

MANDATORY SENTENCING

Nicholas Cowdery AM QC

Adjunct Professor, Sydney Institute of Criminology
Former Director of Public Prosecutions, NSW
Former President, International Association of Prosecutors
Inaugural Co-Chair, Human Rights Institute, IBA
Member, NSW Sentencing Council

INTRODUCTION

In her evidence to the Independent Commission Against Corruption in March 2014, former Labor Premier of NSW, Kristina Keneally, said of a particular allegedly falsified Cabinet Minute from the time of the Labor government: *"This was the cabinet minute that wouldn't die until I drove a stake through its heart."* Unfortunately, we are still waiting for the politician to come along to drive a stake through the heart of mandatory sentencing.

Instead, it rises from its grave periodically, shifting its shape (as mandatory sentencing, mandatory minimum sentencing, grid sentencing, "baseline" sentencing, arguably standard non-parole periodsⁱ and so on) and haunting us apparently at the whim of the politicians in power.

I am delighted to have been asked to present this lecture, sponsored by the Rule of Law Institute of Australia, of which I am a Board Member. This is a serious issue for the rule of law and for criminal lawmakers and legal practitioners and academics everywhere. It is not the first time I have spoken on this subject and I shall come back to the position in Victoria a little later.

CRIME AND PUNISHMENT

First, a few comments about crime and punishment. Crimes are created by politicians – they legislate to proscribe certain conduct and to create penalties for breach of those proscriptions. The process by which that is done can be sound, aided by thorough research and expert input and evaluation; or it can be deeply unsatisfactory, depending as it may upon the political priorities and perceived urgency of the legislators and their assessment of what we deserve, often filtered through the tabloid media.

We observe the separation of powers in our form of democratic government and the legislative arm of government is responsible for this part of the process, driven by the executive. Crimes may be serious or comparatively minor, but penalties must be prescribed for all.

There is a hierarchy of punishments available, with imprisonment – the deprivation of liberty, a fundamental human right – being at the top, the most serious. But whatever the sentence, the law in NSW presently requires that it serve the seven purposes described in section 3A of the *Crimes (Sentencing Procedure) Act 1999*:

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,
- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,
- (g) to recognise the harm done to the victim of the crime and the community.

That section encapsulates the objectives of: punishment (or retribution); specific and general deterrence; community protection; rehabilitation (or reform); accountability; denunciation; and recognition of harm. (I am speaking tonight about the sentence of imprisonment, so I shall not take time to explore the achievement of the purposes of sentencing by other means.)

In *Veen v The Queen (No. 2)*ⁱⁱ in 1988 Mason CJ, Brennan, Dawson and Toohey JJ had said: “*The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who may be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.*” The guideposts have been added to over time: from four to seven in NSW.

In addition, there are five principles of sentencing established by legislation and common law that must be applied in every case:

- (i) imprisonment as a punishment of last resort – that no sentence other than imprisonment is considered appropriate (cf. section 5(1) of the *Crimes (Sentencing Procedure) Act 1999*);
- (ii) proportionality (the penalty must be proportionate to the offence);
- (iii) totality (the total sentence imposed for multiple offences must not be disproportionate to the total criminality);
- (iv) parity (where there are multiple offenders involved); and
- (v) the *De Simoni* rule (preventing sentencing for an element or feature not incorporated in the charge and conviction).

Ordinarily, in accordance with longstanding practice, the legislature when creating a crime prescribes the maximum penalty that may be imposed upon conviction and it then becomes for the judicial arm of government to determine in accordance with the principles that have been legislated and identified at common law where, below that maximum, any particular penalty should be fixed. There is no objection in principle to that practice. There are issues, however, about how much further the legislature should go in circumscribing the discretion of the courts.

MANDATORY SENTENCING

Mandatory sentencing presents issues of principle. We have mandatory penalties prescribed for minor regulatory offences; for example, fixed fines for car parking and driving offences, loss of driving licences, fines for breaches of health regulations, and so on. There is no argument in principle against such provisions, not least because the administrative penalties prescribed can always be reviewed by the court. They are not mandatory in the sense that they are necessarily final; they may be subjected to the exercise of judicial discretion.

But mandatory sentencing for more serious crimes is more problematic. They are created when the legislature prescribes either the sentence, a range of sentencing (as in a “grid”) or (more commonly) the minimum sentence that must be imposed by the court. A mandatory minimum sentence, at least in NSW, becomes the mandatory non-parole period, the minimum period that must be served in custody.

We already have a number of mandatory and mandatory minimum sentences prescribed for serious offences around the country (and this list may not be exhaustive).

- The Commonwealth has them in section 236B of the *Migration Act* 1958 for so-called people smuggling offences. A distinction is drawn in Commonwealth legislation between a mandatory minimum sentence and a mandatory minimum non-parole period.
- The Northern Territory has them in section 157 of the *Criminal Code* for murder; and in sections 78D to 78DI of the *Sentencing Act* for certain offences and in particular circumstances – but there is an exceptional circumstances provision to enliven discretion in appropriate cases.
- Queensland has them in section 305 of the *Criminal Code* 1899 for murder; and in section 161E of the *Penalties and Sentences Act* 1992 for repeat serious child sex offences. In recent times they have also been introduced in the *Vicious Lawless Association Disestablishment Act* 2013 (known as VLAD) which can apply to a much broader section of the community than just members of motorcycle clubs (and that process seems to be continuing).
- Western Australia has them in section 401 of the *Criminal Code Act* 1913 for repeat burglary; and in section 9D of the *Sentencing Act* 1995 for offences involving a declared criminal organisation.
- Victoria has them in sections 15A and 15B of the *Crimes Act* 1958 and sections 10 and 10A of the *Sentencing Act* 1991 for offences of gross violence unless a special reason exists; in section 30 of the *Road Traffic Act* 1986 for repeat offences of driving while suspended or disqualified; and in section 39C of the *Country Fire Authority Act* 1958 for causing a fire with intent to cause damage. Baseline sentencing for select offences is now also on the cards (see below).
- In NSW we have them in section 19B of the *Crimes Act* for the murder of a police officer in certain circumstances; and in section 61 of the *Crimes (Sentencing Procedure) Act* for murder with certain features and for serious heroin and cocaine trafficking, also in certain circumstances.
- There has been discussion of them in South Australia in the context of the last State election campaign.

- In Tasmania also in the last State election campaign the party now in government promised to introduce mandatory sentences for forest protest offences.
- The Australian Capital Territory has not (at least, not yet) gone down that path.
- New Zealand has a mandatory minimum sentence (17 years) for murder with certain aggravating circumstances, but gives the court discretion if it would be manifestly unjust to set such a minimum period.

The USA is really the “home” of mandatory and grid sentences in the English-speaking world, but even there the disadvantages of such schemes have been recognised and they are starting to be wound back. Typically they apply to drug and firearm offences, but numerous studies have shown that they have no measurable deterrent effect, they are costly to administer and they disproportionately disadvantage the most vulnerable in society, particularly African-Americans. The Federal administration over the next two years is considering clemency requests from thousands of Federal prisoners serving mandatory sentences for drug offences. Attorney General Eric Holder has said that the government wants to “*restore a degree of justice, fairness and proportionality for deserving individuals who do not pose a threat to public safety*”. Last August 2013 this initiative began with the Attorney General announcing that low level, non-violent drug offenders with no connection to gangs or large-scale drug organisations would not be charged with offences that call for severe mandatory sentencesⁱⁱⁱ (an example of sentencing decisions being driven down to prosecutors in a slightly different way – see below). The US Sentencing Commission in April 2014 voted to revise sentencing guidelines (or “grids”) to reduce sentences in most drug cases.

SUPPORT FOR MANDATORY SENTENCING

The justification for mandatory sentences – including mandatory minimum sentences – is said to lie in three principal stated aims.

- Consistency of sentencing. On one level this may be difficult to argue against – if the penalty is the same every time the offence is committed, there will certainly be consistency; but sentencing must first be fair and just or consistency means nothing more than repeated injustice. And there is a qualified meaning of consistency: it is the imposition of consistent punishment for like behaviour by similar persons, rather than just for the offence for which an offender happens to have been convicted.

Sir Anthony Mason said^{iv}: “*Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of **unjustifiable** discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.*” [emphasis added]

We should therefore first ask if there is any indication of a worrying, unjustifiable inconsistency in the cases for which mandatory minimum sentences are proposed that could support their introduction on that basis.

- Incapacitation. Yes, imprisonment has certainly been shown to reduce the incidence of offences such as housebreaking; but when the prisoners get out they go back to their old ways until they grow out of it. It may be more helpful to focus on rehabilitation.
- Deterrence. But no: ample research has shown that the greatest deterrent effect is in the expectation of being caught and dealt with, not in the punishment prescribed for the end of the process.

OBJECTIONS TO MANDATORY SENTENCING

Mandatory sentences raise issues and concerns about the rule of law, for one thing. In our system of government (as I have said) we have the separation of powers – between the legislature, which makes the law; the executive, which publicly administers the law; and the judiciary, which decides legal disputes and, in relation to the criminal law, imposes punishments – but only after a process that includes the assessment by an impartial tribunal in a fair manner of all relevant facts, the opportunity for all parties to be heard and avenues of appeal against such decisions. Trouble starts when one branch of government tries to do the work that properly belongs to another branch. The separation of powers has stood us in good stead for centuries, but it must constantly be defended against incursions by politicians, even if well-meaning. The Kable^v case is a modern object lesson.

There have been pronouncements from the highest courts in Australia and elsewhere about the inappropriateness of Parliament seeking to remove or fetter the discretion of the courts.

Chief Justice Barwick^{vi}: *“Ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime.”*

Chief Justice Gibbs^{vii}: even in the case of a most serious crime *“...there may exist wide differences in the degree of culpability of particular offenders, so that in principle there is every reason for allowing a discretion for the judge at trial to impose an appropriate sentence not exceeding the statutory maximum”* and that mandatory sentencing *“would lead to results that would be plainly unreasonable and unjust”*.

Chief Justice Brennan^{viii}: *“A law that purports to direct the manner in which the judicial power should be exercised is constitutionally invalid”*. He included any legislated direction for the exercising of an available discretion.

Chief Justice Spigelman^{ix}: *“The preservation of a broad sentencing discretion is central to the ability of the criminal courts to ensure justice is done in all the extraordinary variety of circumstances of individual offences and individual offenders.”*

Chief Justice Gleeson^x: the sentencing task carried out by courts is *“a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour into the mathematics of units of punishment usually expressed in time or money”*.

Chief Justice Spigelman (speaking this time in the context of making discretionary parole decisions)^{xi}: *“As is the case with respect to the task judges face when they come to sentence a convicted criminal, what is involved is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not point in the same direction. These tasks – whether sentencing or release on parole – involve a difficult process of weighing and balancing such matters.”*

And again^{xii}: *“Specifically, the requirements of justice, in the sense of just deserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy.”*

The Privy Council (Lord Bingham)^{xiii}: in the context of mandatory death sentences for murder in West Indian nations, noting that murder differed widely in severity and character: *“to deny the offender the opportunity, before sentence is passed, to seek to persuade the Court that in all the circumstances to condemn him to death would be disproportionate and inappropriate”* amounts to inhuman and degrading punishment.

The Supreme Court of Canada^{xiv}: *“The choice is Parliament’s on the use of minimum sentences, though considerable differences of opinion continue on the wisdom of employing minimum sentences from a criminal law policy or penological point of view.”*

As I have said, there is no objection in principle to Parliament increasing maximum permissible sentences if that is the considered will of the community (just as it is Parliament’s role to create and abolish offences); but mandatory sentences of any kind for serious offences are anathema to the doing of criminal justice. And even with increased maxima sending a message to the courts to raise penalties imposed for those offences, Government must then be prepared to meet the cost of additional and protracted processes and increased prison populations.

It is unrealistic, therefore, and unjust, to prescribe a penalty or minimum penalty that must be imposed for any serious offence before it has been committed or is even in contemplation (or can even be foreseen by Parliament), before all the facts and circumstances are known and without knowing anything of the offender; and experience has shown that such measures do create injustice. Justice requires proper consideration of all the circumstances of the offence and the offender.

COMMONWEALTH EXPERIENCE

On 19 May 2011 in the Supreme Court of the Northern Territory in Darwin, Kelly J was forced by the Commonwealth mandatory minimum sentencing regime to sentence Edward Nafi^{xv} to an unjustly long sentence (in her Honour’s view) for a repeat offence of involvement in bringing a boatload of people into Australian waters from Indonesia. Her Honour said: *“So far as sentencing principles are concerned, I am required to take into account such of the matters set out in s 16A(2) of the Crimes Act as are relevant and known to me. Having done so, I am required by s 16A(1) of that Act to impose a sentence which is ‘of a severity appropriate in all the circumstances of the offence’. However, I am prevented from doing this by the mandatory sentencing regime in s 236B of the Migration Act. That section provides that for the offence to which you have pleaded guilty, the Court must impose a minimum sentence of five years imprisonment with a minimum non-parole period of three years. In the case of a repeat offence, the mandatory minimum sentence is eight years imprisonment with a minimum non-parole period of five years.”*

And later: *“You will be convicted and sentenced to imprisonment for eight years commencing on 15 June 2010. I fix a non-parole period of five years.*

Had it not been for the mandatory minimum sentencing regime, taking into account the maximum penalty prescribed for this offence and the factors I have already set out I would have considered an appropriate penalty to have been a term of imprisonment for three years with a non-parole period of 18 months.

I therefore recommend that the Commonwealth Attorney-General exercise his prerogative to extend mercy to you, Mr Nafi, after you have served 18 months in prison. There is no guarantee that this will occur. It is a matter for the Attorney-General whether this recommendation is accepted.”

Much later, it seems, agreement was reached by the Commonwealth Attorney General and DPP that a charging policy would prevail of avoiding offences carrying mandatory minimum sentences wherever that could reasonably be done. That is another instance of the sentencing function, in effect, being driven down to prosecutors.

Her Honour in the Nafi case cited Mildren J in *Trenerry v Bradley*^{xvi} who had said, with unarguable logic: *“Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.”*

In a media release on 30 June 2011 the President of the Law Council of Australia, Alex Ward, included the following statements: *“Mandatory sentencing laws are the antithesis of fairness and have no place in the Australian criminal justice system”; “Mandatory sentencing reduces the incentive for offenders to plead guilty and can lead to an increased case load for the courts”; “Mandatory sentencing also prevents judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender”; “It is unfortunate so many jurisdictions are considering the introduction of some form of mandatory sentencing precisely at a time when the folly of the Commonwealth’s mandatory sentencing laws is attracting strident censure from judicial officers”.* The Law Council is updating its 2001 Policy Position in a Discussion Paper that is about to be released, opposing mandatory sentencing.

Mandatory sentences for all but the most minor regulatory offences in the circumstances that I described earlier are objectionable because they remove or unreasonably fetter the court’s discretion and inevitably – inevitably – lead to injustice. As Chief Justice Spigelman once observed, no judge wants to be an instrument of injustice. Nor does any prosecutor, I can tell you. Defence representatives strive to prevent it. And the community does not want it to occur in its name.

RECENT NSW DEVELOPMENTS

The reason why we are considering this topic tonight is, of course, the attention that has been given to mandatory sentencing in NSW over the last four months, since January 2014.

The catalyst for it was the death of Thomas Kelly, although other factors contributed. Just after 10pm on Saturday 7 July 2012, 18-year-old Thomas Kelly and a friend alighted from a taxi and

walked in Victoria Street, Kings Cross. He was punched, rendered unconscious, fell and hit his head and two nights later died from brain injuries received (when his parents authorised the turning off of his life support system). The young man who hit him, Kieran Loveridge, was arrested 11 days after the attack and on 4 November 2013 was sentenced (for manslaughter and four other assaults that night, to all of which he had pleaded guilty on 18 June 2013) to imprisonment for 7 years and 2 months with a 5 years and 2 months non-parole period. Six years of the head sentence and four years of the non-parole period were attributable to the manslaughter, the rest to the assaults; but the sentence was thereafter incorrectly blandly reported as a four year sentence (implying that it was the head sentence). That misinformation fed into the campaign that then began.

Thomas Kelly had not had a big night out, it was just after 10pm, he was not intoxicated, he and Loveridge were complete strangers, Loveridge was intoxicated with alcohol and drugs (which did not become public knowledge until the Statement of Agreed Facts became public in September 2013) and seemed intent on hitting as many young men as he could get away with. Police did not regard this crime as an extension of general alcohol and law and order problems in Kings Cross with which they had been grappling for some time – it was a random and isolated event in the street and liquor fuelled problems in and outside bars in Kings Cross presented different problems. That said, however, this kind of offence is not uncommon. It was reported that the Kelly death was the 15th one punch death in Sydney in the past 6 years and almost as a footnote in one ABC report about the Kelly case there was news of another such attack near the Queensland border in country NSW. Last week there was another such offence reported from Rooty Hill. When I was DPP I estimate that I dealt with about two a year on average through 16 ½ years. The Office of the DPP presently has about half a dozen such cases at various stages of prosecution around the State, committed in varying circumstances and bearing charges of murder and manslaughter and, in the Rooty Hill case, the new charge laid by Police of intoxicated assault causing death.

Reaction to the Kelly attack was swift, even if not focused specifically on that case of 7 July 2012. At first the reaction was interpreted as a positive application of progressive populism – but that was not to last^{xvii}. Within days the Sydney Lord Mayor put forward an eight steps plan for a safer Kings Cross. On 12 July 2012 the Sydney Morning Herald launched its “Safer Sydney” campaign. On 17 July 2012 a public forum for a “Safer Sydney” at Sydney Town Hall attracted over 600 people. On 18 July 2012 the Government directed an audit of late trading licensed premises in Kings Cross. A Coalition of Concerned Emergency Services Workers campaigned for “Last Drinks”. On 26 July 2012 News Ltd launched its “Real Heroes Walk Away” campaign. From August 2012 various measures were taken by the Government to tighten alcohol regulation and availability, especially on licences in the Kings Cross area. On 18 September 2012 the Premier announced a ten- point plan for “cleaning up the Cross”.

After Loveridge’s sentencing on 4 November 2013 the alcohol initiatives continued, but the punitive, penal political populism began. Thomas Kelly’s family, later supported by the families of two other young men (Michael McEwen who was assaulted at Bondi on 14 December 2013 and Daniel Christie, killed in similar circumstances to Thomas Kelly and in almost the same place on New Year’s Eve 2013/14), were dissatisfied with the sentence and started an online petition for more severe penalties for offences of assault committed by intoxicated offenders. It was reported to have gathered 23,000 signatures (including the Prime Minister and Leader of the Opposition) when it was

presented to the Government. It also attracted the attention of the media which ran at full steam with the stories over a lengthy period.

Against the background of the Kelly family petition, two things happened. First, the DPP (having been asked by the Attorney General on 8 November 2013 to consider an appeal) decided to appeal against the inadequacy of the sentence on Loveridge and to request of the Court of Criminal Appeal a guideline sentencing judgment for that kind of manslaughter (this was announced on 14 November 2013); and secondly, on 12 November 2013 the Attorney General at the time announced that he would introduce a new offence of “one punch death”, similar to Western Australian legislation but with a maximum penalty of 20 years imprisonment (double the WA maximum).

It must be asked why the government was not prepared to wait for the course of criminal justice to run its course – for the Court of Criminal Appeal to deal with the matter in public and to make its publicly explained decision as to whether the initial sentence was right or wrong – and to deal with the question of a guideline judgment. The appeal was heard last week and judgment is reserved. The application for a guideline sentencing judgment was earlier refused.

But instead, the government pressed further. After the Premier returned from summer holidays, on 21 January 2014 in a Media Release he announced 16 “alcohol and drug fuelled violence initiatives”. Five of them concerned the criminal law, the rest being directed at regulatory and social measures addressing the supply and consumption of alcohol in central Sydney. The criminal law initiatives included increased maximum penalties and new mandatory minimum penalties for nine offences (including assault police, affray and sexual assault) and the new so-called one punch death offence (the first NSW legislation on homicide in over half a century – since infanticide was legislated in 1951).

It should be noted that this was no longer the Attorney General’s initiative – this was now driven by the Premier and his Department, supported by the then Police Minister. It seems that Criminal Law Review (within the Department of Attorney General and Justice, as it used to be – now Police and Justice) was largely sidelined. A wide range of experienced criminal lawyers, associations of lawyers and human rights defenders and many legal academics shuddered and many voiced their legitimate concerns. Criminal justice agencies (including Corrections) and Treasury began calculating the potential cost. Behind the scenes, judges were fearful of the implications.

CRIMINAL LEGISLATION

On 30 January 2014 Parliament enacted section 25A of the *Crimes Act 1900* which came into effect on 31 January 2014 (the next day, a Friday – expressly in time for that weekend). It is described as a “one punch law”, but that is wrong. The offence created is committed if any person, anywhere, assaults another person by intentionally hitting (any number of times) the other person with any part of the person’s body or with an object held by the person and the assault causes the death of the other person. The maximum penalty is 20 years imprisonment. There is an aggravated form of the offence, committed if the offender is 18 years or older, without a significant cognitive impairment and intoxicated (by alcohol and/or illicit drugs). The maximum penalty for that offence is 25 years and there is a mandatory minimum penalty of 8 years imprisonment (cf. section 25B). It must be remembered also that the minimum penalty for any criminal offence is reserved for

offences at the bottom of the scale of severity for that offence, so almost all minimum sentences imposed for the aggravated offence must turn out to be more than 8 years.

It might also be noted that 25 years imprisonment is also the maximum penalty prescribed for manslaughter (cf. section 24), so the two versions of this offence sit uneasily in the hierarchy of homicide offences. It might also be noted that while the inspiration for this offence was said to be the WA provision, the need seen for it in that Criminal Code State is not reflected in NSW – “accident” is not the defence in NSW that it is in WA. It might also be noted that in section 25A there is a higher penalty imposed upon an offender who is intoxicated than upon one who is stone cold sober when he sets about the hitting.

The Premier returned to the rest of his Media Release of 21 January 2014 on 26 February 2014 with the *Crimes Amendment (Intoxication) Bill* 2014. This Bill sought to:

- amend the section 25A offence (enacted only four weeks earlier) by: making it assault by simply intentionally hitting; defining “hits”; requiring the aggravated offence to be committed in public; and omitting the defence subsections, including significant cognitive impairment;
- define intoxication;
- add 12 new offences of assault (while intoxicated, in public and/or in company);
- prescribe 6 new mandatory minimum sentences (but not for assault police, affray or sexual assault which were in the original Bill).

On 6 March 2014 the Bill was passed by the Legislative Assembly. On 19 March 2014 the Legislative Council substantially amended it (in effect seeking to create an equivalent of the Victorian offence of gross violence and a mandatory minimum sentence, but with discretion preserved to the court for special reasons). On 20 March 2014 the Legislative Assembly rejected the amendments. On 26 March 2014 the Legislative Council refused to budge. We wait to see what might happen next.

VICTORIA

Notwithstanding the well-established theoretical and practical objections to mandatory sentencing, Victoria is pressing ahead with its own shape of the beast. In 2011, soon after its election, the present government was contemplating introducing mandatory sentences for juveniles committing crimes of violence. I spoke about this at the conference of the Law Institute of Victoria on 29 July 2011, addressing the sorts of matters I am speaking about tonight together with the potential impacts on juvenile offenders. The Victorian government did enact mandatory minimum sentences for offences of gross violence; but last month (in April 2014) it introduced the *Sentencing Amendment (Baseline Sentences) Bill* 2014.

The Victorian Sentencing Advisory Council had presented a Baseline Sentencing Report in May 2012 which seems to have been largely misunderstood. The 2014 Bill proposes a different scheme from that recommended by the Council and has met with strong opposition from the Chief Justice and Chief Judge, the Victorian Bar and the Law Institute of Victoria – and just about every criminal legal practitioner in the State.

In short, the proposed amendments to the *Sentencing Act* 1991 and other Acts prescribe in respect of six presently nominated offences a “baseline” sentence. The median sentences being imposed for those offences are said to be too low and not in accordance with community expectations. The baseline sentences are those that Parliament (it is said) would like to see as the median sentences for those offences, higher than the present level. Non-parole periods must then be a fixed proportion of the sentences actually imposed. Attorney General Robert Clark in his Second Reading Speech said: *“The baseline sentence is the figure that Parliament expects will become the median sentence for that offence”* and he stated frankly that it will be higher than the present median figure in each case. He said this was a response to meet community expectations, provide deterrence and protect the community. He claimed that this *“will give to Parliament on behalf of the community a far greater say in the overall level of sentences that are imposed in our courts, while still allowing the courts to take into account the facts of individual cases in determining the sentence for each case”*. To the extent that current sentencing practices are inconsistent with baseline sentencing, the courts are to depart from current practice.

The six offences selected first and the baseline sentences prescribed are murder (25 years), drug trafficking of a large commercial quantity (14 years), incest with a child (10 years), sexual penetration of a child under 12 years (10 years), persistent sexual abuse of a child under 16 years (10 years) and culpable driving causing death (9 years).

The minimum non-parole periods to be specified when at least one baseline offence is being dealt with are: for a life sentence, 30 years; for 20 years or more, 70% of the sentence; for under 20 years, 60% of the sentence.

Courts are to have discretion to depart from these prescriptions, but they must give reasons explaining why they have imposed any sentence – equal to or greater or lesser than those prescribed. The scheme does not apply to children or to offences determined summarily.

The question must be asked if this is an appropriate way for Parliament to have such a say. Should Parliament go beyond prescribing maximum sentences or broadly guiding the sentencing discretion? By so confining the options available to a court, it is at least arguable that Parliament is requiring the courts (at least in some cases) to act unfairly and unjustly. That is probably unconstitutional and it is certainly contrary to the international obligations Australia has willingly undertaken.

The other question is whether this is a scheme that can be supported in principle or even practically. It is protested that such a scheme will interfere with the courts’ obligations to sentence efficiently, consistently and fairly. It seems to me that there is an element of reverse reasoning required to be undertaken by the courts that will be extraordinarily difficult and productive of appeals – starting with a prescribed figure, then contemplating the circumstances that would take half of the cases coming before the courts above that figure and half below, then assessing where in that continuum of circumstances the instant case falls, so as to know whether or not the baseline sentence (as the desired median) or something more or less should be imposed. Then the court must give reasons. Merely describing the process involved gives some insight into the complexities that must be juggled and the time and cost of the process. And for what?

PRACTICAL EFFECTS

The problems posed in the present debate have arisen time and time again. They occur when Government reacts to disproportionate media treatment of particular, usually atypical, cases. Government usually acts in haste and produces bad laws; rather than considering, consulting and legislating with care. The February intention to “fix” the January Bill in NSW is proof of the consequences of acting in haste and repenting at leisure.

The prescription of mandatory minimum sentences will have practical effects that have no doubt been considered by Treasury, especially, since the Premier’s Media Release of 21 January 2014. Those effects will have enormous cost implications and efficiency implications for the criminal justice system, apart from any counterproductive effects for the people caught up in the process. I have heard talk of a need to multiply the DPP’s budget by a factor of five or six, a need for up to 30 additional District Court Judges and a need for two new prisons to be built if all the government’s proposals go ahead.

The practical effects include the following (and this list of 22 is probably not exhaustive).

- (a) Judges are unable to apply the sentencing principles of proportionality, totality (in some instances) and imprisonment as a last resort.
- (b) Mandatory penalties exclude the operation of judicial discretion and thereby prevent the court from being able to give proper consideration to the subjective circumstances surrounding the offender. That usually leads to injustice. Penalties (especially for serious offences) must be tailored to fit the crime and the criminal – justice must be individualised and penalties fixed in advance by Parliament cannot achieve this.
- (c) To have the legislature fixing penalties detracts from the independence of the judiciary and the principle of the separation of powers. People are deprived of their liberty not in accordance with a public balancing process that is individually accountable, but arbitrarily in accordance with penalties fixed in advance without regard for the individual circumstances. It may even be that such penalties would be unconstitutional^{xviii}, although the Commonwealth migration legislation has been held to be constitutional^{xix}.
- (d) Mandatory sentences, being arbitrarily fixed in advance, constitute arbitrary detention contrary to Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party. Further, by removing the power of an appeal court to impose a lesser sentence, they deprive persons of the right to have their sentences being effectively reviewed by a higher tribunal, contrary to Article 14(5) of the ICCPR.
- (e) Police will overreact and charge more serious offences than are warranted.
- (f) Police accordingly will inflate their statements of facts.
- (g) Bail will commonly be refused, the prospect of an inevitable prison sentence providing added incentive to flee.
- (h) Because the lowest mandatory minimum sentence proposed in NSW is the upper jurisdictional limit of the Local Court (2 years imprisonment), there must be more elections for charges to be dealt with on indictment in the District Court, adding to its workload.
- (i) There will be fewer pleas of guilty (because, among other reasons, no proper discount can be given for a plea or for cooperation) and therefore additional strain will be placed on the courts, prosecution and legal aid bodies and defence representatives and all the services associated with defended trials. Backlogs will increase and remand populations grow. Victims of crime must wait longer for the resolution of their matters. Costs blow out.

- (j) Juries may become reluctant to convict in some circumstances (as has been found already with some Commonwealth prosecutions and as used to happen when the death penalty was available in NSW for murder – juries convicted of manslaughter).
- (k) There will be delays to all involved in the process in achieving resolution (including police and victims).
- (l) It means the transfer, effectively, of sentencing discretion from the courts to police and prosecutors (by the selection of charges to proceed – even without directions from or agreements with Attorneys General). There will be additional pressures on prosecutors to negotiate with the defence and (perhaps inappropriately, for pragmatic reasons) to agree to pursue lesser charges. Similar pressures will be imposed on police at the charging stage. That process is not transparent or readily accountable and can be unsatisfactory also for victims of crime.
- (m) There will be more and longer sentences for those who are convicted.
- (n) Prison populations will expand, both remand and sentenced. That has a cost – in funding and in the detrimental effect of prison on many inmates. Where the sentences are short (even up to 2 years), alternative dispositions would usually be more appropriate and effective. More gaols will be required.
- (o) There will be enormous increased public expense.
- (p) It is not a reliable method of treatment of offenders. A past criminal record (if that is one of the criteria) or an atypical criminal involvement can often be a poor predictor of future offending. Therapeutic approaches to sentencing are excluded by mandatory penalties.
- (q) They are not effective. They rest upon selective incapacitation; but it is unlikely that the criminal justice system can identify, apprehend and imprison for long periods sufficient numbers of high rate offenders or offenders of a particular type at the right time in their criminal careers so as to substantially reduce the crime rate. They have been shown not to have a general deterrent effect on offending. Intoxicated young men do not stop to consider what may happen to them if they take a spontaneous course of action.
- (r) They impact disproportionately on the young, on women and on the indigenous population (in the Australian experience already).
- (s) Serious or persistent offenders will receive heavier penalties, in any event, under existing legal regimes, than the mandatory minimum penalties usually prescribed.
- (t) They are a manifestation of political distrust of and lack of confidence in the judicial arm of government.
- (u) They deter cooperation with law enforcement in the resolution of other crime (because no discount can be given for cooperation).
- (v) Canadian experience shows that mandatory sentences, when the judiciary cannot avoid imposing them, can lead to increases in other (non-mandated) punishments as the courts struggle to ensure proportionality and consistency in sentencing across the board.

A COMPROMISE

A compromise (perhaps) is available. In NSW in 2001 the Premier at the time became very attracted to the idea of mandatory minimum sentences. He was halfway through his second term in office and was feeling very confident. The Criminal Law Review Division of the Attorney General's Department of the time and other policy bodies became quite concerned about this development and sought a way of heading it off. They were able to do so, but only by proposing a regime of what came to be known as standard non-parole periods.

The (misnamed) *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* came into effect on 1 February 2003. The Act is misnamed because it does not prescribe

minimum sentences, standard, mandatory or discretionary – it sets out standard non-parole periods to be imposed for a list of specific offences, applicable to those examples of such offences “in the middle of the range of objective seriousness”, but it leaves open mechanisms for departing from those prescribed periods and the courts have been keen to preserve discretion.

The principal object of this part of the Act is stated to be:

- to establish a scheme of standard minimum sentencing [called “standard non-parole periods” in the Act, in contrast to the short title of the Act] for a number of serious offences.

The Act added to the traditional purposes of sentencing (from the time of Veen’s case) a statutory purpose being: denunciation and “to recognise the harm done to the victim of the crime and the community”. (In relation to the latter, courts are required to take into account victim impact statements that now may be written or oral.)

The Act also lists aggravating, mitigating and other factors to be taken into account in determining the appropriate sentence for an offence – applying to all offences in all courts – and section 44 sets all non-parole periods from the bottom up, but preserving the former presumptive ratio between the terms of 3:1, non-parole period to parole period. The considerations in section 21A (the aggravating, mitigating and other factors to be considered) are stated to be “in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law”. That preserves general common law considerations and practices.

In his Second Reading speech of the Bill the Attorney General said (notwithstanding the short title of the Bill) the following. It is useful because of the affirmations of principle contained in it.

“At the outset I wish to make it perfectly clear: the scheme of sentencing being introduced by the government today is not mandatory sentencing. The scheme being introduced by the government today provides further guidance and structure to judicial discretion. It does not replace judicial discretion. These reforms are primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process.

By preserving judicial discretion we ensure that a just, fair and humane criminal justice system is able to do justice in the individual case. This is the mark of a criminal justice system in a civilised society.

By preserving judicial discretion we ensure that when in an individual case extenuating circumstances call for considerations of mercy, considerations of mercy may be given.

A fair, just and equitable criminal justice system requires that sentences imposed on offenders be appropriate to the offence and the offender, that they protect the community and help rehabilitate offenders ... The imposition of a just sentence ... requires the exercise of a complex judicial discretion. The sentencing of offenders is an extremely complex and sophisticated judicial exercise.”

There is no evidence that the NSW Government in the present controversy has considered expanding the list of offences to carry standard non-parole periods.

HISTORICAL FOOTNOTE

We have had mandatory minimum sentences in NSW^{xx}. In the late 1870s and early 1880s there was public controversy about allegedly light sentences being imposed for serious offences. On 26 April 1883 the Criminal Law Amendment Act was passed, prescribing, for five categories of maximum sentences, corresponding mandatory minimum sentences: life (7 years); 14 years (5 years); 10 years (4 years); 7 years (3 years); and 5 years (one year). When the law was implemented (as the judges were obliged to do), injustices quickly became apparent and after sustained public reaction, this time against the provisions, they were repealed on 22 May 1884 – after less than one year and one month.

In its editorial on 27 September 1883 (while the legislation was still in force) the Sydney Morning Herald said: *“We have the fact before us that in a case where a light penalty would have satisfied the claims of justice, the judge was prevented from doing what he believed to be right, and was compelled to pass a sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion.”*

We have been there again more recently in NSW, as I have noted in passing. In 1996 the *Crimes Amendment (Mandatory Life Sentences) Act* inserted section 431B into the *Crimes Act 1900* which provided mandatory (natural) life sentences for murder and for some drug offences *“if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence”*. The provision was never expressly used (after all, it is really a version of Parliament telling the judiciary how to suck eggs) and it was repealed but re-enacted as section 61 of the *Crimes (Sentencing Procedure) Act 1999*. It has never been used (as far as I am aware) – but natural life sentences have continued to be imposed (over 50 of them now) under the traditional tests of worst class of offence and general sentencing principles and in accordance with other legislated provisions of general application.

But the section is still there and the Government now seems intent on adding to it but in ways that will certainly take effect and will do us no good at all. It is getting justice wrong.

ⁱ Cf. *Wong v R* [2001] HCA 64 @ [85]; see also Breyer J in *Harris v United States* 536 US (2002)

ⁱⁱ [1988] HCA 14

ⁱⁱ [1988] HCA 14

ⁱⁱⁱ Sydney Morning Herald, 23 April 2014

ⁱⁱⁱ Sydney Morning Herald, 23 April 2014

^{iv} *Lowe v The Queen* (1994) 154 CLR 606 @ 610-611

^v *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24

^{vi} *Palling v Corfield* [1970] HCA 53

^{vii} *Sillery v The Queen* [1981] HCA 34

^{viii} *Nicholas v The Queen* (1998) 193 CLR 173 @188

^{ix} *R v Jurisic* (1998) 45 NSWLR 209 @221C

^x *Weininger v The Queen* (2003) 212 CLR 638

^{xi} Address to the NSW Parole Authorities Conference, 10 May 2006

^{xii} (1999) 73 ALJ 876

^{xiii} *Reyes v The Queen* (2002) UKPC 11

^{xiv} *Latimer v The Queen* (2001) 150 CCC(3d) 129

^{xv} SCC 21102367

^{xvi} (1997) 6 NTLR 175 @187

^{xvii} I acknowledge the contribution to this analysis and to this paper generally of the publications by Dr Julia Quilter of the University of Wollongong (especially - Contemporary Comment: "Responses to the Death of Thomas Kelly: Taking Populism Seriously", *Current Issues in Criminal Justice*, Vol 24, No 3, March 2013; and "Populism and criminal justice policy: An Australian case study of non-punitive responses to alcohol related violence", *International Journal for Crime, Justice and Social Democracy*, Vol 3, No 1, April 2014). Dr Quilter and I have spoken on and taught this subject together and I am grateful for her scholarship.

^{xviii} In *Nicholas v The Queen* (1998) 193 CLR 173 at 188 Chief Justice Brennan said:
"A law that purports to direct the manner in which the judicial power should be exercised is constitutionally invalid. However, a law which merely prescribes a Court's practice or procedure does not direct the exercise of the judicial power in finding facts, applying law or exercising an available discretion."

^{xix} *Magaming v The Queen* [2013] HCA 40

^{xx} Judge G D Woods in his "A History of Criminal Law in NSW" (Federation Press, 2002) describes this chapter of our history in some detail.