

## **Sentencing: Legislation or Judicial Discretion?**

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Crime is an issue that affects many in our society, and many citizens have been victims—many of them victims of very serious crime. We all probably have been touched in some way by crime in our society, be it anything from car break-ins to crimes involving violence.

Because crime does have an impact on our society and our community, the community has expectations about how the courts should deal with those crimes.

But, should the legislature decide on punishment for criminal offences. Should that punishment be set in stone?

Mikado, in his deep resonating bass voice, thought so, when he declared, in the words of W S Gilbert:

*My object all sublime, I shall achieve in time -  
To let the punishment fit the crime, the punishment fit the crime.*

But perhaps, as Chris McRoberts suggests in a Paper presented at the Australian Institute of Criminology Conference titled “Juvenile Crime and Juvenile Justice, Towards 2000 and Beyond”, given in Adelaide in June 1997, and I quote, “the primary object in sentencing juvenile offenders is to make the punishment fit the **offender**, rather than the crime”.

The job of the courts is a difficult one, and one that often is subject to considerable criticism. This has been so for centuries. And these criticisms have changed over those centuries as community perceptions change.

I wonder how people might feel today, for example, if a man, who is found guilty of stealing a loaf of bread to feed his impoverished family, is declared a convict and sent to a far-off country half way around the world, sailing for three months in the filthy bowels of a ship, there to stay for the term of his natural life.

On the other hand, how many times have we witnessed scenes of families emerging from a courtroom distraught and angry that the court had handed down a sentence that they perceive did not fit the crime? Impassioned cries of perceived injustice such as “we’ve lost our son forever and the criminal gets five years” are all too common on our television screens.

Probably one of the most prominent cases of recent years was the mass murder perpetrated by Martin Bryant at Port Arthur in Tasmania in 1996. Bryant was sentenced to prison with the stipulation he never be released.

Did that punishment fit the crime in the eyes of the community?

A feature article titled “Shedding Light on Port Arthur Killer”, published in The Age newspaper on 29 March 2006, marking the tenth anniversary of the massacre, noted the profound impact imprisonment has had on Bryant. It said, and I quote, ‘A doctor who has seen Bryant recently told the magazine [the Bulletin]: “He is an overweight, shambolic wreck.”’

The article went on to say, and again I quote, ‘If the community wanted a severe punishment for Mr Bryant, then they have it,” the unnamed doctor said. “What he has now is far worse than the death penalty.”’

And yet there are still those in the community that believe Bryant’s punishment was too lenient and that he should have been executed.

Community views and ideals are as diverse as the community itself. Some would say we should rehabilitate criminals with sensitivity and understanding and carefully re-integrate them into the community. Others would seek full retribution and demand that criminals pay for their crimes. Still others would say criminals should pay for their crimes many times over.

Even the Bible reflects this diversity of view. On the one hand, at Matthew Chapter 5 verse 39, Jesus counsels, and I quote, “to him who gives you a blow on the right side of your face, let the left be turned”.

On the other hand, Exodus chapter 21 prescribes a range of punishments, including capital punishment, for a series of specified offences.

This in itself demonstrates the difficulties that courts face in fitting the punishment to the crime.

Let’s look at the ACT.

In September 2003, the *Canberra Times* conducted an opinion poll, which gave some rather disturbing statistics.

It showed that 82 per cent of our population felt that our courts were far too lenient when it came to sentencing people for violent crimes.

Twelve per cent said they were somewhat too lenient and five per cent said they had got it about right.

I want to suggest this poll is a pretty accurate reflection of community perceptions; it is certainly accurate in terms of what I hear in the community from people who express opinions on this important topic.

I refer especially to justice system professionals, who talk about the frustration of victims and police if the courts get it wrong, perceived or otherwise.

So, who is responsible for ensuring our justice system delivers punishments that fit the crimes and that meet community expectations?

The answer to this question is simple and yet complex.

The simple answer is that it should be the legislature. It is the legislature that is elected to represent the people and, by implication, community expectations. It is the legislature that is accountable to the people. It is the legislature that is ultimately responsible for the judicial system. It is the legislature, through the executive arm of government that appoints the judges.

It is the legislature, then, that must take responsibility for fostering consistency in sentencing – to ensure that community expectations, as fickle as they may be, are met as far as possible – to ensure the punishment fits the crime.

The complexity to the answer, though, is that an important element of justice is ensuring that all of the relevant facts are considered fairly and fully when coming to a judgement and resultant sentence in criminal matters. Many issues need to be considered. For example, the forensic evidence, the forensic psychology assessment, the part played by the victim, and myriad other elements.

The legislature simply cannot anticipate the range of facts and circumstances that surround every case. The judiciary must be allowed to judge each case on the basis of its own circumstances and its own facts.

To simplify this complexity, the legislature should set sentencing guidelines; a helpful guiding resource for the judiciary to use in determining how and whether the punishment fits the crime.

It should not seek to direct, simply to guide – to give the judiciary some guidance as to community expectations. This is the expertise of the legislature.

Flexibility and discretion should continue to lay with the judiciary because they know the circumstances of each case. This is the expertise of the judiciary.

Ladies and gentlemen, the essence of what I am suggesting is a partnership between the legislature and judiciary to determine fair and consistent punishments.

In summary, sentencing is a difficult and vexed issue but I think it is very important that our laws and our courts reflect proper community expectations in relation to this very important area of criminal law.

In November last year, I introduced to the ACT Legislative Assembly a bill, which I hope will go some way to achieving that sense of partnership. It's called the Sentencing Legislation Amendment Bill 2007.

There are very few people who think the law does not need to be changed.

My bill, whilst respecting the discretion that the court has, in no way destroys that discretion. It respects the traditional role of the court in regard to sentencing but it does provide guidelines. It provides recommended non-parole periods, which work very well in New South Wales, and it provides criteria that courts need to look at, over and above what we already have, in relation to the most serious offences. Indeed it is based on the NSW legislation.

In summary, the Sentencing Legislation Amendment Bill seeks, amongst other things, to amend the Crimes (Sentencing) Act 2005 by introducing the following elements:

- Courts will be required to have regard to any relevant guideline judgements when deciding whether and to what extent an offender should be sentenced. If a court imposes an inconsistent sentence it will be required to state its reasons.
- A consequential amendment to the Supreme Court Act 1933 empowers the Court of Appeal, whether on its own initiative or by request of the Attorney General, to give a guideline judgment to be taken into account by power courts when sentencing offenders;
- Courts will be required to apply the standard nonparole period for an offence unless it considers there are reasons for setting a longer or shorter period. The various nonparole periods are stated in the bill. In setting the nonparole period, the courts will be able to consider a range of aggravating or mitigating circumstances, which also are listed in the bill. If a court sets a non-standard nonparole period, it will be required to state its reasons

It is disturbing to see how the ACT rates in terms of the rest of Australia. It is disturbing that justice system professionals tell me that we are seen as a soft touch. This issue of leniency within our system has been raised on a number of occasions, and it is of concern even to people such as the Director of Public Prosecutions, and even some defence lawyers.

There is a risk, then, that criminals might come to the ACT to practice their craft so that, if they are caught, they are less likely to receive serious punishment than would occur in a jurisdiction across the border. Police tell me this already occurs.

It is ridiculous that someone who commits an armed robbery in Queanbeyan could expect to spend significant time in prison, yet someone committing a very similar crime in the ACT may well get off with a suspended sentence.

The Bureau of Statistics showed that, for the 2005-06 year, the ACT Supreme Court sent fewer people to jail than any other superior court in the country.

It showed that 30 per cent of those convicted of a crime were ordered to spend time in jail, 40 per cent were given a fully suspended sentence, and the remainder got a non-custodial order such as a good behaviour bond.

If we compare that information to what occurs in New South Wales, we see that 73 per cent of convictions resulted in a custodial sentence. In Victoria, the figure was 56 per cent and in Queensland it was 54 per cent. So there is a big gap between the ACT and Queensland, which has the next highest figure.

Offences that are dealt with by our superior courts, the Supreme Court in the ACT, are serious. They are the most serious offences in most instances, and they need to be dealt with in an appropriate manner that is consistent with that of other states and territories and that is consistent with public expectations.

Later statistics suggest the 30 per cent figure is worsening.

In the December quarter of 2006, for example, the Supreme Court sent only eight of 29 convicted offenders to prison. That's 27.5%.

In following quarters, four out of 18, or 22.2%, and then four out of 22, or 18.2%, of offenders were sentenced to imprisonment.

The ACT Criminal Justice statistical profile for the September 2007 quarter, just for offences dealt with in the Magistrates Court that involved homicide, acts intended to cause injury, sexual assault, abduction, robbery and burglary, reported there were 285 defendants. Of those, 145 were convicted. And of those, six were sent to prison.

In the ACT, even offenders convicted of rape may only receive periodic detention, whereas over the border, in Queanbeyan, the same offender for the same offence would likely receive a hefty jail term.

In one major police operation in the ACT, the police apprehended three people for supplying amphetamines, but only one was sentenced to imprisonment.

In another case, a motorist, who knocked down and killed a cyclist, was sentenced to 12 months jail in the Magistrates Court but was acquitted in the Court of Appeal on a technicality. Rather than rectifying the error of law, which was that the Magistrate should have imposed a nonparole period, the Court of Appeal dismissed the case, even given the driver had admitted to taking drugs in the period leading up to the crash.

These kinds of outcomes in the ACT's criminal justice system do nothing to deter criminals and they do nothing to re-assure the wider community that our legislature and our courts treat community safety and security or, indeed community expectations, seriously.

It is soul-destroying and frustrating for both victims and police when the courts hand down punishment for serious crimes that is the equivalent of being lashed with a feather.

The worsening trend is continuing, and I think it is crucial that we do have consistency.

Consistency, therefore, is the key to success in our sentencing policy in Australia. The whole question of sentencing laws needs to be reviewed across the nation.

Last year I attended a meeting of shadow attorneys-general from around Australia. Uniform sentencing laws was one of the matters for discussion. A very positive outcome of the meeting was the agreement to call on the then Attorney-General to push for uniform sentencing laws. The meeting issued a communiqué, which stated, and I quote:

*Sentencing laws differ significantly and we have a responsibility as elected representatives to push for law reform in this important area.*

*... there was clear consensus that there are strong legal and policy reasons to progress this as a new initiative. Nationally consistent sentencing laws should form an integral part of proposals towards uniform criminal laws.*

That will take time, demonstrated by the fact that the proposal for uniform criminal laws has been around for 15 years. We, as a nation, are still not even half way there.

That said there are very strong legal, policy and practical reasons to implement sensible laws that have been introduced across the border.

One must ask, though, why jurisdictions like NSW and the ACT could not collaborate and co-operate more with each other on developing laws that are consistent, particularly given both are governed by Labor governments.

New South Wales, for example, some years ago introduced laws similar to those proposed in my Sentencing bill. Indeed, the foundation of my bill comes from those laws. These laws have been very effective.

I have talked to a number of practitioners who practise in both New South Wales and the ACT. They understand the NSW laws and have adjusted to them. They say they work quite well and that there is considerable merit in them.

These people often scratch their heads when asked why we do not have similar laws in the ACT and why our system is so lenient. It is certainly something that causes great angst among the public, and especially among police, victims and others who regularly come into contact with the criminal justice system.

The important thing is that these proposals do not amount to mandatory sentencing.

What they do provide is certainty. And, in the state where they are operational – NSW – they work well. So the ACT, in effect, could be seen as an island, a haven if you will, for criminals who want to avoid the more rigorous criminal justice system that exists in NSW.

I want to touch specifically on the proposal in my bill relating to guideline judgements, as this is a very important element to achieve consistency.

This proposal enables our relatively new court of appeal to issue guideline judgements for use by the Supreme Court and the Magistrates Court. The Attorney-General will also be able to request the court of appeal to give a guideline judgement.

For those offences where there are not recommended nonparole periods, it will enable the court of appeal to set out the guidelines to be followed for certain types of crimes and to detail what sorts of penalties should be imposed by the lower courts for certain types of offences.

Again, it is used effectively in New South Wales, where there are guideline judgements for use by lower courts in cases such as culpable driving resulting in death of another person.

Of course, every crime is different but some have a very similar pattern. There is the ability in this package, as happens in New South Wales, to take very different circumstances into account.

Finally, our criminal law is also very much out of kilter with New South Wales in simple things such as maximum penalties.

A maximum penalty does not give any guarantee that the court will adhere to the gravity inherent in it, but in many instances it does. It does express the legislature's concern—and, through the legislature, community concern—about certain offences.

Even the current ACT government has introduced increased maximum penalties for a number of offences. Arson was one, which was up to 15 years.

The late Justice Connolly issued quite a strong sentence in relation to one act there as a result of the legislature plainly making known that it was a serious offence. Accordingly, a maximum of 15 years was seen as sensible. So it is important for consistency reasons.

A policy that embraces uniform sentencing legislation has a lot going for it. It provides consistency, certainty and goes some way to meeting community expectations.

The roles, strengths and expertise of the legislature and the judiciary are combined to deliver these benefits, rather than the two operating in isolation.

Importantly, it is something that, quite clearly, the vast majority of people want to see happen. They want a justice system that delivers.