The art of balancing
Queensland judges and the sentencing process

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Judicial methodology, perceptions and attitudes toward the sentencing process as revealed in an interview-based study of judges.

It is almost trite to say that sentencing offenders is difficult and complex. Yet of all the judicial functions undertaken by the courts, it is sentencing which has become an almost thankless task, with the judiciary singled out for frequent negative criticism by the media.

What judges think about sentencing and how they go about it is not normally known, as judges are not in the position where they can give interviews, or further explain their decisions. This article gives an overview of an interview-based study of 31 judges of the Supreme and District Courts in Queensland that sheds light on how judges sentence offenders.

Scope of the study
Queensland adopted a legislative sentencing regime with the enactment of the Penalties and Sentences Act 1992. This Act has many similarities with the Sentencing Act 1991 (Vic), and the Sentencing Act 1995 (NT). A number of studies have been done in relation to sentencing reform in other Australian jurisdictions, notably Victoria (although none specifically investigating judicial methodology), but there have been no similar in-depth studies of sentencing in Queensland.

Through interviews with judges, this research sought to discern judicial views on the sentencing process, in particular the aims and purposes of sentencing, judicial discretion, and the role of public opinion. Two thirds of judges invited to participate (Brisbane and south-east region only) were able to do so, 21 from the District Court, and 10 from the Supreme Court, including the Court of Appeal.

Each interview involved a series of open-ended questions, intended to discern judicial views on a number of issues. Perhaps unsurprisingly, most of the judges interviewed held strong views about the topics discussed and welcomed the opportunity to speak at length about each of them. What resulted was a valuable insight into judicial attitudes and perceptions of sentencing.

Judicial discretion
At a time of increasing threats to judicial discretion, both nationally and internationally, it would be reasonable to assume that in sentencing, judges would be defensive of encroachments on what has traditionally been seen as an important and impartial role of the judiciary. This has also been evident in other jurisdictions, particularly where substantial change has been experienced.

It was, therefore, hardly surprising that most judges in this study advocated the retention of judicial discretion in sentencing. The point was made by a number of judges that the sentencing judge is in the best position to make sentencing decisions because of their experience and knowledge, coupled with the fact that they have the person before them in court and are informed by detailed submissions from prosecution and defence counsel.
Many judges made the point that a wide judicial discretion enabled the sentencing court to take into account a variety of factors, and to tailor the sentence as appropriate, noting that generalisations cannot cover the situation of every offence and every offender. It was also noted that taking into account individual offence and offender characteristics did not necessarily make the sentence more lenient, but did enable individual circumstances to be taken into account, underlying the point that determinate sentencing systems such as sentencing grids or guidelines do not necessarily produce fair outcomes, as no two cases are alike. The point was well made by one judge: 'The less discretion you give a sentencing tribunal, the more rigid the process, and the greater the risk of injustice in a particular case'.

Balancing on the tightrope

How judges perceive or 'see' the sentencing process is an important part of understanding how the system works. This study found that many judges have a metaphoric image of sentence as a balancing of the many different interests involved in the process. Over one third of the judges in the study responded with some sort of balancing analogy when asked an open-ended question in this regard. In the words of one judge: 'Sentencing is an attempt to juggle objects of various sizes while walking a tightrope which is being shaken at both ends'.

The ability to balance the different factors in each case, although clearly seen by many judges as a key factor in favour of retaining judicial discretion, is not looked on favourably by all commentators, as it is reliant on the individual judge and their ability to act fairly and consistently.

Closely linked with the mechanism of judicial discretion and balancing is the judicial view, expressed on many occasions, that sentencing is an 'art', not a 'science', a description which also emphasises the role of the judicial officer. Two judges in this study described sentencing as an 'art', with another three referring to the 'art of sentencing'. One judge, however, referred to sentencing as a science, describing a more methodological approach to the task.

The art analogy is also linked to the concept of sentencing as an intuitive or instinctive process. While 'instinctive synthesis' is commonly used terminology in Victoria, New South Wales, and even the High Court, it has rarely been used in Queensland to describe sentencing methodology. Although no judges in the present study used the term instinctive or intuitive synthesis, six judges described the sentencing process as intuitive or instinctive in nature.

Whether described as 'art' or 'instinctive synthesis', this approach to sentencing decision-making has been criticised on the basis that it lacks proper scientific investigation and evaluation, and that it indicates a belief that judges alone are uniquely qualified to hand down sentences, and that these sentences will be fair and just, despite the different experiences and personalities of individual judges. Many judges (including many of those in this study) would answer this criticism by pointing to the tightening regulation of judicial discretion in sentencing (for example, by prescriptive sentencing legislation itself, or restrictions on sentencing serious violent offenders), and the system of appellate review, which allows supervision of the sentencing process by a higher court.

Many judges in the present study were against further restrictions on judicial discretion in sentencing, noting for example, that sentencing was not a 'mechanical thing', and was 'not a mathematical exercise'. Most were in favour of preserving and maximising discretion in the hands of the judges.

Recent forays in Australia into mandatory sentencing in Western Australia and the Northern Territory have resulted in such injustice that the schemes had to be either abandoned or largely scaled down, and the system of sentencing guidelines (usually involving sentencing grids) in at least some US jurisdictions, and in particular the federal jurisdiction, has been the subject of criticism on the basis that a failure to take into account individual factors can be so unfair as to be detrimental.

In New South Wales, judicial guidelines have been used since the case of R v Jurisic to structure and guide discretion, rather than eliminate it. There have, however, been no moves in Queensland to introduce formal judicial guidelines, despite the potential benefits in terms of consistency. Judges in Queensland have, for some time, used an informal system of 'range-based' sentencing, where they sentence within a 'range' of comparative sentences. Four judges spoke uncritically of this range-based system (with another judge disagreeing with a 'range'), even though this is in itself a constraint. Judges are guided as to the 'range' for a particular offence by submissions based on previous similar comparative sentences. A sentencing court is, therefore, largely dependent on submissions from counsel being accurate and properly researched. This is not always the case, and some of the judges in this study noted this (however it was also noted that appellate review was an important safeguard).

The reality remains that judges in Queensland, and indeed most, if not all Australian jurisdictions, are comparatively unrestrained in the use of judicial discretion in sentencing. Despite this, a number of judges in this study felt constrained by a number of factors, including legislation, specific provisions in relation to violent offenders, and the system of appellate review. Four of the judges believed that the sentencing legislation itself was a constraint, although four took the opposite view. This view of sentencing legislation as a constraint has also been reflected by the findings of the New South Wales Law Reform Commission, which was strongly of the view that New South Wales should not introduce consolidated, comprehensive sentencing legislation.

Difficulty and complexity

The difficulty of the sentencing task was a consistent theme running through the interviews with the judges, with over one-third of them referring to the sentencing process in terms such as 'difficult', 'very hard' and 'difficult and thankless'. Two judges commented that sentencing is not always difficult; one stating that it was easy when the ranges given by both counsel coincide, and the other citing their considerable experience in the criminal jurisdiction.

Many of the judges mentioned heavy workloads, and the fact that they were frequently assigned up to eight sentences in a single day. Although there was no suggestion from the judges (or otherwise) that this workload is having a detrimental effect on the quality of outcomes, it was clear
that it was making their task more difficult and increasing the pressure on judges.

Linked to the difficulty of sentencing is stress. Four of the judges interviewed spoke specifically about stress or related matters in sentencing. For example, one judge said that sentencing was ‘very traumatic and stressful’, another that it was ‘very painful ... the worst part of our job’. A number of other judges spoke more generally about the stressful nature of the job and the number of traumatic cases coming before them. When coupled with the constant media criticism such cases often attract, the personal stress that this puts on the individual judge must be considerable. In order to do their job properly and effectively, judges must be able to go about making sentencing decisions with confidence. With the considerable stress some are under, it is reasonable to question how this can be so. As one participant said: ‘[J]udges are only human’.

Aims and purposes

Section 9(1) of the Penalties and Sentences Act 1992 (Qld) lists five sentencing purposes, which are stated to be the only purposes for which sentences may be imposed. In summary, these are: to punish the offender to an extent or in a way that is just in all the circumstances; rehabilitation; individual and general deterrence; denunciation; protection of the community; or a combination of two or more purposes. The list of purposes is not prescriptive, and the sentencing judge can choose whichever is appropriate. Such ‘free choice’ lists have not been without criticism in the literature, on bases such as uncertainty and potential inconsistency. What follows is necessarily only a brief summary of the judges’ views on the sentencing aims and purposes.

In general, the judges did not see the list of purposes in s 9(1) as new or innovative, nor (in some cases) even particularly helpful. Several commented along the lines that that this provision ‘stated the obvious’ and merely repeated the common law. In terms of the practical use of the purposes, it was fairly clear that most of the judges tended not to specifically refer to sentencing purposes when sentencing an individual offender, but rather kept the purposes at the back of their minds. The balancing theme, which was fairly pervasive throughout the judicial interviews, was also applied by the judges to the purposes of sentencing.

In relation to the individual purposes of sentencing, just deserts, as expressed in s 9(1), has been a predominant theory in the literature for over 25 years, led by Professor Andrew von Hirsch. Despite this, there was a fairly lukewarm response by the judges to this provision. In addition, a number of the judges indicated a dislike of retribution as a sentencing purpose, which is consistent with the predominant approach in the literature, where retribution in its pure sense has largely fallen out of favour.

The utilitarian sentencing purposes of rehabilitation, deterrence and protection, all forwarding-looking in operation, were the most used by the judges in practice, and attracted the most comment. Rehabilitation was a popular sentencing purpose in relation to young offenders, and those for whom there was seen a hope for redemption. Understandable scepticism was expressed in relation to the ability of some punishments, in particular imprisonment, to achieve this aim. Deterrence, both individual and general, was the sentencing aim most discussed by the judges. Perhaps surprisingly, it was also the one with which many judges disagreed. Despite their personal views, many felt compelled to use it because of appellate guidance or its presence in the legislation. Paradoxically, some judges stated that they did not approve of deterrence as a sentencing aim, but then gave examples or exceptions where it could be useful. There was little agreement, however, between the judges as to which types of offences would benefit from a deterrence-based sentence.

Denunciation, although often a largely symbolic sentencing purpose, is nonetheless important as an expression of the community’s abhorrence of the offending behaviour. This sentencing purpose did not attract much comment from the judges, with some noting that it was linked to retribution, an accurate observation, particularly when retribution is replaced by just deserts. Protection of the community was seen as important, particularly in relation to violent crime, but issues were raised about the difficulty of predicting dangerousness, consistent with reservations about this in the criminological literature.

In summary, on the sentencing purposes, the judges’ views were more utilitarian than retributive, and this was particularly seen in the prominence of deterrence (and, where appropriate, rehabilitation) as a sentencing purpose. The judges did not seem to be familiar with the concept of just deserts as expressed in s 9(1): although this may have been because they were not specifically asked about it. This should not necessarily be taken as a critical comment, however, as no less than the highly influential legal theorist HLA Hart pointed out that judges should not be expected to have time for a philosophical discussion of these matters, and that a judicial bench is not a professorial chair.

Overall, it is suggested that the general statement of purposes in s 9(1) ought to be further clarified, and consideration given to providing the judges with more legislative guidance as to its use. Merely providing a list from which the judges can choose at will is not enough. There is a vast amount of literature on this subject, very little of which is translated to legislative guidance and actual practice.

Law and order and public opinion

The judges were also asked about the part that public opinion plays in the sentencing process, and how, if relevant, it would be ascertained. In addition, they were asked about the role played by the media. Closely linked with this is the law and order debate in politics and in the media, which has been increasing over the past two decades and shows no sign of waning.

Whether public opinion should be taken into account in sentencing, and if so, how, remains a difficult issue on which the judges were divided. Some of the judges were of the view that public opinion was relevant to sentencing, but only if it was informed opinion. How to determine this is far from easy, however, as what is ‘informed’ is of itself a matter of perception on the part of those making such a judgment. Further, how to keep oneself ‘informed’ of such ‘informed’ opinion is another difficulty, with some judges expressing the view that it could be discerned from the community in general. Views were mixed on whether the media was a useful source of opinion, with five judges stating that public opinion could be determined via that source (with some reservations also expressed).
This raises an important question about the role of public opinion in the sentencing process, and whether it has any direct role to play at all. One judge made the point that it may be more appropriate only for the legislature (rather than the courts) to respond to public opinion in enacting the laws for judges to follow. Whatever is the case, the interaction between the courts and the community is a critical one, as the courts must have the confidence of the community in general in order to be able to function effectively.

Reporting of court matters was seen by the judges as sometimes selective and inaccurate, leading to damaging misconceptions of what was actually occurring in court. Although clearly the media cannot report, in full, all cases that come before the courts, it was felt that there was room for improvement. Some judges also acknowledged that the courts could do more on their part in assisting the media to report more accurately, but that many of the improvements that were needed were linked with more funding. For example, many of the judges called for a media liaison officer to be appointed to the courts (an appointment which still has not been made). Some judges were proactive in releasing information such as transcripts, and these judges appeared to have a happier relationship with the media. On the other hand, where a judge had been attacked in the media, they tended to be cynical and even bitter about the experience. There was a sense from a number of judges that it was time to fight back and answer the criticisms; a particularly difficult task when judges are constrained from making public comment.

What emerges from this study is a sensitive and often difficult relationship between the courts and the media, in relation to which there remains considerable room for improvement. Despite this it is a highly synergistic relationship; the media has an obligation to report what is going on in the courts and to do so as fairly as possible, and the courts need to demonstrate to the community that they are working effectively and that justice is not only done, but seen to be done. If the relationship is effectively managed, the media can also play an important role in educating the public on sentencing. A recent three-part feature series on sentencing by The Cairns Post newspaper (in which this author took part) is an illustration of what can be done in cooperation with the courts, the legal profession and academia. Much is to be gained by such initiatives in terms of public understanding of the sentencing process.

With the advent of the information age, and the media soundbite, the courts cannot expect to keep doing things the same way and retain the same level of public confidence in the system. The Queensland courts have responded by providing an excellent courts newspaper (in which this project running from 1996-2001, with the interview phase conducted in late 1998/early 1999.

The continued emphasis on utilitarian sentencing purposes such as deterrence and rehabilitation contributes to the expectation in the community that sentencing has a central role to play in crime prevention, when this role is better ascribed to the criminal justice system as a whole. In particular, judges should be dissuaded from the routine use of general deterrence in sentencing decisions, except where it is definitely justified.

While it was a definite finding of this study that the judges were firmly of the view that judicial discretion in sentencing should not be further restricted, there are valid and compelling arguments for the further structuring of judicial discretion. It is not suggested, however, that discretion should be removed from the judges. Sentencing guideline judgments have been used to good effect in New South Wales, England and New Zealand, and should be introduced in Queensland. There are also compelling arguments for the introduction of a Sentencing Commission or Council, which could play an important role in education and research, including better informing the public on sentencing matters. Without changes such as these being put in place to improve communication between the courts and the community, it is reasonable to suggest that the current pressure on the courts will continue.

Some additional conclusions

There are several conclusions that can be drawn from this study, in addition to those discussed above. The courts are performing a very difficult task in sentencing offenders, and deserve greater support and understanding. Judges need to have the support of the media and the community in order to do this job confidently and effectively. Putting the judges constantly under pressure does not make them do their job any better or more effectively. Judges are not in a position where they can answer their critics by giving interviews about particular cases before them, yet inaccurate and selective reporting can be very damaging. On the other hand, it must be acknowledged that it is impossible for the media to report in full every case which goes through the courts, and that additional resources are required (at the very least, media liaison officers).

References

1. A full description and analysis of the study will be published as a monograph by The Federation Press in mid 2004, entitled A Question of Balance: How Judges Sentence. The judicial study was part of a project running from 1996-2001, with the interview phase conducted in late 1998/early 1999.
3. Court observations or case studies would have also been useful, but were beyond the scope of the present study, which was also limited to adult offenders.
4. For reasons of anonymity, gender analysis of the results was not undertaken; only six women were on the Bench at that time (out of a total of 52 potential participants). All judges participated anonymously.
5. A transcript of each interview was sent to each judge to make corrections as required. Each judge was also sent an information sheet in advance, and asked to sign the required ethics consent form. It should be acknowledged that the survey instrument was designed with the assistance of Dr Simon Petrie, then Head of the School of Justice Studies at QUT. Two Queensland judges also assisted with preliminary research design and methodology, which is gratefully acknowledged.

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