

The Quest for Sentencing Consistency in the Federal System

Speaking Notes:

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Introduction

This paper, in part, aims to set the scene for this afternoon's session on sentencing for commonwealth offences.

We are each speaking to the topic of consistency in federal sentencing. To address that topic, I will examine three things:

Firstly, the nature of the debate surrounding consistency or equal treatment in the context of federal sentencing.

Secondly, the development of sentencing information systems and how the Commonwealth Sentencing Database assists with the push to ensure consistency in federal sentencing.

Thirdly, drawing on the research conducted in the development of the commonwealth sentencing database, I will highlight a couple of examples of where inconsistent approaches to federal sentencing arise, in particular, I want to point out where and why these differences occur.

'The quest for consistency in sentencing'

As many of you are aware, this is the third sentencing conference held by the National Judicial College of Australia and at each of these the issue of consistency in sentencing has been open for discussion.

To quote the Honourable Chief Justice Spigelman in his Keynote address to the 2008 Sentencing Conference,

*Allegations of inconsistency in sentencing are one of the perennials in debate about the criminal justice system.*¹

Chief Justice Spigelman went on to reframe the debate as the tension between individualised justice on the one hand and the principle of consistency on the other.²

¹ Opening statement to the Keynote Address, The Hon CJ Spigelman AC, 'Consistency and Sentencing' (Sentencing Conference 2008, Canberra, 8 Feb 2008).

² Ibid.

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To explore this tension it is helpful to look more closely at what these principles entail.

The principle of ‘Individualised justice’ requires judges to look to the merits of the individual case, exercising broad sentencing discretion and balancing multiple sentencing factors all in the framework of a particular offender in a unique set of factual circumstances.

The ‘principle of consistency’ is more readily understood as that like cases should be treated alike. The Australian Law Reform Commission provides a succinct description in Report Number 44 (entitled *Sentencing*) where it is stated:

*Consistency in sentencing simply means that a court should impose similar punishment for similar offences committed by offenders in similar circumstances.*³

Clearly the reality of drawing such comparisons is a complex and difficult task. Moreover, as Chief Justice Gleeson stated in the High Court decision of *Wong v The Queen* (2001) 207 CLR 584, 591

All discretionary decision-making carries with it the probability of some degree of inconsistency.

Nonetheless, the Chief Justice went on to state,

*But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.*⁴

Therefore, a balance can be found between these two competing principles. Accepting the inherent attributes of the modern act of sentencing and discretionary decision-making, ‘reasonable consistency’ is a worthy goal. What then does ‘reasonable consistency’ look like in the federal sentencing arena?

1. Nature of debate in the context of federal sentencing

³ The Law Reform Commission, *Sentencing*, Report 44 (1988) 80, [155].

⁴ *Wong v The Queen* (2001) 207 CLR 584, 591.

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The nature of federal sentencing makes the task even more difficult than straddling the tension between individualised justice and the principle of consistency within state boundaries. As we know the sentencing of federal offenders

- is carried out by judicial officers in State and Territory courts.
- it is not a task which occupies a great deal of their time. By this I mean that judicial officers are predominately engaged in the application of their local sentencing regime to persons convicted under State or Territory laws.
- legislation governing sentencing across the States and Territories of Australia varies widely. There are disparate policies and procedures, terminology varies; as do the governing rules, norms and practices.
- Moreover, it is difficult to gauge a national perspective; Courts know and are affected by local circumstances and local concerns. As the honourable Sir Guy Green observed the prevalence of a particular offence in a State or Territory may result in a higher evaluation of the seriousness of an offence in that State or Territory. And have a higher bearing on the weight granted to general deterrence in sentencing.⁵

The question has then become: In sentencing federal offenders ought the outcome to depend upon *within which* particular State or Territory the federal offender has come to be sentenced?

The Australian Law Reform Commission has been advocating for uniformity in treatment in the sentencing of federal offenders for more than thirty years.⁶ The position of the Australian Law Reform Commission is that equality in the sentencing of federal offenders is not equality between offenders within a State or Territory, but rather equality in the sentencing of federal offenders across the different States and Territories (that is, broad inter-jurisdictional equality⁷ or consistency in federal sentencing practice across all courts).

It is important to recognise that this position is an ideological objective. In its current form the sentencing regime set out in the Commonwealth *Crimes Act* is a blended regime that in many ways adopts differences – I will return to this later.

2. How the Commonwealth Sentencing Database assists the with the aim for greater consistency in federal sentencing

⁵ The Hon Sir Guy Green, 'The Concept of Uniformity in Sentencing' (1996) 70 *The Australian Law Journal* 112, 118. See further *Leeth v the Commonwealth* (1992) 174 CLR 455, 476.

⁶ The Law Reform Commission, *Sentencing of Federal Offenders*, Report 15 (Interim) (1980); The Law Reform Commission, *Sentencing*, Report 44 (1988); The Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006).

⁷ The Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) 28 [Recommendation 3].

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The development of sentencing information systems across Australia is then the product of the desire to promote consistent sentencing. Unlike the experience overseas, in Australia calls for their establishment have come from all parties.⁸ Government, Judges, Law Reform bodies, Practitioners and Academics have all participated in the establishment of sentencing information systems.

In the context of federal sentencing we have the Commonwealth Sentencing Database. For those of you who are not yet familiar with this resource, the Commonwealth Sentencing Database was developed by the National Judicial College of Australia as a sentencing tool to assist judicial officers sentencing federal offenders.

It was launched by the Minister for Home Affairs at the 2008 Sentencing Conference. The database is housed on the website of the National Judicial College of Australia; it is also accessible via the NSW Judicial Information Research System.

The Commonwealth Sentencing Database is currently made up of two parts. The 'sentencing statistics' component developed by the Office of the Commonwealth Director of Public Prosecutions and the Judicial Commission of NSW and the 'principles and practice' component developed by the ANU College of Law and the National Judicial College of Australia. It is the 'principle and practice' component which I am drawing upon in this paper.

How do sentencing information systems assist with the promotion of consistency? The first step to achieving consistency in sentencing for commonwealth offences is the consistent application of the federal sentencing provisions to federal offenders.

The joint judgement of Gaudron, Gummow and Hayne JJ in *Wong v The Queen* emphasised that 'first and foremost' judicial officers sentencing federal offenders must give effect to the legislative command of part 1B of the Commonwealth *Crimes Act*.⁹

Judgements were being delivered in 2009 where State or Territory sentencing provisions were mistakenly being applied to federal offenders. Errors also arise where, although aware of the federal provisions, judicial officers and practitioners assume that the federal regime operates in precisely the same manner as the sentencing regime in their State or Territory.

It is in these matters where the Commonwealth Sentencing Database can have an immediate effect in fostering consistency in the sentencing of federal offenders.

⁸ Marc Miller, 'Sentencing Information System (SIS) Experiments' in Andrew Von Hirsch et al (Editors) *Principled Sentencing: Readings on Theory and Policy* (2009, 3rd edition) 283.

⁹ *Wong v The Queen* (2001) 207 CLR 584, 609.

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The purpose of the principle and practice component is to describe and disseminate information on the federal sentencing regime set out Part 1B of the Commonwealth *Crimes Act*.

The principles and practice component seeks to provide a clear and concise guide to the rules, principles and considerations which arise in federal sentencing. It provides commentary on each of the federal sentencing provisions and hyperlinks to cases and legislation. It aims to facilitate quick and easy access to leading cases, federal sentencing principles and where possible developing federal sentencing practice.

3. Examples where there are differences in the approach to federal sentencing

The last issue I wish to raise today is to highlight a couple of examples of where differences in the approach to federal sentencing have arisen.

A. In 1989 when substantial reforms were made through the enactment of the *Crimes Legislation Amendment Act (No 2)* the government sought to set up a separate federal sentencing regime. However, the earlier model of depending on State and Territory law was retained for a number of sentencing matters considered peripheral. Therefore, part 1B of the Commonwealth *Crimes Act* is not a comprehensive scheme.

Some sections expressly pick up and apply the sentencing law of the State or Territory in which the federal offender is sentenced.

For example s 16E of the *Crimes Act 1914* (Cth) states:

Subject to subsections (2) and (3), the law of a State or Territory relating to the commencement of sentences and of non-parole periods applies to a person who is sentenced in that State or Territory for a federal offence in the same way as it applies to a person who is sentenced in that State or Territory for a State or Territory offence.

This is quite a quirky section. Subsection (2) picks up only *specific* State or Territory laws governing pre-sentence custody and applies them to the federal offender. These are laws which have the effect of either backdating the sentence or non-parole period (which involves fixing the date of commencement to a date earlier than the date the sentence was actually imposed) **or** providing credit for pre-sentence custody by reducing the term of the sentence or non-parole period.

The federal sentencing regime therefore privileges the use of either of those two approaches where they are available.

Hence, because s 16E (2) picks up the law in the State or Territory in which the offender is being sentenced, a court cannot elect to backdate a federal sentence where there is no local provision enabling it to do this. Where the law of the State or

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Territory does not have the effect mentioned in sub-section (2) - that is the local law does not grant power to either backdate or reduce the sentence – sub-section (3) applies requiring that the federal sentence or non-parole period take into account any period that the person has spent in custody in relation to the offence.

This may mean that, hypothetically, a federal offender sentenced to 4 years in State A has their sentence backdated by 12 months to take into account time spent in pre-sentence custody. While a federal offender sentenced in State B may have their sentence reduced by 12 months to reflect time spent in custody and therefore receive a head sentence of 3 years. The approach is different but the effect is the same and ‘reasonable consistency’ may be said to have been reached in respect of these federal offenders.

Although the extent to which the process is transparent to those subject to the sentence or to the broader public – the extent to which equal justice is *seen* to be done - is open for discussion → we need another panel or conference to discuss that matter.

But what of the federal offender sentenced in State C who has their sentence reduced to reflect time spent in custody but the sentencing judge here decides not to reduce the sentence by the full period of 12 months but rather some lesser period? My point being that inconsistencies in the sentencing of federal offenders can arise in this framework because there are inconsistencies in State and Territory approaches.

Under the federal scheme there is a mechanism that enables time spent in pre-sentence custody to be taken into account. But all federal offenders need not be granted *full credit* for the period of time they have spent in custody.

The federal provision picks up and applies State and Territory laws. So this is not an example where judicial officers are inherently influenced by local conditions and practices, but rather, where they are required to operate under State and Territory laws and are accordingly governed by local practices.

State and Territory law also differs in respect to whether a court is required to take pre-sentence custody into account. For example, in New South Wales it is mandatory for a court to take into account any time the offender has been held in custody in relation to the offence (*Crimes (Sentencing Procedure) Act 1999* (NSW) ss 24(a) and 47(3)) while in Western Australia the power is discretionary (*Sentencing Act 1995* (WA) s 87(b)).

This is one example of where the blended sentencing regime means that inconsistency in sentencing federal offenders is possible because the regime itself accepts and adopts diversity. In fact, to ensure *reasonable consistency* in these aspects of federal sentencing, Courts will need to be incredibly informed about the sentencing law and practice imposed elsewhere in Australia and respond accordingly.

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B. The second aspect of difference I want to touch on returns to the tension between individualised justice and consistency.

The appearance of lists of matters to be taken into account in sentencing is becoming increasingly common in legislation throughout Australia; again, there is no uniformity in the matters which are listed. In the federal jurisdiction a non-exhaustive list of matters to be taken into account is found in section 16A (2).

The Commonwealth *Crimes Act* does not specify which of these matters are aggravating or mitigating. Nor is there statutory guidance on how such matters are to be balanced or considered.

For example, one of the matters listed is ‘if the person has pleaded guilty...’ (s 16A(2)(g)). No further guidance is given.

As legislation addressing this sentencing matter has developed in the States and Territories some jurisdictions have become proscriptive regarding the nature of the discount granted for guilty pleas. For example, requiring courts to state that a discount has been made and encouraging specification of the actual discount granted. Across the States and Territories there is also divergence of opinion regarding the rationale for discounting sentences based on a guilty plea. And the discount range which a guilty plea generally attracts also varies. In the context of federal sentencing, wide judicial discretion remains.

Whilst such State and Territory laws are not applicable to federal offenders, if courts resort to local practice or rely on local precedents there is the potential for inconsistencies in the treatment of federal offenders. However, the extent to which there is inconsistency is difficult to identify given that the discount granted need not be specified nor quantified.

The question remains whether or not differences in sentence which arise in these fields are greater than what one would reasonably accept as within the appropriate range of outcomes where there is broad judicial discretion.

Conclusion

If I am asked the question does it matter that courts in different States and Territories have different approaches to sentencing for Commonwealth offences? My answer in the current climate is - that it depends.

I say this for a number of reasons.

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- It depends on how one is characterising an approach as different, taking into account the principle of individualised justice and broad discretion.
- It depends on what aspect of the sentence is being challenged. Bearing in mind the federal legislative regime itself accepts that there will be differences in approaches to the sentencing of federal offenders where the Act picks up and applies the law of the State or Territory in which the federal offender is being sentenced.
- It depends on how the court has approached the task of sentencing for Commonwealth offences. Where federal provisions govern, in order to achieve *reasonable consistency*, resort must be had to the language of the federal act and attention should be given to authorities beyond local State or Territory borders and federal sentencing principles developed. In respect to both of these measures the Commonwealth Sentencing Database can be useful tool.

So, if we are going to move beyond the quest for sentencing consistency in the federal system, we need to be careful to express what type of inconsistencies we are seeking to eradicate. Full inter-jurisdictional equality in the sentencing of federal offenders cannot currently be achieved because all federal offenders are not currently subject to the same laws.