, n 6, p 12.

<sup>75</sup> Ibid, pp 6-7.

<sup>76</sup> Ibid, p 332.

<sup>77</sup> Ibid, p 332, quoting HLA Hart, *Punishment and Responsibility* (Clarendon Press, Oxford, 1968) p 1.

The Commission concluded that consistency of *approach*, rather than consistency of outcome, was the key concern. The quest was not to achieve identical sentences in like cases, but to ensure that sentences fall within the range of penalties appropriate to the objective gravity of the particular offence and to the subjective circumstances of the offender. These aims should be achieved by the following means:

- Review of sentences by appeal courts, which may be initiated by either the accused or the prosecution. ‘There is no doubt that appellate review has been a most significant factor in setting guidelines for sentencing courts and reducing inappropriate disparity’.<sup>78</sup>
- The Judicial Commission’s sentencing information system - a sophisticated computer system that provides information for judges on sentencing principles and on sentencing patterns. (The system is described more fully in Part 6.1 below).
- Reasons for sentencing. The Commission was of the view that consistency, and judicial accountability, could best be achieved by a clear statement from the sentencing court as to the sentencing rationale chosen, the relevant factors and the reasons for adopting them. ‘This makes the position clear to the offender, improves community and media understanding of the process (including apparent superficial inconsistencies) and provides an unequivocal platform for appellate review.’<sup>79</sup>

**Comment:** It can be seen from these recommendations that the Commission was not prepared to countenance any significant degree of legislative intervention in the judicial sentencing discretion. The conviction that a just sentencing system requires a wide discretion is widespread in Anglo-American common law legal systems. Tonry comments that in most English speaking countries, the prevailing judicial ethos rejects both the need to structure sentencing discretion and the appropriateness of doing so.<sup>80</sup> This ethos has been challenged by academic commentators, including Tonry, as well as by legislators anxious to gain more influence over sentencing outcomes.

Tonry argues that reducing unwarranted discrepancies is a more important policy goal than promoting ‘judicial ownership of sentencing’, as he puts it.<sup>81</sup> In his view, there is no way around the dilemma that sentencing is inherently discretionary and that discretion leads to disparities. In order to reduce the potential for disparities, Tonry argues, judges should be subject to presumptive rules that guide (but do not dictate) their decisions.<sup>82</sup>

---

<sup>78</sup> NSW LRC Sentencing Report, n 6, p 14.

<sup>79</sup> *Ibid*, pp 14-15.

<sup>80</sup> Tonry, *Sentencing Matters*, n 41, p 177.

<sup>81</sup> *Ibid*, pp 180, 181.

<sup>82</sup> Tonry, *Sentencing Matters*, n 41, p 193.

---

The earlier Parliamentary Library Sentencing Guidelines Briefing Paper considered the debate about whether legislative control of sentencing conflicts with the doctrine of separation of powers.<sup>83</sup> The general conclusion is that sentencing is not an inherently judicial function, but one in which the legislative branch of government has a legitimate role, in order to represent the public's interest in determining the punishment for offences against its laws.

## **6. ARGUMENTS FOR AND AGAINST GUIDELINE JUDGMENTS, SENTENCING 'GRIDS' AND MANDATORY SENTENCES**

This section summarises potential arguments about guideline judgments, presumptive sentencing 'grids', and mandatory sentences. It must be noted that these arguments are presented in abstract. Sentencing systems vary widely, and the benefits and disadvantages of any particular proposal can only be assessed by also examining all the relevant, concrete details in the context of the general sentencing framework and practices of the jurisdiction, and the particular concerns that the proposal aims to address.

### **6.1 Guideline judgments**

#### **Arguments in favour**

- Guideline judgments set out applicable principles and penalties for the courts in a clear and authoritative form, while leaving room for judges to depart from them where necessary. This can achieve an appropriate balance between the broad discretion to take the individual circumstances of each case into account, and the desirability of consistency in sentencing.
- Guideline judgments are consistent with the nature of the existing appellate process. The development of guidelines could be grafted onto the existing sentencing appeals system.<sup>84</sup>
- The use of guideline judgments allows for the incremental development of the law by the courts.<sup>85</sup>

---

<sup>83</sup> See Griffith, n 5, pp 8-10, citing Lacey N, 'Government as Manager, Citizen as Consumer: the Case of the Criminal Justice Act 1995' (1994) *Modern Law Review* 534; Munro and Wasik, n 7, p 5. See also Griffith G, *Crimes Amendment (Mandatory Life Sentences) Bill 1995*, NSW Parliamentary Library, Bills Digest No 3/95; Parliament of NSW, Legislative Council Standing Committee on Law & Justice, *Report on the Crimes Amendment (Mandatory Life Sentences) Bill 1995*, Report No 1, November 1995, pp 7-8

<sup>84</sup> NSW LRC Discussion Paper, n 13, p 253.

<sup>85</sup> Zdenkowski G, 'Judging the judgments', *Sydney Morning Herald*, 15/10/98.

- Sentence guidelines contained in judgments are to some extent protected from short-term political pressures. Appeal courts take community views into account in setting guidelines, but they are less affected than legislators by calls to change sentences in response to particular incidents.
- The courts in setting guidelines can take into account public policy concerns expressed in legislation enacted by Parliament.<sup>86</sup>
- There may be fewer appeals against sentence, because it will be easier for both prosecution and defence to see whether a particular sentence falls within a standard sentencing range.
- As indicated below, the standard appeal process may result in an uneven range of offences being covered by guideline judgments, but legislative measures may be able to address this potential problem, by putting in place mechanisms for the executive government to give suggestions or advice to appeal courts about areas where guideline judgements are appropriate (see part 7.1 below).

### Arguments against

- A guideline judgment cannot foresee all the innumerable factors which may arise in sentencing any particular offender, which can make it difficult to set out an appropriate sentence range. Guideline sentencing ranges might become so broad that they would provide no useful guidance at all. Conversely, a guideline judgment may be so narrowly focussed that it would only be applicable to a limited number of cases within the offence category.<sup>87</sup>
- Guideline judgments may require more work by the appeal courts and by judicial administrators. It may be necessary for the courts to have regard to statistical and other research, evidence of community views, and the need to make efficient use of correctional facilities. Issuing guideline judgments may therefore have implications for judicial time and support mechanisms.<sup>88</sup>

---

<sup>86</sup> For example, in *R v Jurisic* (unrep, NSW CCA, 12/10/98), Chief Justice Spigelman noted that Parliament had increased the maximum penalty for some dangerous driving offences, and said, 'The level of community concern about the conduct ... as reflected in this substantial increase in the maximum penalties, must be reflected in the sentences which trial courts can impose. The concerns manifested by Parliament in this way must be given effect to by the courts'.

<sup>87</sup> NSW LRC Discussion Paper, n 13, p 252.

<sup>88</sup> Freiberg, 'Sentencing and Judicial Administration', (1993) 2 *Journal of Judicial Administration* 171 p 175.



- 
- The Court of Criminal Appeal tends to hear sentencing appeals only for serious crimes, which may result in guidelines concentrating around these crimes. The less serious crimes, which make up most of the work of the lower courts, may not be covered by guideline judgments. Legislative measures allowing the executive to give suggestions or advice to the appeal court on what guidelines should be handed down may be perceived as an intervention in the independence of the judiciary.
  - Guideline judgments do not permit a systematic appraisal of the sentencing system, and are unsuitable for debating the overall objectives of the system. They do not allow the penalty severities for an offence to be assessed in relation to other offences.<sup>89</sup>
  - Guideline judgments offer less scope than a grid or mandatory sentencing system for Parliament to influence sentencing outcomes in response to public policy concerns.
  - As noted below in relation to mandatory sentencing, there seems to be no conclusive evidence that increasing the certainty or toughness of penalties has a significant deterrent effect on crime.

## 6.2 Sentencing ‘grids’

### Arguments in favour

- They tend to produce greater certainty and consistency in sentencing, while allowing judges some scope to depart from them where necessary.
- There is some evidence in the United States that sentencing grids have resulted in less sentence disparity between offenders on the basis of race, gender and social class.
- They can increase the transparency of sentencing, and community understanding of the sentencing process, by making the normal sentencing range public (not just the maximum sentence), and by requiring judges to give reasons for departing from the guideline sentence. It may thus enhance public confidence in the judiciary.
- Public policy considerations can be built into grids - for example, minimising the use of prison for some offences and increasing it for others, or imposing overall restraints on the use of imprisonment in order to reduce the need for more prisons.
- Grids can be constructed around a particular sentencing rationale, or to give primacy to different rationales in different circumstances. For example, a grid based on ‘just deserts’ can prescribe sentencing ranges that are proportional to the seriousness of the offence, allowing room for judges to select a sentence within that range on the

---

<sup>89</sup> NSW LRC Discussion Paper, n 13, p 253.

basis of considerations relevant to the offender's culpability; or a grid could be skewed for some offence/criminal history combinations towards deterrence or incapacitation-based sentences that are disproportionately long.

- By minimising the potential for unduly lenient sentences, grid sentences may have a deterrent effect on crime.
- There may be fewer appeals against sentence, because it will be easier for both prosecution and defence to see whether a particular sentence falls within a standard sentencing range.

### **Arguments against**

- It can be difficult to find an acceptable balance in a grid between fairness and practicality. A grid that is based on only a couple of factors, such as offence seriousness and number of prior convictions, is simple but ignores other factors that may make the prescribed sentence arbitrary or unjust. On the other hand, the more factors that are built into a grid, the more complicated, unwieldy and difficult to apply the grid becomes.
- Grid systems can be too rigid or formulaic, and unjust sentences may result from limitations placed on the ability of judges to depart from prescribed sentences.
- Grid sentencing can result in prosecutors, rather than judges, determining the sentence, since it is prosecutors who decide what charges to lay; in effect, it tends to transfer discretion from judges to prosecutors, whose decisions are not reviewable by a judge or any other body. Prosecutors may be able to manipulate the grid system in laying charges (or altering the charges laid) in order to plea-bargain with the offender. Other elements of the grid (such as aggravating circumstances or criminal history) may also be open to manipulation. This can undermine the integrity of the grid.
- Sentencing grids were developed in response to particular problems in the United States. Australian sentencing practices differ in many ways to those in the US. There are no assessments of the potential effects of a grid system on sentencing disparities or sentencing practices in Australia. Such systems may not have the desired effects in Australian conditions.
- As noted below in relation to mandatory sentencing, there seems to be no conclusive evidence that increasing the certainty or toughness of penalties has a significant deterrent effect on crime.

### **6.3 Mandatory sentences**

---

The arguments for and against mandatory minimum sentences are in some respects the same as those for sentencing ‘grids’, except that for mandatory sentences, the reduction in judicial discretion and flexibility is more marked.

### **Arguments in favour**

- Mandatory sentences may produce greater certainty and consistency in sentencing, by removing the possibility of unduly lenient sentences.
- They increase the transparency of sentencing, making it clear to the public (and to offenders) what minimum sentence certain offenders can expect to receive. It may thus enhance public confidence in the criminal justice system.
- The increased certainty and (perhaps) toughness of mandatory sentences may have a greater deterrent effect on other potential offenders.
- Mandatory sentences can be targeted at particular offences or offenders that have caused community concern, to ensure that a particular sentencing objective is applied. For example, where an offender is convicted of a third serious violent offence, a judge could be required to impose a sentence that is longer than proportional, in order to incapacitate the offender for longer.
- Mandatory sentences express the legislature’s view of the seriousness of the criminal conduct, and ensure that the sentence is in accordance with community standards.

### **Arguments against**

- Mandatory sentences can result in unjustly harsh or arbitrary sentences by preventing judges taking individual circumstances of an offender into account.
- They tend to shift discretion from judges to prosecutors, whose decisions are not reviewable. Prosecutors (perhaps in co-operation with judges) can seek to avoid mandatory sentences by manipulating factors such as charges or criminal history calculations.<sup>90</sup> These evasions may undermine the authority of the criminal justice system.
- Minimum sentences may not give much guidance to judges in selecting a sentence between the minimum and maximum ranges. Sentence disparity might remain, although over a narrower range of sentence.<sup>91</sup>
- Mandatory sentences may encourage perverse jury verdicts, as juries may be unwilling to convict where an offender faces an unduly harsh sentence.

---

<sup>90</sup> Tonry, *Sentencing Matters*, n 41, pp 146-159.

<sup>91</sup> NSW LRC Sentencing Report, n 6, p 257.

- Mandatory sentences may decrease the rate of guilty pleas, (adding further burdens to the court system), as offenders take any chance to avoid a harsh sentence.
- They may lead to increased courts delays, as defence lawyers may increase their use of procedural tactics and technical defences.
- There seems to be no conclusive evidence that increasing the certainty or toughness of penalties has a significant deterrent effect on crime.<sup>92</sup>
- Mandatory sentences are a fairly blunt instrument - it can be difficult to target them so that they will only affect certain offenders, such as 'high-risk' violent offenders.<sup>93</sup>

## 7. RECENT DEVELOPMENTS

In the last decade, Australian legislatures have enacted various measures aimed at structuring and clarifying the sentencing process. Freiberg has commented that these legislative directions have not substantially interfered with the judicial discretion:

the guidance offered within the legislative framework is couched in terms of such generality as to leave sentencers flexibility in interpreting their meaning and ample residual discretion in relation to the type and/ or quantum of penalty. Australian federal and state sentencing legislation does not even slightly approximate the extremely specific and rigid legislative controls placed on judicial discretion under federal law and some states in the United States of America.<sup>94</sup>

The judicial sentencing discretion is, however, under challenge in several Australian States. Recently, New South Wales, Western Australia and the Northern Territory have all enacted forms of mandatory sentences - New South Wales in relation to murder and the most serious drug trafficking offences, Western Australia and the Northern Territory in relation to property crimes. Western Australia is also planning to introduce US-style sentencing 'grid'

---

<sup>92</sup> Broadhurst R and Loh N, 'Selective Incapacitation and the Phantom of Deterrence' in Harding R (ed), *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia*, 2nd ed, Research Report No 10, Crime Research Centre, University of Western Australia, March 1995 p 63, Tonry, *Sentencing Matters*, n 41, pp 136-142; Wicharaya T, *Simple Theory, Hard Reality: The Impact of Sentencing Reforms on Courts, Prisons and Crime*, State University of New York Press, 1995, p 12; Home Office Research and Statistics Directorate, *Reducing offending: an assessment of research evidence on ways of dealing with offending behaviour*, Research Study 187, 1998, pp 93-95.

<sup>93</sup> See for example Baker E, 'From 'Making Bad People Worse' to 'Prison Works': Sentencing Policy in England and Wales in the 1990s' (1996) 7 *Criminal Law Forum* 639 p 656.

<sup>94</sup> Freiberg A, 'Three Strikes and You're Out - It's Not Cricket: Colonisation and Resistance in Australian Sentencing', Paper presented to the Australian & New Zealand Society of Criminology Conference on *Crime, Criminology and Justice: Current Trends and Future Directions*, 8-10 July 1998, Queensland University of Technology.

guidelines.

It should be noted that the Western Australian and Northern Territory mandatory sentencing provisions have occasionally been referred to as ‘three strikes’ laws, the term commonly used to describe a particular form of mandatory sentencing law enacted in a number of states in the USA. The phrase “three strikes and you’re out” reveals the objective of these American laws: to incapacitate some offenders more or less permanently by imposing very long mandatory sentences (often 20 years to life) for a third conviction for a serious offense, usually but not always a violent, sexual or drug offence. It is beyond the scope of this briefing paper to examine the range of these United States mandatory sentencing laws,<sup>95</sup> but it is worth noting that the Australian mandatory sentencing laws bear little resemblance to them.<sup>96</sup> The objective of the Western Australian and Northern Territory laws is to ensure that repeat property offenders receive a significant sentence of imprisonment, and not a non-custodial sentence; the laws are not aimed at long-term incapacitation of repeat serious violent or drug offenders.

## 7.1 New South Wales

New South Wales has in general avoided statutory restraints on the sentencing discretion of judges. There is no history of legislated sentencing guidelines, and traditionally the only mandatory sentence was life imprisonment for murder.<sup>97</sup> In 1996, however, mandatory sentences were re-introduced to a limited degree by the *Crimes Amendment (Mandatory Life Sentences) Act 1996* (NSW). This Act amended the *Crimes Act 1900*, imposing a

---

<sup>95</sup> For information on three-strikes laws in US States, see Clark J, Austin J and Henry DA, ‘*Three Strikes and You’re Out: A Review of State legislation*’, Research in Brief, National Institute of Justice, US Department of Justice, September 1997; Parent D, Dunworth T, McDonald D and Rhodes W, *Key Legislative Issues in Criminal Justice: Mandatory Sentencing*, National Institute of Justice, U.S Department of Justice, January 1997; Tonry, *Sentencing Matters*, n 41; Shichor D and Sechrest D (eds), *Three Strikes and You’re Out: Vengeance as Public Policy*, Sage Publications, California 1996; South African Law Commission, *Sentencing: Mandatory Minimum Sentences*, Issue Paper 11, 1997, Ch 3; Caulkins JP, Rydell CP, Schwabe WL, Chiesa J, *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers’ Money?*, RAND Drug Policy Research Centre 1997; Vitiello M, ‘Three Strikes: Can We Return to Rationality?’ (1997) 87 *Journal of Criminal Law and Criminology* 395.

<sup>96</sup> Yeats, MA, ‘“Three Strikes” and Restorative Justice: Dealing with Young Repeat Burglars in Western Australia’. (1997) 8 *Criminal Law Forum* 369 at 375.

<sup>97</sup> In NSW the death penalty for murder was abolished in 1955 and replaced by a mandatory life sentence. At that time a life sentence did not mean a term of natural life; it was possible (and usual) for offenders under life sentences to be released on parole. In 1982 the *Crimes Act 1900* was amended to allow judges some discretion in sentencing for murder. In 1989 further amendments were made as part of the ‘truth-in-sentencing’ reforms, giving judges a full sentencing discretion as to what sentence should be imposed for murder: see Parliament of NSW, Legislative Council, Standing Committee on Law & Justice, *Report on the Crimes Amendment (Mandatory Life Sentences) Bill 1995.*, Report No.1, November 1995, pp 12-14.

mandatory life sentence (meaning natural life) for murder and certain offences involving the trafficking of commercial quantities of drugs, where 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 a life sentence. It has been observed that these provisions in fact leave a substantial discretion for judges in sentencing offenders convicted of these crimes.<sup>98</sup>

Since the truth-in-sentencing reforms of 1989, efforts to increase the consistency and transparency of sentencing have concentrated on the sentencing information system developed by the Judicial Commission in the late 1980s. However, in October 1998 the New South Wales Court of Criminal Appeal in a landmark decision indicated that it would hand down guideline judgments where desirable. These two developments are considered below.

**Guideline judgments:** The New South Wales Court of Criminal Appeal (CCA) has, it seems, decided of its own volition that it will hand down formal guideline judgments for some offences. In *R v Jurisic*<sup>99</sup> the Court set out guidelines for sentencing offenders convicted of dangerous driving causing death or grievous bodily harm. Chief Justice Spigelman in his judgment described the purpose of guideline judgments and set out the reasons for introducing them. He referred to some sentencing guidelines set out in earlier judgments, and said:

The laying down of guidelines in the manner that has hitherto occurred runs the risk that the guidelines will be overlooked and, therefore, not afforded the degree of recognition that they were intended to have. A formal system of labelling particular judgments as 'guideline judgments' will ensure that the profession and trial judges are aware of what has been suggested. At times, and with respect to particular offences, it will be appropriate for this Court to lay down guidelines so as to reinforce public confidence in the integrity of the process of sentencing... In my opinion, guideline judgments should now be recognised in New South Wales as having a useful role to play in ensuring that an appropriate balance exists between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed, and in the judiciary as a whole, on the other.

The Chief Justice went on to explain how guideline judgments are to be applied:

Such guidelines are intended to be indicative only. They are not intended to be applied to every case as if they were rules binding on sentencing judges. Decisions of appellate courts are not to be treated as binding precedents... Guideline judgments are a mechanism for structuring discretion, rather than restricting

---

<sup>98</sup> Griffith G, *Crimes Amendment (Mandatory Life Sentences) Bill 1995*, NSW Parliamentary Library Bills Digest No 3/95 pp 11-12.

<sup>99</sup> Unrep, NSW CCA, Spigelman CJ, Wood CJ at CL, Sully J, B M James J, Adams J, 12/10/98.

---

discretion.

If a trial judge departs from the sentence range indicated by the guideline judgement, the judge will explain the departure in the published reasons for the decision.<sup>100</sup> Both the Chief Justice and Adams J were careful to distinguish guideline judgments from minimum or 'grid' sentences.

The NSW Government has welcomed the CCA's decision to develop guideline judgments.<sup>101</sup> The Opposition, however, continues to argue that sentencing guidelines should be laid down by Parliament in a statute-based grid system. The Shadow Attorney-General has been quoted as saying that the CCA's guideline judgments are an attempt by the courts to fill the parliamentary void on sentencing: 'It is for Parliament to set these guidelines. It shouldn't be left to the courts to be bogged down with the provisions of such guidelines'.<sup>102</sup>

As noted earlier in this paper, if guideline judgements are promulgated case by case in the course of the standard appeal process, it is possible that they will not cover all the offences where guidelines would be desirable. The Premier has indicated that the Government will introduce legislation into Parliament to address this potential problem. The Premier said that the Government has decided to:

give the Court of Criminal Appeal new powers to establish sentencing guidelines for a range of crimes. It will not be necessary to link them to certain cases before the court. Under the plan the Attorney-General will make application to the Court of Criminal Appeal to trigger the court's power to make guidelines for certain offences. Because this will not be case specific, the Government's plan removes the ad hoc nature of the current approach.<sup>103</sup>

The CCA would, it appears, retain the power to initiate guidelines, and it would not be bound by any reference from the Government.<sup>104</sup>

The Government's suggested plan to allow the CCA to issue guidelines for an offence without deciding an actual case has been opposed by the Director of Public Prosecutions, on the grounds that it could involve the CCA in a non-judicial role. The DPP was quoted as saying that 'There has been a longstanding tradition in our courts that they deal only with specific cases. If the courts are required to give advice and through that advice to direct the way in which other courts are to work, then the courts take on something of the character

---

<sup>100</sup> Chief Justice Spigelman, 'Making the punishment fit the crime', *Daily Telegraph*, 13/10/98.

<sup>101</sup> Hon R Carr MP, *NSWPD* (proof), 13/10/98.

<sup>102</sup> 'Drivers who maim: judge acts', *Sydney Morning Herald*, 13/10/98.

<sup>103</sup> Hon R Carr MP, *NSWPD* (proof), 13/10/98.

<sup>104</sup> 'Court of Appeal to set punishments', *Sydney Morning Herald*, 14/10/98 p 2.

of the executive'.<sup>105</sup> However, Zdenkowski has argued a law authorising the Attorney-General to make application for guideline judgments for an offence without a specific case is 'constitutionally unimpeachable'.<sup>106</sup> He added that, 'the court already has advisory powers to clarify the criminal law at the behest of the Attorney-General, admittedly in relation to a particular case... the power of referral will merely complement ad hoc guideline judgments'.

Whether allowing the courts to issue guidelines not set out in an actual judgment would infringe the independence of the judiciary seems to be a debatable question. On the one hand, there is no suggestion that the executive or the legislature would be influencing the content of the guidelines, or could require guidelines to be issued. On the other hand, there is the possibility that the courts may be engaging in a non-judicial activity by promulgating general guidelines other than in a judicial decision. If so, the spectre of *Kable v DPP* may arise in regard to the proposed scheme.<sup>107</sup>

A systemic coverage of offences by guideline judgments can be promoted by other means. In the UK, as noted earlier, the Blair Government has introduced legislation that requires the English Court of Appeal to consider producing sentencing guidelines when appropriate cases come before it and to review existing guidelines, with the aim of developing guideline judgments for all the major offences. There is a sentencing advisory panel which can offer advice to the Court, and can propose that sentencing guidelines for a particular offence should be drawn up or revised. The guidelines are to be included in a judgment of the Court at the next appropriate opportunity.<sup>108</sup> In NSW, a 1994 sentencing review raised the possibility that the Director of Public Prosecutions could specifically request a guideline judgment from the CCA in a particular appeal, with the Court being free to accept or decline the request.<sup>109</sup>

It remains to be seen whether the introduction of formal guideline judgments will have a substantial effect on sentencing in New South Wales. This will depend in part on the number and comprehensiveness of such judgments issued by the CCA. It will also depend on the extent to which the courts follow the guidelines or depart from them. As the Chief Justice noted in his judgment in *Juriscic*, the Court of Criminal Appeal has in the past frequently stated principles of general application with respect to appropriate sentences, but they have not always been given the degree of recognition that they were intended to have.

---

<sup>105</sup> 'Court of Appeal to set punishments', *Sydney Morning Herald*, 14/10/98.

<sup>106</sup> Zdenkowski, 'Judging the judgments', *Sydney Morning Herald*, 15/10/98.

<sup>107</sup> In *Kable v DPP* (1996) 151 ALR 312 the High Court found that a State law was invalid where it conferred on a State court capable of being vested with and exercising federal jurisdiction a power or function which was incompatible with the judicial power of the Commonwealth. See Griffith G, *The Kable case: Implications for New South Wales*, New South Wales Parliamentary Library Briefing Paper 27/96.

<sup>108</sup> *Crime and Disorder Act 1998* (UK) s 80(6). Sections 80 and 81 are set out in part in Appendix C to this briefing paper.

<sup>109</sup> R Brown, *Sentencing Review 1994*, Attorney-General's Department (NSW) pp 46-47.



Promulgating these principles in formal guideline judgments will enhance the importance and weight of the guidelines, and will increase their visibility to sentencing courts. It may be that a trial court's departure from the guideline sentence range, if not adequately explained in the judgment, would increase the chances of a successful appeal against the sentence.

**Judicial Commission's sentencing information system:** The Commission's Judicial Information Research System is an on-line collection of several databases to which all judicial officers in NSW have access, including:

- *Sentencing statistics database:* contains statistical data from 1990 onwards about sentences imposed in the Local Courts, the Supreme and District Courts, and the Children's Court. The data is provided by the Bureau of Crime Statistics and Research. The database shows details of sentencing figures for particular offences in graph form. For example, for a particular offence it is possible to see what percentage of offenders received a prison sentence; and what lengths of sentence were imposed. These figures can be further broken down by offender characteristics such as prior record, guilty plea, liberty status at time of offence, and age.
- *Principles database:* an electronic text book on sentencing, containing summaries of sentencing legislation and compilations of sentencing principles drawn from the common law.

The sentencing statistics are designed not to fetter the exercise of the sentencing discretion, but to inform it.<sup>110</sup> Judges are not bound by any range or pattern of sentences in the database, and any such range or pattern is not to be equated to US-style grid systems.<sup>111</sup> It would nevertheless usually be appropriate for the sentencing judge to explain just why there has been a departure from a recognised range or pattern of sentencing.<sup>112</sup> New South Wales courts have generally approved the sentencing statistics as a useful guide to general sentencing patterns, while being careful to point out that the sentencing discretion should always be exercised with regard to the particular circumstances of each case.<sup>113</sup>

Has the Sentencing Information System succeeded in reducing unwarranted disparities in sentencing? The Judicial Commission is planning to carry out an assessment of the effects

---

<sup>110</sup> The information in these paragraphs is taken from 'Informing the discretion: The Sentencing Information System of the Judicial Commission of New South Wales', an unpublished paper by I Potas, D Ash, M Sagi, S Cumines and N Marsic, officers of the Commission.

<sup>111</sup> *Lawson* (unrep, NSW CCA, 12/12/97) per Hunt CJ at CL.

<sup>112</sup> *Ibid.* In *R v Bloomfield* (unrep, NSW CCA, 15/7/1998, Spigelman CJ, Sully and Ireland JJ) the Court of Criminal Appeal set out some guiding principles for the use of sentencing statistics.

<sup>113</sup> Potas et al, n 110, citing decisions of the Court of Criminal Appeal including *Shorten* (unrep, NSW CCA, 10/9/97, Sully J); *Norris* (unrep, NSW CCA, 23/10/95, Priestly JA, Newman J and Barr AJ); *Mayne* (unrep, NSW CCA, 20/12/96).

of the SIS within the next year. The SIS was completely re-engineered in 1996 to improve its ease of use and to extend its content and its availability to all judicial officers in NSW - previously not all judicial officers had access to it. The Judicial Commission decided to wait until sufficient time had passed to determine the impact of the new system before reviewing its effects. A NSW sentencing review carried out in 1994, which considered whether grid sentencing should be introduced, ultimately recommended that the effects of the Judicial Commission's Sentencing Information System should be given a realistic opportunity to be widely tested before any steps are taken to legislate for sentencing guidelines.<sup>114</sup>

## 7.2 Northern Territory

In November 1996 the Northern Territory Country Liberal Government introduced mandatory minimum prison sentences for a number of property offences, being:

- break-and-enter;
- unlawful entry (to both residential and commercial premises);
- unlawful use of a motor vehicle or vessel;
- stealing (but not shop-lifting);
- armed robbery;
- receiving stolen property;
- unlawful possession of property reasonably suspected of being stolen; and
- criminal damage.

The aim of the mandatory sentencing laws, according to the Attorney-General, is 'to send a clear and strong message to offenders that these offences will not be treated lightly; force sentencing courts to adopt a tougher policy on sentencing property offenders; deal with present community concerns that penalties imposed are too light; and encourage law enforcement agencies that their efforts in apprehending villains will not be wasted'.<sup>115</sup>

The mandatory minimum sentencing laws came into effect on 8 March 1997.<sup>116</sup> The minimum sentences are:

	<b>Adult (17 years and above)</b>	<b>Juvenile (15-16 years)</b>
<b>First property offence</b>	14 days imprisonment	No minimum

<sup>114</sup> R Brown, *Sentencing Review 1994*, Attorney-General's Department (NSW) pp 46-47.

<sup>115</sup> Hon D Burke MLA, Second Reading Speech, *NTPR*, 17/10/96, p 9688.

<sup>116</sup> *Sentencing Amendment Act 1996* (NT), inserting new ss 78A, 78B, Sch 1 in the *Sentencing Act 1995* (NT); *Juvenile Justice Amendment Act (no 2) 1996* (NT) inserting new ss 53AE-53AG in the *Juvenile Justice Act 1983* (NT). For information on these laws see Bonney A, *Background to Mandatory Sentencing for Juvenile Offenders: A Northern Territory Perspective*, Northern Territory Library, Research Paper 14, October 1996.

---

<b>Second property offence</b>	90 days imprisonment	28 days detention
<b>Third or more property offence</b>	12 months imprisonment	28 days detention

The courts have a discretion to impose longer sentences, up to the statutory maximum. Property offenders, whether adult or juvenile, may also be sentenced to a 'punitive work order' in addition to the mandatory minimum custody sentence. If the offender breaches a punitive work order, there is a mandatory minimum sentence of 28 days custody. According to the NT Government, adult first offenders for property crimes are not locked up with violent offenders, but are generally housed in minimum or low security facilities and sent out to work. Juvenile offenders are placed in juvenile detention centres.

The Northern Territory's mandatory sentencing laws have been criticised by the Opposition and others. Some of these criticisms are that:<sup>117</sup>

- Offenders may receive sentences that are harsher than the seriousness of the offence deserves.<sup>118</sup>
- The laws will lead to under-reporting of crime to police, or decisions by the police not to lay charges, or by prosecutors to press less serious charges, in order to avoid unwarranted mandatory imprisonment.
- The laws will encourage defendants to plead not guilty, and so will increase the burden on the courts.
- The mandatory detention of 15 and 16 year-olds may violate provisions of the United Nations Convention on the Rights of the Child 1989.<sup>119</sup>

---

<sup>117</sup> See Mr S Stirling MLA, *NTPR*, 22/4/98 p 972; Flynn, M, 'One strike and you're out!', (1997) 22 *Alternative Law Journal* 72 p 72; Schetzer L, 'A Year of Bad Policy', (1998) 23 *Alternative Law Journal* 117; Tippett J, 'An approach that creates more crime than it cures', *The Australian*, 19/8/98; 'Mandatory sentences for young offenders', Editorial, (1998) 22 *Criminal Law Journal* 201.

<sup>118</sup> Examples of offenders receiving imprisonment for relatively trivial offences include the case of a 18-year old man who was sentenced to 90 days jail for stealing \$0.90 from a car, a 20 year old man with no prior convictions who was sentenced to 14 days imprisonment for stealing \$9 worth of petrol, and a student teacher who was imprisoned for 14 days for criminal damage after pouring water over a cash register during an argument: Schetzer, 'A Year of Bad Policy', n 117; Tippett J, 'An approach that creates more crime than it cures', *The Australian*, 19/8/98; 'Territory's tough justice faces High Court verdict', *The West Australian*, 16/5/98; 'NT sentencing laws "should be abolished"', *The Australian*, 23/3/98; 'It's tough at the Top', *Sydney Morning Herald*, 2/10/97.

<sup>119</sup> See part 7.3 below.

- 
- Mandatory sentences will cause imprisonment rates to rise leading to overcrowding, or to additional expenditure to build new prisons or detention centres.
  - The laws will cause more crime by introducing some young people to the criminal environment of prison, and causing feelings of resentment and grievance among those who feel they have been treated unjustly.<sup>120</sup>
  - The laws contravene the recommendations of the Royal Commission into Aboriginal Deaths in Custody that imprisonment should only be used as a last resort.<sup>121</sup>

The Attorney-General addressed some of these criticisms in the Second Reading speech for the mandatory sentencing laws,<sup>122</sup> saying that:

- Juvenile offenders with no prior convictions are usually given one or more informal cautions by police, so that juveniles will have had several chances to mend their ways before being brought before the courts.
- The intervention and diversion programs that are currently in place, such as drug and alcohol counselling, or training courses, are not affected by mandatory sentencing.
- There is still room for the courts to reward guilty pleas by imposing only the minimum penalty, or a penalty near to the minimum, instead of a heavier penalty.
- The potential increase in workload for the courts will be addressed by extending the jurisdiction of the Magistrate's Court to allow more offences to be dealt with summarily, and by the appointment of another Supreme Court judge.
- The minimum penalties reflect community pressure for harsher sentences, and they have widespread public support in the Territory.
- The NT Government will build more prisons, if that is required.<sup>123</sup>

There are no figures available on the number of people sentenced under the mandatory sentencing laws, but it has been said, on the basis of figures obtained from the Australian

---

<sup>120</sup> 'Mandatory sentences for young offenders', Editorial, (1998) 22 *Criminal Law Journal* 201, citing M Cain, *Recidivism of juvenile offenders in New South Wales*, Department of Juvenile Justice, 1996; Tippet J, 'An approach that creates more crime than it cures', *The Australian*, 19/8/98;

<sup>121</sup> *Royal Commission into Aboriginal Deaths in Custody*, National report [Final report], 1991.

<sup>122</sup> Hon D Burke MLA, *NTPR*, 17/10/96, pp 9684-9688.

<sup>123</sup> In March 1997 the Northern Territory Government was reported as allocating \$3 million for 40 new prison places: Schetzer, 'A Year of Bad Policy', n 117, p 119.

---

Bureau of Statistics, that the rate of imprisonment in the NT has clearly increased since the laws were introduced.<sup>124</sup>

In April 1998 the Chief Minister released police figures on the number of reported offences over several years up to January 1998, covering nine months since the commencement of mandatory sentences in March 1997.<sup>125</sup> For the period January 1997 - January 1998, the figures showed a reduction in the major offence groups covered by mandatory sentencing, as well as a reduction in all reported criminal offences.<sup>126</sup> In relation to all property offences covered by mandatory sentencing laws, there were 14.4% fewer reported offences in January 1998 than in January 1997. The Chief Minister stated that:

Mandatory sentencing offences account for about half of all reported criminal offences, yet there has been an overall decrease in all reported offences since mandatory sentencing was introduced which is broadly similar to the decrease for mandatory sentencing offences. The number of all reported offences for January 1998 was 16.5% lower than for January 1997, a slightly bigger decrease than that reported for all mandatory sentencing offences over the same period. It is not possible at this time to quantify fully the causes for this across-the-board decrease. However, it is clear that mandatory sentencing plays a significant role and there may be a flow-on effect. In addition, other initiatives of my government in terms of greater police resources are almost certainly having an effect.<sup>127</sup>

There was heated debate about the accuracy and the significance of these figures in the NT Legislative Assembly.<sup>128</sup> The Chief Minister during the debate acknowledged that two of the tables that he relied on were wrongly labelled. The Opposition criticised the figures on several grounds, claiming that they did not cover a long enough period since the commencement of mandatory sentencing to detect any meaningful trends; they were not analysed using statistical methods to determine their statistical significance; there was no evidence of a causative link between mandatory sentencing and the reported crime rates; and there were no figures on the number of convictions under the laws, or on re-offending rates for those receiving mandatory sentences.<sup>129</sup> It has been argued that it will probably be many

---

<sup>124</sup> Ibid, p 118.

<sup>125</sup> Ministerial Statement, *NTPR*, 22/4/98, pp 963-970. The figures are available from the Office of the Chief Minister; a copy is held in the NSW Parliamentary Library.

<sup>126</sup> Hon S Stone MLA, *NTPR*, 22/4/98, p 965.

<sup>127</sup> *NTPR*, 22/4/98, p 967.

<sup>128</sup> *NTPR*, 22/4/98, pp 962-1000.

<sup>129</sup> Mr S Stirling MLA, *NTPR*, 22/4/98, pp 972- 975; Mr P Toyne MLA, *NTPR*, 22/4/98, p 980-981.

years before a trend can be attributed to mandatory sentencing, if at all.<sup>130</sup>

### 7.3 Western Australia

Western Australia currently has mandatory minimum sentences for third-time home burglary offences, and it is planning to introduce a 'grid' sentencing guidelines system.

**Mandatory minimum sentences:** In November 1996 the *Criminal Code Amendment Act (No 2) 1996* (WA) came into effect. This statute introduces a mandatory minimum sentence of at least 12 months imprisonment for offenders convicted of home burglary for the third (or more) time.<sup>131</sup> An offender who is less than 18 years old is to be sentenced to a minimum of 12 months detention. The laws will apply retrospectively to offences committed before the law was enacted, as long as the third (triggering) offence occurred after the commencement of the laws.

These mandatory sentencing laws would seem to be based on theories of deterrence and incapacitation, rather than on a 'just deserts' approach to punishment. As the Attorney-General of Western Australia, Hon P Foss MLC explained, the aim of the laws is 'to deter burglars and incapacitate those who commit such offences by providing for much tougher penalties'.<sup>132</sup> It is possible that one impetus for these laws may have been a perception that the courts have been slow to adopt other sentencing reforms introduced by the Government. In particular, since January 1995, the Supreme Court of WA has had the power to hand down guideline judgments that expressly contain guidelines to be taken into account by courts sentencing offenders.<sup>133</sup> However, it seems that the Supreme Court has avoided the question of guideline judgments and has made little use of this power.<sup>134</sup>

The mandatory sentencing laws received bipartisan support in the WA Parliament, but they have been criticised by some commentators as unjust, and also as unnecessary - it has been argued that the courts readily imposed custodial sentences for burglary offences, particularly

---

<sup>130</sup> Tippet J, 'An approach that creates more crime than it cures', *The Australian*, 19/8/98.

<sup>131</sup> Criminal Code s 400(4). This is not the first time that WA has employed mandatory sentencing: the much-criticised *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) (now expired) imposed in effect a mandatory 18-month minimum sentence on 'repeat violent offenders'. See Harding, n 92; Parliament of Western Australia Legislative Council Standing Committee on Legislation, *First and Second Reports on the Crime (Serious and Repeat Offenders) Sentencing Act 1992 and the Criminal Law Amendment Act 1992*, 1992.

<sup>132</sup> WAPD, 22/8/96, p 4429.

<sup>133</sup> *Sentencing Act 1995* (WA) s 143

<sup>134</sup> Morgan N, 'Non-custodial Sentences Under WA's New Sentencing Laws: Business as Usual or a New Utopia?' (1996) 26 *University of Western Australia Law Review* 364 p 368. See also *R v Jurisic* (unrep, NSW CCA, 12/10/98) per Spigelman CJ.

---

for adult offenders, before the new laws.<sup>135</sup> The mandatory sentencing laws are expected to affect juvenile offenders rather than adults, since many third-time adult offenders could already expect to receive a sentence of at least 12 months imprisonment. When the laws were introduced, it was expected that they would double or treble the number of juveniles in detention, and would lead to a considerable increase in the number of adults incarcerated.<sup>136</sup>

There have not been any formal assessments of the effects of the laws. However, according to the Ministry of Justice in WA, the three-strikes burglary laws have not been used as often as was expected. The main effect has been on juveniles - since the laws came into operation at the beginning of 1997, approximately 60 juveniles have been sentenced under these laws, and only a handful of adults.<sup>137</sup> Have the laws had any impact on burglary rates? The Ministry of Justice points out that it is still too early to tell what the effect of the three-strikes burglary law has been, but says that so far the impact does not seem to have been dramatic. There was a small decrease in home burglaries reported to police in 1997, while commercial burglaries seem to have stayed at the same level.

The 'three-strikes' burglary laws have been criticised for having a disproportionately harsh impact on Aboriginal children: 'In 1995, 32 percent of the burglary charges in the Children's Court involved Aboriginal offenders. Given that the Aboriginal population of the state does not exceed 2.7%, the mandatory minimum sentences will inevitably impact in a grossly disproportionate way on Aboriginal children.'<sup>138</sup> For Aboriginal children from remote communities, a sentence of detention may involve being sent a thousand or more kilometres to detention facilities in Perth.<sup>139</sup>

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in their report on children in the legal system noted that the WA mandatory detention provisions have attracted adverse comment in several cases from the President of the WA Children's Court.<sup>140</sup> The report set out some details of these cases, and concluded that:

The Northern Territory and Western Australian laws breach a number of international human rights standards and common law principles. They violate the principle of proportionality which requires the facts of the offence and the

---

<sup>135</sup> Morgan, *ibid*, pp 365-366; Yeats, n 96, p 375.

<sup>136</sup> Morgan, n 134, pp 365-366

<sup>137</sup> Personal communication with Mr A Marshall of the WA Ministry of Justice.

<sup>138</sup> Yeats, n 96, p 381.

<sup>139</sup> *Ibid*, p 376.

<sup>140</sup> Australian Law Reform Commission, *Seen and heard : priority for children in the legal system*, Report No 84, Sydney, 1997, p 552.

circumstances of the offender to be taken into account... They also breach the requirement that in the case of children detention should be a last resort and for the shortest appropriate period... Mandatory detention violates a number of the provisions in the ICCPR [International Covenant on Civil and Political Rights] including the prohibition on arbitrary detention in article 9. Both CROC [United Nations Convention on the Rights of the Child] and ICCPR require that sentences should be reviewable by a higher or appellate court. By definition, a mandatory sentence cannot be reviewed. The Inquiry considers these violations of international and common law norms so serious that it recommends federal legislation to override the laws unless the Parliaments of Western Australia and the Northern Territory override them.<sup>141</sup>

**Sentencing matrix:** Western Australia is currently planning to introduce sentencing guidelines along the lines of US-style 'grid sentencing' systems, although the WA version will be called a 'sentencing matrix'. The Ministry of Justice is currently drawing up the guidelines to be presented to Cabinet, and legislation is expected to be passed by the end of 1998. The matrix will apply to 20 or so 'topical' offences, such as housebreaking, assault, and sexual assault. It is intended that the matrix will reflect current sentencing practices and will not increase the overall severity of penalties.<sup>142</sup> The Attorney-General has said that the matrix would be 'a means of showing that the vast number of sentences met community expectations and would also be a sensible means for highlighting the court's reasons for a lighter sentence, when this was the case. It would thus provide better communication on and better understanding of sentencing'.<sup>143</sup> When the matrix is fully implemented, judges will have to sentence within the range set out by the matrix unless they give reasons for departing from it. If judges depart from it, there will be an automatic right of appeal against the sentence.

In the sentencing grid, offences will be ranked by their seriousness, based on the offence itself; any aggravating or mitigating factors will then be taken into account and scored to arrive at a numerical offence seriousness level. The offender's criminal history score is to be calculated on the basis of 'relevant' and 'non-relevant' prior convictions: the heaviest score will be for three or more prior convictions for an offence relevant to the current offence for which the offender is being sentenced; non-relevant prior convictions will lead to a less punitive criminal history score.

#### 7.4 United Kingdom

In 1996 the former Conservative Government published a White Paper, *Protecting the*

---

<sup>141</sup> Ibid, p 555.

<sup>142</sup> Hon P Foss MLC, letter to *The West Australian*, 14/7/98.

<sup>143</sup> Ibid.



*Public*,<sup>144</sup> in which it set out its view that ‘prison works’. The White Paper explained that by taking offenders ‘out of circulation’, it prevents them from committing more crime; it protects the public from dangerous criminals, it acts as a deterrent to would-be criminals and time spent in prison can be used to rehabilitate offenders by improving their training or education. This belief in the benefits of imprisonment led to legislation in 1997<sup>145</sup> that imposed mandatory prison sentences for certain repeated offences:

- an automatic life sentence on a second conviction for a serious sexual or violent offence,<sup>146</sup> except where there are exceptional circumstances that justify imposing another sentence; and
- a mandatory minimum seven-year sentence for serious three-time repeat drug dealers, except where there are specific circumstances which would make it unjust to impose the prescribed sentence.

Although these mandatory sentencing laws have been subject to much criticism in the United Kingdom,<sup>147</sup> they have been implemented by the new Blair Labour Government. The *Crime (Sentences) Act 1997* (UK) also provided for a mandatory minimum three-year sentence for domestic burglary on the third conviction, except where there are specific circumstances which would make it unjust to impose the prescribed sentence. This provision continues to exist, but has not been put into force. The Labour Government’s Home Secretary stated that plans to implement the three-strikes burglary mandatory sentences would not be practical for the present, in view of the UK Prison Service’s current capacity and available resources. The Conservative Government themselves had not planned to bring the provisions into effect until about 1999. The Home Secretary stated that he would keep the appropriateness of implementing the domestic burglary provisions under review.<sup>148</sup>

As noted in part 4 of this paper, the UK Labour Government has also moved to introduce more consistency into sentencing practices by revising the current sentencing guideline judgment procedures.

---

<sup>144</sup> March 1996, Cm 3190.

<sup>145</sup> *Crime (Sentences) Act 1997* (UK).

<sup>146</sup> These offences are (in England and Wales) attempted murder, manslaughter, wounding or causing grievous bodily harm with intent; rape or attempted rape; certain firearms offences; and armed robbery. Note that in the UK a life sentence does not exclude the possibility that the offender will at some point be released on parole.

<sup>147</sup> See Henham R, ‘Making Sense of the Crime (Sentences) Act 1997’ (1998) 61 *Modern Law Review* 223; Thomas DA, ‘The Crime (Sentences) Act 1997’, [1998] *Criminal Law Review*, 83; Baker E, ‘From “Making Bad People to Worse” to “Prison Works”’: Sentencing Policy in England and Wales in the 1990s’, (1996) 7 *Criminal Law Forum* 639. See also Baber M, *The Crime (Sentences) Bill [Bill 3 of 1996-97]*, Research Paper 96/99, 1 November 1996, House of Commons Library pp 59-64.

<sup>148</sup> Rt Hon J Straw MP, *PD (HC)*, Written Answers cols 261-262, 30/7/97.

## 8. CONCLUSION

Sentencing guidelines, mandatory sentences and other measures are making inroads into the judicial sentencing discretion in many jurisdictions, most obviously in the United States, but also in the United Kingdom and some Australian States. Western Australia and the Northern Territory have introduced mandatory minimum sentences for some repeat property offenders, and Western Australia is planning to introduce 'grid sentencing'. New South Wales has largely resisted calls to limit the sentencing discretion, placing its reliance on the Judicial Commission's sentencing information system. The effects of this system on sentencing practices have yet to be determined. However, perceptions of sentencing disparities - and crime levels - continue to cause public disquiet in New South Wales. It remains to be seen whether recent moves by the NSW Court of Criminal Appeal to issue guideline judgments in appropriate cases will have a substantial impact on sentencing consistency.

Legislative measures to restrict judicial discretion have benefits and disadvantages. What is clear is that such sentencing reforms must be constructed very carefully, with expert knowledge, to avoid the potential for major, unintended changes to sentencing outcomes and imprisonment rates. It must be remembered, as well, that the courts will have some influence in finding the appropriate balance between judicial discretion and legislative direction. It is the role of the courts to put sentencing legislation into daily practice, and in doing so they can to some extent shape the operation of these laws.<sup>149</sup>

---

<sup>149</sup> See for example *R v Hallam* (unrep, NT Supreme Court, Mildren J, 17/9/98), where the NT Supreme Court avoided a possible interpretation of the mandatory sentencing laws that would have seen a 20 year old man serve a minimum of more than 14 years imprisonment for 15 counts of theft and property damage, involving stealing goods valued at about \$7, 500 and damaging more than \$12 000 in property over a 6 month period: 'Judge opens window on mandatory "madness"', *The Australian*, 18/9/98. For judicial attitudes to the WA mandatory sentencing legislation, see Yeats, pp 375-378; Australian Law Reform Commission, p 552-554.

**APPENDIX A**

**Extract from New South Wales Law Reform Commission,  
*Sentencing, Discussion Paper 33***

**APPENDIX B**

**Minnesota Sentencing Guidelines Grid as at 1 August 1996**

**APPENDIX C**

***Crime and Disorder Act 1998 (UK) sections 80 and 81***