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TWENTY YEARS OF CHANGES IN THE SENTENCING ENVIRONMENT AND COURTS' RESPONSES

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Twenty years of changes in the sentencing environment and courts' responses

Twenty years is not a long time in legal history. The common law tends to evolve slowly and generally reactively to changes in the social, economic, scientific and political environment. In Australia, major legal change is usually driven by bodies external to the courts such as law reform commissions or committees, parliamentary inquiries or organized public agitation. Though legal conservatism is not necessarily to be condemned (continuity, predictability, stability and caution are important features of a mature liberal democratic political system), legal obstructionism can stifle innovation create or widen the gulf between the court and the community.

My aim in this paper is to provide a brief and necessarily broad overview of what I consider are some of the key changes in sentencing over recent years and their effects on the courts. My main argument is that the judicial role in sentencing is under attack, that there has been a lessening of confidence in the judiciary and that the role of sentencing courts, particularly at the summary level, where over ninety per cent of sentencing occurs, is changing and must respond to the growing and almost intractable social problems such as mental illness and drugs which manifest themselves in criminal activity.

The last two or three decades have been times of significant social change. These changes appear to be contradictory and in conflict, but they reflect political and communal ambivalence about the direction of direction of criminal justice policy. As in all other areas of social policy, change is a product of a dialectic process which reflects not only ideological conflicts but the deeper structural transformations in the economy and society.

The 1960s saw a disillusionment with rehabilitation models and moves towards a justice model. "Nothing works" became a dominant belief. The social turbulence of the 1960s, the Vietnam war and civil rights movements grew from, and reinforced a distrust of authority and courts and corrections were not immune. The drug problem became one of the leading generators of crime and posed a major challenge to the criminal justice system.

In his seminal text, *The Cultures of Crime* published in 2001, criminologist David Garland argued that in the 1970s there were two sets of transformative forces: first, there were social, economic and cultural changes which posed problems of rising crime and insecurity, and challenged the legitimacy and effectiveness of welfare institutions. Secondly, there was the paradoxical combination of free market ideology and social conservatism manifested in the UK, US, Canada, Australian and New Zealand which is still a potent driver of criminal justice policy in English speaking countries. These ideas are still being played out in the politics of terrorism and the issues of risk and social control.

The late 1980s and the 1990s saw the rise of what came to be termed as 'economic rationalism', a doctrine that emphasised the importance of the market as the organising

economic and social force. With it came ideas such as privatisation, de-regulation, small government and competition. Managerialism came to dominate the discourse of government and is still one of the most powerful forces in government administration, including the criminal justice system. Managerialism values efficiency, effectiveness, economy, reliability and clarity of purpose. It emphasises process over professionalism and outputs over outcomes. In the pursuit of these values it has promoted plea-bargaining and discounts for guilty pleas, sentence indication, contest mentions and an increase in the number of administrative penalties such as on-the-spot fines, penalty notices and diversion schemes. Under the influence of economic rationalism, rehabilitative models gave way to theories of personal responsibility and punishment.

From the 1960s, looking at the broadest level of the relationship between the courts and the community, it is possible to detect some major shifts in the balance of power and in the various interests reflected in the sentencing process. The traditional dyadic adversarial paradigm of the criminal process representing a contest between the state on the one hand, and an impersonal and transcendent “public”, and the offender, on the other, became less relevant or powerful, for two reasons.

First, victims did not regard “the state”, acting through police or prosecutors as sufficiently representing their interests and did not consider the courts responsive enough to their personal plight and to the effect of the crime on them, as individuals. Victims organised politically and effectively. Whether through street demonstrations or small but significant victims’ organizations whose voices are highly amplified by sympathetic media or effective lobbying, victims’ views are now a pivotal element in the sentencing landscape, advocating for victims charters of rights, higher maximum penalties, more severe sentences, offender registration and notification laws and mandatory sentences. Victim impact statements, at first controversial, are now an accepted part of the sentencing process, though their effect on sentencing outcomes is still uncertain. Sentencing legislation, such as the *Crimes (Sentencing) Act 2005* in the ACT now provide for recognition of the harm done to the victim of the crime and the community as one of the purposes of sentencing.

Secondly, politicians and courts have become more aware of, probably more sensitive and responsive to changes in public opinion. Though this is rarely stated overtly or publicly, the climate of opinion, at least that expressed through the media, provides the environment within which all players in the sentencing process operate: the legislature, the courts and the executive authorities such as Parole Boards. Either the climate has become more punitive since the 1970s or it is more powerfully expressed, but it is reflected in more and longer sentences of imprisonment that is in turn reflected in higher imprisonment rates, despite the fact that crime rates are dropping. Over the past twenty years, Australia’s imprisonment numbers and rates have increased significantly. In 1986 there were around 11,500 prisoners in Australia. In June 2005 there were 25,353 persons imprisoned in Australia, an increase of 120%. About 20% of the prison population is unsentenced. The imprisonment rate has increased by around 75%, from 92.9 per 100,000 adults to 163 per 100,000 in 2005. Of course, this is nothing to compare with the United States, where the numbers of persons imprisoned quadrupled between 1980 and 2000. There are now over 2,000,000 persons imprisoned (an

imprisonment rate of over 700 per 100,000), and the UK, with over 75,000 people in gaol, is similar in showing growth unrelated to crime rates.

The prevailing mood is well summed up in a recent press report in which the New South Wales Corrective Services Minister Tony Kelly, commenting on the doubling of his state's imprisonment rate since 1986 said that his state was proud of its record on crime:¹

The NSW government is tough on crime, we make no apology for the fact that in NSW we respond to the community [and] we've become tough on crime ...

We do lock more people up than some of the other states who are not as tough and we also ensure that once we lock them up they stay there.

The institutionalisation of these changed power relationships can be seen in the increasing number and power of victim and public representation on Parole Boards, release on licence and similar bodies, the legislating of the right of victims to receive information about the administration of an offender's sentence of imprisonment, to make oral or written submissions to parole boards when the offender is being considered for release and to provide their views on the effect of the offender's release on them as well as their views on the terms and conditions of the release. The recent resignation of four members of the Western Australian Parole Board (its Chairman former Supreme Court judge Henry Wallwork, Professor Neil Morgan of the University of Western Australia Law School, clinical psychologist Christabel Chamarette and lawyer Jane Thomson) in protest against political interference in the Board's decision making is indicative of the changed balance of power.

Victims, the public, criminal justice professionals and academics have come together in recently established statutory bodies such as the Sentencing Advisory Councils in New South Wales and Victoria and one proposed in Queensland. The Victorian Council summarises its purpose as being to bridge the gap between the community, the courts and government in relation to sentencing issues by informing, advising and educating. It was established on the premise that sentencing should not lie only in the domain of criminal justice professionals and that there was a need for properly informed public opinion to be taken into account in the criminal justice process. The work of these Councils, both in the processes of consultation with both the public and the judiciary, and their recommendations for change, represent an important development in the way that sentencing reform is being undertaken. In relation to the imposition of sentences directly, the Chief Justice of New South Wales has even suggested that juries be given a role in sentencing.

The de-centering of the role of judicial officers in sentencing is also evident in the development of new forms of justice that involve victims and the community more directly. This has been due partly to a growing dissatisfaction with the adversarial system as a means of dealing with conflict and partly due to a recognition of the fact that the criminal justice system alone is a poor means of responding to certain forms of crime. These new forms of justice have taken on a variety of forms.

¹ AAP 3 January 2006.

One of the most influential is the concept of restorative justice which has, since its development in the late 1980s, become a powerful voice in criminal justice discourse providing a credible intellectual and emotional alternative to the dominant ‘law and order’ paradigm. There are two major strands to this concept. Restorative justice as “process” emphasises the fact that it is an attempt to bring together all the affected parties (offenders, families, victims and state agencies) to discuss the harm and agree to an outcome. This is achieved through conferences, healing circles, victim-offender mediation, sentencing circles and the like. This conception, which can and does apply to all forms of conflicts, including those in the workplace, schools and families, suggests that fair and inclusive procedures are as important as ‘just’ outcomes in securing compliance. Restorative justice as a set of values promotes healing or restoration over punishment and deterrence which some have seen as forms of a wider concept – participatory justice—which emphasises the reconstruction of relationships through dialogue and the importance of outcomes developed and agreed to by the disputants themselves.

The key elements of this approach are the involvement of victims, the need to place justice back in the community and, for Aboriginal communities, a re-assertion of their control over their conflicts and problems. The rapid growth of indigenous courts is evidence of the appeal, and possibly the effectiveness of peer and community involvement in the criminal justice system.

Another influential set of discourses is encompassed by the term “therapeutic jurisprudence” which emerged in the late 1980s from the work of American academics Bruce Winick and David Wexler. The founders refer to therapeutic jurisprudence as a ‘school of social inquiry’ rather than as a theory, an ‘interdisciplinary approach’, rather than a worked out concept. Therapeutic jurisprudence can be briefly described as an approach which

seeks to assess the therapeutic and counter-therapeutic consequences of law and how it is applied and to effect legal change designed to increase the former and diminish the latter. It is a mental health approach to law that uses the tools of the behavioural sciences to assess the law’s therapeutic impact, and when consistent with other important values, to reshape law and legal processes in ways that can improve the psychological functioning and emotional well-being of those affected (Winick 2004).

In Australia, the approach has been most evident in the development of problem-oriented courts such as drug courts, mental health courts and family violence courts. Drug courts were developed in the belief that courts could become involved in ‘treatment’. Their major features are that they integrate drug-treatment services within a criminal justice case processing system, provide early intervention, use a non-adversarial approach, create a dominant and continuing role for the judge, use frequent substance abuse testing, require frequent contacts with the court, provide a comprehensive treatment and supervision program and employ a system of graduated sanctions and incentives.

The most recent development in this field is the neighbourhood justice centre model, one of which is being established in the suburb of Collingwood in Victoria. Modelled on a community justice centre in Red Hook, Brooklyn which has been developed and promoted by the Centre for Court Innovation in New York, the Victorian government has committed \$24 million to this experiment in an integrated form of justice which brings together legal and social services under the one roof and seeks to deal with underlying social problems by co-ordinating criminal and civil responses to criminal behaviour and other forms of conflict.

Community courts primarily use sanctions such as community service but are linked with housing and other social services, health care, drug treatment and job placement or training services in or near the court complex. The court acts not just as a welfare broker, but uses the criminal process to emphasise the seriousness of the sanctioning process in an attempt to engender a sense of accountability or responsibility in offenders. The problem-oriented features which community courts contain include an enhanced and ongoing judicial role in relation to the defendant, the use by the court of extensive personal background information relating to the offender, the employment by the court of resource co-ordinators who bring together and manage the legal and other services required to implement the sentence and the location of treatment and other providers in the court precinct to provide immediate assistance.

The Victorian centre, scheduled to open in 2007, will be presided over by a magistrate, who may be selected by panel containing representatives from the local community, another innovation, and who also may have a community advisory board or committee to assist him or her to understand the needs and problems of the local community. There are over thirty community courts in the United States and four in the United Kingdom.

These new courts, or divisions of courts reflect the view the fact that deep seated social problems require social rather than legal responses. Many sentencing reviews usually devote their final chapters to what are termed “special categories of offenders”, known more colloquially as the “too hard basket”. These groups include women, who comprise an increasing proportion of the gaol population, offenders with family and dependents, indigenous offenders, young offenders, offenders from linguistically and culturally diverse backgrounds, offenders with a drug addiction or gambling problems and those with an intellectual disability or mental disorder. These are the recidivists, the people who require flexible or resource intensive sanctions or interventions or treatments which lie outside the scope of traditional sentencing but who all too frequently end up in court.

Sadly, it seems that little progress has been made in relation to these groups of offenders. The number of indigenous offenders in prisons continues to grow despite the work of the Royal Commission into Aboriginal Deaths in Custody. In 1988 there were 1233 indigenous prisoners in Australia, compared with 5656 in 2005. Though the numbers have increased by 212%, the rate is up by 26%, less than the increase in the total imprisonment rates. 22% of the total prisoner population is indigenous, an overrepresentation rate of 12 times the non-indigenous population. Indigenous offenders comprise 81% of the Northern Territory prison population.

Over the last decade female imprisonment numbers have increased by around 110%, whereas male numbers have increased by 45%. Females now comprise around 7% of the prison population. In Victoria the number of female prisoners more than doubled in the last decade due to an increase in the seriousness of their offending, an increase in the use of remand, an increase in prison receptions of those sentenced for breaching non-custodial orders and increased recidivism.

The development of special courts or court lists for special groups such as street sex workers, the mentally disordered, drunk drivers, drug offenders and the like is reflective of the courts' adaptation to the need and desirability of working within a multi-disciplinary environment, and an acceptance of the fact that this does not necessarily entail a loss of judicial independence, a devaluation of their role or a transformation of their role as lawyers to social workers, counsellors or quasi-medicos. However, these new jurisdictions do require new forms of judging, different understandings of the judicial role and the acquisition or development of skills not previously required.

Community-based orders are now a well-established feature of the sentencing landscape. Community work, intensive supervision, education and therapeutic programs are regular conditions of these orders that go under a variety of names and forms in the various jurisdictions. There are more than twice as many people on community-based orders than there are in prison but over the last five years, the rate of community-based orders has declined by 18% from around 402 per 100,000 adults to around 332 per 100,000 adults in 2003–04. This at the same time as imprisonment rates have increased. Though penologically well-established, there is still suspicion in the public mind that these are easy options and that the 'proper' place for these offenders should have been gaol. A recent article in the *Sunday Herald Sun* in Victoria (6 November 2005) noted that there were 1800 more criminals on the streets in 2005 than five years previously, a reflection of government policies that were soft on crime.

The continued use of the term 'non-custodial' sentences rather than the more accurate term 'intermediate sanctions' perpetuates the view that sentences other than prison are 'alternatives' or lesser sentences and therefore somehow a derogation from the truth path of justice. Yet the truth is that sentences of imprisonment comprise only a small proportion of sentencing orders and only appropriate for a small number of serious, recidivist or dangerous offenders. There is a major task of community education to inform people of the range of sentences available to the courts and how they are used.

Around Australia, it appears that the major innovations in the non-custodial field are now occurring at the lower end of the sentencing hierarchy where court and non-court diversion options are expanding and sentencing options are being conflated with bail dispositions. These can take the form of deferred sentences, a modern and improved form of the old Griffith bond which can allow the courts time to consider defendants' capacity and prospects for rehabilitation or participation in a range of treatment or similar programs. In some jurisdictions, diversion programs have been developed, sometimes administratively and sometimes legislatively. In the drug field, 'diversionary' drug programs such as CREDIT (Court Referral and Evaluation for Drug Intervention and Treatment) in Victoria and MERIT (Magistrates Early Referral into

Treatment in New South Wales are bail-based programs which aim to provide treatment programs for alleged offenders coming before the court with drug problems. In other jurisdictions, new species of dispositional outcomes labelled “intervention program orders”, or “pre-sentence orders” have been created which blur the boundaries between bail and sentence and, though well-intentioned, are highly ambiguous in theory, scope and content.

Fear of crime, past and future, has re-cast or even extended sentencing and, to some extent, the judicial role. Communal concern, anxiety and even panic in relation to serious sexual and violent offenders has resulted in the introduction of laws which attempted to oust or limit the principle of proportionality and to revamp or revive the use of indefinite or indeterminate sentences. The 1990s saw the introduction, or more correctly, the reintroduction, of indefinite sentences imposed at the time of sentencing for offenders deemed to be dangerous in Victoria, Queensland and South Australia and in relation to repeat offenders, various forms of mandatory sentencing regimes in Western Australian and the Northern Territory.

The courts have generally been antipathetic to such measures and only four indefinite sentences have been imposed in Victoria, though the Queensland courts appear to be more receptive to these forms of orders. A more recent extension of the boundaries of the law of indeterminate sentencing in the name of protecting the community is found in the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) which permits the Attorney-General to apply to the Supreme Court during the last six months of a person’s sentence for an order that a serious sexual offender be detained indefinitely if the court is satisfied that the prisoner is a serious danger to the community. The constitutionality of these provisions was upheld by the High Court in *Fardon’s* case, and now other states have expressed an interest in adopting similar provisions. Western Australia was reported as drafting indefinite sentencing laws to deal with ‘serial sex monsters’.

The acceptance by the High Court of almost plenary state powers in the name of community protection, and its acceptance of the possibility of indefinite detention of a stateless asylum seeker, highlights the need for either human rights legislation or a more vigorous human rights discourse in the development of sentencing jurisprudence.

This legislation is but one example of the growing trend to keep ongoing control of offenders following the completion of their sentence through mechanisms such as the collection of DNA samples of prisoners, post-sentence electronic monitoring, offender registration and notification provisions and place and association restrictions. Though these have, to date, been confined to sex offenders, pressure will mount to extend them to other “dangerous” offenders”, a category capable of infinite extension, as we have seen with the development of anti-terrorism legislation and “control” and “preventative detention” orders.

The politics of fear which plays on communal anxiety has found further expression in the development of preventive orders such as the “anti-social behaviour order” recently introduced in the United Kingdom. The police or a local authority may apply for such an order in respect of a person who has, or is likely to cause harassment, alarm or

distress to a person. The case may be proved to the *civil* standard of proof and the order requires the person to refrain from doing anything described in the order. It is preventative rather than punitive in intent and requires an assessment of risk by the court. However, breach of the order is a *criminal* offence with a maximum penalty on indictment of five years' imprisonment or a fine and these orders have been used, in effect, to circumvent substantive maximum penalties which have been regarded by enforcement authorities as being inadequate.

Though laws of these have yet to be introduced in Australia, the language and the concepts are insinuating themselves into the policy making process. The Victorian State Liberal Party has signalled its intention to introduce these orders in a letterbox drop, and in the Northern Territory, in addition to its *Alcohol Court Bill 2005* which will contain 'alcohol intervention orders' and prohibition orders, the government has introduced an "Antisocial Behaviour" Bill which seeks to introduce the use of "acceptable behaviour agreements" for public housing tenants. Earlier this year the Western Australian police force announced an 'Anti-social Behaviour Reduction Strategy' aimed at young louts, troublemakers, taking a 'zero-tolerance' stance aimed at restoring law and order.

These hybrid forms of order provide the basis for an expansion of the boundaries of state intervention in ways that cannot be foreseen and which, if uncritically accepted, will provide few limits to the growth of the preventive state, where what matters is not what you have done, but what the government suspects that you might do.

How have judges reacted to these changes in their sentencing environment? Cautiously, and probably a little defensively. Recently, the Judicial Conference of Australia has commissioned a publication intended to explain, and to some extent, defend to the public the judicial role in sentencing, in particular the value and importance of judicial discretion. The work is being jointly funded by the JCA, the Victoria Law Foundation, the Judicial Commission of New South Wales, the Victorian Sentencing Advisory Council and the South Australian Law Foundation, which probably indicates the breadth of concern about the constant criticisms of judicial sentencing.

Though some public criticisms of sentencing are well-founded, others reflect a misunderstanding of what the criminal justice system can, or ought to do. The perennial favourites are that the courts are soft on crime, that there is unjustified disparity, that the courts have too much discretion, do not reflect community views and values, whatever they may be, are too slow and costly and fail to prevent crime and ensure a safe and secure community.

Attacks on the judicial role in sentencing have led to calls for more, or better, judicial regulation through appellate review, more Crown appeals, judicial training, sentencing manuals, guideline judgments, sentencing councils and comprehensive and up to date sentencing information systems. When it suits them, especially electorally, governments have adopted populist policies such as presumptive and mandatory sentences, selective incapacitation and post-conviction orders and restrictions.

Judicial discretion in particular, has been increasingly constrained. The halcyon days of loosely-fettered decision-making in the mid-part of the twentieth century slowly gave way in the late 1980s to statutes which consolidated sentencing laws and attempted to provide courts with a more rational and coherent legislative and policy framework for sentencing. The latest in this series is the *Crimes (Sentencing) Act 2005* in the ACT and the federal government is making another attempt through the Australian Law Reform Commission which is recommending a separate federal sentencing Act. Whatever the outcome of this report, it cannot be worse than the current federal sentencing regime.

These Acts usually set out the purposes or principles of sentencing, though few prioritise any single purpose, some of the factors which must, may or must not be taken into consideration, the types of information which a court must or should be provided with, the range of sanctions available to them, sometimes the purposes of those sanctions and the order in which they must be considered. Some judicial officers see such provisions as useful guidance, others see them as intrusive, trite or even obstructive of the task of doing justice.

The closer control or guidance of judicial sentencing discretion has most recently developed through mechanisms such as guideline judgments, presumptive sentences, matrix sentencing, mandatory minimum sentences and mandatory sentences.

At the heart of the debate about judicial discretion and methodology is the dispute between advocates of the ‘instinctive’ or ‘intuitive’ synthesis approach on the one hand and proponents of more structured approaches to decision-making. In the former camp are those who believe that sentencing is an art, not a science which carries with it the implication that it is an instinctive or intuitive skill rather than a learned one. In the other are those who believe that the sentencing process can be more structured and the processes of reasoning employed by the sentencer better articulated.

The latest salvo in this ongoing quarrel was fired by the High Court in *Makarjian* (2005) 79 ALJR 1048 in which the majority of the court came down in favour of the instinctive approach and, in my view, set back the cause of judicial sentencing by about 69 years (the year of the judgment in *Geddes* (1936) SR (NSW) 554) in which Jordan CJ stated that “the only golden rule is that there are no golden rules”). The details of *Makarjian* are not important to our discussion but what is important is what it says about the sentencing process and the study of sentencing itself. Richard Fox and I have long argued that the instinctive approach is opaque at best and unhelpful, at worst. We have argued that it is intended to deter the bringing of sentencing appeals by defendants aiming to attack the penalty by unravelling the individual threads of reasoning that support it. The intuitive synthesis approach has come under attack on two fronts. First, in the use of a two-stage approach to ensuring that the principle of proportionality has been satisfied, and second, in relation to the quantification of sentencing discounts granted for pleading guilty or for informing.

However, the High Court made some trenchant criticisms of the two-step process. Although it accepted that sequential or sometimes even numerical reasoning could be undertaken, that explanations can be given of the weight given to various factors and

that the law should be transparent in the interests of victims, the parties, appeal courts and the public, it was not a mathematical process. With this, one cannot really disagree, unless you are sentencing in many jurisdictions in the United States.

However, it was Justice McHugh's trenchant criticisms of the two-tiered or structured approach to sentencing which is most disturbing. His view, that if sentencing is a science, it is a junk science, is premised on the argument that any notion of a starting point for sentencing based on the objective circumstances must be wrong because it must give too much weight to one set of factors and therefore one set of purposes, retribution or deterrence. It is also premised on his view that adjustments require a judicially unachievable degree of statistical knowledge or sophistication which ultimately hides the fact that ultimately all sentencing is based on value judgments.

In my view, these are unsatisfactory arguments. Sentencing is as much about law as values and, as a product of human behaviour, is amenable to the social sciences. Numerous studies have found that sentencing is not random, that over time, within a jurisdiction, sentencing patterns emerge and can be described statistically in terms of means, medians, averages and ranges. They have found that most of the variations can be accounted for by two factors, the seriousness of the offence and the offender's prior convictions.

While not seeking to bind Australian or British sentencers to pre-determined sentencing ranges based on statistical and politically determined values, as is done in the USA, it is, in my view, neither intellectually impossible nor legally or politically undesirable for appellate courts to make broad statements of policy in relation to sentencing ranges for offences and for the weight to be put on various factors or principles of sentencing in respect of some or many offences. The United Kingdom Sentencing Guideline Council has embarked on this task, in collaboration with the Sentencing Advisory Council, and while one may disagree with the outcome, both in respect of each offence and its relationship to another, the enterprise has not been regarded as destructive of the judicial role or impracticable. My fear is that if the courts will not undertake this task, others will do it for them, as they have in the USA.

Perhaps my views are, as is often the case, in the minority, for I found myself in profound agreement with the dissenting judgment of Justice Kirby, who argued that the instinctive approach was flawed for a number of reasons.

One important reason is that if sentencing is not transparent, public confidence will be lost. Public confidence in judicial sentencing is not as high as it should be. Although Justice McHugh argued that that judges have a skill which is respected by the community and other judges, a recent Victorian Herald Sun survey, admittedly flawed, small and self-selected, showed that:

- 92% believed that Victorian judges did not represent the community in their decisions
- 91% thought criminals let off lightly
- 83% thought community should have more say in sentencing.

Though I would not wish to stake my criminological reputation on this, the findings are probably closer to the truth about the public's view of sentencing than a view that there is complete public faith and confidence in judicial sentencing.

Another reason that the instinctive approach is flawed is that it is inconsistent with the growing trend for statutory transparency. Increasingly, sentencing legislation sets out principles, aggravating and mitigating circumstances, purposes of sanctions, standard non-parole periods and the like, many of which require a two or more stepped approach.

Thirdly, Justice Kirby argued that the phrase sent the wrong signal. Its message was that sentencing power was personal rather than legal, unknowable and inexplicable rather than open, rational and defensible. Finally, he argued that if there were disagreements about the correct or preferable approach to sentencing, then sentencing discretion should include the discretion about the preferred approach to sentencing. I think that there is much to commend this inclusive approach.

The differences between Justice McHugh and Justice Kirby are stark and reflected in continuing divisions of opinion in state courts. As Kate Warner has noted in her incisive commentary on this case ((2005) 28 Crim LJ 355) appellate courts in Tasmania, South Australian and Western Australia have distinguished or explained *Makarjian* and the tension between the approaches remains and may never be resolved. In my view, the differences are not purely semantic: they go to the heart of sentencing as a mature, explicable and accountable process and a retreat to sentencing as a mysterious, inexplicable craft known only to judges will further undermine public confidence and precipitate more severe constraints on sentencing discretion and the powers of the courts.

Sentencing, is not a matter of intuition, but is a task which can and should be learned. The expansion of judicial training both to neophyte and experienced judicial officers through the Australian Institute of Judicial Administration, the Judicial Commission of New South Wales and newer bodies such as the Judicial College of Victoria and the National Judicial College of Australia is to be welcomed. It recognises the fact that judges do not come fully formed to the bench but must learn, grow and adapt to a complex and changing legal environment.

Sentencing will not fade out of the news. It is too raw, emotive, interesting and important. It is ultimately what the criminal justice system is about. Crime will not disappear and neither, I hope, will the courts as a central player in this social drama. However, all of us, the courts included, must recognise and accept that the environment will keep changing. We cannot afford to be passive. Where possible, we, that is judges, magistrates, academics should be actively engaged in crafting responses which will preserve some of the best features of judicial sentencing, such as judicial discretion, but which will also ensure that over the next twenty years that the courts are more trusted by the community, constantly in tune with emerging theories and experiments and more aware of the empirical evidence of the effect of their sentences on offenders and the community more generally. All of which may result in a more effective justice system and a safer community.