

BOOK REVIEW

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Richard Edney and Mirko Bagaric, Australian Sentencing: Principles and Practice (Cambridge University Press, 2007)
392pp

Australian Sentencing: Principles and Practice is a useful addition to the scholarship of sentencing law in Australia. It strikes a sensible and manageable balance between analysis of general doctrine and principles and an explication of particular laws and positions within separate Australian jurisdictions.

The book begins with a brief discussion of the nature of sentencing and some general theories of punishment. The section concerning theories of punishment is perhaps too cursory to be of use to anyone apart from those who are altogether unfamiliar with the area and this could have been compensated for with some citation and reference to other sources to guide the reader. Chapter Two is a credible and very readable discussion of the somewhat tiresome debate concerning whether judges ought to adopt either a two tiered approach to sentencing or the currently more favoured approach (at least within the High Court) of instinctive synthesis. This chapter contains a sound and enlightening analysis of the judgements of the High Court in *Markarian v R*² and in *Wong*³ and some commentary on the move towards guideline judgements in some jurisdictions. Although the views of some members of the judiciary are clearly of paramount importance in these areas, other research which considers the personal perspectives of judges in relation to their roles in crafting proper sentences might have been usefully referred to.⁴ This discussion segues quite effectively into a consideration, in Chapter Three, of the relationship between policy objectives and sentencing practice and the question of whether specific sentencing objectives (such as individual and general deterrence, incapacitation, rehabilitation and denunciation) 'work'. The discussion is referenced to some quite old research and is perhaps not quite rigorous enough to fully support the authors' conclusion that of all these sentencing objectives, only 'absolute general deterrence works.'

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² (2005) 215 ALR 213.

³ *Wong v R* (2001) 207 CLR 584.

⁴ See for example: G Mackenzie, *How Judges Sentence* (Federation Press, 2005) especially Chapter Two.

The publisher notes that this is ‘the only book that examines sentencing law in all Australian jurisdictions.’ The authors do integrate a reasonable cross-jurisdictional discussion into a number of key areas. For example, in Chapter Seven, which analyses the factors and circumstances which may go towards mitigation of sentence, the authors acknowledge that most circumstances of mitigation have been developed at common law, but they then devote a few paragraphs to the statutory recognition of mitigating factors in each Australian jurisdiction. These separate jurisdictional analyses are useful but perhaps lack a little in depth and there is no real attempt at a conceptual comparison. It would have been enlightening, for instance, to see a more detailed discussion of the express link made in the Western Australian legislation between the culpability of the offender and the various mitigating factors.⁵

One (perhaps unavoidable) problem with books which make extensive references to legislation is that the citations of legislative provisions are often out of date or redundant even in the time between when the book has been drafted and when it appears in print, and there are a number of citations of legislative provisions in the book which fall foul of this phenomenon.⁶ Having said that, there is an adequate level and precision of legislative referencing to provide a very handy starting point to anyone embarking on a comparative analysis of the various sentencing statutes. In fact, for the researcher, the level and quality of the referencing of the book makes it one of the better research tools and sources available on Australian sentencing law.

A more substantive problem the book has in relation to contemporary relevance is that a number of key studies in relation to sentencing issues seem to have been completed and published since the book went to print. In Chapter 10, which deals with the relevance of Aboriginality to sentencing for example, the authors claim that existing empirical analysis, based on statistics relating to recidivism rates, suggest that Indigenous courts may have a higher degree of effectiveness than the non-Indigenous court system for Indigenous offenders.⁷

Recent empirical studies, however, may suggest the opposite is in fact true and that there is little evidence that Indigenous sentencing courts have any appreciable effect on the frequency of offending, the seriousness of offences committed or recidivism rates in general.⁸

Whether or not reducing the over-representation of Indigenous people within the criminal justice system and addressing the seemingly intractable problem of recidivism are the most important benchmarks for the effectiveness of Indigenous sentencing courts is a matter of debate, but needless to say these are performance indicators that

⁵ *Sentencing Act 1995* (WA) s 8(1).

⁶ For example, in the discussion of mitigating factors under the *Penalties and Sentences Act 1992* (Qld): R Edney and M Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 158, where the authors observe that a court may have regard to submissions made by a representative of an Aboriginal or Torres Strait Islander community justice group in determining sentence and cite *Penalties and Sentences Act 1992* (Qld) s 9(2)(o) in this regard, although in 2007 this provision was renumbered as s 9(2)(p).

⁷ R Edney and M Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 270, where the authors cite a 2006 publication of the Victorian Department of Justice which reports on an evaluation of the Koori Court pilot program in 2002-2004.

⁸ See for example: J Fitzgerald, ‘Does Circle Sentencing Reduce Aboriginal Offending’ (2008) 115 *Crime and Justice Bulletin*, 1.

governments will closely monitor. Some quite recent research into what benchmarks ought to be used in assessing the effectiveness of these specialist courts and a comparison of the jurisprudential and theoretical positions which inform them across jurisdictions would have improved the discussion.⁹

Although there are one or two areas in which the book either lacks sufficient analytical depth, in terms of consideration of the best or most recent research, some areas are covered in admirable depth and contain extremely useful sets of references. For example, Chapter Four on the emergence of a sentencing jurisprudence in the High Court of Australia is a very succinct and original piece of legal scholarship. This chapter contains a quite detailed and thoroughly researched discussion of the evolution of the approach of different High Court benches and individual judges towards the issue of dealing with appeals against sentence from the State and Territory higher courts. There is an invaluable footnote on p 90 of the book which sets out a detailed and rigorous explanation of how State and Territory appellate courts have adopted or followed principles and interpretations of traditional sentencing doctrines within their own judgements. The authors do an excellent job of tracing the organic development of a blended Federal and State sentencing jurisprudence and of relating this to specific judgements of the relevant State courts.

Part C of the book deals with the law relating to specific criminal sanctions such as fines and disqualifications, intermediate sanctions (such as community based orders and terms of suspended imprisonment) and imprisonment.

A chapter is devoted to each of these types of sanction and there is a synopsis of the legislative context of each in all Australian jurisdictions. There is some conceptual and empirical analysis of the nature and effectiveness of each of these types of sanction and there is an especially detailed discussion of the current judicial view in relation to preventive detention including an analysis of *Kable*,¹⁰ *Fardon*¹¹ and some later cases.

For researchers starting out in the field of Australian sentencing law and policy this book would be a worthwhile addition to their libraries. For more experienced researchers the analysis is perhaps not quite rigorous enough, but some topics (such as the evolution of a High Court sentencing jurisprudence) are covered in admirable depth. As a text for university courses in sentencing or criminal law and procedure it certainly merits consideration.

⁹ One landmark study which is essential reading in this area is E Marchetti and K Daly, 'Indigenous Sentencing Courts' (2007) 29(3) *Sydney Law Review* 415.

¹⁰ *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

¹¹ *Fardon v Attorney-General* (Qld) (2004) 223 CLR 575.