

## LAUNCH OF UNSW LAW JOURNAL FORUM

HON JUSTICE MICHAEL ADAMS\*

May I, as Chairman of the Law Reform Commission, congratulate the *University of New South Wales Law Journal* on undertaking the conduct of this *Forum* on Mandatory Sentencing. I first learned of the existence of grid-sentencing when, in 1995, I was appointed to the NSW Law Reform Commission for the purpose of participating in the review of sentencing law then to be undertaken. As I read the material, my immediate response was that it could not be seriously suggested that such a mode of sentencing should be introduced in Australia. It was, of course, necessary for the Commission to consider grid-sentencing as it was attempting a comprehensive review. We concluded that it was entirely inappropriate in the Australian context. Our reasons were briefly stated: the legal environment in the US differed in a number of crucial respects from our own; the scheme substituted concealed bureaucratic transactions from an open, independent process; and inappropriate rigidity was imposed on the duty of the courts to consider all the relevant aspects of the case.

However, it now appears that grid-sentencing needs to be seriously considered in this country, not because of any articulated or reasoned critique of the present system – indeed, as the papers produced for this *Forum* demonstrate, and as one is aware from one's general knowledge, the proponents of grid sentencing have never bothered to identify the problems with the present system which they wish to correct, nor the mode by which they might be corrected by grid-sentencing – but because of political announcements bereft alike of attempted explanation or justification. I will return to this issue later.

First, I wish to make some general points:

- 1 The American system of sentencing differs markedly from that in New South Wales or, indeed, in Australia. In the US, reasons for sentences are rarely given in any significant detail, largely because of pressure of work and, most importantly, the absence of any effective system of appellate review. Moreover, because many judges are locally elected, sentencing regimes are especially responsive to the idiosyncrasies of

---

\* Justice of the Supreme Court of New South Wales.

particular judges. Accordingly, sentences exhibit a wide range of disparity which we in Australia would regard as quite unacceptable. Although it is true that in New South Wales one can always identify cases at each end of the sentencing spectrum, there is a high degree of practical consistency once the particular circumstances of each case are apparent. In part, of course, this is due to the supervisory role exercised by the Court of Criminal Appeal which, as you are aware, hears appeals not only from prisoners but also from the Director of Public Prosecutions. No appellate court in any State of the United States, so far as I am aware, exercises supervision at anything approaching that which is accepted as the norm in this State or, for that matter, in Australia.

- 2 The fact that judges must give reasons for their sentences means that very often apparent anomalies are explicable by the particular circumstances applying in what on the face of it might be similar cases. The grid system simply cannot do this with all the relevant factors or even most of them, with the consequence that it frequently produces either sentences that are too heavy by most reasonable standards and, as well, sentences that are too light in all the circumstances of the case: a result which is not often adverted to. In this respect, the media almost never advert in any comprehensive way to the findings of the sentencing judge as to the facts or to the reasons for the particular sentence; indeed, there are many cases of either significant misstatements or omissions, which makes a fair evaluation by the public, and by the politicians, of the appropriateness of particular sentences very difficult, if not impossible.
- 3 Jails in American States which utilise the grid system have a very large proportion of prisoners who are serving very short sentences for relatively trivial crimes for which in New South Wales they would normally be fined or, at most, receive sentences of community service or periodic detention. Of course, there are also a large number of prisoners serving very lengthy terms of imprisonment. A consequence has been an explosion in prison populations at enormous expense since the grid systems have come into effect. However, research does not indicate any reduction in crime rate capable of being traced to the introduction of the system. In New South Wales, it is accepted as a rule of thumb that a prison will cost about \$75 million to build and about \$25 million per year to run. In the last eight months, as a result of increased activity (and, perhaps, efficiency by the Police) the New South Wales prison population has increased by something over 10 per cent, and this trend is increasing. As I understand it, every prison in New South Wales is on or well over its designed capacity. The impact of a grid sentencing system on this already inadequate structure will be

considerable. These issues are discussed in Russell Hogg's paper. Mr Hogg points out that one of the consequences in the US has been to move the discretion in sentencing from the courts to the prosecutors, who have to cut deals in order to reduce the enormous court backlogs and the pressures on the jail systems. Indeed, some States have dealt with this problem simply by reducing the sentences specified in their grids. This consequence, of course, seems to run counter to the political and supposedly public interest considerations underlying the system. It serves, however, to demonstrate its essentially arbitrary character. In Michigan, which had a guidelines system and is considering a grid system, I was informed that one in four of the public servants employed by the State Government was associated with corrective services.

- 4 Grid systems have tended to increase considerably the role of prosecutors in the charge bargaining context, whose decisions are not public and cannot be effectively reviewed. They frequently disappoint and offend victims. Of course, if a grid system is in place, that would necessarily reduce the significance of the voice of victims in the sentencing process. In this context, I think I should point out that the Law Reform Commission *supported* the input of victims into the sentencing process; the only area where it seemed to us to be inappropriate for this input was in cases where the victim was dead.
- 5 The cost of setting up a grid system is considerable. It has usually been done by the establishment of a widely representative commission reviewing the sentences usually passed for all the crimes chargeable in the State, refining those crimes to create differential elements enabling reasonable distinctions to be drawn between categories of offences and, once the scheme is in place, continuing to monitor it to check for the inevitable anomalies. This is, as is obvious, an undertaking requiring major administrative and research backup. In the Northern Territory and Western Australia, whose mandatory systems are the subject of compelling criticism in the papers by Neil Morgan and Helen Bayes, this expense was avoided by the simple expedient of changing the law with no research and maintaining it without any continuing critical supervision. Of particular interest is the analysis by Neil Morgan showing that, far from deterring crime, it is possible to discern increased numbers of offences where mandatory penalties have been imposed.
- 6 It also needs to be noted that only a minority of States in the US have undertaken grid schemes of one kind or another although many have them under current consideration. Again, I have yet to see an argument

that attempts to demonstrate that the problems faced in that country, to which grid sentencing might at least be a partial, though qualified solution, are to be found in Australia.

One of the crucial aspects of this debate, but one not sufficiently explicit as it seems to me, concerns the independence of the judiciary. In proposing schemes either of mandatory or grid sentences, the politicians are, explicitly or implicitly, calling into question the sentencing patterns and procedures that have been developed by the courts in accordance with statutes of long standing. To do so without any attempt at reasoned justification or to analyse the alleged shortcomings of the existing sentencing regimes, to my mind, seriously undermines public confidence in the courts. It is scarcely reasoned discussion to criticise individual sentences, based on a few paragraphs in a newspaper or a 20 second grab on the steps of the court house, and then move to a wholesale reconstruction of the sentencing process without any analysis of the alleged shortcomings of the present sentencing standards. To remove judicial discretion in such a vital area of the liberties of the subject is tantamount to a vote of no confidence in the judiciary. Of course, the responsibilities of parliament and those of the judiciary are very different. But this area seems to me to be one where we are seeing a fundamental change in their roles. Of course, when one speaks of the parliament, one is really speaking of the executive. The independence of the individual parliamentarian, indeed the relevance of those in the minority, is virtually non-existent. The assertion by the elected politicians of the right, in effect, to impose particular sentences for particular crimes, as a response to immediate political exigencies is a significant interference with traditional and well settled principles of the separation of powers. The point is neatly made, perhaps, by bearing in mind that no parliamentarian takes an oath to act without fear or affection towards any person. The independence of the judiciary is a fundamental value in any liberal democracy governed by the rule of law. That persons are deprived of their liberty only in a public process by an officer of the state conducting himself or herself independently and able to bring an objective and disinterested judgment to bear on the facts free of political pressure seems to me to be of the very essence of the rule of law. I readily accept that others may have a different point of view, but what concerns me greatly is that this aspect of the debate is not the subject of any discussion at all, let alone the careful and profound consideration that it should have.

The constitutional considerations that might be relevant to laws imposing mandatory sentences are discussed most helpfully in the paper by Martin Flynn but the issue that I raise seems to me to be more fundamental than any legal restraints on parliamentary power. Of course, this issue is of greater or lesser significance depending on the extent of the residual discretion contained in any grid sentencing scheme but, even so, any scheme which sets a real statutory starting point must, I think, have the practical effect of amounting to a direction by the executive. It must be acknowledged that parliament has always (and rightly) asserted its responsibility for setting maximum sentences and, with

respect to murder, a mandatory sentence. The paper by Cowdery QC, Director of Public Prosecutions for NSW, critically and usefully analyses recent legislation in that State imposing mandatory sentences for very serious drug offences as well as murder. In times past, mandatory sentences of death were imposed by parliament for a wide range of crimes. However, I don't believe any person would seriously suggest a return to such a system. It is important nevertheless to note that the exercise of the royal prerogative was frequently applied in those cases. Nowadays, such an interference with sentences seems to be widely regarded as inappropriate and the statutory basis for clemency which existed prior to 'truth in sentencing' has now been dismantled.

To my mind, a grid sentencing scheme introduces a new and significant limitation on the independence of the judiciary in its vital role of standing between the state and the individual as well as attempting to do justice by reference to standards which are generally accepted in the community and responsive to the particular circumstances of each case. Where there is a need for guidelines to be established, the appropriate body for doing so is the independent Court of Criminal Appeal, as the *Jurisc* case demonstrates. The significance of this judgment is the subject of an insightful paper by Donna Spears.

With the greatest respect for the parliament, grid sentencing, I think, places a political thumb on the scales in a way which is foreign to our conceptions of the rule of law and which will have continuing repercussions for the role of the independent judiciary.

I do not say that the passionate views of some persons, involved with some victims' groups, which actively campaign in this area should be ignored; nor that public disquiet about some aspects of law and order should be disregarded. But it worries me that these matters seem to be increasingly the subject of political campaigns, especially at election time, a context in which reasoned debate is not the usual or even preferred mode of discourse.

I hope that this *Forum* will be part of an ongoing public discussion about these important questions of public policy and I congratulate the *University of New South Wales Law Journal* for its initiative in this regard.