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Advancing Sentencing - an Australian perspective

by

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Advancing Sentencing – An Australian Perspective

In this paper I will endeavour to provide an Australian perspective of the ways in which the practice of sentencing can be advanced by the provision of information and training to judicial officers. In the first section of the paper, I will provide a brief overview of the information that is available with respect to sentences actually imposed in Australia in various jurisdictions, including my own jurisdiction of Western Australia.

In the second part of the paper I will refer to some of the training programmes that have been developed to assist the judiciary in the discharge of their important responsibilities when passing sentence.

Sentencing data and information

Because Australia is a federation in which each of the polities has power to legislate with respect to criminal law,¹ the information and data available with respect to sentences passed varies from jurisdiction to jurisdiction. Electronic databases and related material maintained by the Judicial Commission of New South Wales (JCNSW) provide ready access to data with respect to sentences passed in New South

¹ Because the States and Territories have plenary legislative power, primary responsibility for the general body of criminal law rests with each State and Territory. The Commonwealth, however, has power to create offences within its specific areas of legislative responsibility, and has enacted a Commonwealth Criminal Code which stipulates the general principles applicable to all Commonwealth offences (*Criminal Code Act 1995* (Cth)).

Wales.² The JCNSW also maintains a similar database on sentences passed in Queensland in partnership with the Supreme Court Library Queensland,³ and in respect of sentences for Commonwealth offences in partnership with the Office of the Commonwealth Director of Public Prosecutions and the National Judicial College of Australia (NJCA).⁴ A similar database maintained by the Judicial College of Victoria (JCV) provides data relating to sentences passed in that State and other related material in the form of an online sentencing manual.⁵ The databases are accessible to members of the judiciary, prosecution agencies, and legal practitioners with authorised access and for Commonwealth and Victorian offences, to the public as well.

These databases are extremely valuable tools for judicial officers, including Courts of Appeal, and to both prosecutors and defence counsel. Anecdotal information and general experience is a poor substitute for hard data of the kind which is provided by these databases. Without access to information of this kind, it is extremely difficult for judges at first instance and for Courts of Appeal to determine whether a particular sentence is consistent with other sentences customarily imposed for offences of that kind, when committed by offenders with comparable personal circumstances.

² Judicial Commission of New South Wales, 'Judicial Information Research System (JIRS)' available at: www.judcom.nsw.gov.au/research-and-sentencing/judicial-information-research-system-jirs (accessed 5 October 2014).

³ Supreme Court Library Queensland, 'Queensland Sentencing Information Service (QSIS)' available at: www.sentencing.sclqld.org.au/ (accessed 5 October 2014).

⁴ National Judicial College of Australia, 'Commonwealth Sentencing Database' available at: njca.com.au/sentencing/ (accessed 5 October 2014).

⁵ Judicial College of Australia, 'Victorian Sentencing Manual' available at: www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#13888.htm (accessed 5 October 2014).

The information in these databases is generally presented by reference to the statutory provision creating the relevant offence. The databases can be interrogated for characteristics pertaining to the offence itself (such as the quantity and purity of drugs involved) or the circumstances of the offender (such as age).

Sentencing data and information in Western Australia

Unfortunately, information of this kind is not available in respect of sentences imposed in the three other States and two Territories. In my own jurisdiction of Western Australia, the courts have requested executive government to provide this resource without success, despite the relatively modest expense involved. As a result, we have had to make do with ad hoc and incomplete arrangements including the following:

- The Office of the Director of Public Prosecutions (WA) publishes a number of tables on its website relating to decisions of the Court of Appeal with respect to some of the more common categories of offence. It has also developed and published a table of penalties for offences that would not usually fall within the jurisdiction of the Supreme Court but which may be remitted for sentence to the Magistrates Court.⁶
- The Associates to the Judges in the Supreme Court have developed sentencing tables for offences falling within the exclusive jurisdiction of that court, containing the name of the case, the offences, the sentence imposed, the circumstances of

⁶ Office of the Director of Public Prosecutions for Western Australia, 'Comparative Sentencing Tables and Section 32 Offence Penalties Table' available at: www.dpp.wa.gov.au/S/sentencing.aspx?uid=2851-7898-0868-7784 (accessed 5 October 2014).

the offence, aggravating circumstances, personal mitigating circumstances and judicial observations. These tables are only available to the judiciary.

- Observations made by a Judge at the time of passing sentence in the Supreme Court are published on the website of the court.⁷ These observations are available to the public for 28 days only (because of the risk of interference with a subsequent jury trial if the data remains available to the public indefinitely), but remain available to the judiciary, and to legal practitioners through a service provided by the Law Library.
- Individual Judges in the District Court of Western Australia have developed an internal benchbook containing references to legislation and cases on sentencing for the assistance of the Judges of that court.
- Individual Magistrates have developed penalty tables relating to particular pieces of legislation listing the section number, offence, maximum fine and term of imprisonment, together with remarks as to the alternative verdicts that might be available, or the circumstances of aggravation, although these tables do not record sentences actually imposed.
- The Court of Appeal delivers judgments from time to time in which a review or survey of sentences imposed for particular offences is undertaken. Although the Court of Appeal has power to issue guideline sentencing judgments,⁸ for reasons

⁷ Supreme Court of Western Australia, 'Sentences' available at: decisions.justice.wa.gov.au/supreme/supSR.nsf/main.xsp (accessed 5 October 2014).

⁸ *Sentencing Act 1995* (WA), s 143.

indicated in my paper delivered earlier in this conference, that power has never been exercised.

- Two bench books have been developed for use by the judiciary of Western Australia which include material on sentencing particular groups, namely, Aboriginal people, those subject to disadvantage of one kind or another, or members of minorities of one form or another.⁹ These bench books provide a broad range of information to Judges and Magistrates with respect to social and cultural circumstances and the particular difficulties experienced by those who suffer from various forms of disadvantage such as mental illness, foetal alcohol spectrum disorder, etc.

There is also an online publication relating to sentencing in Australia which is available commercially.

Sentencing Research

JCNSW and JCV each undertake research in relation to sentencing practices in the jurisdictions which they serve. The product of that research is made available to judicial officers in those jurisdictions and is generally also available to the public. Unfortunately in my jurisdiction (WA), there is no agency responsible for the analysis of sentencing or crime data. Any such analysis is undertaken on an ad hoc basis if and when particular policies or legislative changes are under consideration. The Crime Research Centre of Western Australia produced a detailed series on crime data and analysis,

⁹ *Aboriginal Bench Book for Western Australia Courts* (2nd ed, 2008); *Equality before the Law Bench Book* (2010) available at: www.supremecourt.wa.gov.au/O/other_publications.aspx?uid=7313-1532-3097-3568 (accessed 5 October 2014).

including sentences imposed, but the last publication in that series related to the year 2006, and production has been discontinued.

Training Programmes

JCNSW and JCV

JCNSW and JCV each provide training programmes for the judiciary of New South Wales and Victoria respectively in a variety of fields, including sentencing. As the CEO of JCNSW is to address this session, it would be presumptuous of me to usurp his role by attempting to describe the courses provided by the Commission. The JCV publishes its prospectus online.¹⁰ The college has developed a new course 'Sentencing in an Environment of Change' which covers many of the relevant topics and principles relating to sentencing. Each of JCNSW and JCV provide orientation programmes for newly-appointed Magistrates which include programmes on sentencing within the curriculum.

NJCA

The NJCA¹¹ has responsibility for the delivery of judicial education to all judicial officers in Australia (within its limited budget).¹² It regularly provides an orientation programme for Judges recently appointed to District and County Courts, Supreme Courts, the Federal Court and the Family Courts of Australia. A

¹⁰ Judicial College of Victoria, 'College Prospectus' available at: www.judicialcollege.vic.edu.au/college-prospectus (accessed 5 October 2014).

¹¹ Which I had the pleasure of chairing between 2008 and 2012.

¹² For a general description of judicial education in Australia see The Hon Wayne Martin Chief Justice of Western Australia & Chair of the National Judicial College of Australia, 'Future Directions in Judicial Education' –(Supreme and Federal Court Judges' Conference 2011, Wellington, New Zealand, 28 January 2011) available at: http://www.supremecourt.wa.gov.au/files/Future_Directions_in_Judicial_Education_January_2011_NZ.pdf (accessed 5 October 2014).

session on sentencing is included within that programme. The College also provides a programme for Magistrates¹³ which includes a programme on sentencing.

In addition, every second year, the NJCA, in conjunction with the Australian National University, presents a programme over two days focused on various topics related to sentencing. The programme is available to Judges and legal practitioners, and has covered a wide variety of topics over the years. Papers or other materials from more recent programmes are available online.¹⁴ International experts are invited to address this conference from time to time. For example, at the conference held earlier this year, Professor Andrew Ashworth, of All Souls College Oxford, a renowned expert in the field of sentencing, delivered a paper on the use of sentencing guidelines in the UK.¹⁵ Other papers presented at that conference included alternatives to custodial sentences, issues in sentencing indigenous offenders, and papers on punishment and deterrence. The 2012 programmes focused upon sentencing for Commonwealth offences. The 2010 programme covered a variety of topics, including communication with the public in relation to sentencing, the sentencing of Indigenous offenders, genetic factors in sentencing, sentencing by video link, sentencing in arson (bushfire) cases, sentencing and children, sentencing for offences motivated by hatred or prejudice, and sentencing in so-called

¹³ Particularly Magistrates from jurisdictions other than New South Wales and Victoria, each of which have their own programmes.

¹⁴ National Judicial College of Australia, 'Program papers' available at: njca.com.au/program-papers/ (accessed 5 October 2014) //

¹⁵ National Judicial College of Australia 'ANU/NJCA Conference: Sentencing from theory to practice' available at: njca.com.au/program/anu-njca-conference-on-sentencing/ (accessed 5 October 2014).

'technical rape' cases. Earlier programmes have included papers on suspended sentences, sentencing in the Magistrates Courts, preventative detention and indeterminate sentencing, sentencing for environmental offences, sentencing people with mental illness or cognitive disability, and the interesting question of whether the jury should have a role in the sentencing process.

These biennial programmes are extremely valuable and well attended. However, because of Australia's geography, the cost of attendance from jurisdictions like Western Australia can be substantial, and court budgets for attendance at such programmes are limited. The papers published online nevertheless provide a valuable resource for judicial officers interested in any of these important topics.

In jurisdictions which do not have a judicial education body devoted to that jurisdiction, or the funds available to send large numbers of judicial officers to the biennial sentencing conference,¹⁶ arrangements for the provision of training in relation to sentencing are ad hoc and tend to be made by individual courts. So, for example, at the annual conference of the Judges of the Supreme Court of Western Australia, there will often be a session devoted to sentencing. One year the session addressed recent changes in the law with respect to sentencing. Other years have included interactive programmes encouraging active participation by Judges in discussion on the factors and issues which must be taken into account when passing sentence.

¹⁶ Like Western Australia.

Programmes on Sentencing

It will be apparent from what I have already stated that in Australia there are many different approaches to the provision of training in relation to sentencing.

Traditional Approach

Those approaches include what I might describe as the traditional approach - namely, delivery of a paper by an expert in the area identifying the key legal principles which must be applied when passing sentence. Training of this kind can be augmented by similar papers dealing with specific topics of the kind addressed in the biennial programmes provided by the NJCA. Such programmes can be supported and enhanced by the information and data provided by the databases to which I have referred.

Interactive Programmes

More contemporary methods of judicial education favour interactive and participatory training programmes for the development of practical skills. Although sentencing requires a certain knowledge of principle and law, it is a fundamentally practical exercise, especially when conducted under the pressure of a busy list in a crowded lower court. In my experience of the sessions offered at the orientation programmes by the NJCA, and of the sessions delivered at our judicial conferences, interactive sessions based on practical examples provide a great opportunity for the development and enunciation of principles and practices.

Some interactive models

One model involves providing a hypothetical set of facts to participants, who then meet in small groups to discuss the approach which they would take to the sentence, reporting back to the group as a whole. This enables participants to develop their approach to the sentence in a collaborative fashion, developing ideas through discussion with colleagues. Another model used at our Judges' conference a couple of years ago was particularly interesting. A questionnaire was administered to the Judges in advance of the conference, asking for an indicative sentence in respect of 20 different scenarios (each relatively brief and not necessarily in the Judges' area of expertise). The responses were compiled and reported to the Judges. The range of responses was quite extraordinary - in some cases the responses ranged from a suspended sentence to a term of 10 years imprisonment! I note, of course, that such a survey cannot accurately replicate what occurs in court during sentencing pleas and the proper exercise of judicial discretion. However, the exercise reinforced to me how idiosyncratic sentencing can be, and how important it is to take whatever steps can be taken to improve consistency in sentencing. The provision of information and data with respect to sentences actually imposed, and the provision of regular training to the judiciary of differing kinds on differing topics related to the topic of sentencing can only enhance the achievement of that important public policy objective.