

## Sentencing: Legislation or Judicial Discretion?

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*Presented at the Sentencing Conference (February 2008)  
National Judicial College of Australia/ ANU College of Law*

1 The sentencing of offenders is a task in which the three arms of government each have a role. The Executive determines what governmental policy shall be and proposes bills to the Parliament. The Parliament enacts legislation which reflects the extent to which the policies of the Executive are acceptable to it. The Judiciary (magistrates as well as judges) determine what the punishment shall be subject to any prescription of maximum penalties.

2 The role traditionally exercised by Parliament has been to fix the maximum penalty for an offence. In that way the Parliament expresses its assessment of the community's view of the seriousness of the offending. Having expressed the maximum penalty, the Parliament has left it to the courts to determine the appropriate penalty. Judges and magistrates have a wide discretion to determine the appropriate penalty. For certain kinds of offending, especially offending arising out of the misuse of motor vehicles, Parliament has been more prescriptive as to the type and severity of penalty. One instance is penalties fixed for drink driving offences<sup>2</sup>. However, as a general rule, judges and magistrates have a wide discretion as to the penalty which is appropriate.

3 The relationship between Parliament and the courts in this respect is a sensitive one. It has important implications for the separation of powers. For a long time, Parliaments have recognised the separate role of judges and magistrates and have acknowledged that the discretion vested in judges and magistrates will enable them to tailor a punishment to fit the crime.

4 However, in the last 20 years, Parliaments throughout this country have enacted legislation to curb the width of the discretion which judges and magistrates might exercise. It is not a phenomenon restricted to this country. As long ago as 1990 Lord Bingham, when considering the discretions exercised by judges in England, expressed the view that there was an "accelerating tendency"

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<sup>1</sup> The views expressed in this paper are my own. It would be wrong to infer that they necessarily represent the views of my judicial colleagues in either the Supreme Court or the Judicial Conference of Australia.

<sup>2</sup> See, for example, s 47B of the *Road Traffic Act 1961* (SA). Even within the range prescribed by that provision, judicial officers have a discretion as to the appropriate penalty. See also N Morgan, *Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?* (2000) 24 Crim LJ 164.

towards narrowing judicial discretions and that was “nowhere better illustrated than in the field of sentencing”<sup>3</sup>. One manifestation of such legislation is the statutory prescription of mandatory penalties. Another is the prescription of mandatory minimum penalties. An example is the *Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act 2007* enacted by the South Australian Parliament which prescribes the minimum non-parole period for murder and other crimes of violence resulting in the death or permanent physical or mental incapacity of the victim. I will return to that Act.

5 In this paper I examine the reasons why Parliaments have prescribed mandatory penalties and enquire into the validity of those reasons.

### The Existing System

6 The process of sentencing occurs upon the ascertainment of guilt either following a trial or plea of guilty. The magistrate or judge will hear submissions from the prosecution and by the legal representative of the offender and will then determine the appropriate penalty. As a general rule, the magistrate or judge has a discretion to determine what will be the appropriate penalty.

7 The over-riding principle when determining penalty is proportionality.<sup>4</sup> The sentence must be proportional to the circumstances of the crime (which includes the effect on the victim) and the circumstances of the offender. The punishment must fit the crime and the circumstance of the offender as nearly as may be<sup>5</sup>. That principle is deeply rooted in the common law system. It has been referred to with approval in the House of Lords and the Privy Council<sup>6</sup>. As the Privy Council noted in *Bowe*, proportionality in sentencing can be traced back to Magna Carta. The eighth amendment to the Constitution of the United States has been held to proscribe punishment which is by its excessive length or severity is disproportionate to the offence<sup>7</sup>.

8 Regard must be had to other factors. They include retribution, deterrence (both personal and general) and rehabilitation. The extent to which the offender is genuinely remorseful for the crime and has co-operated with police and prosecution authorities is often relevant. The effect upon the victim is another important consideration especially in crimes of violence and that is one aspect of the circumstances of the crime. In a number of jurisdictions in this country, the

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<sup>3</sup> Bingham, *The Discretion of the Judge*, The Royal Bank of Scotland lecture, Oxford University delivered on 17 May 1990 published in *The Business of Judging (Oxford UP)* at 35.

<sup>4</sup> *Veen v The Queen (No 1)* (1979) 143 CLR 458 at 467, 468, 482-483, 495 affirmed in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472.

<sup>5</sup> *Webb v O’Sullivan* [1952] SASR 65 at 66.

<sup>6</sup> *R v Barnsley Metropolitan Borough Council; ex parte Hook* [1976] 1 WLR 1052 at 1057-1058; *Bowe v The Queen* [2006] 1 WLR 1623 at 1635.

<sup>7</sup> *O’Neil v Vermont* (1892) 144 US 323 at 339-340; *Weems v United States* (1910) 217 US 349 at 366-367.

Parliament has prescribed the factors to be taken into account<sup>8</sup>. They largely reflect proportionality and the other factors just mentioned.

9 Whether the sentence be ordered by a magistrate or by a judge of a District or County Court or by a judge of a Supreme Court, it is subject to appellate review. Generally speaking, the sentence will be reviewed if it is either manifestly excessive or manifestly inadequate. The contention that the sentence is manifestly excessive may be advanced on a number of grounds. The sentence is also capable of review if there has been a failure to have regard to any relevant statutory provision. Appellate review is by one means by which courts seek to avoid disparity in sentencing. Another is the relatively recent practice of guideline judgments, a practice adopted in a number of jurisdictions in Australia.

10 The exercise of the sentencing discretion does not result in a sentence fixed with mathematical precision or even approximation<sup>9</sup>. Even able and experienced judges may differ as to the precise sentence which might be ordered in any one case. That is a necessary consequence of any exercise of discretion. The determination of a sentence is not a mathematical exercise but an exercise of judgment where reasonable and experienced judges may reasonably disagree as to the penalty or sentence to be ordered in respect to the circumstances of a particular offence and of a particular offender. These considerations were noted by Jordan CJ in *R v Geddes*<sup>10</sup>.

This throws one back upon a preliminary question as to the general principles upon which punishment should be meted out to offenders. In the nature of things there is not precise measure, except in the few cases in which the law prescribes one penalty and one penalty only. In all others, the judge must, of necessity, be guided by the facts proved in evidence in the particular case. The maximum penalty may, in some cases, afford some slight assistance, as providing some guide to the relative seriousness with which the offence is regarded in the community ; but in many cases, and the present is one of them, it affords none. The function of the criminal law being the protection of the community from crime, the judge should impose such punishment as, having regard to all the proved circumstances of the particular case, seems, at the same time, to accord with the general moral sense of the community in relation to such a crime committed in such circumstances, and to be likely to be a sufficient deterrent both to the prisoner and to others. When the facts are such as to incline the judge to leniency, the prisoner's record may be a strong factor in inducing him to act, or not to act, upon this inclination. Considerations as broad as these are, however, of little or no value in any given case. It is obviously a class of problem in solving which it is easier to see when a wrong principle has been applied than to lay down rules for solving particular cases, and in which the only golden rule is that there is no golden rule...In applying considerations as general as these, it is necessarily not often that it can be said, with reasonable confidence, that the sentence imposed was wrong. If it appears that the wrong principle has been applied, the Court must, of necessity, treat the question of the sentence as being at large, although, even in such a case, the attitude and report of the judge, who alone has had the opportunity of

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<sup>8</sup> An example is s 10 of the *Criminal Law (Sentencing) Act 1982 (SA)*.

<sup>9</sup> Hammond J, *Sentencing: Intuitive Synthesis or Structure Discretion?* [2007] *New Zealand Law Review* 211 at 213.

<sup>10</sup> (1936) 36 SR(NSW) 554 at 555-556.

coming to grips with the evidence at first hand, may be, and ordinarily would be, of great importance.

In *Markarian v The Queen*<sup>11</sup> Gleeson CJ, Gummow, Hayne and Callinan JJ expressed the position in these terms:

Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence: *Peace v R* (1998) 194 CLR 610 at 624 [46]; 156 ALR 684 at 694; [1998] HCA 57. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies: *Johnson v R* (2004) 205 ALR 346 at 348 [5]; 78 ALJR 616 at 618; [2004] HCA 15 per Gleeson CJ, ALR 356 [26]; ALJR 624 per Gummow, Callinan and Heydon JJ.

Thus, if a sentence is within a proper range and there is no error of principle, an appellate court will not interfere. There is, therefore, a potential for disparity in sentences.

- 11 Appellate review has the capacity to correct error and, should it occur, perverse refusal to exercise the sentencing discretion according to established principle: *R v Stafford Justices*<sup>12</sup>.

### **A Perception of Leniency**

- 12 A widespread view exists amongst the public that sentences are too lenient. Another view, although I suspect not as widely held, is that there is a large amount of disparity in sentencing. Dr Bagaric contends that the “rule of law virtues of consistency and fairness are trumped by the idiosyncratic intuition of sentences”<sup>13</sup>. These are the two factors which have led governments to introduce legislation circumscribing the exercise of the sentencing discretion. More weight is attached to the perceived leniency than to the perceived disparity. Dr Morgan, a criminologist at the Crime Research Centre at the University of Western Australia, has made extensive studies of mandatory penalties. He observes<sup>14</sup>:

Individual examples of disparity can, no doubt, be found but the question is whether the problem is so systemic and pervasive as to require such a radical new sentencing

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<sup>11</sup> (2005) 215 ALR 213 at [27].

<sup>12</sup> (1940) 2 KB 33 at 43.

<sup>13</sup> M Bagaric, *What Sort of Mandatory Penalties Should We Have?* (2002) 23 Adelaide Law Review 113 at 114.

<sup>14</sup> N Morgan, *Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities* (2002) 23 Adelaide Law Review 141 at 142.

structure. Disparity is a complex question but advocates of mandatory sentences tend not to define the term or to back up their arguments with examples of empirical evidence.

The issue of disparity is, I believe, of more the concern to those who have been sentenced than to the public at large. The major concern of the public is that sentencing is too lenient and that concern has existed for years.

<sup>13</sup> A study in Western Australia in 1996 found that 76 per cent of the public thought that sentences were “not severe enough”<sup>15</sup>. Another study in South Australia in 2000 concluded that 80 per cent of South Australians agreed that sentencing was “too soft”<sup>16</sup>. Other serious misconceptions exist among the public about crime and punishment. Some examples<sup>17</sup> are

- 73 per cent of a sample substantially over-estimated the proportion of crimes involving violence;
- 79 per cent of the same sample believed that murder had increased over the past ten years, whereas in fact it had decreased or remained stable.

Misconceptions of such magnitude as these are plainly very conducive to misconceptions as to the appropriateness of sentences.

<sup>14</sup> Dr Austin Lovegrove, a criminologist at the University of Melbourne, has identified the perceived dimensions of lenience<sup>18</sup>:

1. **Harsh practice.** All too frequent judges impose non-custodial sentences where imprisonment is appropriate or, when they impose imprisonment, it is for a lesser term than is warranted.
2. **Consensus of opinion.** There is substantial agreement in the community on the severity of sentences appropriate in individual cases. When this is taken in conjunction with the first element, it follows that the judiciary are thought to be more lenient than the majority of the community.
3. **Offence-based justifications.** There is too much emphasis on leniency for offenders by way of finding excuses for their behaviour, otherwise downgrading their culpability, being sympathetic to their plight or being concerned about their rehabilitation. Consequently, there is too little emphasis on the seriousness of offending, or on punishment, deterrence and incapacitation.

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<sup>15</sup> D Indermaur, *Public Perception of Sentencing in Perth, Western Australia* (1987) 20 Australian and New Zealand Journal of Criminology 163.

<sup>16</sup> *Courts Consulting the Community* (2006), Square Holes, Adelaide South Australia cited in A Lovegrove, *Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community* [2007] Crim LR 769 at 770.

<sup>17</sup> D Indermaur cited in *Myths and Misconceptions: Public Opinion v Public Judgment about Sentencing*, Sentencing Advisory Council 2006 at 30.

<sup>18</sup> A Lovegrove, *Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community* [2007] Crim LR 769 at 770.

4. **Conviction and rigidity.** For any particular case there is one correct sentence, and individuals hold their view of what it is with strong conviction.

These views are to a large extent influenced, if not shaped, by the media's reporting of sentences. Dr Lovegrove suggests that two beliefs support the view that sentences are too lenient. The first concerns the making of judgments about sentencing. The second concerns the judge's relationship with the public.

15 Dr Lovegrove lists the factors that lead the public to the view that it has the ability to determine an appropriate sentence<sup>19</sup>. It is a disturbing list. I list some of the factors. There is a perception that the public is able to make a judgment as to the appropriate sentence

- without experience of the principles and factors relevant to sentencing;
- on the basis of little information about the circumstances of the crime and even less about the circumstances of the offender;
- with no strong sense of the offender as a real person; and
- without a proper knowledge of sentencing options.

Those factors in turn lead people to the conclusion that, as the sentence they determine is reasonable, sentencing by judges is problematic, a conclusion reinforced by the view that judges differ from the community in terms of their educational and social backgrounds as well as their life experiences. Judges are said to be remote and out of touch. In the survey in South Australia in 2000, 73 per cent thought it "about time the courts caught up with the real world". These factors undermine public confidence in the courts. There can be little doubt that politicians base law and order programs on these perceptions with the consequence that legislation ultimately reflects those views.

### **Is The Populist View Valid?**

16 Are these perceptions correct? Are judges and magistrates too lenient in sentences and other penalties they impose? Are judges out of touch with what the community believes are appropriate sentences?

17 Any person who has an informed knowledge of judicial officers knows that they are not out of touch with the community standards. Judicial officers share the life experiences of many in the community. However, I will not dwell on that fact but examine the question whether sentences are too lenient.

18 Recent studies both in Victoria and in Tasmania demonstrate that, when given more and relevant information, people are less punitive and are likely to

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<sup>19</sup> Ibid at 770-771.

agree with the sentence or determine upon a sentence less than that ordered by the sentencing judge.

19 Between 2004 and 2006, Dr Lovegrove organised a survey using four sentences ordered in the County Court and in the Supreme Court of Victoria<sup>20</sup>. The study was conducted by an academic and four judges of whom two were reserve judges and two were retired judges. The survey involved 471 participants and was conducted at 32 workplaces in metropolitan and rural Victoria. The participants had to consider four cases of serious offending with potentially strong claims for mitigation of the sentence. I list the four cases.

1. An armed robbery of \$1,100 at a small gambling venue with minimal violence and an unloaded gun.
2. Multiple rapes at knife point of a young woman in her home at night by her neighbour.
3. Multiple stabbings of a young man by a young adult male and the punching of a young woman by his 18 year old girlfriend.
4. The theft from a company of goods to the value of about \$1,000,000 by two employees over an extended period of time.

Participants were first given a talk for about 70 minutes on the topic of sentencing, its aims, the considerations relating to the various aims and how they might be reconciled in framing the sentence. In the second session, the judge presented his sentencing remarks which included an account of the facts of the offence and the circumstances of the offender as well as any reports about the offender and statements from the victim. Participants were also presented with the statutory maximum for each offence and data on current sentencing practice. Participants then decided what sentence they would have imposed and to rate the sentence actually ordered on a scale ranging from “much too tough” to “much too soft”.

20 The results of the survey were that the median sentence of the participants was markedly less than the sentence imposed by the judge in three of the four cases. In the case of the multiple stabbings, the judge ordered a sentence of three years whereas the median of the participants was 3.2 years. The study showed, among other things, that<sup>21</sup>

- judges are not more lenient than the community;
- there was a range of sentences ordered by the participants;
- the participants had regard to factors pointing to leniency and were prepared to give weight to mitigating factors; and

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid at 776-778.

- the participants did not have firm views as to what is an appropriate sentence in any one case.

Dr Lovegrove believes that those last two findings represent community views.

21 The results are consistent with similar less formal exercises conducted by judges in South Australia on a number of occasions with service organisations and other community groups. The exercises involved outlining the nature and circumstances of offending, the circumstances of the offender and other relevant facts. The group was then asked to determine the sentence. Almost invariably, the sentence determined by the group was less than the sentence that the judge had ordered.

22 In 2005 and 2006 the Sentencing Advisory Council of Victoria undertook an extensive review of public opinion of sentencing. Published in 2006, it is called *Myths and Misconceptions: Public Opinion Versus Public Judgment about Sentences*. It draws on research in the United States of America and Canada as well as Australia. That research concluded that<sup>22</sup>

- in the abstract, the public thinks that sentences are too lenient;
- in the abstract, people tend to think about violence and repeat offenders when reporting that sentencing is too lenient;
- the public has very little accurate knowledge of crime and the criminal justice system;
- the mass media is a primary source of information on crime and justice issues;
- people are overly influenced by information concerning a single case and falsely generalise that leniency characterises the entire sentencing process;
- when people are given more information, their levels of punitiveness drop dramatically;
- victims of crime are no more punitive than the general community;
- people with high levels of fear of crime are more likely to be punitive;
- despite apparent punitiveness, the public favours increasing the use of alternatives to imprisonment.

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<sup>22</sup> *Myths and Misconceptions: Public Opinion v Public Judgment about Sentences*, Sentencing Advisory Council 2006 at 11-30.

The study drew the following conclusion from a study in 2005 of public attitudes in Australia<sup>23</sup>:

Public perceptions of crime and the criminal justice system are based not on the *reality* of crime but on the *reporting* of crime. But it is difficult and complex to untangle the direction of causality in the relationship between media reporting and perceptions. While the media may provide negative stories, individuals are likely to seek out stories that accord with their pre-existing beliefs. It is thus likely that the two exist in a dynamic, synergistic relationship (Indermaur and Roberts, 2005, p. 148).

Looking at public perceptions of the courts, Indermaur and Roberts (2005) found that 46% of respondents had ‘not very much’ confidence in the courts and legal system, while 24% had ‘no’ confidence. Stiffer sentences were advocated by 70% of all respondents, with almost half (47%) agreeing that the death penalty should be the punishment for murder and a large majority (81%) believing that crimes committed by big business often go unpunished (Indermaur and Roberts, 2005, pp. 152-153). Most respondents (63%) felt that judges should reflect public opinion in their sentencing decisions.

The questions on perceptions of sentencing and the death penalty have been included in the Australian Survey of Social Attitudes on ten occasions over the past two decades. Responses to these questions over time reveal an interesting picture: the proportion of Australians who agree with stiffer sentences has decreased from a high reached in 1987. This slight shift has occurred despite continuing political rhetoric and media focus on law and order. Indermaur and Roberts suggest that the public might have reached ‘saturation’ point with constant media attention to crime and sentencing, becoming somewhat desensitised to media images and even cynical about the frequent inflammatory tone of political debate (Indermaur and Roberts, 2005, p.156).

These conclusions as to public opinion accord with Dr Lovegrove’s research.

<sup>23</sup> The Sentencing Advisory Council will be undertaking similar research to that of Dr Lovegrove<sup>24</sup>:

A deliberative poll methodology has also been applied in the context of the Council’s ‘You Be the Judge’ seminar series. Participants are asked to complete a survey before the seminar begins. The session then provides participants with information about sentencing practices and policy in order to illustrate the difficulties that sentencers face in arriving at an appropriate sentence. Finally, participants once again complete the same survey.

Professor Arie Frieberg, the Chairman of the Sentencing Advisory Council and a distinguished criminologist, has already conducted “You be the Judge” programs. They yield like results to those found by Dr Lovegrove<sup>25</sup>.

<sup>24</sup> A study which is still in progress is a direct consequence of remarks made by Gleeson CJ in 2004, when he suggested that the views of jurors be sought as to the appropriateness of the sentence in a case they had tried<sup>26</sup>:

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<sup>23</sup> Ibid at 35.

<sup>24</sup> Ibid at 43.

<sup>25</sup> Comments made at conference of judges of the Supreme Courts of the States and Territories and of the Federal Court of Australia in Sydney in January 2008.

The best way of seeing that the public are informed about the working of the criminal justice system is through the jury system. I referred earlier to the reduction in the use of juries in civil cases. The maintenance of the jury system for the trial of serious crimes, and especially crimes of violence, is a vital means of keeping the public and criminal justice in touch. There is another practical suggestion I would make. Juries do not sentence offenders, but they are interested in the outcome of cases they have tried, and they are well informed about the circumstances of the particular case. The reaction of jurors to sentences imposed on offenders is likely to influence public opinion. It is also likely to provide a useful source of information to courts about public opinion. If governments were concerned to know what the public think of sentencing practice, a survey of the reactions of jurors to sentences imposed in cases which those jurors had tried could provide interesting information. That could be a useful practical test of whether there is some systemic failure of the process to meet the expectations of well-informed members of the public.

That suggestion has been taken up by a study funded by the Criminology Research Council and led by Professor Kate Warner of the Tasmanian Law Reform Institute. The study has two aims:

1. to explore the possibility of using jurors as a means of ascertaining informed public opinion about sentencing by surveying jury members about sentencing issues in the cases they tried; and
2. to investigate the usefulness of using the jury as a means of better informing the public about crime and sentencing issues.

The study is still in its early stages. Professor Warner reported some preliminary results to a conference of the judges of the Supreme Courts of the States and Territories and of the Federal Court of Australia in January last. Those preliminary results indicate that, as a general rule, jurors believe that the sentence was appropriate. However, as Professor Warner has emphasised, the study is in its very early stages. Given the survey by Dr Lovegrove, it is interesting to note that the study is conducted in two stages. At Stage 1, the jurors are not aware of all considerations affecting the possible sentence. They receive that information at Stage 2. Generally speaking, at Stage 2, there is a greater acceptance of the sentence than at Stage 1.

25 There is a clear correspondence in the results of these different studies. Sentences imposed by judges are not unduly lenient. Judges are not going soft on crime. Sentences imposed by judges accord with informed public opinion. These studies highlight the need for the public to be provided with accurate information relating to sentencing. How is that to be achieved?

26 Virtually, the only information which the public receives about sentencing is provided by the mass media. The first report will be a short piece on radio or the internet. The next will be the television news that evening. The radio and television report will usually be quite short highlighting whatever sensational or

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<sup>26</sup> Gleeson CJ, *Out of Touch or Out of Reach?* Speech delivered to Judicial Conference of Australia in Adelaide on 2 October 2004.

dramatic event or twist on the story that the reporter or editor finds. Often, the report is of the reaction of the victim or members of the victim's family. The response of victims or their loved ones is perfectly understandable but it is unlikely to lead to dispassionate and objective assessment of the sentence. The next day, a fuller but, generally speaking, no less sensational report will appear in the morning daily newspaper. In some cases, politicians will enter the fray, usually the Attorney-General or the Premier or both. Not wishing to be perceived as lacking in a desire for law and order, the leader of the Opposition and the Shadow Attorney-General might also voice their concern. Can it realistically be said that this is a proper setting for reasoned debate?

27 In most, if not all, courts in Australia the sentencing remarks are published very soon after sentence on the internet. One healthy step forward is that some newspapers are now occasionally publishing the internet reference to the sentencing remarks. That should be standard practice. Any newspaper worthy of the name should not hesitate to publish such basic information. However, that reference is usually at the foot of the report after all the sensational or dramatic events as perceived by the reporter or editor have been described. The sad fact is that the facts are not what newspapers regard as news. The circumstances of the crime and of the offender are, generally speaking, not news. What is news is the reaction to the sentence.

28 The task which lies ahead is to educate and inform the public and politicians on the process of sentencing and the facts pertaining to each sentence. An informed public will express reasoned views about the appropriateness of a sentence. The task is plainly difficult. Another important source of information is surveys of the kind referred to in this paper. How can reports of relevant surveys be drawn to the attention of the public? They are not perceived as news by the media. Another course would be to ensure that organisations such as the Sentencing Advisory Council ensure that reports of such surveys are drawn to the attention of parliamentarians and government advisors. The Sentencing Advisory Council's report should be required reading for all parliamentarians. There is no simple way. The challenge is to devise an effective process by which to educate and inform public opinion.

### **Circumscribing Judicial Discretion**

29 The perception that judges are unduly lenient – a false perception for the reasons just noted – has led Parliaments in some Australian States and Territories in recent years to circumscribe the judicial discretion by different forms of mandatory penalties. Those mandatory penalties include

- In Western Australia in late 1996 a mandatory minimum of 12 months imprisonment for a third conviction for home burglary, the “three strikes home burglary law”.

- In Western Australia in 2000 the enactment of a sentencing matrix akin to the sentencing grids in some jurisdictions in the United States. Although enacted, the legislation has not been proclaimed.
- In 1997, the Northern Territory Parliament enacted mandatory minimum penalties for a range of property offences.
- Jurisdictions in the United States of America (for example Minnesota and Oregon) have adopted sentencing grids which set presumptive starting points for a sentence.

These schemes have been subject to trenchant criticism in legal and academic circles. A leading critic is Dr Morgan. Some of his papers are noted in the list of reading materials attached to this paper. As Dr Morgan notes the defence of mandatory penalties has generally been a matter for politicians and government agencies<sup>27</sup>. Another academic, Dr Bagaric has recently answered criticisms of mandatory sentencing<sup>28</sup> to which Dr Morgan has replied in the paper noted at footnote 27.

<sup>30</sup> Mandatory penalties have attracted widespread criticism and their utility has been doubted. I note some of the criticisms<sup>29</sup>.

### **1. No deterrent**

There is little basis for believing that mandatory penalties have any significant effects on rates of serious crime. That is a clear inference from the various initiatives in the United States of America and that experience has been matched in Australia. The experience in Western Australia with the “three strike” home burglary laws is an example<sup>30</sup>. The major objective was to deter burglars. Evidence quickly emerged that rates of burglary were unaffected by the law causing a change in the terms of official policy statements purporting to justify the legislation. There have been, at least, three changes to those policy statements. In the meantime, as at 2002, Western Australia had the highest rate of burglary in Australia.

### **2. Potential for Injustice**

The United States experience has been that mandatory sentences and mandatory minimum sentences sometimes result in penalties that everyone involved believes to be unjustly severe. The Australian experience is the same. While some offenders do have long records for serious offending, mandatory sentencing can work special hardship and

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<sup>27</sup> N Morgan, *Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities* (2002) 23 Adelaide Law Review 141 at footnote 1.

<sup>28</sup> M Bagaric, *What Sort of Mandatory Penalty Should We Have?* (2002) Adelaide Law Review 113.

<sup>29</sup> This list is primarily taken from two sources, A Von Hirsch and A Ashworth, *Principled Sentencing*, Oxford (1998) and N Morgan, *Going Overboard? Debates and Developments in Mandatory Sentencing*, June 2000-June 2002 (2002) 26 Criminal Law Journal 293 at 299-304.

<sup>30</sup> N Morgan at note 29 at 299.

injustice on young and indigenous offenders. That has been both the experience in Western Australia and in the Northern Territory<sup>31</sup>.

### 3. Shifting the Discretion

Because of the potential for injustice, prosecuting authorities and judges will look for means to circumvent the mandatory penalty. Dr Tonry's<sup>32</sup> research shows that prosecution authorities and judges adapt procedures to avoid outcomes agreed to be unjust. It also means that prosecuting authorities will use their discretion to use alternative mechanisms and modify the nature of the charge in order to avoid injustice. Options include plea and charge bargaining. Thus, power is redistributed from the courts to pre-trial decisions by police and prosecuting authorities. The Western Australian experience in relation to the "three-strike" home burglary laws has been to similar effect<sup>33</sup>.

### 4. Fewer Guilty Pleas

Where the penalty is mandatory, there are fewer guilty pleas. Tonry reports that "the United States Sentencing Commission found that the trial rates were two and a half times higher for offences bearing mandatory minima than for other offences"<sup>34</sup>. There is similar experience in the State jurisdictions in the United States. There are no doubt a number of explanations for that phenomenon but mandatory penalties appear to have had some bearing.

The worst of the mandatory schemes in Australia was that in the Northern Territory. It has been abolished. There is pressure to abolish the "three-strikes" legislation in Western Australia. The Western Australian sentencing matrix has not been proclaimed. As Dr Morgan wryly notes, the Northern Territory experience also demonstrates that so called "tough law and order" policies do not guarantee electoral success<sup>35</sup>.

<sup>31</sup> The experience in the United States and in Australia does not suggest that the proclaimed benefits of mandatory penalties exist. It demonstrates that the burden of proof is upon those who seek to introduce them. Those who seek to change the law must demonstrate that there is a justifiable need to change that law. If it is said that there is a need to avoid lenient sentences by judges, there is no evidence that informed public opinion believes sentences to be lenient or that judges are out of touch.

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<sup>31</sup> Morgan, op cit at 299-302; Zdenkowski and Johnson, *Mandatory Injustice: Compulsory Imprisonment in the Northern Territory* (Centre for Independent Journalism, Sydney 2000).

<sup>32</sup> M Tonry, *Sentencing Matters* (1996) chapter 5.

<sup>33</sup> N Morgan, *Going Overboard?* (supra) at 303-304.

<sup>34</sup> M Tonry (supra).

<sup>35</sup> N Morgan, *Going Overboard?* (supra) at 308.

32 Even if it is assumed that disparity exists the proposed cure is worse than the disease. Dr Morgan expresses the issue in these terms<sup>36</sup>:

The third issue is whether the proposed cure is worse than the disease. For the sake of argument, let us assume that the current system is fundamentally flawed. The question then arises as to whether the prescribed cure (a hearty dose of fixed penalty sentencing) will fix the symptoms. To some extent, the answer may depend on the specific model which is adopted. However, for reasons which are discussed later in this paper, the prescription appears likely to exacerbate rather than to cure the problem. Fixed penalty regimes often lead to different cases being sentenced in the same way, thereby entrenching disparity. ‘Rule of law virtues’ are undermined as a result of the fact that public decision making by judges assumes less importance than largely unaccountable pre-trial decision making. Finally, it is naïve to believe that fixed penalty schemes will lead to a more systematic and principled focus on sentencing issues; both nationally and internationally, the history of mandatory sentences has been one of legislatures riding roughshod over issues of principle in the pursuit of political gain.

The important part of that passage is “Fixed penalty regimes often lead to different cases being sentenced in the same way, thereby entrenching disparity”. The evidence does not suggest that mandatory penalties will lead to less injustice than might be caused by disparity.

### **The Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act**

33 This Act was passed by the South Australian Parliament in 2007. It commenced operation on 1 November 2007. It applies to offences committed before or after that date. The Act has a number of purposes. One is to amend the *Criminal Law (Sentencing) Act 1982 (SA)* (“the Sentencing Act”) to include s 33 and s 33A which authorise the Attorney-General to apply to the Supreme Court for an order to declare a person a dangerous offender and seek an order to negate any order fixing a non-parole period. That raises issues outside this paper.

34 I wish to note two amendments to s 32 of the Sentencing Act, the provision prescribing the duty of the sentencing court to fix a non-parole period, as well as the new s 32A. The amendments to s 32 both concern s 32(5) which qualifies the power to fix a non-parole period. The new s 32(5)(ab) prescribes a minimum non-parole period of 20 years for the crime of murder. The new s 32(5)(ba) fixes a minimum non-parole period of four fifths of the length of the head sentence in the case of a serious offence against the person which is a crime other than murder that results in the death of the victim or total physical and mental incapacity of the victim. Section 32A provides for the circumstances in which the sentencing court may reduce or increase the prescribed minimum. It provides:

- (1) If a mandatory minimum non-parole period is prescribed in respect of an offence, the period prescribed represents the non-parole period for an offence at the lower end of the range of objective seriousness for offences to which the mandatory minimum non-parole period applies.

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<sup>36</sup> N Morgan, cited at footnote 27, at 143.

- (2) In fixing a non-parole period in respect of an offence for which a mandatory minimum non-parole period is prescribed, the court may—
  - (a) if satisfied that a non-parole period that is longer than the prescribed period is warranted because of any objective or subjective factors affecting the relative seriousness of the offence, fix such longer non-parole period as it thinks fit; or
  - (b) if satisfied that special reasons exist for fixing a non-parole period that is shorter than the prescribed period, fix such shorter non-parole period as it thinks fit.
- (3) In deciding whether special reasons exist for the purposes of subsection (2)(b), the court must have regard to the following matters and only those matters:
  - (a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct;
  - (b) if the offender pleaded guilty to the charge of the offence—that fact and the circumstances surrounding the plea;
  - (c) the degree to which the offender has co-operated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such co-operation.
- (4) This section applies whether a mandatory minimum non-parole period is prescribed under this Act or some other Act.

As a member of the court which might have to apply these provisions it is inappropriate that I comment on the manner in which those provisions are to be applied. However, some general observations are not, I think, inappropriate.

35 It will have been noticed that the criteria for increasing the non-parole period differ from those for reducing it. In order to increase the non-parole period, the court must have regard to any objective or subjective factors affecting the relative seriousness of the offence. By contrast, special reasons (as defined) must be demonstrated if the non-parole period is to be reduced. Are not the objective and subjective factors affecting the relative seriousness of the offence also relevant on an application to reduce the non-parole period? Plainly, they must be. There is nothing in the second reading speech which explains why it is necessary that the factors in paragraphs (a) and (b) of subsection (2) should differ. It is notorious that the circumstances in which the crime of murder might be committed vary enormously in the degree of culpability. They range from the mercy killing to the cold-blooded pre-meditated killing of one or more persons or a contract killing. Between those extremes is an extraordinary large range of culpability. The character and circumstances of the offenders vary enormously. Some are young and under the age of 18 years. Others are persons who have no criminal record and are never likely to have one. Others have serious criminal records. These new provisions have scant regard to these variations. Is a

sentence of 20 years appropriate in the case of a person with an unblemished record who kills in circumstances where his judgment has been affected by alcohol or he has been provoked in circumstances falling short of provocation as defined by the criminal law?

<sup>36</sup> It may be that s 32A(3)(a) will be applicable in the case of a mercy killing. I express no concluded view on that. But there may well be circumstances which very substantially reduce the degree of culpability but which do not otherwise constitute special reasons within s 32A(3). Speaking for myself alone, the legislation represents a serious intrusion upon the sentencing discretion of a judge. As a judge of the Supreme Court of South Australia I have an obligation to act according to that law but I do not think that that obligation prevents me from voicing concerns as to potential injustice in the operation of the law.

<sup>37</sup> The legislation is remarkable not only for its potential for injustice but also for its lack of reasoned justification and the fact that it flies in the face of the principle of proportionality. The only justification for the legislation given by the Attorney-General was to build on the government's "law and order record" to deal with "well documented public concerns"<sup>37</sup>. One question which immediately arises is whether those public concerns are founded on reliable information. Certainly there was no evidence that rates of crime for serious offences had increased. There is nothing to suggest that murder rates are increasing in South Australia, even if that is a relevant criterion which I doubt. If the spike caused by the Snowtown murders is put to one side, the statistics indicate that the murder rate in South Australia has remained below 2.0 per 100,000 population in the period 1995-2005<sup>38</sup>. The rates for both South Australia and Australia as a whole have remained relatively stable over that period. On what basis can it be said that the prescribed minimum adopted by the Parliament is correct?

<sup>38</sup> Both the judges of the Supreme Court and the Law Society of South Australia made submissions to the government opposing mandatory minimum non-parole periods. The government's view was that the issue was one of policy to be decided by the government and the Parliament<sup>39</sup>.

## Conclusion

<sup>39</sup> The real deterrent to serious crime is not a harsh sentence but the certainty of detection, prosecution and conviction of the offence. It has not been demonstrated that sentences of long terms of imprisonment reduce offending. Politicians in this country should not forget the lessons of history. Transportation to this country for offending which fell short of serious crime did little or nothing to reduce crime rates in England. During the 19<sup>th</sup> century, the realisation that

<sup>37</sup> Hansard, House of Assembly, 8 February 2007 page 1743 and following.

<sup>38</sup> Office of Crime, Statistics and Research (SA), Information Bulletin no 53, page 4 and Office of Crime, Statistics and Research, Recorded Crime – Victims 2004, page 11.

<sup>39</sup> Hansard, Legislation Council, 24 July 2007 at 747.

harsh sentences will not reduce crime led to a reduction in penalties. There is nothing to suggest that crime rates have so significantly increased that there is any need to return to the harsh penalties which existed long ago.

40        There can be no perfect sentencing régime. It is not possible to do more than seek to improve the process. Mandatory penalties are not an improvement but are likely to lead to greater injustice than discretionary sentencing. Although the exercise of the sentencing discretion by judges might have some flaws, it is a more flexible system and, therefore, less likely to lead to injustice than schemes of mandatory sentencing. It is more flexible in that it is capable of achieving the goal of proportionality so that the sentence has due consideration for the nature and degree of the offending (which includes the effect upon the victim) as well as to the circumstances of the offender.

41        If the goal in sentencing is proportionality, it is a goal more likely to be achieved by an exercise of a judicial officer's sentencing discretion than by mandatory penalties prescribed by Parliament. Public concerns about the adequacy of sentencing are best addressed by public education, not by circumscribing the sentencing discretion of judicial officers.

No 27 of 2007 assented to 2.8.2007

South Australia

## **Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act 2007**

An Act to amend the *Criminal Law (Sentencing) Act 1988*.

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**The Parliament of South Australia enacts as follows:**

## **Part 1—Preliminary**

### **1—Short title**

This Act may be cited as the *Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act 2007*.

### **2—Commencement**

This Act will come into operation on a day to be fixed by proclamation.

### **3—Amendment provisions**

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

## **Part 2—Amendment of *Criminal Law (Sentencing) Act 1988***

### **4—Amendment of section 3—Interpretation**

Section 3(1), definition of *sentence*, (c)—delete "or extending" and substitute:  
 , extending or negating

### **5—Amendment of section 10—Matters to be considered by sentencing court**

- (1) Section 10(1)—after paragraph (e) insert:
  - (eaa) the need to give proper effect to the policy stated in subsection (1b);
- (2) Section 10(1)(i)—delete paragraph (i)
- (3) Section 10—after subsection (1) insert:
  - (1a) However, a court, in determining sentence for an offence, must disregard any mandatory minimum non-parole period prescribed in respect of the sentence under this Act or another Act.
  - (1b) A primary policy of the criminal law is to protect the safety of the community.

### **6—Amendment of section 11—Imprisonment not to be imposed except in certain circumstances**

Section 11(1)(b)—delete "primary policy stated in section 10(2)" and substitute:  
 policies of the criminal law stated in section 10

**7—Amendment of section 23—Offenders incapable of controlling, or unwilling to control, sexual instincts**

Section 23—after subsection (2a) insert:

- (2b) The Attorney-General may make an application under subsection (2a) in respect of a person serving a sentence of imprisonment whether or not an application to the Supreme Court to have the person dealt with under this section has previously been made (but, if a previous application has been made, a further application cannot be made more than 12 months before the person is eligible to apply for release on parole).

**8—Amendment of section 30—Commencement of sentences and non-parole periods**

Section 30(2)—delete subsection (2) and substitute:

- (2) If a defendant has spent time in custody in respect of an offence for which the defendant is subsequently sentenced to imprisonment, the court may, when sentencing the defendant, take into account the time already spent in custody and—
- (a) make an appropriate reduction in the term of the sentence; or
  - (b) direct that the sentence will be taken to have commenced—
    - (i) on the day on which the defendant was taken into custody; or
    - (ii) on a date specified by the court that occurs after the day on which the defendant was taken into custody but before the day on which the defendant is sentenced.

**9—Amendment of section 32—Duty of court to fix or extend non-parole periods**

(1) Section 32(5)—after paragraph (a) insert:

- (ab) if fixing a non-parole period in respect of a person sentenced to life imprisonment for an offence of murder, the mandatory minimum non-parole period prescribed in respect of the offence is 20 years;

(2) Section 32(5)—after paragraph (b) insert:

- (ba) if fixing a non-parole period in respect of a person sentenced to imprisonment for a serious offence against the person, the mandatory minimum non-parole period prescribed in respect of the offence is four-fifths the length of the sentence;

- (3) Section 32—after subsection (5) insert:
- (5a) If a person is sentenced under section 18A to the 1 penalty for a number of offences and a mandatory minimum non-parole period is prescribed in respect of the sentence for 1 or more of those offences, the non-parole period fixed in relation to the sentence imposed under that section must be at least the length of the prescribed mandatory minimum non-parole period.
- (4) Section 32(10)—after paragraph (b) insert:
- (ba) a reference to an *offence of murder* includes—
- (i) an offence of conspiracy to murder; and
  - (ii) an offence of aiding, abetting, counselling or procuring the commission of murder; and
- (5) Section 32(10)—after paragraph (c) insert:
- (d) a *serious offence against the person* means—
- (i) a major indictable offence (other than an offence of murder) that results in the death of the victim or the victim suffering total incapacity; or
  - (ii) a conspiracy to commit an offence referred to in subparagraph (i); or
  - (iii) aiding, abetting, counselling or procuring the commission of an offence referred to in subparagraph (i); and
- (e) a victim suffers *total incapacity* if the victim is permanently physically or mentally incapable of independent function.

## 10—Insertion of section 32A and Part 3 Division 3

After section 32 insert:

### **32A—Mandatory minimum non-parole periods and proportionality**

- (1) If a mandatory minimum non-parole period is prescribed in respect of an offence, the period prescribed represents the non-parole period for an offence at the lower end of the range of objective seriousness for offences to which the mandatory minimum non-parole period applies.
- (2) In fixing a non-parole period in respect of an offence for which a mandatory minimum non-parole period is prescribed, the court may—
  - (a) if satisfied that a non-parole period that is longer than the prescribed period is warranted because of any objective or subjective factors affecting the relative seriousness of the offence, fix such longer non-parole period as it thinks fit; or
  - (b) if satisfied that special reasons exist for fixing a non-parole period that is shorter than the prescribed period, fix such shorter non-parole period as it thinks fit.

- (3) In deciding whether special reasons exist for the purposes of subsection (2)(b), the court must have regard to the following matters and only those matters:
- (a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct;
  - (b) if the offender pleaded guilty to the charge of the offence—that fact and the circumstances surrounding the plea;
  - (c) the degree to which the offender has co-operated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such co-operation.
- (4) This section applies whether a mandatory minimum non-parole period is prescribed under this Act or some other Act.

### **Division 3—Dangerous offenders**

#### **33—Interpretation**

- (1) In this Division—
- serious sexual offence* means any of the following offences where the maximum penalty prescribed for the offence is, or includes, imprisonment for at least 5 years:
- (a) —
    - (i) an offence under section 48, 49, 56, 58, 59, 60, 63, 63B, 66, 67, 68, 72 or 74 of the *Criminal Law Consolidation Act 1935*; or
    - (ii) an attempt to commit or an assault with intent to commit any of those offences;
  - (b) an offence against the law of another State or a Territory corresponding to an offence referred to in paragraph (a).
- (2) For the purposes of this Division—
- (a) an offence will be taken to have been committed in *prescribed circumstances* if, in the opinion of the Attorney-General—
    - (i) the offence was committed in the course of deliberately and systematically inflicting severe pain on the victim; or
    - (ii) there are reasonable grounds to believe that the offender also committed a serious sexual offence against or in relation to the victim of the offence in the course of, or as part of the events surrounding, the commission of the offence (whether or not the offender was also convicted of the serious sexual offence); and
  - (b) a reference to an *offence of murder* includes—

- (i) an offence of conspiracy to murder; and
  - (ii) an offence of aiding, abetting, counselling or procuring the commission of murder.
- (3) No proceeding for judicial review or for a declaration, injunction, writ, order or other remedy may be brought to challenge or question a decision of the Attorney-General under subsection (2).

### **33A—Dangerous offenders**

- (1) If a person has been convicted, whether before or after the commencement of this Division, of an offence of murder and the offence was committed in prescribed circumstances, the Attorney-General may, while the person remains in prison serving a sentence of imprisonment, apply to the Supreme Court to have the person declared to be a dangerous offender.
- (2) An application cannot be made under subsection (1) more than 12 months before the person is eligible to apply for release on parole.
- (3) The Court must give the person at least 14 days written notice of the date on which it intends to conduct the proceedings to determine the application.
- (4) If the Court is of the opinion that a report from the Parole Board may assist the Court in determining an application under this section, the Court may direct the Board to hold an inquiry and report to the Court.
- (5) The Parole Board may exercise such powers as are conferred on the Board under Part 6 of the *Correctional Services Act 1982* as are necessary or expedient for, or incidental to, the purposes of an inquiry under subsection (4).
- (6) Each of the following persons is entitled to appear and be heard in proceedings under this section and must be afforded a reasonable opportunity to call and give evidence, to examine or cross-examine witnesses, and to make submissions to the Court:
  - (a) the person (personally or by counsel);
  - (b) the Director of Public Prosecutions;
  - (c) the Commissioner for Victims' Rights.
- (7) The paramount consideration of the Court when determining an application under this section must be to protect the safety of the community (whether as individuals or in general).
- (8) The Court may also take the following matters into consideration when determining an application under this section:
  - (a) any relevant remarks made by the court in passing sentence;
  - (b) the degree to which the person has shown contrition for the relevant offence;
  - (c) the behaviour of the person while in prison;

- (d) any rehabilitation of the person while in prison;
  - (e) the willingness of the person to co-operate with an inquiry (if any) by the Parole Board under this section;
  - (f) any reports tendered, and submissions made, to the Court under this section;
  - (g) the likelihood of the person committing a serious sexual offence, an offence of murder or some other serious offence of a violent nature should the person be released from prison;
  - (h) whether the non-parole period imposed by the court when sentencing the person for the relevant offence was reduced as a consequence of the commencement of the *Statutes Amendment (Truth in Sentencing) Act 1994*;
  - (i) the character, antecedents, age, means and physical or mental condition of the person;
  - (j) the probable circumstances of the person after release from prison;
  - (k) any other matters that the Court thinks are relevant.
- (9) If the Court is satisfied, on the balance of probabilities, that the release from prison of the person to whom the application relates would involve a serious danger to the community or a member of the community, the Court must—
- (a) declare the person to be a dangerous offender; and
  - (b) order that the non-parole period fixed in respect of the sentence of imprisonment for the murder be negated.
- (10) A person who has been declared to be a dangerous offender under this section—
- (a) will serve his or her sentence of imprisonment as if the fixing of a non-parole period in respect of that sentence of imprisonment had been declined by order of the court under section 32; and
  - (b) may not make an application under that section for the fixing of a non-parole period for at least 12 months after having been so declared.

### **33AB—Appeal**

- (1) An appeal lies to the Full Court against a decision by the Supreme Court—
  - (a) to make a declaration and order under this Division; or
  - (b) not to make a declaration and order under this Division.
- (2) An appeal under this section may be instituted by the Attorney-General or by the person to whom the particular decision relates.

- (3) Subject to a contrary order of the Full Court, an appeal cannot be commenced after 10 days from the date of the decision against which the appeal lies.
- (4) On an appeal, the Full Court may—
  - (a) confirm or annul the decision subject to appeal;
  - (b) remit the decision subject to appeal to the Supreme Court for further consideration or reconsideration;
  - (c) make consequential or ancillary orders.

**33B—Division does not affect Governor's powers etc in relation to parole**

Nothing in this Division has any effect on the powers and authorities conferred on, or vested in, the Governor in relation to parole.

**11—Transitional provision**

An amendment made by Part 2 of this Act to the *Criminal Law (Sentencing) Act 1988* applies whether the offence to which a sentence of imprisonment or non-parole period relates was committed before or after the commencement of that Part.

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