

Sentencing in Magistrates' and Local Courts in Australia

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In the year 2006/07 magistrates sitting in Magistrates', Local and Children's Courts in Australia finalised over 185,000 criminal cases. The majority of these involve sentencing decisions across a wide range of criminal charges. Some are minor and carry virtually automatic penalties (for example, drunk in a public place), others are serious and include robbery, burglary, assaults causing serious injury, dangerous driving and drink driving.

In 2005/06, 80,630 people were sentenced by Victorian magistrates who in that year dealt with well over 90% of the Victorian criminal caseload¹.

Changes in the Landscape

Magistrates Courts as first instance courts of general jurisdiction deal with a very high proportion of the nation's criminal caseload across a wide range of offences from minor to serious. In sentencing, they continue to utilise the fine as the predominant sentencing option and deal with large daily lists under heavy time pressures. Nothing has changed from that perspective.

¹ Case number statistics for all States and Territories are available in the Report on Government Services published on 31 January each year.

But other things have changed - and dramatically for the better in my opinion. Australian magistrates now have at their disposal comparative statistical data to better inform sentencing decisions (and promote sentencing consistency) and a widening range of sentencing options. They also have increasingly well developed therapeutic interventions and rehabilitative programs to support bail and sentencing decisions². The criminal and civil jurisdictions of magistrates have steadily increased and the availability of online sentencing information through such services as JIRS and JOIN has contributed to an evermore information-rich sentencing environment³.

Intersecting and overlapping with these developments has been an increase in specialisation by magistrates, not just in the traditional Children's Court, Coroner's Court and Family/Family Violence Law areas, but in Koori Courts/Aboriginal Courts, Drug Courts, Mental Health Courts, or lists, and similar specialised areas. Sitting in these courts/divisions/lists has given Australian magistrates access to a new paradigm – one which is less adversarial, and which has a problem-solving focus within the framework of orthodox sentencing law and principles – a challenging and exciting new environment⁴.

As Australian society has changed courts have been required to work with, and within, an increasingly ethnically and linguistically diversified environment⁵ and with all the benefits of modern information technology.

Sentencing Options in Victoria

The Sentencing Options in Victoria are set out in the Sentencing Act 1991. They are set out in Appendix 1 to this paper. The list in that appendix demonstrates a wide range of options within the sentencing hierarchy. The position is similar in other Australian jurisdictions.

² See the paper by Deputy Chief Magistrate Jelena Popovic given at this conference in February 2006, titled "Meaningless vs Meaningful Sentences: Sentencing the unsentencable". The paper gives an excellent description of recent sentencing developments from a Victorian perspective.

³ These are the sentencing information database systems available in NSW (JIRS) and Victoria (JOIN).

⁴ See Professor Arie Freiberg on non-adversarial justice, in particular his paper titled "Non-adversarial approaches to Criminal Justice", 10th International Criminal Law Conference to October 2006. See also various papers by Dr. Michael King on therapeutic jurisprudence. "Therapeutic jurisprudence" has found statutory recognition in Victorian Legislation – see Section 4M of the Magistrates' Court Act of Victoria 1989.

⁵ In 2006/07 interpreters were needed for 65 languages in Victorian courts.

The Magistrates' Research Project – Flinders University

Thanks to the work of Professors Kathy Mack and Sharyn Roach Anleu of Flinders University and their empirical research project “The Changing Role of the Magistrates’ Court”, we now have good data on the day-to-day work of Australian magistrates.

In June 2006, the project published Report No. 5 titled “National Court Observations Study: Overview of Findings”. In the original survey of magistrates in 2001-02, magistrates had identified time management, control over the amount of work, the sheer volume of cases and the emotional labour of the job as issues of concern.⁶ The research team focused on Magistrates’ Courts and have reported on their observations as follows:

“Observations included information about the nature of decisions a magistrate must make as well as the number of decisions, the time available to decide, the sources of information used and the interaction with other participants.”

“The study involved observing 27 different magistrates conducting some version of a general criminal list in 30 different courts sessions in 20 different locations, including all capital cities, five suburban and four regional locations. This represents more than 6% of all Australian magistrates. The magistrates observed include men and women magistrates covering a range of ages and experience as magistrates.”

In setting the scene for the findings the report says:

“To sum up, the sessions observed reflect some core elements across all the criminal lists observed but also considerable variation from jurisdiction to jurisdiction or from magistrate to magistrate in some specific details of the way the criminal list is organized and the roles of the different participants. The time pressures, the central role of the magistrate, the kinds of matters handled, the core participants and processes were relatively consistent across all sessions.”

Under the heading of “everyday work in the criminal list” the researchers dealt firstly with “volume and pace of work” :

⁶ Magistrates research project, Report number 5-06 June 2006 “National Court Observation Study: Overview of Findings” by Kathy Mack and Sharyn Roach Anleu, Flinders University. The quotes on pages 6, 7 and 8 of this paper are also from the same report.

"One of the concerns about magistrates everyday work, as raised in the survey and in the consultations, the volume and pace of the work. In the National Survey of Australian Magistrates, nearly three quarters agreed or strongly agreed that the volume of cases is unrelenting."

"Magistrates must deal with individual matters very quickly to get through the list. The time taken for a single matter ranged from 15 seconds or less for five percent of the matters observed to 30-40 minutes for 11 matters (<1 percent). One quarter (25%) of all matters were dealt with in less than one minute."

59.7% of defendants in the cases observed had legal representation including a duty solicitor.

There is no doubt that time pressure is a key determinant in the sentencing environment in Magistrates' Courts and probably always have been. As Professors Mack and Roach Anleu state :

"From the point of view of the magistrate at the beginning of the day, facing a long list, it is impossible to know with any certainty which matters will be heard at all and which will require significant time and attention and how long the list will take. There was often a considerable discrepancy between the number of cases listed for a day's session and the number of matters actually dealt with by the court in which they were originally listed. In the full day court sessions observed, the number of matters dealt with ranged from 29 to 107 with an average of 51.7 and a median of 51.5. This compares with a range of 25 to 313 matters scheduled for one court for one day. For partial sessions observed, either afternoon or morning, the range of matters observed was 11 to 33 matters, the average was 21.6, with a median of 19."

According to the survey, 52.9% of Australian magistrates agreed that sentencing is the most difficult aspect of their work. Personally I would say that it is what most magistrates regard as **the** most important function they perform.

The report states:

"Guilty pleas were entered in one-quarter (24.9%) of the matters observed."

“The 320 matters in which a guilty plea was entered took, on average, seven minutes, 27 seconds, with a median of 5:35. In 243 matters where the defendant pleaded guilty and was sentenced, the average time was only slightly greater at seven minutes, 33 seconds, with a median of five minutes, 44 seconds. This indicates that half of cases in which the defendant pleaded guilty and was sentenced in the magistrates court criminal list were completed in less than six minutes. One quarter were completed in three minutes, 15 seconds or less.”

This is not surprising because as the authors state, “magistrates must deal with individual matters very quickly to get through the list.”

In dealing with sentencing, the researchers state:

“The most significant aspect of the criminal list is sentencing. One-quarter of the matters observed (25.3%) involved a sentence. According to the National Survey of Australian Magistrates, half of magistrates (52.9%) agree or strongly agree that sentencing is the most difficult aspect of their work. The choice of sentences that magistrates could, could not, or must impose, for particular offences varies enormously from jurisdiction to jurisdiction. In order to provide nationally comparable findings, several categories of sentence were developed: ‘no conviction’, ‘fine’, ‘other non-custodial’, ‘custodial’, ‘suspended’, ‘licence disqualification/suspension’, ‘restitution/compensation’. These categories are not mutually exclusive. Indeed, in two thirds of the 326 matters in which a sentence was imposed (65.6%, n=214), defendants received more than one component of sentence, such as a fine and a suspension of drivers’ licence. Only 4.9% had no conviction recorded, though most of this group (n=44) also received further penalty such as a fine. A very few (n=19) were given no penalty at all.

The most frequently imposed sentence was a fine, given in nearly three-quarters of sentences (74.2%). For this purpose, fine includes any monetary penalty such as court costs, but not restitution. Nearly one-quarter of those sentenced (24.2%) received some other non-custodial sentence such as a community service order or a bond with or without specific conditions and/or supervision by corrections, probably or other agency. Only 37 sentenced matters (11.3%) received a custodial sentence and nearly half of those (17) were suspended.”

The authors then make this interesting (perhaps, dramatic) finding:

“In spite of all this activity, the mean time for all sentenced matters is seven minutes and 15 seconds, and the median time was only five minutes, 25 seconds. This indicates that it took less than five and a half minutes to sentence a defendant in over half the matters observed.

Sentencing time varied considerably, depending on the kind of offence, ranging from an average of under seven minutes (6:44) for driving offences to over 13 minutes (13:03) for consequential offences.”

Interestingly, the observers also make findings about judicial demeanour, and stated :

*“Overwhelmingly, magistrates’ demeanour as categorized by the observers was **routine, impersonal, business like** towards participants in 74.2% of all interactions observed in which a demeanour of any sort was recorded. Magistrates were often **patient/courteous**, with this demeanour being displayed in 16.3% of all interactions. Magistrates were only sometimes **welcoming or good natured** (1.5% of interactions). The predominance of routine/businesslike and patient/courteous treatment is remarkable, given time pressure and other emotional demands of the criminal list. Magistrates appeared **impatient, bored, rushed or inconsiderate in only 6.2% of interactions and harsh, condescending in only 1.9% of interactions”.***

Some of the findings of the Flinders University project are surprising, others are not. They clearly show high levels of efficiency, but also highlight the often-asked question: are time pressures, output demands and the influence of the performance measures applied to all courts in the modern era creating an environment in which there is a risk of sacrificing case-by-case justice on the altar of efficiency⁷? In my opinion the answer to that rhetorical question is, yes. However courts can, and must, minimise that risk by good management of their criminal lists. One aspect of that good management is ensuring that longer, more complex cases are allocated appropriate time. At the same time, magistrates need to remain conscious that the courts in which they work are mandated to deal efficiently with volume at the same time as ensuring that case-by-case justice is not compromised.

⁷ See paper presented by Chief Justice Spigelman AC of NSW “Measuring Court Performance” to the September 2006 AIJA Annual Conference in Adelaide. There will always be a tension between high volume caseload disposal and the allocation of appropriate time and resources to individual cases as required. Getting that balance right is the name of the game in the administration of modern magistrates and local courts.

Expanding Criminal Jurisdiction

It is probably the “unrelenting” nature of work done by magistrates in high volume courts that attracts the most comment. An equally important challenge results from the increasing seriousness of offences can now be finalised by magistrates and the pressures associated with doing so in a high volume environment.

It was once true that magistrates dealt with criminal offences which could fairly be called “minor”. It has not been strictly true for a long time and it is even less so now.

On 1 July 2007 the criminal jurisdiction of the Victorian Magistrates’ Court was increased to include :

- Common law offences punishable by imprisonment of up to 10 years. (e.g. common law assault)
- Current offences triable summarily where property value does not exceed \$100,000 (up from \$25,000).
- Additional matters added to the previous list of offences triable summarily including:
 - *Perjury*
 - *Dealing with proceeds of crime*
 - *Conspiracy to defraud and cheat*
 - *Possessing or carrying, or using, unregistered hand guns*

Similar increases occur periodically in all states and territories. With a steady shift of some of the more serious criminal matters to the Magistrates’ Courts, and a corresponding removal of categories of minor offences into infringement courts, there will be a need to refine listing and case management techniques, and better resource the case management capacity of our high volume courts. The task is to ensure that the routine, more minor, matters can continue to be dealt with efficiently and balanced with the longer, more serious criminal cases.

Magistrates are under heavy time pressures, but more time must be set aside for dealing with the more serious criminal offences (often involving very large numbers of charges). The intellectual task performed in dealing with these matters through the application of sentencing law and principle, and an appropriate balancing and calibration of the various “incommensurable” sentencing purposes is the same as that performed by judges in

intermediate and higher courts. But judges in those courts normally have far more time per case.

The justice system will continue to depend on multi-jurisdictional, high volume courts of first instance to efficiently clear large criminal caseloads and governments will be tempted to push more and more of the simpler more routine offences into an infringement system⁸. As a result, an increasing proportion of the work of magistrates will involve more serious, rather than more minor charges.

Courts must respond with listing strategies that allow more time for the more demanding and complex sentencing tasks. But there are limits to this and it is more easily done in larger court complexes with flexible judicial resource numbers and far more difficult to do in courts with lower numbers – in particular one person courts. Courts will need to ensure that case preparation, case management and list coordination are prioritised for modernisation and this is likely to have resourcing implications for governments.

To complicate things further, and increase the challenge, a number of the more recent innovative changes – eg drug courts, koori courts, mental health lists - involve far slower case processing, and the daily lists are far shorter (5 to 10 matters on average in Koori Court lists in Victoria) With the judicial resources tied up in this way, there is a loss of capacity for some of the general work of the court.

“Problem-solving” approaches to sentencing, by their very nature involve deferral, repeat appearances, judicial supervision and monitoring. They are excellent developments and in my view are producing a higher quality of justice. The quality of procedural justice is also enhanced through a more meaningful engagement in the court process – the Victorian Koori Court is a good example. But the implications are clear : as these approaches are expanded, governments must accept that additional resources will be required to support them. This is so because we can expect that the courts in which they operate will remain obliged to achieve an efficient and effective disposal of the high volume lists at the same time.

The public will expect governments to invest in justice systems that produce results – to punish to the extent necessary when the offending calls for it, but also to deliver an

⁸ For example, in Victoria the government recently decided to make shop theft under \$600 an infringeable offence – on a trial basis .

ever-more effective range of services and programs to support sentencing approaches which reduce risks of re-offending and tackle the underlying causes of crime.

Combining efficient high volume courts with expanding ranges of slower problem-solving approaches to sentencing doesn't come cheaply. Governments have taken a number of excellent initiatives in various jurisdictions⁹ and the challenge now is to "mainstream" the successful initiatives to ensure that there is equal access to justice across a given city, region or state¹⁰. If this does not happen, there is a risk that some may argue on human rights grounds, that the unavailability of a particular sentencing option in one part of a major city, when it is available in another part, is a denial of their right to equal justice. The public will ultimately demand no less than equality of access to these improved justice "services". "Mainstreaming" the successful justice innovations is one of the biggest challenges facing governments and courts. Courts stand ready to take on that challenge – but it will come at a significant cost.

Public Confidence / Community Standards

Courts must have the confidence and respect of the community. Independence and impartiality of the judiciary and of courts are the bedrock requirements to support community confidence in the system of justice. Community acceptance of the general approach taken to sentencing, and sometimes to particular sentencing decisions, helps to secure and maintain that confidence.

Magistrates' Courts are closest to the community, and especially in regional and country areas the public expects magistrates to take into account and reflect the standards of the community in the approach they take to sentencing.

A lot has been written on this topic¹¹ – much of it recently. Chief Justice Murray Gleeson summarised¹² the result of public opinion polls about sentencing not just in Australia but also in the United Kingdom and North America :

⁹ Governments have to varying degrees "rolled out" some recent initiatives – for example, in Victoria the Koori Court has been expanded from one in 2002 to 8 (including 2 Children's Koori Courts) - with another to be launched later this year.

¹⁰ For example in Victoria the drug treatment order, only available in the drug court, is an effective intensively supervised therapeutic order made as an alternative to actual imprisonment. It is only available at Dandenong, where the drug court is located, and therefore only available to people within a limited geographical area defined by gazette.

¹¹ DPP v Scott [2003] VSCA 25; (2003) 6VR 217. Judgment of Vincent JA at p 225.

¹² Public Confidence in the Courts Conference, Canberra 9 February 2007 – Opening address by Chief Justice Murray Gleeson.

“...when people are asked whether they think the sentences imposed by judges are too lenient, or too severe, or just about right, most say that the sentences are too lenient. However, when they are then given the facts of individual cases, and asked what sentences they themselves would have imposed, a majority come up with sentences that are more lenient than sentences that were actually imposed by judges. The same results have shown up in similar surveys in other countries. When people are questioned more closely about an issue, their responses change.”

and

“Detailed research in many nations, including Australia, has shown that when the full facts of particular cases are explained, the public tends, to a very substantial degree, to support the sentences actually imposed by judicial officers or, at least, to express the opinion that the sentences were lenient to a significantly lesser extent than answer to general questions about judicial leniency in sentencing, would suggest¹³.”

Just how difficult this question is, was highlighted by the questions raised in the following passage from the Chief Justice:

“How should judges keep in touch? Should they employ experts to undertake regular surveys of public opinion? Should they develop techniques for obtaining feedback from lawyers or litigants? And what kind of opinion should be of concern to them? Any opinion, informed or uninformed? What level of knowledge and understanding of a problem qualifies people to have opinions that ought to influence judicial decision-making? Who exactly is it that judges ought to be in touch with?.....Whose values should we know and reflect?”

Out of Touch or Out of Reach, Chief Justice Murray Gleeson – Judicial Conference of Australia Colloquium, Adelaide, 2 April 2002.

Penal Populism, Sentencing Councils and Sentencing Policy, edited by Arie Freiberg and Karen Gelb – published by Hawkins Press 2008.

Myths and Misconceptions: Public Opinion vs Public Judgment About Sentencing, Dr Karen Gelb, July 2006, Sentencing Advisory Council (Vic).

Valuing Courts 2001, 13 Judicial Officers Bulletin 49 at 51, quoting Chief Justice Murray Gleeson.

Sentencing Guideline Judgments (1999) 73 ALJ 876, Chief Justice of New South Wales JJ Spigelman.

¹² Opening of Law Term Dinner, NSW Law Society, Sydney, January 2002.

¹³ Chief Justice Murray Gleeson AC “Valuing Courts” 2001 13 Judicial Officers Bulletin 49 at 51

Despite all the tabloid headlines about “soft justice” and “state of leniency” and the shock-jock driven hysteria over a small number of sex offence sentencing decisions each year, I agree with Chief Justice Gleeson that if adequately informed, the community would regard magistrates and judges as “getting it right” in the overwhelming majority of their sentencing decisions. This is certainly borne out by my own experience in speaking to community groups about sentencing, even to more sceptical audiences such as local Neighbourhood Watch groups.

The recent work done by Karen Gelb¹⁴, in particular the research based on deliberative polls should reassure magistrates that when they are “constructing” non-custodial sentencing “packages” for the purposes of combining punishment, discipline, rehabilitation, education and therapeutic interventions, they are doing what an informed community would want them to do. Whilst the punishment component may be de-emphasised in many of these orders, they are decisions made to incorporate a degree of punishment within a framework set-up to achieve disciplined behavioural change (often through a supervised program or process), a reduced risk of re-offending, and some paying back, or restoration to the community (often through unpaid work). When it works, this combination of sentencing elements will promote the protection of the community and if well understood, well explained, and accepted, should gain the confidence and respect of the community.

It is clear that informing and educating the public remains a top order priority for courts. As Karen Gelb has put it :

“Deliberative polls are based on the conclusion, from much previous research in the field, that the general public has very little knowledge about crime and justice issues. According to this premise, people can only have an informed opinion if they are first given information about the issues to be studied.”

In his keynote address to the Colloquium of the Judicial Conference of Australia on 6 October 2006, Chief Justice Gleeson of the High Court said:

“The uncertainty of some aspects of the law [including sentencing], reflected in diversity of judicial opinion in the highest courts, or in the scope for normative judgment involved in particular legal rules or standards, cannot be ignored. These are inescapable features of a rational, tolerably flexible, system of law, capable of adjusting to the demands of circumstances. But they can shake

¹⁴ “Myths & Misconceptions: Public Opinion vs Public Judgment About Sentencing” – July 2006, Sentencing Advisory Council Victoria.

confidence unless people understand that, in its nature, law requires the exercise of judgment, and issues for judgment are often contestable. It is a mark of political maturity and sophistication that the Australian community accepts that the law is not rigid and inflexible, and that judges are not automatons."

These are reassuring words, but the task remains to inform and educate the community in such a way that they continue to accept "that judges are not automatons", that inflexible mandatory sentencing is inimical to case-by-case justice and that the human, fallible, face of justice is better than any alternative yet devised.

Last year the Victorian Magistrates' Court opened a new front on the educational offensive. The court, through the Department of Justice, entered into a contract with Channel 9 2006 to film and air court cases as part of a 10 episode television series titled "Crime and Justice" (initially branded "The Code – Crime and Justice"). Filming took place at Melbourne Magistrates Court in December 2006 and January and February 2007. Ten episodes were aired across Australia on Channel 9 and its affiliates in early and mid-2007.

Each episode featured two police stories and one court case, providing the Magistrates' Court of Victoria within approximate total of 132 minutes of prime-time attention on its court cases and procedures. Viewers were introduced to many different types of court cases throughout the program, including plea hearings, a contest hearing, a bail proceeding, a diversion matter and a case dealing with the breach of an intervention order.

The program highlighted cases that dealt with a range of criminal charges, from drug trafficking and driving whilst-suspended, to shop theft and property offences.

The purpose of the court's participation in this reality television program was to show as many people as possible what happens in courts, help them understand why things are done the way they are, and give them some appreciation of the nature of cases heard by magistrates. Most members of the public do not get a chance to see courts at work and television offers an educational alternative. As an exercise in raising awareness of court process and the approach of magistrates in the modern era, I believe it was successful. The program, and programs like it, serve as a corrective balance to what people believe occurs in court. It categorically was *not* Judge Judy. It categorically was an exercise in raising awareness and demythologising courts and court processes. "Crime & Justice" reached a total national audience of over two million people over the series. The feedback I received from the public was positive with many saying that it had a genuine educative value.

The task is to ensure that the community understands what we are doing and why. Educating the community will always be a responsibility of courts. We do our best on that front, but it's a perennial challenge. The Judicial Conference of Australia's booklet, "Judge for Yourself – A Guide to Sentencing in Australia" published last year is simply one of many good contributions to the educational effort.

Sentence Indication

Victoria will soon have legislation supporting sentence indication and specified sentence discount after pleas of guilty.

The Sentencing Advisory Council made recommendations in a report to government in September 2007. After a public consultation program, it reported that almost all of the non-lawyers who participated in the enquiry "wanted greater clarity in the way in which sentencing decisions were expressed and presented" in the public arena." They made three relevant recommendations :

Recommendation 1: Courts to state the effect of the guilty plea on the sentence

The *Sentencing Act 1991 (Vic)* should be amended to require the court, in passing sentence on an offender who has pleaded guilty, to state whether the sentence has been reduced for that reason, and if so, the sentence that would have been imposed but for the guilty plea.

Recommendation 2: Statutory support for sentence indication in summary cases

The *Magistrates' Court Act 1989 (Vic)* should be amended to provide explicit statutory authority for magistrates to indicate the sentence likely to be imposed on a guilty plea entered at that stage of the proceedings, and for the Chief Magistrate to give any directions and make any rules required for this purpose.

Recommendation 3 : The effect of the guilty plea on the indication

The Chief Magistrate should issue a note or direction to require a magistrate, when providing an indication of the sentence likely to be imposed on a guilty plea entered at that stage of the proceedings, to state whether, but for such a guilty plea, a more severe sentence would be indicated.

Leaving aside the question of whether the Chief Magistrate has the power to issue a note or direction as per Recommendation 3 (and the implications for judicial independence), the point of the recommendations is clear and the government has accepted them.

In his Second Reading Speech introducing the legislation to give effect to the recommendations, the Attorney-General said this:

“The Sentencing Advisory Council also found that sentence indications could sometimes be helpful in resolving matters at an earlier stage of proceedings. Having an indication of a likely sentence can help some defendants to decide whether or not to plead guilty to an offence. The council found that sentence indication schemes are very effective in resolving contested summary matters. For defendants whose primary concern is the possibility of a conviction or an immediately servable sentence of imprisonment, an indication that rules out one or both of these possibilities may remove the impediments that are causing them to defer their plea decision. This process already occurs informally in the Magistrates’ Court and the Sentencing Advisory Council recommended that this be formalised.”

In its report, the Sentencing Advisory Council noted that the key to a successful sentence indication process is simplicity – ensuring that it does not lengthen and then complicate proceedings. The requirement will be that judges and magistrates will be obliged to state the amount of discount given for a plea of guilty where the sentence is of a custodial nature or involves a fine of over 10 penalty unit (\$1,000) or an aggregate fine of more than 20 penalty units (\$2,000) across a number of charges. For less severe sentences, including fines, and sentences imposed in the Children’s Court, the court may, but is not required to, identify the amount of the discount.

Giving sentence indications which lead to earlier, rather than delayed pleas, achieves obvious efficiencies. However the requirement to specify a discount for a guilty plea, calibrated to reflect when that plea was entered, will require more time per case. As the vast majority of matters are dealt with after pleas of guilty, and significant numbers of them involve non-custodial penalties or fines over \$1,000, there will be a clear increase in sentencing time per case where it is necessary to specify this discount. It may not be much time and the process will become relatively straight-forward within a short period for most magistrates, however, it will be necessary to deal with the tricky question of making it clear to an offender what any reduced sentence is being discounted from.

For my part, I believe the reform will increase sentencing integrity by improving its transparency, but in a high volume sentencing environment will add an additional demand on the busy magistrate and will add additional time (although I believe only a brief time) to the sentencing task.

Consistency

“Sentences vary wildly between judiciary. “Crime Time Lotto”.

This was the headline in the general news section of the Adelaide Advertiser on 1 November last year. There have been many like it in the press over the years.

It is axiomatic that consistency in sentencing promotes public confidence in the administration of justice. Care must be taken, of course, to ensure that comparisons are legitimate – that like is compared with like and that the object is that “similar cases lead to similar results.”¹⁵

We all know that “all cases are different” – in no two cases are the objective facts of the offence and the subjective the facts about the offender identical. As the majority of the High Court stated in Wong¹⁶

“to focus on the result of the sentencing task, to the exclusion of the reasons which support the result, is to depart from fundamental principles of equal justice. Equal justice requires identify of outcome in cases that are relevantly identical. It requires different outcomes in cases that are different in some relevant respect. (Emphasis in original).”

But it is important that there is a reasonable degree of consistency in magistrates’ sentencing, particularly in regional and country areas where the local focus on the court is often intense: there is far more reporting of decisions of magistrates in country courts than in the larger suburban or metropolitan courts. Sentencing legislation requires courts to have regard to “current sentencing practices”¹⁷. The clear reason for this is to promote sentencing consistency. There can be no doubt that a lack of sentencing consistency erodes the credibility of courts.

In May 2005 the New South Wales Sentencing Council published a report titled “How Best to Promote Consistency in Sentencing in the Local Court”.

¹⁵ Chief Justice Jim Spigelman “Reasons for Judgment and the Rule of Law’ – paper delivered at the Judicial College, Beijing 10 November 2003 and the Judge’s Training Institute, Shanghai, 17 November 2003.

¹⁶ Wong v The Queen: Leung v the Queen [2001] HCA 64.

¹⁷ See section 5 (2)(b) of the Victorian Sentencing Act 1991.

Two of the main issues identified and addressed by the recommendations were:

1. *“The lack of availability state-wide of sentencing options, and related resourcing issues”;*
2. *“The practices of prosecutors in regard to addressing the Local Court on sentence and the internal procedures regarding appeals.”*

For the purposes of this paper, the relevant recommendations were :

- *Police prosecutors in the field should have direct access to relevant sentencing resources produced by the Judicial Commission and be given training in their interpretation and use.*
- *That primary sentencing options such as Periodic Detention, Home Detention, community service and probation supervision should be made available at every court in NSW.*
- *That access to programs such as MERIT and traffic offenders programs should be extended to all Local Courts.*
- *That where initiatives relating to sentencing are trialled, a timely decision must be made about their effectiveness, and where successful, they should be properly funded and implemented expediently across the state.*
- *The level on ongoing education and training provided to police prosecutors should be enhanced, in particular to ensure adequate knowledge and awareness of recent reforms to sentencing law in NSW.*
- *In relation to police prosecutors, measures should be taken to promote the proper implementation of the relevant provisions of the ODPP Prosecution Guidelines regarding the circumstances in which to address on sentence.*

These recommendations will resonate with Australian magistrates and they have direct and immediate relevance to Victoria. I have already referred to the need to mainstream successful, but often very local and geographically confined, sentencing options, as a matter of sentencing equity and access to justice.

As I have said earlier in this paper, the resourcing issues for government are significant; but to date the evaluations of specialist courts and court support and diversionary services which have been put in place to tackle recidivism and reduce re-offending, appear to justify a commitment to state-wide, or at least region-wide investment. That would ensure that wherever magistrates are sitting, they have at their disposal the options best designed to promote these sentencing objectives. This in turn will enhance overall consistency of sentencing and promote public confidence. The second of these two issues relates to prosecuting.

Prosecuting in Local and Magistrates' Courts

In an earlier time, these courts were known as “police courts”. Australian magistrates achieved full judicial independence decades ago in most states, and the jurisdictions of magistrates have steadily increased. Magistrates’ Courts and Local Courts have transformed. They are no longer “police courts”, but the fact that prosecuting the great bulk of criminal cases in Magistrates’ and Local Courts remains the responsibility of State and Territory police departments leaves an unsatisfactory hangover from a previous era.

In my opinion, it is time for reform. It is time to restructure the prosecution function in these courts with the aim of entrenching an acceptable level of prosecutorial independence. Prosecutors play as critically important a role in magistrates’ and local courts as they do in superior courts. Magistrates are entitled to rely upon well prepared, skilled prosecutors and to expect appropriate sentencing submissions from them, particularly in the more serious cases.

The New South Wales Sentencing Council expressed its (majority) support for the following reform:

“ODPP lawyers should be responsible for prosecuting all matters in the Local Court, including summary matters, all indictable matters and prosecutions on behalf of other bodies and authorities.”

However, no Australian government has gone down this road although the issue has been looked at a number of times in the past. There are clear resourcing implications associated with any change involving a substantial shift of responsibility to an independent prosecuting authority – OPP or DPP. The solution may lie in a complete handover of authority and resources from police departments to independent OPPs/DPPs. There may be alternative or half-way house positions involving an assumption of responsibility by OPPs/DPPs for summary criminal trials, contest mention type hearings and the more complex guilty pleas where custodial sentences are often within range and parole and related issues arise. There may be scope for police departments to restructure prosecuting services to ensure that greater independence is built into the system by changing the relationship between those who prosecute in courts and those who investigate crimes, prepare briefs and brief prosecutors. Other alternatives may involve the division of work between independent OPPs/DPPs dealing with the more serious, and contested matters, with the routine road traffic and other bulk offence lists continuing to be prosecuted by police prosecutors.

Whichever way it is approached, this issue should not simply be waved away as too difficult or too expensive. It is time for a careful re-evaluation of the system: as a matter of principle, structural change is needed to ensure that independent, expert prosecuting services operate in the courts where over 90% of Australia's criminal offences (many of which are very serious) are prosecuted day in – day out, each and every year.

Ian L Gray

Chief Magistrate of Victoria

APPENDIX 1

<u>Type</u>	<u>Section</u>	<u>Description</u>
Discharge	s.73	Upon conviction, the offender maybe unconditionally discharged without further penalty.
Dismissal	s.76	A charge might be proven, but can be dismissed if it is not appropriate to impose a sentencing disposition – it may be minor, or it may be minor in the scheme of things, or a person may already have been punished enough (eg a person who has shop lifted food but has been in the cells for the weekend due to outstanding warrants)
Deferred Sentence	s.83A	For persons under 25 years, sentence can be deferred for up to 6 months to assess progress under a Rehabilitative regime.
Adjourned Undertaking without conviction	s.75	Can be for up to 5 years. Conditions as well as a contribution to the Court fund can be imposed. Can be charged with breach of undertaking and resentenced if charge found proven. Option most used with mentally impaired offenders to attempt to achieve better compliance with treatment regimes
Adjourned undertaking with conviction	s.72	Can be for up to 5 years. Conditions as well as a contribution to the Court fund can be imposed. Can be charged with breach of undertaking and resentenced if breach of undertaking found proven. Option most used with mentally impaired offenders to attempt to facilitate compliance with treatment regimes.
Fine without conviction	s.49	Individual Act et out maximum fines for specific offences
Fine with conviction	s.49	Individual Acts set out maximum fines for specific Offences

Community Based Order with conviction and Community based order without conviction. (CBO)	s.36 s.36	May be imposed for up to 24 months Supervision by a Community Corrections officer may be a component if necessary. Community work may also be ordered. Other conditions may also be imposed, such as drug and alcohol treatment and testing, psychiatric or psychological treatment, anger management, sex offender programs, cognitive skills, etc. Consequences on breach: resentence
Suspended sentence	s.27	Can be imposed for up to 12 months Supervision may be
Intensive Correction Order (ICO)	s.19	Can be imposed for up to 12 months Supervision by a community corrections officer mandatory. Twelve hours of compulsory programs per week – this may include: community work, and programs such as drug & alcohol treatment and testing, psychiatric or psychological treatment and testing, anger management, sex offender programs, cognitive skills, etc. Consequence of breach of conditions or by re-offending, generally restoration of outstanding portion of sentence.
Youth detention (YTC)	s.32	Incarceration of offenders aged between 18 and 21 years in a youth training facility
Drug treatment order	s.18X	Specific to Drug Court – treatment order made after a term of imprisonment fixed to a maximum of 24 months
Combined Custody and Treatment Order (CCTO)	s.18Q	Offender whose offending is drug related may be imprisoned for 12 months, with 6 months to be served in prison and 6 months being served in the community while participating in a specialist drug program Consequences on breach – serve balance of sentence in prison
Home detention (HDO)	s.18ZT	Can be made after a prison term is ordered and a favourable assessment has been undertaken to a maximum of 12 months

Imprisonment

Generally considered to be the sentence of last resort
A magistrate has the power to imprison for up to 2
Years on a single charge (3 years for some drug
offences) to a maximum of 5 years. Maximum terms
of Imprisonment for specific offences are set out in
the legislation applicable to the individual offence. If
a sentence of between 12 and 24 months is imposed,
the sentence may consider fixing a non-parole period
of not less than 6 months before the expiration of the
sentence. For sentences in excess of 24 months or
over, the sentencer must consider setting a non-
parole period.

Hospital Orders and Hospital Security Orders Part 5, S90-94

Where offender, upon assessment by a psychiatrist,
is sentenced to a term of imprisonment to be served
in a mental health facility until no longer certified, and
then serves balance in general prison population¹⁸

¹⁸ This list is taken from Jelena Popovic's paper referred to at footnote 2, page 2
In 2005/06 12% of Victorian Sentencing decisions by magistrates resulted in imprisonment (5% actual, 7%
suspended). The other 88% of sentences were broken up as follows:

- 52% fines
- 2% intensive correction orders
- 6% community based orders
- 7% criminal justice diversion
- 9% adjourned undertakings (good behaviour bonds)
- 1% Commonwealth sentencing orders
- 12% discharge or dismissal (alternative ways of dealing with such offences as drunk in a public place)