ADDRESS TO THE QUEENSLAND MAGISTRATES 2011 STATE CONFERENCE, MAGISTRATES' LIBRARY, 9TH FLOOR, MAGISTRATES COURT BUILDING, 9.30 AM, THURSDAY, 4 AUGUST 2011

SENTENCING

Introduction

Chief Magistrate, Judge Butler; fellow judicial officers; Mr Philip Reed, Director-General, Department of Justice and Attorney-General. Thank you, Judge Butler, for that generous introduction.

After the splendid welcome to country we enjoyed a few moments ago from Uncle George, let us reflect on the fact that, for tens of thousands of years before European contact, the traditional owners of this land, the Turrbal and Jaggera people, have held meetings of their wise elders to discuss how to best deal with wrongdoers, in essence not so very different to this conference.

I am delighted to speak with you today about Sentencing, one of the most difficult and controversial tasks undertaken by judicial officers. It is entirely appropriate that you are spending a whole day of your three day conference on different aspects of it.

According to your annual report, last year the Queensland Magistrates Court dealt with about 96 per cent of the State's criminal matters. That translated to 202,966 adult defendants on 340,878 criminal charges and a further 11,525 child defendants on a further 25,503 criminal charges. In all, the Magistrates Court and Children's Court dealt with a staggering 366,381 criminal charges, an increase of 5,812 charges on the previous year. The annual report did not contain statistics as to the number of sentences meted out in Magistrates Courts, but it was clearly a six figure number. It makes my Court's 238 filed sentence matters in the same period look distinctly leisurely! Maybe you Magistrates should be telling me about sentencing!

It is almost certain that this year you will deal with an even higher number of sentences, in part because of your Court's increased criminal jurisdiction following the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act* 2010 (Qld) which came into operation last November. In addition to hearing and determining all State and Commonwealth summary offences, as

well as an extensive selection of otherwise indictable offences, you can now sentence offenders for an even larger range of otherwise indictable offences. See Pt 8 Ch 58A *Criminal Code* 1899 (Qld). These include more serious examples of stealing, breaking and entering and burglary where the offender pleads guilty; assault with intent to steal under s 413 *Code*; demanding property with menaces with intent to steal under s 414 *Code*; wilful damage under s 469 *Code* regardless of the value of the property; and more serious possession offences under the *Drugs Misuse Act* 1986 (Qld).[1] I understand one of your number has descended into the labyrinth of the amending legislation and emerged with and distributed a helpful schedule of your enlarged jurisdiction so that I need not spend anymore time discussing this aspect of it.

There has been no change to the maximum term of imprisonment of three years which you can impose: s 552H *Code*. The Magistrates Court must abstain from dealing summarily with these matters if the convicted defendant may not be adequately punished on summary conviction: s 552D(1), s552A(3), s 552B(3) and s 552BA(3).

All this means that in the months to come you will often be sentencing offenders for a greater array of more serious offences than has been your practice. As a result, your sentences are likely to be increasingly scrutinised by the legal profession, the media and the community. One of your challenges in exercising the increased jurisdiction is to ensure that public confidence in the criminal justice system is maintained.

Appeals are an integral part of the criminal justice system. Appeals from your sentences are still to a single District Court judge under s 222 *Justices Act* 1886 (Qld). There is an appeal from that decision, but by leave only, to the Court of Appeal under s 118(3) *District Court of Queensland Act* 1967 (Qld). Appeals are a burden on judicial officers – unless, of course, you belong to the group of seven in Canberra. I am currently reading Queenslander, A J Brown's well-reviewed biography, *Michael Kirby: Paradoxes, Principles*.[2] When Kirby was appointed President of the New South Wales Court of Appeal, a District Court judge, Tom Dunbar, wrote him these verses:
" If 'tis the lot of such as we

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1 Section 14, *Drugs Misuse Act* 1986 (Qld).
2 The Federation Press, 2011.

From great heights peeed upon to be;
Why then bareheaded we wait to see
What shall descend from mighty Kirby P."
As a former trial and sentencing judicial officer, I empathise with Judge Dunbar, but also as an appellate judge with Michael Kirby. His Presidential response to the judge was that the " 'peeing on' would not only be done *by* Kirby P – but *on* Kirby P from Lake Burley G!"[3]

I advise you not to get disheartened by appeals from your decisions, even when you get the silver medal. Mind you, I am not advising you take the approach of one notorious, long-retired magistrate from Townsville and later Nambour. He stubbornly and persistently refused to follow the Court of Criminal Appeal's rulings. The first ground of appeal in those cases became "This is an appeal from Magistrate X".

I know you will be hearing more on the topic of avoiding appellable error from Judge Durward later in this conference, but a few words about personal resilience when overturned on appeal. First, it's a bit like getting the odd traffic infringement when you drive a car. Coping with being overturned on appeal should be part of the job description of a judicial officer. It happens to all of us. And the harder you work, the more likely you are to have the odd successful appeal from your orders. It is the justice system functioning as it should. After all, appeals allow the law to develop. Second, appeals often have quite a different life to the proceeding at first instance. No wonder different results are reached when the case argued on appeal is sometimes barely recognisable as that argued at first instance. And third, if you are tossed on appeal, there's always a chance someone will get it right at the next appellate level! That said, if you are being overturned on appeal as often as the long-retired Magistrate X I mentioned earlier, there probably is a problem you need to understand and address. I hasten to add that I am not aware of any Magistrate Xs presently on your bench.

The observations I will make in this paper are geared to the sentencing of adult offenders against Queensland law. Commonwealth sentencing principles, though generally comparable to those applying to Queensland offences, are

[3] Above, 182.

governed by Part 1B *Crimes Act* 1914 (Cth) with general sentencing principles set out in Division 2 s16A to s 16D *Crimes Act*. The sentencing of children is a specialised function of designated Children's Court judges and is governed by the particular principles relating to the treatment of children set out in the *Youth Justice Act* 1992 (Qld), particularly s 2 and s 3, and the Charter of Youth Justice Principles in Schedule 1. Queensland is now the only Australian jurisdiction where 17 year old offenders are dealt with in the adult justice system contrary to the United Nations Convention on the Rights of the Child. In all other Australian states and territories, offenders under the age of 18 are sentenced within the youth justice system and, if incarcerated, are placed in youth detention centres. This Queensland anomaly has been criticised by commentators and by the Committee on the Rights of the Child. The Committee has recommended that 17 year olds should be removed from the Queensland adult criminal justice system and that Queensland should bring its system of juvenile criminal justice into line with the Convention: see *R v Loveridge*.[4]

Tomes have been written on sentencing principles and practice. I will not attempt to comprehensively address the myriad matters that may arise in the infinitely variable task of sentencing offenders. I plan to discuss some important sentencing principles and make a few practical suggestions which may assist in your difficult task, before briefly discussing guideline judgments and the Sentencing Advisory Council's consultation paper on Minimum Standard Non-Parole Periods.

Some Sentencing Principles

Queensland judicial officers are usually required to exercise a discretion when undertaking the onerous function of sentencing offenders. I am pleased to report that, so far, we have not been subjected to any significant mandatory sentencing regime. But more of that later. I have long held the view that the maintenance of the sentencing discretion is an essential part of a functional criminal justice system. It keeps the "justice" in the "system".[5] But the sentencing discretion must be exercised according to law. It often requires the wisdom of Solomon and the courage of Goliath. We all have experienced the heavy burden of deciding whether to

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4 [2011] QCA 32, [5]-[7].

5 See "Why the Sentencing Discretion must be Maintained", Justice M McMurdo, Queensland Bar News, No 3, December 1999.

record a conviction for a concerning offence committed by a young person with no criminal record and promising prospects. Who amongst us has not agonised over whether to sentence a young man to jail for the first time. And who of us has enjoyed having our sentences selectively or wrongly reported in the media and then attacked as inappropriate. But such is the life of a judicial officer. As Justice Jeffrey Spender, recently retired from the Federal Court of Australia, has often said: "If you are a judicial officer and you want to be loved, get a dog."

Public opinion surveys have consistently suggested that the community considers the sentences imposed by judicial officers are too lenient. The recent Tasmanian Jury Sentencing Study[6] has provided a welcome touch of sanity in the often hysterical law and order debate. Erstwhile Chief Justice of the High Court of Australia, Murray Gleeson, suggested that it may be a useful contribution to the debate to survey jurors as they are informed public representatives with a thorough knowledge of the cases they have heard. The result was the Tasmanian Jury Sentencing Study which surveyed 698 jurors from 138 trials between September 2007 and September 2009. The survey found that a substantial majority of jurors, with firsthand experience of the court system considered that sentences were appropriate and that judicial officers were in touch with public opinion. Our challenge is how best to inform the public about sentencing. That's a topic for another paper. But we do need the legislature and the public to understand both the results of surveys like the Tasmanian Jury Sentencing Study and the reasons for our sentences. The very giving of logical, accessible reasons must be a promising beginning to informing the public, as well as the offender, the victim, and appeal courts, as to why the sentence is appropriate. I know that giving reasons is not always easy with your workload. But, at least when imposing a term of imprisonment, s 10 *Penalties and Sentences Act* 1992 (Qld) requires reasons to be given. And reasons are also required when imposing a sentence other than a term of imprisonment: *R v KU & Ors; ex parte Attorney General (Qld)* [2008] QCA 154, [101].

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[6] Kate Warner, Julia Davis, Maggie Walter, Rebecca Bradfield and Rachel Verney, *Trends and Issues in Crime and Criminal Justice* Australian Institute of Criminology, No 47, February 2011.

Jacob J in *Moyse v The Queen*[7] stated:
"[A] cardinal principle of sentencing [is], that the Court, whenever it can properly do so, should temper justice with mercy by imposing the lowest, rather than the highest sentence of imprisonment that can be justified." I think very few judicial officers would disagree with that statement. But as this Court said in *R v Patel; ex parte Attorney-General (Qld)*:[8]
"… reasonable and proper views will vary as to what is the lowest justifiable sentence in the circumstances. Appellate courts recognise that in any particular case there is seldom only one appropriate sentence but rather an appropriate sentencing range."

In *Markarian v The Queen*,[9] Gleeson CJ, Gummow, Hayne and Callinan JJ explained it this way:
"… there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies."[10]

Whist flexibility is important in arriving at a just sentence in each case, and there is usually a range of just sentences which could be imposed, the solemn task of sentencing is not "the vibe" of the sentencer on the day or the undertaking of an unstructured intuitive exercise. Judicial officers must be vigilant to exercise the sentencing discretion according to established legal principles and legislative requirements and impose a sentence within the range established by comparable cases. When the mitigating and exacerbating features of two or more cases are similar, so too should the sentences in those cases be similar, even if imposed by different judicial officers. Otherwise offenders, victims and the public will lose confidence in the criminal justice system and have a justifiable sense of grievance with the sentence imposed, of the kind discussed in *Lowe v The Queen* when sentencing co-offenders.[11]

The starting point in determining the appropriate sentence is Part 2 *Penalties and Sentences Act* 1992 (Qld). You probably know it

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7 (1988) 38 A Crim R 169, 172-173 cited by the Court of Appeal in *R v Patel; ex parte Attorney-General (Qld)* [2011] QCA 81 [200].
8 [2011] QCA 81, [226].
9 (2005) 228 CLR 357.
10 At 371 (footnotes omitted).
11 (1984) 154 CLR 606; Gibbs CJ 610, Mason J 613; Brennan 617-618; Dawson J 623; Wilson J agreeing with Gibbs CJ and Dawson J 616.

backwards. Section 9 is appropriately headed "Sentencing guidelines". The sole purposes for which sentences may be imposed are set out in s 9(1): just punishment; conditions to assist rehabilitation; specific and general deterrence; community denunciation; community protection; and a combination of all these.

The principles of sentencing are set out in s 9(2). Importantly, a sentence of imprisonment should only be imposed as a last resort and a sentence that allows the offender to stay in the community is preferable (s 9(2)(a)).

But that principle does not apply to the sentencing of an offender for an offence involving the use of, or counselling or procuring the use of or attempting or conspiring to use violence against another (s 9(3)).

In sentencing such an offender, the court must have primary regard to the matters set out in s 9(4).

Nor does s 9(2)(a) apply in sentencing an offender for an offence of a sexual nature committed in relation to a child under 16 (s 9(5)). For such an offence, the offender must serve an actual term of imprisonment unless there are exceptional circumstances (s 9(5)(b)) having regard to the closeness in age between the offender and the child (s 9(5A)). In sentencing such an offender, the court must have regard primarily to the matters set out in s 9(6). I mention this provision as your court has jurisdiction in sexual offences under the *Code* where the complainant is 14 years or older; there are no circumstances of aggravation; and the defendant has pleaded guilty: s 552B(1)(a) *Code*.

And nor does s 9(2)(a) apply to the sentencing of an offender for offences involving child exploitation material, including offences dealt with summarily under the *Classification of Computer Games and Images Act* 1995 (Qld); the *Classification of Films Act* 1991 (Qld) and the *Classification of Publications Act* 1991 (Qld). In these matters, the court must have primary regard to the matters set out in s 9(6B).

Youthfulness and prospects of rehabilitation remain significant mitigating features, even in cases to which s 9(3), (5) and (6A) apply: *R v Dullroy & Yates; ex parte A-G (Qld)*.[12]

If the offender is an Aboriginal or Torres Strait Islander person, the court must take into account any relevant submissions made by a representative of the Community Justice Group in the offender's community (s 9(2)(p)). The representative must advise the court if any member of the Community Justice Group responsible for the submissions is related to the offender or the victim, or if there are any circumstances that give rise to a conflict of interest between any member of the Community Justice Group that is responsible for the submissions and the offender or victim (s 9(7)).

Cooperation with law enforcement authorities is a significant mitigating feature: s 9(2)(i) and s 13A *Penalties and Sentences Act*. This is especially so where the offending would not have come to light but for the cooperation; and where the cooperation is extensive and has placed the offender's personal safety at risk: *R v SBS*.[13] The sentence imposed must, however, reflect the seriousness of the offence which is being punished: *R v SBS*.[14]

A prior criminal history, especially for like offending, is an aggravating matter. So too is the commission of an offence whilst on bail or while the offender was subject to a community based sentence order. But the principle of proportionality still applies. A sentence should not be increased beyond what is proportionate to the crime, solely to extend the period of community protection from the risk of the offender's recidivism: *Veen v The Queen [No 1]*[15] and s 9(9) *Penalties and Sentences Act*.

Our criminal justice system is functional because most people who are charged with criminal offences plead guilty. That is why the Queensland Magistrates Court is able to dispose of such an extraordinary number of criminal matters each year. Courts have long recognised that the efficient operation of the criminal justice system requires the giving of a significant sentencing discount for pleas of guilty to encourage such cooperation. If courts do not give an appropriate discount for guilty pleas, those charged will be

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12 [2005] QCA 219.
13 [2010] QCA 108, [19]-[20].
14 (2000) 114 A Crim R 281; [2000] QCA 316.
15 [2010] QCA 108, [20].

less likely to plead guilty and the criminal justice system will become unworkably congested. The legislature has recognised this principle in s 13 *Penalties and Sentences Act*. A plea of guilty can also be a sign of an offender's remorse, insight into his conduct, and a beginning of rehabilitation. The extent of the sentencing discount will turn on the facts of the case. Where custodial sentences are imposed, the discount will often be by way of a set parole date, a parole eligibility date or a suspension at about one-third of the head sentence, or even earlier if there are many mitigating features. The guilty plea may be reflected in a reduced head sentence instead of, or in addition to, the early release or parole eligibility date. But remember, sentencing is not a mere mathematical exercise.

The effect of the crime on victims is an important factor to take into account: see s 9(2)(c)(i) and s 15 *Victims of Crimes Assistance Act* 2009 (Qld). The Court of Appeal has recently discussed the use to be made of victim impact statements in *R v Evans; R v Pearce*.[16] Sentencing courts may accept allegations of fact in victim impact statements which are admitted or not challenged: see 132C(2) *Evidence Act* 1977 (Qld). If the allegation is not admitted or is challenged, the judicial officer may act on it if satisfied on the balance of probabilities it is true: s 132C(3). But the degree of satisfaction will vary according to the consequences adverse to the offender of finding the allegation to be true: s 132C(4).

Comprehensive as is Part 2 *Penalties and Sentences Act*, additional or expanded sentencing principles are also found in case law. The totality principle comes to mind, but it, too, is partially reflected in s 9(2)(k) and (l) *Penalties and Sentences Act*. When sentencing for a series of offences, care must be taken to ensure that the overall effective sentence imposed is neither so lenient that it does not fairly punish the overall offending, nor so heavy as to be crushing.[17] If the offences are discrete and not closely interconnected, some judicial officers will impose cumulative (consecutive) sentences: see s 156 *Penalties and Sentences Act*. Others will impose a heavy penalty on the most serious offence to reflect all the offending. As long as the effective total sentence imposed is within the appropriate range, and does not exceed the maximum penalty able to be imposed for that

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16 [2011] QCA 135, [2] – [9], [15] – [19].

17 For a recent discussion on the totality principle see Fryberg J's reasons in *R v Schmidt* [2011] QCA 133.

offence, it does not matter whether the sentences are concurrent or cumulative. Sometimes legislation requires the imposition of cumulative sentences: see for example s 156A *Penalties and Sentences Act.* Remember that cumulative sentences may cause unintended consequences by delaying release dates and they are commonly altered by appeal courts. Care must be taken in imposing them. As the High Court explained in *Mill v The Queen*[18] the totality principle requires:
"a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'."

Helpful material as to general sentencing principles is available online through the Judicial Virtual Library. I particularly recommend Thomson Reuters Legal Online which has available Judge Robertson's and Professor Geraldine Mackenzie's Queensland Sentencing Manual. The Supreme and District Court judges have developed their own sentencing benchbook which is regularly updated by a committee of judges from both courts. It is available through the Judicial Virtual Library under the link "Internal Documents". Perhaps the benchbook could be adapted specifically for your use (with appropriate permission and acknowledgment, of course) and then updated by a committee of magistrates. To assist with your high volume of work, you may find it useful to individually develop your own checklist template for quick and easy reference when giving *ex tempore* reasons.

The use of comparable sentences
Comparable sentences, especially for offences with which you are not familiar, are helpful in determining the sentencing range. Encourage legal practitioners to provide you with such material, especially for novel offending which comes within your recently increased jurisdiction. If you apprehend you have not been given sufficient information about the facts, the applicable sentencing principles or comparable sentences, direct the lawyers to provide further material and adjourn the matter. This will save time in the long run. A one week adjournment will be more time and cost efficient than an appeal or two over six or 18 months. Magistrates

[18] (1988) 166 CLR 59, 63.

might also be assisted in their sentencing role if the DPP (Qld) took over the role of police prosecutors in the Magistrates Court, a desirable but not, I fear, imminent step. Judge Butler informs me that police prosecutors are sometimes replaced by very inexperienced legal practitioners, briefed directly by the police. In theory, this should be an improvement as at least the lawyers, unlike police prosecutors, are officers of the court. But I understand the reality may be different. I suggest approaching the Queensland Law Society and Bar Association to conduct a regular continuing legal education program for such lawyers so that they understand their obligations in carrying out this important role. It would, of course, be desirable for magistrates to be involved in this training.

Both legal practitioners, and magistrates will receive assistance in finding useful comparable sentences from the Queensland Sentencing Information Service (QSIS). I expect you are all familiar with QSIS and that it as a favourite on your computer, as it is on mine. QSIS provides pathways to relevant Court of Appeal and s 222 sentencing decisions, as well as the Chief Magistrate's notes which refer to both. QSIS is considering providing direct access to all s 222 sentencing decisions. Ms Amanda O'Brien, the QSIS manager, assures me that she is keen to assist magistrates in the use of QSIS and regularly does so. She offers QSIS demonstrations to Brisbane magistrates. For those who work outside Brisbane, she can provide telephone assistance and make appointments for a hands-on demonstration when the magistrate is in Brisbane. She is contactable by email: amanda.obrien@justice.qld.gov.au or on 3224 4213.

Most Court of Appeal sentencing decisions concern sentences imposed in either the Supreme Court Trial Division or the District Court. Even so, these may be relevant when you are sentencing for offences which are otherwise indictable offences. True it is that the appeal process from the Magistrates Court to the District Court, and then to the Court of Appeal only by way of leave, means that relatively few Court of Appeal decisions directly concern the sentences imposed in the Magistrates Court. There are exceptions, for example, the recent case of *Skorka v Hartley; Skorka v Kurtz*[19] a professional and prolonged stealing of parking meter money from the Brisbane City Council.

[19] [2011] QCA 116.

For a number of reasons, appeals from Magistrates Court sentences to the District Court may be of limited assistance. First, they are single judge decisions. Second, there is no specialist criminal appellate division of the District Court so that the decisions may not always take a consistent approach. Third, the prosecution seems to seldom appeal against magistrates' sentences. This has the result that s 222 sentence appeals tend to consider only whether the sentence imposed was manifestly excessive, rather than appropriate sentencing ranges for particular offences. This is unlikely to change unless the prosecution takes a proactive role in s 222 sentence appeals and the District Court arranges its calendar so that sentence appeals are heard by a reasonably consistent group of judges experienced in criminal appellate work.

Guideline judgments

Late last year, the *Penalties and Sentences Act* was amended to add Part 2A which deals with guideline judgments.[20] Until then, the Queensland Court of Appeal did not in terms give guideline judgments or purport to lay down prescriptive rules for sentencing. That was just as well, given the High Court's 2001 decision in *Wong v The Queen*[21] which was critical of and overturned as unconstitutional the New South Wales Court of Appeal's guideline judgment for Commonwealth drug offences. Gaudron, Gummow and Hayne JJ emphasised:

"there is an important distinction between a court articulating the principles which do, or should, underpin the determination of a particular sentence and the publication of the expected or intended result of future cases. Articulation of applicable principle is central to the reasoned exercise of jurisdiction in the particular matters before the court. By contrast, the publication of expected or intended results of future cases is not within the jurisdiction or the powers of the court."[22]

Most Queensland Court of Appeal sentencing decisions come within the first category of cases referred to in *Wong*: the articulated principles of sentencing that may guide the determination of similar cases. In that sense, most of my Court's sentence appeals are, and have always been, guideline judgments in the ordinary meaning of that term. See, for example, *R v*

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20 *Penalties and Sentences (Sentencing Advisory Council) Amendment Act* 2010 (Qld), No. 48.

21 (2001) 207 CLR 584.

22 Above, 615 [83].

O'Grady; ex parte A-G (Qld)[23] which concerned a serious example of street violence; *R v Bryant*[24] where the applicant pleaded guilty to nine different property offences and was a mature man with an extensive criminal history for like offences; and *R v Quick; ex parte ex parte A-G (Qld)*[25] where the respondent committed multiple sexual offences against a 14 year old boy, his former student.

But the term "guideline judgment" is now defined in s 15AA *Penalties and Sentences Act*. The definition distinguishes between guideline judgments in respect of Queensland laws and Commonwealth laws, no doubt in an attempt to avoid conflict with *Wong*. In this respect, s 15AC(2) states that a guideline judgment for an offence under a Commonwealth Act must be consistent with Commonwealth law; set out non-binding considerations to guide the future exercise of discretion and not purport to establish a rule of binding effect; and articulate principles to underpin the determination of a particular sentence and not state the expected decisions in a future proceeding.

The Court of Appeal may on its own initiative give or review a guideline judgment for offences against both Queensland and Commonwealth law: s 15AD.

And the Attorney-General, the Director of Public Prosecutions or the Chief Executive Officer of Legal Aid Queensland (LAQ) may apply to the Court of Appeal for a guideline judgment to be either given or reviewed: s 15AE(1). A person who has been convicted and is appealing can apply for a review of a guideline judgment: s 15AE(3). Each of those entities has a right of appearance in a guideline proceeding: s 15AF. If the Court gives or reviews a guideline judgment, it must consider consistency of approach in sentencing offenders and promoting public confidence in the criminal justice system: s 15AH(1)(a), principles which, I emphasise, are equally apposite to sentencing at first instance.

The Court must notify the Sentencing Advisory Council and consider the written views of the Council before a guideline proceeding (s 15AH(1)(b)) unless it concerns an appeal against sentence by a convicted person and the time taken to notify the Council and consider its views could result in injustice to the

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[23] [2003] QCA 137.
[24] [2007] QCA 247.
[25] [2006] QCA 477.

convicted person: s 15AH(2). The Court must also notify the Attorney-General, the Director of Public Prosecutions, the Chief Executive of LAQ and, if applicable, the convicted person whose sentence is in question in the giving or reviewing of a guideline judgment: s 15AI(2). If the Court has received the written views of the Sentencing Advisory Council, the Court must give a copy of the Council's views to those notified persons: s 15AI(3).

Subject to Part 2A *Penalties and Sentences Act*, the Court has an unfettered discretion to give or review a guideline judgment: s 15AJ(1)(a). The Court need not do so if it considers giving or reviewing a guideline judgment would be inappropriate: s 15AJ(1)(b). But if the Court decides not to give or review a guideline judgment, it must give reasons: s 15AJ(2). The Court has unlimited power to receive evidence or to take matters into consideration in giving or reviewing a guideline judgment: s 15AK.

Once given or varied, a guideline judgment is additional to the governing principles set out in Part 2 of the *Penalties and Sentences Act*: s 15AL.

The Victorian Court of Appeal has, since 2004, been subject to legislation purporting to authorise the giving of guideline judgments, broadly of the kind set out in Part 2A *Penalties and Sentences Act*. Victorian Court of Appeal President, Chris Maxwell, confirmed to me last week that Victoria has not yet given any legislative guideline judgments.

It may be that the constitutionality of Part 2A *Penalties and Sentences Act* will be challenged if and when the Court of Appeal is first asked to give a guideline judgment. I will be monitoring the life of guideline judgments in Queensland with intense interest. And so will you: if the Queensland Court of Appeal gives guideline judgments, and the legislative provisions are not successfully challenged as unconstitutional, you will find them useful, indeed binding, insofar as they state matters of legal principle or are relevant to offences within your jurisdiction.

Sentencing Advisory Council's Minimum Standard Non-Parole Periods Consultation Paper and Sentencing of serious violent Offences and sexual offences in Queensland research paper

I could not give a current paper on sentencing without mentioning the Queensland Sentencing Advisory Council's inaugural project. It is to give recommendations to the legislature as to the implementation of minimum standard non-parole periods (SNPPs) for serious violent offences and sexual offences. The consultation paper suggests that the legislature has determined already to impose SNPPs. Unlike other jurisdictions which already have SNPPs, Queensland has Part 9A *Penalties and Sentences Act* which requires those convicted of serious violent offences under Part 9A to serve 80 per cent of their term of imprisonment before parole eligibility.[26]

According to the Council's consultation paper, one of the objectives of the Queensland government in considering the introduction of SNPPs is "to provide additional guidance to courts in sentencing to ensure that appropriate consideration is given to the actual minimum time an offender must spend in prison".[27] Well, I suppose standard minimum parole periods is a form of guidance – of the sledgehammer, non-optional kind!

The consultation paper in Chapter 7 sets out possible detrimental impacts of SNPPs on the criminal justice system with reference to the New South Wales experience. These are said to include:

- concerns about police over-charging offenders to support successful plea negotiations later;
- placing pressure on vulnerable, innocent people charged with offences to plead guilty to avoid the strict application of the scheme;
- additional work for the DPP in preparing and prosecuting matters to determine whether SNPP offences should be dealt with on indictment or summarily and in preparing sentencing submissions;
- potential for an increase in matters to be dealt with in the higher courts;
- greater complexity of sentence hearings contributing to court backlogs and increases in appeals;
- potentially longer sentences of imprisonment and increased costs.

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26 *Corrective Services Act* 2006 (Qld), s 182.

27 Consultation paper, *Minimum standard non-parole periods*, Ch 2, p 37.

An additional concern is that SNPPs will almost certainly disproportionately impact on Indigenous Australians and create an upward spiral of the already shockingly large numbers of Indigenous people in custody in Queensland.

Of further concern, the Council is considering whether to recommend that SNPPs should operate retrospectively.[28]

Appendix 4 to the consultation paper (Glossary) contains the following definitions:
" **'Serious violent offence' (SVO) as defined in the *Penalties and Sentences Act 1992* (Qld) –** A 'serious violent offence', as defined for the purposes of Part 9A of the *Penalties and Sentences Act 1992* (Qld), are offences listed in Schedule 1 of the Act. A declaration by a court that an offender has been convicted of a 'serious violent offence' means that the offender must serve 80 per cent of his or her prison sentence or 15 years in prison (whichever is the lesser) before being eligible to apply for parole; and
Serious violent offence – A serious violent offence, in the ordinary use of the term, means an offence involving serious violence against the person."

I have no problem with those definitions, but in Ch 5 under the sub-heading "What offences are currently defined as 'serious violent offences'…?" the consultation paper states:
"The offences currently defined as being 'serious violent offences' are those included in Schedule 1 to the *Penalties and Sentences Act*."[29] This statement is apt to mislead and confuse and is not consistent with either definition in the Glossary. An offender is convicted of a serious violent offence under Part 9A *Penalties and Sentences Act* only if the offender is convicted on indictment of a Schedule 1 offence (or of counselling or procuring its commission, or attempting or conspiring to commit it) and either sentenced to 10 or more years imprisonment,[30] or the offender is *declared to be convicted of a serious violent offence under s 161B(3) or (4)*.

The legislature had good reason for stating in Part 9A that Schedule 1 offences in respect of which sentences of less than 10 years are imposed are not serious violent offences in the absence of a declaration by the court. There can be relatively minor

[28] Above, Ch 7, p 129.
[29] Above, Ch 5, p 87.
[30] *Penalties and Sentences Act,* s 161A.

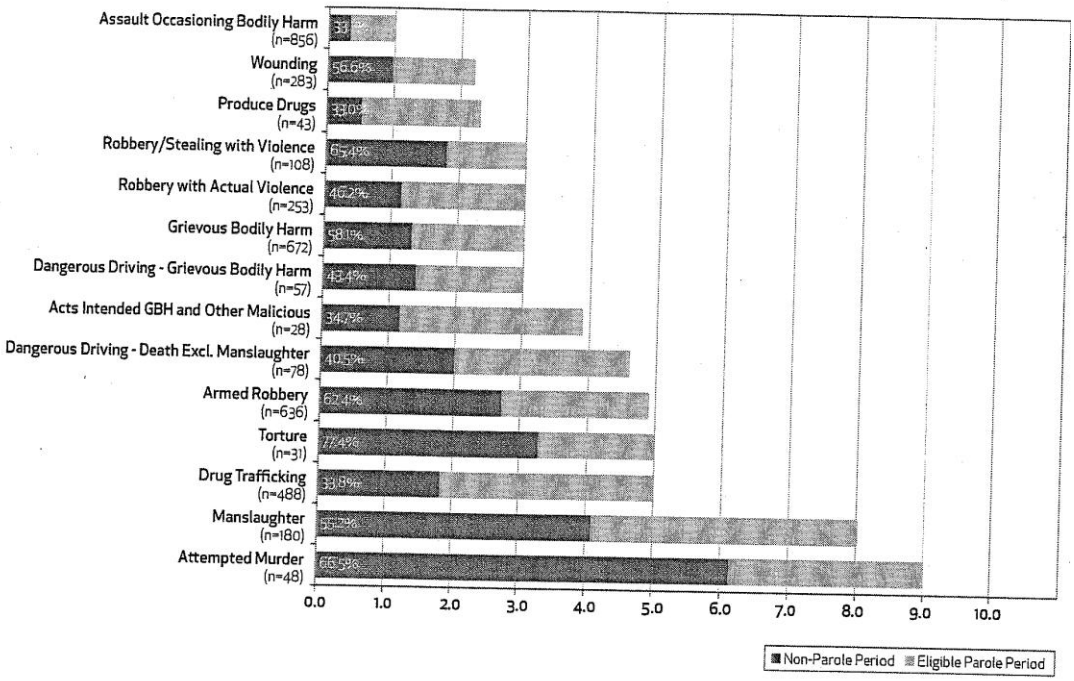
examples of many of the offences listed in Schedule 1. The legislature's approach in Part 9A reflects the self-evident truth that the facts of Schedule 1 offences where the sentences imposed are less than 10 years must be considered in determining if they are serious violent offences.

By way of illustration, Schedule 1 includes the offence of threatening violence under s 75 *Code*, an offence punishable by a maximum penalty of as little as two years imprisonment. If, in a stressful life moment, someone with no prior violent history threatens to punch another and does nothing more, surely this is not a serious violent offence. To suggest otherwise, as the consultation paper does, is inconsistent with the definition of "serious violent offence" under the *Penalties and Sentences Act* and in the consultation paper's Appendix 4 (Glossary). The Council's approach is likely to suggest to members of the public that there are far more "serious violent offences" being committed in Queensland than in truth is the case.

This confusing approach in the consultation paper to what is a serious violent offence also colours the Council's research paper *Sentencing Serious Violent Offences and Sexual Offences in Queensland*, which was released with the consultation paper. In its glossary of terms it defines 'serious violent offences' as "Selected offences from Schedule 1 – Serious Violence Offences of the *Penalties and Sentences Act 1992* (Qld)". Nowhere is there a list of which selected offences from Schedule 1 are said to be serious violent offences. I was puzzled by a number of tables in the research paper which showed that offenders convicted of "serious violent offences" often served less than 50 per cent of their

sentences in custody. See, for example, Figure 13.

Figure 13: Average time served in custody and average sentence length (in years) for sentenced offenders discharged from custody with a serious violent offence (as most serious offence), 2000–10



Source: QCS unit record data
Note: Offences may be excluded from analyses because of insufficient sample size (that is, fewer than 10) to calculate reliable average sentence lengths. Average time served in custody information may be biased by the inclusion of offenders not subject to SVO legislation in the corrections data.

How could this be, I thought, when those convicted of serious violent offences under Part 9A must serve at least 80 per cent of their sentence in custody before parole eligibility.[31] These graphs must be based on those sentenced to terms of imprisonment for Schedule 1 offences, but not necessarily where a court has made a declaration under Part 9A that the offence was a serious violent offence. These graphs seem to be misleading in that they suggest that those convicted of serious violent offences in Queensland spend less time in custody than in truth they do. And the public are invited to make submissions on this basis. This approach of the Sentencing Advisory Council causes me deep concern for the future of our criminal justice system.

Conclusion

Let me conclude with a topical brain teaser.

A magistrate was about to sentence a man who had pleaded guilty to a concerning example of serious assault under s 340 *Code*. The man was self-represented. It had been a tedious day and the magistrate decided she could do with some intellectual stimulation.

31 *Corrective Services Act* 2006 (Qld), s 182.

She told him, "You may make a statement to me. If it is true, I will sentence you to six months imprisonment. If it is false, I will sentence you to two years imprisonment." After the man made his statement, the magistrate discharged him without punishment. What did he say?

Here's the solution. The offender said, "You'll sentence me to two years imprisonment." If what he said was true, the magistrate would, according to her undertaking, have to sentence him to six months imprisonment. But that would make his statement false! If what he said was false, she would, according to her undertaking, have to sentence him to two years imprisonment. But this would make his statement true! Realising she had been checkmated and rather than breach her undertaking to the offender, the magistrate set him free.

While that may be an interesting brain teaser and a useful exercise in lateral thinking, such reasoning would likely send the prosecution straight to the District Court under s 222!

Best to stick to Part 2 *Penalties and Sentences Act*, common law principles, comparable sentences and the giving of brief but sound reasons.

I wish you well in the difficult task we share of sentencing offenders according to legal principle; in balancing the exacerbating and mitigating features in each unique case; in determining sentences within the appropriate range; and in explaining our decisions to the offender, the victim and the public so that confidence in the criminal justice system is maintained.