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**Guideline judgments and standard
minimum sentencing – an uneasy
alliance in the way of the future.**

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Transcript of presentation

Guideline judgments and standard minimum sentencing – an uneasy alliance in the way of the future.

This is a topic of fairly recent origin from a sentencing point of view. Certainly standard minimum sentencing in NSW has only had its third anniversary on the 1st February this year. There hasn't been a great deal of research done in this area, but there is an increasing amount of court jurisprudence coming out on this. This is what I'm going to look at today - the relationship of standard minimum sentencing with guideline judgements and what the future might hold in relation to these forms of what I would call regulation of the sentencing discretion of judges and magistrates.

Of course to some extent the standard minimum sentencing scheme in NSW doesn't apply to offences that can be dealt with by magistrates, but of course there are some guideline judgements that do apply to magistrates.

The interesting word that is used in this area is 'structuring' judicial discretion. Chief Justice Spigelman used it in the first guideline judgement in 1998. But we are not trying to control judicial discretion. This isn't meant to be a straight-jacket for judges in sentencing - it's meant to structure their discretion. I'm going to use the word 'structuring', as the courts use it and as the Attorney General used it, to mean organising the interconnecting parts of the sentencing decision rather than being directive. It is a subtle difference, but it's something that is emphasized in both the court jurisprudence and in the legislation. We are not controlling – we are structuring.

The introduction of this legislative scheme has brought a number of indictable offences into a table. What has happened with the case law arguably is that the actual standard minimum sentence links have been used as what the courts call reference points. Discretion has to be shaped around those reference points. At the same time, if you look at that table, there has been a significant increase on the average range of sentences that were previously imposed for most of those offences in the table. There has in the interpretation of the scheme been a circumscription of its operation. It is only said to apply directly to offences where the person has been convicted after trial after a plea of 'not guilty' (although the courts have also said it still relevant in sentencing for pleas of 'guilty').

This particular form of sentencing scheme also challenges the instinctive synthesis approach to sentencing. This particular scheme when you look at it, and Justice Kirby has most probably clearly said this about standard minimum sentencing, lends itself to reasoning to a sentence through specific and express stages. It is something, in an era of transparency, that heralds very much the outmoded nature of the instinctive synthesis approaches to sentencing.

My research shows the courts have reacted to standard minimum sentencing by guideline judgements going into a form of decline. My view is that guideline judgements are a very important mechanism for fostering consistency in sentencing for the judiciary. They come from judges for judges and I think they are accepted because of that. Research shows that there has been a falling into line and more consistent sentencing as a result of guideline judgements. The most recent guideline judgement was for a high range PCA drink driving offences in NSW. Research has also shown that that has been important.

We haven't had any guideline judgements for indictable offences for many years now. It raises questions, when you have this other scheme in place, as to whether or not guideline judgements are in decline and whether they should be in decline or not. So this form of judicial self-regulation seems to sit somewhat uneasily with a legislative scheme.

Law and order issues maintain a high political profile and there are always noticeable sporadic legislative views incrementally encroaching on judicial discretion. I think one of the best examples most recently is the amendments to the Bail Act. These were amendments in the face of the race riots in Cronulla, where presumption against bail has been brought in for an increased number of offences including riot. Riot of course is not one of the offences that appears in the standard minimum sentencing table. Yet the standard minimum sentencing table is one that is open to amendment upon legislative decision making.

Although NSW is the only state with standard minimum sentencing, there are provisions for guideline judgements in a number of other States in Australia. The questions that I want to look at, because of the interaction of these two schemes are: 'What is the sort of guidance that you get from standard minimum sentencing in guideline judgements and has it achieved the legislative objectives'?

So you have got this moderate form of guidance by reference points and sounding boards. The alternative is strict rules, or rigid control which is at the most extreme end if you are looking at - mandatory sentencing or the strict grid sentencing that is available in some of the states in the United States.

The other questions that come up are: is the ongoing question of leniency of judges in sentencing going to lead to more restrictive legislative measures? or should there be a revival of guideline judgements in the wake of legislative encroachments ?

The other thing that comes out is the role of sentencing councils. We have one in NSW and one of Victoria, and one proposed in Queensland. But we also have the model of the UK sentencing guidelines council which is of recent origin. It has developed out of their sentencing advisory panel which they have had for a number of years.

So what are the future extent and form of the guidance or regulation that judges might face?

Part 4, Division 1A of the Crime Sentencing Procedure Act NSW started in February 2003. When it was first brought in, there was a lot of commentary about concerns as to how it would affect judicial discretion or whether it would at all. There were some commentators saying it was simply a system that preserved the discretion of judges and didn't create mandatory sentencing - it was just providing them a non-exhaustive check list of factors which they already take into account.

The issue goes the reach of the statutory scheme. The approach to sentencing that it requires and to the sentencing scales to the offences, so there were three main things that had to be looked at in relation to this particular scheme. One of the phrases that are used in the legislation is that the standard minimum sentence in the table applies to an

offence in the middle of the range of objective seriousness for that offence. That of course needed some unpacking.

The other thing was that it was also apparent, as stated by the Attorney General in the second reading speech, was that the Crime Sentencing Procedure Act provisions wasn't intended to replace the system of judicial guideline judgement which has operated for four or five years by the time this scheme came in. It was promoted by the government as structuring discretion and satisfying community expectations in sentencing consistency. But there was also emphasis on consistency - the words transparency and community expectation are constantly used.

The initial concern was that the scheme threatens the independence of the judiciary, putting unnecessary fetters on the discretion of judges. One senior NSW judge said that the whole underpinning philosophy of the independence of the judiciary from the legislature and the executive is a separation of powers question - that judges have the freedom to make decisions in an unfettered way. Of course they set their own parameters as we have seen in the concept of proportionality in sentences.

Under this scheme the first detailed decision of the court of criminal appeal was in the case of *R v Way*. This was a drug case in relation to standard minimum sentencing and how the courts should go about applying the standard non-parole period. The court decided that a purpose interpretation needs to be applied. So following statutory interpretation rules, they looked at these phrases in some detail.

One of the major points circumscribing the scheme is that it applies after trial - it has no direct application to a guilty plea. If the standard non-parole period applies then there is significant scope for departure. The scheme provides that you can go up or down, once you have identified the middle range and objective seriousness, you can adjust up or down your non-parole period by reference to section 21A factors (which are your aggravating and mitigating factors). Also Section 21A (1)(c) in the Act says you can use any other factor that might be relevant to a particular case in adjusting the sentence. So it is actually not particularly circumscribed.

The threshold question would be 'is the offence in the middle range of the objective seriousness?' The court said in this case it is to be determined only by reference to the elements that proved the offence beyond reasonable doubt. You make an initial assessment of seriousness by looking at a combination of sentencing experience. Immediately that brings in questions about judicial discretion. But that must be based upon the range of instances which go to make up cases of the relevant kind that come before the courts. This is combined with an understanding of the facts which are necessary elements of the offence as well as the consequences of the offence and the reason for its commission.

The court went on to say you look at the consequences and factors that impinge on the mens rea of the offence. So they have attempted to restrict that threshold question to elements of the offence, then they have to place the offence as it is interpreted by using that method in the seriousness spectrum. Now that again is of course has elements of subjectivity in it. But the court in *R v Way* said judges are very used to doing this because it is little different from looking at cases falling into the worse category, the middle range, below the middle range, low level cases right down to trivial cases. There is an identifiable spectrum and judges are used to referring to a different place in the

spectrum on a daily basis. Clearly categorising an offence is somewhat intuitive and of course they rely on and they use sentencing experience as part of being able to undertake that task.

The other thing is of course, judges have to characterise specific facts to be able to set where the elements of the offence sit in the spectrum. If you look at the jurisprudence on 'worst case' (which I looked at extensively when I was doing life sentences for murder in NSW), you don't come away with a great feeling that this something that is very easily categorised. Just as Badgery Park refers to crimes of very great heinousness, the words that are used are not, I suppose, leading to clear categorisation. There is still very much an intuitive element coming into those sorts of categorisations. Ultimately the court in *R v Way* said there is no significant fetter put upon judicial discretion by this particular Act, There is no legislative policy to create a straight-jacket for judges, but rather it was intended to provide further guidance and structure to judicial discretion.

The interesting thing is in *R v Way* is that the court gave a new guide post to the sentence appropriate for an offence in the category of middle of the range of objective seriousness. You have a new terminology coming in through the scheme. I'm sure judges prior to the standard minimal sentencing scheme did refer to middle range objective seriousness although there aren't very many examples of it in the case law. Now they do they refer to it quite regularly.

It is a legislative scheme that adopts a two-stage approach. The standard non-parole period becomes a statutory reference point to the middle range of objective seriousness. Once that reference point is identified, the judge is required to take into account the other factors set out in the Act in order to arrive at an appropriate non-parole period and the balance of the sentence.

In *R v Way* the judges observed that reflected in the table there were generally longer than average sentences that had been imposed in the past. They said that was hardly surprising because they were set as reference points before adjustment for purely subjective features. But on the other hand, they also noted the absence of any consistent proportion between non-parole period and maximum penalties prescribed in the table and an absence of any consistent relativity between those non-parole periods and the statistics. Therefore they said it may be that for some offences the sentencing pattern will move upwards while for others it will not.

After *R v Way* there is still an issue about the legislative intent concerning severity of sentencing levels. It certainly wasn't clearly resolved. The non-parole period for a firearms offence is 21 ½% of the maximum sentence. For the indecent sexual assault offence, under Section 61M of the Crimes Act, is 71 ½% of the maximum sentence. Now, when the non-parole period itself has to be 75% of the head sentence in NSW under Section 44, you are looking at imposing the maximum penalty almost, in that Section 61M offence to get the standard non-parole period. So there was some extremes in proportions identified by the court in *Way*. One of them of course was the Section 66A offence (sexual assault on a child under ten) which has a proportion of 60% of the maximum sentence. Now, that went to the High Court refused special leave in *Way*. Stephen Odger's main point appearing for the applicant in that case was that the middle range of objective seriousness should be a point, not a band, as has been interpreted by the court in *Way* - that we were putting too many cases into the middle

range if we interpreted it as a band. The High Court rejected that - indications from the High Court were that the interpretation of the middle band was more consistent with the legislative language than as a point.

Overall, this is a modified form of mandatory minimum sentencing in NSW which does seem to leave some scope for the exercise of judicial discretion. But the question ultimately becomes a political one. Is it simply political manoeuvring in a climate of continuing law and order politics until we get to the next election? What will we see happening 12 months away in NSW? If that is the case then this sort of legislation may not be the final instalment in legislative attempts to structure judicial discretion. They could be the possibility of more onerous restrictions.

Just briefly on Makarian. The simmering debate in the High Court is about the two-stage sequential approach. I prefer Justice Kirby's judgement in this case, but the majority prefer the instinctive synthesis approach. But majority decision says there is no universal rule to be applied. They look carefully at statutory requirements which they say may lead to some indulgence in arithmetical process. Actually, what the majority says depends on whether the sentencing exercise is simple or complex. Too many arithmetical deductions lead to potential for error. If you look at the standard minimum sentencing scheme in NSW there are quite a number of factors that have to be added, deducted whatever - whether that is simple or complex is another question. Justice Kirby's approach I would argue is clearly articulated - the most important factors in determining the sentence. He goes on of course to say this is how you promote public confidence and greater understanding.

The recent cases (*R v Davies* cf *R v Mouloudi*) have refined, developed and applied the principles in *Way*. *R v Davies* certainly shows that there is a limitation on discretion by reference to the standard non-parole period. In *R v Pellew* (the offence was one where the standard non-parole period for a Section 66A offence of sexual intercourse with a child under ten is 15 years) the sentence imposed was 18 months. So there was quite some judicial discussion of sentencing in this case in relation to this particular offence. There is some very interesting judicial observations about the contrast between statistical sentencing range to date where the non-parole periods for these offences had been somewhere between 12 months and 6 years. Then there is the legislature that says the standard non-parole period is 15 years. Ultimately, Justice Simpson says it's inevitable that these offences will increase because of what the legislature has said.

My question is: is there a need for revision of some of the standard non-parole periods, noting that disproportion? Are the official statistics so low that this is a task for the sentencing council?

R v Mills [2005] and *R v Dang* [2005] and other examples of how the standard non-parole period operates as a reference point. There a number of other cases and I have only chosen a couple. It's very clear, from *Way* onwards (2004 into 2006) we are still getting cases on standard non-parole. This has been a real focus in the court of criminal appeal.

There has been an increase in recognition of the prominence of the standard non-parole period as a guide in reaching the sentencing outcome. Cases like *Dang* show that the court of criminal appeal is saying judges, in some instances, are just not taking it into account - they are not applying the scheme as it has been interpreted as this reference

point. They are comparing the standard non-parole period figure in the table to the sentence imposed by the judge and say this is way out of whack. So, therefore, there is a judicial recognition and a move to this increased sentencing.

Guideline judgements have a diminished role these days in my view. I still regard them as a powerful form of judicial self-regulation and I think the results of studies into the impact of Jurisic, Henry and the high-range PCA guidelines show the impact they have, which is very positive. They are more detailed - they are not simply a table. As we know, in the case of Wong, the High Court rejected judges fixing guideline judgements in the shape of tables. The legislature comes along and gives us a table, which has to be open to judicial interpretation, but the more detailed the more guidance you get is from these types of judgements. Arguably, the question is: could we use them in a better way? Could we make them more sophisticated? Could we avoid these legislative encroachments by reviving guideline judgements? So, the uneasy alliance, as I call it, is between these two differing forms of guidance, structural judicial discretion because of the legislative imposition as apposed to the self-regulatory judicial mechanism. The other question, of course, which comes out is what sort of reference point has the standard non-parole period become?

What is the role of the independent sentencing authorities? We have them in NSW and Victoria. The UK sentencing guideline council compiles compendium guidelines for all offences. It has 7 judges on it compared to 4 non-judicial members. Interestingly enough, the ALRC has recently said we don't need a federal sentencing council. And, of course, federal sentencing is becoming increasingly important. It has probably never assumed the importance that it has at State level. But I think sentencing councils are something that need serious consideration in the future.

So there are my concluding thoughts. It is a regulation question transparent decision making. I think we have seen increasing amounts of legislative activity, an unheralded amount in the last 15 to 20 years. Prior to that, the only thing the legislature did was to fix a maximum sentence. There has been increasing regulation, is that going to continue into the future. I don't think the numerical grids are unequivocally buried. My own preference would be that we re-invigorate guideline judgements through the Court of Criminal Appeal. But if that is not something they can cope with, the load that they have in dealing with cases, then I think a guidelines council modelled on the UK is certainly something worth considering.