

OSF-SA Sentencing Conference  
Cape Town, South Africa  
25-26 October 2006

---

## **MINIMUM SENTENCING - THE AUSTRALIAN PROSECUTORIAL EXPERIENCE**

**Nicholas Cowdery AM QC**

Director of Public Prosecutions, NSW, Australia

Member, NSW Sentencing Council

Immediate Past President, International Association of Prosecutors

---

### INTRODUCTION

This conference arises out of the need for the community served by a criminal justice system (which is part of the government of the community) to have confidence in the operation of that system. Without the support of the community, or at least acceptance by the majority, we in criminal justice are largely wasting our time and the resources at our disposal. There may then develop a risk of vigilante action by those aggrieved, in place of the orderly processes properly entrusted to the relevant government agencies.

One of the aims of the criminal justice process must be to seek to achieve consistency in sentencing – or at least to avoid any systemic impediments to it (accepting that individual sentencing aberrations will occur from time to time). That is necessary in order to avoid claims of unequal justice or of unfairness in the operation of a compulsory process, contrary to the rule of law itself. Claims of that kind can do great harm to community confidence in and therefore acceptance of the criminal justice system.

Sir Anthony Mason (later to become Chief Justice of Australia) said in *Lowe v The Queen* (1994) 154 CLR 606 at 610-611:

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

The purposes of sentencing – denunciation, retribution (or revenge), incapacitation (or protection of the community), rehabilitation (or reform) and deterrence (both specific and general) – are well known. The extent to which it achieves any of those to any

real level of satisfaction is problematic; however, in organised societies it is the only mechanism we have for dealing with criminal offenders.

In *Weininger v The Queen* (2003) 212 CLR 638 Chief Justice Gleeson of the High Court of Australia described the sentencing task as:

*“... a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour into the mathematics of units of punishment usually expressed in time or money.”*

(Is it any wonder, then, that there remain enormous difficulties in trying to punish people into goodness?)

In an address to the New South Wales (“NSW”) Parole Authorities Conference on 10 May 2006, NSW Chief Justice Spigelman said:

*As is the case with respect to the task judges face when they come to sentence a convicted criminal, what is involved [in making parole decisions] is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not point in the same direction. These tasks – whether sentencing or release on parole – involve a difficult process of weighing and balancing such matters.*

[And in an admonition to those who agitate unreasonably in the community for different approaches, he added:] *Long experience has established that such tasks are best done by independent, impartial and experienced persons, who are not subject to the transient rages and enthusiasms that attend the so frequently ill informed, or partly informed, public debate on such matters.”*

In an earlier article [(1999) 73 ALJ 876] the Chief Justice had added, in relation to sentencing: *“Specifically, the requirements of justice, in the sense of just deserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy.”*

The criminal justice process is relied upon to reduce levels of crime, particularly serious and violent crime, and to demonstrate the community’s “toughness” on crime on its behalf. [For my own part, I do not know of many law abiding people who are not tough on crime – but, since there will always be crime, I would rather see approaches taken to it that are effective in reducing its incidence and reforming offenders.] I note that for South Africa there are also concerns about the influence of race, gender and legal representation on sentencing outcomes. It is against that background that these topics are being addressed and real questions arise as to the restrictions to be properly imposed by government on the sentencing task of the judges.

## SOME AUSTRALIAN HISTORY

In the 1870s and 1880s in NSW, politicians and the media were very vocal about the perceived leniency of sentencing by judges and magistrates in the colony. (Not much has changed in 130 years in that respect.) Various proposals were advanced in

Parliament for mandatory minimum sentences in a succession of Bills. On one such occasion in 1882 one Member said that “*the curse of the country had been the practice of judges in inflicting light sentences. If it were thought advisable to flog a man, or to inflict any severe punishment for any offence, no discretion ought to be allowed to the judges.*”

In further debate in 1883 the same Member said: “... *I should be inclined to take from the judges all discretionary power, forcing them to inflict a certain sentence, and leaving it to the Executive to redress any wrong which may be done*”. It mattered not that this notion had been rejected by the Law Reform Commission in 1871 – the legislation was passed and the *Criminal Law Amendment Act* became law on 26 April 1883.

It provided mandatory minimum sentences for five categories of prescribed maximum sentences:

- penal servitude for life (eg. garrotting): seven years;
- penal servitude for 14 years (eg. forging a deed or will): five years;
- penal servitude for ten years (eg. embezzlement): four years (or three years imprisonment);
- penal servitude for seven years (eg. breaking and entering a dwelling-house with intent to commit a felony therein): three years (or two years imprisonment);
- penal servitude for five years (eg. simple larceny): one year imprisonment.

Cases rapidly arose where injustice was apparent and the unreasonableness of such sentencing became obvious. A public outcry ensued, letters were written to the newspapers and the legal profession condemned the lack of flexibility in the new regime. It was feared that jurors were compromising their oaths – knowing that harsh penalties would flow from conviction they were either acquitting or convicting of lesser alternative offences. Public meetings were held. Petitions were presented.

The Sydney Morning Herald editorialised on 27 September 1883:

*“We have the fact before us that in a case where a light penalty would have satisfied the claims of justice, the judge was prevented from doing what he believed to be right, and was compelled to pass a sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion.”*

Parliament was forced to act. The *Sentences Mitigation Act* became law on 22 May 1884. The mandatory minimum sentence legislation, which it abolished, had been in force for one year and three weeks.

Among the speeches in its support, the Attorney General said: “*It is of no use passing a law for the punishment of crime if you leave untouched the existence of a public sentiment which doubts the justice of your tribunals*”.

## MINIMUM SENTENCING

Minimum sentencing may take several forms – the description is used loosely in some places. The Australian experience has included the following.

- 1 For specific offences or repeat offences, mandatory minimum penalties may be prescribed.
- 2 For specific offences or repeat offences, minimum penalties may be prescribed, but with discretion reserved to the court to depart from them on terms.
- 3 “Standard” minimum penalties for specific offences of a certain severity may be prescribed, also with discretion reserved to the court to depart from them on terms.
- 4 “Guideline” penalties may be set for specific offences, also with discretion reserved to the court to depart from them on terms.

In other jurisdictions (such as the USA), minimum penalties may also come about by the application of “grids” or matrices to the cases. Minimum penalties for repeat offending there sometimes go under the description of “three strikes” laws.

---

1. The **first category** includes penalties imposed for regulatory (such as less serious driving) offences. A monetary penalty (fine) may be prescribed, or a fixed period of suspension or disqualification of a licence. All jurisdictions accept the mandatory nature of such penalties, even when a mandatory minimum penalty (such as a term of licence suspension) is included. Our discussion lies elsewhere.

Mandatory minimum penalties have been legislated in Western Australia (“WA”) and the Northern Territory (“NT”) at various times. In WA there was a regime prescribing mandatory minimum terms of imprisonment for 12 months for property offences by juveniles. Indeterminate detention was prescribed at one time for persons involved in high speed motor vehicle pursuits – in fact, the number of such events had declined just before the legislation was passed (but after the main public outcry that followed the death of a pregnant woman in a collision) and the number increased after the legislation came into force. There was a change of government and at present the only mandatory terms prescribed in WA are for driving offences (as above), murder (being life – but subject to remission) and burglary by a repeat offender (where the mandatory minimum term is 12 months imprisonment).

In the NT property offenders were subject to mandatory and increasing minimum periods of imprisonment upon conviction (14 days for a first offence, 28 days for a second and 120 days for a third). The legislation was repealed upon a change of government a few years ago, but not before an Aboriginal teenager, imprisoned for stealing a can of drink from a store, hanged himself in custody.

In Australia we have nine legal jurisdictions and each has a Director of Public Prosecutions. We correspond and meet regularly. All DsPP are opposed to this form of mandatory minimum sentencing. The grounds for opposition include the following.

- (a) Mandatory penalties exclude the operation of judicial discretion and thereby prevent the court from being able to give proper consideration to the subjective circumstances surrounding the offender. That can lead to injustice. Penalties (especially for serious offences) must be tailored to fit the crime and the criminal – justice must be individualised and penalties fixed in advance by Parliament cannot achieve this.
- (b) To have the legislature fixing penalties detracts from the independence of the judiciary and the principle of the separation of powers. People are deprived of their liberty not in accordance with a public balancing process that is individually accountable, but arbitrarily in accordance with penalties fixed in advance without regard for the individual circumstances. It may even be, especially in Australia, that such penalties would be unconstitutional. In *Nicholas v The Queen* (1998) 193 CLR 173 at 188 Chief Justice Brennan said:
 

*“A law that purports to direct the manner in which the judicial power should be exercised is constitutionally invalid. However, a law which merely prescribes a Court’s practice or procedure does not direct the exercise of the judicial power in finding facts, applying law or exercising an available discretion.”*
- (c) They result in fewer pleas of guilty and therefore place additional strain on the courts, prosecution and legal aid bodies and all the services associated with them. Backlogs increase and remand populations grow.
- (d) They impose additional pressures on prosecutors to negotiate with the defence and (perhaps inappropriately, for pragmatic reasons) agree to pursue lesser charges. That process is not transparent or readily accountable and can be unsatisfactory also for victims of crime.
- (e) It is not a reliable method of treatment of offenders. A past criminal record can often be a poor predictor of future offending.
- (f) They are not effective. They rest upon selective incapacitation; but it is unlikely that the criminal justice system can identify, apprehend and imprison for long periods sufficient numbers of high rate offenders at the right time in their criminal careers so as to substantially reduce the crime rate. They have been shown not to have a general deterrent effect on offending.
- (g) They expand prison populations. That has a cost – in funding and in the detrimental effect of prison on many inmates. Where the sentences are short, alternative dispositions would usually be more appropriate and effective. [Indeed, in WA sentences of six months or less have been abolished entirely and that option has been considered in other Australian jurisdictions.]
- (h) They impact disproportionately on the young, on women and on the indigenous population (in the Australian experience).
- (i) Serious or persistent offenders will receive heavier penalties, in any event, under existing legal regimes, than the mandatory minimum penalties usually enacted.

New South Wales has not had any such penalties since 1884.

---

2. The **second category** seems to be the situation in South Africa under section 51 of the *Criminal Law Amendment Act, 1997* (cf. subsection (3)).

Such a scheme is really little more than the legislature indicating the severity with which certain offences are viewed by it and exhorting the courts to be appropriately severe in their treatment of them. The NSW Law Reform Commission referred to such a practice in its Discussion Paper 33, *Sentencing*, April 1996:

*“... it might reasonably be argued that, at a time when the common law has come under criticism, a restatement of the law by the legislature operates to support and reinforce the law and the courts which have an independent constitutional duty to ascertain and apply it. In this context it may matter little that the criticism is ill-informed or inappropriate: the legislature might reasonably consider that it has a responsibility to lend its weight to supporting the law as applied by the courts.”*

That argument applies also to legislative increases in maximum penalties.

There is a risk, however, in leaving it to individual judges to interpret the meaning of terms such as “substantial” and “compelling” circumstances (cf. the South African legislation). That is an invitation for the appellate courts to intervene to set the standard to be applied and to correct the inevitable inconsistencies that will arise.

[In NSW there was a short-lived example of the reverse approach to such a regime. It is possible under section 19A of the *Crimes Act 1900* (enacted in 1989) for a court to impose a sentence of “life meaning life” or imprisonment for the whole of one’s remaining life (ie. without the possibility of release on parole) for murder and under other legislation for some drug offences. That is prescribed by the relevant sections as the maximum (not mandatory) penalty available. Additional legislation in 1996 (section 431B of the *Crimes Act 1900*) was framed in such a way as to seek to prescribe it as, in effect, the mandatory penalty for the worst examples of such offences.

For murder that sentence was to be imposed “*if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence*”. By leaving to the courts, however, discretion not to find such circumstances and so to impose lesser penalties, the legislation proved to be self-defeating (which some argued was the real political intention, in any event). Section 431B was never used and it was repealed from 2000. The courts have imposed and continue to impose whole of life sentences using general sentencing principles under section 19A and there have been 33 such prisoners – one a female; two have died in custody. (The population of NSW is about 7 million.)]

---

3. In NSW the **third category** is exemplified in the (misnamed) *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*. The Act is misnamed because it does not prescribe minimum sentences, either mandatory or discretionary – it sets out standard non-parole periods to be imposed for a list of

specific offences, to those examples of such offences “in the middle of the range of objective seriousness”, but it leaves open mechanisms for departing from those periods. I shall deal with this in some detail, because it is unique to NSW (in Australia, at least) and has both benefits and pitfalls that should be considered.

The principal objects of the Act are stated to be:

- *to establish a scheme of standard minimum sentencing* [called “standard non-parole periods” in the Act, in contrast to the short title of the Act] *for a number of serious offences; and*
- *to constitute a New South Wales Sentencing Council to advise the Attorney General in connection with sentencing matters.*

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

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

In his Second Reading speech of the Bill the Attorney General said:

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

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

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

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

Nevertheless, as DPP I strongly opposed this legislation as unnecessary and undesirable, as did the NSW Bar Association, the Law Society of NSW and the Public Defenders. Too much “guidance and structure” provided to judicial discretion can eliminate the discretion entirely, or at least unreasonably restrict its scope with unjust consequences. However, I find consolation now in the fact that, like the mandatory life sentencing legislation in 1996, so many let-outs have been provided for the courts by the legislation as interpreted by the Court of Criminal Appeal that the exercise of judicial discretion has remained largely intact (although the regime has resulted in increased levels of sentences for some of the offences listed). Section 21A allows pragmatism to pay some respect to principle. But that occurs only once the matter is before the court – there are still practical hurdles to be overcome before that stage is reached and they can directly affect the conduct of prosecutors. (Those considerations are particular to the regime in NSW, so I do not take time to address them here.)

## STANDARD NON-PAROLE PERIODS

The new Division 1A of Part 4 of the Act provides for standard non-parole periods for a number of offences listed in the Table when they are prosecuted on indictment (section 54D(2)). It does not apply to summary disposal, to life or other indeterminate periods, nor to detention under the *Mental Health (Criminal Procedure) Act* 1990. It applies to offences committed on or after 1 February 2003.

Section 54A(2) provides that “*For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle range of objective seriousness for offences in the Table to this Division*”. The court is to set that non-parole period “*unless the court determines that there are reasons for setting a non-parole period that is longer or shorter*”. Some of the reasons that the court may find are those listed in section 21A. The court must record its reasons for departing from the standard non-parole period and identify each factor taken into account.

Given the closing words of section 21A(1), it might be argued that the only thing that has changed in practice is the process to be undergone and recorded by the sentencer in court and recent judgments tend to reinforce that view.

However, the starting point now for offences listed in the Table is the identification of where in the “range of objective seriousness” the offence falls. Prosecutors now have to make this assessment, as well as the sentencing court, for reasons to do with the jurisdictions of the various courts in NSW.

## EXPERIENCE

Attached as “Annexure A” is a table of the offences listed, the penalties applicable and the percentages the standard non-parole periods bear to the prescribed maxima.

Attached as “Annexure B” is a table of the sentences imposed to date under this scheme.

Attached as “Annexure C” is a table of such sentences for the offences for which there have been more than ten sentences imposed under this regime.

## SOME DIFFICULTIES

1 There may be a temptation on the part of prosecutors to negotiate lesser and perhaps inappropriate charges in order to dispose of matters in the Local Court. (Such temptation can be resisted, but prosecutors are human, after all.) The transfer in effect of sentencing discretion from the bench to prosecutors, where its exercise is not as transparent and accountable, is to be avoided.

2 The Table of standard non-parole periods contains 6 offences in Table 1 under Chapter 5 of the *Criminal Procedure Act* 1986 (ie. to be disposed of summarily unless either party elects for indictment) and one offence in Table 2 (ie. to be disposed of summarily unless the prosecution elects for indictment). The shortest prescribed standard non-parole period is 3 years, one year more than the jurisdictional limit of the Local Court for a single offence. Therefore, where only one offence is being dealt with, prosecutors will need to assess where in the range of objective seriousness the offence falls in order to know whether to elect for indictable proceedings. If it is in a position being between some undetermined point below the middle of the range up to the most serious, then an election will have to be made (because the Local Court jurisdiction may be too low to adequately address the criminality involved). If it is below that undetermined point, then no election should be made. The identification of this point may be an extraordinarily difficult exercise to undertake in a conscientious, reasoned and accountable manner, even if all the relevant material is available from police (which usually is not the case when the election decision typically has to be made). Prosecutors have not welcomed this additional role in the sentencing process. The easy way out for them would be to make an election in every such case which increases the time, cost and inconvenience of disposing of the matter; but that temptation has also been resisted.

3 The legislation reversed the previous scheme of top-down sentencing to prescribe a bottom-up approach. Now the non-parole period must be fixed first, with the balance of the sentence to be limited to no more than one third of the non-parole period, unless the court decides that there are special circumstances for making it more. Those special circumstances may therefore warrant varying the statutory ratio and fixing the non-parole period, in the result, at less than 75% of the total sentence (section 44, *Crimes (Sentencing Procedure) Act* 1999). [Recently special circumstances were being found in 87% of cases – one wonders what is required for circumstances to be “special”.]

4 Another of the difficulties created by this legislation is the anomalous treatment of the offences and penalties in the Table. It is highlighted by the way in which the offence under section 61M of the *Crimes Act* 1900 has been treated (see “Annexure A”); but the proportions that the prescribed standard non-parole periods are of the maximum sentences prescribed vary widely from 28% to 71%.

## SUMMARY

In broad terms, the stated aim of the “Minimum Sentencing Act” was to promote consistency and transparency in sentencing and to promote public understanding of the sentencing process. In relation to the selection of specific standard non-parole periods, and on the basis of statements made by the Attorney General and the Parliamentary Secretary in speeches which accompanied the passage of the Bill through Parliament, standard minimum terms are supposed to reflect:

- (a) the seriousness of the offence;
- (b) the existing maximum penalty for the offence;
- (c) the sentencing trends for the offences in the table as reflected in the NSW Judicial Commission Judicial Information Research System (“JIRS”) statistics; and
- (d) the need to meet legitimate community expectations that sentences imposed by courts adequately reflect the gravity of the criminal conduct being punished.

It is fair to say that judges have been quite ingenious in finding ways to avoid being unnecessarily constrained by the legislation, so (in my view, at least) the legislation has failed to contribute much to either consistency or transparency in sentencing. Its operation is to be reviewed in the near future.

---

4. The **fourth category** is exemplified in the NSW guideline sentencing judgment regime. This was an initiative of Chief Justice Spigelman, faced with threats by both sides of politics in an election campaign to introduce mandatory minimum sentences. He borrowed the idea from the UK, where such measures had been practised since the 1970s. It was a highly effective deterrent to the politicians.

In the article referred to above [(1999) 73 ALJ 876] the Chief Justice stated:

*“... guideline judgments are a mechanism for structuring discretion, not for restricting discretion. The continued existence of sentencing discretion is an essential component of the fairness of our criminal justice system. Unless judges are able to mould the sentence to the circumstances of the individual case then, irrespective of how much legislative forethought has gone into the determination of a particular regime, there will always be the prospect of injustice. No judge of my acquaintance is prepared to tolerate becoming an instrument of injustice. Guideline judgments are preferable to the constraints of mandatory minimum terms or grid sentencing.”*

He emphasised the need for *“both consistency and individualised justice”*.

Guideline judgments were initially a device employed by the courts without the backing of specific legislation; however, when some benefits were realised, Parliament enacted Division 4 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999* and it now deals with sentencing guidelines.

A guideline judgment is defined in section 36 of the Act as:

*“a judgment that is expressed to contain guidelines to be taken into account by courts sentencing offenders, being:*

- guidelines that apply generally, or*
- guidelines that apply to particular courts or classes of courts, to particular offences or classes of offences, to particular penalties or classes of penalties or to particular classes of offenders (but not to particular offenders).”*

Guideline sentencing judgments have been delivered on:

- dangerous driving causing death or grievous bodily harm: (before Division 4 of the Act) *R v Jurisic* (1998) 45 NSWLR 209; (after Division 4) *R v Whyte* [2002] NSWCCA 343;
- armed robbery: *R v Henry* (1999) 46 NSWLR 346;
- drug importation: *R v Wong; Leung* (1999) 48 NSWLR 340; see also *R v Wong; Leung* [2001] HCA 64;
- break, enter and steal: *Re: Attorney General’s Application (No 1); R v Ponfield et ors* (1999) 48 NSWLR 327;
- guilty plea: *R v Thomson; Houlton* [2000] NSWCCA 309;
- application to children: *R v SDM* (2001) 127 A Crim R 318;
- Form 1 (taking other offences into account when sentencing for the principal offence/s): *Attorney General’s Application (No 1) of 2002* [2002] NSWCCA 518;
- high range PCA (prescribed concentration of alcohol) driving offences: *Road Transport (Safety and Traffic Management) Act 1999*, [2004] NSWCCA 303.

Guidelines have been given that nominate variously:

- the starting point of appropriate sentences;
- the range of appropriate sentences; or
- the salient factors to be taken into account on sentence.

They are in “narrative”, rather than “numerical”, form.

Section 37 of the Act enables the Attorney General to apply for a guideline judgment. The CCA may also give a guideline judgment on its own motion (section 37A). The CCA has discretion whether or not to issue a guideline judgment in any case. The DPP may apply and may be heard in all such matters, as may the Senior Public Defender.

Under section 40 of the Act, nothing in Division 4:

- “(a) limits any power or jurisdiction of the Court to give a guideline judgment that the Court has apart from this Division, or*
- (b) requires the Court to give any guideline judgment under this Division if it considers it inappropriate to do so.”*

The Court when considering a guideline judgment is not limited as to the evidence or other matters that it may take into consideration and the Court may inform itself as it sees fit (section 42). Guideline sentencing judgment applications, therefore, are

extremely resource-intensive for the parties and require a great deal of work by the Court.

In the article referred to above [(1999) 73 ALJ 876] Chief Justice Spigelman stated:

*“The new system of guideline judgments has been well received by the public. It has also been well received in legal commentary... insofar as I have received commentary from trial judges, that has also been supportive.”*

The system’s successes have been demonstrated and reported by the Judicial Commission of NSW:

- in bringing a greater measure of consistency to sentencing for dangerous driving offences – *“Sentencing Dangerous Drivers in New South Wales”*, Monograph Series 21 (2002); and
- in reducing the “systematic excessive leniency and inconsistency in sentencing practice” for offences of armed robbery – *“Sentencing Trends for Armed Robbery and Robbery in Company: The Impact of the Guideline in R v Henry”*, Sentencing Trends & Issues, No 26, February 2003; and
- in arresting declining penalties for high range percentage of alcohol offences – *“Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW”*, Sentencing Trends and Issues, No 35, September 2005.

It is fair to say, however, that although the regime has been successful in several respects, the Court’s enthusiasm for guideline judgments has waned considerably and some applications for guideline sentencing judgments have been refused.

## CONCLUSION

All proposals for mandatory minimum sentences or any other forms of mandatory sentencing (for all but minor regulatory offences) are objectionable in principle because they remove or inappropriately limit judicial discretion and impede the attainment of individual justice. Proportionality of the punishment to the offending cannot be achieved, punishment cannot be made to fit the criminal (as well as the crime) and unjust and (paradoxically) unequal penalties result. The proper objectives of punishment cannot be achieved. The result is often not fair, just or effective.

The modern historical objective of sentencing in our system is to make the punishment fit the crime and the criminal. It is not possible for the relevant sentencing considerations to be identified accurately and comprehensively in advance of the offending (as Parliament would have to do in order to be able to fix just sentences in legislation). There must be left scope for discretion, to be exercised in a judicial fashion (and not arbitrarily or capriciously). The alternative is not justice.

Courts must remain alert to preserve and apply the discretions that are essential to the dispensing of justice. Capable judicial officers must be appointed to ensure this happens and the process must be appropriately superintended.

In an address to the Annual Colloquium of the Judicial Conference of Australia on 6 October 2006 Australian Chief Justice Gleeson said:

*“The uncertainty of some aspects of the law [including sentencing], reflected in diversity of judicial opinion in the highest courts, or in the scope for normative involved in particular legal rules or standards, cannot be ignored. These are inescapable features of a rational, tolerably flexible, system of law, capable of adjusting to the demands of circumstances. But they can shake confidence unless people understand that, in its nature, law requires the exercise of judgment, and issues for judgment are often contestable.”*

## ANNEXURE A

### *Crimes (Sentencing Procedure) Act 1999*

**Table of standard non-parole period offences.**

Item No	Offence	Standard non-parole period	Maximum penalty	Standard non-parole period as a percentage of maximum penalty
1A	Murder — where the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation	25 years	Life imprisonment s 19A Crimes Act	Not calculable
1	Murder — in other cases	20 years	Life imprisonment s 19A Crimes Act	Not calculable
2	Section 26 of the Crimes Act 1900 (conspiracy to murder)	10 years	25 years	40 per cent
3	Sections 27, 28, 29 or 30 of the Crimes Act 1900 (attempt to murder)	10 years	25 years all sections	40 per cent
4	Section 33 of the Crimes Act 1900 (wounding etc with intent to do bodily harm or resist arrest)	7 years	25 years	28 per cent
5	Section 60 (2) of the Crimes Act 1900 (assault of police officer occasioning bodily harm)	3 years	7 years	42 per cent
6	Section 60 (3) of the Crimes Act 1900 (wounding or inflicting grievous bodily harm on police officer)	5 years	12 years	41.6 per cent
7	Section 61I of the Crimes Act 1900 (sexual assault)	7 years	14 years	50 per cent
8	Section 61J of the Crimes Act 1900 (aggravated sexual assault)	10 years	20 years	50 per cent

9	Section 61JA of the Crimes Act 1900 (aggravated sexual assault in company)	15 years	Life imprisonment	not calculable
9A	Section 61M (1) of the Crimes Act 1900 (aggravated indecent assault)	5 years	7 years	71 per cent
9B	Section 61M (2) of the Crimes Act 1900 (aggravated indecent assault---child under 10)	5 years	10 years	50 per cent
10	Section 66A of the Crimes Act 1900 (sexual intercourse---child under 10)	15 years	25 years	60 per cent
Item No	Offence	Standard non-parole period	Maximum penalty	Standard non-parole period as a percentage of maximum penalty
11	Section 98 of the Crimes Act 1900 (robbery with arms etc and wounding)	7 years	25 years	28 per cent
12	Section 112 (2) of the Crimes Act 1900 (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)	5 years	20 years	25 per cent
13	Section 112 (3) of the Crimes Act 1900 (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)	7 years	25 years	28 per cent
14	Section 154C (1) of the Crimes Act 1900 (car-jacking)	3 years	10 years	30 per cent
15	Section 154C (2) of the Crimes Act 1900 (car-jacking in circumstances of aggravation)	5 years	14 years	35.7 per cent
15A	Section 203E of the Crimes Act 1900 (bushfires)	5 years	14 years	35.7 per cent
16	Section 24 (2) of the Drug Misuse and Trafficking Act 1985 (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does	10 years	20 years	50 per cent

	not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug			
17	Section 24 (2) of the Drug Misuse and Trafficking Act 1985 (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15 years	Life imprisonment	not calculable
18	Section 25 (2) of the Drug Misuse and Trafficking Act 1985 (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10 years	20 years	50 per cent
Item No	Offence	Standard non-parole period	Maximum penalty	Standard non-parole period as a percentage of maximum penalty
19	Section 25 (2) of the Drug Misuse and Trafficking Act 1985 (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15 years	Life imprisonment	not calculable
20	Section 7 of the Firearms Act 1996 (unauthorised possession or use of firearms)	3 years	(a) prohibited firearm: 14 years (b) all other	(a) 21.42 per cent (b) 60 per cent

			cases: 5 years	
--	--	--	-------------------	--

## ANNEXURE B

### Sentences under the Standard Non-Parole Period Scheme

**Notes:**

The “before 1/02/03” period covers sentences outside of the scheme from 1 January 1998 to 30 December 2002. The “after 1/02/03” period covers sentences under the scheme from 1 February 2003 to 30 December 2005.

The “number of matters” refers to the number of sentences under the scheme. The “percentage sentenced to imprisonment” was calculated on the basis of *all* matters sentenced; that is, both consecutive and non-consecutive terms.

The “term of sentence” and “non-parole period” were calculated on sentences where a non-consecutive term was imposed.

Item No. / Offence	SNPP	Percentage Sent to Imprisonment		Term of Sentence		
		Before 1/02/03	After 1/02/03	Midpoint		
				Before 1/02/03	After 1/02/03	
<b>1A</b> Murder- where the victim was a police officer, emergency services worker, or other public official, exercising public or community functions and the offence arose because of the victim’s occupation	25 yrs	N/A		N/A		
<b>1</b> Murder – other cases ( <b>23 matters</b> )	20 yrs	100%	100%	18 yrs	20+ yrs	
<b>2</b> Section 26 <i>Crimes Act</i> (conspiracy to murder)	* conspiracy to murder ( <b>0 matters</b> )	10 yrs	100%	N/A	10 yrs	N/A
	* solicit to murder ( <b>4 matters</b> )	10 yrs	92%	100%	5 yrs	5 yrs
<b>3</b> Section 27 <i>Crimes Act</i> (acts done to the person with intent to murder)	* administer poison with intent to murder ( <b>0 matters</b> )	10 yrs	100%	N/A	9 yrs	N/A
	* wound or cause GBH with intent to murder ( <b>4 matters</b> )	10 yrs	100%	100%	12 yrs	7 yrs
<b>3</b> Section 29 <i>Crimes Act</i> (certain other attempts to murder)	* attempt to strangle/suffocate with intent to murder ( <b>0 matters</b> )	10 yrs	50%	N/A	4 yrs	N/A
	* shoot at with intent to murder ( <b>0 matters</b> )	10 yrs	100%	N/A	5 yrs	N/A
<b>3</b> Section 30 <i>Crimes Act</i> ( attempt to murder by other means) ( <b>0 matters</b> )	10 yrs	100%	N/A	5 yrs	N/A	
<b>4</b> Section 33 <i>Crimes Act</i> (wounding etc with intent to do bodily harm or resist arrest)	* wounding with intent ( <b>52 matters</b> )	7 yrs	93%	92%	5 yrs	7 yrs
	* shoot at/attempt to shoot with intent ( <b>3 matters</b> )	7 yrs	85%	100%	7 yrs	3 yrs
<b>5</b> Section 60 (2) <i>Crimes Act</i> (assault of police officer occasioning bodily harm) ( <b>4 matters</b> )	3 yrs	56%	75%	2 yrs	3 yrs	
<b>6</b> Section 60(3) <i>Crimes Act</i> (wounding or inflicting GBH on police officer) ( <b>1 matters</b> )	5 yrs	33%	100%	2 yrs	4 yrs	

Item No. / Offence	SNPP	Percentage Sent to Imprisonment		Term of Sentence		
		Before 1/02/03	After 1/02/03	Midpoint		
				Before 1/02/03	After 1/02/03	
<b>7</b> Section 61I <i>Crimes Act</i> (sexual assault) ( <b>40 matters</b> )	7 yrs	86%	93%	4 yrs	5 yrs	
<b>8</b> Section 61J <i>Crimes Act</i> (aggravated sexual assault) ( <b>28 matters</b> )	10 yrs	95%	100%	6 yrs	6 yrs	
<b>9</b> Section 61JA <i>Crimes Act</i> (aggravated sexual assault in company)	* inflict abh ( <b>1 matter</b> )	15 yrs	N/A	100%	N/A	N/A
	* threaten abh by weapon ( <b>5 matters</b> )	15 yrs	100%	100%	7 yrs	7 yrs
	* deprive liberty ( <b>2 matters</b> )	15 yrs	100%	N/A	16 yrs	N/A
<b>9A</b> Section 61M (1) <i>Crimes Act</i> (aggravated indecent assault) ( <b>21 matters</b> )	5 yrs	42%	52%	2 yrs	3 yrs	
<b>9B</b> Section 61M (2) <i>Crimes Act</i> (aggravated indecent assault-child under 10) ( <b>17 matters</b> )	5 yrs	55%	71%	3 yrs	3 yrs	
<b>10</b> Section 66A <i>Crimes Act</i> (sexual intercourse-child under 10) ( <b>14 matters</b> )	15 yrs	82%	88%	54 mth	6 yrs	
<b>11</b> Section 98 <i>Crimes Act</i> (robbery with arms etc and wounding)	* with arms cause wounding ( <b>11 matters</b> )	7 yrs	98%	100%	5 yrs	7 yrs
	* in company cause wounding ( <b>18 matters</b> )	7 yrs	94%	83%	6 yrs	6 yrs
	* assault with intent to rob and cause wounding ( <b>10 matters</b> )	7 yrs	87%	90%	6 yrs	7 yrs
<b>12</b> Section 112(2) <i>Crimes Act</i> (breaking etc into any house and committing serious indictable offence in circumstances of aggravation) ( <b>269 matters</b> )	5 yrs	73%	69%	42 mth	42 mth	
<b>13</b> Section 112(3) <i>Crimes Act</i> (breaking into any house and committing indictable offence circumstances special aggv) ( <b>11 matters</b> )	7 yrs	92%	100%	6 yrs	7 yrs	
<b>14</b> Section 154C (1) <i>Crimes Act</i> (car-jacking) ( <b>3 matters</b> )	3 yrs	100%	100%	3 yrs	5 yrs	
<b>15</b> Section 154C (2) <i>Crimes Act</i> (car-jacking in circumstances of special aggravation) ( <b>17 matters</b> )	5 yrs	88%	100%	30 mth	42 mth	
<b>15A</b> Section 203E <i>Crimes Act</i> (bushfires) ( <b>1 matter</b> )	5 yrs	67%	100%	54 mth	N/A	
<b>20</b> Section 7 <i>Firearms Act 1996</i> ** (unauthorised possession or use of firearms)	Old section 7 ( <b>19 matters</b> )	3 yrs	57%	84%	2 yrs	3 yrs
	New section 7 – firearms ( <b>6 matters</b> )	3 yrs	N/A	67%	N/A	18 mth
	New section 7 – pistols ( <b>1 matter</b> )	3 yrs	N/A	100%	N/A	3 yrs

\*\* “Old” Section 7(1) prior to amendment by *Crimes Legislation Further Amendment Act 2003*. Assented to 5/12/2003, commenced 14/02/2004.

Item No. / Offence	SNPP	Percentage sent to imprisonment		Term of sentence		
		Before 1/02/03	After 1/02/03	Midpoint		
				Before 1/02/03	After 1/02/03	
<b>16</b> Section 24(2) <i>Drug Misuse and Trafficking Act 1985</i> (manufacture or production of commercial quantity of prohibited drug) being an offence that: a) does not relate to cannabis leaf, and b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug)	* manufacture prohibited drug - commercial quantity amphetamines (0 matter)	10 yrs	100%	N/A	6 yrs	N/A
	* manufacture prohibited drug – commercial quantity cocaine ( <b>1 matter</b> )	10 yrs	N/A	100%	N/A	3 yrs
	* knowingly take part in manufacture of prohibited drug – commercial quantity amphetamines (0 matters)	10 yrs	95%	N/A	5 yrs	N/A
	* knowingly take part in manufacture of prohibited drug – commercial quantity cocaine (0 matter)	10 yrs	67%	N/A	3 yrs	N/A
	* knowingly take part in manufacture of prohibited drug – commercial quantity ecstasy (0 matters)	10 yrs	100%	N/A	18 mth	N/A

Item No. / Offence	SNPP	Percentage sent to imprisonment		Term of Sentence		
		Before 1/02/03	After 1/02/03	Midpoint		
				Before 1/02/03	After 1/02/03	
<b>17</b> Section 24(2) <i>Drug Misuse and Trafficking Act 1985</i> (manufacture or production of commercial quantity of prohibited drug) being an offence that: a) does not relate to cannabis leaf, and b) if a large commercial quantity specified for the prohibited drug concerned under that	* manufacture prohibited drug – large commercial quantity amphetamines ( <b>1 matter</b> )	15 yrs	100%	100%	18 mth	4yrs
	* knowingly take part in manufacture of prohibited drug – large commercial quantity amphetamines (0 matters)	15 yrs	86%	N/A	5 yrs	N/A

Item No. / Offence	SNPP	Percentage sent to imprisonment		Term of Sentence		
		Before 1/02/03	After 1/02/03	Midpoint		
				Before 1/02/03	After 1/02/03	
Act, involves not less than the large commercial quantity of that prohibited drug)	* knowingly take part in manufacture of prohibited drug – large commercial quantity ecstasy (0 matters)	15 yrs	100%	N/A	6 yrs	N/A

Item No. / Offence	SNPP	Percentage sent to imprisonment		Term of Sentence		
		Before 1/02/03	After 1/02/03	Midpoint		
				Before 1/02/03	After 1/02/03	
18 Section 25(2) Drug Misuse and Trafficking Act 1985 (supplying commercial quantity of prohibited drug) being an offence that: a) does not relate to cannabis leaf, and b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug)	* supply prohibited drug – commercial quantity heroin (7 matters)	10 yrs	94%	100%	5 yrs	8 yrs
	* supply prohibited drug – commercial quantity amphetamines (12 matters)	10 yrs	92%	83%	4 yrs	6 yrs
	* supply prohibited drug – commercial quantity cocaine (4 matters)	10 yrs	87%	100%	5 yrs	6 yrs
	* supply prohibited drug – commercial quantity ecstasy (14 matters)	10 yrs	81%	86%	3 yrs	4 yrs
	* supply prohibited drug – commercial quantity ketamine (1 matter)	10 yrs	N/A	100%	N/A	8 yrs
	* knowingly take part in supply of prohibited drug – commercial quantity heroin (3 matters)	10 yrs	100%	100%	4 yrs	54 mth
	* knowingly take part in supply of prohibited drug – commercial quantity amphetamines (2 matter)	10 yrs	79%	100%	3 yrs	4 yrs
	* knowingly take part in supply of prohibited drug – commercial quantity cocaine (0 matters)	10 yrs	100%	N/A	4 yrs	N/A

Item No. / Offence		SNPP	Percentage sent to imprisonment		Term of Sentence	
			Before 1/02/03	After 1/02/03	Midpoint	
					Before 1/02/03	After 1/02/03
	* knowingly take part in supply of prohibited drug – commercial quantity ecstasy ( <b>1 matter</b> )	10 yrs	75%	100%	3 yrs	3 yrs

Item No. / Offence		SNPP	Percentage sent to imprisonment		Term of Sentence	
			Before 1/02/03	After 1/02/03	Midpoint	
					Before 1/02/03	After 1/02/03
19 Section 25(2) <i>Drug Misuse and Trafficking Act</i> 1985 (supplying commercial quantity of prohibited drug) being an offence that: a) does not relate to cannabis leaf, and b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug)	* supply prohibited drug – large commercial quantity heroin ( <b>6 matters</b> )	15 yrs	100%	100%	8 yrs	8 yrs
	* supply prohibited drug – large commercial quantity amphetamines ( <b>4 matters</b> )	15 yrs	95%	100%	7 yrs	6 yrs
	* supply prohibited drug – large commercial quantity cocaine (0 matters)	15 yrs	75%	N/A	7 yrs	N/A
	* supply prohibited drug – large commercial quantity ecstasy ( <b>11 matters</b> )	15 yrs	100%	100%	6 yrs	7 yrs
	* knowingly take part in supply of prohibited drug – large commercial quantity heroin ( <b>1 matter</b> )	15 yrs	100%	100%	7 yrs	8 yrs
	* knowingly take part in supply of prohibited drug – large commercial quantity amphetamines (0 matters)	15 yrs	100%	N/A	54 mth	N/A
	* knowingly take part in supply of prohibited drug – large commercial quantity cocaine (0 matters)	15 yrs	100%	N/A	5 yrs	N/A

Item No. / Offence		SNPP	Percentage sent to imprisonment		Term of Sentence	
			Before 1/02/03	After 1/02/03	Midpoint	
					Before 1/02/03	After 1/02/03
	* knowingly take part in supply of prohibited drug – large commercial quantity ecstasy (0 matters)	15 yrs	100%	N/A	30 mth	N/A

## ANNEXURE C

### Scheme offences where there have been more than 10 sentences

Item No. / Offence		SNPP	Percentage sent to imprisonment		Term of sentence		Non-parole period	
			Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03
<b>1</b> Murder – other cases ( <b>23 matters</b> )		20 yrs	100%	100%	18 yrs	20+ yrs	14 yrs	18 yrs
<b>4</b> Section 33 <i>Crimes Act</i> (wounding etc with intent to do bodily harm or resist arrest)	* wounding with intent ( <b>52 matters</b> )	7 yrs	93%	92%	5 yrs	7 yrs	3 yrs	4 yrs
<b>7</b> Section 61I <i>Crimes Act</i> (sexual assault) ( <b>40 matters</b> )		7 yrs	86%	93%	4 yrs	5 yrs	2 yrs	30 mth
<b>8</b> Section 61J <i>Crimes Act</i> (aggravated sexual assault) ( <b>28 matters</b> )		10 yrs	95%	100%	6 yrs	6 yrs	3 yrs	3 yrs
<b>9A</b> Section 61M (1) <i>Crimes Act</i> (aggravated indecent assault) ( <b>21 matters</b> )		5 yrs	42%	52%	2 yrs	3 yrs	1 yr	30 mth
<b>9B</b> Section 61M (2) <i>Crimes Act</i> (aggravated indecent assault-child under 10) ( <b>17 matters</b> )		5 yrs	55%	71%	3 yrs	3 yrs	18 mth	18 mth
<b>10</b> Section 66A <i>Crimes Act</i> (sexual intercourse-child under 10) ( <b>14 matters</b> )		15 yrs	82%	88%	54 mth	6 yrs	30 mth	4 yrs
<b>11</b> Section 98 <i>Crimes Act</i> (robbery with arms etc and wounding)	* with arms cause wounding ( <b>11 matters</b> )	7 yrs	98%	100%	5 yrs	7 yrs	3 yrs	3 yrs
	* in company cause wounding ( <b>18 matters</b> )	7 yrs	94%	83%	6 yrs	6 yrs	3 yrs	3 yrs
	* assault with intent to rob and cause wounding ( <b>10 matters</b> )	7 yrs	87%	90%	6 yrs	7 yrs	42 mth	42 mth
<b>12</b> Section 112(2) <i>Crimes Act</i> (breaking etc into any house and committing serious indictable offence in circumstances of aggravation) ( <b>269 matters</b> )		5 yrs	73%	69%	42 mth	42 mth	18 mth	2 yrs
<b>13</b> Section 112(3) <i>Crimes Act</i> (breaking into any house and committing indictable offence circumstances special aggrvt) ( <b>11 matters</b> )		7 yrs	92%	100%	6 yrs	7 yrs	4 yrs	4 yrs
<b>15</b> Section 154C (2) <i>Crimes Act</i> (car-jacking in circumstances of special aggravation) ( <b>17 matters</b> )		5 yrs	88%	100%	30 mth	42 mth	18 mth	18 mth
<b>20</b> Section 7 <i>Firearms Act 1996</i> (unauthorised possession or use of firearms)	Old section 7 ( <b>19 matters</b> )	3 yrs	57%	84%	2 yrs	3 yrs	18 mth	2 yrs

Item No. / Offence		SNPP	Percentage sent to imprisonment		Term of sentence		Non-parole period	
					Midpoint		Midpoint	
			Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03
18 Section 25(2) <i>Drug Misuse and Trafficking Act</i> 1985 (supplying commercial quantity of prohibited drug) being an offence that: a) does not relate to cannabis leaf, and b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug)	* supply prohibited drug – commercial quantity amphetamines (12 matters)	10 yrs	92%	83%	4 yrs	6 yrs	30 mth	42 mth
	* supply prohibited drug – commercial quantity ecstasy (14 matters)	10 yrs	81%	86%	3 yrs	4 yrs	18 mth	2 yrs
19 Section 25(2) <i>Drug Misuse and Trafficking Act</i> 1985 (supplying commercial quantity of prohibited drug) being an offence that: a) does not relate to cannabis leaf, and b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug)	* supply prohibited drug – large commercial quantity ecstasy (11 matters)	15 yrs	100%	100%	6 yrs	7 yrs	4 yrs	54 mth

Of the 14 scheme offences identified, 10 have shown an increase in the non-parole period with the remaining 4 showing no change. Eleven of the scheme offences in the table show an increase in the percentage sent to prison.