I. INTRODUCTION

Sentencing involves a judge balancing the protection of the community with the rights of those involved in the process (balancing act).

In the exercising of a judge’s discretion there is a tension between the principles of individualised justice and ensuring consistency in punishment. Inconsistency is a matter which concerns both individual and community interests; it offends the notion of equality before the law, and its presence can lead to an erosion of public confidence in the administration of justice.

Recently in NSW there have been certain developments aimed at improving consistency and transparency in sentencing law. This has been motivated to some extent by community demands or misperceptions that the law is too lenient. The changes have included the introduction of guideline judgements, SNPPs and certain mandatory provisions. The consequences have been the implementation of increasingly punitive and complex laws, with mixed levels of success, and different effects for the balancing act.

II. JUDICIAL DISCRETION – TRENDS

Sentencing involves the weighing of overlapping, incommensurable and often contradictory objectives: protection of the community, deterrence, retribution and rehabilitation. Judges must reconcile all relevant factors in a case and reach a value-judgment decision through ‘instinctive synthesis’. The existence of multiple objectives in sentencing permits a range of variation between individual judges, but there are limits beyond which inconsistency constitutes an injustice.

In modern times judicial discretion can and has been affected by NSW courts and parliaments in three broad ways as follows.

Broad discretion

Spigelman CJ elucidates that centuries of practical experience establish that the multiplicity of factors involved in sentencing require the exercise of a broad discretion, which is best conferred on trial judges. A broad discretion is ‘central to the ability of the criminal courts to ensure justice is done in all the extraordinary variety of circumstances of individual offences and individual offenders.’

Notwithstanding this proposition the trend in NSW has been to increasingly ‘structure’ discretion to enhance consistency and transparency, predicated on the notion that judicial intuition alone may not meet community expectations for more serious punishment. Concurrent with this trend has been the strengthening of the view that the promulgation of new structures should not be inconsistent with a sentencing discretion, lest injustices ensue. Thus we see the evolution of a preference for ‘guidelines’ over ‘mandatory minimum provisions’ or ‘grid sentencing’, and in the High Court’s interpretation of the SNPP regime in Muldrock in a manner consistent with McHugh J’s approach in Markarian, which led to NSW legislative amendments clarifying SNPPs as ‘guideposts’ rather than as having determinative significance.

Removing discretion

Judicial discretion may be removed or fettered due to parliament’s intention for deterrence or consistency. This intervention is widely considered to be undesirable for serious offences. While mandatory provisions may not be constitutionally invalid, they may do harm to the rule of law and to a court’s ability to do justice to an accused. In NSW mandatory provisions are also at odds with certain aspects of the CSPA, for instance s5(1) conveying that imprisonment is a last resort option, and s21A, providing for the consideration of aggravating, mitigating and other factors. Furthermore, substantial evidence suggests that mandatory sentencing provisions are unsuccessful in achieving deterrence.

Mandatory sentencing has been described as the ‘antithesis of just sentencing.’ This is all the more so when the penalty, not the minimum, is mandated. Mandatory systems tend to ‘collapse under the weight of … injustices.’ This has occurred in NSW. The Criminal Law Amendment Act 1883 created a sentencing structure with five distinct steps or categories and minimum and maximum sentences. Judges were compelled to pass sentences which they considered to be excessive. This led to injustices and the system was abandoned a year later. In 1996, s 431B, CA, provided mandatory natural life sentences for murder and certain drug offences, where an offender’s culpability level was extreme. The provision has since been re-enacted and has been scarcely used. Instead, judges have proceeded to impose life sentences under traditional tests and provisions.

In 2011, a provision unique to NSW, s 19B(1), was inserted into the CA, mandating life sentences for the murder of police officers in certain circumstances. The provision would appear to unduly favour police victims, or unduly burden offenders, because:

- police victims are already protected in s 21A(2)(a), CSPA;
• there is no apparent need for reform;
• any deterrent value of the provision is doubtful; 31
• there is a social cost in the unnecessary, preferential treatment for certain victims.

Cowdery QC writes that it would be rare for any case to enliven s 19B(1), thus the provision may not be overly significant. 32 If it did apply, however, there would be no offer of a guilty plea, which would prolong anxiety for victims’ families and for others. 33

There has been more recent action. In 2014, a new offence of assault causing death when intoxicated (minimum eight years) was implemented. 34 The government also proposed mandatory laws for violent assault offences where the offender is intoxicated by drugs and/or alcohol. 35

The injustices of mandatory sentencing have been highlighted in people smuggling cases. In Ambo, 36 an Indonesian offender was sentenced to three years imprisonment in NSW under the Migration Act, 37 for facilitating the bringing to Australia of 53 non-citizens. The passengers had each paid boarding fees of A$8,000–10,000 over a long journey. Knox SC DCJ lamented the requirement to order a non-parole period of three years 38 for a mere ‘facilitator’ who was only active at the journey’s end, and whose circumstances included being illiterate, poor and paid a ‘pittance’ (A$217), and being as desperate as the people he transported. 39

Structuring discretion

Guideline judgments

Guideline judgments have been one method to achieve greater consistency and transparency, with certain success. 40 They were developed when it was possible that the NSW Parliament would adopt statutory methods to respond to community expectations of increased penalties, which may have been unpalatable for judges. 41

The scheme commenced in Jurisic 42 (dangerous driving case) in 1998 by the NSWCCA of its own motion, following precedent in England and Wales. Spigelman CJ considered that guideline judgments strike a preferable balance between individual justice and consistency. 43 The scheme was later reinforced by supportive legislation enabling the attorney general to apply for a judgement. 44 The second reading Speech emphasised, inter alia, the encouragement of upward trends in sentencing as an aim of the regime. 45

A sentencing judge must take a guideline into account as a check, indicator or guide - not as a rule or presumption 46 - with a requirement to address the guideline and articulate reasons for its applicability or inapplicability in a given case. 47 Guideline judgments tend to be ‘numerical,’ 48 stating a range of appropriate sentences, or ‘qualitative,’ 49 defining relevant factors to be taken into account.

Guideline judgments remain somewhat controversial. 50 Some High Court members view them as an intrusion into judicial discretion, 51 and concerns include a risk of uncritical adherence by judges and a difficulty of reconciling guidelines with common law and other statutory requirements. At least four other states have the power to issue guideline judgments yet only NSW courts appear to have done so. 52 Judgments have now been issued in various areas. 53

In 2013 the LRC praised the utility of guideline judgments as follows:

Guideline judgments have proved valuable in encouraging greater consistency in sentencing, in correcting inappropriate levels of sentencing and in giving guidance to courts, both in providing numerical ranges and in stating overarching principles. 54

Empirical evidence suggests that guideline judgments are achieving their purpose. The Judicial Commission’s research into three judgments reveals the following improvements in consistency:

• Dangerous driving: 55 full-time custodial sentences increased from 49.47 per cent to 67.94 per cent.

• Armed robbery: 56 reduction in systemic excessive leniency and inconsistency in sentencing.

• High range PCA: 57 reduction in use of s10 non-conviction orders and corresponding increase in offenders who were disqualified from driving receiving longer disqualification periods; substantial decrease in use of penalties less severe than a community service order, particularly fines. 58

Evidently, the increase in consistency was accompanied by harsher penalties.

Alternatively (and accepting traditional links between punishment and deterrence) the scheme may be said to maintain the rule of law, enhance public confidence in criminal justice, aid deterrence by increasing the transmission of knowledge about sentencings, 59 and lower the number of appeals. 60

There are more specific benefits. The Thompson guideline, for example, which gives offenders pleading guilty a sentence discount of up to 25 per cent, is an identifiable parameter
which Justice McClellan states has had ‘enormous benefit for the administration of criminal justice,’ particularly with respect to murder cases in the Supreme Court given the length of those trials. In addition, the value of guideline judgments may be evident when comparing the difficulties of identifying appropriate penalty ranges in Commonwealth matters, in which no guideline judgments exist.

In 2008 Spigelman CJ noted that guidelines ceased to grow because of SNPPs, covering virtually all offences that were capable of being subject to guidelines. However in 2013 the LRC has indicated a desire to broaden guideline judgments and to expand the Sentencing Council’s involvement in the process, increasing the type of information that the NSWCCA should consider by including victim impact data, offender demographics and key stakeholder views. The LRC recognises that considerable resources are required to prepare cases in the NSWCCA, thus it is not practicable in the short term to replace the SNPP scheme.

SNPP regime
The SNPP regime was introduced in early 2003 to provide statutory guidance to sentencing courts for what were 24 offence categories (now 30). The intention was to increase the applicable NPPs and ensure greater consistency and transparency. The regime has been heavily criticised for being arbitrary, complicated and punitive. Many consider that the regime was founded on a flawed premise that the community expected higher penalties for serious crimes. Nevertheless, the LRC sees value in the scheme’s guidance and has supported its retention, conditional on certain amendments and a review by the Sentencing Council to clarify appropriate offences and SNPP levels.

SNPPs are provided for designated serious offences. SNPPs aim to reflect the ‘middle of the range of objective seriousness’ for each offence. A ‘middle range’ reference point was a novel concept, intended to further guide judicial decision-making.

The scheme affects the balancing act. SNPPs are significantly higher than previous median NPPs, generally becoming at least double the median NPPs between 1994 and 2001, and in cases of sexual offences and supplying a commercial quantity, becoming triple the size.

Judicial Commission research from 2010 indicates that sentence levels have generally increased under the scheme, in terms of both NPPs and head sentences (particularly violence offences). The greater the proportion of the SNPP to maximum penalty the greater sentences have increased. For aggravated indecent assault (which has a high SNPP ratio) the increase was from 37.3 per cent to 59.3 per cent and for aggravated indecent assault to children under 10, the increase was from 57.1 per cent to 81.3 per cent. Sentences have become relatively more severe on offenders pleading not guilty.

The research also shows that the number of offenders pleading guilty under the regime increased from 78.2 per cent to 86.1 per cent, it would appear to benefit from a sentencing discount. Such an outcome is applauded by the LRC. It remains to be seen whether this effect, and others, will taper off after Muldrock, which ostensibly weakened the scheme’s application.

In relation to consistency, where the scheme has not significantly affected sentencing severity, sentences appear to have become more uniform. Yet the Judicial Commission indicates that it is not possible to tell if the consistency being achieved is ‘benign’ consistency, that is, whether cases which are both similar and dissimilar are complying with the scheme in an unjust sense. The consistency often sought is consistency in approach rather than consistency in outcome, although as Spigelman CJ emphasises consistency in outcome is important in that similar cases should lead to similar results, and this notion is inherent in the structuring of discretion which has been implemented.

The SNPP scheme has certain deficiencies. First, it is unclear how the scheme’s offences were selected. Not all serious offences are covered by the regime but these expanded to cover most serious crimes with a relatively high volume. Secondly, numerous offences have identical maximum penalties, but with different SNPPs. Ordinarily parliament conveys a message about the seriousness of crimes by reference to a maximum penalty. Here there is no discernible ratio for the SNPPs which range from 21.4 per cent to 80 per cent of maximum penalties, introducing ‘new concepts’ to sentencing. Stakeholders criticise the lack of transparency behind the SNPPs. Thirdly, aggravated indecent assault offence SNPPs are so close to the maximum penalty (71.4 per cent/80 per cent) so as to make the scheme’s application illogical because it treats offences in the middle range of objective seriousness as close to the most serious range. These types of issues are being addressed in a review by the Sentencing Council.

Muldrock has caused significant cost to NSW albeit that it has triggered a simplification of the SNPP regime. In essence Way gave primary significance to a SNPP in interpreting the former CSPA provisions, asking whether an offence fell in the middle range of objective seriousness, and if it did, to inquire if matters justify a longer or shorter period (two-staged). Instead, Muldrock held that the correct approach was to factor in all relevant sentencing considerations mindful of two legislative
guideposts, the maximum sentence and the SNPP. The High Court removed the mandatory element of SNPPs which Way considered was intended by parliament, re-emphasising the instinctive synthesis approach, with potentially positive effects for individualised justice over consistency. Various issues were left unclear after Muldrock, however, which were the subject of amendments in late 2013.\(^3\) Confusion over Muldrock has caused significant cost to NSW. Legal Aid has reviewed some 3,000 cases to determine if ‘Muldrock error’ affected earlier cases, and the NSWCCA has decided over 30 cases on the issue, with mixed findings.\(^3\) Although the LRC sees value in error, it has a corresponding effect by way of deterrence.\(^103\) Spigelman CJ also highlights that just because allegations of systematic leniency in sentencing are often not well-informed, that does not mean that there are occasions when the criticism is well-informed, as the NSWCCA detected in Jurisic and Henry.\(^104\)

Minds will differ as to whether harsher custodial penalties really address the fears and concerns of the community. The evidence shows it is difficult to gauge informed public opinion.\(^105\) Bathurst CJ refers to considerations which can leave the general community with the misperception that the legal community is soft on crime, but, he states, when the community is properly informed people mostly think that criminal judges make good decisions.\(^106\) Jury surveys confirm this broad notion.\(^107\)

The costs for an accused and NSW are substantial if the courts are striking the wrong balance between deterrence/retribution and rehabilitation. In 2012, the daily cost to NSW per prison offender per day was $293, more than 10 times the costs per offender of supervised community-based sentences.\(^108\) The social costs of an increasingly punitive society are also important.

Guideline judgments and SNPPs tend to be targeted at offences which are usually dealt with in higher courts.\(^109\) In Attorney-General’s Application No 2,\(^110\) the NSWCCA declined to make a guideline judgment in respect of assault police,\(^111\) referring to the court’s lack of direct experience of sentencing the offence and the low rate of Crown appeals against sentence.\(^112\) Similarly the SNPP scheme does not apply to offences dealt with summarily.\(^113\) Relevantly, while NSW has moved towards imposing harsher penalties at the higher end of sentencing, there is also an increased use of non-conviction orders at the lower end and a shift towards improving prison alternatives to facilitate rehabilitation and reduce the risk of harm to the community. This is important because recidivism rates in all courts are significant,\(^114\) and imprisonment may increase recidivism.\(^115\) Targeting recidivism will reduce costs,\(^116\) which the LRC recognises in its reports. A key benefit of judicial guidelines over mandatory sentencing is the flexibility of the former to enable judges to serve the objective of rehabilitation, as well as deterrence and retribution.\(^117\)

III. DETERRENCE AND COST CONSIDERATIONS

The developments referred to above have contributed to an increase in the numbers and lengths of sentences regarding serious crime, a matter criticised by many jurists concerned about the scale and cost of incarceration in NSW, emphasising that recent changes are not justified by an increase in serious crime rates.\(^94\) This criticism has substance. Between 1993 and 2007 the use of imprisonment in NSW led to a 50.3 per cent increase in the prison population, reaching peak levels in 2009.\(^95\) NSW’s imprisonment rate is twice that of Victoria.\(^96\) Moreover, per capita crimes rates have been trending down for violent crime since 2003 and for property crime since 2001.\(^97\) Changes in prison population due to SNPP increases are also relevant. An example of the increase in prison population for upward changes in the NPP of break enter and steal is provided in Ponfield.\(^98\) Ultimately, while the media often portrays NSW Courts as increasingly lenient, the evidence suggests otherwise.\(^99\) In addition, the evidence suggests that increasing the duration of prison sentences ‘exerts no measurable effect at all’ on crime reduction, whereas increasing the risk of arrest or the risk of imprisonment does.\(^100\)

This calls into question some of the motivation for increasingly punitive laws, i.e. with respect to deterrence and leniency. In Henry,\(^101\) Spigelman CJ did not dispute that general deterrence ‘operates at the margin,’ but preferred to emphasise that in increasing penalties - ‘some people will be deterred.’\(^102\) His Honour did not dispute that increasing the risk of detection may have a greater deterrent effect than increasing punishment. But the two concepts are related, he says, and the criminal justice system should not abandon the proposition that ‘punishment deters and, within limits of tolerance, increased punishment has a corresponding effect by way of deterrence.’\(^103\) Spigelman CJ also highlights that just because allegations of systematic leniency in sentencing are often not well-informed, that does not mean that there are occasions when the criticism is well-informed, as the NSWCCA detected in Jurisic and Henry.\(^104\)

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IV. CONCLUSION

This paper has discussed three main facets of judicial discretion as it affects the balancing act in NSW. While a broad judicial discretion is a key starting point to striking a preferable balance, the trend is to structure discretion for the significant benefits which that affords in terms of consistency and transparency.

Mandatory regimes enable parliament to achieve a certain level of consistency, at a cost to individual justice and the rule of law,
shifting discretion from judges. The potential consequences of such regimes include the avoidance of the provisions, undue complexity, and the imprisonment of offenders with associated societal costs.

The preferred approach in NSW appears to be to adopt guidelines/guideposts to structure discretion as appropriate, although striking an ideal balance may be complicated somewhat by, inter alia, the discrepancy between public perception and actual sentencing practice. Guidelines may help to bridge that gap and may continue to improve through research and tasks undertaken by relevant bodies including the Sentencing Council.

References


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Cases


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Magaming v The Queen [2013] HCA 40

Markarian v R (2005) 228 CLR 357

Muldrock v The Queen [2011] HCA 39

Nicholas v The Queen (1998) 193 CLR 173


R v Dean [2013] NSWSC 1027

35. Mandatory sentencing laws have also been raised in debates about child sex offenders and regarding ‘bikie’ gangs.

34. Cowdery, N, 'Mandatory Life for Cop Deaths', Winter 2011

33. Inserted by the


31. Cowdery, N, 'Mandatory Life for Cop Deaths', Winter 2011


25. Division 1A, Pt 4, CPA, s54A-54AD.


Adam Butt, 'Structuring discretion in sentencing’

82. See Basten J in R v K third party (2011) NSWCCA 288, [18]–[19].
86. For instance, whether a sentencing judge may classify an offence by reference to the offence’s maximum penalty, sentencing trends, and community expectations that appropriate penalties will be imposed.
88. See ‘Sentencing Report 139’ NSW Law Reform Commission, July 2013 at 180, ‘Sentencing Report 134 - Interim Report on Standard Non-parole Periods’, NSW Law Reform Commission, May 2012, at [2.5], [2.34]. The Second Reading Speech said that the SNPPs took into account matters such as the offence’s maximum penalty, sentencing trends, and community expectations that appropriate penalties will be imposed.
89. See NSW Sentencing Council, ‘Standard Minimum Non-Parole Periods – Questions for Discussion’, September 2013. According to its website the Sentencing Council has submitted a report to the A-G which will be released once it is approved.
90. Muldowney v The Queen (2011) 24 CLR 120, [26].
92. For instance, whether a sentencing judge may classify an offence by reference to the certain range of objective seriousness, and the relevance of matters personal to an offender as they relate to the objective seriousness of an offence. See Crimes (Sentencing Procedure) Amendment (Standard Non-parole Period) Bill 2013.
98. Postfield at [33]–[36].
101. See [204]–[211]; see also Justici.
102. Henry [205].
103. Henry [208]. See also Justici, at 221E–F.
113. Section 60(1), CA.
114. Focusing just on higher courts, depending on the method of calculation recidivism is roughly 44 per cent to 58 per cent in the last 11–20 years. ‘Sentencing – Patterns and Statistics’, NSW Law Reform Commission Companion Report 139-A, July 2013, at 11–12.
117. Justici, at 221A per Spigelman CJ.