Mandatory Sentencing In NSW

Aboriginal Legal Service

CLE Conference Armidale

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Introduction

1. On 8 November 2013 Kieran Loveridge, a client of the ALS, was Sentenced to 6 years goal with a non-parole period of 4 years for the manslaughter of Thomas Kelly. The result brought about a furious response from Mr Kelly's parents who described the decision as "shocking" and "a joke."[1]

2. The Sentence also triggered attacks within the media on the Judiciary about the adequacy of sentencing of those convicted of serious assault and manslaughter. The New South Wales Director of Public Prosecutions has lodged an appeal against the sentence on the grounds of manifest inadequacy and will invite the Court of Criminal Appeal to issue a guideline judgment for "one-punch manslaughter" cases.

3. Predictably, within days of the Sentence the NSW Premier, as he then was, Barry O'Farrell pledged to introduce new laws specifically designed for "one-punch manslaughter" with a new focus on mandatory sentencing.

4. The current proposed amendments deal with much more than just one-punch manslaughter …

Part I – The Existing Law

5. In the last decade public debate in NSW about inconsistency and perceived undue leniency in sentencing has brought about two significant changes to the sentencing law in the way of guideline judgments and standard non-parole periods.

6. Guideline judgments that are issued by the Court of Criminal Appeal generally indicate a range of sentences available for a typical offence that nominates a number of objective criteria in which a particular offence can

[1] Paul Bibby, "DPP appeals against Keiran Loveridge sentence over Thomas Kelly king hit death" (14 November 2013) *Sydney Morning Herald*.

be compared. The judgments serve to act as a reference point for a Judge when dealing with offenders convicted of offences such as Break and Enter, Armed Robbery and Dangerous Driving.

7. Standard non-parole periods, on the other hand, are found in Part IV Division 1A of the *Crimes (Sentencing Procedure) Act 1999* and apply to 35 nominated offences as set out in a Table under the Division.

8. While it appears to be accepted that a standard non-parole period should be used as a "guidepost" or "yardstick" to assist Judges with finding a starting point for the particular Sentence, the High Court decision in *Muldrock v The Queen*[2] has "weakened the link between the standard non-parole period and the sentence imposed in a particular case."[3] Accordingly judicial discretion in the form of an "intuitive synthesis" approach appears to play the most important role in individualised sentencing.

9. As a result of the decision in *Muldrock* the standard non-parole period for an offence is now recognised as "a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender."[4]

10. In 2011 the coalition government introduced a mandatory sentence of life imprisonment for murdering a police officer in the course of his or her duty.[5] The Sentence applies to persons who intended to kill the police officer, as well as persons who were engaged in criminal activity that risked serious harm to police officers.[6]

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[2] *Muldrock v The Queen* (2011) 244 CLR 120.
[3] *Regina v Koloamatangi* [2011] NSWCCA 288 at [18].
[4] Section 54B *Crimes (Sentencing Procedure) Act 1999.*
[5] Section 19B *Crimes Act 1900* (NSW).
[6] Section 19B(1)(d) *Crimes Act 1900* (NSW).

CRIMES ACT 1900 - SECT 19B

Mandatory life sentences for murder of police officers

19B Mandatory life sentences for murder of police officers

(1) A court is to impose a sentence of imprisonment for life for the murder of a police officer if the murder was committed:
(a) while the police officer was executing his or her duty, or
(b) as a consequence of, or in retaliation for, actions undertaken by that or any other police officer in the execution of his or her duty,
and if the person convicted of the murder:
(c) knew or ought reasonably to have known that the person killed was a police officer, and
(d) intended to kill the police officer or was engaged in criminal activity that risked serious harm to police officers.
(2) A person sentenced to imprisonment for life under this section is to serve the sentence for the term of the person's natural life.
(3) This section does not apply to a person convicted of murder:
(a) if the person was under the age of 18 years at the time the murder was committed, or
(b) if the person had a significant cognitive impairment at that time (not being a temporary self-induced impairment).
(4) If this section requires a person to be sentenced to imprisonment for life, nothing in section 21 (or any other provision) of the *Crimes (Sentencing Procedure) Act 1999* or in any other Act or law authorises a court to impose a lesser or alternative sentence.
(5) Nothing in this section affects the obligation of a court to impose a sentence of imprisonment for life on a person convicted of murder in accordance with section 61 of the *Crimes (Sentencing Procedure) Act 1999* .
(6) Nothing in this section affects the prerogative of mercy.
(7) This section applies to offences committed after the commencement of this section.

11. In October 2013 Michael Jacobs was the first person to be sentenced to a term of imprisonment for his natural life after shooting a police officer who had stopped Mr Jacobs after suspecting him of driving while disqualified and requested he comply with a random breath test.

12. On 31 January 2014, and after much debate triggered to some extent by the sentence for the manslaughter of Thomas Kelly, the government introduced the new offence of Assault Causing Death when Intoxicated under s 25A(2) *Crimes Act 1900*, which carries a maximum sentence of 25 years imprisonment.

13. Significantly the offence attracts a mandatory minimum sentence of 8 years imprisonment, the section of which is set out below.

CRIMES ACT 1900 - SECT 25B

Assault causing death when intoxicated-mandatory minimum sentence

25B Assault causing death when intoxicated-mandatory minimum sentence

(1) A court is required to impose a sentence of imprisonment of not less than 8 years on a person guilty of an offence under section 25A (2). Any non-parole period for the sentence is also required to be not less than 8 years.

(2) If this section requires a person to be sentenced to a minimum period of imprisonment, nothing in section 21 (or any other provision) of the *Crimes (Sentencing Procedure) Act 1999* or in any other Act or law authorises a court to impose a lesser or no sentence (or to impose a lesser non-parole period).

(3) Nothing in this section (apart from subsection (2)) affects the provisions of the *Crimes (Sentencing Procedure) Act 1999* or any other Act or law relating to the sentencing of offenders.

(4) Nothing in this section affects the prerogative of mercy.

14. It is noted that the new law mandates a mandatory non-parole period of 8 years. Accordingly an offender of this provision would need to be Sentenced to a full term of 10 years and 8 months so as to comply with section 44 *Crimes (Sentencing Procedure) Act 1999*.

15. It will be interesting to see what the Courts have to say about findings of special circumstances in such matters. Clearly the provision prevents an alteration of a Sentence with a result that the non-parole period is less than that prescribed in the mandatory minimum non-parole period.

16. So if a Judge deals with an offender who is found to have compelling special circumstances, it seems they are nonetheless constrained to setting the mandatory minimum non-parole period, and such a finding is effectively made redundant. It might be that this sort of conflict ultimately leads to a question of constitutional validity (see below on constitutional issues).

Proposed Amendments

17. Further to the introduction of a mandatory minimum sentence introduced under section 25B *Crimes Act 1900*, the government has introduced into parliament a new bill that aims to impose mandatory minimum sentences of imprisonment for offences involving reckless wounding or recklessly cause grievous bodily harm in public, or reckless wounding or recklessly cause grievous bodily harm to a police officer in public, where in each case the offender was "intoxicated in public by alcohol or a narcotic drug".

18. Like section 25B the proposed amendments compel a Court to impose a non-parole period that cannot be less than the minimum sentence set for the offence.[7]

19. At the time of writing this paper, the Upper House of parliament has disagreed with the amendments and instead the Labor Party has introduced its own amendments that were carried in the Upper House. These amendments include a provision that allows Judges to avoid the application of a mandatory minimum sentence if there are "substantial and compelling circumstances"[8].

20. However the Lower House of parliament has rejected the Labor Party amendments and the legislation remains in limbo.

21. The provisions of the *Crimes Amendment (Intoxication) Bill 2014* that deal with mandatory minimum sentencing are set out below.

Section 35 Reckless grievous bodily harm or wounding

Insert before section 35 (1):

(1AA) **Reckless grievous bodily harm—when intoxicated in public and in company**

A person of or above the age of 18 years who, when intoxicated in public and in the company of another person or persons:

(a) causes grievous bodily harm to any person, and

(b) is reckless as to causing actual bodily harm to that or any other person,

is guilty of an offence.

[7] Section 8B *Crimes Amendment (Intoxication) Bill 2014* (NSW).
[8] No. 3 Amendments proposed by Legislative Council on 19 March 2014.

Maximum penalty: Imprisonment for 16 years.

Minimum penalty: Imprisonment for 5 years.

Section 35 (1A)

Insert after section 35(1):

(1A) **Reckless grievous bodily harm – when intoxicated in public**

A person of or above the age of 18 years who, when intoxicated in public:

(a) causes grievous bodily harm to any person, and

(b) is reckless as to causing actual bodily harm to that or any other person,

is guilty of an offence.

Maximum penalty: Imprisonment for 12 years.

Minimum penalty: Imprisonment for 4 years.

[13] Section 35 (2A)

Insert after section 35 (2):

(2A) **Reckless wounding—when intoxicated in public and in company**

A person of or above the age of 18 years who, when intoxicated in public and in the company of another person or persons: 14

(a) wounds any person, and

(b) is reckless as to causing actual bodily harm to that or any other person,

is guilty of an offence.

Maximum penalty: Imprisonment for 12 years.

Minimum penalty: Imprisonment for 4 years.

[14] Section 35 (3A)

Insert after section 35 (3):

(3A) **Reckless wounding—when intoxicated in public**

A person of or above the age of 18 years who, when intoxicated in public:

(a) wounds any person, and

(b) is reckless as to causing actual bodily harm to that or any other person,

is guilty of an offence.

Maximum penalty: Imprisonment for 9 years.

Minimum penalty: Imprisonment for 3 years.

Section 35 (5)

Insert "and no or a lesser minimum penalty" after "that carries a lesser maximum penalty".

Section 35

Insert at the end of the section:

Note. See section 8A for provisions relating to establishing intoxication in public for the purposes of the aggravated intoxication offences under this section.

Section 60 (3B) and (3C)

Insert after section 60 (3A):

(3B) A person of or above the age of 18 years who by any means, when intoxicated 32 in public:

(a) wounds or causes grievous bodily harm to a police officer while in the execution of the officer's duty, and

(b) is reckless as to causing actual bodily harm to that officer or any other person,

is guilty of an offence.

Maximum penalty: Imprisonment for 14 years.

Minimum penalty: Imprisonment for 5 years.

(3C) A person of or above the age of 18 years who by any means, during a public 1 disorder and when intoxicated in public:

(a) wounds or causes grievous bodily harm to a police officer while in the 3 execution of the officer's duty, and

(b) is reckless as to causing actual bodily harm to that officer or any other 5 person,

is guilty of an offence.

Maximum penalty: Imprisonment for 16 years.

Minimum penalty: Imprisonment for 5 years.

Section 60

Insert at the end of the section:

Note. See section 8A for provisions relating to establishing intoxication in public for the 12 purposes of the aggravated intoxication offences under

this section.

Part II - The Issues

22. The main thrust of the argument for mandatory sentencing appears to be based on two general propositions:

    i) That Judges are unnecessarily out of touch with community concerns about punishment for serious crime, unlike elected representatives; and

    ii) Serious violent crimes can be reduced because of the effect that tough sentencing would have in deterring would-be offenders.

23. However to say that Judges are out of touch with the reality of crime assumes that Judges do not have any meaningful contact with crime and its effects on members of the community, and that sentencing itself is solely to be used as a means to inflict punishment on offenders.

24. In a speech given by Chief Justice Bathurst in February this year his Honour made these apposite remarks about the criticism:

> *"Judges are not isolated from the reality of crime. Not only are Judges members of the community, but sentencing judges have seen more of the reality of crime than most members of the community can imagine. With great respect to the media, the community and members of parliament, it is judges who day after day have contact with people from disadvantaged social backgrounds, both offenders and victims of crime; it is judges who review gruesome exhibits; it is judges who hear evidence of violence and abuse in criminal proceedings; it is judges who read victim impact statements and see in court the grief of victims whose lives have been torn apart; it is judges who grapple with the history that many offenders have*

of addiction, mental illness and neglect; and it is judges who try to balance an often impossible set of competing considerations to come to a result that is appropriate according to law."[9]

25. It seems that further transparency in sentencing, including educating the community on the competing considerations involved in the sentencing process, would ameliorate concern about the adequacy or otherwise of particular results. Moreover if there could be a shift in public perception of what sentencing really achieves to do, that is, to stop crime from occurring again in the future through rehabilitation as well as punishment, perhaps then the community concern could be focused on committing further resources to tackling the actual causes of offending, rather than dealing with its end results.

26. Regarding the idea of reducing crime through deterrence, it is difficult to see how an increase in penalties can actually trigger something in the mind of the would-be offender so as to deter them from committing the crime at hand.

27. As defence lawyers we observe that the vast majority of our clients commit spontaneous or impulsive crime, and are predominantly affected by alcohol, drugs or even mental illness at the time of its commission, and accordingly knowledge of the potential criminal penalty plays no part.

28. Moreover one only needs to consider the offence of Driving while Disqualified and its prevalence in the community to see that the exceedingly heavy sentence of 18 months to 2 years has no effect on those committing such offences.

29. In a speech given by Justice Harrison of the Supreme Court, his Honour made these comments regarding deterrence as a concept in sentencing:

[9] Opening of Law Term Address; Community Confidence in the Justice System: The Role of Public Opinion (3 February 2014), Bathurst CJ.

> *"We are required to operate upon the assumption that members of the community will be reliably and logically influenced by the severity or otherwise of sentences we impose. We are obliged to re-affirm and thereby to institutionalise the notion that fear about a particular sentence for a particular crime will have some bearing upon later decisions about whether or not to commit crime … the only fear that is relevant to deterring crime is fear of detection."*[10]

30. Indeed using the above example of the heavy sentences available for the offence of Driving while Disqualified it can hardly be assumed that an offender will, before making the decision to drive with a disqualified license, weigh up the risk of potential penalties attributable to a first or second and subsequent offence.

31. Surely what would more likely operate on the mind of the driver would be knowledge that police would likely be patrolling the expected route to be travelled rather than any preconception about the available punishment if apprehended.

32. Mandatory sentencing also effectively removes a Judge's discretion and thus the principle of individualised sentencing that attempts to match the punishment to the specific crime and the offenders' moral culpability. It is not difficult to imagine cases where offenders will inevitably receive overly harsh and disproportionate sentences (see hypotheticals below).

33. Even members within the ranks of the Liberal Party have expressed reservations about mandatory sentencing. Politician for the coalition government and eminent barrister, Mark Speakman SC MP, said the following in a speech to parliament in November 2013 about proposed mandatory sentencing laws: "There is no evidence that mandatory

[10] Sentencing Conference Speech, Australian National University (8 February 2008), Harrison J at pg 4.

sentencing reduces the incidence of crimes. In fact, it reduces the incentive to plead guilty and leads to arbitrary and capricious results."

34. One can see how reducing the incentive to plead guilty can also lead to additional costs on an already underfunded criminal justice system. With fewer pleas of guilty we could expect to see more trials and higher prison costs as more offenders are sentenced to imprisonment and for longer periods of time.[11]

A Constitutional Question?

35. While mandatory sentencing laws have existed in other states and territories since the early 1990's, until very recently there doesn't seem to have been any significant challenge to their constitutional validity.

36. In October 2013 however, the High Court handed down its decision in the matter of *Magaming v The Queen* [2013] HCA 40, which was a case concerning the constitutional validity of mandatory minimum sentencing provisions under the *Migration Act 1958* (Cth).

37. Mr Magaming, a 19-year old Indonesian fisherman, had pleaded guilty in the District Court to an offence of Aggravated People Smuggling contrary to section 233C *Migration Act*, which has a maximum penalty of 20 years imprisonment, and is subject to a mandatory minimum sentence of 5 years with a non-parole period of "at least three years."[12]

38. In Sentencing Mr Magaming, Blanch CJ commented that Mr Magaming's role in the offence fell " right at the bottom end of the scale" and that, in the ordinary course of events, "normal sentencing principles would not

[11] "e-brief", *NSW Parliamentary Research Service* (January 2014) pages 2-3.
[12] Section 236B *Migration Act 1958* (Cth).

require a sentence to be imposed as heavy" as the mandatory penalties that have been imposed by Federal Parliament.[13]

39. In the appeal to the High Court the Mr Magaming advanced three propositions in arguing that the mandatory sentencing provisions of the *Migration Act* were invalid:

    i) First that "they were incompatible with the separation of judicial and prosecutorial functions;

    ii) second, that those provisions were incompatible with the institutional integrity of the courts; and

    iii) third, that the provisions required a court to impose sentences that are "arbitrary and non-judicial."[14]

40. The French CJ, Hayne, Crennan, Keifel and Bell JJ, in the majority, rejected Mr Magaming's arguments and held: "The decisions which a prosecutor makes about what offences to charge may well affect what punishment will be imposed if the accused is convicted. But that observation does not entail, as the appellant's argument necessarily assumed, that the prosecutor exercises judicial power in choosing to charge an aggravated form of offence rather than a simple form of that offence."[15]

41. Further their Honours found: "[I]t is enough to conclude that the availability or exercise of a choice between charging an accused with the aggravated offence created by s 233C, rather than one or more counts of the simple offence created by s 233A, is neither incompatible with the separation of judicial and prosecutorial functions nor incompatible with the institutional integrity of the courts.[16]

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[13] *Magaming v The Queen* [2013] HCA 40 at [7].
[14] Ibid at [11].
[15] Ibid at [38].
[16] Ibid at [40].

42. Finally the majority held: "[I]n very many cases, sentencing an offender will require the exercise of a discretion about what form of punishment is to be imposed and how heavy a penalty should be imposed. But that discretion is not unabounded. Its exercise is always hedged about by both statutory requirements and applicable judge-made principles. Sentencing an offender must always be undertaken according to law."[17]

43. Justice Gageler dissented and found that the mandatory sentencing provisions of the *Migration Act* were invalid and accepted the appellant's submission in that "a purported conferral by the Commonwealth Parliament on an officer of the Commonwealth executive of a discretion to prosecute an individual within a class of offenders for an offence which carries only a discretionary penalty, amounts in substance to a purported legislative conferral of discretion to determine the severity of punishment consequent on a finding of criminal guilt and is for that reason invalid by operation of Ch III of the Constitution."[18]

44. Gageler J relied on the principle that "[I]n exclusively entrusting to the courts designated by Ch III the function and adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form."[19]

45. He further found that "[T]he limitation on legislative power should be recognised as a limitation on the legislative power of the Commonwealth arising from the separation of judicial power by Ch III of the Constitution … The limitation will be transgressed by a Commonwealth law which purports to confer on an executive officer what is in substance a power to determine the punishment to be imposed by the Court in the event of a conviction of an offender in a particular case."[20]

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[17] *Magaming v The Queen* [2013] HCA 40 at [47].
[18] Ibid at [59].
[19] Ibid at [62].
[20] Ibid at [87] – [88].

46. Finally Gageler J held that the constitutional vice of the mandatory sentencing provision was the effect to "empower the CDPP in effect to determine the minimum penalty to be imposed on the conviction of any individual within the class"[21] which amounts in substance to a usurpation of judicial power.

47. Mandatory sentencing under the Migration Act was ultimately found to be constitutionally valid in *Magaming v The Queen*, but Gageler's dissent raises important considerations that might have different application with respect to the provisions being introduced by the NSW Parliament.

48. For instance are there differences in the proposed legislation that amount to a usurpation of judicial power insofar as it is incompatible with the institutional integrity of the courts?

49. Or do the laws in question "in substance" give rise empowering the DPP to determine the minimum punishment to be imposed on an individual offender upon conviction and thus removing the Court's function and role under Ch III in judging and punishing criminal guilt?

50. Alternatively are the mandatory minimum sentences proposed inconsistent with the long-standing sentencing principle of proportionality, and can this lead to an arbitrary or capricious result that is incompatible with Ch III of the constitution?

51. Among others these might be the sorts of questions that would need to be considered if further laws with mandatory sentencing provisions are passed. Moreover if the laws do lead to injustice because of the removal of judicial discretion then perhaps we will need to turn our minds to the constitution for resolution.

[21] *Magaming v The Queen* [2013] HCA 40 at [92].

Part III – Hypotheticals

52. Perhaps one way of demonstrating the potential for injustice in the proposed laws is to look at some hypothetical, although not unusual or even uncommon, scenarios involving intoxicated persons.

    i) Michael was arrested for being involved in a scuffle with his twin brother Adam after having some drinks at the Wicklow Hotel in Armidale.

    During the course of the scuffle Michael was able to land a right-hander to Adam's left temple, resulting in Adam falling onto the concrete and dying as a result of a ruptured aneurysm that had been previously undetected.

    Michael's wife left him after the assault, and he has been ostricised from the family. Michael has sold his house and offered to give his share of the proceeds to Adam's widow and children.

    Michael has no criminal history, is deeply remorseful, and now suffers from severe anxiety, depression and PTSD as a result of his feelings of guilt for his brother's death.

    Michael is to be Sentenced for assault causing death while intoxicated.

    ii) David is a bikie who has arrested after having been involved in a drunken street brawl involving a rival bikie gang. During the course of the fight David pushed the victim who then fell over David's motorbike. The victim suffered a 5 cm laceration to his thigh as a result.

During the course of the fight David witnessed one of his fellow members stab a rival member in the throat killing him almost instantly.

David gave crucial evidence for the Crown in the murder trial of his co-member, which led to a conviction, and is accordingly entitled to a discount for assistance under s 23 *Crimes (Sentencing Procedure) Act 1999*.

David is to be sentenced for Reckless Wounding – when intoxicated in public and in company after pleading guilty at the earliest possible opportunity.

iii) Julie is the single mother of Sam, a 19 year-old university student who suffers from mild autism. Julie attended a protest rally after seeing Sam on television being "man-handled" by the local constabulary in the course of the rally.

She had consumed a couple of glasses of wine at home when she saw the footage, and police later observed that her speech and balance were "noticeably affected" as a result.

When Julie arrived she saw that Sam had been restrained with his arms bent up behind his back by two police officers. Sam was crying and obviously afraid.

Julie swung her handbag at one the police officers, after he refused to release her son's arms, causing the officer to fall and fracture his ankle.

Julie has no criminal history, is a volunteer for Meals on Wheels, and has written to the victim police officer apologising for her behavior and acknowledging the extent of the harm caused to him.

Julie is to be sentenced for causing grievous bodily harm to a police officer while intoxicated and in public.

iv) Ian is a 41 year-old long-term abuser of drugs, predominantly ICE. Ian was arrested after a fight with another drug user in a local park known for drug use.

During the course of the fight the victim threatened to stab Ian with a kitchen knife after an argument over the quality of the ICE that Ian had just consumed after purchasing it from the victim.

Ian managed to disarm the victim, and then punched the victim in his face causing a split lip, after the victim had fallen onto the ground. Ian has a long criminal history consistent with a life of drug addiction.

Prior to sentence Ian completed a 6 month full-time residential rehabilitation program. He has been clean for the longest time since abusing drugs from the age of 11, and is obviously at a "crossroads" in his life. He now has a part-time job at the local supermarket collecting trolleys, and is studying social work at Tafe.

Ian is to be sentenced for reckless wounding when intoxicated and in public.

v) Phil and Jasmine have been in and "on and off" relationship for the last 12 years. This relationship has been marred with repeated episodes of domestic violence.

Phil has been arrested after neigbours called police after hearing Jasmine screaming inside the couple's shared accommodation.

Upon arrival police found Jasmine lying on the floor, bleeding from her mouth, and she was later diagnosed with a fractured mandible.

Both Jasmine and Phil were observed to be highly intoxicated and there were empty bottles of VB scattered throughout the property.

Phil is to be sentenced for recklessly causing GBH to Jasmine. He is **not** subject to any mandatory sentencing provisions.

Benjamin Bickford
1 May 2014