PURSUING CONSISTENCY IN AN INDIVIDUALISTIC SENTENCING FRAMEWORK: IF YOU KNOW WHERE YOU’RE GOING, HOW DO YOU KNOW WHEN YOU’VE GOT THERE?¹

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I

INTRODUCTION

Sentencing in Australia is founded upon two major premises that are in perennial conflict: individualized justice and consistency. The first holds that courts should impose sentences that are just and appropriate in light of all of the circumstances of each particular case. The second holds that similarly situated offenders should receive similar sentencing outcomes. The result is an ambivalent jurisprudence that challenges sentencers as they attempt to meet the conflicting demands of each premise.

While there is an inherent tension² between the premises of individualized justice (“individualism”) and consistency (“comparativism”), they are not mutually exclusive and both are fundamental to a fair sentencing system. These paradigms are not dichotomous but points at the ends of a spectrum along which a balance can be struck.³ In practice, sentencing judges recognize this and do not act at either extreme. The balance currently being stuck, however, heavily favours the individualist end of the spectrum.

Over recent decades, common law jurisdictions have developed measures aimed at reducing unjustifiable disparity in sentencing and generally encouraging consistency of approach or outcome in like cases. Unjustifiable disparity violates fundamental tenets of the rule of law, erodes public confidence in the administration of justice and has costly resource implications. Although the pursuit of this aim is non-controversial, its manifestations are not. In particular, there is disagreement about the nature of disparity and a paucity of evidence regarding its extent. More

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¹ With apologies to Anthony Doob, The United States Sentencing Commission Guidelines: If you don’t know where you are going, you might not get there, in THE POLITICS OF SENTENCING REFORM 199 (Chris Clarkson ed. et al.) (1995).
² JJ Spigelman, Consistency and Sentencing, 82 AUST. L.J. 450 (2008) (Sentencing involves weighing often contradictory objectives like the principles of consistency and individualized justice); The problem is an old one, see, e.g., Leon Radzinowicz & Roger Hood, Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem, 127 U. PA. L. REV. 1288 (1978-1979).
problematically, there is a lack of evidence regarding the effectiveness of the measures that have been introduced to eliminate unjustified disparity.

In this article, competing paradigms of individualism and consistency are compared, the meanings of “consistency” and “disparity” are explored, some of the empirical evidence for unjustifiable disparity is identified, some of the measures adopted in Australia to encourage consistency are outlined and the meagre evaluative literature that attempts to assess these interventions is discussed.

The rule of law and the right to equality require that courts and governments ensure that unjustifiable disparity is minimized. More and better quantitative and qualitative data are needed to understand the extent of unjustified disparity in sentencing as well as the effectiveness of the measures introduced to minimise it. In Australia, the efficacy or otherwise of the measures adopted to encourage consistency may not reflect a failure of the measure themselves but rather the predominantly individualist framework within which they operate and the ambivalent attitude towards the importance of consistency. The way in which courts of appeal have privileged individualism in opposition to comparativism requires review in order to identify the legitimate contribution that the latter can make to fair sentencing.4

II

INDIVIDUALIZED JUSTICE AND CONSISTENCY

Australia has nine separate sentencing jurisdictions (eight states and territories plus a federal system).5 Most sentencing decisions are made at the state level.6 The High Court of Australia is the highest court in the country, with appellate jurisdiction over all state and territory courts. Each state and territory has its own court hierarchy culminating in the appeals division of its Supreme Court. Trial divisions of the Supreme Courts hear major criminal matters, mostly murders and some serious drug cases. Most jurisdictions have two levels of inferior courts. County or District Courts hear the majority of serious criminal matters with juries and Magistrates’ or Local Courts hear less serious criminal matters without a jury. Typically these amount to around 90 per cent of all criminal cases.

The basic framework is that general legislation creates offenses, prescribes maximum penalties, and sometimes lists (without ranking) the purposes of sentencing, the various aggravating and mitigating factors that may or must be considered and provides guidance regarding the appropriate use of certain sanctions.7 Within that broad structure, judicial discretion is regulated by the common law as developed by appellate courts.

5 The differing state and federal laws which apply to offenders can themselves produce inconsistency of outcome, see AUSTL. LAW REFORM COMM’N, REPORT NO. 103, SAME CRIME, SAME TIME: SENTENCING OF FEDERAL OFFENDERS (Arguing that Federal offenders should be treated consistently with each other rather than with state offenders).
7 See Freiberg, supra note 6. We omit from the following discussion sentencing in juvenile courts where rehabilitative aims are statutorily preferred and are therefore likely to produce more disparate outcomes.
The tension between individualized justice and consistency is reflected in the potential difference between a sentence based on the circumstances of an individual case and one based on comparison with similar cases.\(^8\) The sentencing discourse regarding the relationship between individualized justice and consistency is mediated through the concept of judicial discretion, which is regarded as a crucial component of fair sentencing because it enables abstract legal rules to be applied to specific, real-life offenses. The orthodox view holds that a “broad”\(^9\) judicial discretion is “of ‘vital importance’”\(^10\) because it alone safeguards individualized justice by freeing judges to tailor sentences to the “wide variations of circumstances of the offence and the offender”\(^11\) which are “unique”\(^12\) to each case.\(^13\) It also holds that being able to choose between the variety of sentencing purposes and options is key to imposing sentences that are appropriate to both the offence and offender. On this understanding, broad judicial discretion, individualized justice and fair sentencing outcomes are directly related. There is a deep “cultural resistance to modification of judicial discretion within the judiciary and the legal profession generally,” a concept that is sometimes couched in terms of judicial independence.\(^14\) This “strong” view of individualized justice is frequently (entirely) conflated with notions of fair sentencing.\(^15\)

A. The Individualist Approach

The individualist approach to sentencing is underpinned by a number of widely repeated and strongly held propositions:\(^16\)

(1) As the discretion entrusted to sentencing judges is of “vital importance”\(^17\) in the administration of the criminal justice system, it is required\(^18\) that this discretion be “very wide”\(^19\) and at large within the parameters of the maximum penalty, the limiting principle of proportionality and any (rare) statutory constraints.\(^20\)

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\(^8\) See Brian J. Preston & Hugh Donnelly, Achieving Consistency and Transparency for Environmental Offences (Research Monograph no. 32, JUD. COMM’N NEW SOUTH WALES), at 218 (2008).

\(^9\) R v Whyte [2002] NSWCCA 343, at [147] (N.S.W. Ct. Crim. App.) (A broad sentencing discretion is essential to ensuring that all of the wide variations of circumstances are taken into account).


\(^12\) DPP v Arney [2007] VSCA 126 (Vic. Ct. App.).

\(^13\) See AUSTL. LAW REFORM COMM’N, REPORT NO. 103, SAME CRIME, SAME TIME: SENTENCING OF FEDERAL OFFENDERS, 5.21 (2006) (Individualized justice can be attained only if a judicial officer possesses a broad sentencing discretion).

\(^14\) George Zdenkowski, Limiting Sentencing Discretion: Has there been a paradigm shift? 12 CURRENT ISSUES IN CRIM. JUST. 58, 59 (2000); see also NEW SOUTH WALES LAW REFORM COMM’N, REPORT NO. 79, SENTENCING (1996), at 1.7.

\(^15\) See Kable v DPP (N.S.W.) (1995) 36 NSWLR 374, at 394 (N.S.W. Ct. App.) (“If justice is not individual, it is nothing”).

\(^16\) Freiberg & Krasnostein, supra note 3.


\(^18\) AUSTL. LAW REFORM COMM’N, supra note 11, at 5.21.

\(^19\) House v R [1936] HCA 40; (Austl. H. Ct.).

(2) Although there may be a range of appropriate sentences, there is no single correct sentence;\(^\text{21}\)

(3) Although there might be recurring features,\(^\text{22}\) no two cases are exactly alike;\(^\text{23}\)

(4) While statements by appellate courts regarding principles affecting the sentencing discretion can constitute precedents, sentences themselves are not precedents;\(^\text{24}\)

(5) A certain level of inconsistency is acceptable and inevitable.\(^\text{25}\)

This paradigm tends to regard consistency as a threat to the exercise of discretion and can be divisive. The Australian authorities position the individualist approach in direct opposition to a comparativist approach.\(^\text{26}\) Rather than identifying the contribution that each paradigm can make towards the rule of law and fair sentencing, they are often presented as largely mutually exclusive propositions.

The High Court of Australia\(^\text{27}\) has determined that the proper methodology for arriving at an appropriate sentence is through an “instinctive” or “intuitive” synthesis\(^\text{28}\) - an exercise in which all considerations relevant to the instant case are simultaneously unified, balanced and weighed by the sentencing judge.\(^\text{29}\) In doing so, a judge may have recourse to a number of guides, the most important being their intuition regarding the factors pertaining to the instant offense and offender. Because the confluence of these factors is said to be ‘unique’\(^\text{30}\) to each case, determining their relative weight, and translating that weight into a tailored sentence, must be similarly unique. Sentencing is, therefore, more “art than science.”\(^\text{31}\)


\(^{22}\) R v Olbrich [1999] HCA 54; (Austl. H. Ct.) (per Kirby, J., dissenting).


\(^{24}\) Wong v The Queen [2001] HCA 64, at [57] (Austl. H. Ct); Hili and Jones v The Queen [2010] HCA 45, at [77]-[79] (Austl. H. Ct); Bowen v The Queen [2011] VSCA 67, at [73] (Vic. Ct. App.). In a Practice Note (No. 8) issued by the Victoria Court of Appeal in November 2011 the Court stated that when it considered that the reasons for decision contained no new point of principle, that fact would be noted with the consequence that that decision cannot be cited in a subsequent case without leave of the court.

\(^{25}\) Wong [2001] HCA 64, at [6].

\(^{26}\) Hudson [2010] VSCA, at [31]-[33] (Undertaking comparative analysis to identify a sentence in a similar case introduces unacceptable mathematical precision to the instinctive synthesis.)

\(^{27}\) The High Court is the final court of appeal for all cases, civil or criminal, state or federal.


\(^{29}\) First enunciated in this form by the Supreme Court of Victoria in R v Williscroft [1975] VicRp 27, at 301.

\(^{30}\) Russell v The Queen [2011] VSCA 147 at [57] (Vic. Ct. App.).

\(^{31}\) KATJA FRANKO AAS, SENTENCING IN THE AGE OF INFORMATION: FROM FAUST TO MACINTOSH (2005), at 24-26; see also Weininger v The Queen [2003] HCA 14, at [24] (Austl. H. Ct Markarian v The Queen [2005] HCA (‘But if two-tier sentencing is science, its results …suggest it is junk science’), per McHugh J at [71].
A necessary consequence of this approach is that “scientific methods” – that is the use of objective, replicable measurement techniques – are eschewed in Australian sentencing. “[M]athematical precision”\(^{32}\) is described as inimical to the instinctive synthesis. Further, the instinctive synthesis is theoretically incompatible with sentencing “tariffs”\(^{33}\) or “ranges”, with case comparison,\(^{34}\) or with the use of “starting points,” other than where they might play a role in “informing” the instinctive synthesis\(^{35}\) or assisting a court in determining which instance of an offense is more serious than another.\(^{36}\) Giving these considerations a more elevated role when sentencing an offender would be to “sentence the person for another crime.”\(^{37}\) As a consequence, it has become accepted as an article of faith that “[t]he method of instinctive synthesis will by definition produce outcomes upon which reasonable minds will differ.”\(^{38}\)

Another consequence of this methodology is that it conceals, and possibly normalizes, disparity. The latitude given to judges to balance all “unique”\(^{39}\) considerations in each case means that sentences are “subjective judgments, largely intuitively reached.”\(^{40}\) As a consequence, the reasoning process – specifically, the weight attributed to certain determinative factors – is not always explicated\(^{41}\) nor transparent. This affects the ability to assess empirically whether patterns of offense and offender are routinely being approached and weighed in the same way. Because there can be no “correct” sentence in any particular case\(^{42}\) sentences can be inconsistent within a (potentially vast) margin of error yet still rational and legal.\(^{43}\)

B. The Comparativist Approach

Despite the dominance of the individualist approach, Australian sentencing authorities have recognized, at least at the level of principle, the importance of consistency as a guiding value\(^{44}\) and its relationship to fair sentencing.\(^{45}\) Sentencing should not be a “multiplicity of unconnected single instances”,\(^{46}\) and it has been suggested that unjustified inconsistency between offenders is contrary to the rule of

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\(^{32}\) Hudson v The Queen [2010] VSCA 332, at [31]-[33]


\(^{37}\) AB [1999] HCA, at [15].

\(^{38}\) Hudson v The Queen [2010] VSCA 332, at [27].

\(^{39}\) Russell v The Queen [2011] VSCA 147, at [57] (Vic. Ct. App.).


\(^{46}\) Wong [2001] HCA, at [6].
law that requires that like cases be treated alike.\(^{47}\) A frequently cited High Court judgment states that:\(^ {48}\)

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.

This recognition is also reflected by sentencing legislation in most jurisdictions which provides that one of its purposes is “to promote consistency of approach in the sentencing of offenders”.\(^ {49}\)

## III

### CONSISTENCY

“There is no universally accepted definition of consistency in sentencing. The general concept is clear, however: similar offenders who commit similar offences in similar circumstances would be expected to receive similar sentencing outcomes”.\(^ {50}\)

Consistency in sentencing takes many forms. It is generally understood to require courts to “apply the same purposes and principles of sentencing, and … consider the same types of factors when sentencing.”\(^ {51}\) Relevant to these issues is the manner in which judges approach and weigh legally-relevant factors such as those that relate to the seriousness of the offense, the culpability of the offender and the purposes and principles of sentencing and the degree to which they are, consciously or otherwise, improperly influenced by extra-legal factors such as the defendant’s race, ethnicity or gender.

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\(^{48}\) Lowe [1984] HCA, at [1] (Mason, J.). Recently described as the origins of contemporary Australian doctrine on consistency, his Honour was discussing disparity between co-offenders, however, the principle has broader application. See Wong [2001] HCA, at [89]; See Spigelman, supra note 1; Preston and Donnelly, supra note 6.


\(^{51}\) AUSTL. LAW REFORM COMM’N, supra note 11, at 5.18; See also Hili and Jones v The Queen [2010] HCA 45, [49] – [50].
In relation to sentences for co-offenders, consistency generally refers to parity between their sentences – the challenge being to identify the grounds of difference between cases and to assign them an appropriate weight.\footnote{Freiberg & Krasnostein, supra note 3.}

A distinction is often drawn between consistency of approach and consistency of outcome.\footnote{There are other forms of consistency, for example in the Australian federal framework, the term concerns the relationship between federal and state sentencing practices where Commonwealth and state offenses are heard in state courts. Consistency may also refer to same judge disparities. See Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, Extraneous Factors in Judicial Decisions. 108 PROC. NAT’L ACAD. SCI. 6889 (2011) (Findings suggest that judicial decisions can be influenced by factors that should have no bearing on the substantive outcome).} Consistency of approach is a procedural mechanism that obliges a sentencing judge to follow a prescribed sequence of steps, or take prescribed factors into account in arriving at a conclusion. Within a discretionary framework, this approach carries within it an assumption that sentences will only ever be “reasonably consistent”, a phrase reflecting an acceptance that there is no correct sentence, but rather a range of correct sentences, and that it must necessarily be so if sentences are to be consistently proportionate. An emphasis on proportionality – the need for the particular punishment to fit the particular circumstances of the offence and offender - underlies the concept of consistency of approach. Without consistency of approach between judges, the search for just sentencing outcomes becomes “at best a lottery, and at worst a myth.”\footnote{See R. v. Arcand, 2010 ABCA 363 at [8] (Alta. Ct. App.).}

Consistency of outcome, on the other hand, is concerned with uniformity of sentence type or quantum (within and between offense types). It seeks congruence with a pre-determined standard derived from factors deemed legally relevant (such factors having been allocated a range of pre-determined weights by persons or bodies other than the sentencing judge). This type of consistency may be achieved through statistical sentencing grids of the type employed by the United States federal courts, or through mandatory sentencing schemes. It embodies assumptions regarding correct sentences for cases that are relevantly similar, which, in turn, requires agreement about the correct identification and weighting of relevant factors, including the seriousness of the offense, the harm to the victim, and the culpability of the offender. The history, context, and implementation of measures aimed at promoting consistency of outcome indicates that they may have been more directed toward increasing the severity of sentences than increasing the fairness of sentencing.\footnote{See Patrizia Poletti & Hugh Donnelly, The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales (Research Monograph no. 33 - JUD. COMM’N NEW SOUTH WALES) (2010). See Doob, supra note 1, at 199, 202, 208, 212.}

A. Demonstrating Unjustifiable Disparity or Parity

Disparity - the converse of consistency - may be justifiable or unjustifiable. Disparity that is based on legally relevant differences between offenders is justifiable, but sentencing outcomes which are attributable to differences between judges are not. Similarly, sentencing outcomes that are identical but which ignore legally relevant differences are unwarranted. The Australian system is prone to the former error, while rigid guideline or mandatory systems are prone to the latter.\footnote{The remainder of this article will focus primarily on the efforts to reduce unwarranted interjudge disparity.} Implicit in the concept

\footnotesize{\textsuperscript{52} Freiberg & Krasnostein, supra note 3.}
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\footnotesize{\textsuperscript{55} See Patrizia Poletti & Hugh Donnelly, The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales (Research Monograph no. 33 - JUD. COMM’N NEW SOUTH WALES) (2010). See Doob, supra note 1, at 199, 202, 208, 212.}
\footnotesize{\textsuperscript{56} The remainder of this article will focus primarily on the efforts to reduce unwarranted interjudge disparity.}
of unjustifiable disparity is ‘some notion of an appropriate or ‘normal’ sentence from which the disparate sentence varies.’

The contention that unjustifiable disparity is a significant problem in Australia is not widely accepted by the judiciary and, where accepted, is considered a lesser evil than its remedies.

1. Methodological Issues

There are a number of ways of measuring unjustifiable disparity. The first involves simulation exercises in which judges provide sentences based on common sets of facts. The second looks at cases with common observable characteristics, attributing residual variation among those cases to the particular judges. This can be done statistically or by a more qualitative case comparison of the sentencing practices of judges dealing with similar types of cases. The third method is to deem random caseloads assigned to judges as comparable, which then allows average sentencing outcomes to be compared and difference attributed to judges.

2. Empirical Problems

Although a number of studies have been conducted that appear to demonstrate forms of disparity there is a dearth of conclusive empirical evidence as to the nature and extent of unjustifiable disparity in Australia. This is due partly to the difficulty of conceptualizing and operationalizing the notion of ‘unjustified disparity,’ though this is not an insurmountable problem as the breadth of United States scholarship in this area demonstrates. With rare exceptions, the Australian


59 Id. at 271.

60 See AUSTL. LAW REFORM COMM’N, supra note 11, at 2, 6, 508, 511. See NSW LAW REFORM COMM’N, supra note 12, at 1.12-1.13; Don Weatherburn, Sentence Disparity and Its Impact on the NSW District Criminal Court (Report 34 – N.S.W. NSW BUREAU CRIME STAT. RES.) (1994); Ross Homel & Jeanette A. Lawrence, Sentencer orientation and case details: An interactive analysis 16 LAW & HUM. BEHAV. 509 (1992).

61 See AUSTL. LAW REFORM COMM’N, supra note 11, at 508.


63 Numerous factors are relevant to the sentencing outcome, each of which could legally justify a different sentence for offenders convicted of the same offense. Therefore, the mere fact that individuals have been sentenced differently does not indicate unjustified disparity; Weatherburn, supra note 57, at 5.

64 Social science researchers regularly control for the influence of a variety of different factors. See Weatherburn, supra note 57, at 5. (Variation which cannot be explained by selected variables, typically representing relevant legal factors, can be characterized as a measure of unjustified disparity.)

65 See AUSTL. LAW REFORM COMM’N, supra note 11, at 508.

66 The studies conducted after 1990 are: IVAN POTAS, SENTENCING ROBBERS IN NEW SOUTH WALES; PRINCIPLES, POLICY AND PRACTICE (1990); Jeanette A. Lawrence & Ross J. Homel, Sentencer and Offender Factors as Sources of Discrimination in Magistrates’ Penalties for Drinking Drivers 5 SOC. JUST. RES. 385 (1992); Homel & Lawrence, supra note 57; Weatherburn, supra note 57, Don Weatherburn & Bronwyn Lind, Sentence Disparity, Judge Shopping and Trial Court Delay, 29 AUSTL. & N.Z. J. CRIMINOLOGY 147 (1996); IVAN POTAS & PATRIZIA POLETTI,
empirical studies purporting to find unjustified disparity focus on the specific issues of gender and race (here, even, the number of race-effects studies in Australia being ‘scant’ or ‘sparse’ in comparison with the United States). There are also studies looking at how intellectual disability and juvenile ethnicity affect sentencing.

While these are valuable, more empirical research is needed to answer the broader question of whether, and how much, unjustified disparity exists generally in sentencing. The studies that look at this question are now out of date and many focused on sentencing practices in the Magistrates Courts only. While the bulk of sentencing occurs in that jurisdiction, such studies cannot account for sentences for more serious offenses. Many of the studies reveal different sentence lengths and types for certain offenses. However, disentangling the different causes of variation is a fraught task, and it is probably true to say that the extent and “nature of inconsistency in sentencing is not understood in great detail.”


69 Besides being fewer, such studies appear less methodologically sophisticated. See Samantha Jeffries & Christine Bond, Does Indigeneity Matter? Sentencing Indigenous Offenders in South Australia’s Higher Courts, 42 AUSTL. & N.Z. J. CRIMINOLOGY 47 (Regression techniques used only recently in Australia to explore the impact of Indigenous status on sentence. The first Australian attempts to use methodologically rigorous techniques to compare sentencing outcomes for Indigenous and non-Indigenous defendants occurred in 2006 and 2007.)


73 Weatherburn, supra note 57; Weatherburn & Lind, supra note 63, at 147-165.

74 A possible exception is a study of sentences for serious offenses in Queensland. See Sentencing Advisory Council (Queensl.), Sentencing of serious violent offences and sexual offences in Queensland (Research Paper, 2011) (No evidence found indicating a systemic problem with consistency in the Queensland higher courts but noted that further research is needed to obtain better measures of sentencing consistency than those used for this study.)

75 U.K. SENT’G COUNCIL, supra note 48.
IV
MECHANISMS TO PROMOTE CONSISTENCY

As a result of persistent criticisms of unjustifiable disparity, a number of mechanisms to achieve consistency have been introduced in the Australian states and territories. These differ both in their overall approach to the task, and in the extent to which they constrain judicial discretion. These mechanisms, singly and in combination, have evoked significant scholarly and political debate. The recurring theme of those debates is the proper value and scope of discretion in a fair sentencing system.

A. Appellate Review

The breadth of the sentencing discretion is theoretically counter-balanced by appellate review which should promote consistency in two ways. First, as a check on individual sentencing outcomes in the lower courts. Second, through offering guidance to sentencing judges via statements of policy or principle and correcting the course of sentencing practices where appropriate. However, the ability of the appeal mechanism to fulfil both purposes has been significantly hindered by a number of self-imposed limitations and conventions which privilege individualism over comparativism and thus, consistency in sentencing.

In Australian sentencing, “consistency is sought to be attained largely through the unifying effect of appellate review,” or through the court hierarchies, beginning with the state Courts of Appeal and, culminating in the High Court of Australia. The actual experience of courts of criminal appeal in Australia, however, has been that “since their inception, they have adopted a very conservative stance” to guiding sentencers. This has had the practical effect of limiting what was, in theory, intended to function as the major check on the broad discretion of the lower courts.

Both defence and prosecution have the right to appeal against sentence, and appellate courts have developed an extensive sentencing jurisprudence, as well as principles to guide appellate intervention. Appellate courts will overturn sentencing decisions only with evidence of legal error, otherwise their role is not to substitute their discretion for that of the sentencing judge.

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76 And, in some cases, perceived leniency.

77 The operation of, and necessity for, each of these mechanisms is affected by the size of the jurisdiction. In relation to intra-state variations, smaller states like Tasmania and South Australia have fewer judges and are therefore likely to develop an informal culture based on physical propinquity which contributes to consistency. In larger states, like New South Wales and Victoria, the role of formal mechanisms in promoting consistency will be heightened.

78 Weatherburn, supra note 57, at 16.

79 There are many other reasons why appellate review is not an adequate vehicle for providing guidance including the limited range of cases that come before courts of appeal, the changing composition of the bench, and the lack of time, research and policy resources to consider thoroughly a wide range of matters.


In Australia, while appeal of less serious sentences is *de novo*, higher sentencing courts have the final say on findings of fact and are given a “wide measure of latitude” by appeal courts which will overturn sentences only where there is evidence of legal error. There are two basic types of relevant error. The first is specific (or legal) error (e.g., that the lower court acted on an erroneous principle of law, considered irrelevant matters, or gave improper weight to matters). The second, and more common, type of review is for non-specific error, occurring when sentences are “manifestly excessive” or “manifestly inadequate” despite there being no apparent error in the reasons for sentence. Here, error will be inferred only if the sentence is obviously outside the range of appropriate sentences for the instant offence and offender. This can be understood as a species of reasonableness review where the appeal court will assess whether the sentence was justified in all the circumstances. However, if the sentencing judge considered all relevant factors, the reviewing court will not substitute another sentence merely because it disagrees. The original sentence must be manifestly outside the appropriate range, assessed primarily in terms of the case before the court, not in relation to other cases. While criticisms can be made in relation to the efficacy (in terms of minimising unwarranted disparity) and transparency of review for non-specific error, the rules and standards for appellate review of sentences in Australia are – unlike the United States federal appellate jurisprudence- relatively well defined and have not dramatically shifted over time.\(^3\)

The continued allegiance to the “instinctive synthesis” methodology, where sentences are ‘subjective judgments, largely intuitively reached,’\(^3\) has had the practical effect of hindering the pursuit of consistency. It has done so through a broad prohibition on what has been termed “two-stage sentencing,” or sentencing based on a “notion of a mathematical norm,” above or below which a sentence might be placed depending upon the balance of aggravating and mitigating increments.\(^4\) Consequently, the reasoning process leading to a sentence follows a largely inscrutable “instinctive reaction”.\(^5\) This is manifested in statements that it is sometimes “profitless…to attempt to allot to the various considerations their proper part in the assessment of the particular punishments”\(^6\) and that “it is an unwarranted assumption that all of the relevant factors which bore upon the imposition of [those comparative] sentences can be identified and weighted.”\(^7\)

Australian appellate courts have determined that consistency is not “numerical equivalence,”\(^8\) but rather ‘consistency in the application of the relevant legal principles’ which is not capable of “mathematical precision”.\(^9\) If ranges are therefore inadequate to ascertain if a sentence is reasonably consistent, then the only conclusion

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\(^{84}\) *AB v The Queen* [1999] HCA 46, at [12], [15]-[18], *Wong v The Queen* [2001] HCA 64, at [74]-[77]; *Markarian v The Queen* [2005] HCA 25, at [51]-[53] and [56]

\(^{85}\) *DPP (Vic.) v Terrick* [2009] VSCA 220 at [74].


\(^{87}\) *Hudson v The Queen* [2010] VSCA 332, at [8].

\(^{88}\) *Hilli and Jones v The Queen* [2010] HCA 45, at [18].

\(^{89}\) *Hudson* [2010] VSCA, at [8].
is that there must be sufficient explication by sentencers of the weight given to
selected determinative factors in the instant case.

An individualist approach to sentencing is antithetical to the issuance of
authoritative guidance to sentencing courts because it holds that the primary role of an
appellate court is to rectify error in a particular case, not to lay down explicit
principles. In contrast, a comparativist view holds that there is a proper public policy
role for the court in ensuring an appropriate level of consistency in sentences imposed
within that jurisdiction. The dominant understanding of individualism has resulted
in courts generally declining the task of overtly setting standards. They usually do so
only by identifying whether a particular sentence was manifestly inadequate or
excessive, leaving first instance courts to infer an appropriate sentence from the
explanation. Further guidance may be gleaned from a collection of appellate cases
which indicate, in the (ostensibly) infinite variety of circumstances, which possibly
relevant sentences were or were not correct or appropriate.

A comparativist approach to appellate intervention would, by contrast, identify
ranges for various categories of offenses and types of offenders in various sets of (oft-
seen) circumstances. It would also, beneficially, identify a way of approaching and
weighing these circumstances, providing needed assurance that aggravating and
mitigating factors would be routinely approached (and seen to be approached) in a
consistent manner. These elements of guidance would honour the fact that one of the
major functions of a Court of Criminal Appeal is to achieve consistency and certainty
by “minimizing disparities of sentencing standards, while leaving a fair margin of
discretion to sentencing judges.”

Instead, there has, generally speaking, been a disinclination by Australian
appellate courts to resolve the majority of questions except to say that there “are no
golden rules”:

It is obviously a class of problem in solving which it is easier to see when
a wrong principle has been applied than to lay down rules for solving
particular cases, and in which the only golden rule is that there is no
golden rule...In applying considerations as general as these, it is
necessarily not often that it can be said, with reasonable confidence, that
the sentence imposed was wrong.

B. Provision of Sentencing Information to Primary Judges

Another mechanism introduced to promote consistency in the highly
individualized Australian sentencing framework is the provision of sentencing
information to judges. Sentencing information assists judges by bringing to their

90 Fox and Freiberg, supra note 75, at 13.102.
91 See AUSTL. LAW REFORM COMM’N, supra note 11, at 20.29 (citing Sir Ivor Richardson, a past
President of the New Zealand Court of Appeal who stated that the three functions of the Court are to
correct errors made in the lower courts, to enunciate and harmonize the law and to ensure consistency
of approach to the administration of justice). See Ashworth, supra note 76, at 525.
92 See, e.g., Police (SA) v Cadd (1997) 69 SASR 150, at 165 (S. Austl. Sup. Ct.) (sentencing standards
can be established over time ‘through the process of correcting individual sentences’); Kovacevic v
93 R v Allinson (1987) 49 NTR 38, at 39 (Sup. Ct. N.T.); see also R v Green [1986] 2 Qd R 406 , 410
(Queensl. Ct. Crim. App.).
94 R v Geddes (1936) 36 SR (NSW) 554 at 555 (N.S.W. Ct. Crim. App.).
particular task “the collective experience of the judiciary,” in the hope that consistency is just a question of “better informing the sentencing discretion.” This information takes a number of forms including sentencing ranges, statistics, comparable cases and databases, each of which indicates “current sentencing practices” and gives judges the “means to ascertain whether the manner in which [they sentence is] consistent with that of other judges for similarly situated offenders.” Understandably, judges usually want to know what other judges have done in similar cases, and they do not set out to impose deliberately disparate views of sentencing policy on the world. However, this approach is largely voluntary and judges are for the most part not obligated to use the information in any particular way, or at all.

There are three major methods of providing information to sentencing judges: sentencing ranges, sentencing statistics and sentencing information databases.

**Sentencing ranges:** The High Court of Australia has stated that there is no correct sentence, there may only be a range of permissible sentences. The concept of “range” implies scope for discretion, but also that this scope is not unlimited. A “range” is generally regarded as an “historical fact” that may broadly identify a sentencing “pattern” and therefore assist a court in imposing a sentence that is more likely to be consistent with similar cases. Sentence ranges may be provided by the defence, the prosecution or developed by the courts themselves. For some judges this goes too far in restricting discretion. They have rejected such a concept, arguing that the intuitive synthesis approach “implies an absence of a necessary relationship between one case and another”. For judges who accept the concept of range, albeit with reservation, it can assist by acting as a general guide or “yardstick” against which proposed sentences may be examined. However, a sentencing judge who refers to the range as a “starting point” or “benchmark” sentence must take care not to employ a “two-stage” reasoning process which is inimical to the instinctive synthesis methodology supported by the High Court and thus fall into appellable error. This is because it is “wrong in principle” to start anywhere except with a full consideration of all relevant factors particular to the offender and offence before the court.

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95 *Wong and Leung v The Queen* (2001) 207 CLR 584 at 591; 76 ALJR 79; *R v Bangard* [2005] VSCA 313, at [12].
99 *Lowe v The Queen* [1984] HCA 46; *Pearce v The Queen* [1998] HCA 57; *Markarian v The Queen* [2005] HCA 25.
100 *DPP (Vic.) v Terrick* [2009] VSCA 220, at [75].
102 *Spiteri v The Queen* [2011] VSCA 33, at [58].
103 *DPP (Cth) v De La Rosa* [2010] NSWWCCA 194; *R v Way* [2004] NSWCCA 131, at [122].
105 See, for example, the warning given in *R v Bartel* [2008] SASC 289, at [14].
106 *Wong v The Queen* [2001] HCA 64, at [76]
elevate only certain considerations or factors – such as the range of comparable sentences – is regarded as distorting the reasoning process which the sentencing judge must undertake.\textsuperscript{107}

**Sentencing Statistics:** Another way of providing information to sentencing judges in order to promote consistency between like cases is by providing sentencing statistics.\textsuperscript{108} In relation to sentencing, at the broadest level, statistics may provide indications of general trends.\textsuperscript{109} In this way they can provide a quantitative aspect to inform the qualitative aspects of case comparison to ensure consistency in the instant case. However, they are generally treated with reserve or suspicion and the courts have hedged their use by numerous caveats relating to the nature of the offense under consideration, the sample size, time period, counting rules and others.\textsuperscript{110} They have also been criticized because, by themselves, they can never provide information about the particular reasons for judgment in a particular case.\textsuperscript{111}

The underlying antipathy to the use of social science data in the courts has limited their utility in identifying patterns of sentencing practice in commonly occurring crimes where there are sufficient cases and circumstances to permit legal conclusions about what is unjustifiably disparate and what is not.

**Sentencing Information Systems:** Sentencing information systems or databases operate on a simple premise. They utilize information technology to store, and facilitate targeted access to, the qualitative and quantitative forms of information discussed above.\textsuperscript{112} The database does not indicate how this information should be used, but the “availability of the information might in itself promote consistency.”\textsuperscript{113} Thus, databases preserve discretion by informing the decision-making process rather than determining the outcome.\textsuperscript{114} However, they can help avoid unjustifiable discrepancies if judges access and use the information to produce individualized sentences which are also consistent with outcomes in similar circumstances.

Although the idea of information databases is not new,\textsuperscript{115} they have only become an extremely efficient technological reality relatively recently. Few are in

\textsuperscript{107} Id.

\textsuperscript{108} There is a growing number of reliable sources of sentencing statistics in Australia. For instance, in Victoria, the Sentencing Advisory Council provides information in the form of ‘Sentencing Snapshots’, which are brief statistical summaries of sentencing practices for the most commonly heard offences. Sentencing statistics at the federal level are provided to the courts through the Commonwealth Sentencing Database which provides information about current sentencing practices as well as current law and sentencing principles. For further discussion of statistics resources in Australia, see Freiberg and Krasnostein, supra note 3.

\textsuperscript{109} T v The Queen [2007] NSWCCA 62, at [25]; White v The Queen [2010] VSCA 261, at [35].

\textsuperscript{110} See Freiberg & Krasnostein, supra note 3.

\textsuperscript{111} Relatedly, such statistics do not show individual judges at all. In relation to the inability of statistics to provide information about the reasons for sentence, see: Hili and Jones v The Queen [2010] HCA 45; Wong v The Queen [2001] HCA 64.


\textsuperscript{113} Hutton, supra note 106, at 561.

\textsuperscript{114} See AUSTL. LAW REFORM COMM’N, 103, at 11.

\textsuperscript{115} Miller points out that the idea of a sentencing information system was first proposed by Norval Morris in 1953; See Norval Morris, Sentencing Convicted Criminals, 27 AUSTL. L. J. 186, 200 (1953). See Miller, supra note 93, at 1371; See Anthony N. Doob & Norman W. Park, Computerised Sentencing Information for Judges: An Aid to the Sentencing Process, 30 CRIM. L.Q. 54 (1987).
operation. Databases that had been set up in Canada and Scotland are no longer operating. Explanations for their demise have included lack of (judicial) support for the system.\(^\text{116}\)

New South Wales (NSW) has one of the oldest, most comprehensive and currently most successful sentencing databases - the Judicial Information Research System (JIRS), a subset of which is the Sentencing Information System (SIS). Frequently cited,\(^\text{117}\) JIRS provides information about sentencing patterns with the advantage that the information can be analyzed minutely in relation to such factors as age, prior convictions and plea. Recently, an Environmental Crime Sentencing Database has also been established in NSW.\(^\text{118}\)

There are other examples of Australian sentencing information systems. In 2007, a database modelled on JIRS was established in Queensland called the Queensland Sentencing Information Services (QSIS). The Commonwealth Sentencing database provides courts exercising federal jurisdiction with information about current sentencing practices, law and sentencing principles. The Tasmanian Sentencing Advisory Council is currently setting up a database of sentencing practices in Tasmania which will be used to “support judicial decision making, research and policy making.”\(^\text{119}\)

Development, implementation and access to sentencing databases in Australia have been ad hoc. This may, in part, be attributable to the systems’ cost and perceived difficulty of use. There is also the potential threat posed by the databases to individualism. This threat arises first from the erroneous belief that they usurp discretion by providing an ‘answer’ (when all such data bases do is provide raw data). The threat also arises from a suspicion that the accumulation and accessibility of raw data will reveal a record of sentencing practices and outcomes that may make existing disparity more evident.

The provision of sentencing information as a mechanism to promote consistency is premised on the hope that disparity arises “from lack of systemic knowledge.”\(^\text{120}\) Once equipped with the information, the judge is still relatively free to interpret and apply (or not) it as she or he wishes, and the existing research shows that she or he will do so “in manners consistent with their own schemas.”\(^\text{121}\) This context of relatively unbridled discretion means that the provision of information on sentencing law and practice may, on its own, be “inherently insufficient” to reduce unwarranted disparity.\(^\text{122}\)

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\(^{118}\) See Preston & Donnelly, *supra* note 6.

\(^{119}\) Sentencing Advisory Council (Tas.), *Initial Projects, available at* http://www.sentencingcouncil.tas.gov.au

\(^{120}\) See Homel & Lawrence, *supra* note 62, at 534.

\(^{121}\) See id.

\(^{122}\) See Weatherburn, *supra* note 57, at 16.
C. Judicial Training and Education

The same rationale underlying the provision of sentencing information to judges extends to the next mechanism for promoting sentencing consistency: the use of judicial training and education.

Judicial education is “not a novel idea in Australia.” While there are “numerous” judicial education programs annually, no single agency carries responsibility for judicial education. Education programs are voluntary and include orientation programs for new judicial officers as well as specific courses constituting part of judicial continuing education. The voluntary nature of such programs, and the fact that “[i]nterest in judicial education has been slow to develop in Australia” can be viewed as symptoms of the individualist framework, which places a premium on unfettered discretion entrusted to those deemed wise enough to know (intuitively) how to wield it.

The Judicial Commission of New South Wales, established in 1986, is an independent statutory agency and part of the judicial branch. First listed among its functions is assisting courts achieve consistency in sentencing (although it has no legislative power to do anything that could be construed as limiting the sentencing discretion). To meet that objective, the Commission “provides relevant information online, undertakes original research, and publishes material on sentencing.” Foremost among these publications is the Judicial Information Research System (JIRS) (discussed above).

The Commission also publishes the Sentencing Bench Book, which is a regularly updated source of sentencing information “primarily designed to assist judicial officers on a day-to-day basis.” It “incorporates many years of research about sentencing acquired by officers of the Judicial Commission” and “serves one of the principal functions of the Commission — the promotion of consistency in sentencing.”

Similarly, the Judicial College of Victoria, established in 2002, has publications primarily written for judicial officers including the Victorian Sentencing Manual. Regularly updated as required, the Manual provides a practical guide to sentencing in all Victorian jurisdictions and is intended to “promote consistency of approach by sentencers in the exercise of their discretion.”

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123 Susan C. Kenny, Judicial Education in Australia, 13 LEGAL EDUC. DIG. 54, 8 (2004).
124 Id.
125 See Peter Underwood, Educating Judges What Do We Need? 14 LEGAL EDUC. DIG. 25, 10 (2006).
126 See Weatherburn, supra note 57, at 16.
130 Id.
132 See Introduction, id.
Like the provision of sentencing information, reasonable minds can differ as to the efficacy of judicial education and training in reducing unwarranted disparity. This is especially so in the absence of evaluative studies to shed light on the matter.\[^{133}\]

D. Presumptive and Mandatory Sentences

Whereas appellate review and judicial information have been judicially-generated methods of achieving consistency, presumptive and mandatory sentences are political responses to disparity, as well as leniency. In Australia, the vicissitudes of politics (rather than a genuine concern for disparity) have driven the introduction of such measures. However, insofar as these steps fill a policy vacuum, it is reasonable to assume that the ambivalence or reluctance by appellate courts to promote their own sentencing standards may have contributed towards such measures.\[^{134}\]

Mandatory restrictions on sentences for certain violent and sexual offenders exist in Victoria and Queensland.\[^{135}\] More prescriptive mandatory sentencing, however, usually takes the form of minimum sentences of imprisonment that escalate with each subsequent offense. The mandatory minimum periods are not long by international standards—between fourteen days and one year—and where they are or were in operation, did not appreciably add to the prison population due to their brevity and infrequent use.\[^{136}\]

At the federal level, the offense of people smuggling requires a court to impose a sentence of imprisonment of at least five years (with a minimum of three years) in the case of a first offense, and at least eight years (with a minimum of five years) for a repeat offense.\[^{137}\] The provision is very rarely invoked.

In 2003,\[^{138}\] presumptive sentences for certain offenses were introduced in New South Wales in the form of standard non-parole periods (SNPPs).\[^{139}\] This was the first Australian jurisdiction to enact a defined term SNPP scheme, a form of legislative guidance geared toward increasing the consistency, and severity, of sentences. In most Australian jurisdictions, a sentence of imprisonment has two main components: the “head” or maximum term, which is the period beyond which a person cannot be held in custody, and a minimum, (the non-parole period, prior to which the person is not eligible to be considered for release on parole).\[^{140}\] The period between the head sentence and the non-parole period is the parole period.

SNPPs were never mandatory insofar as courts could depart from them in cases falling outside the middle range of objective seriousness, or where there is a guilty plea, or where there are relevant aggravating, mitigating, statutory or common law

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\[^{133}\] See Underwood, supra note 118, at 10 (judicial officers must embrace learning beyond an initial judicial orientation program.)

\[^{134}\] Freiberg & Krasnostein, supra note 3.


\[^{136}\] Freiberg, supra note 4.

\[^{137}\] See Migration Act 1958, § 233C (Austl.).

\[^{138}\] After an election in which law and order was an issue. See Kate Warner, Sentencing Review 2010-11, 35 CRIM. L.J. 284, 285 (2011).


\[^{140}\] Parole is generally not available in relation to shorter sentences (e.g., those under one year).
The High Court, however, had recently held that SNPPs are not even strongly presumptive and that the appropriate place to start in formulating a sentence remains the instinctive synthesis method requiring courts to “take into account the full range of factors in determining the appropriate sentence for the offence.” Courts may do so being mindful of the maximum penalty and the SNPP as “two legislative guideposts”. However the SNPPs were only “a circumstance” that said little about the appropriate sentence for a particular offense and offender. Even the legislative prescription of presumptive periods of imprisonment was “not to be understood as suggesting either the need to attribute particular mathematical values to matters regarded as significant to the formation of a sentence that differs from the standard non-parole period, or the need to classify the objective seriousness of the offending. Ultimately what was important, according to the Court, was the provision of a ‘full statement of reasons for the specification of non-parole periods either higher or lower than the standard [that] assists appellate review and in this way promotes consistency in sentencing’ for the SNPP offenses.

Three other Australian jurisdictions have a form of SNPP scheme – South Australia, Northern Territory and Tasmania. Two further jurisdictions, Queensland and Victoria, have foreshadowed the introduction of forms of SNPPs or baseline sentences, though both appear to be concerned more with perceptions of leniency than unwarranted disparity.

E. Guideline Judgments

Guideline judgments of the type common in the United Kingdom (albeit created by appellate courts rather than a commission or council) are another mechanism that has been introduced in Australia in the quest to achieve consistency in the individualized sentencing framework. Guideline judgments attempt to do so by guiding or structuring the sentencing discretion. This can occur in a number of ways. Using the example of the case before the court, a guideline judgment can articulate general sentencing principles, identify broadly relevant mitigating or aggravating factors, discuss the relevance of particular types of sanctions to the offense in question or provide a range for that offense. Non-binding, guideline judgments are understood to promote consistency while preserving judicial discretion to tailor sentences. These functions are now, however, mostly academic in Australia.

Guideline judgments had a brief and unspectacular life before being rendered effectively moot by the High Court. In Australia, as in the United Kingdom, no statutory foundation was needed for this power – Courts of Appeal were always able to develop guidelines as they deem necessary and appropriate. However, a number of

142 The decision may have the same effect as the Booker decision in relation to sentencing guidelines in the United States, but for different reasons.
143 Muldrock [2011] HCA.
144 Id. at [27]
145 Id. at [29]
146 Id. at [30]
147 See ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE (5th ed. 2010), at 32, 37.
148 See infra, at 25.
jurisdictions statutorily authorized their use.\textsuperscript{149} At that time, the Chief Justice of New South Wales, the only Court to implement them in Australia, described them as a logical extension of previous practice.\textsuperscript{150}

In 1998, the New South Wales Court of Criminal Appeal began issuing guideline judgments on its own initiative to provide guidance to judges and improve consistency in sentencing.\textsuperscript{151} The court delivered seven guideline judgments, each a “mechanism for structuring discretion, rather than restricting discretion.”\textsuperscript{152} However, this was seen to go too far down the path of comparativism. A decision of the High Court held that certain forms of guideline judgment might be unconstitutional on the grounds that courts cannot generally deal with points of law that may not be the subject of a dispute. A guideline judgment is considered to be prospective, and, because it produces no order or declaration, it is not strictly a justiciable “matter” subject to appellate review.\textsuperscript{153}

Some members of the court were also concerned that a guideline, which identifies a range of results rather than a reasoning process, passes from being a decision settling a matter to a “decision creating a new charter by reference to which further questions are to be decided” and thus passes from the judicial to the legislative.\textsuperscript{154}

One member of the majority noted that in issuing the guideline judgment, the court “was clearly motivated by the laudable aim of removing the badge of unfairness [i.e. inconsistency], so far as that was possible and consistent with evaluative decisions made by judicial officers...The purpose of ‘guideline judgments’ is to replace informal, private and unrevealed judicial means of ensuring consistency in sentencing with a publicly declared standard.”\textsuperscript{155} Despite critical remarks about guidelines generally in the majority decision, there was support from members of the Court for guideline judgments in an appropriate case.\textsuperscript{156} The risks of wrongly identifying such an “appropriate case” have, however, effectively meant this decision ended that form of judicial guidance.

F. Statutory Frameworks

Another mechanism for achieving consistency in Australia is the use of sentencing legislation. Generally, such sentencing frameworks are the result of policy projects and in that sense they are different from the “knee-jerk” legislative responses that produce mandatory or presumptive sentences. However, the frameworks have been subject to ad hoc amendment as a result of the same pressures that give rise to mandatory sentences, and in that respect are not immune to similar criticisms.


\textsuperscript{151} The first guideline judgment concerned the offense of dangerous driving occasioning bodily harm. Other guidelines have dealt with armed robbery, drug trafficking, breaking and entering, and guilty pleas. See Mackenzie, supra note 91, 85-89.

\textsuperscript{152} R v Jurisic [1998] NSWSC 423.

\textsuperscript{153} Wong v The Queen [2001] HCA 64, at [84] and [131]. See Arie Freiberg and Peter Sallmann, Court of Appeal and Sentencing: Principles, Policy and Politics, 26 L. IN CONTEXT 43, 66 (2009).

\textsuperscript{154} Wong [2001] HCA, at [95].

\textsuperscript{155} Id. at [92].

\textsuperscript{156} Mackenzie, supra note 91, at 88. Wong [2001] HCA, at [168].
In Australia, the basic model is that legislation creates offenses and maximum penalties, but within those boundaries discretion is regulated only by the common law. Since the 1980s, all jurisdictions have enacted specific laws that attempt to provide the courts with a coherent sentencing framework.\(^{157}\) By consolidating general provisions prescribing sentencing powers, these Acts replaced a patchwork of laws which had been successively amended over time, rendering sentencing law inaccessible and incoherent.\(^{158}\)

These laws are not rigid codes, but provide only general guidance to courts in terms of broad sentencing principles and purposes and the appropriate use of a range of sentencing options, particularly intermediate sanctions.\(^{159}\) Elements of this approach are seen also in the United Kingdom (albeit where they exist in combination with more detailed guidelines)\(^{160}\), Canada\(^{161}\) and New Zealand.\(^{162}\)

The non-prescriptive nature of these Acts, taken together with the reluctance of appellate courts to offer principled guidance, results in a ‘free for all’ approach to the purposes of punishment.\(^{163}\) The phrase belongs to Andrew Ashworth, who, when discussing the rationales of sentencing in the English context, argued that the desire to maintain sufficient discretion to individualize sentences does not adequately rebut the argument for bringing the rule of law as far into sentencing decisions as possible.\(^{164}\) Instead, the legislation reflects the case law that “[t]he purposes of punishment are manifold and each element will assume a different significance not only in different crimes but in individual commission of each crime.”\(^{165}\) For this reason, broadly framed legislative schemes reinforce and perpetuate the high individualism of the courts.

G. Sentencing Councils

The final mechanism that has been relied on in an attempt to promote consistency is the establishment of sentencing councils. Four states have done so - New South Wales (established 2003), Victoria (established 2004), Queensland (established 2010) and Tasmania (established 2010). In July 2011, the South


\(^{158}\) Freiberg, supra note 4, at 204.

\(^{159}\) Id.

\(^{160}\) See Criminal Justice Act 2003 (U.K.), § 142; See Ashworth, supra note 141, at 76-78.

\(^{161}\) Criminal Code, RSC 1985, c C-46, § 718 (Can.).

\(^{162}\) Sentencing Act 2002 § 7 (N.Z.); See Julian V. Roberts, Aggravating and mitigating factors at sentencing: Towards greater consistency of application 4 CRIM. L. R. 264 (2008) (comparing, inter alia, the degree and nature of guidance regarding statutory sentencing factors between various common law jurisdictions).

\(^{163}\) Ashworth, supra note 140, at 76-8.

\(^{164}\) Id. at 76. On the other hand, a consequence of elevating one purpose, such as desert or retribution, may be that unjust parity results. A single or dominant purpose may also reduce the opportunity to innovate with such as procedures as restorative justice or with problem-oriented courts such as drug courts.

Australian Attorney-General announced that a sentencing council will be established in that State.166

These bodies have a range of functions, which varies between states but usually includes promoting consistency through the creation, collection and dissemination of sentencing data.167 In Australia, the existing councils each promote public confidence in the sentencing system by informing and engaging the public in the development of sentencing policy. They also conduct specialist research which is used by both the government (in formulating evidence-based policy responses to sentencing issues) and the courts (in sentencing in specific cases). Importantly, while only the Queensland Sentencing Advisory Council explicitly lists “promotion of consistency” as one of its purposes,168 each council is concerned with improving the quality and dissemination of sentencing information.

The Victorian Sentencing Advisory Council provides information in the form of “Sentencing Snapshots”, which are brief statistical summaries of sentencing practices for the most commonly heard offenses in the higher courts and the Magistrates’ Court. As of June 2011, 113 Snapshots have been published, which have been cited over 100 times by the Court of Appeal.169 The Council also publishes a series on current sentencing practices for individual offenses.170

As discussed above, access to information by judges is a key method of promoting consistency. In this way, each council is implicitly concerned with promoting a comparativist approach to sentencing.

V
EVALUATING SUCCESS

Each of the mechanisms explored above has been relied on to reduce the conscious or unconscious use of broad judicial discretion in a manner that produces unjustifiably disparate sentences. But if the evidence for the extent of unjustifiable disparity is limited, then that for determining the success of the various mechanisms employed for reducing it is negligible. The sentencing literature is replete with material articulating the reasons for, and descriptions of, the means to achieve consistency.171 But whether for methodological, financial or political reasons, the evaluative literature is, for the most part, missing.

169 There are no data as to how often they are cited to sentencing judges and how they have been used.
171 For example, a 2005 New South Wales Sentencing Council inquiry into promoting consistency stated that: “the Council considers that the main issue is how sentencing consistency could be better promoted, and as such it is not necessary to determine the extent to which sentencing is actually inconsistent, but only to identify impediments to consistency which currently exist and how consistency could be better promoted”. Sentencing Council (N.S.W.), How Best to Promote
The exceptions are evaluations conducted by the Judicial Commission of New South Wales (NSW) of the impact of guideline judgements and SNPPs.

The few evaluations of guideline judgments demonstrate that during their short life, they successfully achieved greater consistency.\textsuperscript{172} Studies in 2002 and 2003, by the Judicial Commission of NSW, showed evidence of increased consistency in sentencing practice for the offenses of dangerous driving and armed robbery,\textsuperscript{173} respectively. This was confirmed for armed robbery by a 2007 evaluation of the guideline.\textsuperscript{174}

A 2002 study by the Judicial Commission of NSW analysed the impact of the guideline judgment issued by the NSW Court of Criminal Appeal for dangerous and aggravated dangerous driving offenses heard in the NSW higher courts.\textsuperscript{175} The study assessed whether the guideline had reached its goals of correcting “an unacceptable level of inconsistency in the sentences imposed, [and addressing] a need to raise the general level of penalties to more adequately reflect the intention of Parliament and the wishes of the community.”\textsuperscript{176} By comparing sentencing patterns for cases decided three years before and three years after the guidelines were promulgated, the study found that “there was not only greater consistency of result in the sentences…after the guideline judgment, but that there was a clear and discernible increase in the severity of penalties imposed under the various categories of dangerous driving offences.” The study also found a “noticeable drop” in Crown appeals after the guidelines from which it concluded that this again indicated that sentences were both more consistent and more severe following the guideline.

The Commission similarly conducted two assessments of the impact of the guideline judgment for the offense of robbery. A 2003 exploratory study, which looked at the type and quantum of penalties imposed in the NSW higher courts for robbery offenses during the three-year period following the promulgation of the guideline, found that it had increased the consistency and severity of relevant sentences. This was confirmed by a larger study, by the same authors, in 2007.\textsuperscript{177}

The last evaluative study of the effectiveness of guideline judgments in promoting consistency, was a 2005 analysis, again by the Judicial Commission of NSW, of the impact of the guideline on the offense of high range prescribed

\begin{footnotesize}
\begin{enumerate}
\item Barnes & Polettii (2003), \textit{supra} note 164, at 11.
\item Barnes &Poletti (2007), \textit{supra} note 164.
\item Barnes, Poletti & Potas, \textit{supra} note 164.
\item \textit{Id. See also} R v Jurisic [1998] NSWSC 423.
\item \textit{Id.} at 148.
\end{enumerate}
\end{footnotesize}
the concentration of alcohol (PCA). The study analysed sentencing patterns for the offense before and after the guideline. It looked to see if there was “a flow-on or incidental effect on sentencing patterns for similar offenses” and it examined whether and how the guideline had impacted appeals. It found that the guideline, “together with the research and educational programs leading up to it,” increased sentence severity for high range PCA offenses and that sentences for these offenses had been more consistent.

These evaluations showed that the guideline judgements successfully responded to informed public opinion regarding the need to increase severity and consistency of sentencing for certain offenses. The mechanism is now effectively defunct, however, as the High Court has confirmed that the Australian overriding emphasis on individualisation, not only represents an inherent mistrust of United States Federal Sentencing Guidelines and Minnesota type guidelines, but has carried over to a suspicion toward English-style guidelines, and, in fact, guidelines of any type. This is because, broadly speaking, the only “starting point” should be the all the particular circumstances of the offender and offence before the court. To begin elsewhere—for example, with the presumption of a certain range or weights attributed to oft-seen factors as contained in a guideline judgement—is to ignore the proper “instinctive synthesis” method in favour of the two-stage sentencing method which is “wrong in principle” because it “single[s] out [only] some of those considerations and attribute[s] specific numerical or proportionate value to [only] some features, [which] distorts the already difficult balancing exercise which the judge must perform.”

Except for these studies evaluating guideline judgments, the only other study to look at the efficacy of a mechanism introduced to promote consistency was an evaluation of the SNPP legislative scheme, also by the Judicial Commission of NSW. Comparing nearly five years of SNPP sentencing data to sentencing data from before SNPPs were introduced, it found that the scheme “has generally resulted in a greater uniformity of, and consistency in, sentencing outcomes.” The study also confirmed an increase in the severity of penalties and the duration of sentences of imprisonment. It found that “it is not possible to conclude that the statutory scheme has only resulted in a benign form of consistency or uniformity whereby like cases are being treated alike and dissimilar cases differently…it is not possible to tell whether dissimilar cases are now being treated uniformly in order to

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178 Introduced for the purpose, inter alia, of ‘avoiding unwarranted disparities among defendants with similar records who have been found guilty of criminal conduct’. 28 U.S.C. § 991(b). The disparity in question was connected to race and ethnicity. See Jeffry T. Ulmer, Michael T. Light & John H. Kramer, Racial Disparity in the Wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC’s 2010 Report, Criminology and Public Policy 10(4) (forthcoming Nov. 2011).

179 Freiberg, supra note 4, at 210.

180 Wong v The Queen [2001] HCA 64, at [76].

181 See Patrizia Poletti & Hugh Donnelly, The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales (Research Monograph no.33 - JUD. COMM’N NEW SOUTH WALES) (2010). This was preceded by a preliminary study comparing guilty plea rates for offenders sentenced before and after the SNPP. See Hugh Donnelly & Patrizia Poletti, Guilty plea rates for offenders sentenced before and after the standard non-parole period legislation (2007) 19(4) JOB 34.

182 For methodology see Poletti & Donnelly, id. at 15-18.

183 Id. at 60.

184 Id. at 60.
comply with the statutory scheme.”185 Thus while sentences may have become more consistent under the SNPP scheme, it had not been demonstrated that they have been consistently reasonable.

These evaluations of guidelines and SNPPs are robust empirical evaluations of consistency. However, the evaluations are relatively few in number and are confined in their scope and utility. With one exception,186 they look broadly at consistency, using the concept of sentencing ranges, trends or patterns rather than specifically investigating the presence, or extent of unwarranted disparity per se.187 While the former is useful for indicating the spread and variability of sentences, the latter type of study would establish whether such differences were indeed justified by asking whether (a) measures of offense seriousness and (b) offender characteristics were being approached and weighed in a consistent manner.188 This further inquiry is essential given that the breadth of ranges, or variation within the permissible boundaries, does not necessarily equate to “relevant inconsistency or impermissible disparity.”189

The lack of research into unwarranted disparity in Australia has “allowed the existence of unwarranted disparity to be the subject of continuing scepticism.”190 However, absence of evidence is not evidence of absence.191 Without proof of reasonable consistency (in approach and outcome) in the sentencing of similar offenders, it cannot be asserted that sentencing in Australia is, in the required sense, either systematically fair or unfair.192 Data that indicate whether unjustified disparity exists and how successful the mechanisms for promoting consistency have been are needed in order to optimize fair sentencing outcomes and avoid injustice.

In technical terms, the evaluative task is considerable. It first requires a way of determining amounts of unjustifiable disparity prior to the implementation of the measure introduced to address it. As we have attempted to demonstrate, it is difficult enough to measure disparity, let alone unjustifiable disparity. The measures of unjustifiable disparity can themselves be problematic. Early evaluative problems of the United States Federal Guidelines were exacerbated because the Guidelines introduced a fundamentally new model of sentencing.193 Certain empirical

185 Id. at 60-1.
186 Barnes & Poletti, supra note 164, at 149 (Looking, in addition to data on ranges, at the ways in which judges articulated sentencing purposes and assessed the variations in the objective and subjective features of the case).
187 Poletti & Donnelly, supra note 175, at 60-1 (The study cannot tell whether the increased consistency is a product of treating dissimilar cases differently); Barnes & Poletti, supra note 165 (Comparing sentencing trends for robbery offenses); Poletti, supra note 164, (insufficient data to determine whether the offense was an example of an ordinary case or one where the moral culpability of an offender was increased. Nevertheless, for the purposes of this study, it is assumed that the overall nature and quality of these offenses did not significantly vary from one period to the next.); Barnes, Poletti & Potas, supra note 164.
188 See, e.g., Poletti & Donnelly, supra note 175, at 17.
189 Spigelman, supra note 2, at 450.
190 Zdenkowski, supra note 12, at 59.
191 See MARTIN REES, OUR COSMIC HABITAT (2001), at 21.
193 Under the pre-Booker Guidelines previously crucial factors pertaining to the offense and the offender were effectively excluded from judicial consideration.
assessments\textsuperscript{194} ignored this to their detriment, using an inappropriate test of disparity that compared sentences before and after the introduction of the Guidelines in a manner that was like “comparing apples to oranges.”\textsuperscript{195} These assessments used “variation from the guideline” as the only measure of unwarranted disparity instead of asking whether similar offender characteristics (eg, life history or background factors) were being treated similarly.\textsuperscript{196} This was, of course, because the content and implementation of the Guidelines, as well as the existence of mandatory sentences, made such considerations (largely) moot. Any evaluation of the mechanisms introduced in Australia must be mindful of such problems. This endeavour may be slightly easier insofar as the mechanisms discussed in this paper have been introduced to maintain, rather than overhaul, the individualized model of sentencing.

The measures of unjustifiable disparity can also be problematic in a second way. Many of the United States evaluations have been concerned with the application and effect of the Federal Guidelines, rather than whether the sentences handed down were appropriate and fair. Although both considerations are valuable, the two are not the same. The Guidelines emphasize the primacy of offense characteristics and criminal history. However, in Australia, a broader range of contextual considerations are fundamental to notions of fair sentencing which rest on the belief that offense seriousness is a result of offender culpability (heavily determined by subjective offender characteristics) as well as the harm caused. Therefore future evaluations must incorporate qualitative data as well as quantitative data in order to assess whether disparity is justified or not.

Evaluative studies must also be alert to the dangers of unjustifiable parity. Anderson, Kling and Stith’s study found that the US Federal Guidelines had reduced inter-judge disparity but led to complaints of undue uniformity of sentences.\textsuperscript{197} Consequently, sentencing outcomes produced by that system, while consistent, may not be warranted.\textsuperscript{198} This is an equally undesirable result.

VI
CONCLUSION

The rule of law and right to equality require courts and governments to ensure that unjustifiable disparity and parity are minimized. A key issue is to determine what is justifiable and what is not. Common law sentencing has always struggled to reconcile the principles of individualized justice and consistency. In Australia, the emphasis on individualism places it at one end of the spectrum. Its broad judicial discretion and conflicting and unranked purposes of punishment mean that Australia

\textsuperscript{195} Doob, supra note 1, at 199, 234; Anderson, et al, supra note 55, at 271, 280; Lynch, supra note 59.
\textsuperscript{196} Doob, supra note 1, at 199, 234-5.
\textsuperscript{197} Anderson, et al, supra note 55.
\textsuperscript{198} \textit{Id.} at 271.
stands where the United States jurisdictions were in the early 1970s, before the introduction of systems which privileged, to varying degrees, consistency of outcome, albeit with a considerably more developed system of appellate supervision.

The United States federal experience of mandatory grid sentencing prior to Booker highlights the dangers of too strongly restricting judicial discretion. The relatively recent decisions of the United States Supreme Court have seen the law move closer to the center. Individualism and consistency are not “either-or” propositions, but rather are matters of degree. The various experiments with structured discretion around the common law world provide a rich source of ideas for achieving consistency. The modern challenge is not to find new ideas but to determine which of the current ones are effective in doing what they purport to do. Only when these measures are rigorously evaluated will we know whether we have arrived at our destination.

199 See in United States Supreme Court decisions which rendered the federal guidelines advisory and re-invested federal judges with a degree of individualized sentencing discretion (reinforced by changes to appellate review), although not to the same extent as the pre-Guidelines era. Illustrating the dialectic nature of this debate, research is now divided on whether the increase in discretion has increased racial disparities in sentence. See United States v Booker, 543 U.S. 220 (2005); see also Gall v. United States, 128 S. Ct. 586 (2007); Kimbrough v. United States, 128 S. Ct. 558 (2007); Rita v United States, 127 S. Ct. 2456 (2007); see Ulmer, et al, supra note 173); See Kate Stith, The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion, 117 YALE L. J. 1420, 1496 (2008); See Richter, supra note 92, at 340-342.


201 See Miller, supra note 93, 1351-1352 (noting state sentencing reform has appeared to be more successful, principled, popular and consistent than the federal guidelines).