

Sentencing Law NSW

Published by Lexis Nexis as a loose leaf service

As a law student studying criminal law there was little mention of sentencing and sentencing principles. The focus was on categories of offences and evidence law. I remember an early interview for a criminal law position where the panel was more concerned if I had done any mock hearings and knew my evidence law. My misconception as to the practice of criminal law continued on my first day on the job at a regional NSW local court. Steeling myself for “adversarial battle” I believed myself prepared for any eventuality with my Crimes Act and Evidence Act plus commentaries. My naivety was soon punctuated when I quickly realised that most of my work had to do with “pleas in mitigation” with much negotiation beforehand with the prosecutor. Fortunately, I had a supportive and understanding Magistrate.

But then I could be forgiven. Back then sentencing was less driven by complex legislation and legal commentary was sparse. However, such “halcyon” legal days are long gone. From the perspective of the defence solicitor/counsel, the preparation required, so that a plea of mitigation has sufficient persuasive force before the Bench, can sometimes equal that of a hearing/trial.

Things are made more difficult since sentencing by its very nature allows the tribunal of fact board discretion. In *Markarin v The Queen* (2005) 215 ALR 213; [2005] HCA 25; BC200503148 the High Court made clear that the judge is to be “allowed as much flexibility in sentencing as is consonant with consistency

of approach and as accords with the statutory regime that applies”, and further, the Court added an additional element of indeterminacy when it held that the process of sentencing is not one of “arithmetical deduction” but a “process of instinctive synthesis.” Translated into practice the caveat to us practitioners is: better to be over prepared than under, and consider as many permutations of the sentence as possible.

Sentencing thus requires preparation. But where does a busy, overworked practitioner begin? With his/her Supreme Court web page or Austlii with simple key word searches and Boolean operators? In certain Australian jurisdictions the preparation is made easier by other legal service agencies/providers. For example, in Victoria the Victorian Sentencing Manual is available online for free (www.judicialcollege.vcc.edu.au); in NSW the Judicial Commission of NSW provides sentencing material, but you have to subscribe (www.judcom.nsw.gov.au), though some sentencing information is available for free at the NSW Sentencing Council and NSW Public Defender (both at www.lawlink.nsw.gov.au). While each provides invaluable information, they are not designed for easy and ready use and assume that the reader is already well read and versed in the area of sentencing.

This brings me to *Sentencing Law in NSW* published by Lexis Nexis. The service is provided either online or in a hand copy loose leaf format. I note in

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passing that Law Book Company provide a similar service for QLD, entitled “Queensland Sentencing Manual” which is authored by John Robertson. Unfortunately, there are no other equivalents.

Sentencing Law in NSW was first published in 2003. Since then it has become a standard reference tool for both the NSW bench and the practitioner. What makes this reference tool so helpful is its accessibility. It is structured so as to allow the practitioner to obtain his/her answers quickly. A comprehensive index further assists. The Manual’s topic areas cover general sentencing principles, statutory factors, the sentence, children matters, advocacy in sentencing, appeal issues, specific offences, Commonwealth offences, narcotics, and finally, an overview of all relevant legislation. Each section provides commentary with reference to latest case developments.

The detail provided is impressive. Take for instance, the concept of “General Deterrence”, which is much heard in a sentencing plea. Apart from providing case-law based explanation, it further provides extensive categories as to when General Deterrence has been emphasised through the case law. To illustrate, the following two (out of twenty-five) examples are provided.

- “serious driving offences : *R v Jurisic* (1998) 45 NSWLR 209, 29 MVR 49, BC9805254; *R v Whyte* (2002) 55 NSWLR 252; 37 MVR 1; BC200204713;

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[2002] NSWCCA 343 ; *R v McKinney* (1999) 29 MVR 355; BC9901060; [1999] NSWCCA 51; *R v Gardiner* [2004] NSWCCA 365; BC200406986 (driving a heavy vehicle under the influence of drugs);

- **domestic violence** : *R v RKB* (CCA(NSW), 30 June 1992, unreported); *R v Glen* (CCA(NSW), 19 December 1994, unreported, BC9403423 (victims attitude re forgiveness is irrelevant); *R v Berry* (2002) 32 MVR 405; BC200006765; [2000] NSWCCA 451 ; *R v Dunn* (2004) 144 A Crim R 180; BC200400791; [2004] NSWCCA 41”

The section “Specific Offences” includes offence categories such as murder, manslaughter, conspiracy or solicitation to murder, personal violence (other than homicide), robbery, property offences, sexual offences, fraud and related offences, drug offences, firearm offences and driving offences. Comprehensive comparative case tables with

sentencing outcomes are provided for each category.

Well, you might ask, I agree with you on its legal utilitarian value, but what use is it to me here in the Northern Territory, especially since it does not come cheap. It costs \$672.10 to subscribe and the service provides approximately two updates per year. The ongoing annual subscription is \$641.30.

In answer to this question, I note that the service does cover Commonwealth criminal law. Commentary and case tables are provided for relevant sentencing sections under the Crimes Act 1914 (in particular Part 1B); Crimes (Sentencing Procedure) Act 1999 and other relevant legislation. Categories covered include, narcotics, fraudulent receipt of government funds (e.g. welfare fraud), currency offences, computer-related offences.

Further, while legislatively and judicially NSW has developed its own trajectory in sentencing

there is still considerable over-lap in general common sentencing principles and in the NSW Supreme court’s development of common law. One prominent example is the NSWSC’s case of *R v Fernando* (1992) 76 A Crim R 58; BC9202738, a significant sentencing case which extended mitigation to Indigenous Australians born and raised in extremely dysfunctional social circumstances. In the NTSC this case has been applied (e.g. *R v Sebastian Lee* SCC20106980) and distinguished (e.g. *R v Wurraramara* [1999] NT CCA 45; BC9901910).

In summary, if you need a quick revision of basic sentencing principles and an overview of sentencing tariffs this is a good start. The Service can therefore assist you in better defining and directing your research when searching on the NTSC web page or Austlii or any other relevant legal web site.

The Law Society has the following books available to be reviewed by practitioners, for publishing in *Balance*

Macdonald & McGill - **LN Skills Series: Drafting**, 2nd Ed.

Tyree - **Banking Law in Aust**, 6th Ed

Pentony, Graw Lennard & Parke - **Understanding Business Law**

Baxt, Black & Hanrahan - **Secur. Finance Services Law 7e**

Harris - **LN Study Guide - Corps Law**

Taylor, Juchau & Houterman - **Financial Planning in Australia**, 3rd Ed.

Mo - **International Commercial Law**

Hall & Macken - **Butts Guides: Legislation**, 2nd Ed.

Croucher & Vines - **Succession Family Properties** - Text, 3rd Ed.

Moore, **Commercial and Residential Tenancies: The Laws of Australia**

Barnes & Douglas, **BQA: Administrative Law** 2nd Ed

Hanrahan, **Funds Management in Australia**, 1st Ed

Sweeney & O’Reilly, **Law in Commerce**, 3rd Ed

Mackie, **Principles of Australia Succession Law**, 1st Ed

Goldwasser, **Mastering Business Law**, 1st Ed

Clarke & Devereux, **Torts: A Practical Learning Approach**, 1st Ed

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