

# **A judge's perspective on using sentencing databases**

by

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## Introduction

A number of states and the Commonwealth have established sentencing databases. In NSW, the Judicial Commission maintains a Sentencing Information System as a component of the Judicial Information Research System (“JIRS”). In April 2008, JIRS was extended to include sentences for environmental crime.<sup>1</sup> In so doing, the functions and capabilities of the JIRS sentencing database were considerably enhanced. The enhanced sentencing database yields benefits for the criminal justice system and for the sentencing judge in relation to both sentencing outcomes and the process of sentencing. This paper highlights these outcome and process benefits.

## JIRS and the environmental crime sentencing database

The environmental crime sentencing database of JIRS contains data concerning sentences imposed by the Land and Environment Court of NSW and other courts in NSW for environmental offences since 1 January 1998. The data includes the case name, its medium neutral citation and matter number and the class of jurisdiction in the Land and Environment Court of NSW; the principal offence and any other offences; the penalty type; and the variable characteristics of the offence and offender.

Data was collected on the statutory provision constituting the offence. Where there was more than one offence the most serious or principal offence was selected. Where there were multiple counts, they were also recorded in the database. The latter matter is, of course, relevant to whether the totality principle was applied in sentencing.

The penalty types mostly fall under the *Crimes (Sentencing Procedure) Act 1999* (NSW) (“CSPA”). However, the Land and Environment of NSW has the power to make additional orders not included in the CSPA, under the *Protection of the Environment Operations Act 1997* (NSW) (“POEOA”) and the *Environmental Planning and Assessment Act 1979* (NSW) (“EPAA”). Fines as a penalty type fall under each environmental statute or regulation that applies and the maximum penalty is generally set by the statute or regulation that makes the act or omission an offence. Apart from full time imprisonment and alternatives forms of imprisonment (suspended sentences, periodic detention and home detention), the penalties that fall under the CSPA include: under s 10 dismissal of the charge, or s 10A dismissal of the charge on condition that the offender enter into a good behaviour bond; under s 10A, conviction with no other penalty; under s 9, a conviction and the imposition of a good behaviour bond, with or without supervision, as an alternative to imprisonment; under s 8, imposition of a community service order as an alternative to imprisonment; and different forms of fines.

The Court may impose a fine along with additional orders or additional orders in place of a fine under ss 245-250 of POEOA and under s 126(3) of the EPAA. The

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<sup>1</sup> Preston BJ and Donnelly H, *Achieving consistency and transparency of sentencing for environmental offences*, Judicial Commission of NSW – Monograph 32, June 2008, also published as Preston BJ and Donnelly H, “The establishment of an environmental crime sentencing database in New South Wales” (2008) 32 *Criminal Law Journal* 214

additional orders include: orders for restoration and prevention;<sup>2</sup> orders for payment of costs, expenses and compensation;<sup>3</sup> orders to pay investigation costs;<sup>4</sup> monetary benefit orders;<sup>5</sup> publication orders;<sup>6</sup> environmental service orders;<sup>7</sup> environmental audit orders;<sup>8</sup> payment into an environmental trust;<sup>9</sup> order to attend a training course;<sup>10</sup> order to establish a training course;<sup>11</sup> and order to provide financial assurance.<sup>12</sup>

The variable characteristics that are included in the sentencing database are based on traditional sentencing objective and subjective characteristics, supplemented by the matters in s 241 of the POEOA, along with other principles involving aggravating or mitigating factors. These variable characteristics match the sentencing considerations for environmental offences.<sup>13</sup> The objective characteristics relate to the objective seriousness or gravity of the offence that has been committed. They include: whether there were financial reasons for or advantage gained in committing the offence; whether there was foreseeable harm to the environment; whether there were practicable measures to avoid the foreseeable harm; whether there was control over the causes of the offence; the state of mind of the offender in committing the offence; the environmental harm caused by the commission of the offence; whether the offence was committed under a supervisor's orders; and the maximum penalty for the offence. In addition, there is a variable expressing the overall conclusion of the objective seriousness of the offence, taking into account all of the other objective characteristics.

The subjective characteristics relate to the particular offender. These include: the prior criminal record of the offender; whether the offender provided cooperation and assistance; whether the offender has expressed contrition and remorse; whether the offender had a prior good character; whether the offender pleaded guilty and the timing of the plea; whether costs are to be awarded against the offender and the quantum of costs; the offender's means to pay any fine imposed; and, where there are multiple offences and/or counts, whether the totality principle is applicable.

The data relating to these variables, both the objective and subjective characteristics, have been captured and entered in the sentencing database. The data is available to be displayed graphically for users, except the data relating to maximum penalty, as this information is available from the statute creating the offence.

The sentencing database also contains the sentencing remarks for the decision underlying each of the sentences captured in the database. Users are able to

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<sup>2</sup> s 245 POEOA and s 126(3) EPAA

<sup>3</sup> ss 246-247 POEOA

<sup>4</sup> s 248(1) POEOA

<sup>5</sup> s 249 POEOA

<sup>6</sup> ss 250(1)(a)-(b) POEOA

<sup>7</sup> s 250(1)(c) POEOA

<sup>8</sup> s 250(1)(d) POEOA

<sup>9</sup> s 250(1)(e) POEOA

<sup>10</sup> s 250(1)(f) POEOA

<sup>11</sup> s 250(1)(g) POEOA

<sup>12</sup> s 250(1)(h) POEOA

<sup>13</sup> See Preston BJ, "Principled sentencing for environmental offences – Part 2: Sentencing considerations and options" (2007) 31 *Criminal Law Journal* 142 at 142-157

access the sentencing remarks after making inquiry of the data. This capability to access directly the sentencing remarks is an important feature of the environmental crime sentencing database and is not currently available for other crimes on the JIRS database.

### **Outcome benefits of a sentencing database**

A principal objective of a sentencing database is to improve consistency of approach to sentencing. Consistency of approach involves two aspects, one concerned with outcomes and the other with process.

In relation to consistency of outcomes, what is desired is not to achieve “uniformity in outcome”,<sup>14</sup> that would be impossible,<sup>15</sup> but rather to reflect the notion of equal justice. In *R v Jurisic*,<sup>16</sup> Spigelman CJ quoted Lord Bingham of Cornhill that “it is generally desirable that cases which are broadly similar should be treated similarly and that cases which are broadly different should be treated differently”. In *Lowe v The Queen*,<sup>17</sup> Mason J stated:

“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”.<sup>18</sup>

This aspect of consistency of approach is promoted “if sentencers are aware of, or have ready access to, clear information of the sentences imposed by other sentencers in similar cases”.<sup>19</sup> A sentencing database, such as is provided by JIRS, collects and disseminates information about sentences to sentencing judges and the legal profession. As Gleeson CJ noted in *Wong v The Queen*,<sup>20</sup> providing “knowledge of what is being done by courts generally will promote consistency”.

The sentencing database of JIRS not only provides the results of sentencing, but also, in the case of the environmental crime sentencing database, information on the objective and subjective circumstances of the offence and offender taken into account by the sentencer in reaching each result. Furthermore, in the case of the environmental crime sentencing database, there is the capability of identifying the underlying decision for each sentence result and accessing the sentencing remarks explaining the facts and reasoning for reaching that sentencing result. The capability of accessing the sentencing remarks enables the sentencing judge to better ascertain the comparability of prior sentences to the case at hand. Over time, by reason of the process benefits of the sentencing database discussed below, the

<sup>14</sup> *R v Bibi* [1980] 1 WLR 1193

<sup>15</sup> *Wong v The Queen* (2001) 207 CLR 584 at [6] per Gleeson CJ

<sup>16</sup> (1998) 45 NSWLR 209 at 221-222

<sup>17</sup> (1984) 154 CLR 606 at 610-611

<sup>18</sup> See also *Everett v The Queen* (1994) 181 CLR 295 at 306 per McHugh J

<sup>19</sup> Sentencing Commission for Scotland, *Report: The Scope to Improve Consistency in Sentencing* (2006), p 35

<sup>20</sup> (2001) 207 CLR 584 at [7]

sentencing remarks of judges for sentences entered in the database will become more helpful and improve the sentencer's ability to ascertain the similarities and differences between different cases.

The other aspect of consistency of approach involves the consistent application of established sentencing principles.<sup>21</sup> This aspect of consistency is discussed below in relation to the process benefits of sentencing databases.

Another outcome benefit of a sentencing database is that the sentencing data indicates a range of sentences for a particular offence, but they do not determine *the* range or, more accurately, *the permissible* range for the case at hand. A sentencing database records, as an historical fact, the general pattern of sentencing at that particular time. Sentencing judges may properly have regard to that general pattern when imposing sentences in the particular case.<sup>22</sup>

A further outcome benefit of a sentencing database is assisting appellate review. Sentencing statistics assist appeal courts to discharge their supervisory function. In *R v Maguire*,<sup>23</sup> the NSW Court of Criminal Appeal said that statistics could assist the day to day function of appeal courts responsible for determining whether a sentence was manifestly excessive in a severity appeal and manifestly inadequate in a Crown appeal. This view is reiterated by Spigelman CJ in *R v Bloomfield*<sup>24</sup> and by Winneke P in *R v Giordano*.<sup>25</sup>

Finally, a reliable record of sentences passed enables an appeal court to monitor lower courts and, sometimes, express disapproval of sentencing practices. There are numerous examples of the NSW Court of Criminal Appeal registering its disapproval on sentencing patterns using the JIRS statistics. One example is *R v Henry*.<sup>26</sup>

### Process benefits of a sentencing database

As stated above, one aspect of consistency of approach to the sentencing task involves the consistent application of established sentencing principles. Street CJ stated in *R v Rushby*<sup>27</sup> that:

“... the doctrines and principles established by the Common Law in regard to sentencing provide the chart that both relieves the judge from too close a personal involvement with the case in hand, and promotes consistency of approach on the part of individual judges.”

Mahoney JA elaborated on the role of sentencing principles in *R v Lattouf*.<sup>28</sup>

“General sentencing principles must be established, so that the community

<sup>21</sup> *R v Rushby* [1977] 1 NSWLR 594 at 597

<sup>22</sup> *R v Lawson* (1997) 142 FLR 323 at 324; *Wong v The Queen* (2001) 207 CLR 584 at [19] and *R v Whyte* (2002) 55 NSWLR 252 at 280

<sup>23</sup> Unreported, 30 August 1995, NSWCCA

<sup>24</sup> (1998) 44 NSWLR 734 at 739

<sup>25</sup> [1998] 1 VR 544 at 549. See also *R v Bangard* (2005) 13 VR 146 at [11], [29] and [30]

<sup>26</sup> (1999) 46 NSWLR 346 at 371. Other examples are provided in Preston BJ and Donnelly H, note 1 at 16-17

<sup>27</sup> [1977] 1 NSWLR 594 at 597

<sup>28</sup> Unreported, 12 December 1996, NSWCCA

may know the sentences which will be imposed and so that sentencing judges will know the kind and the order of sentence which it is appropriate that they impose”.

A sentencing database which collects and disseminates information based on sentencing principles can promote this consistency in approach. The environmental crime sentencing database of JIRS contains data on relevant objective and subjective circumstances of the environmental offence and the offender, the sentencing orders and the sentencing remarks. Such data are components of “the chart” of sentencing doctrines and principles that the sentencer needs to apply in the sentencing task. The sentencing database thereby provides a helpful aide-mémoire of matters relevant to the sentencing task and enables comparison with prior sentencers’ evaluations of the same matters in reaching their sentencing decisions. Consistency is promoted by facilitating a consistent approach to sentencing.

The capacity of a sentencing database to collect and disseminate information on the objective and subjective circumstances of each offence and offender also facilitates the achievement of individualised justice. Spigelman CJ said in *R v Whyte*:<sup>29</sup>

“The maintenance of a broad sentencing discretion is essential to ensure that all of the wide variations of circumstances of the offence and the offender are taken into account. Sentences must be individualised”.

Similarly, Mahoney JA said in *R v Lattouf*:<sup>30</sup>

“If a sentencing process does not achieve justice, it should be put aside. As I have elsewhere said, if justice is not individual it is nothing”.

The environmental crime sentencing database of JIRS captures the sentencer’s consideration of the individual circumstances of the offence and the offender. Again, the existence of these circumstances as variables in the sentencing database serves as an aide-mémoire, facilitating the individualisation of sentences.

Many of the database variables require an evaluation of where on a scale of seriousness the circumstances of the offence and the offender fall. For example, environmental harm, the most common manifestation of the objective harm caused by an environmental offence, requires an evaluation of the seriousness ranging from none, through low, medium to high.

One of the database variables requires the sentencer to form a conclusion about the overall objective seriousness of the offence. Such a conclusion is reached after consideration of the objective circumstances of the offence, which are other variables in the database. It is well established that the objective seriousness of the offence sets the limits of proportionate punishment, both the upper limit<sup>31</sup> and the lower limit.<sup>32</sup> So as to understand these limits, a conclusion needs to be drawn by

<sup>29</sup> (2002) 55 NSWLR 252 at [147]

<sup>30</sup> Unreported, 12 December 1996, NSWCCA

<sup>31</sup> *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472, 485-486, 490-491, 496; *Hoare v The Queen* (1989) 167 CLR 348 at 354

<sup>32</sup> *R v Dodd* (1991) 57 A Crim R 349 at 354; *R v Whyte* (2002) 55 NSWLR 252 at 277 [156]-[158] and *R v*

the sentencer as to the objective seriousness of the particular offence. The presence of this variable in the database reminds the sentencer of the task of consideration of the objective seriousness of the offence and better enables comparison with other sentences by reference to the conclusion of objective seriousness in those other sentencing decisions.

The environmental crime sentencing database of JIRS also implicitly facilitates consideration of the purposes for which sentences may be imposed. In NSW, the purposes for which a court may impose a sentence on an offender are those set out in s 3A of the CSPA. Those purposes are reflected in the various objective and subjective sentencing considerations that are variables in the sentencing database. Furthermore, the various sentencing options that are available in sentencing for environmental offences reflect purposes of sentencing.<sup>33</sup> For example, orders that an offender publicise the offence, including the circumstances of the offence, and its environmental and other consequences, and the other orders made against the offender, serve the sentencing purpose of general deterrence; orders for restoration of the environment harmed by commission of the offence and for prevention of continuing harm serve the sentencing purpose of restoration; and orders for the payment of compensation and reimbursement of costs and expenses serve the sentencing purpose of reparation.

The environmental crime sentencing database, by recording the various sentencing orders made, and allowing search and retrieval of information on orders made in prior sentencing decisions, facilitates effective attainment of the purposes of sentencing by enabling judicious selection from the sentencing options available for the offence in question. It also enables sentencers to see how prior sentencers have used the sentencing options available and, by being able to access the sentencing remarks, see the circumstances in which those sentencing options were used and the terms of the sentencing orders made.

The environmental crime sentencing database of JIRS, by providing information on the objective and subjective circumstances of the offence and offender, the sentencing orders made, and the sentencing remarks, promotes a more principled and “systematically fair”<sup>34</sup> approach to sentencing. It reduces the risk that the outcome of discretionary, sentencing decision-making depends on the identity of the sentencing judge who happens to hear the case.<sup>35</sup>

By sentencing judges referring to the same sentencing principles and considerations, and articulating their evaluation of those principles and considerations in the individual circumstances of the offence and offender in their sentencing remarks, and the subsequent capture of this information in the sentencing database, accessibility and transparency of sentencing decisions are improved. As the High Court noted in *Markarian v The Queen*:<sup>36</sup>

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*McNaughton* (2006) 66 NSWLR 566 at 572 [15]

<sup>33</sup> For a description of sentencing options available for environmental crime and case examples of usage, see Preston BJ, note 13 at 157-163

<sup>34</sup> *Wong v The Queen* (2001) 207 CLR 584 at [6]

<sup>35</sup> *ibid*

<sup>36</sup> (2005) 228 CLR 357 at 375 [39]

“The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts and the public”.

Statistical information captured in the environmental crime sentencing database proves the accessibility and transparency of the sentencing decisions.

## **Conclusion**

The sentencing database for first instance environmental crime cases in the Land and Environment Court and other courts of New South Wales will have an influential effect on environmental sentencing both in Australian jurisdictions as well as in other countries. The database is the first of its kind, meshing the traditional JIRS sentencing database approach with an approach specifically tailored to environmental offences in NSW.

In summary, the environmental crime sentencing database of JIRS:

- provides centralised data on sentences for environmental offences imposed by the Land and Environment Court and other courts of New South Wales;
- reveals the key objective and subjective considerations of the sentencing court in determining the sentence imposed;
- reveals the different components of the total penalty imposed including fines, other orders and costs orders;
- covers the elements devoted to such matters as remediation, removal of economic gains and cost saving, restitution to communities and moral blame, by revealing the sentencing considerations, the penalties imposed and the reasons for sentence;
- reveals how the purposes of sentencing are being achieved, by reason of the foregoing matters and the ability to access the reasons for sentence addressing the purposes of sentencing in s 3A of the CSPA; and
- provides a public register of sentences accessible on the internet and searchable by offence, nature of offender, objective and subjective characteristics and penalties, which register supplements the internet register of judicial decisions available on Caselaw NSW and AustLII.

The sentencing database, because of these features, should assist in: improving consistency in sentences; balancing individualised justice and consistency; improving accessibility and transparency of sentencing decisions; indicating a range of sentences; facilitating appellate review and monitoring and, if appropriate, registering disapproval by appellate courts of sentencing patterns.

The usefulness of the sentencing database should be evident both now and in the future as it will shape the way judges sentence offenders and how they go about arriving at a decision about what penalty to impose and, if it is a fine, how much is reasonably appropriate to the situation. While some of the drawbacks of using a

sentencing database may be that it cannot capture all of the detail of a case and may be seen as a formulaic way of sentencing, it is a useful tool in assisting judges in sentencing by reminding them what characteristics need to be considered as well as a tool for policy development and legislative reform.