MANDATORY SENTENCING – WHERE FROM, WHERE TO AND WHY?

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INTRODUCTION

Mandatory sentences are not a new concept, dating back in Australia to the 19th century and much earlier again in other jurisdictions. They achieved particular notoriety in Australia a decade ago following efforts by some states/territories to introduce new fixed sentencing laws for specified offences. Mandatory sentencing schemes operate often uncontroversially at both the lower and upper end of the criminal scale. In Queensland currently for example, we have a mandatory life sentence for murder, as well as offences which carry a sentence of compulsory jail ("mandatories" of sorts), eg.. repeat drink driving and leaving the scene of an accident if showing callous disregard to an injured person. The area where mandatory sentencing has been most controversial is in its application to the "middle ground", to more common offences such as property offences. Following on from developments in the United States in the 1990's, Australia has in recent years experimented with different forms of mandatory sentencing, in the process creating much debate, and exciting much passion, on all sides of the argument.

Few areas of debate within the law contain a more fascinating mixture of issues – the independence of the judiciary, our obligations under international law, populism versus legalism, and the public's role and influence in legal affairs.

There has been an enormous amount of research and literature devoted to this topic in recent years. In this paper it is proposed to provide an overview of the literature, summarising the main arguments for and against mandatory sentencing regimes, and to consider what alternatives exist if changes to established sentencing practice are thought desirable.

THE RECENT PAST AND THE CURRENT STATE OF PLAY

Over the last 20 years, most States in the US have developed (often piecemeal) mandatory sentencing laws to some degree. Since 1993 the "three strikes" type of legislation has been enacted in many of the different States. Such laws usually relate to very serious offences, and require a given number of previous convictions (usually one or two) to trigger the imposition of a mandatory penalty, usually resulting in long (and even lifetime) periods of imprisonment, sometimes with no possibility of parole. California has taken the concept further than other States, having introduced the broadest such laws in the country.

Similar types of laws are well established in other jurisdictions. South Africa, England, Wales, and (somewhat notoriously) certain Asian countries such as Malaysia, all carry mandatory minimum sentencing schemes for different specified offences. For the purposes of this paper, the recent Australian experience will be examined.

- *Western Australia*

The Australian experience with such sentencing regimes commenced in earnest in Western Australia in 1996. Western Australia first dabbled with the concept of mandatory sentences a few years earlier with a short-lived Act, the *Crime (Serious and Repeat Offenders) Act* 1992, which was only in force for about two years and targeted young offenders involved in high speed pursuits in stolen vehicles. In that legislation a repeat offender was a person who had, within the preceding 18 months, accumulated three convictions for prescribed offences of violence, in which case the person was to be sentenced to serve at least 18 months in custody.

The Western Australian government then introduced a "three strikes" law in respect of home burglaries in late 1996. Under that legislation (in WA's *Criminal Code*) a person with two previous convictions for home burglary, if convicted again, was required to serve at least 12 months in

custody. In the case of juveniles, judges had some scope to depart from the mandatory penalty of 12 months imprisonment. The laws introduced in 1996 are still in force.

In 1998 the WA government proposed further radical change to sentencing practice, with the development of a three part "sentencing matrix" (or grid) scheme which was partially enacted but has never been proclaimed.

- *Northern Territory*

The Northern Territory laws came into force in March 1997, and applied to a range of property offences, with different schemes being set up for adults and juveniles. The legislation on its face was much broader in scope, and even less forgiving, than the WA laws implemented the previous year. Under the NT legislation, there were escalating penalties provided according to the number of strikes an offender had. Initially, for adult offenders there was a minimum 14 day imprisonment period for the first conviction for a prescribed offence, with 90 days imprisonment for the second strike and 12 months imprisonment for the third and subsequent strikes. Under these laws, 15 and 16 year olds were required to serve a minimum of 28 days detention for their second strike. After great outcry and some examples of exceptionally harsh sentencing outcomes, the Parliament introduced an "exceptional circumstances" provision in 1999 which provided for some judicial discretion where very stringent conditions were met. Juveniles over the age of 15 years could have either a detention or a diversionary option imposed for a second strike, although detention remained the only option for a third strike.

The laws were repealed and replaced with a significantly modified regime by the new Labour government in October 2001. The scheme as it applied to adults then allowed judges to depart from a designated sentence if particular aggravating or mitigating factors could be shown. The mandatory sentencing provisions for juveniles were removed altogether. It had been a specific part of the then Labour Opposition's election platform to abolish the mandatory regime for property offences in the lead up to that Territory election. The amendments did not do away with all

constraints on judicial sentencing discretion, but they are far less onerous than the previous government's laws.

- *Commonwealth*

The Commonwealth Parliament enacted new laws in late 2001 dealing with "border control". The laws were part of amendments made to the *Migration Act* 1958 (Cth) which provided for mandatory minimum penalties for certain offences. These laws were brought into place in the context of a federal election campaign where the arrival of boat people (and suggestions of "children overboard") were then at the forefront of public debate. The mandatory punishments imposed included a minimum of 5 years imprisonment (with a minimum non-parole period of 3 years) for anybody facilitating the coming to Australia of 5 or more unauthorised people. Repeat offenders face a mandatory minimum of 8 years (with a minimum non-parole period of 5 years).

THE LEGALITY OF MANDATORY SENTENCING REGIMES

The constitutionality of such laws has been examined by the High Court of Australia as early as 1970. In *Palling and Corfield* (1970) 123 CLR 52, Barwick CJ stated that (at 58):

> *"It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose, and in my opinion, it may lay an unqualified duty on the court to impose that penalty. …[O]rdinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime. But whether or not*

such a discretion should be given to a court in relation to a statutory offence it is for the decision of the Parliament."

It has been suggested by Manderson and Sharp (2000) that *Palling's* case could now be distinguished in light of subsequent High Court rulings such as that in *Kable v DPP (NSW)* (1996) 189 CLR 51, in which it was ruled impermissible to require judicial officers to engage in inherently non-judicial processes. This "doctrine of incompatibility" suggests that the very nature of a power vested in a court may sometimes prove incompatible with the exercise of judicial power and thereby infringe Chapter III of the Constitution. Given that State courts are capable of exercising federal jurisdiction, they must conduct themselves in a manner which renders them fit to exercise the federal judicial power. Consequently, they cannot be vested with power by the State or Federal government if such powers are incompatible with the exercise or potential exercise of federal judicial power. Justice Kim Santow of the NSW Supreme Court also suggested in a 2000 paper that the High Court will no doubt again be asked to rule on the validity of such laws in light of the development of *Kable* principles.

Another basis upon which the validity of such laws might be challenged relates to their supposed operation in contravention of Australia's treaty obligations. There is no specific treaty law or international law that expressly prohibits mandatory sentencing, either of adults or juveniles. Several international instruments deal specifically with the treatment of children, and with juvenile justice however. The most relevant treaties in this debate include the Convention on the Rights of the Child, and the International Covenant on Political and Civil Rights, and the International Convention on the Elimination of all Forms of Rational Discrimination.

There were numerous adverse observations by international human rights bodies concerning Australia's mandatory sentencing laws at the start of this decade. The NT and WA laws were examined by at least three of the United Nations independent human rights treaty bodies, all of which expressed concerns about various aspects of the operation and effect of the laws. The

response of the Australian Government was to reject the committees' conclusions and suggest that the United Nations was meddling in Australia's domestic affairs.

ARGUMENTS FOR MANDATORY SENTENCING

A review of the literature identifies recurrent themes in the support given to the imposition of mandatory sentencing schemes. It has been suggested there are three broad rationales for the imposition of mandatory sentencing. The first is community concern about perceived leniency within the sentencing system; the second being unjustified disparities in sentences on offenders who, on their face, should be receiving similar penalties. The third basis is one of crime rate reduction through deterrence, *specifically* through the incapacitation of the offender, but more importantly, *generally* throughout the community. Such rationales lead to suggestions that a more proactive role for the legislature when sentencing is required, with a correspondingly restricted role for the judiciary.

In an energetic push for the introduction of a widespread fixed penalty regime, Associate Professor Mirko Bagaric of the Faculty of Law, Deacon University has argued that the significant disparities in sentencing caused by the wide discretion enjoyed by sentencing judges has demonstrated a need to curtail judicial sentencing discretion. He points to the enormous range and number of recognised aggravating and mitigating circumstances thought to be relevant to sentencing, and adopts suggestions that such factors permit sentencers to pick and choose a sentencing rationale which seems appropriate at the time, with little constraint.

Bagaric points to inconsistent sentencing results and the suggestion of fixed penalty regimes producing results that are too harsh as being the principal hurdles to overcome in the introduction of a fixed penalty regime. In a 2002 paper suggesting both philosophical and practical reasons for fixed penalties, he argued that if mandatory penalties are fixed at an *appropriate* level (presumably meaning at a lower level than politicians on law and order campaigns may otherwise suggest) then

many of the otherwise valid criticisms of mandatory sentencing schemes disappear, whilst maintaining the benefit of judicial consistency.

Bagaric also argues that genuine efforts need to be made to distil the proper sentencing considerations. He argues that issues of rehabilitation, specific deterrence and incapacitation are all flawed theories and should be discarded for the purposes of sentencing, with more focus being given to general deterrence. He argues that the only justification for punishment is the common good, whereby the negative consequences of punishment (the pain experienced by offenders and their associates) are outweighed by the community benefits stemming from the imposition of the penalties.

ARGUMENTS AGAINST MANDATORY SENTENCING

There have been numerous arguments against mandatory sentencing repeatedly identified in the literature. In summary, the most common are:

(a) Restriction of Judicial Discretion and Interference with Judicial Independence

It has often been suggested that it is necessary to the proper judicial exercise of discretion that there cannot be a pre-determined penalty for a specific offence. Otherwise the role of the judiciary would be merely to rubber stamp Parliament's intention. Taking that argument further, it has been argued that such schemes threaten our system of constitutional democracy by diminishing the role of the judicial branch of government generally. It is also argued that it is necessary to have an independent branch of government perform a sentencing function so as to enable the exercise of independent discretion of judgment in contests between victims of crime on the one hand and the prisoner on the other.

The development of *Kable*-type principles will no doubt have significance in the prospects of any such argument succeeding. Justice Santow of the New South Wales Supreme Court has indicated

a view that a mandatory sentencing case will sooner or later go to a High Court and be argued on the basis of the threat to the integrity of the courts and their independence from the legislature and the executive.

(b) Shifting the Sentencing Discretion

Many writers argue that the restriction on judicial discretion through mandatory sentencing regimes does not make the criminal process any more certain, but rather leads to a reallocation of power from the courts to those exercising pre-trial decisions, namely the police and prosecutors. That is because these agencies have the ability to decide whether to prosecute or use alternative mechanisms such as diversion and cautioning. The gravity of this distinction is highlighted by research suggesting that indigenous youths are less likely to be diverted by police and more likely to be processed through the courts than other offenders. If choosing to charge, police also have unfettered discretion as to the exact charge to lay. Consequently, their decisions have a significant impact on the way an offender is dealt with, and on the number of strikes appearing on a person's criminal history. Research suggests that such concerns have led to an increase in plea bargaining, contested trials, and people pleading guilty to offences which do not carry a mandatory minimum, whether or not the evidence supports the charge. Morgan (2002) has argued that such processes are far less transparent and accountable than those made by the courts exercising a wide sentencing discretion.

(c) Unfair Sentencing Results, Disproportionately on Indigenous and Juvenile Groups

Case studies reveal a consistency of those most affected by mandatory sentencing laws as being the socio-economically disadvantaged. It has been suggested by Morgan (2002) that mandatory laws based on broadly defined offence categories are a singularly inappropriate strategy for addressing what may be welfare-related issues as much as criminal problems. Morgan gives the example, gleaned through his research, of an 11 year old Aboriginal boy from northern Western Australia who had been left to fend largely for himself by his parents, who were heavy alcohol

users. It was accepted that his offences, which consisted of stealing food, water, cigarettes and small quantities of cash, were committed mainly to feed himself. He was first placed on a conditional release order for a minimum of 12 months. Morgan notes the poignant submissions of ATSIC that "*12 months is a long time to remain hungry*". Inevitably the boy breached the order by similar further offences and by the age of 13, he was serving a minimum 12 months sentence in detention in Perth.

Early figures examining the Western Australian laws suggested that 81% of juveniles dealt with under the laws were Aboriginal. (The WA government disputed that figure and suggested that it was closer to 74%!). Morgan (2002) makes the point that based on these figures, four-fifths of the "three strikes" cases are drawn from less than 4% of the State's general population and from around 30% of all offenders appearing in the Children's Court.

The NT decision of *Wynbyne v Marshall* (1997) 117 NTR 11 is regularly featured by those wishing to illustrate the unfair impact of mandatory sentencing laws. In that case a young Aboriginal woman, a first offender with a 2 year old child, was jailed for the mandatory 14 day sentence under the Northern Territory laws for stealing a can of beer valued at $2.50. Prior to sentence she had paid full restitution and the evidence was that she was of good character and did not normally drink alcohol. The matter was appealed all the way to the High Court which refused special leave on the grounds of there being insufficient prospects of success.

It is argued that such regimes indirectly discriminate along socio-economic and racial lines because of the nature of the offences selected to attract mandatory terms. History shows that the sorts of offences selected are usually those committed by young (and often indigenous and/or poor) offenders, rather than offences that are arguably more serious, but which do not have the same socio-political resonance, such as white collar crimes like fraud. In the year 2000, journalist Paul Barry noted that Alan Bond's release after 1,298 days in jail on charges of $15 million fraud involving the La Promenade painting and $1.2 billion fraud on shareholders of Bell Resources equated to roughly one day behind bars for every million dollars he stole. Barry pointed to the

Northern Territory case of a young Aboriginal man sentenced to a year in prison for stealing $23.00 worth of cordial and biscuits, noting that had the same formula been applied to Mr Bond, he would have been locked away for 50 million years.

THE VERDICT

The vast weight of opinion reported in the literature suggests that mandatory sentencing policies do not achieve the purported aims of deterrence, and reduction in crime rates. Even pro-mandatory advocate Bargaric (2002) concedes that "fixed penalties are almost universally condemned". Looking at the Australian experience, Morgan (2000) has noticed a shift in justifications which he explains this way:

> *"All three sets of legislation started life to strong utilitarian claims that they would reduce crime, especially through general deterrence. The Federal Attorney-General has continued to refer to general deterrence to defend the laws against international criticism. However, the Western Australian and Northern Territory governments now make no such claims. The fact that they have attempted to shift the focus is tantamount to an acceptance of the evidence… namely, that none of the laws have achieved any demonstrable effect on crime rates. As deterrence has faded, the purported justifications for mandatory sentences have become increasingly rhetorical; "community concern"; "don't forget the victims" and "no money for alternatives.""*

Assessments of the United States schemes also suggest that the principal aim of crime prevention through deterrence has not been achieved there. Advisory Commissions in the United States and elsewhere have rejected the notion that mandatory schemes enhance the deterrent impact of the criminal justice system (see for example Brown (2001)).

Furthermore, it has been suggested that in the US, that mandatory sentencing laws have been associated with a tremendous, "almost stupefying", increase in the incarceration rate. McCoy and

Krone (2002) note that "*from 1995 to 2001 when the entire number of mandatory sentencing laws had taken full effect across the nation, the rate of incarceration in prison and jail increased from 1 in 166 US residents to 1 in 145. The American incarceration rate is now 6 to 10 times that of various Western European nations, and has now surpassed Russian and South Africa in the number of citizens incarcerated per capita*".

The Australian experience seems to be similar. Within little more than a year of the introduction of the Northern Territory's laws, their impact was being publicly questioned. In its editorial on 13 July 1998, the *NT News* asked:

> *"What exactly were the voters asked about mandatory sentencing? Were all the implications explained? Because 12 months down the track many of those who supported the concept might just be thinking they've created a monster."*

It is suggested that mandatory sentencing regimes ignore what from society's point of view should be one of the most important aspects of sentencing, namely the prospect of rehabilitation. Such schemes seek to impose uniform discipline upon offenders that may have dramatically different backgrounds and personalities which may render the issue of deterrence largely ineffective. The issue of rehabilitation remains important because of the percentage of people of whom imprisonment is no deterrent whatsoever.

Such schemes also ignore at least these two familiar themes from criminology research, namely:

(a) that the fear of getting caught is far more operative than the fear of jail; and

(b) placing inexperienced offenders in jail commonly leads to an education in crime which the offender would not get elsewhere.

In a 2001 paper, Professor David Brown from the Faculty of Law at the University of New South Wales concluded that:

"The difficulty facing those opposed to mandatory sentencing policies is that while it is possible to demonstrate that they don't work, in terms of their original justifications, and further that they produce or exacerbate a range of damaging consequences to the individuals, families, communities, the integrity of the criminal justice system and the wider polity, such a demonstration does not in itself fully cut off the populist roots of such policies. These populist roots lie in the thirst for retribution and vengeance, the felt need to strike back in some way at a range of disparate social anxieties and fears, to offer up sacrifices or scapegoats through the imprisonment and social exclusion of particular individuals and particular communities. Mandatory sentencing policies, particularly those aimed at relatively minor property offences and at relatively socially and economically marginalised individuals and communities, are but one manifestation of a wider uncivil politics of law and order which exacerbates social division and rents the bonds of social cohesion so central to the maintenance of our social democracy".

It is these broader social consequences that ultimately count most tellingly against such laws. Sir Gerard Brennan described the results of the Northern Territory's legislation this way:

"The impact of mandatory sentencing…has fallen generally on those who are outside the mainstreams of our society – on those who, by reason of race or want of education or opportunity, do not find fulfilment in the ordinary activities of our society, on those who indulge in petty crime, sometimes under the compulsion of hunger, but are not malicious or hardened criminals. They may be troublesome, and sometimes gravely disturbing to their victims.

All of the factors of each offence, however, could and ordinarily would be evaluated by a magistrate imposing a discretionary sentence. But a legislative hammer has been used to satisfy politically demand for measures which would impose penalties, different from those

which might be accorded by an experienced judicial officer in exercising his or her discretion."

Even if it is accepted that those who advocate fixed penalties have not made out their case, that should not necessarily be the end of the matter. The genesis of this debate lies in an apparent public disquiet at the level and consistency of sentences imposed through the discretionary model. It is for another paper to examine just how consistent our sentencing outcomes actually are, if they can even be measured accurately. Such concerns should not be dismissed out of hand, however. Certainly it is insufficient simply to point to the presence of an appeal process as the answer to inconsistency – appeals are slow, costly, and therefore often unattractive even for someone who may have a justifiable grievance. Rather, lawyers should remain receptive to new ideas and alternative sentencing models which might in any way improve current practice. In the wake of the mandatory sentences debate over the last few years, academics and jurists have considered and explored different models that might provide better consistency whilst avoiding the pitfalls of fixed penalty schemes.

ALTERNATIVES

Consideration of alternatives to fixed penalties has focussed largely on increased efforts at rehabilitation of offenders, and on practical efforts to improve the consistency of sentences.

- *Rehabilitation/Education*

The Australian Institute of Criminology (1999) has suggested that the large government investment required by mandatory sentencing laws would arguably return a great yield in terms of crime prevention if it were invested in prevention policy in areas such as education.

In his 2001 paper *"Mandatory Sentencing: Implications for Judicial Independence"*, Sir Anthony Mason suggested that *"a law which insists on the incarceration of a first offender, more especially*

a young offender, for theft, no matter how trivial the amount involved, and regardless of alleviating circumstances, is inhuman in this day and age. A moment's reflection on the conditions which prevail in our prisons and on the character of some of their inmates is enough to lead inevitably to the conclusion that to send a youthful first offender for a trivial offence may well be a greater threat to humanity than the commission of the actual offence itself." He went on to say that he was "*not alone in thinking that effort put into rehabilitation, rather than retribution and deterrence, is more likely to be cost-effective and lead to a better world*".

- *A Bill of Rights?*

Sir Anthony Mason concluded with a suggestion that draconian legislation of this kind strengthens his view that it is time we joined other nations in the western world in adopting a Bill of Rights, otherwise disadvantaged minority groups have no protection against the majority rule when it sanctions legislation which causes grave injustices.

Sir Gerard Brennan in a 2001 paper also noted that a Bill of Rights is one way in which the self-interest of the majority can be restrained so as to balance the interests of "the minorities and the misfits".

- *Guideline Judgments*

From a practical perspective, there has been much discussion about the use of guideline judgments by superior courts as something of a compromise between the desires for consistency in sentencing and the retention of judicial discretion. Guideline judgments came to prominence in Australia in the case of *R v Jurisic* (1998) 45 NSWLR 209, in which the New South Wales Court of Appeal provided a judgment for the assistance of inferior courts as to the appropriate penalty range for the offence of dangerous driving occasioning grievous bodily harm.

Chief Justice Spiegelman in that case indicated that such judgments are a mechanism for "structuring discretion, rather than restricting discretion". The Chief Justice noted (at 262):

> *"That there are a multiplicity of factors that need to be considered in sentencing has long been recognised. There is, however, a tension between maintaining maximum flexibility in the exercise of the discretion, on the one hand, and ensuring consistency in sentencing decisions, on the other. Inconsistency in sentencing offends the principle of equality before the law. It is itself a manifestation of injustice. It can lead to a sense of grievance amongst individuals on whom uncharacteristically severe sentences are imposed and amongst the broader community, or victims and their families, in the case of uncharacteristically light sentences."*
>
> *"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 the 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 whole, on the other"* (at 266).
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> *"…guideline judgments perform a limited role. Nevertheless, in my opinion, such judgments will provide a useful statement of principle to assist trial judges to ensure consistency of sentencing with respect to particular kinds of offences. I reiterate that such guidelines are not binding in a formal sense. They represent a relevant indicator, much as trial judges have always regarded statutory maximum penalties as an indicator. The critical difference between judicial guidelines and statutory guidelines – whether minimum penalties or a grid system – is the flexibility of the former. There is provision for the special or exceptional case. There is recognition that sentencing must serve the objective of rehabilitation, as well as the objectives of denunciation and deterrence"* (at 267).

In completing his judgment (and by way of example for this paper) Chief Justice Spiegelman provided the following guidelines (at 277):

"1. A non-custodial sentence for an offence [of dangerous driving causing death or grievous bodily harm] should be exceptional and almost invariably confined to cases involving momentary inattention or misjudgement;

2. With a plea of guilty, whenever there is present to a material degree any aggravating factor involving the conduct of the offender, a custodial sentence (minimum plus additional or fixed term) of less than three years (in the case of dangerous driving causing death) and less than two years (in the case of dangerous driving causing grievous bodily harm) should be exceptional.

The period of three or two years, once the threshold of abandoning responsibility has been reached, is a starting point. The presence of additional aggravating factors, or their increased intensity, will determine the actual sentence."

The decision in *Jurisic*, and the utility of guideline judgments generally, has been the subject of almost as much debate in Australian criminal law over the last few years as has mandatory sentencing itself. (See for example the High Court's decision in *Wong v The Queen* (2001) 207 CLR 584). It is fair to say that there are vastly differing views on the value of guideline judgments, including on the issue of whether they require a legislative framework in which to operate. Whilst the Queensland Court of Appeal has not gone the way of formally providing guideline judgments as such, the Court has on occasions delivered judgments containing statements of principle to assist lower courts as to the correct approach to take in the future; see for example *R v Kopa and Istogu* [2004] QCA 100. Whilst the scope of this paper does not allow for a detailed analysis of the arguments for and against guideline judgments, they remain important as an obvious "middle ground" in the continuing debate about mandatory sentencing.

- *Information systems*

Other methods have been examined to achieve greater sentencing consistency whilst not removing the essence of judicial discretion. One such method is the use of computerised comparative systems providing judges with access to case summaries, relevant principles and text books to assist in the sentencing process.

The Queensland position has for a long time been insufficient in this regard. It is understood that changes are on the way, with judicial officers to be given access to such databases in the near future. Presently, in the Magistrates Court, where the vast bulk of sentences are prosecuted by police, comparatives are rarely referred to or used. Indeed, police prosecutors rarely make submissions on sentence at all, but rather outline the relevant facts to the Magistrate, leaving the "discussion" of the appropriate penalty as a discourse between the defence and the Magistrate.

In the higher courts where the prosecution take a more proactive role in making sentencing submissions, judges are nonetheless reliant on their own experience and the efforts of counsel to bring to their attention relevant authorities and principles for the purposes of sentencing. Whilst the situation has steadily improved with the continual advancement of electronic judgments becoming more readily assessable, the Director of Public Prosecutions and the Legal Aid Office have been the only two institutions with a comprehensive list of sentencing comparables. Court of Appeal judgments are available (and searchable) on the Queensland Courts' website, although the vast bulk of District and Supreme Court judgments are not yet accessible in this form.

CONCLUSION

A review of the literature suggests that the advocates for mandatory sentencing have not made out a good case for the imposition for such regimes, either as a matter of principal or practical necessity. It is suggested that independent and qualified judicial officers, operating within a sentencing structure that allows for the appropriate assessment of competing features, is the best

means to balance the complex and competing requirements entailed in the sentencing discretion. The challenge for governments and the criminal justice system as a whole is to ensure that judicial officers have available to them high quality and relevant information so that their discretion is exercised in the most informed manner possible.

It seems that, for the time being at least, we have perhaps seen the best/worst of mandatory sentencing schemes in Australia. The Northern Territory scheme has been abolished; whilst the Western Australian "three strikes" laws remain, they remain fairly narrowly confined, and subsequent efforts in WA to produce a matrix/grid regime have not been successful.

Despite strident criticisms and examples of great social and individual unfairness arising from this sort of legislation, it seems that the attraction of mandatory sentencing has abated entirely, though. In 2002 the New South Wales Liberal Party committed itself to introducing a scheme of mandatory sentencing if elected at the forthcoming election. In Queensland, Leader of the Opposition Mr Lawrence Springborg MLA recently introduced a Private Member's Bill entitled *The Offenders (Serious Sexual Offences) Minimum Imprisonment and Rehabilitation Act* 2006. The Bill provided for mandatory imprisonment for serious sexual offences (although with no minimum time prescribed) as well as a focus on the completion of rehabilitation programs prior to release. Unsurprisingly in light of the parliamentary make-up in Queensland, the Bill has not been passed.

Australia's experience with these laws suggest that it is too difficult a thing to draft formulas or legislation which properly reflect the subtlety and nuances of issues such as criminality, intent, cultural factors, and social harm. These shades of grey can only be assessed by a human being exercising an experienced and rational discretion. The rigidly equal application of the law to those whose circumstances are unequal does not equate to fairness or equality. Fairness has as its cornerstone an adjustment of consequences in response to different circumstances. That is the very flexibility that mandatory sentencing prevents.

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