



SENTENCING SYMPOSIUM MARCH 2014

- 1 As Hoeben CJ at CL has observed, a wide range of issues bear upon the sentencing process. An informed, balanced and respectful dialogue concerning sentencing calls for an understanding of these issues.
- 2 I wish to address briefly two topics:
 - (a) charge selection and the presentation of facts on sentence;
 - (b) the facility for appeal against sentence and what the rate of appeals and their outcomes indicate about the adequacy of sentences.

Charge Selection and Agreed Facts

- 3 These issues are important for two reasons. Firstly, they serve to explain limits placed upon a sentencing Judge. Secondly, they identify key elements available to be utilised in a fair and balanced report of a sentencing decision.
- 4 It is for the prosecuting authorities, not the courts, to decide who is to be prosecuted and for what offences.¹
- 5 The importance under Australian law of maintaining the separation between prosecutorial and judicial functions has been emphasised

¹ *Magaming v The Queen* [2013] HCA 40; 87 ALJR 1060 at 1067 [20].

repeatedly by the High Court of Australia. The independence and impartiality of the judicial process would be compromised if courts were perceived to be in any way concerned with who is to be prosecuted and for what.²

6 The prosecutor's selection of charges has an obvious bearing on sentence. This will be the case where the prosecution has, for example, exercised discretion to accept a plea of guilty to manslaughter where the original charge was murder. The court may not canvass the exercise of the prosecutor's discretion, even if the court considers a more serious charge to be more appropriate.³

7 It is for the sentencing Judge alone to decide the sentence to be imposed. There is no such thing as a plea bargain where the sentence is agreed (as seen in the USA) under Australian law.⁴

8 Where a plea of guilty is entered to a charge in the Supreme Court or District Court, the usual practice is for a Statement of Agreed Facts to be placed before the sentencing Judge. In the absence of any other evidence concerning the facts of the offence, the sentencing Judge is to proceed to sentence the offender by reference to the Agreed Facts.

9 Where there have been charge negotiations leading to a plea of guilty for an offence other than the offence originally charged, the prosecution must provide to the sentencing court a certificate⁵ verifying that:

- (a) consultation with the victim and police officer in charge of the investigation has taken place or, if it has not, the reasons why it has not occurred, and

² *Maxwell v The Queen* [1996] HCA 46; 184 CLR 501 at 534, *Likiardopoulos v The Queen* [2012] HCA 37; 247 CLR 265 at 279-190 [37].

³ *Elias v The Queen* [2013] HCA 31; 248 CLR 483 at 497-498 [34].

⁴ *GAS v The Queen* [2004] HCA 22; 217 CLR 198 at 210-211 [28]-[32], *Barbaro v The Queen* [2014] HCA 2; 305 ALR 323.

⁵ Under s.35A *Crimes (Sentencing Procedure) Act 1999*.

- (b) any Statement of Agreed Facts, to be tendered at the sentencing hearing, constitutes a fair and accurate account of the objective criminality of the offender having regard to the relevant and provable facts.
- 10 The Statement of Agreed Facts will ordinarily be tendered as evidence in open court. The recital of facts in a Judge's remarks on sentence will be drawn ordinarily from the Agreed Facts.
- 11 An accurate, fair and balanced report of any sentencing outcome should be based upon the sentencing remarks stated publicly and (in the case of the Supreme Court) published always on the Court's website.
- 12 At times, media reports of sentencing decisions do not state accurately the charge for which the offender was sentenced, let alone the facts of the offence. What is sometimes reported as fact may be drawn from earlier and out-of-date sources or other commentary which goes beyond what has been presented to the court. Reporting of this type does not serve the public interest in fair, accurate and balanced reporting so as to assist the public to understand what has happened in court.

Criminal Appeals

- 13 The principal measure for redress, if error is claimed concerning sentences passed by the Supreme or District Courts (where more serious offences are prosecuted), is appeal to the Court of Criminal Appeal, heard ordinarily by a Bench of three Judges.
- 14 An appellant to the Court of Criminal Appeal (whether the offender or the Crown) must establish error on the part of the sentencing court. It may be argued that there was legal or factual error or that the sentence was manifestly excessive or manifestly inadequate. A claim of manifest excess

or manifest inadequacy requires demonstration that the sentence passed was unreasonable or plainly unjust.

- 15 It is appropriate to consider the rate of appeals against sentence to the Court of Criminal Appeal and outcomes of those appeals. This provides a practical means to assess any claim that sentences imposed are (in particular) too lenient.
- 16 First, mention should be made of some basic figures.
- 17 In 2012, the District Court heard 3,152 finalised matters in its original criminal jurisdiction. Of these, 2,388 proceeded to sentence.⁶
- 18 In 2012, some 60 matters proceeded to sentence in the Supreme Court.
- 19 The number of offender sentence appeals to the Court of Criminal Appeal has fallen between 2002 and 2012. The success rate has ranged from 34.3% to 49.5% over that period.
- 20 The following table summarises the number of offender appeals to the Court of Criminal Appeal, and their outcomes, in the period 2002 to 2012.⁷

Offender appeals against sentence, NSW and Commonwealth offences, 2002 - 2012

Year	Total appeals against sentence	Allowed	
2012	200	65	38.7%
2011	188	93	49.5%
2010	216	84	38.9%
2009	230	78	34.3%
2008	216	83	38.4%

⁶ NSW Bureau of Crime Statistics and Research, "Criminal Courts Statistics 2012" (2013).

⁷ The information is sourced from the Judicial Commission of New South Wales.

Year	Total appeals against sentence	Allowed	
2007	242	94	38.8%
2006	259	106	40.9%
2005	318	141	44.3%
2004	285	131	46%
2003	272	109	40.1%
2002	331	148	44.7%

21 The number of Crown appeals has fluctuated in the period 2002 to 2012, between 101 (in 2004) and 32 (in 2012). The success rate has ranged between 37.5% (in 2012) and 71% (in 2010).

22 The following table summarises the number of Crown appeals to the Court of Criminal Appeal, and their outcomes, in the period 2002 to 2012.⁸

Crown appeals against sentence for NSW and Commonwealth offences, 2002 - 2012

Year	Total appeals against sentence	Allowed	
2012	32	12	37.5%
2011	34	15	44.1%
2010	69	49	71%
2009	48	31	64.6%
2008	62	32	51.6%
2007	59	35	59.3%
2006	76	47	61.8%
2005	58	34	58.6%
2004	101	52	51.5%
2003	65	32	49.2%
2002	80	49	61.3%

⁸ The information is sourced from the Judicial Commission of New South Wales.

- 23 There is a further procedure available to deal with sentencing. If there is concern about the level of sentence for an offence, it is open to the Attorney General to make application to the Court of Criminal Appeal for a sentencing guideline judgment.⁹ This procedure has not been used for a decade. The last application for a guideline judgment was in 2004 (relating to sentencing for high-range PCA offences).
- 24 Given the number of sentencing decisions in the District Court and Supreme Court, the volume of offender appeals to the Court of Criminal Appeal and, in particular, successful offender appeals, is small.
- 25 The number of prosecution appeals against sentence to the Court of Criminal Appeal is smaller again. This points to a conclusion that the rate of erroneously lenient sentencing is very low indeed.
- 26 The broader picture is also relevant.
- 27 Out of the great number of people sentenced in all New South Wales courts each year, including the Local Court and Children's Court (an average of about 116,000), a small minority (5%) complain about the severity of their sentence, and a reasonable number (3.6%) of them succeed. However, the prosecution only complains about asserted manifestly inadequate sentences in less than 0.1% of cases.
- 28 None of this supports a conclusion that there is a pattern of erroneous sentencing in this State.

A Concluding Comment

- 29 The importance of an informed, balanced and respectful dialogue concerning sentencing is not confined to this State.

⁹ Section 37 *Crimes (Sentencing Procedure) Act 1999*.

- 30 Speaking in October 2013, Sir Brian Leveson (President of the Queen's Bench Division and then Chair of the Sentencing Council of England and Wales) observed that an aim of the Sentencing Council was to improve public confidence in sentencing. Sir Brian continued:¹⁰

"This is perhaps the Council's biggest challenge as it is a matter of changing often firmly held views about the way in which criminal justice operates. It is one thing to draft and publish a piece of work, confident in the belief that the courts and practitioners will duly accept and implement it. It is quite another to alter the understanding and the mindset of the general public through the same piece of work.

The findings of various surveys often report that members of the public believe that sentencing is lenient. This is frequently as a result of low levels of knowledge of the criminal justice system. However, what is clear is that when the public are given details of criminal cases and are made aware of the process that judges and magistrates follow when sentencing, the public's sentencing decisions are much closer to the sentences actually passed and in some cases are more lenient."

- 31 A similar conclusion has been expressed with respect to Australian research.¹¹
- 32 Considerations of this type emphasise the importance of an ongoing dialogue to enhance public confidence in sentencing.

Justice Peter Johnson

20 March 2014

[Note: Footnote 11 added on 11 April 2014]

¹⁰ Sir Brian Leveson, "Achieving Consistency in Sentencing", *The Parmoor Lecture*, 24 October 2013, pages 21-22.

¹¹ Warner, Davis, Walter and Spiranovic, "Are Judges Out of Touch?" (2014) 25 *Current Issues in Criminal Justice* 729; Mackenzie, Stobbs, Ferguson and Gelb, "Measuring the Effects of Small Group Deliberations on Public Attitudes Towards Sentencing: Benefits and Challenges" (2014) 25 *Current Issues in Criminal Justice* 745; McMurdo, "Murray Gleeson's Contribution to the Development of Criminal Law" (2014) 88 *ALJ* 186 at 190-191; Bartels, Warner and Zdenkowski, "National Research with Jurors on Sentences for Sexual Offenders" (2014) 26 *Judicial Officers' Bulletin* 9.