

CONSISTENCY AND SENTENCING
KEYNOTE ADDRESS BY
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Allegations of inconsistency in sentencing are one of the perennials in debate about the criminal justice system. At its core the debate raises a fundamental ethical issue identified by Aristotle in his dictum that justice requires that equals be treated equally and unequals be treated unequally. The problem, of course, is that there is no universally accepted standard as to what kinds of differences constitute a relevant form of inequality, so as to justify different treatment.

This is not a debate about which one can ever expect an ultimate resolution other than, perhaps, in a totalitarian society. Even there, as George Orwell reminded us, the principle is that all persons are equal, but some are more equal than others.

At the core of the sentencing task – and the reason why debate in well informed circles, let alone in the tabloid media – will know no rest is the process of weighing incommensurable and often contradictory objectives: protection of the community, deterrence, retribution and rehabilitation. Such a process of balancing, in the words of Justice Scalia of the United States Supreme Court, is like asking whether a particular line is longer than a particular rock is heavy.¹

As this audience is well aware, working out the divergent objectives of the sentencing task in a particular case necessarily means that, within reasonable bounds, different judges can permissibly reach different conclusions. Variations within those boundaries do not constitute a relevant inconsistency or impermissible disparity. This is simply a manifestation of the wise dictum of Sir Frederick Jordan that in the context of sentencing for criminal offences: “the only golden rule is that there is no golden rule”.²

In this, as in virtually every other context of debate about sentencing, there is a tension between principles that point in different directions, yet which have to be reconciled in the wide variety of specific factual circumstances that arise. The way in which I prefer to express

the issue is as a tension between the principle of individualised justice and the principle of consistency.³

A memorable expression of a similar tension is contained in Ralph Waldo Emerson's essay "Self Reliance" where he emphasises the importance of every person following his or her instincts rather than seeking to conform. In a memorable turn of phrase, he says:

"A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do."

Attractive as the phrase may be, everything that matters is subsumed in the word "foolish". Unfortunately, Emerson did not seek to identify the difference between foolish and wise consistency.

The principle of individualised justice, depends on the elementary proposition that the wide variation of circumstances of both the offence and of the offender must always be taken into account, so that the sentence is appropriate to the individual case. Experience over the centuries has led to the clear conclusion that this task is best undertaken by the exercise of a broad discretion by individual judges. Subject, of course, to any statutory requirements, there is room for judges to bring

to this task different penal philosophies in terms of the emphasis given to one or other of the incommensurable objectives of the sentencing exercise.

In this respect judges will, at least to a certain degree, reflect the wide range of differing views on this very matter that exists in the general community. However, the range of permissible variation amongst judges is narrower than the range of actual variation in the general community. The reason why the range is narrower is the principle of consistency which is sometimes referred to in terms of disparity or uniformity or discrepancy.

The observations of Sir Anthony Mason in *Lowe v The Queen* may be regarded as the origins of contemporary Australian doctrine on the issue of consistency. His Honour said:

“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.”⁴

As this quotation makes clear, what is involved is something more than justice for the individual offender. There is also a public interest dimension to ensuring consistency in sentencing. Nothing is more corrosive of public confidence in the administration of justice than a belief that criminal sentencing is primarily determined by which judge happens to hear the case. As Justice Gummow has pointed out, public confidence in the administration of justice is today the meaning of the ancient phrase “the majesty of the law”.⁵ Given the nature of media reporting about the administration of justice, such public confidence is, to a very substantial extent, determined by public understanding of sentencing by criminal courts.

I invoke also the observations of Chief Justice Gleeson in *Wong v The Queen*:

“All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner.

The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.”⁶

The emphasis on fairness in these observations identifies an important public interest. For that reason the principle of inconsistency is sometimes expressed as a separate principle, which may be useful for some purposes. However, inconsistency or disparity also impinges on the central principle of Australian sentencing law, the principle of proportionality, authoritatively established in *Veen No 2*.⁷ Wherever two sentences can be said to be inconsistent or to manifest impermissible disparity, then at least one and perhaps both, must offend the principle of proportionality.

Chief Justice Gleeson’s reference to “unconnected single instances” is reminiscent of the well-known observations of Lord Tennyson in *Aylmer’s Field*, where the poet referred to:

“ ... the lawless science of our law,
that codeless myriad of precedent,
that wilderness of single instances ...”

In the context of sentencing for criminal offences this wilderness is tamed and given shape and form by the principles of sentencing and the emergence, over a period of time, of a pattern of sentences for particular offences. It is these principles and such patterns which play the critical role in reconciling the principle of individualised justice and the principle of consistency.

There are, however, difficulties in identifying sentencing patterns. It is in this context, perhaps more than in the context of identifying relevant sentencing principles, that the imperfections necessarily inherent in any system of human endeavour appear to emerge in this context.

The identification of a sentencing pattern is the core task to be undertaken so that the principle of consistency can be carried into effect. That task involves a level of complexity by reason of the principle of individualised justice. All of the information available about past sentences reflects the implementation of the principle of individualised justice. In every past case, whilst the elements of an offence for purposes of a conviction have been established, the circumstances encompassed a wide range of culpability in both the objective features

of the offence and, perhaps an even wider range, in the subjective circumstances of each offender.

The first and most important component of the process of identifying sentencing patterns is the almost intuitive understanding developed over many years of experience by individual judges who have been long engaged, both as counsel and as judges, in the sentencing exercise. The collegiality of individual courts also ensures that this body of collective experience is transmitted to new judges, who may not have the same background in the administration of criminal justice.

As Chief Justice Street observed:

“The task of the sentencing judge, no less than the task of an appellate court, is to pursue the ideal of evenhandedness in the matter of sentencing. Full weight is to be given to the collective wisdom of other sentencing judges in interpreting and carrying into effect the policy of the legislature. That collective wisdom is manifested in the general pattern of sentences currently being passed in cases which can be recognised judicially as relevant to the case in hand. This is not to suggest that sentences are to be arbitrarily dictated by mathematical application of statistics. There is an

enormous difference between recognising and giving weight to the general pattern as a manifestation of the collective wisdom of sentencing judges on the one hand and, on the other hand, forcing sentencing into a strait-jacket of computerisation.”⁸

Like any other human institution this mechanism for identifying a body of collective knowledge is subject to imperfections and can be improved. Whilst bearing in mind Sir Laurence’s warnings, since then the most important additional element, in the experience of the New South Wales system about which I can speak, has been the development of a sentencing information system which provides statistics about sentences actually imposed and which is readily available to all those involved in the sentencing task. The statistics are capable of disaggregating the data by relevant variables, e.g. identifying cases in which the particular offence was committed while the offender was on conditional liberty or where the offence was a first offence, etc.

Of course such statistics have to be supplemented, as they generally are, by the sentencing judge being informed of particular cases where the full range of facts, that are not capable of being reduced to statistical form, may suggest more precise parallels.

Nevertheless, it is one of the great advantages of statistics, so long as the database is sufficiently broad, that many of the items that lead to variations in the sentence appropriate for an individual case are already reflected in the broad range that past sentences display when reduced to a graph or table.

It is important not to confuse the range of appropriate sentences for an individual case, which is a matter that is frequently the subject of submissions in a court of criminal appeal, on the one hand, from the range that the statistical database shows has been appropriate in the past for *all* the different kinds of cases that have arisen, on the other hand. Nevertheless, statistics are capable of assisting judges in the difficult task of applying the principle of consistency. Such statistics may identify a sentencing pattern which accommodates differences in the individual circumstances of an offence and of an offender upon which the judge has to adjudicate.

I have attempted to identify the utility of statistics on the basis of the case law in which they have been deployed, as follows:

- (i) The sentence to be imposed depends on the facts of each case and for that reason bald statistics are of limited use.

- (ii) Statistics may be less useful than surveys of decided cases, which enable some detail of the specific circumstances to be set out for purposes of comparison.
- (iii) Caution needs to be exercised in using sentencing statistics, but they may be of assistance in ensuring consistency in sentencing.
- (iv) Statistics may provide an indication of general sentencing trends and standards.
- (v) Statistics may indicate an appropriate range, particularly where a significant majority or a small minority fall within a particular range. Similarly when a particular form of sentence such as imprisonment is more or less likely to have been imposed.
- (vi) Statistics may be useful in determining whether a sentence is manifestly excessive or manifestly inadequate.
- (vii) Statistics are least likely to be useful where the circumstances of the individual instances of the offence vary greatly, such as manslaughter.
- (viii) The larger the sample the more likely the statistics will be useful.⁹

Statistics have been shown to be of significant, albeit limited, use in a variety of circumstances.¹⁰ Anyone who has had the benefit of the sentencing database compiled by the Judicial Commission of New South Wales is well aware that the database has proven to be very useful, particularly in order to implement the principle of consistency. The officers of the Commission, of which I should reveal I am the President, have done a magnificent job over the decades, both in compiling the database and maintaining its accessibility and utility. It has been recognised internationally as world's best practice on this matter.

I refer, for example, to the *Auld Report* of 2001, which led to fundamental changes in the administration of the criminal law in England and Wales. His Lordship said:

“The New South Wales system is one of the most sophisticated yet unobtrusive systems of its kind in the world ... It is probably the world leader in this field.”¹¹

The officers of the Commission have assisted the Courts of Queensland in establishing an equivalent in that State. At the launch of the Queensland Sentencing Information System, Chief Justice de Jersey said:

“The people of Queensland have been well served by a current judicial system where judges and magistrates exercise a comprehensively informed and comparatively unfettered sentencing discretion. The introduction of this comprehensive sentencing database is potentially the most significant development in recent years in the streamlining of our criminal justice system. The ideal is increased consistency and predictability in sentencing.”¹²

As you are all aware, tomorrow morning there will be a formal launch of the Commonwealth sentencing database, in which endeavour the expertise of the Judicial Commission was also drawn upon.

The significance of such a database has been expressed by Chief Justice Gleeson who, as Chief Justice of New South Wales, was President of the Judicial Commission for most of the years that the system was being developed. His Honour said:

“Most sentencing of offenders is dealt with as a matter of discretionary judgment. Within whatever tolerance is required by the necessary scope for individual discretion, reasonable consistency in sentencing is a requirement of justice. The *Judicial Officers Act* 1986 (NSW) identifies

sentencing consistency as a legislative objective. That Act established the Judicial Commission of New South Wales to monitor sentences and disseminate information about sentences 'for the purpose of assisting courts to achieve consistency in imposing sentences' (s8). How does collecting and disseminating information about sentences help to fulfil the statutory purpose? The obvious legislative assumption is that knowledge of what is being done by courts generally will promote consistency. That assumption accords with ordinary practice. Day by day, sentencing judges, and appellate courts, are referred to sentences imposed in what are said to be comparable cases. There will often be room for argument about comparability, and about the conclusions that may be drawn from comparison. But sentencing judges seek to bring to their difficult task, not only their personal experience (which may vary in extent), but also the collective experience of the judiciary. Communicating that collective experience is one of the responsibilities of a Court of Criminal Appeal."¹³

Sentencing statistics are of utility for matters other than ensuring consistency. For example, they may reveal the fact that the

parliamentary intention with respect to particular offences is not being carried into effect. Take a case where Parliament's intention with respect to a particular offence has been reflected in a number of increases in the maximum sentence available. It sometimes appears that sentencing judges have not changed the sentencing pattern in response. This has arisen in courts of criminal appeal, for example, with respect to changes in maximum sentence for the offence of dangerous driving causing death or grievous bodily harm.¹⁴

From time to time judges have expressed surprise, with respect to particular offences, that there have been so few cases which have justified more than half the maximum sentence as determined by Parliament.¹⁵ Statistics have also indicated that a legislative provision requiring a particular proportionate relationship between the head sentence and the non-parole period, with a "special circumstances" exception, may not have been implemented in accordance with the parliamentary intention, when the overwhelming majority of cases appear to throw up some "special circumstance" or another.¹⁶

Sometimes there is public controversy about the manner in which judges exercise the broad discretion vested in them with respect to sentences. I have spoken of these matters on other occasions and won't

repeat my observations again. The general thrust of such public debate and, from time to time, parliamentary intervention, focuses on leniency rather than on inconsistency. In this debate the tension between the principle of consistency and the principle of individualised justice becomes manifest. Those who emphasise the significance of the latter object to any step which may be seen to interfere with the discretion of an individual sentencing judge. However, sentencing principles, including proportionality and consistency, must mean that an individual judge cannot impose whatever sentence he or she likes. The issue is how to resolve the tension between the relevant principles, a tension that inevitably arises and which can never be finally resolved to everyone's satisfaction. It is important to recognise that there is no absolute correct answer in all jurisdictions and all situations to the resolution of this tension.

At one extreme there have been examples, and continue to be proponents of, a rigid system which takes away to a substantial degree the discretion of the trial judge. This includes mandatory minimum sentences in some cases or a rigid grid system that requires sentences carefully calibrated by reference to some, but not all, of the circumstances of a case. The degree of rigidity involved in such interventions inevitably leads to injustices arising in individual cases.

Sooner or later those systems collapse under the weight of those injustices. The principle of consistency has been served at the expense of other sentencing principles, especially the principle of individualised justice.

This is not a new phenomenon. For example, the *Criminal Law Amendment Act 1883* (NSW) created a sentencing structure with five distinct steps or categories, and minimum and maximum sentences. The scheme led to such palpable injustices that it was abandoned a year later. As *The Sydney Morning Herald* editorialised on 27 September 1883:

“We have the fact before us that in a case where a light penalty would have satisfied the claims of justice, the judge was prevented from doing what he believed to be right, and was compelled to pass a sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion.”

Other less prescriptive forms of intervention have been undertaken from time to time. They include the creation of sentencing councils, generally of an advisory character. They also include the adoption of guideline judgments which are well established in overseas jurisdictions

but, outside of New South Wales and South Australia, remain somewhat controversial in Australia.

In New South Wales the system of guideline judgments was first established by the Court of Criminal Appeal but was reinforced by supportive legislation. It is a system which has ceased to grow because of the introduction into our sentencing legislation of a scheme of indicative “standard” non-parole periods, providing the same guidance in legislative form. The scheme of the legislation is such as to cover virtually every offence that was capable of being the subject of a guideline judgment.

Such judgments are not prescriptive in character but they do establish a system in which sentencing judges have to take the guideline into account as a check or indicator or guide, with a requirement to address the guideline and to articulate reasons for its applicability or inapplicability to the case in hand. The principal objective of a guideline judgment is to promote consistency.

The Judicial Commission of New South Wales has studied the impact of guideline judgments from a number of points of view, including that of consistency in sentencing. The results of these studies are

generally supportive of the system as a way of implementing the principle of consistency.

The first such study was with respect to the guideline judgment for dangerous driving. The relevant conclusion by the authors of the study of the impact of the guideline was as follows:

“The guidelines have resulted in consistent results or outcomes in the sentencing of offenders convicted of dangerous driving offences under s52A. In addition, after reading the various judgments in the course of this study it became apparent that since *Jurisic* consistency is also evident in the articulation of the purpose underlying the type and quantum of sentences handed down, and in the approach taken by trial judges in sentencing for these offenders.”¹⁷

With respect to the guideline judgment for armed robbery, the study concluded:

“The authors found that the *Henry* guideline judgment has provided consistency in sentencing for robbery offences under s97 of the *Crimes Act* 1900. This consistency was evident in the way in which judges commonly articulated

that deterrence, both general and specific, was the main purpose of sentencing for this offence; assessed the wide variations in the objective and subjective features of the case; and applied the starting range suggested in *Henry* to arrive at an appropriate sentence in the individual case.”¹⁸

Finally, employees of the Judicial Commission have conducted a study of the impact of the guideline for high range PCA offences, particularly directed to the hitherto extensive use of orders under s10 of our *Crimes (Sentencing Procedure) Act 1999* which is our provision for not entering a conviction notwithstanding a finding of guilt. The study relevantly concluded:

“ ... [T]here has been more consistency in the sentences imposed for high range PCA offences with:

- More uniformity in the use of s10 non-conviction orders between the courts ...
- More uniformity in the length of disqualification periods between the courts ...
- A clear distinction in sentencing patterns between first offenders, subsequent offenders and subsequent offenders where the prior offence was high range PCA – although there was a clear distinction prior to the

guideline, after the guideline it was even more accentuated.”¹⁹

A critical mechanism by which consistency is achieved within any jurisdiction is through appeals to the court of criminal appeal. One of the most important of appellate tasks is to balance the principle of individualised justice and the principle of consistency. Indeed, the development in recent years of guidelines by the courts, as in England and New South Wales, or issued by sentencing councils, as in England, is specifically directed to this objective.

It is, however, important to recognise a constraint which operates with respect to the effective operation of the appellate process in this respect.²⁰ Our system of appeals operates differently depending on who the appellant is.

Wherever a trial judge sentences in a manner that can be described as inconsistent in that it is too harsh, a severity appeal to the appellate court will succeed without any constraint. In the case of a Crown appeal, in which the proposition is that the trial judge has been too lenient and in that sense given rise to inconsistency, there are significant restraints. I refer to what is, quite inappropriately, referred to

as the principle of double jeopardy, which requires both a higher level of error before intervention and imposes restraints upon the extent of any variation.

For present purposes it is sufficient to note that this difference of treatment does impede the ability of the appellate process to carry the principle of consistency into effect.

In a federal system such as our own there is an additional difficulty arising from the fact that the Commonwealth has vested its criminal jurisdiction in State courts, each of which has its own court of criminal appeal. Theoretically sentencing appeals could go from one of those courts to the High Court, but that is not a practical proposition. Accordingly, it is necessary to ensure that the principle of consistency is carried into effect between jurisdictions in the absence of a single court of criminal appeal. I refer again to the observations of Gleeson CJ in *Wong v The Queen*, quoted above, that one of the responsibilities of a court of criminal appeal is to communicate the collective experience of the judiciary.

As I have indicated above, judges must know what their colleagues have been doing and to have information available about sentencing

patterns. This is a requirement that must be addressed in all jurisdictions. Clearly, by reason of distances and comparatively lesser opportunities for communication, sentencing in all of the different parts of Australia under Commonwealth legislation involves an added dimension of difficulty in this regard. In my experience, and of those whom I have consulted, judges regularly obtain information about sentences imposed by colleagues in other States and Territories with respect to Commonwealth offences under consideration. To a large extent, of course, this depends, as it does for State offences, upon information being made available by the parties, especially representatives of the prosecution.

As this audience is well aware this is a matter that has been considered in some depth by the Australian Law Reform Commission (ALRC) culminating in its report which, in accordance with contemporary custom, has a media release style title, *Same Crime, Same Time*, with the more appropriately prosaic subtitle *Sentencing of Federal Offenders*. The ALRC has made important recommendations for reform of the Commonwealth regime by the enactment of a new Federal Sentencing Act in substitution for Part 1B of the *Crimes Act* 1914. The recommendations in this respect are comprehensive. If enacted such an Act will assist in ensuring consistency in the exercise of the sentencing

discretion by courts throughout Australia. The proposals have much to commend them.

Everything I have said about sentencing statistics applies, perhaps even with more force, to sentencing under Commonwealth statutes. Accordingly, the launch tomorrow of the new sentencing database will be of considerable significance, as the ALRC report recognised. Until now, sentencing judges have relied on the information available from the Director of Public Prosecutions database. The new system will, I am sure, be a considerable improvement and will go a long way to minimising such inconsistency as has existed.

It is by no means clear to me that the kinds of inconsistency that may exist with respect to the sentencing for Federal offences are of a different order of magnitude to those which have existed, and despite all best endeavours will continue to exist to some degree, within each jurisdiction. This is not a matter about which we will ever be able to declare victory. It is a principle of sentencing which must be continually applied.

It may be correct that there are significant differences between judges of one State jurisdiction and judges of another State jurisdiction

with respect to use of full time imprisonment as a sentencing option and with respect to the severity of sentences imposed. Indeed, there are indications of some differences from State to State even with respect to State offences. However, statutory provisions and the sentencing regimes do vary from State to State and these indications may not indicate inappropriate disparity.²¹

Nevertheless, the Australian Law Reform Commission, not least by the very title of its Report, acted on the assumption that, in some way, its material has established impermissible inconsistency amongst the judges of some States and Territories. It does appear that Commonwealth prosecuting authorities believe that there is such divergence on the basis of evidence which the Australian Law Reform Commission politely refers to as “anecdotal”.²² However, dissatisfaction with sentences is an occupational hazard of being a prosecutor. It may be that such dissatisfaction is held more acutely in some State offices of Commonwealth agencies than in others.

The evidence presented by the ALRC to support its conclusion of inconsistency has been subject to cogent criticism. There is a certain sense of déjà vu about this Report. Similar assertions about the existence of impermissible disparity in sentencing for Commonwealth

offences had been made by the first report of the Australian Law Reform Commission entitled *Sentencing of Federal Offenders* published in 1980.²³ That Report was subject to fundamental criticism of much the same kind as has been directed to the recent Report.²⁴

It is, of course, possible that the anecdotal evidence to which the ALRC referred is correct although, in my view, the report assumes that to be the case and does not establish it in any rigorous manner. It must, however, be accepted that the absence of a single court of criminal appeal does mean that one of the mechanisms for ensuring consistency which operates within each Australian jurisdiction is not at present operative with respect to Commonwealth offences. The sentencing information database will assist, in my opinion significantly assist, in this regard. Nevertheless, harmonisation of practice amongst the respective courts of criminal appeal is a worthy objective.

In a Federal system like our own there are numerous alternative ways to pursue this objective. Unlike some other areas of discourse in which Commonwealth/State relationships are institutionally fraught, the judiciary has an advantage that is quite special. There is a very real sense of collegiality amongst judges throughout Australia. This sense of collegiality has grown apace over recent years. Indeed, the very

establishment of a National Judicial College is a manifestation of that development and its activities, not least through conferences such as this, will reinforce it.

The sense amongst judges that they belong to a single national enterprise is a comparatively recent development and it is increasing every year. Perhaps its most recent manifestation is the renewed attention now being given to exchanges between courts. This is an idea whose time has come.

Some 15 or 16 years ago the Council of Chief Justices of Australia resolved that such exchanges ought be encouraged. The only actual practical consequence of that resolution of all of the Chief Justices of Australia was that there emerged an annual exchange between the Supreme Court of New South Wales and the Supreme Court of the Northern Territory, which continued for some years. There were other ad hoc exchanges.

Necessity brought about a particularly significant exchange when a judge of the Court of Appeal of New South Wales was a litigant before that Court. By agreement a special Court of Appeal was created consisting of the Chief Justice of Western Australia and appeal judges

from Victoria and Queensland. In the case of Western Australia there was an exchange in that the time of the Chief Justice sitting in New South Wales was repaid by a New South Wales appellate judge sitting in Perth. The Victorian Supreme Court did not take up the offer of a return exchange. In the case of Queensland, I was able to inform the Chief Justice that in the 1890s a judge of the Supreme Court of New South Wales had sat on an appeal in his court in a case in which the integrity of the then Chief Justice of Queensland had been called into question. Although it had taken a century for us to call up the debt, it was duly repaid.

Another example of systematic exchange arose when the Supreme Court of Western Australia was provided with funds for acting judges, to replace a judge who conducted a lengthy Royal Commission for the Commonwealth. A number of judges, including judges of the Supreme Court of New South Wales, sat in Perth.

In this and every other case of which I am aware, the judges who participated in the exchanges have found the experience not only fulfilling but stimulating. I have had a similar experience. A number of judges of my Court sit as judges of the Supreme Court of Fiji and I did so on one occasion. When we do, we sit with judges of the Federal

Court and, until recently, with judges from New Zealand. From my own personal experience this kind of interaction is invaluable.

As Justice French, with whom I sat in Fiji, described the result:

“There are many benefits to be derived from exposure to diversity in judicial work. One of them is a sharpened sense of what is essential and what is inessential in the law. This is an understanding which lawyers sometimes find difficult to attain. To the extent that Australian judges can be exposed to diversity within the national judicial system, they have the opportunity to be better judges and to make their courts better courts.”²⁵

The issue of expanding such exchanges on a systematic basis was put back on the agenda by Justice French some 18 months ago in a speech delivered to the Judicial Conference of Australia.²⁶ His Honour traced the history of exchanges and also outlined a range of options. His Honour’s proposal has led to the appointment of a committee, chaired by himself, by the Judicial Conference of Australia. I understand its Report is just about ready. I have no doubt it will prove influential.

In the meantime discussions have occurred between courts to implement such a system and the Attorneys General are considering the matter. One of the matters to which Justice French referred was the suggestion, made over a decade ago in a paper by recently retired Justice Kim Santow and a co-author for the creation of mixed jurisdiction intermediate appeal benches on matters of national significance.²⁷ There are a number of ways in which such a system could emerge: from ad hoc arrangements of the kind that have occurred from time to time; more formally by means of a protocol between two or more heads of jurisdiction and, finally, by parallel legislation of two or more jurisdictions. Recently Chief Justice Gleeson has expressed again his longstanding support for judicial exchanges.²⁸

Justice French appears to be quite confident that there is no inhibition arising from Chapter 3 of the *Commonwealth Constitution* with respect to the involvement of Commonwealth judges in such composite benches, which his Honour described as constituting “a de facto, ad hoc, intermediate National Court of Appeal”.²⁹ I certainly hope he is right, although the authors of the eminently sensible cross-vesting scheme, which operated to universal acclaim for a decade, were no doubt similarly confident.

As the pressures on the High Court inevitably grow, the need for some kind of national intermediate court of appeal arrangement will increase. An appropriate place to start this kind of development is with sentencing for Commonwealth offences. There may also be matters of some significance with respect to the substantive criminal law of the Commonwealth, but which are not of sufficient importance to justify special leave of the High Court. However, it is clear that the problem, if there be one, of consistency in sentencing is of that character.

Speaking on behalf of the Supreme Court of New South Wales I have no difficulty in entering into arrangements with other States to have experienced criminal judges from those States sit as acting judges of the Supreme Court of New South Wales Court of Criminal Appeal, on days when we list criminal appeals with respect to Commonwealth offences, including sentence and Crown appeals. Furthermore, on those occasions, and there have been a number in recent times, when an issue has arisen which is of sufficient significance for us to sit a five judge bench, I would welcome the participation of a judge from another State in such a bench. I have every reason to believe that the Attorney General of New South Wales would be prepared to support such an arrangement by ensuring the appointment of persons that I nominate to him, as acting judges of the Supreme Court for a defined period. I would

expect that, in any such case, there would be an exchange in which a judge of the Supreme Court of New South Wales would reciprocate and sit in the other State for the same period on Commonwealth criminal appeals.

I have no doubt that this system can work and that it would be welcomed by the judiciary throughout Australia. It could be placed on a more formal basis by protocols between heads of jurisdiction. Eventually, if thought desirable, the system could be institutionalised by parallel legislation. It may, however, be best to allow the system to develop before adopting a legislative structure. However, there may be some need for minor technical amendments to facilitate the process, although that has not inhibited past exchanges.

It was in part the recognition of the need for some kind of harmonisation of sentencing practice that led the Australian Law Reform Commission in its Discussion Paper on its reference about Sentencing of Federal Offenders to raise the possibility that the Federal Court of Australia, in addition to obtaining for the first time a significant criminal jurisdiction with respect to certain matters, could also exercise an appellate jurisdiction with respect to all Federal criminal offences. In my opinion, constituting a court with judges, few of whom would have had

any experience in the administration of criminal justice with respect to the range of offences on which they would be asked to sit on an appeal, is institutionally unsound. No doubt for that reason the ALRC did not make any such recommendation in its final report. Of course, there could be no objection if the Commonwealth chose to invest the full range of criminal jurisdiction on the Federal Court.

The issue that was sought to be addressed by this original proposal can be effectively resolved by harnessing the sense of national collegiality of judges throughout Australia in a programme of systematic exchanges, directed particularly to harmonisation of practice with respect to Commonwealth criminal offences. Once the system is established for such a purpose I have every reason to believe that Justice French is right and that it will grow and extend to a range of other matters. For purposes of this paper it is sufficient to note that such exchanges can significantly assist the process of applying the principle of consistency when sentencing for Commonwealth offences.

We are probably far away from a formal institutionalised national intermediate court of criminal appeal. There is one circumstance in which such a body would need to be created. If a policy decision were made that a system of guideline judgments was appropriate, that could

only be established by Commonwealth legislation and the creation of an institution to undertake that task. That institution could be unilateral or collaborative, but it would have to be national.

Let me conclude with a note of caution about sentencing statistics. I do not want to spoil tomorrow's party but, important as such information is, in the end the principle of individualised justice requires the exercise of a broad based judgment. The sentencing task is an art, not a science. It is well to remember the warning given by Socrates about the introduction of literacy in the ancient world. Plato in *The Phaedrus* recalls Socrates words:

“ ... [F]or this discovery of yours will create forgetfulness in the learners' souls, because they will not use their memories; they will trust to the external written characters and not remember of themselves. The specific which you have discovered is an aid not to memory, but to reminiscence, and you give your disciples not truth, but only the semblance of truth; they will be hearers of many things and will have learned nothing; they will appear to be omniscient and will generally know nothing; they will be tiresome company, having the show of wisdom without the reality.”

The sentencing task continues to require the reality of wisdom, not merely the show. It can never be forgotten that wisdom requires sentences to differ. Inconsistency does not exist merely because there is difference.

¹ *Bendix Autolite Corp v Midwesco Enterprises Inc*, 486 US 888 (1988) at 897.

² *R v Geddes* (1936) 36 SR (NSW) 554 at 555.

³ See *R v Whyte* [2002] NSWCCA 343; (2002) 55 NSWLR 252 at 276–282 [147]–[189].

⁴ *Lowe v The Queen* (1984) 154 CLR 606 at 610–611.

⁵ *Mann v O'Neill* (1997) 191 CLR 204 at 245.

⁶ *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at 591 [6].

⁷ *Veen v The Queen (No 2)* (1988) 164 CLR 465.

⁸ *R v Oliver* (1980) 7 A Crim R 174 at 177.

⁹ *R v Bloomfield* (1998) 44 NSWLR 734 at 739.

¹⁰ Judicial Commission of New South Wales, “The Use and Limitation of Sentencing Statistics” (Sentencing Trends and Issues No 30, 2004).

¹¹ See Robin Auld, *Review of the Criminal Courts of England and Wales* (2001) ch 11 at 603, accessible at <<http://www.criminal-courts-review.org.uk/>>.

¹² Paul de Jersey, “Launch of the Queensland Sentencing Information Service” (Speech delivered at the Banco Court, Supreme Court of Queensland, Brisbane, 27 March 2007), accessible at <<http://archive.sclqld.org.au/judgepub/2007/dj270307.pdf>>.

¹³ *Wong supra* at 591 [7].

¹⁴ See *R v Jurisic* (1998) 45 NSWLR 209 at 229.

¹⁵ See e.g. *Maxwell v R* [2007] NSWCCA 304 at [30].

¹⁶ See *R v Fidow* [2004] NSWCCA 172 at [20]; Judicial Commission of New South Wales, “Common Offences and The Use of Imprisonment in the District and Supreme Courts in 2002” (Sentencing Trends and Issues No 30, 2004) at pp 3-4.

¹⁷ Judicial Commission of New South Wales, “Sentencing Dangerous Drivers in New South Wales: Impact of the *Jurisic* Guidelines on Sentencing Practice” (Research Monograph No 21, 2002) at 33.

¹⁸ Judicial Commission of New South Wales, “Sentencing Robbery Offenders since the *Henry* Guideline Judgment” (Research Monograph No 30, 2007) at 149.

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- 19 Judicial Commission of New South Wales, "Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in New South Wales" (Sentencing Trends and Issues No 35, 2005).
- 20 See J J Spigelman, "Sentencing Guideline Judgments" (1999) 73 *Australian Law Journal* 876 at 878–879.
- 21 See Judicial Commission of New South Wales, "Trends in the Use of Fulltime Imprisonment 2006–2007" (Sentencing Trends and Issues No 36, 2007).
- 22 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) at [20.24].
- 23 Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 15 (1980).
- 24 See Guy Greene, "The Concept of Uniformity in Sentencing" (1996) 70 *Australian Law Journal* 112 esp at 114.
- 25 See R S French, "Judicial Exchange: Debalkanising the Courts" (2006) 15 *Journal of Judicial Administration* 142 at 144.
- 26 Ibid.
- 27 See G F K Santow and M Leeming, "Refining Australia's Appellate System and Enhancing its Significance in our Region" (1995) 69 *Australian Law Journal* 348.
- 28 See Michael Pelly, 'Gleeson Calls for Court Time Limits', *The Australian* (Sydney), 1 February 2008.
- 29 French *supra* at 161.