

Achieving Consistency in Sentencing: Moving to Best Practice?

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Traditionally, sentencing in Australia has been characterised by the presence of judicial discretion, which is typically exercised subject to appellate review and any common law or legislative restrictions. Sentencing laws introduced over the past 10–15 years in most Australian jurisdictions list the purposes for which sentences may be imposed, and provide principles of sentencing under which this is to be done.¹ Generally it is left to individual judicial officers, in the exercise of their discretion, to apply these principles to the case before them in a way that they see fit, according to all of the circumstances of the case. This wide judicial discretion is now beginning to be eroded by various legislative restrictions. These have included mandatory sentencing laws,² restrictions on sentences for violent offenders,³ and even proposals for sentencing grids.⁴ Guideline judgments, mandatory sentencing schemes, and sentencing grids have been identified as constituting ‘potentially serious encroachments’ on judicial discretion.⁵

This article examines firstly consistency as a central sentencing imperative. It then addresses methods adopted in various jurisdictions for the regulation of judicial discretion in sentencing, namely computerised information retrieval systems, sentencing grids, mandatory sentencing and guidelines judgments. The usefulness of these strategies in achieving consistency is then discussed in the context of the Queensland sentencing system,

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1 See *Penalties and Sentences Act 1992* (Qld) s 9; *Sentencing Act 1991* (Vic) s 5; and *Sentencing Act 1995* (NT) s 5 which are very similar provisions; see also *Sentencing Act 1995* (WA) s 6; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1997* (Tas) s 3; *Crimes Act 1914* (Cth) s 16A; *Crimes Act 1900* (ACT) ss 429, 429A. New South Wales has enacted legislation which is largely administrative and procedural in nature: *Crimes (Sentencing Procedure) Act 1999* (NSW); *Crimes (Administration of Sentences) Act 1999* (NSW); and *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW).

2 See eg, *Sentencing Act 1995* (NT), Division 6, in particular s 78A; *Crime (Serious and Repeat Offenders) Act 1992* (WA) (note that these provisions have now been repealed), and now s 401(4) *Criminal Code 1913* (WA). The NT provisions were repealed in 2001 after a change in government; see *Sentencing Amendment Act (No 3) 2001* (NT), which came into effect on 22 October 2001. Section 78A–B have been replaced with a new category of Aggravated Property Offences, which although restrictive, does not prescribe mandatory imprisonment. The mandatory sentencing provisions for juveniles were likewise repealed by the *Juvenile Justice Amendment Act (No 2) 2001*.

3 See eg, Part 9A Serious Violent Offenders, *Penalties and Sentences Act 1992* (Qld); Part 2A Serious Offenders, *Sentencing Act 1991* (Vic). See also Arie Freiberg, ‘Guerillas in our Midst?’ in Mark Brown and John Pratt (eds), *Dangerous Offenders: Punishment and Social Order*, Routledge, London, 2000, 66–68 in relation to the restrictions on discretion for those deemed dangerous offenders.

4 The Western Australian Parliament proposed the introduction of a sentencing matrix system, initially via the Sentencing Legislation Amendment and Repeal Bill 1998. This Bill was divided in two in 1999, including the Sentencing Matrix Bill 1999, which provided for the establishment of a two-stage sentencing matrix system. This Bill then became the Sentencing Amendment Bill 2000, which was passed and assented to on 6 December 2000 (Act no 64 of 2000). The Act was not proclaimed before the 2001 Western Australian elections, which resulted in a change in Government.

5 George Zdenkowski, ‘Sentencing Trends: Past, Present and Prospective’ in Duncan Chappell and Paul Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond*, Butterworths, Sydney, 2000, 173–180.

and conclusions drawn on the utility of adopting these approaches in gaining greater uniformity and fairness in sentencing.

I. Consistency

Consistency in sentencing, and conversely avoiding undue disparity, has often been said to be a fundamental principle of criminal law and sentencing.⁶ Consistency was one of the main reasons cited by the New South Wales Court of Criminal Appeal in *R v Jurisic*⁷ for the promulgation of judicial sentencing guidelines.⁸ In that case, Chief Justice Spiegelman makes the clear link between having consistency in sentencing decisions and thereby doing justice in the circumstances of a particular case, and achieving public confidence.⁹

Because sentences are determined on an individual basis in the exercise of judicial discretion, the issue of consistency between different sentences, and with that, the subject of disparity inevitably arises.¹⁰ As Richard Fox and Arie Freiberg point out, disparity can arise with respect to the consistency of the same sentencer in treating like offenders in like cases, the consistency of different sentencers in the same jurisdiction dealing with like cases, or cases dealt with in different localities within a jurisdiction or between jurisdictions.¹¹ To this list can be added disparity between co-offenders.¹²

Issues of consistency and disparity have arisen in the various reviews of sentencing which have taken place in the past twenty years.¹³ Numerous reasons have been put forward to explain such alleged disparity, however Fox and Freiberg note that blame is frequently attributed to the application of different penal philosophies, caused by legislative inconsistency in sentencing policy.¹⁴ Not all commentators would agree that differing penal philosophy is the only basis for such disparity, arguing that it is a complex mix of institutional and social factors, and individual perspectives and decision-making skills of the individual sentencer.¹⁵ Some studies of disparity involving identical facts given to sentencers are able to show significant variation in outcomes.¹⁶ Despite a study by Weatherburn showing substantial disparity in sentencing between two groups of District

- 6 See eg, Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee*, Attorney-General's Department, Victoria, Melbourne, 1988, 146; see also comments by Kirby J in *Wong v The Queen* [2001] HCA 64, (2001) 185 ALR 233, at [89], citing Mason J in *Lowe v The Queen* (1984) 154 CLR 606, 610.
- 7 (1998) 45 NSWLR 209.
- 8 See discussion on guidelines below.
- 9 *R v Jurisic* (1998) 45 NSWLR 209, 221.
- 10 George Zdenkowski, 'Limiting Sentencing Discretion: Has There Been a Paradigm Shift?' (2000) 12 *Current Issues in Criminal Justice* 58.
- 11 Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed, Oxford University Press, Melbourne, 1999, para 1.220. See also Victorian Sentencing Committee Report, above n 6, 147–148.
- 12 *Lowe v The Queen* (1984) 154 CLR 606.
- 13 See Australian Law Reform Commission, *Sentencing: Report No 44*, Australian Government Publishing Service (ALRC 44), Canberra, 1988, 156–161; Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, Canadian Government Publishing Centre, Ottawa, 1987, 71–76; Victorian Sentencing Committee Report, above n 6, 146–157; New South Wales Law Reform Commission, *Sentencing: Discussion Paper No 33*, New South Wales Law Reform Commission, Sydney, 1996, 30–35; New South Wales Law Reform Commission, *Sentencing (Report No 79)*, Law Reform Commission Publications, Sydney, 1996.
- 14 Fox and Freiberg, above n 11, 30.
- 15 See for example, Jeanette Lawrence and Ross Homel, 'Sentencing in the Magistrates' Courts: The Magistrate as Professional Decision Maker' in Ivan Potas (ed), *Sentencing: Problems and Prospects*, Proceedings of a Seminar held at Australian Institute of Criminology, 18–21 March 1986, Canberra, 1987.
- 16 See for example a brief study of sentencing by 84 magistrates at an annual conference, carried out by the NSW Deputy Chief Magistrate in 1986: Kevin Anderson, 'Sentencing in Magistrates' Courts' in Ivan Potas (ed), *Sentencing: Problems and Prospects*, Proceedings of a Seminar held at Australian Institute of Criminology, 18–21 March 1986, Canberra, 1987.

Court judges in New South Wales,¹⁷ the New South Wales Law Reform Commission denied that the study provided evidence of general sentencing disparity in that court,¹⁸ and concluded it could not be inferred from such studies that widespread sentencing disparity existed.¹⁹

Disparity in sentences between offenders charged with similar offences may be justified in particular cases, based on different personal circumstances, particularly so in the case of offenders with differing criminal histories.²⁰ Unjustified disparity however is a matter of legitimate concern.

The existence of undue disparity in sentencing (should it be shown to exist), offends against the general principle that like cases should be treated in a like manner.²¹ The distinction needs to be made however between justified and unjustified disparity, as disparity between sentences may be clearly justified on the grounds of seriousness of the offence, number of previous convictions, youth or a multitude of other considerations.²² The Victorian Sentencing Committee in their 1988 report provided a definition of unjustified disparity:

Unjustified disparity in sentencing is the imposition of dispositions of differing severity or the same disposition but of differing severity on two or more individuals who have, or the same individual who on two or more occasions has, committed an offence of the same degree of seriousness where that difference in disposition is caused by a factor other than the one which gives a legitimate reason for differentiating the dispositions in the manner which has occurred.²³

According to American commentator Michael Tonry, 'There is unfortunately, no way round the dilemma that sentencing is inherently discretionary and that discretion leads to disparities.'²⁴ In the current system in most Australian jurisdictions, because individual judges sentence offenders (and are accorded considerable discretion), there is potential for the sentences to differ.

II. Is there a link between unstructured discretion and disparity?

Tonry in his book *Sentencing Matters* points out that unstructured discretion may have an association with unwarranted disparity.²⁵ Andrew Ashworth states that it is not hard to obtain agreement that the elimination of judicial discretion would sacrifice the courts' ability to do justice by way of individualising the sentence in a particular case, but also notes potential difficulties with this approach.²⁶

The Queensland sentencing system, in common with other Australian jurisdictions, gives the sentencer a central and powerful role in the process. If judges are given a free rein in interpreting sentencing guidelines²⁷ (ie, relatively unlimited judicial discretion

17 Don Weatherburn, *Sentence Disparity and its Impact on the NSW District Criminal Court*, New South Wales Bureau of Crime Statistics and Research, Sydney, 1994.

18 NSWLRC, *Sentencing: Discussion Paper No 33*, above n 13, 33.

19 NSWLRC, *Sentencing (Report No 79)*, above n 13, 8–11.

20 *Lowe v The Queen* (1984) 154 CLR 606.

21 Victorian Sentencing Committee Report, above n 6, 146. Note that this report commissioned for the Victorian Government ultimately led to the enactment of the Victorian *Sentencing Act* 1991, which is very similar in format to the *Penalties and Sentences Act* 1992 (Qld).

22 See s 9(2) & (4) *Penalties and Sentences Act* 1992 (Qld), which set out the factors to be taken into account in sentencing offenders in Queensland.

23 Victorian Sentencing Committee Report, above n 6, 148.

24 Michael Tonry, 'Sentencing Reform Across National Boundaries' in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform*, Clarendon Press, Oxford, 1995, 271.

25 Michael Tonry, *Sentencing Matters*, Oxford University Press, New York, 1996, 177.

26 Andrew Ashworth, 'Reflections on the Role of the Sentencing Scholar' in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform*, Clarendon Press, Oxford, 1995, at 260.

27 As used in the Queensland sense of factors to be taken into account, eg in s 9 of the *Penalties and Sentences Act*.

instead of a prescriptive system), what are the consequences? There is a belief among some commentators that unjustifiable disparity between judges and sentencers has been a major concern, and that this in turn has led to a breakdown of confidence in the system, particularly by the public at large.²⁸ For example, according to Victorian criminologist Austin Lovegrove, disparity in sentencing has been the 'inevitable result' of the failure to set out the principles governing the exercise of discretion resulting in inconsistent application of policy; lack of a framework for judges to follow when making sentencing decisions resulting in inconsistency; and the complexity of sentencing where the judge must process a large volume of information, with the potential for the inappropriate omission or inclusion of factors.²⁹

There is disagreement however as to the fundamental question of whether unjustified disparity in sentencing exists. The submission by the majority of judges of the Supreme Court of Victoria to the Victorian Sentencing Committee disputed the existence of widespread disparity. According to that submission:

Those who sit in the Court of Criminal Appeal in Victoria would not subscribe to the view that there is such unjustified disparity amongst judges in Victoria though some judges tend to be more severe or more lenient in sentencing than others. This will always be the case, but the system of review by the Court of Criminal appeal should serve to correct a departure from what that Court considers to be within an appropriate range.³⁰

Sir Guy Green, formerly Chief Justice of Tasmania, also challenged the notion that there is widespread disparity in sentencing in Australia, and called into question some of the assumptions which lie behind those claims.³¹ He noted that since the 1970s there have been criticisms that judicial discretion in sentencing is exercised arbitrarily and inconsistently, with a lack of uniformity and widespread disparity,³² and saw a danger in the sheer volume of the criticisms being seen as lending support to the conclusion that the system is deficient. He further commented that just because these assertions of disparity and problems are 'frequently and loudly repeated does not make them valid'.³³

On the other hand, Lovegrove has conducted studies of disparity in the sentencing system, and puts the case that many of the recent sentencing reforms have sprung from a view that there is disparity in the sentencing of offenders.³⁴ He draws a distinction between the approach where disparity is seen as the problem, and that which regards disparity as a symptom, the latter being the preferred method.³⁵ Lovegrove however, in previous writings,³⁶ acknowledges that there are inevitable weaknesses in evidence offered in support of disparity, such as a lack of adequate controls, however he notes that the case for doing something about sentencing does not stand or fall on the strength of such

28 See eg, Weatherburn, above n 17; Don Weatherburn and Bronwyn Lind, 'Sentence Disparity, Judge Shopping and Trial Court Delay' (1996) 29 *The Australian and New Zealand Journal of Criminology* 147; Austin Lovegrove, 'Sentencing Guidance and Judicial Training in Australia' in Colin Munro and Martin Wasik (eds), *Sentencing, Judicial Discretion and Training*, Sweet and Maxwell, London, 1992.

29 Lovegrove (ibid) 208–209.

30 Victorian Sentencing Committee Report, above n 6, Appendix A, A–6. This report ultimately led to the enactment of the *Victorian Sentencing Act* 1991, which is very similar in format to the *Penalties and Sentences Act* 1992 (Qld).

31 Sir Guy Green, 'The Concept of Uniformity in Sentencing' (1996) 70 *Australian Law Journal* 112.

32 Ibid 113.

33 Ibid.

34 Austin Lovegrove, 'Structuring the Judicial Sentencing Discretion: Some Empirical Considerations on Reforms' in Andros Kapardis (ed), *Sentencing: Some Key Issues*, La Trobe University Press (special issue of *Law in Context* vol 13(2) 1995), Melbourne, 1995, 143. Lovegrove was also a member of the Victorian Sentencing Committee.

35 Ibid 144. See also discussion in Austin Lovegrove, 'An Empirical Study of Sentencing Disparity Among Judges in an Australian Criminal Court' (1984) 33 *International Review of Applied Psychology* 161.

36 Austin Lovegrove, *Judicial Decision Making, Sentencing Policy, and Numerical Guidance*, Springer-Verlag, New York, 1989.

evidence, as he takes the view that disparity is the inevitable consequence of judicial discretion.³⁷

As noted above, while it is undisputed that consistency is an important goal in sentencing, whether or not there remains unjustified disparity in the sentencing system remains a matter of debate. Arguably, the existence of appellate review allows correction of any such injustices based on disparity, and the system of wide judicial discretion currently in use allows the sentencer to take into account all of the circumstances of the case, both in relation to the offence and the offender.

It has already been noted that many of the so-called 'reforms' introduced in recent times have not been based on the need for greater consistency, but on law and order considerations and the perceived need for an escalation in severity.³⁸ Achieving greater consistency is however an important goal of the criminal justice system, and various methods by which this may be accomplished will now be considered.

III. Computerised sentencing information systems

One method of better informing the sentencing discretion and thus achieving greater consistency is the use of a computerised data retrieval system such as that employed in New South Wales. The Sentencing Information System (SIS) was developed by the Judicial Commission of New South Wales and launched in October 1990.³⁹ With continued evolution and improvement, there is said to have been a steady rise in the acceptance and use of the system in New South Wales.⁴⁰ The SIS not only contains a comparative sentencing database, called the Case Summaries Database, but also the Principles Database, which operates as an electronic textbook.⁴¹ Other SIS databases contain legislation, facilities (information on services for adult and juvenile offenders), selected High Court judgments, and publications.⁴²

In Queensland, both Legal Aid Queensland and the Director of Public Prosecutions maintain separate sentencing databases, used to inform submissions by defence counsel and prosecutors respectively. While these individual databases are a useful and important part of preparation for sentencing submissions, they are not a substitute for a detailed and comprehensive system such as the New South Wales SIS run by the Judicial Commission of New South Wales, with its team of researchers.

There is a compelling argument for the establishment of a similar Judicial or Sentencing Commission in Queensland charged with similar responsibilities, namely, the establishment of computerised sentencing databases, data collection and the conduct of research into sentencing, judicial education and training, advice and oversight on law reform, and public information and dissemination of information.

In recent years, the online availability and consequent free and ready access to Queensland Court of Appeal sentencing decisions has been a valuable enhancement to the

37 Ibid 3–4. See also discussion in Lovegrove, 'An Empirical Study of Sentencing Disparity Among Judges in an Australian Criminal Court', above n 35.

38 See Zdenkowski, 'Sentencing Trends: Past, Present and Prospective', above n 5, and discussion above.

39 See description of the early operation of the system in Graham Greenleaf, 'Making the Sentence Fit the Computer — or the Accused?' (1991) 65 *Australian Law Journal* 45, and Janet Chan, 'A Computerised Sentencing Information System for New South Wales Courts' (1991) 7 *Computer Law and Practice* 137. The evolution and current operation of the SIS is described in detail in Potas *et al*, 'Informing the Discretion: The Sentencing Information System of the Judicial Commission of New South Wales' (1998) 6 *International Journal of Law and Information Technology* 99. The five authors of that article were all employed by the Judicial Commission of New South Wales.

40 Potas *et al* (ibid) at 124.

41 Ibid 108–110.

42 Ibid 110.

dissemination of principles in sentencing decisions,⁴³ and these decisions can be readily searched. The comprehensive databases and research such as that available through the NSW SIS would enable access to significantly more information than is currently the case. Care has to be taken however in the use of such data, that sentencing continues to be an exercise of discretion, taking into account the unique circumstances of each case.⁴⁴ If such care were not taken, the use of data from a sentencing information system may come to be indistinguishable from a sentencing grid system, discussed below.

IV. Sentencing grids

The Queensland system of wide sentencing discretion under the *Penalties and Sentences Act 1992* (Qld) is directly antithetical to the recent United States experience in some jurisdictions of sentencing commissions, guidelines and grids. In 1972, Judge Marvin Frankel mooted the idea of sentencing commissions which would develop rules, or guidelines, for sentencing,⁴⁵ thus in effect vesting discretion not in the legislature or the sentencing court, but in an appointed commission.⁴⁶ The sentencing commission proposal was first adopted by four States; Minnesota,⁴⁷ Oregon, Washington and Pennsylvania.⁴⁸ By 1996, 25 States had created sentencing commissions, and sentencing guidelines were either in effect or development in 20 States.⁴⁹ Guidelines for the United States federal jurisdiction were introduced by the United States Sentencing Commission in 1987,⁵⁰ but not without substantial controversy as to their operation, being described by one prominent

- 43 See the Queensland Courts Home Page at <<http://www.courts.qld.gov.au/qjudgment/ca.htm>>, (but note that sentencing decisions from the Supreme Court Trial Division and the District Court are not available electronically); and AUSTLII: <<http://www.austlii.edu.au/au/cases/qld/QCA/>>.
- 44 See comments by Kirby J in *Wong v The Queen* [2001] HCA 64, (2001) 185 ALR 233, at [91], and note also the critical comments by Gaudron, Gummow and Hayne JJ at [59] regarding the use of bare statistics about sentences. See also comments regarding the limitations of the use of statistics in sentencing in *R v AEM* [2002] NSWCCA 58, at [110]–[117].
- 45 Marvin Frankel, *Criminal Sentences: Law Without Order*, Hill and Wang, New York, 1972. See later comment by Frankel on the operation of guidelines in Marvin Frankel and Leonard Orland, 'Fourteenth Annual Review of Criminal Procedure: United States Supreme Courts and Courts of Appeals 1983–84: Sentencing Commissions and Guidelines' (1984) 73 *Georgetown Law Journal* 225; Marvin Frankel, 'Sentencing Guidelines: A Need for Creative Collaboration' (1992) 101 *Yale Law Journal* 2043; Marvin Frankel and Leonard Orland, 'A Conversation About Sentencing Commissions and Guidelines' (1993) 64 *Colorado Law Review* 655; and Michael Tonry, 'The Success of Judge Frankel's Sentencing Commission' (1993) 64 *Colorado Law Review* 713.
- 46 Paul Robinson, 'The Federal Sentencing Guidelines: Ten Years Later: An Introduction and Comments' (1997) 91 *Northwestern University Law Review* 1231, 1232. See generally on US sentencing guidelines, Richard Frase, 'Sentencing Guidelines in Minnesota and Other American States: A Progress Report' in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform*, Clarendon Press, Oxford, 1995; Anthony Doob, 'The United States Sentencing Commission Guidelines: If you don't know where you are going, you might not get there' in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform*, Clarendon Press, Oxford, 1995.
- 47 For a detailed description and defence of the Minnesota guidelines, see Richard Frase, 'The Uncertain Future of Sentencing Guidelines' (1993) 12 *Law and Inequality* 1; see also Frase, 'Sentencing Guidelines in Minnesota and Other American States: A Progress Report', above n 46. On the construction of the guidelines, see Andrew von Hirsch, 'Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Sentencing Guidelines Commission' (1985) 5 *Hamline Law Review* 164.
- 48 Andrew von Hirsch, 'Proportionality and Parsimony in American Sentencing Guidelines: The Minnesota and Oregon Standards' in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform*, Clarendon Press, Oxford, 1995, 149.
- 49 Tonry, *Sentencing Matters*, above n 25, 10; Richard Frase, 'State Sentencing Guidelines: Still Going Strong' (1995) 78 *Judicature* 173. It is important to note that all sentencing guidelines systems are not the same: see Frase, 'The Uncertain Future of Sentencing Guidelines', above n 47. See also Lisa Stansky, 'Breaking Up Prison Gridlock' (1996) 82 *ABA Journal* 70, with respect to the development of state guidelines schemes.
- 50 See description of the guidelines and criticism of their operation in Tonry, *Sentencing Matters*, above n 25, chapter 3. Details of the US Sentencing Commission and the Guidelines Manual are available on the US Sentencing Commission's website: <<http://www.ussc.gov/>>.

commentator as 'the most controversial and disliked sentencing reform initiative in US history'.⁵¹

Sentencing guidelines in the United States are normally set out in a two dimensional grid.⁵² Although the details differ between jurisdictions, grids typically have one axis representing the seriousness of the offence, and the other the previous convictions of the offender.⁵³ According to Tonry, the two dimensional grid 'produces unjust results and conduces to needlessly harsh sentences' because of both the over-emphasis on severity,⁵⁴ and the psychology of sentencing grids themselves, which he says are 'blunt instruments when applied to sentencing operations for which scalpels are often needed'.⁵⁵ Thus, Tonry argues there is a reification of thinking about punishment which emphasises criminality⁵⁶ instead of an holistic approach.⁵⁷

Benefits claimed for the use of sentencing guidelines are commonly based on reductions in disparity.⁵⁸ According to Anthony Doob,⁵⁹ the goals of the United States Sentencing Commission are to create honesty in sentencing, and uniformity and proportionality; the last mentioned term apparently referring to escalation in severity, rather than the normal meaning.⁶⁰ Despite their claimed advantages in the reduction of undue disparity, there are still many critics of the system, for example this statement by Professor Albert Alschuler:

In evaluating sentencing commissions, one must ask, 'compared to what?' Sentencing by a commission may be preferable to sentencing by a legislature, but neither is preferable to individualised sentencing. The sentencing reforms of the past dozen years have pointed in some useful directions; but in their current form, they are bankrupt. Some things are worse than sentencing disparity, and we have found them.⁶¹

The operation of the United States federal guidelines in particular have been subject to detailed scrutiny. Much of the comment on the federal guidelines has been critical.⁶² Tonry has summarised the criticisms into a number of grounds, which are: policy (undue narrowing of judicial discretion and the shift of discretion to prosecutors),⁶³ process (they

51 Tonry, *Sentencing Matters*, above n 25, 72.

52 Ibid 14. This is not always the case however, as noted above.

53 Ibid 14–15.

54 Ibid 15.

55 Ibid 20.

56 See also the arguments in Albert Alschuler, 'The Failure of Sentencing Commissions' (1991) 141 *New Law Journal* 829, which states that the focus has been (wrongly) on harms, not people.

57 Tonry, *Sentencing Matters*, above n 25, 20. Tonry notes the possibility of disparity and bias with indeterminate sentencing, but notes that the system allowed judges to take account of the crime and all of the relevant circumstances.

58 Ibid 40. But see Joel Waldfogel, 'Does Inter-judge Disparity Justify Empirically Based Sentencing Guidelines?' (1998) 18 *International Review of Law and Economics* 293 where it is argued that such reduction does not offset the associated loss in proportionality.

59 Doob, above n 46, 204.

60 Doob points out that the US Guidelines have had their desired impact on severity, and that there has been a dramatic increase in the imprisonment rate: ibid 238.

61 Alschuler, above n 56, 829.

62 Summarised in Tonry, *Sentencing Matters*, above n 25, chapter 3.

63 It can also be argued that the discretion has been largely shifted to the sentencing commission: Paul Robinson, 'The Federal Sentencing Guidelines: Ten Years Later: An Introduction and Comments' (1997) 91 *Northwestern University Law Review* 1231, 1232. For an analysis of the use of discretion under the guidelines, see John Walker, 'Loosening the Administrative Handcuffs: Discretion and Responsibility Under the Guidelines' (1993) 59 *Brooklyn Law Review* 551 (the author is a United States Circuit Judge for the Second Circuit). Cf mandatory sentencing, where it has been argued that discretion has likewise been transferred to prosecutors, and other parts of the criminal justice system: Neil Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24 *Criminal Law Journal* 164, 177–178; Russell Hogg, 'Mandatory Sentencing Laws and the Symbolic Politics of Law and Order' (1999) 22 *UNSW Law Journal* 262, 263.

are being circumvented by prosecutors and judges)⁶⁴ ethics (forcing key decisions behind closed doors and fostering hypocrisy); technocratic grounds (too complex and hard to apply accurately); fairness (because only the offence or offence behaviour and criminal record is taken into account,⁶⁵ not other circumstances); on outcome and normative grounds, for the reasons that they have not in fact reduced sentencing disparity;⁶⁶ and they are too harsh.⁶⁷

Various US State sentencing guidelines have also been subject to examination, however the assessment has not been as negative.⁶⁸ Some studies have also suggested that the use of guidelines can significantly increase the use of imprisonment as a sentencing option,⁶⁹ thereby leading to problems of prison overcrowding.⁷⁰

It is useful also to note that an alternative to sentencing grids, non-numerical guidelines, has been favoured in parts of Europe, for example, Sweden. This less restrictive approach to sentencing regulation has been identified with a number of significant advantages in the Swedish system, including detection of disparity, the development of sentencing precedents by the courts and more explicit reasoning in court decisions.⁷¹

It has to be concluded that the use of sentencing grids has led to unfairness in many cases, and would be unlikely to be adopted in Australian jurisdictions, at least without a substantial paradigm shift in sentencing policy. The use of non-numerical guidelines as adopted in Sweden has merit, but the likelihood of judicial and practitioner resistance is high to any such suggested restrictions on discretion. The inability of numerical guidelines, or even strict non-numerical guidelines, to discriminate effectively and fairly between different offence and offender characteristics, leads to understandable reluctance on the part of commentators, practitioners and the judiciary to embrace such systems. Western

- 64 See Chantale Lacasse and Abigail Payne, 'Federal Sentencing Guidelines and Mandatory Minimum Sentences: Do Defendants Bargain in the Shadow of the Judge?' (1999) 42 *Journal of Law and Economics* 245; and also Jennifer Reinganum, 'Sentencing Guidelines, Judicial Discretion, and Plea Bargaining' (2000) 31(1) *Rand Journal of Economics* 62.
- 65 As to the use of the criminal record in sentencing guideline systems, see Julian Roberts, 'The Role of the Criminal Record in the Sentencing Process' in Michael Tonry (ed), *Crime and Justice: A Review of Research*, vol 22, The University of Chicago Press, Chicago, 1997.
- 66 For a discussion on disparity under the federal guidelines, see Paul Hofer, Kevin Blackwell and Barry Ruback, 'The Effect of the Federal Sentencing Guidelines on Interjudge Sentencing Disparity' (1999) 90 *Journal of Criminal Law and Criminology* 239, where it is stated that despite there being no consensus on whether the federal guidelines have reduced unwarranted disparity, the guidelines have had a modest but meaningful success at reducing disparity.
- 67 Tonry, *Sentencing Matters*, above n 25, 72.
- 68 Von Hirsch, 'Proportionality and Parsimony in American Sentencing Guidelines: The Minnesota and Oregon Standards', above n 48, 164–167; Frase, 'Sentencing Guidelines in Minnesota and Other American States: A Progress Report', above n 46, 169; Frase, 'The Uncertain Future of Sentencing Guidelines', above n 47; Kay Knapp, 'Allocation of Discretion and Accountability Within Sentencing Structures' (1993) 64 *Colorado Law Review* 679.
- 69 See Stewart D'Alessio and Lisa Stolzenberg, 'The Impact of Sentencing Guidelines on Jail Incarceration in Minnesota' (1995) 33 *Criminology* 283, 197; but cf Carlisle Moody and Thomas Marvell, 'The Uncertain Timing of Innovations in Times Series: Minnesota Sentencing Guidelines and Jail Sentences — a Comment' (1996) 34 *Criminology* 257 which calls D'Alessio and Stolzenberg's claims of escalation 'spurious'.
- 70 This has been a complex issue. One study (funded by the National Institute of Justice, United States Department of Justice) of the relationship between sentencing guidelines and prison populations in nine US States concluded that in six States where there was legislation for guideline framers to consider prison capacity when establishing guidelines for prison lengths, guidelines were associated with declines in the prison populations: Thomas Marvell, 'Sentencing Guidelines and Prison Population Growth' (1995) 85 *Journal of Criminal Law and Criminology* 696.
- 71 Nils Jareborg, 'The Swedish Sentencing Reform' in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform*, Clarendon Press, Oxford, 1995, 122–123. See also further description and commentary on the Swedish reforms in Andrew von Hirsch and Nils Jareborg, 'The Swedish Sentencing Law' in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing*, 2nd ed, Hart Publishing, Oxford, 1998; Andrew von Hirsch, 'Principles for Choosing Sanctions: Sweden's Proposed Sentencing Statute' (1987) 13 *New England Journal on Criminal and Civil Confinement* 171.

Australia has been the only Australian jurisdiction thus far to legislate for sentencing grids, although the legislation was not proclaimed.⁷²

V. Mandatory sentences

As noted above, the Northern Territory introduced mandatory minimum sentences in 1997 for adult property offences, with a minimum sentence of not less than fourteen days for the first offence, ninety days for the second, and twelve months for the third; irrespective of the circumstances of the offence or the offender. These mandatory provisions relating to property offences have now been repealed, (as of 22 October 2001), and replaced with a new category called Aggravated Property Offences, which although restrictive in operation, does not have the effect of mandatory imprisonment.⁷³ Mandatory provisions for sentencing of juveniles convicted of a second property offence have also now been repealed.⁷⁴

Mandatory sentences in the Northern Territory were later extended to offences other than property; namely violent offences,⁷⁵ and sexual offences.⁷⁶ Western Australia introduced mandatory sentencing laws for a third offence on particular charges for both adult and juvenile offenders in 1992.⁷⁷ In 1996, WA introduced minimum mandatory imprisonment of 12 months for 'repeat' home burglary offenders, which applied when the offender had been twice previously convicted of the same offence.⁷⁸

The non-discrimination in relation to seriousness of the offence of the Northern Territory's mandatory minimum sentencing laws for property offenders meant that adult offenders were obliged to serve an actual jail term of 14 days even for a first, trivial offence. For second and third offences, the escalating jail terms did not differentiate between the seriousness of the offence; illustrated by a case in February 2000 where a 21 year old Australian Aboriginal man was sentenced to 12 months in prison for stealing \$23 worth of biscuits and cordial.⁷⁹

72 The enabling legislation creating the sentencing matrix (or grid) proposal was the *Sentencing Legislation Amendment and Repeal Bill 1998*, parts of which became the *Sentencing Matrix Bill 1999*, which in turn became the *Sentencing Amendment Bill 2000*. This Bill was enacted, and assented to on 6 December 2000 (Act no 64 of 2000). The Act has not been proclaimed (as far as can be ascertained).

73 See (former) sections 78A and 78B *Sentencing Act 1995* (NT), and see now ss 78A and 78B *Sentencing Act 1995* (NT) (as amended).

74 See previously s 53 AE(2) *Juvenile Justice Act*, repealed by the *Juvenile Justice Amendment Act (No 2) 2001*, which took effect from 22 October 2001. See also Helen Bayes, 'Punishment is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory' (1999) 22 *UNSW Law Journal* 286.

75 Section 78BA *Sentencing Act 1995* (NT): offender must serve period of actual or suspended imprisonment if previously found guilty of a violent offence.

76 Section 78BB *Sentencing Act 1995* (NT): offender must serve period of actual or suspended imprisonment if convicted of a first sexual offence. Neither of the mandatory provisions for violent offences and sexual offences has been repealed.

77 *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA). These provisions have now been repealed.

78 Section 401(4) *Criminal Code 1913* (WA). See also Neil Morgan, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' (1999) 22 *University of New South Wales Law Journal* 267; Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?', above n 63; and Roderic Broadhurst and Nini Loh, 'The Phantom of Deterrence: The Crime (Serious and Repeat Offenders) *Sentencing Act*' (1993) 26 *The Australian and New Zealand Journal of Criminology* 251. There is also mandatory imprisonment for juveniles for home burglary in WA, which tends to be overlooked in the mandatory sentencing debate, see *Criminal Code* (WA) s 401 and *Young Offenders Act 1994* (WA), and Bayes, above n 74.

79 Mike Seccombe, 'Biscuit Thief Jailed as MPs Quibble', *Sydney Morning Herald*, Sydney, 17 February 2000.

Although claimed to be electorally popular,⁸⁰ the mandatory sentencing laws attracted considerable criticism from the judiciary,⁸¹ the legal profession,⁸² politicians,⁸³ church and community groups⁸⁴ and commentators.⁸⁵ It has also been argued that the laws may be vulnerable to constitutional attack.⁸⁶ One of the central criticisms of the laws of the Northern Territory has been the unduly harsh effect on Indigenous Australians, who make up a disproportionate percentage of the prison population in that jurisdiction.⁸⁷ This has also been a criticism levelled at the WA legislation, particularly in relation to juveniles.⁸⁸ Other reasons include lack of proportionality to the offence,⁸⁹ lack of sound policy and theoretical justification,⁹⁰ a failure to show any crime reduction effect,⁹¹ and the cost of incarceration of offenders under the schemes.⁹² Added to this are the consequences for the administration of justice, with fewer guilty pleas and increased pressure on the courts and

- 80 Northern Territory Government, *What it is All About*, Northern Territory Government, Darwin, June 2000, 2. The NT Government also claimed, based on nation-wide public opinion polls, that 58.7% of Australians (outside the Northern Territory) agree with mandatory sentencing, with 36.1% being against: Hon Denis Burke, 'Australians Support NT Laws — Newspill', *Media Release from Office of the Chief Minister*, NT, Darwin, 8 March 2000.
- 81 Dianne Johnson and George Zdenkowski, *Mandatory Injustice: Compulsory Imprisonment in the Northern Territory*, Centre for Independent Journalism, Sydney, 2000, chapter 6.
- 82 *Ibid*, chapter 4.
- 83 The public opposition to the laws by various politicians is detailed in Johnson and Zdenkowski, (*ibid*), chapter 4. This includes the Northern Territory's (then) Opposition party, the Australian Labor Party: Johnson and Zdenkowski, 48–51.
- 84 *Ibid*, chapter 4.
- 85 George Zdenkowski, 'Mandatory Imprisonment of Property Offenders in the Northern Territory' (1999) 22 *UNSW Law Journal* 302; David Gibson, 'Mandatory Madness: The True Story of the Northern Territory's Mandatory Sentencing Laws' (2000) 25 *Alternative Law Journal* 103; Russell Goldflam and Jonathon Hunyor, 'Mandatory Sentencing and the Concentration of Powers' (1999) 24 *Alternative Law Journal* 211; Campbell Thomson, 'Preventing Crime or "Warehousing" the Underprivileged? Mandatory Sentencing in the Northern Territory' (1999/2000) 4(26) *Indigenous Law Bulletin* 4; Morgan, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories', above n 78; Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?', above n 63; David Brown, 'Mandatory Sentencing: A Criminological Perspective', *UNSW Symposium 2000 Mandatory Sentencing — Rights and Wrongs*, Sydney, 28 October 2000.
- 86 G F K Santow, 'Mandatory Sentencing: A Matter for the High Court' (2000) 74 *Australian Law Journal* 298; G F K Santow, 'The High Court and Mandatory Sentencing', *Sydney Morning Herald*, Sydney, 28 March 2000; Martin Flynn, 'Fixing a Sentence: Are There any Constitutional Limits' (1999) 22 *UNSW Law Journal* 280; Johnson and Zdenkowski, above n 81, 53–54; Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?', above n 63, 180–182. One case has already been taken to the High Court on the basis that the mandatory sentencing law was unconstitutional, but special leave to appeal was refused: *Wynbyne v Marshall* (1997) 117 NTR 11. The High Court has also rejected these arguments in two previous cases involving mandatory sentences, *Palling v Corfield* (1970) 123 CLR 52, and *Sillery v The Queen* (1981) 180 CLR 353.
- 87 See Commonwealth, Parliamentary Debates, Second Reading Speech, Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, Senate, 25 August 1999 (Senator Brown, Tasmania); Johnson and Zdenkowski, above n 81, 83–90; Chris Howse, 'Covering a Multitude of Sins: How can the NT Office of Aboriginal Development have Concluded that Mandatory Sentencing has Little or Nothing to do with Rising Aboriginal Imprisonment Rates?' (1999) 24 *Alternative Law Journal* 224; Chris Howse, 'Towards a Dealing Just and Kind: Reflections on Gaoling Homeless People and Mandatory Sentencing' (2000) 25 *Alternative Law Journal* 108; Rodney Allen, 'Literature and the Judicial Role: Why Judges Should Read Novels and Mandatory Sentencing Should be Rejected' (2000) 25 *Alternative Law Journal* 157.
- 88 See comments in the report released by the Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000*, March 2002, at 35, recommending that WA address the deleterious effect of mandatory sentencing on indigenous youth.
- 89 Johnson and Zdenkowski, above n 81, 9. Proportionality is a fundamental principle of sentencing, endorsed by statements of the High Court in *Veen v The Queen (No 1)* (1979) 143 CLR 458 and *Veen v The Queen (No 2)* (1988) 164 CLR 465.
- 90 Johnson and Zdenkowski, above n 81, 9. Johnson and Zdenkowski note that deterrence was originally cited as a justification, but appeared to later have been abandoned in favour of retributive reasons. See also Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?', above n 63, 170–171, and the analysis of justifications in Declan Roche, *Mandatory Sentencing — Trends and Issues in Criminal Justice*, Australian Institute of Criminology, Canberra, 1999.
- 91 Brown, 'Mandatory Sentencing: A Criminological Perspective', above n 85, 67–69.
- 92 The cost of imprisonment of an offender in the Northern Territory was estimated (based on government figures) to be \$62 000 per annum: see Johnson and Zdenkowski, above n 81, 81.

associated bodies such as prosecutorial authorities and legal aid organisations; and a possible effect on juries and the reporting of crime, if the harsh and unconscionable effects of the law are known in advance and affect decision-making.⁹³ Like the experience in the United States with sentencing guidelines and grids,⁹⁴ the mandatory sentencing schemes have not necessarily eliminated discretion and inconsistency, but have transferred the discretion to prosecutors and other parts of the criminal justice system.⁹⁵ Harsh mandatory sentencing schemes have been introduced in a number of United States jurisdictions, attracting similar criticisms.⁹⁶

One of the main objections to the mandatory sentencing schemes in both the Northern Territory and Western Australia has been the removal of discretion from the courts, and consequent harsh and unjust operation of the laws.⁹⁷ The non-discrimination between seriousness of offence in sentencing for property offences effectively destroyed any valid argument that mandatory minimum sentences, as manifested in the Northern Territory scheme achieved consistency and fairness in sentencing. Such schemes therefore do not assist in the appropriate structuring of judicial discretion, but restrict it in a way that severely limits the ability of the courts to do justice.

Queensland has some mandatory sentencing provisions (as do many other Australian jurisdictions), the most important one of which is the mandatory life sentence (or an indefinite sentence under Part 10 *Penalties and Sentences Act*) for the offence of murder.⁹⁸ The consequences of such a mandatory penalty in a case where the offender has pleaded guilty or been found guilty of murder is the inability of the sentencing court to take into account any relevant mitigating factors. Contrast this with a manslaughter case, where the maximum penalty (ie, life imprisonment) is reserved for the worst category of cases only.⁹⁹ The consequences of mandatory sentencing for murder is potential unfairness for offenders who may have had the possibility of a viable defence such as self defence, but run the risk of mandatory life imprisonment should such a defence be unsuccessful. If such an offender were offered the option of a guilty plea to manslaughter on the basis of provocation or diminished responsibility,¹⁰⁰ the potential for a substantial difference in the comparative length of prison terms for murder and manslaughter would result in an almost impossible decision of whether to plead guilty to the lesser charge, or risk mandatory life imprisonment for the chance of complete acquittal on the basis of self defence.

Although superficially politically popular, mandatory sentencing could not be said to have been a successful experiment in the Northern Territory and is now largely repealed.

93 *Ibid* 5.

94 There has been a disturbing trend in Australia to copy the US moves away from judicial discretion: 'Cocacolonising Australian criminal justice'; see Zdenkowski, 'Sentencing Trends: Past, Present and Prospective', above n 5, 179, quoting Arie Freiberg, 'Three Strikes and You're Out — It's Not Cricket: Colonisation and Resistance in Australian Sentencing' in *Sentencing Policy in Comparative International Perspective: Recent Changes within and across National Boundaries*, University of Minnesota Law School, May 1–3, 1998, 41.

95 See Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?', above n 63, 177–178; Hogg, above n 63, 3.

96 See eg, Michael Tonry, 'Mandatory Penalties' in Michael Tonry (ed), *Crime and Justice: A Review of Research*, vol 16, The University of Chicago Press, Chicago, 1992; Lois Forer, *A Rage to Punish: The Unintended Consequences of Mandatory Sentencing*, W Norton and Company, New York, 1994. See also comments on the effects of mandatory sentencing generally from an international perspective in Dato Param Cumaraswamy, *Keynote Address to the UNSW Symposium 2000 Mandatory Sentencing — Rights and Wrongs*, Sydney, 28 October 2000.

97 Commonwealth, Parliamentary Debates, Second Reading Speech, Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, Senate, 25 August 1999 (Senator Brown, Tasmania); Gordon Hughes, *The Mandatory Sentencing Debate*, Position Paper Update, Law Council of Australia, Canberra, August 2000; Sheldon and Gowans, above n 21; Santow, 'Mandatory Sentencing: A Matter for the High Court', above n 86, 300.

98 The offence of murder is created by s 302 *Criminal Code* (Qld), and is punishable under s 305 by mandatory life imprisonment, or an indefinite sentence under Part 10 of the *Penalties and Sentences Act*. The offence of wilful murder (now abolished), attracted the death penalty.

99 *Veen v The Queen* (No 2) (1988) 164 CLR 465; *R v Chivers* [1993] 1 Qd R 432.

100 See sections 304 and 304A *Criminal Code* (Qld).

There is little to commend its adoption in other jurisdictions; in fact there are valid arguments for the removal of existing mandatory sentencing provisions in Queensland and other jurisdictions,¹⁰¹ although experience suggests that once such sentencing options are in place, there is little chance of repeal.

VI. Guidelines judgments

Guidelines judgments have been used in a number of jurisdictions as a mechanism for guiding discretion.¹⁰² The English Court of Appeal has been issuing guidelines judgments since the 1970s, initiated by Lord Justice Lawton and further developed by Lord Chief Justice Lane.¹⁰³ The English guidelines normally set a tariff, and differentiate between, as well as analysing aggravating and mitigating factors in relation to the relevant offence.¹⁰⁴ Canada and New Zealand¹⁰⁵ have also issued sentencing guideline judgments,¹⁰⁶ however a proposal by the Victorian Sentencing Committee to introduce the practice of binding guideline judgments¹⁰⁷ was rejected by the Parliament because of Opposition support for a majority of Supreme Court judges who were of the view that guidelines were unnecessary because the legal community was small and close-knit (compared with England), and that it would unduly restrict judicial discretion.¹⁰⁸

Both Western Australia and New South Wales have enacted legislative provisions for guideline judgments, in 1995¹⁰⁹ and 1998¹¹⁰ respectively.¹¹¹ However the first use of a guideline judgment in Australia was by the New South Wales Court of Criminal Appeal, on its own initiative in 1998, in *R v Jurisic*,¹¹² a case of dangerous driving occasioning grievous bodily harm. Commentators have generally welcomed the practice, albeit with

101 See eg, s 161 *Criminal Code* (NT); s 282 *Criminal Code* (WA).

102 See discussion in *Wong v The Queen* [2001] HCA 64, (2001) 185 ALR 233, per Kirby J at [90].

103 See 'Sentencing — Guideline Judgments' (1998) 10 *Judicial Officers Bulletin* 67.

104 *Ibid.* For further discussion of the English guidelines, see Andrew Ashworth, 'Techniques of Guidance on Sentencing' [1984] *Criminal Law Review* 518; Martin Wasik and Ken Pease (eds), *Sentencing Reform: Guidance or Guidelines?*, Manchester University Press, Manchester, 1987; Linda Harvey and Ken Pease, 'Guideline Judgments and Proportionality in Sentencing' [1987] *Criminal Law Review* 96; Gavin Dingwell, 'The Court of Appeal and "Guideline" Judgments' (1997) 48 *Northern Ireland Legal Quarterly* 143; Andrew Ashworth and Andrew von Hirsch, 'Recognising Elephants: The Problem of the Custody Threshold' [1997] *Criminal Law Review* 187; Fox and Freiberg, above n 11, 33–34.

105 See further Geoff Hall, 'Reducing Disparity by Judicial Self-Regulation: Sentencing Factors and Guideline Judgments' (1991) 14 *New Zealand Universities Law Review* 208.

106 Mainly in order to set a tariff for an offence: see 'Sentencing — Guideline Judgments', above n 103, 67, and thus less comprehensive than either the UK or *Jurisic* style guidelines.

107 See Victorian Sentencing Committee Report, above n 6, 192–195 and 218–221.

108 *Ibid.* 194, and Fox and Freiberg, above n 11, 34.

109 *Sentencing Act* 1995 (WA) s 143. The Western Australian Court of Criminal Appeal has thus far declined to give guideline judgments despite requests to do so. See discussion of this in Neil Morgan and Belinda Murray, 'What's in a Name? Guideline Judgments in Australia' (1999) 23 *Criminal Law Journal* 90, and Neil Morgan, 'Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?' (1999) 28 *Western Australia Law Review* 259 at 267–270.

110 Originally the legislative provision enabling this was contained in the *Criminal Procedure (Sentencing Guidelines) Act 1998* (NSW), which inserted the provisions in the *Criminal Procedure Act 1986* (NSW). This was later replaced by the *Crimes (Sentencing Procedure) Act 1999* (NSW), Part 3 Division 4. See in particular s 37(1), which empowers the Court of Criminal Appeal to give a guideline judgment on the application of the Attorney-General. Note also that these provisions were amended in late 2001, adding a new definition of 'guideline proceedings' in s 36, and new sections 37A, 37B, 39A and 42A. See later discussion on the reason for these amendments.

111 Note also that South Australia is also in the process of introducing such legislation, see *Criminal Law (Sentencing) (Sentencing Guidelines) Amendment Bill 2002* (read a first time in the SA Legislative Council 28 August 2002). The Bill amends the *Criminal Law (Sentencing) Act 1988*, and allows the Full Court to give a judgment establishing sentencing guidelines.

112 (1998) 45 NSWLR 209. See commentary in see 'Sentencing — Guideline Judgments', above n 103, 67; Mr Justice P W Young, 'Guideline Judgments in Criminal Appeals' (1999) 73 *Australian Law Journal* 13.

some reservations.¹¹³ In addition, according to Chief Justice Spigelman, the judgment was well received by the public and trial judges in New South Wales.¹¹⁴

The New South Wales Court of Criminal Appeal has subsequently issued a number of other guideline judgments. These are: *Henry*¹¹⁵ (armed robbery); *R v Wong and Leung*¹¹⁶ (drug trafficking); *R v Ponfield*¹¹⁷ (break and enter); and *R v Thomson* (guilty pleas).¹¹⁸

According to Spigelman CJ in *Jurisic*, guideline judgments were seen as:

... having a useful role to play in ensuring that an appropriate balance exists between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed, and in the judiciary as a whole, on the other.¹¹⁹

Guideline judgments were also described as a 'mechanism for structuring discretion, rather than restricting discretion'.¹²⁰ Guideline judgments are however intended to act as a relevant indicator, rather than binding in the formal sense.¹²¹ In the case of *Jurisic* itself, in the leading judgment by Chief Justice Spigelman, mention is made and reliance put upon the previous practice of the Court of stating principles of general application in relation to particular offences, the statements having in part the characteristics of a guideline judgment.¹²² Under this reasoning, guideline judgments are argued to be a logical extension of previous practice.¹²³

In 1996, the New South Wales Law Reform Commission recommended strongly against the use of legislative guidelines such as those in s 9 of the *Penalties and Sentences Act 1992* (Qld),¹²⁴ and New South Wales has no such provision. The reason for this recommendation was the perceived restriction it would place on judicial discretion. It is interesting then that it was New South Wales that adopted the system of sentencing guidelines in appellate cases, on the initiative of the judges in the Court of Criminal Appeal.

New South Wales Chief Justice Spigelman himself has pointed out that the system of guideline judgments has emerged in the context of public debates about the introduction of legislative schemes to confine the exercise of judicial discretion, namely minimum sentences or sentencing grids.¹²⁵ Part of the public debates to which he was referring was

113 Morgan and Murray, above n 109, Donna Spears, 'Structuring Discretion: Sentencing in the Jurisic Age' (1999) 22 *UNSW Law Journal* 295, especially 299–300; Evelyn McWilliams, 'Sentencing Guidelines: Who Should be the Arbiter, The Judiciary or Parliament?' (1998) 36 *Law Society Journal* 48; Nicholas Cowdery, 'Guideline Sentencing: A Prosecution Perspective' (1999) 11 *Judicial Officers Bulletin* 57, 61; George Zdenkowski, 'Judging the Judgments', *Sydney Morning Herald*, Sydney, 15 October 1998; Kate Warner, 'Sentencing Review 1998' (1999) 23 *Criminal Law Journal* 364, 366–369. There had in fact been calls for such an approach for some time, see Don Weatherburn, 'Sentencing Principles and Sentencing Choice' (1987) 11 *Criminal Law Journal* 212, 227.

114 The Hon JJ Spigelman, 'Sentencing Guideline Judgments' (1999) 73 *Australian Law Journal* 876, 876. It has been reported that sentencing judges have, in large, applied the guidelines: Cowdery, above n 113, 59.

115 (1999) 106 A Crim R 149. See also Ivan Potas, 'Guidelines for the Sentencing of Armed Robbers' (1999) 11 *Judicial Officers Bulletin* 28.

116 (1999) 48 NSWLR 340. See however the decision of the High Court in *Wong v The Queen* [2001] HCA 64, (2001) 185 ALR 233, in which the decision of the NSW CCA was successfully appealed. The High Court decision is discussed below.

117 [1999] NSWCCA 435.

118 [2000] NSWCCA 294, (2000) 115 A Crim R 104. See also recent comments by the High Court on guilty pleas in *Cameron v The Queen* [2002] HCA 6, and doubts on the methodology adopted for *Thomson* in *Wong v The Queen* at [76] (per Gaudron, Gummow and Hayne JJ).

119 *R v Jurisic* (1998) 45 NSWLR 209, 220 (Spigelman CJ).

120 *Ibid* 221 (Spigelman CJ).

121 *Ibid* 220–221 (Spigelman CJ). For a useful guide to the current approach of the NSW CCA to guideline judgments, see Hon Brian Sully, 'Trends in Guideline Judgments' (2001) 20 *Australian Bar Review* 250.

122 *Jurisic*, 217–220 (Spigelman CJ). Note however the comments by Wood CJ at CL in *Jurisic* that sometimes the principles in such cases can be overlooked in the volume of appellate cases handed down: *Jurisic*, 233.

123 *Ibid* 217. See also Morgan and Murray, above n 109, 93.

124 See NSWLRC, *Sentencing: Discussion Paper No 33*, above n 13, 27; and NSWLRC, *Sentencing (Report No 79)*, above n 13.

125 Spigelman, 'Sentencing Guideline Judgments', above n 114, 876.

the announcement by the New South Wales Opposition that they would implement grid sentencing if elected in a forthcoming State election.¹²⁶ The use of such sentencing grids was rejected in *Jurisc* by Adams J, who stated that it could not be consistent with our notions of justice that facts characterising both the seriousness of the offence and the culpability of the offender should be ignored, when that was the case with grid sentencing and minimum sentencing schemes.¹²⁷

The main reasons given for issuing guideline judgments, as expressed by the Chief Justice in *Jurisc*, were summarised by Morgan and Murray to be threefold. First, that it was a logical development building on previous practice; secondly that it was necessary at times to re-evaluate previous sentencing practice, such as was the case in *Jurisc* where the Parliament had increased the penalties for dangerous driving without a consequent increase in sentences by the courts; and thirdly that such judgments were an appropriate method of balancing consistency with the discretion required to accommodate circumstances of individual cases.¹²⁸

Although Western Australia has legislative provision to issue guideline judgments, the judges have declined to do so. Neil Morgan and Belinda Murray have noted the reasons for failure of the Court of Criminal Appeal to take this course, despite a number of requests to do so, as having 'limited force' and not standing up to rigorous scrutiny.¹²⁹ Despite this, Morgan and Murray acknowledge that the Western Australian Court has given a number of 'guidance judgments',¹³⁰ and that these are quite sophisticated in operation, and in terms of sentencing ranges more detailed than *Jurisc*.¹³¹ In comments that could translate readily to other jurisdictions, Morgan and Murray contend that the failure of the Western Australian Court of Criminal Appeal to 'market' its sentencing practices more effectively, in the manner of *Jurisc*, was a costly mistake.¹³² This was particularly so in Western Australia, due to threats of the introduction of a sentencing matrix system which would, if the enabling legislation were ever proclaimed, severely curtail judicial discretion.¹³³

Why New South Wales has been the only Australian jurisdiction to enthusiastically embrace judicial sentencing guidelines is a matter for conjecture. Morgan and Murray suggest that one of the factors behind the Western Australian Court's opposition to guideline judgments is a reflection of judicial culture and perceptions of the nature of judicial decision-making, and further that the 'judicial synthesis' approach to sentencing decision-making does not readily accommodate guideline judgments.¹³⁴ Morgan and Murray conclude that the debate is ultimately a matter of balance between retaining sufficient discretion in sentencing against unwarranted restrictions,¹³⁵ however as noted by Spigelman CJ in *Jurisc*: 'Guideline judgments are a mechanism for structuring discretion, rather than restricting discretion'.¹³⁶

Despite the fact that guidelines judgments have enjoyed success in New South Wales, and have arguably played a significant role in structuring discretion, they have recently

126 See discussion in McWilliams, above n 113, 52.

127 *Jurisc* (1998) 45 NSWLR 209, 254–255 (Adams J). See also Hon Justice Michael Adams, 'Launch of UNSW Law Journal Forum' (1999) 22 *UNSW Law Journal* 257.

128 Morgan and Murray, above n 109, 93–94.

129 *Ibid* 105.

130 As has the Queensland Court of Appeal, see discussion above.

131 Morgan and Murray, above n 109, 99.

132 *Ibid* 106.

133 *Ibid*; and Morgan, 'Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?', above n 109. See further, above n 4 and n 72.

134 Morgan and Murray, above n 109, 106. 'Instinctive synthesis' is a term commonly employed in Victoria to describe judicial decision making in sentencing: see *R v Williscroft* [1975] VR 292, and many subsequent cases.

135 *Ibid*.

136 *Jurisc* (1998) 45 NSWLR 209, 221 (Spigelman CJ).

come under critical notice from the High Court in *Wong v The Queen*.¹³⁷ In that case, Gaudron, Gummow and Hayne JJ in a joint judgment, and Kirby J, (Gleeson CJ and Callinan J delivering minority judgments), allowed a defence appeal in a so-called 'guidelines' decision by the New South Wales Court of Criminal Appeal.

The appellants in that case were charged under s 233B of the *Customs Act 1901* (Cth), in that they were knowingly concerned in the importation of a commercial quantity of heroin. The majority of the High Court held (inter alia) that a guidelines judgment was inappropriate in the case in question because of incompatibility with the statutory scheme under the *Customs Act* (Cth), and s 16A *Crimes Act* (Cth).¹³⁸ The guidelines were also held to be unnecessarily restrictive in that they referred only to one consideration, namely the weight of the prohibited substance.¹³⁹ Of more general relevance, the joint judgment then went further and made critical comments about guideline judgments in general.¹⁴⁰ In particular, their Honours stated the following:

Again, for the reasons given earlier, 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 results 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.¹⁴¹

What is also relevant to note is that the other member of the Court in the majority, Kirby J, did not make similar comments, but made the following observations:

The court [in giving guidelines judgments] was clearly motivated by the laudable aim of removing the badge of unfairness, so far as that was possible and consistent with evaluative decisions made by judicial officers in a judicial proceeding. The purpose of 'guideline judgments' is to replace informal, private and unrevealed judicial means of ensuring consistency in sentencing with a publicly declared standard.¹⁴²

Of the two dissenting judgments, Callinan J dismissed the appeals, but noted in passing, (without deciding), that he doubted that the guidelines were a proper exercise of the judicial power of the Commonwealth, that they would inevitably come to assume a prescriptive tone, and that there could be said to be a problem in their formulation because of the lack of presence of a contradictor.¹⁴³ Despite this, his Honour expressed qualified support for the concept of guidelines judgments, provided that they were seen as guidelines only, and that the discretion of the sentencing judge remained.¹⁴⁴

Therefore, despite the critical remarks about guidelines generally in the joint judgment in *Wong* (which were not part of the ratio of the case), there was support from other members of the Court for guidelines judgments in an appropriate case, and it might be assumed therefore that the practice of issuing guidelines judgments in New South Wales will continue, albeit with appropriate qualifications. Inevitably however, the comments of members of the High Court in *Wong* have caused a reassessment of guidelines

137 [2001] HCA 64, (2001) 185 ALR 233. See comment on this case and its impact on future guidelines judgments in C B Craigie, 'Guidelines Judgments Patched Up' (2002) 40 *Law Society Journal* 52. Craigie SC is the Acting Deputy Senior Public Defender in NSW. See also subsequent discussion by the NSW Court of Criminal Appeal in *R v Whyte* [2002] NSWCCA 343 (20 August 2002).

138 See also comments on s 16A (in agreement) by Gleeson CJ at [31] (delivering a dissenting judgment).

139 See comments in the joint judgment at [67–78], and Kirby J at [138].

140 Although some of the comments appear to be directed to numerical guidelines (such as those used in some US jurisdictions — see above), see [77–78].

141 *Wong v The Queen* [2001] HCA 64, (2001) 185 ALR 233, at [83], per Gaudron, Gummow and Hayne JJ.

142 *Ibid* at [92].

143 *Ibid* at [165]. These comments, when added to those of the majority, will probably have an impact on future considerations in relation to the use of guidelines judgments in New South Wales, see Craigie, above n 137, 54.

144 *Wong v The Queen* at [168].

judgments,¹⁴⁵ and immediately after the judgment in *Wong* in November 2001, New South Wales legislated retrospectively; see *Criminal Legislation Amendment Act 2001 (NSW)*, Schedule 5: Amendment of *Crimes (Sentencing Procedure Act) 1999*. This amendment provides that any guideline judgment given by the Court of Criminal Appeal before the commencement of the new s 37A, (which gives additional powers to the court in giving a guidelines judgment), has the same force and effect as if it had been given before s 37A commenced.

Although guideline judgments, at least in the sense understood by *Jurisc*, have never been expressly used in Queensland, there have been judgments of the Queensland Court of Appeal, and previously the Court of Criminal Appeal, which have from time to time been seen as providing a strong message to the courts as to the appropriate sentences to be imposed.¹⁴⁶ In recent times however the Court has stated that it should not necessarily be bound by the range of sentences indicated in these previous decisions, particularly where sentencing trends have changed over time.¹⁴⁷

Despite the extent of the debate generated by *Jurisc*, there has been little discussion in Queensland on the concept of guideline judgments as adopted in New South Wales, when there could be considerable benefits in adopting such a scheme to further guide judicial discretion.

VII. Conclusion

It has been pointed out that some of the recent Australian restrictions on judicial discretion have been driven not by a desire for consistency and fairness derived from just deserts theory,¹⁴⁸ but by a perceived need for the escalation of sentence severity, driven by 'law and order populism'.¹⁴⁹ Recent public disquiet at the injustices brought by mandatory sentencing¹⁵⁰ has demonstrated that law and order can have superficial appeal until there are unwanted and unpleasant consequences.¹⁵¹

Where methods used to regulate judicial discretion are largely a response to law and order imperatives, such as mandatory sentencing or sentencing grids, they are more likely themselves to offend against the central goal of fairness in sentencing. Mandatory minimum

145 See discussion in Craigie, above n 137. But note however the subsequent NSW Court of Criminal Appeal decisions in *R v Sharma* [2002] NSWCCA 142, and *R v Whyte* [2002] NSWCCA 343; affirming the use of guidelines judgments.

146 See eg, *R v Joyce* [1986] 1 Qd R 47 (housebreaking); *R v Ryan and Vosmaer* [1989] 1 Qd R 188 (armed robberies of financial institutions); *Green* [1986] 2 Qd R 406 (manslaughter in a domestic violence situation); and *Sheppard* (1995) 77 A Crim R 139 (dangerous driving causing death, see above).

147 See for example, *R v Holton* (unreported Qld CA 10/12/96) where it was stated that Joyce was no longer of much assistance; *R v Whiting* [1995] 2 Qd R 199 where it was said that *Green* should no longer be followed as the range of sentences for domestic violence killing indicated in that case of five to six years' imprisonment was no longer appropriate, and that such cases should not be treated differently from other cases of manslaughter. See also comments in two dangerous driving causing death cases, *Sheppard* (1995) 77 A Crim R 139 and *Vessey* (1996) 86 A Crim R 290, about the need to impose sentences appropriate to the circumstances of the particular case.

148 Just deserts is closely linked with proportionality, which has been accepted as an important sentencing principle in a number of leading cases, see eg, *Veen v The Queen* (No 2) (1988) 164 CLR 465. Just deserts is also represented in the purposes for which sentences may be imposed, see eg, s 9(1)(a) *Penalties and Sentences Act 1992* (Qld).

149 Zdenkowski, 'Sentencing Trends: Past, Present and Prospective', above n 5, 173. See also Russell Hogg and David Brown, *Rethinking Law and Order*, Pluto Press, Annandale, 1998, 4; Brown, 'Mandatory Sentencing: A Criminological Perspective', above n 85, 74.

150 Discussed in Zdenkowski (ibid).

151 In February 2000, a 15-year-old Australian Aboriginal boy hung himself while detained on a 14 day mandatory sentencing order in the Northern Territory (for stealing textas and some other minor items), causing immense public and political disquiet. See discussion on the increased risk of deaths in custody in Johnson and Zdenkowski, above n 81; Brown, 'Mandatory Sentencing: A Criminological Perspective', above n 85, 73–74.

sentencing and sentencing grids may indeed achieve greater consistency in sentencing, but at what cost to fairness and justice?

If however methods to guide discretion are a considered response to allegations of inconsistency, and serve to *structure* rather than *restrict* judicial discretion, they have a useful part to play in the system. Computerised information retrieval systems promote consistency and fairness, as they assist the courts to hand down like sentences in like cases, as far as is possible. If such information is not readily retrievable and identifiable, the courts are reliant on comparative sentencing judgments submitted by counsel, which, depending on the research undertaken, may or may not be the best comparative sentences available. While most judges, practitioners and commentators would welcome SIS systems in all jurisdictions, government funding considerations normally preclude their implementation. The introduction of such a system in Queensland would add considerably to the ability of the courts to do justice in individual cases.

Similarly with guidelines judgements, which promote consistency by laying down non-binding guidelines for application in future cases. Arguably these judgments do not inhibit judicial discretion, but guide it. It is the role of the State appellate courts to provide such guidance, and the use of judicial guidelines allows this to occur at the instigation of the judges themselves.

As has been seen in the discussion above, not all methods for regulating discretion are suggested for ideologically sound reasons, and therefore can result in a cure worse than the original ailment.¹⁵² Others, such as computerised sentencing information systems, rely on considerable government funding, not normally forthcoming. In the case of guidelines judgments however, there is not necessarily any extra cost involved, as it is a judge-led initiative. Provided that the misgivings by the High Court about the use of guidelines judgments in particular cases can be addressed,¹⁵³ this system should be seriously considered by the legislature and the Queensland courts, and the courts of other Australian jurisdictions. It is also an opportunity for the legislature and the courts to demonstrate real commitment to consistency and fairness, rather than harsh and unfair sentencing strategies based on law and order imperatives.

152 Tonry, *Sentencing Matters*, above n 25, 25 (in relation to US systems of numerical guidelines and grids).

153 And noting that the appeal in question, (*Wong*), related to the Commonwealth jurisdiction and was, in retrospect, perhaps not a prudent vehicle for a guidelines judgment.