

A JUDGE'S PERSPECTIVE ON USING SENTENCING DATABASES*

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This paper examines the features of the online environmental crime sentencing statistics database launched by the Judicial Commission of New South Wales in 2008 as a component of its Judicial Information Research System. The Hon. Justice Preston highlights the outcome and process benefits delivered by this database to sentencing judges, and more generally to the criminal justice system in New South Wales.

Introduction

The foremost sentencing database in Australia is the Sentencing Information System, a component of the Judicial Information Research System (JIRS), maintained by the Judicial Commission of New South Wales.

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JIRS is an online source of primary, secondary and statistical reference material for judicial officers, the courts, the legal profession and government agencies that play a role in the justice system.

JIRS contains case law, legislation, principles of sentencing, sentencing statistics and other information. In April 2008, JIRS was extended to include sentences for environmental crimes.¹ In so doing, the functions and capabilities of the JIRS sentencing database were considerably enhanced. The enhanced sentencing database yields benefits for the criminal justice system and for the sentencing judge in relation to both sentencing outcomes and the process of sentencing. This paper highlights the outcome and process benefits of the environmental crime sentencing database and illustrates its contribution to more consistent and transparent sentencing decisions.

JIRS and the Environmental Crime Sentencing Database

The environmental crime sentencing database of JIRS contains data concerning sentences imposed by the Land and Environment Court of New South Wales (NSWLEC) and other courts in New South Wales for environmental offenses since January 1, 1998. The data includes:

- the case name, its medium neutral citation and matter number;
- the class of jurisdiction in the NSWLEC;
- the principal offense and any other offenses;
- the penalty type; and
- the variable characteristics of the offense and offender.

Data is collected on the statutory provision constituting the offense. Where there is more than one offense, the most serious or principal offense is selected by the person entering the sentencing statistics on the database after the court has imposed the sentence. Usually, the most serious or principal offense is that which attracts the largest penalty. Where there are multiple counts, they are also

1. See B.J. Preston & H. Donnelly, *Achieving Consistency and Transparency of Sentencing for Environmental Offenses*, in RESEARCH MONOGRAPH NO. 32 (Judicial Commission of New South Wales, Sydney, 2008), also available at B.J. Preston & H. Donnelly, *The Establishment of an Environmental Crime Sentencing Database in New South Wales*, 32(4) CRIM L.J. 214 (2008).

recorded in the database. The latter matter is, of course, relevant to whether the totality principle has been applied in sentencing.

In New South Wales, the types of penalties imposed by the sentencing court usually are those provided for in the Crimes (Sentencing Procedure) Act.² Fines as a penalty type fall under each environmental statute or regulation, and the maximum penalty is generally set by the statute or regulation that makes the act or omission an offense. Apart from full-time imprisonment and alternative forms of imprisonment (suspended sentences, home detention and intensive correction orders), the penalties that fall under the Crimes (Sentencing Procedure) Act include:

- dismissal of the charge;³
- dismissal of the charge on condition that the offender enter into a good behavior bond;⁴
- conviction with no other penalty;⁵
- conviction and the imposition of a good behavior bond, with or without supervision, as an alternative to imprisonment;⁶
- imposition of a community service order as an alternative to imprisonment;⁷ and
- different forms of fines.⁸

The court may impose a fine with additional orders or additional orders in place of a fine under the Protection of the Environment Operations Act,⁹ under the Environmental Planning and Assessment Act¹⁰ and/or the National Parks and Wildlife Act.¹¹

The additional orders include:

- orders for restoration and prevention;¹²
- orders for payment of costs, expenses and compensation;¹³

2. Crimes (Sentencing Procedure) Act, 1999 (Austl.).

3. Crimes (Sentencing Procedure) Act § 10.

4. *Id.*

5. *Id.* § 10A.

6. *Id.* § 9.

7. *Id.* § 8.

8. *Id.* §§ 14-17.

9. Protection of the Environment Operations Act, 1997, §§ 245-250 (Austl.).

10. Environmental Planning and Assessment Act, 1979, § 126(3) (Austl.).

11. National Parks and Wildlife Act 1974, 1974, §§ 200 – 205 (Austl.).

12. Protection of the Environment Operations Act § 245; Environmental Planning and Assessment Act § 126(3).

13. Protection of the Environment Operations Act §§ 246-247.

- orders to pay investigation costs;¹⁴
- monetary benefit orders;¹⁵
- publication orders;¹⁶
- environmental service orders;¹⁷
- environmental audit orders;¹⁸
- payment into an environmental trust;¹⁹
- orders to attend a training course;²⁰
- orders to establish a training course;²¹ and
- orders to provide financial assurance.²²

The variable characteristics that are included in the sentencing database are based on traditional sentencing objective and subjective characteristics, supplemented by the matters specified in relevant environmental legislation,²³ along with other principles involving aggravating or mitigating factors. These variable characteristics match the sentencing considerations for environmental offenses.²⁴ The objective characteristics relate to the objective seriousness or gravity of the offense that has been committed. They include:

- whether there were financial reasons for, or advantage gained in, committing the offense;
- whether there was foreseeable harm to the environment;
- whether there were practicable measures which may have been taken to avoid the foreseeable harm;
- whether there was control over the causes of the offense;
- the state of mind of the offender in committing the offense;
- the environmental harm caused by the commission of the offense;
- whether the offense was committed under a supervisor's orders, and

14. *Id.* § 248(1).

15. *Id.* § 249.

16. *Id.* § 250(1)(a)-(b).

17. *Id.* § 250(1)(c).

18. *Id.* § 250(1)(d).

19. *Id.* § 250(1)(e).

20. *Id.* § 250(1)(f).

21. *Id.* § 250(1)(g).

22. *Id.* § 250(1)(h).

23. Protection of the Environment Operations Act § 241; National Parks and Wildlife Act § 194.

24. See B.J. Preston, *Principled Sentencing for Environmental Offenses — Part 2: Sentencing Considerations and Options*, 31(3) CRIM L.J. 142, 142–157 (2007).

- the maximum penalty for the offense.

In addition, there is a variable expressing the overall conclusion of the objective seriousness of the offense, taking into account all of the other objective characteristics.

The subjective characteristics relate to the particular offender. These include:

- the prior criminal record of the offender;
- whether the offender provided cooperation and assistance;
- whether the offender has expressed contrition and remorse;
- whether the offender had a prior good character;
- whether the offender pleaded guilty and the timing of the plea;
- whether costs are to be awarded against the offender and the quantum of costs;
- the offender's means to pay any fine imposed; and
- where there are multiple offenses and/or counts, whether the totality principle is applicable.

The data relating to these variables, both the objective and subjective characteristics, have been captured and entered in the sentencing database. Most data is available to be displayed graphically for users of JIRS. Data relating to maximum penalty, however, is not displayed, as this information is available from the statute creating the offense.

The sentencing database also contains the full reasons for the sentencing decision underlying each of the sentences captured in the database. Users are able to access the sentencing judgment after making inquiry of the data. This capability to access directly the sentencing remarks is an important feature of the environmental crime sentencing database and is not currently available for other crimes on the JIRS database.

A principal objective of a sentencing database is to improve consistency of approach to sentencing. Consistency of approach involves two aspects, one concerned with outcomes and the other with process.

Outcome Benefits of a Sentencing Database

In relation to consistency of outcomes, what is desired is not to

achieve “uniformity in outcome”²⁵ — that would be impossible²⁶ — but rather to reflect the notion of equal justice. In *R v. Jurisic*,²⁷ Chief Justice Spigelman quoted Lord Bingham of Cornhill who said that: “[i]t is generally desirable that cases which are broadly similar should be treated similarly and that cases which are broadly different should be treated differently.” In *Lowe v. The Queen*, Justice Mason J stated:

Just as consistency in punishment — a reflection of the notion of equal justice — is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.²⁸

This aspect of consistency of approach is promoted: “. . .if sentencers are aware of, or have ready access to, clear information of the sentences imposed by other sentencers in similar cases.”²⁹

A sentencing database, such as is provided by JIRS, collects and disseminates information about sentences to sentencing judges and the legal profession. As Chief Justice Gleeson noted in *Wong v. The Queen*,³⁰ providing “knowledge of what is being done by courts generally will promote consistency.” The sentencing database of JIRS not only provides the results of sentencing, but also, in the case of the environmental crime sentencing database, information on the objective and subjective circumstances of the offense and offender taken into account by the sentencer in reaching each result. Furthermore, in the case of the environmental crime sentencing database, there is the capability of identifying the underlying decision for each sentence result and accessing the sentencing remarks

25. *R v. Bibi* (1980) 1 W.L.R. 1193 (Eng.).

26. See *Wong v. The Queen* (2001) 207 C.L.R. 584, para. 6 (Gleeson, C.J.) (Austl.).

27. *R v. Jurisic* (1998) 45 N.S.W.L.R. 209, 221 (Spigelman, C.J.) (Austl.).

28. *Lowe v. The Queen* (1984) 154 C.L.R. 606, 610–611 (Mason, J.) (Austl.). See also *Everett v. The Queen* (1994) 181 C.L.R. 295, 306 (McHugh, J.) (Austl.).

29. SENTENCING COMMISSION FOR SCOTLAND, *THE SCOPE TO IMPROVE CONSISTENCY IN SENTENCING*, at 35 (2006).

30. *Wong v. The Queen*, *supra* note 26, at para. 7.

explaining the facts and reasoning for reaching that sentencing result. The capability of accessing the sentencing remarks enables the sentencing judge to better ascertain the comparability of prior sentences to the case at hand. Over time, by reason of the process benefits of the sentencing database discussed below, the sentencing remarks of judges for sentences entered in the database will become more helpful and improve the sentencer's ability to ascertain the similarities and differences between different cases.

The other aspect of consistency of approach involves the consistent application of established sentencing principles.³¹ This aspect of consistency is discussed below in relation to the process benefits of sentencing databases. Another outcome benefit of a sentencing database is that the sentencing data indicates *a range* of sentences for a particular offense, but they do not determine *the range* or, more accurately, *the permissible range* for the case at hand. A sentencing database records, as a historical fact, the general pattern of sentencing at that particular time. Sentencing judges may properly have regard to that general pattern when imposing sentences in the particular case.³²

A further outcome benefit of a sentencing database is assisting appellate review. Sentencing statistics assist appeal courts to discharge their supervisory function. In *R v. Maguire*,³³ the New South Wales Court of Criminal Appeal said that statistics could assist the day-to-day function of appeal courts responsible for determining whether a sentence was manifestly excessive in a severity appeal and manifestly inadequate in a Crown appeal. This view is reiterated by Chief Justice Spigelman in *R v. Bloomfield*³⁴ and by Justice Winneke, in *R v. Giordano*.³⁵

Finally, a reliable record of sentences imposed enables an appeal court to monitor lower courts and, sometimes, express disapproval of sentencing practices. There are numerous examples of the New South Wales Court of Criminal Appeal registering its disapproval on

31. See *R v. Rushby* (1977) 1 N.S.W.L.R. 594, 597 (Austl.).

32. See *R v. Lawson* (1997) 98 A. Crim. R. 463, 465 (Austl.); *Wong v. The Queen*, *supra* note 26, at para 19; *R v. Whyte* (2002) 55 N.S.W.L.R. 252, 280 (Austl.).

33. *R v. Maguire*, (N.S.W.C.C.A. Aug. 30, 1995) (unreported).

34. *R v. Bloomfield* (1998) 44 N.S.W.L.R. 734, 739 (Spigelman, C.J.) (Austl.).

35. *R v. Giordano* (1998) 1 V.R. 544, 549 (Winneke, P.) (Austl.). See also *R v. Bangard* (2005) 13 V.R. 146, paras 11, 29 and 30 (Austl.). Justice Winneke was at the time of this judgment the President of the Court of Appeal of Victoria.

sentencing patterns using the JIRS statistics.³⁶

Process Benefits of a Sentencing Database

As stated above, one aspect of consistency of approach to the sentencing task involves the consistent application of established sentencing principles. Chief Justice Street stated in *R v. Rushby* that “. . . the doctrines and principles established by the Common Law in regard to sentencing provide the chart that both relieves the judge from too close a personal involvement with the case in hand, and promotes consistency of approach on the part of individual judges.”³⁷ Justice Mahoney elaborated on the role of sentencing principles in *R v. Lattouf*:

General sentencing principles must be established, so that the community may know the sentences which will be imposed and so that sentencing judges will know the kind and the order of sentence which it is appropriate that they impose.³⁸

A sentencing database which collects and disseminates information based on sentencing principles can promote this consistency in approach. The environmental crime sentencing database of JIRS contains data on relevant objective and subjective circumstances of the environmental offense and the offender, the sentencing orders and the sentencing remarks. Such data are components of “the chart” of sentencing doctrines and principles that the sentencer needs to apply in the sentencing task. The sentencing database thereby provides a helpful aide/mémoire of matters relevant to the sentencing task and enables comparison with prior sentencers’ evaluations of the same matter in reaching their sentencing decisions. Consistency is promoted by facilitating a consistent approach to sentencing.

The capacity of a sentencing database to collect and disseminate information on the objective and subjective circumstances of each offense and offender also facilitates the achievement of individualized justice. As Chief Justice Spigelman said in *R v. Whyte*:

36. See *R v. Henry* (1999) 46 N.S.W.L.R. 346, 371 (Austl.). See also Preston & Donnelly, *supra* note 1, at 16–17.

37. *R v. Rushby*, *supra* note 31, at 597 (Street, C.J.).

38. *R v. Lattouf*, (N.S.W.C.C.A. Dec. 12, 1996) (Mahoney, ACJ) (unreported) (Austl.).

The maintenance of a broad sentencing discretion is essential to ensure that all of the wide variations of circumstances of the offense and the offender are taken into account. Sentences must be individualised.³⁹

Similarly, Mahoney said in *R v. Lattouf*: “If a sentencing process does not achieve justice, it should be put aside. As I have elsewhere said, if justice is not individual, it is nothing.”⁴⁰ The environmental crime sentencing database of JIRS captures the sentencer’s consideration of the individual circumstances of the offense and the offender. Again, the existence of these circumstances as variables in the sentencing database serves as an aide/mémoire, facilitating the individualization of sentences.

Many of the database variables require a sentencing judge to evaluate where on a scale of seriousness the circumstances of the offense and the offender fall. For example, environmental harm, the most common manifestation of the objective harm caused by an environmental offense, requires an evaluation of the seriousness ranging from none, through low, medium to high.

One of the database variables requires the sentencing judge to form a conclusion about the overall objective seriousness of the offense. Such a conclusion is reached after consideration of the objective circumstances of the offense, which are other variables in the database. It is well established that the objective seriousness of the offense sets the limits of proportionate punishment, both the upper limit⁴¹ and the lower limit.⁴² So as to understand these limits, a conclusion needs to be drawn by the sentencer as to the objective seriousness of the particular offense. The presence of this variable in the database reminds the sentencer of the task of consideration of the objective seriousness of the offense and better enables comparison with other sentences by reference to the conclusion of objective seriousness in those other sentencing decisions.

The environmental crime sentencing database of JIRS also

39. *R v. Whyte*, *supra* note 32, at para. 147.

40. *R v. Lattouf*, *supra* note 38.

41. See *Veen v. The Queen (Veen II)* (1988) 164 C.L.R. 465, 472, 485–486, 490–491 & 496 (Austl.); *Hoare v. The Queen* (1989) 167 C.L.R. 348, 354 (Austl.).

42. See *R v. Dodd* (1991) 57 A. Crim. R. 349, 354 (Austl.); *R v. Whyte*, *supra* note 32, at para. 156–158; *R v. McNaughton* (2006) 66 N.S.W.L.R. 566, para. 15 (Austl.).

implicitly facilitates consideration of the purposes for which sentences may be imposed. In New South Wales, the purposes for which a court may impose a sentence on an offender are those set out in section 3A of the Crimes (Sentencing Procedure) Act. Those purposes are reflected in the various objective and subjective sentencing considerations that are variables in the sentencing database. Furthermore, the various sentencing options that are available in sentencing for environmental offenses reflect the purposes of sentencing.⁴³

For example, orders that an offender publicize the offense, including the circumstances of the offense, and its environmental and other consequences, and the other orders made against the offender, serve the sentencing purpose of general deterrence; orders for restoration of the environment harmed by commission of the offense and for prevention of continuing harm serve the sentencing purpose of restoration; and orders for the payment of compensation and reimbursement of costs and expenses serve the sentencing purpose of reparation.

The environmental crime sentencing database, by recording the various sentencing orders made, and allowing search and retrieval of information on orders made in prior sentencing decisions, facilitates effective attainment of the purposes of sentencing by enabling judicious selection from the sentencing options available for the offense in question. It also enables sentencers to see how prior sentencers have used the sentencing options available and, by being able to access the sentencing remarks, see the circumstances in which those sentencing options were used and the terms of the sentencing orders made.

The environmental crime sentencing database of JIRS, by providing information on the objective and subjective circumstances of the offense and offender, the sentencing orders made, and the sentencing remarks, promotes a more principled and “systematically fair”⁴⁴ approach to sentencing. It reduces the risk that the outcome of discretionary sentencing decision-making depends on the identity of the sentencing judge who happens to hear the case.⁴⁵

43. For a description of sentencing options available for environmental crime and case examples of usage, see Preston, *supra* note 24, at 157–163.

44. Wong v. The Queen, *supra* note 26, at para. 6.

45. *Id.*

By sentencing judges referring to the same sentencing principles and considerations, and articulating their evaluation of those principles and considerations in the individual circumstances of the offense and offender in their sentencing remarks, and the subsequent capture of this information in the sentencing database, accessibility and transparency of sentencing decisions are improved. As the High Court noted in *Markarian v. The Queen*: "The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts and the public."⁴⁶ Statistical information captured in the environmental crime sentencing database improves the accessibility and transparency of the sentencing decisions.

Conclusion

The sentencing database for first instance environmental crime cases in the NSWLEC and other courts of New South Wales has had and is likely to continue to have an influential effect on environmental sentencing both in Australian jurisdictions and in other countries. The database is the first of its kind, meshing the traditional JIRS sentencing database approach with an approach specifically tailored to environmental offenses in New South Wales.

In summary, the environmental crime sentencing database of JIRS:

- provides centralized data on sentences for environmental offenses imposed by the NSWLEC and other courts of New South Wales;
- reveals the key objective and subjective considerations of the sentencing court in determining the sentence imposed;
- reveals the different components of the total penalty imposed including fines, other orders and costs orders;
- covers the elements devoted to such matters as remediation, removal of economic gains and cost saving, restitution to communities and moral blame, by revealing the sentencing considerations, the penalties imposed and the reasons for sentence;
- reveals how the purposes of sentencing are being achieved, by reason of the foregoing matters and the ability to access the reasons for sentence addressing the purposes of sentencing in section 3A of the Crimes (Sentencing Procedure) Act; and

46. *Markarian v. The Queen* (2005) 228 C.L.R. 357, para. 39 (Austl.).

- provides a public register of sentences accessible on the internet and searchable by offense, nature of offender, objective and subjective characteristics, and penalties, which register supplements the internet register of judicial decisions available on Caselaw NSW and AustLII.

The sentencing database, because of these features, should assist in: improving consistency in sentences; balancing individualized justice and consistency; improving accessibility and transparency of sentencing decisions; indicating a range of sentences; facilitating appellate review and monitoring; and if appropriate, registering disapproval by appellate courts of sentencing patterns.

The usefulness of the sentencing database should be evident both now and in the future as it will shape the way judges sentence offenders and how they go about arriving at a decision about what penalty to impose and, if it is a fine, how much is reasonably appropriate to the situation. While some of the drawbacks of using a sentencing database may be that it cannot capture all of the detail of a case and may be seen as a formulaic way of sentencing, it is a useful tool in assisting judges in sentencing by reminding them what characteristics need to be considered as well as a tool for policy development and legislative reform.