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The Independence of the Judiciary and the Criminal Justice System

by

Justice Mark Weinberg
Of the Federal Court of Australia

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Sentencing Law and Practice – A Threat to Judicial Independence?

Justice Mark Weinberg
Federal Court of Australia

Introduction

Recent developments in sentencing law and practice in Australia have raised questions as to whether State and Territory governments have encroached too far upon judicial independence.

In a recent paper, the Chief Justice of Australia commented upon the tension that exists in many parts of the world between governments and the judiciary which he ascribed to the nature of their respective functions. He did not see this as a cause for alarm. He considered that the role played by the courts in constitutional interpretation, judicial review of administrative action, and the development of human rights law would inevitably, but only occasionally, bring the judicial branch into conflict with the legislature and the executive government. He called for each arm of government to respect the role of the other in contributing to justice[1].

Other members of the High Court have spoken in far less sanguine terms of the relationship between government and the judiciary in Australia. Justice Kirby was highly critical some years ago of legislative initiatives taken in relation to suspected

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1 A M Gleeson, *"Legal Oil and Political Vinegar"* (1999) 10 Public Law Review 108.

instances of judicial misconduct[2]. More recently, he responded to what he described as a series of personal and political attacks upon the judiciary which he considered might be designed to undermine judicial independence and to deflect judges from their duty[3].

Sir Anthony Mason has expressed a concern that the vast expansion of what he termed "administrative justice" has blurred community recognition of the intrinsic value of judicial independence. He explained that he used the term "judicial independence" in an extended sense. It encompassed an independence that was something more than the freedom of a judge to make a decision free from governmental threat or favour. It extended to the institutional autonomy of the courts. He observed that the relationship between the judiciary and the executive had become more complex than it used to be. That relationship was subject to tensions arising from various legislative and executive actions that posed a threat to that institutional autonomy, and on the other hand, judicial decisions on policy issues seen by some as overstepping the elusive boundary between law and politics[4].

The concept of judicial independence

In 1993 Professor Robert Stevens, a distinguished American lawyer and historian, was moved to describe the notion of judicial independence as understood in England as having been enveloped in "mystique"[5]. He characterised the literature published upon that subject in England as "meagre"[6]. His thesis was that English political theorists had generally shied away from any serious analysis of the judicial function. He acknowledged that political theorists in the United States and Australia could not be subjected to the same criticism. The concept of judicial independence was at the forefront of constitutional theory in those countries.

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2 M D Kirby "*Judicial Independence in Australia Reaches a Moment of Truth*" (1990) 13 UNSWLJ 187.

3 M D Kirby "*Attacks on Judges – A Universal Phenomenon*" (1998) 72 ALJ 599.

4 A Mason, "*Judicial Independence and the Separation of Powers – Some Problems Old and New*" (1990) 13 UNSWLJ 173.

5 R Stevens, "*The Independence of the Judiciary – The View from the Lord Chancellor's Office*" Clarendon Press, Oxford 1993 at p 3.

6 *Ibid.*

For reasons which are not altogether obvious judicial independence has become highly topical in Australia. The concept, it must be said, is elusive, and lacks defining features.[7] The essence of the principle may perhaps be described as "the attainment of impartiality in the conduct of the business of the judicial branch"[8] Included within the concept are such matters as the appointment and removal of judges, and their terms and conditions of employment. At an institutional level, judicial independence focuses upon the financing of courts, and the maintenance of public confidence in the judiciary. At a more abstract level, the question most frequently asked is how to reconcile judicial independence with the need for "accountability", a concept which now permeates public life[9].

Judicial independence and accountability

Judicial accountability is, of course, manifested in many ways. The business of all courts is, except in extraordinary circumstances, conducted in public[10]. Judges generally publish full reasons for their decisions[11]. Each decision, other than those of the High Court, is subject to being appealed. Academic lawyers, and others, criticise judicial reasoning freely, often trenchantly.

Despite these guarantees that the business of the courts will be exposed to full scrutiny, there is constant pressure from politicians and others for the judicial branch to become somehow more accountable.

It must be emphasised that judicial independence is not a principle intended for the benefit or enhancement of individual judges. It is a fundamental precept of a liberal and democratic government.

Judges are not, and should not be, immune from criticism. Such criticism, even strong criticism, is not a threat to judicial independence. Free speech is not

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7 R D Nicholson, *"Judicial Independence and Accountability; Can They Co-Exist?"* (1993) 67 ALJ 404.

8 *id* at 405.

9 *id* at 413.

10 *Scott v Scott* [1913] AC 417.

11 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

merely an ingredient of representative democracy – it is fundamental to that system of government.

At the same time, so widespread, consistent and vehement has been the criticism levelled at the judiciary in Australia in recent years that fears have been expressed that the traditional and democratic values enshrined in the phrase "the independence of the judiciary" may be under threat. One commentator has observed:

> *"In Australia, for example, judges have not only been subject to intense scrutiny for their curious curial comments, 'soft' sentencing decisions and 'activist' decision-making but have also seen their traditional jurisdiction contract and the resources available to them diminish"*[12]

It must be remembered that judges are called upon to adjudicate disputes. They do so "according to law", and not according to whim. When they make decisions which do not accord with popular (or populist) values, they are criticised, and urged to become more accountable.

There is nothing untoward about calling for judges to be "accountable" if by that expression is meant nothing more than "responsive to community values". Sovereign power in Australia resides in the people and is exercised on their behalf by their elected representatives. Judges, no less than others, are bound by the laws laid down by Parliament.

It does not follow that it is sound policy, or necessarily lawful, for the legislature to enact laws which are so prescriptive that they encroach upon judicial independence. In any society which purports to respect the rule of law, judges must be free, within appropriate limits, to develop the common law, to interpret statutes, to define the limits of executive power, and to carry out those functions which are quintessentially judicial, free from executive or legislative interference.

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12 M Barker QC, *"Bagging Judges: Good Sport or Dangerous Game"* (1999) 26 Law Society of Western Australia 'Brief' 5.

Sentencing individual offenders – A quintessentially judicial function?

Until relatively recently, it was generally accepted in Australia that the task of sentencing an individual offender was perhaps the most quintessentially judicial function known to the law. That was certainly the position at common law. In 1916 White CJ, speaking on behalf of the United States Supreme Court, described the relationship between Congress and the judiciary as follows:

> *"Indisputably under our constitutional system the right to try offences against the criminal laws and upon conviction to impose the punishment provided by law is judicial, and it is equally to be conceded that in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority ... the authority to define and fix the punishment for crime is legislative and includes the right in advance to bring within judicial discretion, for the purpose of executing the statute, elements of consideration which would be otherwise beyond the scope of judicial authority ..."*[13]

In *Polyukhovich v The Commonwealth*[14] the High Court held that the separation of powers effected by the *Constitution* would invalidate a law which inflicted punishment upon specified persons without a judicial trial on the ground that involved a usurpation of judicial power. Hence a bill of attainder (a legislative enactment which inflicts punishment without a judicial trial) would be prohibited as a legislative exercise of the judicial function, or more simply – trial by legislature.

Although determining punishment after conviction is a shared responsibility among the executive, legislative and judicial branches, reasonable discretion in the application of sentencing policy to individual defendants has traditionally been considered a part of the judiciary's unique constitutional responsibility. However, the judicial role in sentencing has declined to some degree in recent years. It has been said:

> *"As the common law declines in importance in determining sentencing options, the legislature's role in defining and expanding possibilities has come to dominate the sentencing picture"*[15]

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13 *Ex parte: United States, Petitioner* 242 US 27 at 41-42 (1916).

14 (1991) 172 CLR 501.

15 R Fox and A Freiberg, *"Sentencing - State and Federal Law in Victoria"* 2nd ed Oxford University Press (1999) at par 1.201.

Developments in sentencing law and practice in the United States

During the 1980s there was increasing dissatisfaction with the manner in which judges carried out their sentencing function. That dissatisfaction centred around a perception that sentences were generally too lenient, and that there was not enough consistency among judges in the sentences imposed.

In 1984 Congress enacted the *Sentencing Reform Act* which created the United States Sentencing Commission. The Commission was charged with the task of developing Federal Sentencing Guidelines aimed at producing greater consistency in sentencing by Federal District Judges. It included several judges among its members.

In *Mistretta v United States*[16] the Supreme Court upheld the constitutional validity of the *Sentencing Reform Act*. The challenge to the Act was based upon the proposition that it compromised fundamental separation of powers principles, including the impartiality and independence of the judiciary, through its mandate that at least three judges participate in the process of developing binding sentencing policies. It was contended that the Act weakened the judiciary by removing from it discretion in sentencing, historically considered a part of the judicial power, even if that power had not been explicitly shifted to a competing branch of government. It should be noted that there was a powerful dissent in *Mistretta* by Justice Scalia.

Mistretta has since been followed by the Supreme Court on at least two occasions. The first, *Williams v United States*[17], a seven to two decision, considered the weight a sentencing judge should give to the "general policy statements" promulgated by the Commission to assist in the application of the Sentencing Guidelines. The second, *Stinson v United States*[18], a unanimous decision, considered the weight a sentencing judge should give to the commentary accompanying the Sentencing Guidelines. In the end, a mere policy statement, which was not subject to congressional review, became the functional equivalent of a Sentencing Guideline.

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16 488 US 361 (1989).
17 503 US 193 (1992).
18 508 US 36 (1993).

There is a perception among some commentators that the decision in *Mistretta* had undermined the institutional integrity of the judiciary. Although recognising that the determination of punishment after conviction is a shared responsibility among the executive, legislative and judicial branches, the application of sentencing policy to individual defendants was, until *Mistretta*, considered the constitutional responsibility of the judiciary. Whatever else the Sentencing Commission may be, and notwithstanding the presence on that Commission of serving members of the judiciary, it is not a court.

It has been said that:

> *"Increasingly shrill public and political outcry for retribution ... is causing criminal justice policy-making to be even more rancorous than in the past ... Moreover, it misleads the public to camouflage the legislative character of a social decision and shore up its acceptability by committing it to the judiciary, thereby cashing in on the judicial reputation."*[19]

The position is, if anything, worse in the States. Competing theories of mandatory and discretionary sentencing have, in varying degrees, been in ascendency or decline throughout much of the history of the United States[20]. A particularly controversial development in sentencing has been the enactment between 1993 and 1995 by twenty-four States of so-called "three strikes and you're out" laws. These provide longer prison terms for certain criminals with prior convictions for serious violent crimes. The laws vary, but most call for life sentences without the possibility of release, or at least twenty-five years upon a third conviction for a serious violent crime. The crimes include murder, rape, kidnapping, aggravated robbery, aggravated assault and sexual abuse. A few States include additional crimes, most commonly firearm violations, burglary of occupied dwellings and simple robbery. The rationale for these laws is that the longer prison terms will reduce crime by deterring and incapacitating the most active and dangerous criminals.

There is a substantial body of opinion to the effect that these laws actually increase serious crimes, and in particular homicides, because there are criminals who, fearing the enhanced penalties, murder victims and witnesses to limit resistance and

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19 I Bloom, *"The Aftermath of Mistretta: The Demonstrated Incompatibility of the United States Sentencing Commission and Separation of Powers Principles"* (1996) 24 Am. J. Crim. L. 1.

20 *United States v Grayson* 438 US 41 at 45-47 (1978).

identification. Some research suggests that there is little evidence that the laws have any compensating crime reduction impact through deterrence or incapacitation[21].

The position in Canada

In *R v Latimer*[22] the Supreme Court of Canada held that a mandatory minimum sentence of life imprisonment with no chance of parole for ten years contained in the *Criminal Code* did not amount to cruel and unusual punishment within the meaning of s 12 of the *Canadian Charter of Rights and Freedoms*. The Court observed that murder was the most serious crime known to law, and even if the gravity of second degree murder was reduced in comparison to first degree murder, it was an offence accompanied by an extremely high degree of criminal culpability.

Mandatory sentencing in Australia – the Northern Territory

It is against this background that one considers the amendments to the *Sentencing Act* 1995 (NT) introduced in 1996 which brought about the introduction of Division 6 into that Act. Division 6 came into force on 8 March 1997. It is headed "Minimum Mandatory Imprisonment for Property Offenders" and contains s 78A.

Division 6 operates to ensure that a wide range of property offences including theft, criminal damage, assault with intent to steal, and unlawful use of a motor vehicle, now provide for mandatory terms of imprisonment. For the first offence, there is a minimum term of imprisonment of fourteen days, although in certain "exceptional circumstances" the courts are not required to impose this mandatory sentence. Thereafter, the minimum term of imprisonment increases, regardless of the circumstances. For a second offence the term is ninety days, and for a third or subsequent offence, the court must impose a term of imprisonment of not less than twelve months.

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21 T Marvell and C Moody, "*The Lethal Effects of Three Strikes Laws*" (2001) 30 Journal of Legal Studies 89.

22 [2001] SCC 1.

It was scarcely surprising that this mandatory sentencing regime was challenged in the High Court soon after it came into force. In *Wynbyne v Marshall*[23] a young aboriginal mother of a two year old child had been sentenced to fourteen days imprisonment because she stole a can of beer valued at around $2.50. The magistrate said he would not have imposed a custodial sentence but for the requirements of s 78A. On the application for special leave to appeal, it was contended that under the *Sentencing Act*, a court was "required to impose sentences that are inappropriate ... and the oppressive punishment brings the court into disrepute."[24] Special leave to appeal was refused.

Recently criticism has been levelled at the manner in which the challenge to s 78A was mounted in *Wynbyne v Marshall.*[25] It has been suggested that it was unhelpful in that case to conflate provisions such as s 78A with other legislative or judicial attempts to confine or guide judicial discretion in the punishment of offenders, including the enactment of minimum penalties, or the issuance of guideline judgments. It has also been suggested that a more fruitful basis upon which the legislation can be attacked is that it constitutes a usurpation on the part of the legislature of what is quintessentially judicial power.

There is a question as to whether, and to what extent, the doctrine of the separation of powers is applicable to the States and Territories, as distinct from the Commonwealth.[26]. To some extent it may not matter, depending upon what scope is given to the decision of the High Court in *Kable v Director of Public Prosecutions (NSW)*[27]. It will be recalled that in that case a State Act which empowered the Supreme Court of New South Wales to make an order for the detention of a specified person in prison for a specified period if it was satisfied on reasonable grounds that the person was likely to commit a serious act of violence and that it was appropriate, for the protection of the community, that the person be held in custody, was invalid.

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23 Unreported, High Court of Australia, 21 May 1998.

24 D Manderson and N Sharp, "*Mandatory Sentences and the Constitution; Discretion Responsibility and Judicial Process*" (2000) 22 Sydney Law Review 585 at 589.

25 *Ibid.*

26 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. See also *Hilton v Wells* (1985) 157 CLR 67; and *Grollo v Palmer* (1995) 184 CLR 348.

27 (1996) 189 CLR 51.

It was held that a State court in which federal jurisdiction had been invested may not act in a manner incompatible with Chapter III of the Commonwealth Constitution.

There is at least one formidable barrier to the contention that mandatory sentencing is unconstitutional. In *Palling v Corfield*[28] the High Court held that it was open to the Commonwealth Parliament to require courts to impose a mandatory term of seven days imprisonment for an offence under the *National Service Act* (1951) (Cth) in circumstances where the convicted person was not willing, in response to a request by the prosecution, to give an undertaking to the Court to comply with the requirements of a notice to attend for medical examination. That Act was not invalid on the ground that it purported to confer part of the judicial power of the Commonwealth upon the prosecution or that it constituted an interference by the legislature with the judicial functions of a court.

It has been suggested[29] that *Palling* may be distinguished upon the basis that in that case the challenge to the validity of the legislation was based essentially on an argument that judicial power had been taken from the courts by executive action. The Court had not been asked to consider a challenge based upon an impermissible interference with the judicial power arising from the legislature having assigned to the judiciary a function incompatible with the judicial process. It was not until years later that the significance of Chapter III in relation to such an incompatibility argument first emerged.[30]

Those who contend that s 78A is constitutionally invalid expressly disavow any suggestion that their argument rests upon the severity of the law. They acknowledge that an argument couched in these terms would involve the court in an evaluation of the merits of the legislation, contrary to all modern notions of parliamentary sovereignty. They also disavow any reliance upon the issue of possible abuse of executive discretion. Nonetheless it has been said in that regard:

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28 (1970) 123 CLR 52.

29 D Manderson and N Sharp *op cit* at 588.

30 *Grollo v Palmer* (1995) 184 CLR 348 at 364-365; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 8-15.

> *"In practice, of course, prosecution under section 78A is likely to be highly selective, and subject to the unfettered discretion of the Northern Territory police. There is strong evidence that race is the main determining factor. Yet the attempt to raise prosecutorial discretion to the level of constitutional provision prohibition has been tried before, and failed before."*[31]

It has also been said:

> *"The real issue is not the existence of prosecutorial discretion but the striking absence of any* countervailing *discretion vested in the judiciary. This balancing discretion is central to the idea of judicial process as we understand it. In the normal course of events, if a prosecutor decides to use his or her discretion to pursue an essentially trivial matter, the court may refuse to impose a fine, or suspend a sentence, or discharge the matter. Undoubtedly there are limits to these powers in some legislation, but these limits can not completely element judicial discretion although they may constrain it. These arguments were never put in* Palling v Corfield *or in* Wynbyne v Marshall"[32]

The fact that the High Court refused special leave in *Wynbyne v Marshall* does not necessarily mean that the constitutional question over the validity of s 78A has been resolved. It must be said, however, that any future attempt to invoke the reasoning in *Kable* in the context of such a challenge will face serious difficulty.

Whatever be the prospects of a successful constitutional challenge to s 78A, it is at least clear that mandatory sentencing as it exists in the Northern Territory represents a radical departure from past practice in relation to sentencing law in Australia.

It has been said:

> *"We conclude that mandatory sentencing legislation demonstrates that the Northern Territory legislature has fundamentally misunderstood what is involved in the process of judging, and thus, what at a minimum is required to ensure the continued integrity of the judicial process and continued public confidence in the judiciary."*[33]

I shall return to the issue of mandatory sentencing shortly.

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31 D Manderson and N Sharp *op cit* at 589.

32 *Ibid.*

33 *id* at 591.

The position in Western Australia

It should not be assumed that the Northern Territory is alone in having enacted mandatory sentencing. In late 1998 the "law and order" debate focused on the sentencing practices of judges in Western Australia. The provisions ultimately enacted in that State were of less sweep and range than those in the Northern Territory. They are to be found in s 401(4) of the *Criminal Code* and in the provisions of the *Sentencing Amendment Act* 2000 (WA).

The technique adopted by the Western Australian legislature in the *Sentencing Amendment Act* is to make provision for what is described as an "indicative sentencing method" to be prescribed in relation to what are called "regulated offences". In effect the system is one which closely approximates what is known in the United States as "grid sentencing", or "sentencing by matrix". It has been suggested that the Western Australian provisions have transferred the sentencing discretion, and thus the judicial function, from the courts to the Parliament. The situation in Western Australia is said to be more serious than in the United States where, though Sentencing Guidelines have been introduced, these are drafted and monitored by an independent Sentencing Commission, and not by the Government or Attorney-General of the day.

> It has been said in relation to the Western Australian provisions:
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> *"In practical terms, the real danger with a sentencing matrix ... is that **unlike** cases are treated **alike**. The essence of justice is that **like** cases should be treated **alike**."*[34]

The Full Court of the Supreme Court of Western Australia has also been given power to give guideline judgments containing guidelines to be taken into account by courts sentencing offenders.[35] I shall return to the subject of guideline judgments shortly.

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34 M Barker QC, *op cit* at 11-12.

35 *Sentencing Act* 1995 (WA) s 143.

Sentencing legislation at the Commonwealth and State level

It is clear that the role of the common law in sentencing has steadily declined in recent years. Statutes now spell out ever more prescriptively not merely the sentencing options available, but also the factors which must be taken into account in determining the type of sentence to be imposed and, if custodial, the duration of that sentence.[36]

There may be debate about whether provisions of this type are of any real utility in promoting rational and consistent sentencing. However, there is no doubt that it is open to Parliament to enact sentencing legislation which provides detailed guidance as to how the sentencing discretion should be exercised.[37] There is a vast difference between enacting prescriptive legislation and enacting mandatory sentencing provisions.

The position in New South Wales

There is legislation in New South Wales which enables the Attorney-General of New South Wales to make an application to the Court of Criminal Appeal to issue a guideline judgment with respect to a particular offence or category of offences. The Senior Public Defender and the Director of Public Prosecutions may intervene in any such application. It has been suggested that in accordance with the reasoning in *Kable* there may be a question as to whether the broadly legislative function said to have been conferred upon the Court by this legislation is incompatible with the exercise by the Court of the judicial power of the Commonwealth.

In addition, the New South Wales Court of Criminal Appeal has recently developed its own practice of issuing what are known as "guideline judgments". The court has acknowledged that these judgments represent a departure from the traditional system of sentencing principles developed through appellate review, and involve the adoption of a more structured approach. In *R v Jurisic*[38] Spigelman CJ said:

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36 See for example *Crimes Act 1914* (Cth) s 16A.

37 *Nicholas v The Queen* (1998) 193 CLR 173.

38 (1998) 45 NSWLR 209.

"In my opinion, guideline judgments should now be recognised in New South Wales as having a useful role to play in ensuring that an appropriate balance exists between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed, and in the judiciary as a whole, on the other."[39]

In the same case Wood J observed:

"By tagging selected decisions as guidelines judgments, the Court is not to be taken as usurping the function of the legislature, or as inappropriately intruding into the exercise of the sentencing discretion reserved to trial judges. Rather, what is intended is for the Court of Criminal Appeal to highlight the sentencing principles which fall for it to determine, in a way that might assist trial judges, the Director of Public Prosecutions and trial counsel, and reduce the occasion for that degree of inconsistency or departure from principle that is an indicator of injustice."[40]

Guideline judgments have been issued by the English Court of Appeal for many years. It has been suggested that the introduction of guideline sentencing in New South Wales may be seen as an unacceptable engagement by the judiciary with populist views and as an institutional acknowledgment of some type of "law and order" crisis.[41]

Subsequent guideline judgments have also been issued by the New South Wales Court of Criminal Appeal in *R v Henry*[42]; *R v Wong and Leung*[43] and in *R v Thomson and Houlton*[44].

The position in Victoria

In *R v Ngui & Tiong*[45] the Victorian Court of Appeal referred to the decision of the five member bench of the New South Wales Court of Criminal Appeal in *R v Wong and Leung* in which that Court had expressed "judicial guidelines" relating to the sentencing of importers of heroin and cocaine. Winneke P (with whom Callaway and Buchanan JJA agreed) commented:

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39 *id* at 220.
40 *id* at 233.
41 D Spears, *"Structuring Discretion: Sentencing in the* Jurisic *Age"* (1999) 22 UNSWLJ 295.
42 (1999) 46 NSWLR 346.
43 (1999) 48 NSWLR 340.
44 (2000) 115 A Crim R 104.
45 (2000) 111 A Crim R 593.

> *"For my own part, I have reservations about the use which can or should be made in the sentencing process of judicially expressed guidelines, based on existing* 'sentencing patterns' *which are themselves the product of the accumulated wisdom of sentencing judges exercising individual discretions in respect of individual cases over a number of years. It must, of course, be acknowledged that consistency in sentences imposed for like offences upon like offenders is an objective to which the system of criminal justice aspires. Such consistency, as the courts have frequently stated, is particularly important where the offences are created by commonwealth statues and sentences for such offences are being imposed by courts throughout Australia:* Krasnov *(1995) 82 A Crim R 92 at 95. To the extent that judicially expressed guidelines can assist the production of such consistency, then they may be of use. However, the search for sentencing consistency should not be permitted to usurp the discretion of the sentencing judge."*[46]

Winneke P continued:

> *"Experience in other areas of the law has shown that judicial expressed guidelines can have a tendency, with the passage of time, to fetter judicial discretion by assuming the status of rules of universal application which they were never intended to have ... It would, in my opinion, be unfortunate if such a trend were to emerge in the sentencing process where the exercise of the judge's discretion, within established principles, to fix a just sentence according to the individual circumstances of the case before him or her is fundamental to our system of criminal justice:* Lowndes *(1999) 195 CLR 665 at 671-672."*

The High Court has recently heard an appeal from the New South Wales Court of Criminal Appeal in the matter of *R v Wong and Leung*. No doubt when judgment is delivered in that matter there will be much more known about the principles which govern guideline judgments.

Conclusions

Legislation in Australia which operates to provide a more structured sentencing discretion is not necessarily incompatible with judicial independence. Nor is the development of guideline sentencing. It was, after all, the New South Wales Court of Criminal Appeal which instigated the practice of issuing guideline judgments.

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46 *R v Ngui & Tiong* (2000) 111 A Crim R 593 at 598.

Mandatory sentencing is both quantitatively and qualitatively different from structured sentencing. It is plainly arguable that it is incompatible with the principle of judicial independence. The removal of the Courts' discretion in a matter as profoundly important as the sentencing of individual offenders is a step not to be taken lightly. The issues raised by mandatory sentencing are serious, and ought not to be trivialised as part of ordinary political debate.