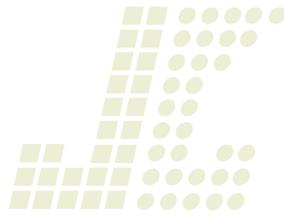


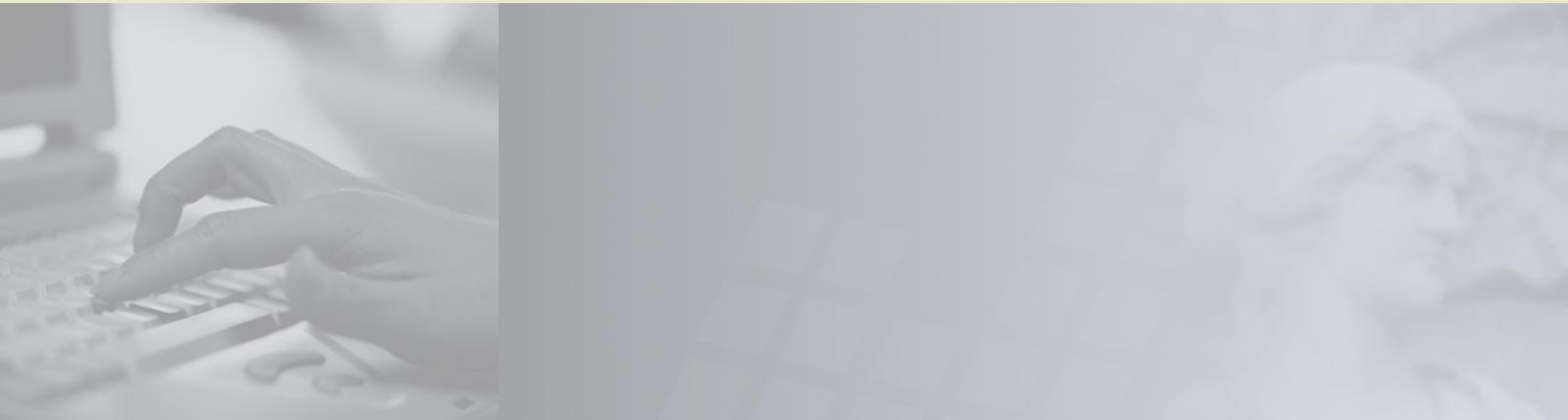


Achieving consistency and transparency in sentencing for environmental offences





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Protection of the Environment Operations (Noise Control) Regulation 2000: 29

Road and Rail Transport (Dangerous Goods) Act 1997: 29

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INTERNATIONAL

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (Aarhus Convention): 10

New South Wales will be a world leader in the area of sentencing for environmental crimes following the completion of a major project between the Land and Environment Court and the Judicial Commission of New South Wales. Sentencing statistics for criminal matters dealt with by the Land and Environment Court are now accessible in graphical form on the Judicial Information Research System (JIRS). These criminal matters dealt with by the Land and Environment Court have been, until now, a notable omission from JIRS.

The importance of this project should not be underestimated and it represents a significant technological breakthrough. JIRS statistics display sentencing graphs and a range of objective and subjective features peculiar to environmental offences. The user is also able to directly access the remarks on sentence behind each graph. In February 2008, Spigelman CJ said, in a keynote address, that while sentencing statistics may be useful in identifying a sentencing pattern they "... have to be supplemented ... 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."¹

The current initiative overcomes this oft-cited deficiency of bare statistics by providing direct access to the remarks on sentence for the individual cases behind each graph.

Sentencing statistics for criminal offences have been used by Local, District and Supreme Courts for more than 15 years. JIRS is internationally recognised. Lord Auld described JIRS in his Lordship's *Review of the Criminal Courts of England and Wales* as "... probably the world leader in [the] field".² Similarly, the Chief Justice of Queensland said at the launch in 2007 of a sentencing database in that jurisdiction (modelled on JIRS) that it was "... potentially the most significant development in recent years in streamlining of our criminal justice system. The ideal is increased consistency and predictability in sentencing."³

1 JJ Spigelman, "Consistency and Sentencing", Keynote address to *Sentencing 2008* Conference, National Judicial College of Australia, Canberra, 8 February 2008, p 9, at <[http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman080208.pdf/\\$file/spigelman080208.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman080208.pdf/$file/spigelman080208.pdf)>, accessed 11/5/08.

2 R Auld, *Review of the Criminal Courts of England and Wales* (2001), p 603, at <<http://www.criminal-courts-review.org.uk/chpt11.pdf>>, accessed 11/5/08.

3 P de Jersey, "Launch of the Queensland Sentencing Information Service", Speech delivered at the Banco Court, Brisbane, 27 March 2007, p 3, at <<http://archive.sclqld.org.au/judgepub/2007/dj270307.pdf>>, accessed 11/5/08. QGIS uses the same software developed by the staff of the Judicial Commission for JIRS.

A considerable body of refined case law has developed in relation to the use of statistics by sentencers and appellate courts. Section 2 of the monograph revisits the legal debate about the utility of sentencing statistics and sets out some of the benefits and limitations of statistics. Section 3 sets out a brief history of the development of JIRS. Section 4 explains the steps taken to develop sentencing statistics for environmental offences, how the system works and what it can provide.

2.1 Using statistics — the *R v Bloomfield* principles

In *R v Bloomfield*,⁴ Spigelman CJ addressed the use of statistics by New South Wales courts:

“The Sentencing Information System maintained by the Judicial Commission is available as the major component of the on-line Judicial Information Research System. It is a source of information on sentencing patterns for particular offences ...

The following points appear to emerge from these cases:

- (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. Also 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 are likely to be useful.”⁵

4 (1998) 44 NSWLR 734.

5 *ibid* at 738–739.

There is no shortage of cases which apply the *Bloomfield* principles. Some of the recent cases are *Douar v R*,⁶ *R v Gent*,⁷ *R v Said El Masri*,⁸ *Campbell v R*,⁹ *Carrion v R*¹⁰ and *T v R*.¹¹

2.2 Improving consistency in sentences

The courts have long emphasised the importance of consistency in sentencing. Lord Lane famously remarked in *R v Bibi*¹² that it is not uniformity in outcome that is desired but rather consistency of approach on the part of individual sentencers. Jacobs J said in 1977:

“Disparity of sentencing standards is a very serious deficiency in a system of criminal justice. This is coming more and more to be recognized.”¹³

In the first guideline judgment of *R v Jurisic*, Spigelman CJ quoted a speech of Lord Bingham of Cornhill, then Lord Chief Justice of England:

“It is generally desirable that cases which are broadly similar should be treated similarly and cases which are broadly different should be treated differently. As Aristotle observed: ‘True equality exists in the treatment of unequal things unequally’.”¹⁴

Robust discussions about sentencing consistency usually begin with Mason J’s lucid statement in *Lowe v The Queen*:

“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.”¹⁵

Spigelman CJ recently described this passage in *Lowe* as “... the origins of contemporary Australian doctrine on the issue of consistency.”¹⁶

6 (2005) 159 A Crim R 154 at [141].

7 (2005) 162 A Crim R 29 at [89].

8 [2005] NSWCCA 167 at [42].

9 [2007] NSWCCA 137 at [31].

10 [2007] NSWCCA 174 at [18].

11 [2007] NSWCCA 62 at [25].

12 (1980) 2 Crim App R (S) 177 at 179.

13 *Griffiths v The Queen* (1977) 137 CLR 293 at 326.

14 (1998) 45 NSWLR 209 at 221–222.

15 (1984) 154 CLR 606 at 610–611.

16 Spigelman, above n 1, p 4.

Similarly, McHugh J said in *Everett v The Queen*:

“Uniformity of sentencing is a matter of great importance in maintaining confidence in the administration of justice in any jurisdiction. Sentences that are higher than usual create justifiable grievances in those who receive them. But inadequate sentences also give rise to a sense of injustice, not only in those who are the victims of the crimes in question but also in the general public. Inadequate sentences are also likely to undermine public confidence in the ability of the courts to play their part in deterring the commission of crimes.”¹⁷

The method used by the courts and Parliament to achieve consistency has been the subject of a continuing and rigorous debate over the last 50 years. This has occurred in all equivalent Commonwealth common law jurisdictions and the United States.¹⁸ At the core of the discussion is whether the common law sentencing discretion should be fettered, structured or simply replaced by mandatory penalties. It is accepted as a universal truth that sentencing outcomes must not merely depend on the identity of the sentencer — there must be reasonable consistency even in a discretionary system of sentencing. Gleeson CJ made this point eloquently in *Wong v The Queen*:

“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.”¹⁹

The *Judicial Officers Act 1986* (NSW) identifies sentencing consistency as a legislative objective.²⁰ Section 8 provides:

“8 Sentencing

- (1) The Commission may, for the purpose of assisting courts to achieve consistency in imposing sentences:
 - (a) monitor or assist in monitoring sentences imposed by courts, and

17 (1994) 181 CLR 295 at 306.

18 In the United States the debate has centered upon the US Sentencing Commission’s Federal Sentencing Guidelines. The US Supreme Court held in *United States v Booker* 543 US 220 that the Guidelines were advisory rather than mandatory. More recently in *Gall v United States* 552 U.S. (2007), Stevens J, delivering the opinion of the court, said at pp 11–12: “As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however.” The judge after hearing from the parties “... may not presume that the Guidelines range is reasonable ... and must make an individualized assessment based on the facts presented.”

Many of the academic articles on the subject can be found in C Tata and N Hutton, “What ‘Rules’ in Sentencing? Consistency and Disparity in the absence of ‘Rules’” (1998) 26(3) *International Journal of the Sociology of Law* 339.

19 (2001) 207 CLR 584 at [6].

20 *ibid* at [7].

- (b) disseminate information and reports on sentences imposed by courts.
- (2) Nothing in this section limits any discretion that a court has in determining a sentence.
- (3) In this section, *sentence* includes any order or decision of a court consequent on a conviction for an offence or a finding of guilt in respect of an offence.”

The object of s 8(1) is to achieve consistency of approach among sentencers. The use of the phrase in the section “consistency in imposing” has been interpreted to include the concept of consistency of approach to the sentencing task. As Lord Lane said in *R v Bibi*,²¹ achieving uniformity in outcome is an impossible aim. What is desired is rather consistency of approach on the part of individual sentencers. A legitimate area of divergence between results can be caused by the individual circumstances of a particular offender and offence. As the High Court expressed in *Markarian v The Queen*, with reference to authority:

“... there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with *consistency of approach* and as accords with the statutory regime that applies.”²² [Emphasis added.]

Consistency of approach has two aspects. The first was described by Street CJ as the consistent application of established sentencing principles:

“... 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.”²³

Mahoney JA further elaborated upon the role of principle 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. But, of course, principles are necessarily framed in general terms. General principles must, of their nature, be adjusted to the individual case if justice is to be achieved.”²⁴

Gleeson CJ has said while it is not unusual for people to find fault with some sentencing decisions, rarely are sentencing debates conducted with reference to sentencing principles which bind judges and magistrates and more particularly where the principles may be at fault.²⁵

21 above n 12, at 179.

22 (2005) 228 CLR 357 at 371.

23 *R v Rushby* [1977] 1 NSWLR 594 at 597.

24 (unrep, 12/12/96, NSWCCA).

25 M Gleeson, “A Core Value” (2007) 8 *TJR* 329.

The second aspect of consistency is achieved by providing ready access to sentencing results. As the Sentencing Commission for Scotland put it:

“... consistency in sentencing is also likely to be promoted if sentencers are aware of, or have ready access to, clear information of the sentences imposed by other sentencers in similar cases.”²⁶

The objective of consistency in imposing sentences in s 8 of the *Judicial Officers Act 1986* is assisted by making sentencing results readily available to judicial officers and the legal profession. The logic of this approach was explained by Gleeson CJ in *Wong v The Queen*:

“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.”²⁷

Gleeson CJ’s logic and reasoning in *Wong* reflected what Street CJ had said in the early 1980s in *R v Oliver*:

“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.”²⁸

The use of sentencing statistics to promote the object of consistency was acknowledged by the Australian Law Reform Commission (ALRC) in its 2006 report *Same Crime, Same Time*.²⁹ It recommended that a comprehensive national database be established for the sentences imposed on all federal offenders “[i]n order to promote consistency in ... sentencing”.³⁰ The ALRC recommended that the database “... should include information on the type and quantum of sentences imposed and the characteristics of the offence and the offender that have been taken into account in imposing the sentence.” The Commonwealth Sentencing database was launched by the Federal Minister for Home Affairs, the Honourable

26 Sentencing Commission for Scotland, *Report: The Scope to Improve Consistency in Sentencing* (2006), p 35, at <<http://www.scottishsentencingcommission.gov.uk/docs/consistency/Consistency%20Report%20-%20Final.pdf>>, accessed 8/5/08.

27 above n 19, at [7].

28 (1980) 7 A Crim R 174 at 177. See also *R v Visconti* [1982] 2 NSWLR 104 at 107.

29 Australian Law Reform Commission (ALRC), Report 103: *Same Crime, Same Time: Sentencing of Federal Offenders* (2006), Australian Government Publishing Services, Canberra.

30 *ibid* pp 48 and 531.

R Debus at the Sentencing 2008 conference held in Canberra in February. At the launch, the Minister said:

“... the NSW Judicial Commission database is of world class standard and has been invaluable in assisting judicial officers.

The National database builds on that experience and is designed to provide judicial officers with reliable, accessible and up-to-date information on penalties imposed for breaches of Commonwealth laws.

This will promote consistency of sentencing across the nation — which is fundamental to maintaining a just and equitable criminal justice system.

Inconsistency has the potential to erode public confidence.”³¹

2.3 Balancing individualised justice and consistency

In sentencing, as in other aspects of the criminal justice system, there is an expectation of individualised justice.³² This requires consideration of the individual circumstances of the offence and of the offender. Spigelman CJ said in *R v Whyte*:

“The maintenance of a broad sentencing discretion is essential to ensure that all of the wide variations of circumstances of the offence and the offender are taken into account. Sentences must be individualised.”³³

Mahoney JA had similarly stated 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: *Kable v Deputy Director of Public Prosecutions* (1995) 36 NSWLR 374 at 394.”³⁴

There is a tension, however, between the notion of individualised justice and the public interest in ensuring consistency in sentencing. Consideration of the individual circumstances of the offence and the offender might suggest a sentence different to that which consistency might suggest. In *R v Balfour Beatty Rail Infrastructure Services Ltd*, Lord Phillips CJ endorsed the trial judge’s statement of principle that “... consistency of fines between one case and another and proportionality between the fine and the gravity of the offence may be difficult to achieve”.³⁵

31 R Debus, “Sentencing Issues and the Launch of the Commonwealth Sentencing Database”, *Sentencing 2008 Conference*, 9 February 2008, National Judicial College of Australia, Canberra, paras [44]–[47], at <http://www.ministerhomeaffairs.gov.au/www/ministers/ministerdebus.nsf/Page/Speeches_2008_9February2008-SentencingConference2008>, accessed 8/5/08.

32 As to the trend in the law toward individualised justice, see M Gleeson, “Individualised justice — the holy grail” (1995) 69 *ALJ* 421.

33 (2002) 55 NSWLR 252 at [147].

34 (unrep, 12/12/96, NSWCCA).

35 [2007] 1 Cr App R(S) 65 at [11].

There have been calls, occasionally answered, for the broad judicial sentencing discretion to be confined, such as by mandatory penalties and sentencing grids. These obviously promote consistency, but at the expense of individualised justice.

A system which provides ready access to sentencing statistics to inform the sentencing discretion is unobtrusive compared to sentencing grids or mandatory penalties. Statistics are not prescriptive. Rather than fettering the sentencing discretion, statistics serve an educative function and inform it. Individualised justice is retained as an important feature of the sentencing process.

Statistics are neither intended nor capable of reducing the sentencing decision to a mathematical calculation or as Street CJ described it in *R v Oliver* as "... forcing sentencing into a straitjacket of computerisation".³⁶ Statistics offer sentencers general guidance. They are not intended to dominate the exercise or even to function as a starting point, as that term is used by the Canadian Supreme Court.³⁷ In *R v Way*, the Court of Criminal Appeal described statistics as one of the extrinsic aids a sentencer can use.³⁸ Rothman J recently described the role of statistics in the following terms:

"While a comparison with statistics is a legitimate and potentially useful exercise, it does not constrain the proper application of sentencing principles nor inhibit the flexibility that inheres in the sentencing process. The use of statistics promotes consistency in sentencing, but a sentencing judge is not constrained by those statistics."³⁹

In *R v Peters*, Judge LJ said that:

"Guidelines, whether resulting from cases decided in this Court, or produced by the Sentencing Guidelines Council, are guidelines: no more, no less. The purpose is to ensure consistency of approach among sentencers. It is critical to any informed understanding of the sentencing decision, however, that the precise circumstances of and in which each crime is committed are different from each other. Each victim is a different individual: so is each defendant. Unless a mandatory sentence is prescribed by statute, as it is for murder, the sentencing decision is not compartmentalised, nor capable of arithmetical calculation. Broad guidance will produce sentencing consistency, but precisely because the circumstances of the offence and the offender vary, and may vary widely, an individual sentencing decision appropriate for the unique circumstances of each case is required."⁴⁰

36 above n 28, at 177.

37 See *R v McDonnell* [1997] 1 SCR 948.

38 (2004) 60 NSWLR 168 at [122].

39 *Robertson v R* [2007] NSWCCA 270 at [37].

40 [2005] 2 Cr App R(S) 101 at [3].

2.4 Improving accessibility and transparency of sentencing decisions

The provision of sentencing statistics makes the law more accessible and transparent to the public. As the joint judgment in *Markarian v The Queen* remarked:

“The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public.”⁴¹

Statistics form a public record of sentencing patterns that the Parliament can monitor and sometimes use. For example, the Attorney General said when he introduced the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002⁴² that the figures in the table⁴³ to the Bill were set taking into account, amongst other things, the “... current sentencing trends for the offence as shown by sentencing statistics compiled by the Judicial Commission of New South Wales”.⁴⁴

Sentencing statistics provide the public with an overall pattern and allow a comparison of a particular sentence against the existing pattern.

Improving access to information and to justice is increasingly being recognised as important in environmental matters. The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters⁴⁵ is evidence of such recognition. The United Kingdom became a signatory in 1998 and the Convention came into force on 30 October 2001. The Environmental Justice Project was established to examine the extent to which the UK’s civil and criminal law systems satisfied the requirements of the Convention. The final report of the Environmental Justice Project was issued in March 2004. One of the aims was to see whether the data revealed any trends in relation to prosecution rates, conviction rates and penalties imposed by the courts so as to assess whether the remedies were “adequate” and “effective”, and that environmental issues received “fair” treatment in the criminal courts.⁴⁶

41 above n 22, at [39].

42 The provisions relating to standard non-parole periods commenced 1 February 2003.

43 Now s 54D of the *Crimes (Sentencing Procedure) Act* 1999.

44 The Honourable R Debus Attorney General (NSW), Second Reading Speech: “*Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill*”, Legislative Assembly, 23 October 2002, at <[http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/d2117e6bba4ab3ebca256e68000a0ae2/9ae8469165f3bef9ca256c5b001e5141/\\$FILE/A9002.pdf](http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/d2117e6bba4ab3ebca256e68000a0ae2/9ae8469165f3bef9ca256c5b001e5141/$FILE/A9002.pdf)>, accessed 8/5/08.

45 Aarhus Convention, “Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters”, 25 June 1998, at <<http://www.unece.org/env/pp/documents/cep43e.pdf>>, accessed 8/5/08.

46 Environmental Justice Project, *Report of the Environmental Justice Project*, March 2004, p 54, at <<http://www.wwf.org.uk/filelibrary/pdf/envirojustice.pdf>>, accessed 14/5/08. See also C Hutton, P Castle and M Day, “The environment and the law: does our legal system deliver access to justice? A review” (2004) 6 *Env L Rev* 240 at 252.

One of the problems encountered was a lack of centralised data on prosecution and sentencing for environmental offences. It was necessary to gather data from a considerable variety of different sources, including government departments, regulatory authorities and non-governmental organisations.⁴⁷ Other reviews of sentencing have encountered the same problem.

The UK Department for Environment, Food and Rural Affairs (Defra) commissioned an examination of current levels of sentencing for environmental offences in response to concerns over the inconsistency and low levels of fines and other penalties imposed for environmental offences. The 2003 report especially commented on the issue of unavailability and incompleteness of information in the public domain because of an absence of centralised data on environmental sentences.⁴⁸ The report recommended systematic collection and centralisation of data.⁴⁹

A later report by Defra in October 2006 found that one of the obstacles to effective enforcement in environmental regulation is that "... the available data on enforcement cannot tell us what is being achieved".⁵⁰ The Defra report noted:

"The existing data is insufficient to support discussion about whether enforcement action is consistent or penalties are adequate. Data on average fines provide no useful information about the adequacy or likely effect of current financial penalties as they do not reveal key aspects of sentencing, in particular seriousness and ability to pay. Nor is there data to show whether specific purposes of enforcement are being met. Improved data would assist in finding ways in which enforcement could be improved in the future."⁵¹

The report recommended possible solutions as including:

- "2 **Developing a transparent basis for sentencing** [including]
 - 2.2 Future data collection should reveal how well the purposes of enforcement were achieved.
- "4. **Ensuring a consistent approach** [including]
 - 4.2 Information gathered about penalties should explicitly cover the elements devoted to remediation, removal of economic gains or cost saving, restitution to communities and, for criminal action, moral blame.

47 Environmental Justice Project, *ibid* pp 54–55.

48 C Dupont C and P Zakkour, *Trends in Environmental Sentencing in England and Wales*, Defra, London, 2003, pp i, iii and 45. See also M Grekos, "Environmental fines — all small change?" (2004) *JPL* 1330 at 1330.

49 Dupont and Zakkour, *ibid* pp iii and 45.

50 Defra, *Review of Enforcement in Environmental Regulation, Report of Conclusions*, October 2006, para 2.3, p 3 and p 5, Obstacle 6, at <<http://www.defra.gov.uk/environment/enforcement/pdf/enforcereview-report.pdf>>, accessed 14/5/08.

51 *ibid* para 5.24, p 17. See also para 5.6, p 14.

- 4.3 There should be public registers of criminal sentences, administrative penalties, and stop and improvement notices covering all areas of environmental regulation. These would be available on the internet, and it should be possible to search the registers by offence, operator name, and nature of breach.”⁵²

The JIRS database of sentences for environmental offences imposed by the Land and Environment Court and other jurisdictions addresses these problems of the absence of centralised data on environmental sentences and of data by revealing key aspects of sentencing. Accessibility and transparency of sentencing decisions are also improved.

2.5 Indicating a range of sentences

Sentencing statistics may indicate a range for an offence but they do not determine *the* range or more accurately *the permissible* range for the case at hand. Eames JA remarked in *R v Bangard*⁵³ that “... for both appellate and trial judges ascertaining what constitutes the range remains a somewhat mysterious and often elusive process.”⁵⁴ Unless Parliament has prescribed a specific sentence, there is no single “correct” sentence. There is only a range of permissible sentences. This was accepted by the High Court in *Lowe v The Queen*,⁵⁵ *Pearce v The Queen*⁵⁶ and *Markarian v The Queen*.⁵⁷

The concepts *range of conduct* and a *range of permissible sentences*, should not be confused. In *R v AEM*,⁵⁸ the court accepted that the use of sentencing statistics is “one tool” which a court can employ to assist it in its task of ascertaining the pattern of sentences. There is a trap, however, of assuming the statistics represent *the* range. In *R v Lao*, Spigelman CJ said:

“What is an available ‘range’ is sometimes not accurately stated, when reference is made to Judicial Commission statistics. The statistics of the Judicial Commission do not show a range appropriate for a particular offence.

52 Defra, above n 50, p 6, Solutions 2 and 4, and see further paras 6.2.32–6.2.33, p 25 and para 6.2.40, p 27 on data collection for a transparent basis for sentencing and paras 6.4.4–6.4.6, pp 44–45 on a database for consistency of approach.

53 (2005) 13 VR 146 at 150.

54 See also *DPP v VH* (2004) 10 VR 234 at 239–242.

55 (1984) 154 CLR 606. Mason J said at 612:

“The reference to an appropriate sentence is apt to be misunderstood. Generally speaking, a sentence within a limited range of years is appropriate to the circumstances in which the offence was committed and to the character, antecedents and conditions of the offender. As the ascertainment and imposition of an appropriate sentence involve the exercise of judicial discretion based on an assessment of various factors it is not possible to say that a sentence of a particular duration is the only correct or appropriate penalty to the exclusion of any other penalty.”

56 (1998) 194 CLR 610 at [46].

57 above n 22, at [27].

58 [2002] NSWCCA 58 at [110].

This court is concerned to determine the appropriate range for the particular offence. The Judicial Commission statistics do not indicate that range. They reflect what was regarded as appropriate in the wide variety of circumstances in the cases reported in those statistics.

Those statistics will be available to be aggregated by certain categories, such as, in this case, the age of the offender. However, that capacity reflects only some of the wide variety of relevant considerations that must be taken into account.”⁵⁹

Spigelman CJ elaborated on the topic in *R v Hoerler*:

“Prior cases and Judicial Commission statistics do not often determine a range appropriate for a particular offence. They reflect what was regarded as appropriate in the wide variety of circumstances of those particular prior cases. Whether or not a sentencing pattern can be said to have emerged requires consideration of the whole body of sentences. It is unlikely that any such pattern can be said to have been established unless there have been a significant number of cases covering a wide variety of objective circumstances. Unless that is so, the cases would not encompass the relevant range of objective criminality.”⁶⁰

Spigelman CJ summarised the position in a recent speech on the issue of consistency in sentencing:

“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.”⁶¹

In other decisions, the Court of Criminal Appeal has stressed that sentencing statistics do not define or set the upper limit of the range for a crime. In *R v Le*,⁶² Heydon JA (as he then was) cited with approval the two-judge-bench decisions of *R v Hofer*⁶³ and *R v Hayes*.⁶⁴ In the latter case, Grove J said:

“The upper limit of sentence is in fact the maximum set by parliament. If the upper limit of the statistical range is treated as reserved for the worst case or the worst offenders then persistent selection of sentences for others

59 [2003] NSWCCA 315 at [32]–[34]. Part of the passage was quoted again in *R v Achurch* [2004] NSWCCA 180 at [39].

60 (2004) 147 A Crim R 520 at [35].

61 Spigelman, above n 1, p 10.

62 (2002) 130 A Crim R 44 at [121].

63 [2001] NSWCCA 544.

64 [2001] NSWCCA 410.

within that range will inevitably reduce the upper figure. This is not a matter of jurisprudence but a matter of arithmetic.”⁶⁵

In *R v AEM*, the court said it was not a court’s function “... to sentence at the median range of sentences handed down over a period of time.”⁶⁶ Rather, as Sully J had noted in *R v Shorten*:

“... the advent of the computer and of computerised statistics does not remove the need for sentencing Courts, primary or appellate, to look with discriminating care at the particular circumstances, objective and subjective, particular to each individual case.”⁶⁷

In *R v Derbas*,⁶⁸ Hulme J (Bell and Shaw JJ agreeing) said that sometimes statistics may have a detrimental effect on the establishment of a range:

“[Statistics] tend to be self perpetuating in that as soon as the first few cases suggest a particular figure or range, other judges are urged and there is a tendency to follow that figure or range. If that early figure or range is wrong, the fact that it is later often followed does not make it right.”⁶⁹

Hulme J added that “... for this Court to simply follow patterns of sentencing in the District Court is, as has been submitted in the past, ‘to allow the tail to wag the dog’.”⁷⁰

However, any discussion about the use of ranges cannot be pressed too far. Even where there is an established range, it does not bind sentencers in any formal sense. Hunt CJ at CL pointed out in *R v Lawson* that:

“Where this Court refers to a range of sentences which have been imposed for a particular offence, it is doing no more than recording, as an historical fact, that that is the general pattern of sentencing at that particular time, so that sentencing judges will have regard to that general pattern when imposing sentences in the particular case.”⁷¹

The passage was cited with approval by Gleeson CJ in *Wong v The Queen*.⁷² However, a failure to take into account as a material consideration the existing pattern of sentencing may qualify as an error within the terms of *House v The King*.⁷³ Spigelman CJ said in *R v Whyte*:

“... a failure to take into account a material consideration is identified as error in *House v The King*. The obligation to take into account an existing pattern

65 *ibid* at [15].

66 *ibid* n 58, at [116].

67 (unrep, 10/9/97, NSWCCA).

68 [2003] NSWCCA 44.

69 *ibid* at [33].

70 *ibid*.

71 (1997) 142 FLR 323 at 324.

72 *ibid* n 19, at [19].

73 (1936) 55 CLR 499.

of sentencing reflects the principle of equality which requires consistency in outcomes, so that like cases are in fact treated alike and can be seen to have been so treated.”⁷⁴

2.6 Assisting appellate review

Statistics assist appeal courts to discharge their supervisory function. In *Griffiths v The Queen*,⁷⁵ Barwick CJ referred to the Court of Criminal Appeal’s “function” of “... lay[ing] down principles for the governance and guidance of courts having the duty of sentencing convicted persons.”

Jacobs J said, in the same case:

“It is the task of a court of criminal appeal to minimize disparities of sentencing standards yet still recognize that perfect uniformity cannot be attained and that a fair margin of discretion must be left to the sentencing judge.”⁷⁶

Sections 5AA and 5D(1A) of the *Criminal Appeal Act 1912 (NSW)* make provision for appeals against sentence in Class 5 matters dealt with in the Land and Environment Court. It is well established that the Court of Criminal Appeal may not substitute its own opinion for that of the sentencing judge merely because it would have exercised the discretion differently.⁷⁷ Error of the kind described by the High Court in *House v The King*⁷⁸ must be established.⁷⁹ The mere demonstration of a legal error by the sentencing judge does not automatically force the court to resentence; the error needs to be a material error.⁸⁰ In a Crown appeal, the sentence must also be manifestly inadequate.⁸¹

In *R v Maguire*,⁸² the Court of Criminal Appeal said statistics could assist the day-to-day function of appeal courts responsible for determining whether a sentence is manifestly excessive in a severity appeal and manifestly inadequate in a Crown

74 (2002) 55 NSWLR 252 at 280.

75 (1977) 137 CLR 293 at 310.

76 *ibid* at 326.

77 *Lowndes v The Queen* (1999) 195 CLR 665 at [15].

78 *above* n 73.

79 *Markarian v The Queen*, *above* n 22, at 370. The joint judgment described the inquiry on an appeal against sentence in these terms:

“Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender’s appeal, as ‘manifest excess’, or in a prosecution appeal, as ‘manifest inadequacy’.”

See also *Dinsdale v The Queen* (2000) 202 CLR 321 at 324 and *Baxter v R* (2007) 173 A Crim R 284 at [14].

80 *Baxter v R*, *ibid* at [83]–[85].

81 *R v Janceski* (No 2) (2005) 44 MVR 328 at 334 and *R v AA* [2006] NSWCCA 55 at [29].

82 (unrep, 30/8/95, NSWCCA).

appeal. This view was reiterated by Spigelman CJ in *R v Bloomfield*.⁸³ Similarly, in Victoria the utility of statistics in providing guidance for appeal courts was accepted by Winneke P in *R v Giordano*:

“However, a general overview of the sentences imposed by courts over a substantial period for offences of a similar character must inevitably play its part in provoking the instinctive reaction of any court which is asked to consider whether a particular sentence is manifestly excessive or manifestly inadequate.”⁸⁴

Buchanan JA said in *R v Bangard*:

“Sentencing statistics may be of limited value, for each sentence involves a unique synthesis of diverse factors stemming from the circumstances of the crime and the character and antecedents of the offender. Nevertheless, statistics may provide guidance by showing general trends in sentencing.”⁸⁵

Buchanan JA then quoted Winneke P in *R v Giordano* with approval and added:

“His Honour was speaking of appellate courts, but in my view sentencing statistics may equally benefit judges imposing sentences at first instance.”⁸⁶

In the same case, Eames JA said he found a list of 93 manslaughter cases “... a very useful overview”⁸⁷ and later:

“Relevant and accurate sentencing information is much more readily available today than was the case in years past. In my opinion, the exercise of the sentencing discretion may be intuitive, but it neither is, nor should be, uninformed.”⁸⁸

Suffice to state that in New South Wales JIRS statistics are routinely relied upon by parties to proceedings at first instance and in the Court of Criminal Appeal.⁸⁹

2.7 Registering appellate disapproval of sentencing patterns

A reliable record of sentences passed enables an appeal court to monitor lower courts and sometimes express disapproval of sentencing practices. There are numerous examples of the Court of Criminal Appeal registering its disapproval of sentencing patterns using Judicial Commission statistics. In *R v Henry*, Spigelman CJ used the statistics to conclude that the sentencing practices in the District Court for armed robbery “... strongly suggest both inconsistency in sentencing practice and systematic excessive leniency in the level of sentences”.⁹⁰

83 above n 4, at 739.

84 [1998] 1 VR 544 at 549.

85 (2005) 13 VR 146 at [11].

86 *ibid* at [11].

87 above n 85, at [30].

88 *ibid* at [29].

89 A recent example is *R v SC* [2008] NSWCCA 29 at [35] where the statistics were used to ascertain sentencing patterns for importing the trafficable quantity of cocaine.

90 (1999) 46 NSWLR 346 at 371.

Other examples include *R v Aristodemou*,⁹¹ (false swearing under the *Independent Commission Against Corruption Act 1988*); *Ghazi v R*,⁹² (malicious wounding with intent to inflict grievous bodily harm under s 33 of the *Crimes Act 1900*); *Maxwell v R*,⁹³ (break and enter offences under s 112(2) of the *Crimes Act*);⁹⁴ and *R v McMillan*,⁹⁵ (aggravated dangerous driving causing grievous bodily harm under s 52A(4) of the *Crimes Act*). Hulme J has remarked more than once (not always with support) that the sentencing statistics for supply of a prohibited drug reveal systemic leniency of sentencing.⁹⁶ In one of those cases, *R v Georgiou*,⁹⁷ Santow JA and Hidden J wanted fuller argument before concluding that the statistics for supply *by themselves* “strongly suggest” undue leniency.⁹⁸ Hidden J said:

“To draw such an inference from the bare figures, it seems to me, is itself bedevilled by the limitations on the use of the statistics identified in cases such as *Bloomfield* and *AEM*, to which [Hulme J] has referred.”⁹⁹

The Land and Environment Court has an important appellate function in setting and maintaining sentencing practices for environmental crime for the Local Court of New South Wales. The provision of reliable sentencing statistics enables this kind of review in New South Wales. In *Bentley v BGP Properties Pty Ltd*,¹⁰⁰ Preston CJ recorded the debate that has occurred in England and Wales about the lenient and inconsistent sentencing practices of magistrates. Numerous studies have shown that the level of sentences given in courts, principally magistrates’ courts, for environmental offences was too low for them to be effective either as punishment

91 (unrep, 30/6/94, NSWCCA). The sentences were described as being “inadequate to a point verging on irresponsibility”. See also Commentary at (1994) 1(9) *Crim LN* [256].

92 [2006] NSWCCA 320. At [2], Howie J said the statistics “tend to suggest that insufficient regard is being given to the seriousness of the offence and the statutory maximum penalty.” Rothman J said (at [48]) in the same case: “[it] seems that the courts have been lenient in sentencing for a particularly violent offence”.

93 [2007] NSWCCA 304.

94 At [30], Howie J said JIRS statistics suggest sentences being imposed for s 112(2) break and enter offences do not fully take into account either the maximum penalty or the standard non-parole period.

95 [2005] NSWCCA 28. At [51], Howie J said the sentencing statistics suggest that insufficient regard has been paid to the seriousness of the driving as reflected in the matters of aggravation and the increased penalties that the aggravated form of the offence attracts. The decision was quoted with approval by Hall J in *Elyard v R* [2006] NSWCCA 43 at [110].

96 *R v Sciberras* (2006) 165 A Crim R 532 at [56]; *R v Amurao* [2005] NSWCCA 32 at [52]; *R v Georgiou* [2005] NSWCCA 237; *R v Soo* [2005] NSWCCA 161 at [17].

97 [2005] NSWCCA 237.

98 *ibid* at [2].

99 *ibid* at [63].

100 (2006) 145 LGERA 234 at [150]–[155].

or as a deterrent.¹⁰¹ Concern has been expressed about the lack of guidance issued to the courts on appropriate sentencing levels.¹⁰² There have been calls for appellate courts to provide guidance, including by tariff guidelines, in sentencing for environmental offences.¹⁰³ Appellate courts in the UK, however, have so far declined to suggest tariff guidelines for environmental offences, although they have provided focal points for exercising sentencing discretion.¹⁰⁴ There have also been calls for courts to take account of the full range of sentencing options available.¹⁰⁵

The problems experienced in England and Wales may be addressed in New South Wales by the availability of a centralised database of sentences for environmental offences. Such a database facilitates appellate review of sentencing practices, identification of systemic or persistent sentencing leniency or excessiveness, and setting and maintaining sentencing standards. Principled sentencing is encouraged by the provision of information on sentences for each particular environmental offence, including the objective and subjective characteristics of the offence and of the offender, and the sentencing options considered and employed, and by the ability to access the sentencing remarks for the sentences. These facilities are especially useful for judicial officers of general criminal courts with no particular training or expertise in environmental law, who might only hear an environmental case occasionally.¹⁰⁶

101 See Dupont and Zakkour, above n 48, pp ii, 43–44; and the Environmental Justice Project, above n 46, pp 80–81; Hutton, Castle and Day, above n 46, p 264; House of Commons Environmental Audit Committee, *Environmental crime and the courts*, 2004, The Stationery Office Ltd, London at [15]; N Parpworth, K Thompson and B Jones, “Environmental offences: utilising civil penalties” [2005] *JPL* 560 at 576; M Watson, “Environmental offences: the reality of environmental crime” (2005) 7(3) *J Env L Rev* 190 at 199; M Grekos, “Review of civil and administrative penalties for environmental offences: background and development update paper”, [2008] *JPL* 463 at pp 463, 464, 470, 471.

102 P de Prez, “Excuses, excuses: the ritual trivialisation of environmental prosecutions” (2000) 12 *J Env Law* 65 at 75.

103 Sentencing Advisory Panel (UK), *Environmental offences: the panel advice to the Court of Appeal* (2000), p 2, at <<http://www.sentencing-guidelines.gov.uk/docs/environment.pdf>>, accessed 14/5/08; R Navarro and D Stott, “A brief comment: sanctions for pollution” (2002) 14 *J Env Law* 299 at 299; Environmental Justice Project, above n 46, pp 14, 15 and 82; Grekos, n 48, p 1333; R Carnworth, “Judicial protection of the environment: at home and abroad” (2004) 16 *J Env Law* 315 at 320.

104 *R v Milford Haven Port Authority* [2000] 2 Cr App R(S) 423 at 429; *R v Anglian Water Services Ltd* [2004] 1 Cr App R(S) 62 at [27].

105 Dupont and Zakkour, above n 48, p iii; Environmental Justice Project, above n 46, pp 15 and 85; Hatton, Castle and Day, above n 46, p 264.

106 These problems have been experienced in the UK: see Grekos, above n 48, pp 1332–1333 and 1335.

The Judicial Information Research System

3.1 History and development

The Judicial Information Research System was originally known as the Sentencing Information System (SIS). It is now a matter of history that the Judicial Commission itself was established partly because the Vinson Report claimed that there was systemic disparity in sentences for drug cases in the District Court.¹⁰⁷ The concept of a computerised sentencing information system originally came from Canada.¹⁰⁸ It is not necessary to set out an exhaustive history of what was originally known as the Sentencing Information System as this has already been done by others.¹⁰⁹ Gleeson CJ recently described the genesis of SIS extra-judicially in the following terms:

“Unpredictability of judicial decision-making is demoralising. People resent insecurity. Consider an area in which there is a great deal of public commentary on the work of judges: sentencing. The Judicial Commission of New South Wales was established in the 1980s, not because of complaints about leniency in sentencing, but because of complaints about inconsistency. The first task of the Judicial Commission was to establish a Sentencing Information System, designed to reduce inconsistency. Episodic complaints about undue leniency, or severity, sometimes based on misunderstandings and misrepresentations, are fairly easy to answer. What would be more worrying would be complaints of widespread inconsistency.”¹¹⁰

During the development phase of the Sentencing Information System in 1988, the Judicial Commission conducted a survey of judicial officers about sentencing information which revealed the following results: 74 per cent of judges and 83 per cent of magistrates thought it was “always useful” or “often useful” to have information on the frequency with which dispositions have been used for similar

107 N Bolzan, M Carroll, G Cooney, A King and T Vinson, “Accountability and the legal system: drug cases terminating in the District Court 1980–82”, Report to the Criminology Research Council, released 8/9/86. For a brief history of the Judicial Commission, see K Lumley, “From controversy to credibility: 20 years of the Judicial Commission of NSW” (2007) 19 *Judicial Officers’ Bulletin* 73.

108 The Canadian concept is described in A Doob and N Park “Computerised sentencing information for judges: an aid to the sentencing process” (1987) 30 *Criminal Law Quarterly* 54–72.

109 For articles about New South Wales, see J Chan, “A computerised sentencing information system for New South Wales Courts” (1991) 7 *Computer Law and Practice* 137 and I Potas, D Ash, M Sagi, S Cumines and N Marsic, “Informing the discretion: The Sentencing Information System of the Judicial Commission of New South Wales”, (1998) 6(2) *International Journal of Law and Information Technology* 99.

110 Gleeson, above n 25, p 4.

offenders in the past, and 84 per cent of judges and 81 per cent of magistrates responded it was “always useful” or “often useful” to have information on the range of prison sentences for a particular offence.¹¹¹ After two years of development, the Judicial Commission commenced a trial phase at two District Court locations.¹¹² The statistics were only one component of the Sentencing Information System. The system initially comprised Penalty Statistics and a Sentencing Law component.¹¹³ The Sentencing Appeals Database, Facilities Database and Sentencing Date Calculator were developed later. The SIS was switched on in September and launched in October 1990. At the launch, Gleeson CJ said:

“The [*Judicial Officers*] Act called forth the system as an aid to uniformity in sentencing. That is a worthwhile aspiration, but it may owe its origin to some political debate which has now largely passed by. My own view is that the principal benefit of the system will be as a resource available to judicial officers and as an aid to efficient and accurate decision making.”¹¹⁴

During the first decade, the SIS went through a number of changes. It was re-engineered and enhanced by a multidisciplinary project team over a nine-month period in 1995.¹¹⁵ A primary focus was to make JIRS more accessible remotely and, as Potas et al wrote, “... to provide an extensive interrelated and hypertext linked intranet sentencing resource made up of discrete modules of reference materials”.¹¹⁶ The current modules or components on JIRS are described below. It was at that time the title Judicial Information Research System, “JIRS”, was first coined.

3.2 Explanation of the current content of JIRS

Again, for present purposes, it is only necessary to describe briefly what constitutes JIRS. It is important to emphasise that sentencing statistics are only one component of JIRS. The statistics together with the other components listed below form a package of information intended to assist the courts in achieving consistency of approach to sentencing. JIRS currently comprises the following information:

(a) sentencing information:

- Principles and Practice (includes the *Sentencing Bench Book* also found on the Commission internet site)
- Court of Criminal Appeal judgments (1989 to present in HTML form and 1940–1990 in PDF form)

111 E Schmatt and J Chan “Sentencing Information System Progress Report” (1989) 1(12) *Judicial Officers’ Bulletin* 1 at 2.

112 I Potas, “The SIS is Switched On” (1990) 2(12) *Judicial Officers’ Bulletin* 1.

113 *ibid* p 1.

114 M Gleeson, “Launch of the SIS” (1990) 2(13) *Judicial Officers’ Bulletin* 1.

115 E Schmatt, “Judicial Information Research System (JIRS): A new and integrated approach to the provision of electronic information services for the judiciary” (1996) 8(7) *Judicial Officers’ Bulletin* 49.

116 Potas et al, above n 109, at 104.

- Court of Criminal Appeal summaries (1989 to present)
 - standard non-parole period sentencing appeals
 - guideline judgments (promulgated by the Court of Criminal Appeal)
 - statistics (see further detail below)
 - Advance Notes (Office of Director of Public Prosecutions (NSW) publication comprising summaries of appeal cases)
 - date calculator (for sentences)
 - services directory (contact numbers for the administrators of sentencing options and other programs directed at rehabilitation)
- (b) recent law (this component consists of items which briefly summarise recently enacted criminal legislation, case law, and other sentencing developments)
- (c) judgments from the High Court of Australia, NSW Court of Appeal, NSW Supreme Court
- (d) legislation (New South Wales and Commonwealth)
- (e) bench books (including the *Sentencing Bench Book*, *Criminal Trial Courts Bench Book*, *Sexual Assault Handbook*, *Local Courts Bench Book*, *Equality before the Law Bench Book* and the *Civil Trial Courts Bench Book*)
- (f) Evidence (DPP publication)
- (g) Land and Environment Court of New South Wales (see below)
- (h) Industrial Relations Commission of New South Wales
- (i) publications (including the *Judicial Officers' Bulletin*, Research Monographs and *Sentencing Trends* publications)
- (j) conferences (Judicial Commission conference dates and other conferences of interest)
- (k) Lawcodes (Lawcodes database contains information on common codes to describe offences in New South Wales).

The Land and Environment Court webpage on JIRS contains:

- (a) judgments for the jurisdiction for the period 1998 to present
- (b) NSW legislation relevant to the Land and Environment Court
- (c) *Land and Environment Court Bench Book*¹¹⁷ and
- (d) sentencing statistics for environmental offences in the Land and Environment Court, District Court, Local Court and Children's Court.

Data for the sentencing outcomes for the different jurisdictions are captured differently depending on the jurisdiction. Data for sentences in the Land and Environment Court have been analysed and captured at a high degree of specificity, including each offence and offender, the sentencing considerations relating to the offence and the offender, and sentencing options imposed (as elaborated in section 4 below). Data for sentences by the inferior courts have not been able to be analysed and captured at this level of detail.

¹¹⁷ The *Land and Environment Court Bench Book* is currently out of date.

Sentencing statistics for environmental offences dealt with by the Land and Environment Court

4

4.1 Development of the system for environmental offences

Sentencing statistics for offences dealt with in the Land and Environment Court of NSW have been a notable omission from the JIRS sentencing database. The project to develop a sentencing database for environmental offences for the Land and Environment Court was initiated by the Chief Judge of the Land and Environment Court, Justice Brian Preston, along with staff of the Judicial Commission of NSW.

With the co-operation of the Judicial Commission, the court was able to access the Commission's rich corporate history in this area. The Director of Information Systems, Mr Murali Sagi PSM, was a vital player in the process, liaising with the court about what should be included in the database and how it should work. This consultation process was designed to ensure that the system has real relevance for courts sentencing for environmental offences, including which data relating to specific variables should be collected.¹¹⁸

Although the Commission has specialised knowledge about sentencing input, it still needed information from the Court itself about the objective and subjective features peculiar to sentencing for environmental offences.¹¹⁹ These sentencing variables were ultimately reduced to 17 objective and subjective characteristics. The inclusion of these characteristics is unique to this database. All of the other JIRS databases include the more traditional objective characteristics but very few subjective characteristics such as some aggravating and mitigating factors listed under s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

The environmental sentencing database will provide a useful resource to judges to assist them in determining penalties for environmental offences. It will assist other jurisdictions and magistrates within Australia and overseas in determining how offenders are being sentenced for varying environmental offences, and perhaps serve as a comparison and model.

118 The Council of Europe recommended the regular collection and publication of statistics on sentencing. In order to assist sentencers, it recommended that "effort must be devoted to ensuring a high standard of clarity in communication, and a high standard of relevance in what is communicated ... Account must be taken of the wide range of factors which are relevant to sentencing decisions ...": Council of Europe, "Consistency in sentencing: recommendations to member States and explanatory memorandum" (1993) 4(2) *Criminal Law Forum* 355 at 391.

119 For a comprehensive description of objective characteristics of the offence and subjective characteristics of the offender, relevant to environmental offences, see BJ Preston, "Principled sentencing for environmental offences — Part 2: Sentences considerations and options" (2007) 31 *Crim LJ* 142, and, for a summary, BJ Preston, "Sentencing for environmental crime" (2006) 18(6) *Judicial Officers' Bulletin* 41.

4.2 The process to create the sentencing database — an explanation of how the data was collected and interpreted

Appendix “A” entitled “Explaining the JIRS Land and Environment Court statistics” sets out what can loosely be described as the principal rules applied to the cases. Before collecting any data, a decision needed to be made as to what information would be collected from cases. It was determined that the relevant information to include would be the case name, its medium neutral citation and matter number and the class of jurisdiction; the principal offence and any other offences; the penalty type; and the variable characteristics of the offence and offender. Some of these types of information need explanation.

Offences

Data was collected on the statutory provision constituting the offence or where more than one offence, the principal offence and whether there was one or multiple counts. These can be relevant to whether the totality principle was applied in sentencing.

Penalty types

The penalty types to be extracted from the data mostly fall under the *Crimes (Sentencing Procedure) Act* 1999. However, the Land and Environment Court has the power to make additional orders not included in the *Crimes (Sentencing Procedure) Act*, under the *Protection of the Environment Operations Act* 1997 (NSW) (POEOA) and the *Environmental Planning and Assessment Act* 1979 (NSW) (EPAA). Fines as a penalty type fall under each environmental statute or regulation that applies and the maximum penalty is generally set by the statute or regulation that makes the act or omission an offence. Apart from full-time imprisonment and alternatives to full-time imprisonment (suspended sentences, periodic detention and home detention), the penalties that fall under the *Crimes (Sentencing Procedure) Act* include:

- **s 10 dismissal**
A s 10 dismissal, if granted, entails that a court may choose not to proceed to conviction of an offender but instead issue an order directing the charge to be dismissed. The court will consider a number of factors when deciding whether to apply a s 10 dismissal such as the person’s character, the trivial nature of the offence and any extenuating circumstances.
- **s 10 bond**
Further to the above, the court may choose to dismiss the charge on the condition that the offender enter into a good behaviour bond for a period not exceeding 2 years.
- **s 10A conviction with no other penalty**
A court that convicts an offender may dispose of the proceedings without imposing any other penalty.

- **s 9 bond**
The court may also impose a good behaviour bond in place of imprisonment for a specified term not exceeding 5 years. This is after a conviction has been recorded.
- **s 9 bond with supervision**
Under s 95 of the Act, certain conditions may be imposed on the good behaviour bond such as performing community work or payment of a fine or of compensation. If the offender fails to comply with the conditions, the bond is breached and the court may decide to revoke the bond or vary its conditions.
- **s 8 community service orders**
The court may also impose a community service order in place of imprisonment, directing the offender to perform up to 500 hours of community service work.
- **Fine**
Ordinarily a fine is a monetary penalty but may take different forms (see s 4(1) of the *Fines Act* 1996).

The court may impose a fine along with additional orders or additional orders in place of a fine under ss 245–250 of the POEOA and under s 126(3) of the EPAA.

The additional orders include:

- orders for restoration and prevention¹²⁰
- orders for payment of costs, expenses and compensation¹²¹
- orders to pay investigation costs¹²²
- monetary benefit orders¹²³
- publication orders¹²⁴
- environmental service orders¹²⁵
- environmental audit orders¹²⁶
- payment into an environmental trust¹²⁷
- order to attend a training course¹²⁸
- order to establish a training course¹²⁹
- order to provide financial assurance.¹³⁰

120 s 245 POEOA and s 126(3) EPAA.

121 ss 246–247 POEOA.

122 s 248(1) POEOA.

123 s 249 POEOA.

124 ss 250(1)(a)–(b) POEOA.

125 s 250(1)(c) POEOA.

126 s 250(1)(d) POEOA.

127 s 250(1)(e) POEOA.

128 s 250(1)(f) POEOA.

129 s 250(1)(g) POEOA.

130 s 250(1)(h) POEOA.

Variables — objective and subjective characteristics

The variable characteristics that are included in the database are based on traditional sentencing objective and subjective characteristics, supplemented by s 241 of the POEOA along with other principles regarding aggravating or mitigating factors. These were specifically chosen to match the sentencing considerations for environmental offences in the Land and Environment Court.¹³¹

It was determined that the database would capture cases starting from 1 January 1998. This was date chosen because the POEOA — the central Act in this area — was assented to in late 1997. It was also felt that including cases using the repealed legislation would be of reduced assistance as the statutory offences were different and the maximum penalties were significantly less. As the database applies to criminal matters at the first instance, the collection of the cases was restricted to matters in Class 5 of the court's jurisdiction (its criminal jurisdiction). The parties that have the power to initiate prosecutions in the Land and Environment Court include the Environment Protection Authority of NSW (EPA), officers of the Department of Environment and Climate Change of NSW (DECC), officers of the National Parks and Wildlife Service (NPWS) and local councils.

The Judicial Commission designed software for the collection of the data. The court identified the names of the cases. The Commission had possession of the first instance sentencing remarks of the court for Class 5 criminal matters. Sentencing decisions of the court from 1998 until the present time were analysed to extract the required information on penalty types and variable characteristics. This information was entered by the Judicial Commission. An audit was made of a statistically significant sample of cases by staff of the Judicial Commission to verify the analysis and entry of data. After the database is officially running, the court will manage the database and members of the court will enter the information as judgments are handed down. The information will continue to be audited and carefully checked by the staff of the Judicial Commission.

The following sentencing variables were collected relating to the objective and subjective characteristics of the offence and offender:

Objective characteristics

The objective characteristics relate to the objective seriousness or gravity of the offence that has been committed.

Financial reasons

- financial advantage
- no financial advantage

¹³¹ See Preston (2007), above n 119, at 142–157.

Foreseeability of harm to the environment

- foreseeable harm to the environment
- no foreseeable harm to the environment

Practicable measures

- practicable measures
- no practicable measures

Control over causes

- control
- no control

State of mind

- intentional
- negligence
- accidental

Environmental harm

- no environmental harm
- low environmental harm
- medium environmental harm
- serious environmental harm

Complying with supervisor's order

- complying order
- no complying order

Maximum penalty

- primary and additional penalties expressed in dollars
- fine imposed expressed as a percentage of maximum monetary penalty

Objective seriousness

- low objective seriousness
- medium objective seriousness
- high objective seriousness

The objective seriousness encompasses all of the other objective characteristics.

Subjective characteristics

The subjective characteristics relate to the particular offender.

Prior record

- no prior record
- prior record

Co-operation

- no co-operation
- co-operation

Contrition and remorse

- no contrition
- contrition

Prior good character

- yes
- no

Costs awarded

- costs not awarded
- costs awarded

Plea

- not guilty plea
- early plea
- not early plea
- late plea
- other factors affecting utility of guilty plea

Means to pay fines

- capacity to pay fines
- no capacity to pay fines

Totality principle (where multiple offences and/or counts)

- applied
- not applied

All the data relating to these variables have been captured and entered in the database. All will be able to be displayed for users, except for the data relating to maximum penalty as these are available from the statute creating the offence.

4.3 Accessing the statistics — an example

The statistics component for Land and Environment Court sentences operates in the same way as the other jurisdictions, only much more information about the individual case is available, making it more useful. The user is able to look at what the judge considered in each case, rather than just relying on the more traditional objective characteristics.

Using JIRS, the user first selects the “L & E Court” jurisdiction located on the left-hand tool bar. A new screen will appear (“Land and Environment Court”) and the user should select “Land and Environment Court” under the heading “Sentencing statistics for environmental offences”. A list of statutes and regulations will then appear in alphabetical order, grouped under headings for corporations and individuals. The statutes and regulations are currently as follows:

- *Clean Air Act 1961*
- *Clean Air (Motor Vehicles and Motor Vehicle Fuels) Regulation 1997*
- *Clean Waters Act 1970*
- *Crimes Act 1900*
- *Environmental Offences and Penalties Act 1989*
- *Environmental Planning and Assessment Act 1979*
- *Exhibited Animals Protection Regulation 2005*
- *Marine Pollution Act 1987*
- *National Parks and Wildlife Act 1974*
- *Native Vegetation Conservation Act 1997*
- *Pesticides Act 1978*
- *Pesticides Act 1999*
- *Pollution Control Act 1970*
- *Protection of the Environment Operations Act 1997*
- *Protection of the Environment Operations (Noise Control) Regulation 2000*
- *Road and Rail Transport (Dangerous Goods) Act 1997*
- *Waste Minimisation and Management Act 1995*

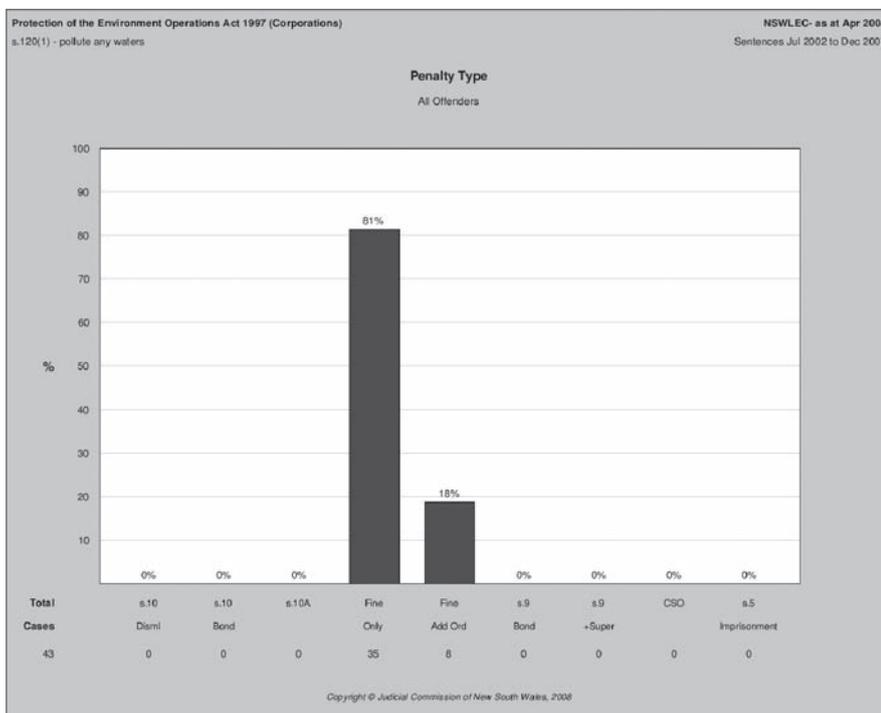
The data separates individual offenders and corporate offenders where necessary. This ensures that the user differentiates between the two. The separation reflects that, under certain statutes and regulations, a different maximum penalty is imposed on corporations compared to individuals. For example, the maximum penalty for water pollution offences against s 120(1) of the POEOA is fixed by s 123 to be \$250,000 with a further daily penalty of \$60,000 for an individual, compared to \$1,000,000 and a further daily penalty of \$120,000 for corporations. Further, by separating corporate and individual offenders this will prevent the output from the data, such as the range or average of fines imposed for an offence, being artificially skewed.

When the user clicks on the relevant Act, under the relevant type of offender (corporation or individual), a list of offence sections appears. If the user, for example, clicks on the *Protection of the Environment Operations Act 1997 (Corporations)*, the list below appears.

- 48(2) Occupier of premises with scheduled activity not holding licence
- 64(1) Contravene any condition of licence relating to noise.
Contravene any condition of licence – not noise
- 97 Fail to comply with prevention notice
- 116(2)(a) Person in possession of substance harming environment
- 120(1) Pollute any waters
- 120(2) Cause waters to be polluted
- 129(3) Contravene section by emission of odours
- 143(1)(a) Transport waste to unlawful waste facility
- 143(1)(b) Owner of waste transported to unlawful waste facility

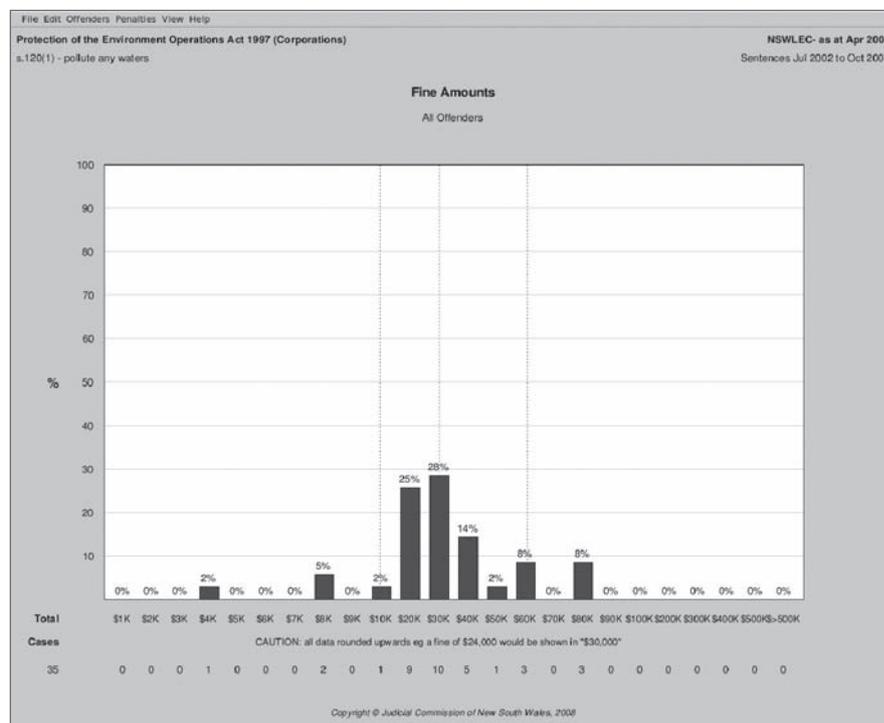
The user then selects the relevant offence section number. For example, if the user selected s 120(1) Pollute any waters, a graph listing all the penalty types and their frequency would appear. As at April 2008, the graph is as follows:

Figure 1. s 120(1) Pollute any waters graph



The penalty itself can be further examined. If the user selects “Penalties” on the top toolbar, a menu box will appear asking if the user wishes to switch to the fine amounts. If the user selects “Fine Amounts”, this will transfer them to a new graph displaying the specified fine amounts and their frequency, along with the total number of cases where a fine was imposed as a penalty. The user can also select to display the midpoint and 80% range of fines by going to “View” along the top toolbar and selecting “Midpoint” and/or “80% Range”. This information may assist the user in determining what was the most common fine amount imposed for an offence. As at April 2008, the graph for the example given is as follows:

Figure 2. Penalties

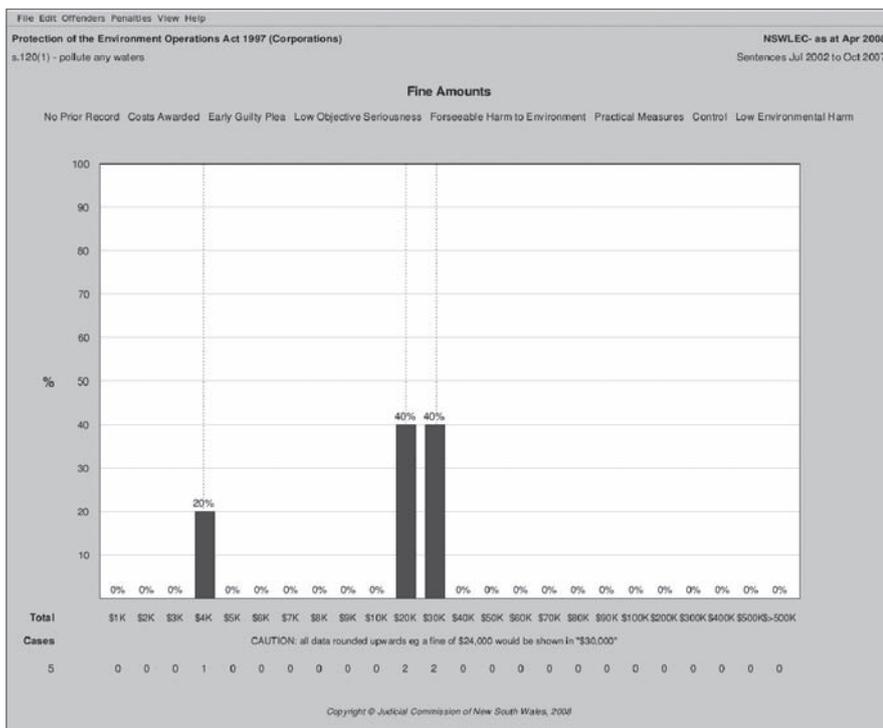


The user can further refine the graph by adding or subtracting the objective and subjective characteristics described above. This is done by going to “Offenders” on the top toolbar and selecting from the list in the dropdown menu box each desired characteristic. On selection of each characteristic, a menu box will appear asking the user to select the presence or absence, or the degree of, the selected characteristic. The graph will be redisplayed showing the set of cases with that selected characteristic. The exercise needs to be repeated for each desired characteristic. In this way, the user can apply the objective and subjective characteristics to determine the average penalty for a case with similar facts.

For example, the user might select objective characteristics such as the offence had a low objective seriousness; the harm was foreseeable to the environment; practical measures could have been taken to mitigate, abate or prevent the harm;

the offender had control over the causes of the offence; and there was a low level of environmental harm caused by the offence. The user may also select subjective characteristics such as the offender had no prior record before the offence occurred; the offender entered a guilty plea to the offence at the earliest opportunity; and costs were either agreed or awarded by the court to the prosecutor. As at April 2008, the graph for the example given is as follows:

Figure 3. Offender’s characteristics

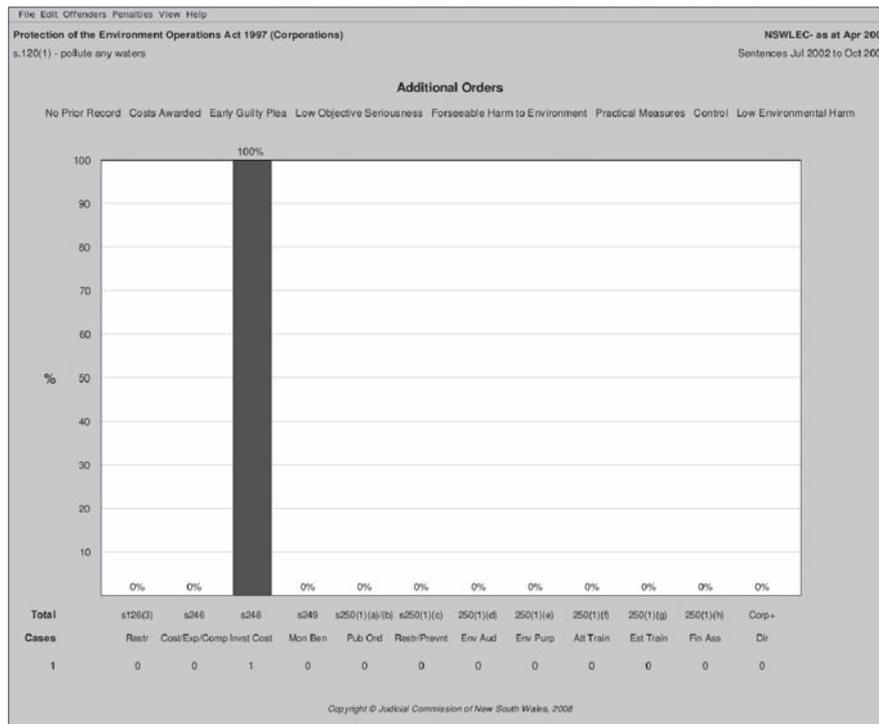


This information serves the purpose of demonstrating what types of monetary penalties have been imposed on offenders in similar circumstances to their case. Such detailed information is not currently available for any other database within JIRS. While it is recognised that there is only a limited amount of cases within the database at present, this amount will gradually increase as more data is added.

The user can also enquire of cases where an additional penalty was imposed, such as a publication order or an environmental order, either in conjunction with a fine or as a stand-alone punishment. The user can access the data on additional orders by going to “Penalties” on the top toolbar, then clicking on “Additional Orders” in the dropdown menu box. A new graph will appear (“Additional Orders”) listing the 11 different additional order penalties that are available. There is also an entry for “Corp+Dir” which provides information on cases where both a corporation and

director were sentenced. The subjective and objective characteristics can also be applied to the graph as above. As at April 2008, the graph for additional orders for the example given is as follows:

Figure 4. Additional orders



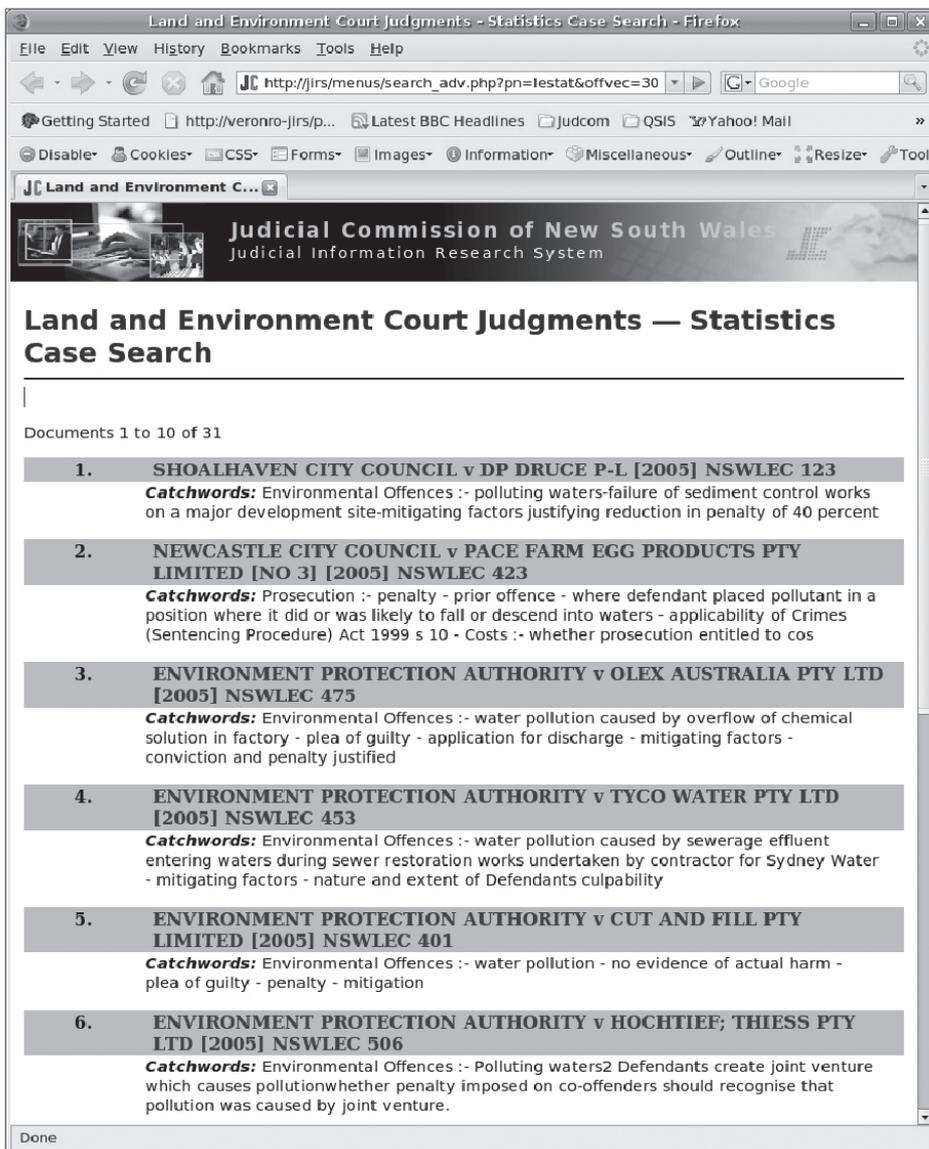
It is useful to include the additional penalty graph as in many cases the court is no longer imposing only a monetary fine, but is imposing other penalties that better fit the offence and offender and the purpose of sentencing.¹³²

When the selection has been completed, the user is able to access the sentencing remarks for the cases comprising the selected data set. This is done by clicking on one of the bars in the graph. A menu box will appear asking whether the user wishes to view a display of cases from the starting point of data in the database for the relevant offences. In the example of the offence of polluting waters under s 120(1) of the POEOA, the starting point is 2000 onwards. Upon clicking “OK”, the list of cases will appear. Each case will be listed by name and medium neutral citation, and will display case catch words. Upon clicking on the hyperlinked name of the case, the reasons for judgment will be displayed.

132 For a summary of sentences involving additional orders, see Preston (2007), above n 119, at 157–163.

For the example given, the following list of cases would appear:

Figure 5. List of cases example



This ability to access the sentencing remarks for cases is a unique feature of the JIRS Land and Environment Court database and adds considerable value.

Conclusion

5

The sentencing database for first instance environmental crime cases in the Land and Environment Court and other courts of New South Wales will have an influential effect on environmental sentencing both in Australian jurisdictions as well as 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 offences in NSW.

In summary, the JIRS Land and Environment Court database:

- provides centralised data on sentences for environmental offences imposed by the Land and Environment Court 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 s 3A of the *Crimes (Sentencing Procedure) Act 1999*, and
- provides a public register of sentences accessible on the internet and searchable by offence, 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 JIRS database of sentences for environmental offences, because of these features, should assist in: improving consistency in sentences; balancing individualised 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 database will be evident both now and in the future. It will help 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.

Appendix A

Explaining the JIRS Land and Environment Court statistics

1. Introduction

The design of the JIRS Land and Environment Court sentencing statistics draws on the methods used by the Judicial Commission to compile sentencing statistics in the Local, District and Supreme Courts. It also adds specific environmental law sentencing variables (discussed below). The sentencing information was compiled by the court and the Research and Sentencing Division of the Judicial Commission using the remarks on sentence of the sentencing judge. The most ground breaking feature of JIRS Land and Environment Court sentencing statistics is that the user is able to access the remarks on sentence for any case that appears in a penalty graph.

2. What do the statistics record?

The statistics record sentencing outcomes for matters dealt with by the Land and Environment Court in its summary jurisdiction in Class 5 matters — environmental planning and protection summary enforcement. Since the maximum penalties for corporations are commonly higher than for individuals, the statistics separate sentences imposed against corporations from those imposed against individuals. Therefore, where a case involves a director and corporation, the sentencing outcomes for the director in his or her individual capacity and for the corporation are recorded separately.

3. How is the offence selected?

The statistics record the sentence for what is known as the “principal offence”. The principal offence is the offence that attracts the highest or most severe sentence. If the sentences for two or more different offences are the same, then the offence with the highest statutory maximum penalty is selected as the principal offence.

4. Single and multiple counts

Under the menu option “Offenders”, the user can choose “Counts” and then the following categories:

One count: displays sentences for offenders who committed one count of the principal offence.

Multiple counts: displays sentences where offenders have been sentenced for more than one count of either the principal offence or for multiple offences. If, for example, several fines are imposed all the fines are added and the total effective sentence appears.

Total: displays all the categories described above.

Suffice to state that in multiple count matters the principle of totality is engaged. Where a court sentences offenders for more than one offence the aggregate or overall sentence must be “just and appropriate” to the totality of the offending behaviour. The Court of Criminal Appeal held in *Environment Protection Authority v Barnes*¹³³ that where an offender is sentenced for more than one offence and the sentencer believes that the totality principle requires an adjustment to the fines which may otherwise be appropriate, the amount of each fine should be altered by reducing individual sentences and then aggregating each to determine a total fine amount.

133 [2006] NSWCCA 246 at [50].

5. The penalty graph

Each penalty graph for an offence displays the section number, a short description of the offence, the time frame of the sentencing statistics and the penalties that have been imposed. Generally, the penalties are those available to judges set out in Pt 2 of the *Crimes (Sentencing Procedure) Act 1999* headed “Penalties that may be imposed”. These sentencing options include orders under s 10 (dismissal of charges and conditional discharge), s 10A (conviction with no other penalty), s 9 (good behaviour bonds), s 8 (community service orders), the various forms of imprisonment referred to in Div 2 of Pt 2 of the Act and fines pursuant to the *Fines Act 1996*.

Additional orders under the *Protection of the Environment Operations Act 1997* and other Acts

Under the *Protection of the Environment Operations Act 1997* (POEOA) where a court finds an offence against the Act or regulations proved, it may make orders in addition to any penalty that has been imposed. These additional orders are set out under Pt 8.3 of the Act headed “Court orders in connection with offences”. The additional orders include:

- s 245 (orders for restoration and prevention),
- s 246 (orders for costs expenses and compensation at the time the offence is proved),
- s 247 (recovery of costs, expenses and compensation after offence proved),
- s 248 (orders regarding costs and expenses of investigation),
- s 249 (orders regarding monetary benefits), and
- s 250(1)(a)-(h) (additional orders).

Similarly, s 126(3)(a) of the *Environmental Planning and Assessment Act 1979* permits the court to make an additional order “to plant new trees and vegetation and maintain those trees and vegetation to a mature growth”.

The additional orders for any given offence can be displayed by selecting “offence” on the menu bar and “Additional orders”. The graph shows the types of additional orders listed above that have been imposed for the offence.

The penalty graph also has a category “fine plus additional order” category which combines the fine penalty with any additional order. For example, in *Environment Protection Authority v Australian Pacific Oil Company Pty Ltd*,¹³⁴ all three defendants received fines. The court further made an additional order under s 250 of POEOA which provided that each of the defendants jointly and severally cause a quarter-page advertisement to be published in the *Journal of Waste Management and Environment* at their respective expense.¹³⁵ As there was an additional order, the fine amounts for this case will be recorded as “fine plus additional order”.

Additional order — “director plus corporation”

The additional order graph also contains a “director plus corporation” category. This alerts the user that the fine imposed is not the *only* order in the case. That is, it is a case where both the corporation and a director have been punished. This is relevant to the principle of totality. For example, in *Environment Protection Authority v Australian Pacific Oil Company Pty Limited*,¹³⁶ the corporation and its two directors received two fines each. The penalty types for the corporation in this case are recorded as “fine plus additional orders”. The additional order is classified as

134 [2003] NSWLEC 279.

135 *ibid* at [31].

“director plus corporation”. Thus, by displaying the fines imposed on the corporation as “fine plus additional order” the user is alerted to the existence of the fines imposed on the directors in their individual capacity shown as “director plus corporation”.

6. Accessing details of the penalties imposed from the penalty graph

It is possible to obtain more information about the penalties that have been imposed from the penalty graph. This is achieved by clicking on any of the bars on the penalty graph. For example, the most common penalty imposed in the Land and Environment Court is a fine. To access the range of monetary amounts of fines, the user first clicks on the fines bar of the penalty graph. A message appears “switch to fine amounts?” The amounts can be accessed by clicking “OK”. A graph which displays the distribution of fines appears.

7. Accessing the remarks on sentence for individual cases

It is possible for the user to access the remarks on sentence for individual cases. This is achieved by clicking on any of the bars on the penalty graph for a given offence. For example, when the user clicks on the penalty option “fines”, the user accesses the range of monetary amounts of fines. By clicking on the individual bars of this graph a message appears “Display a sample of cases from 2000 onwards”. From here the remarks on sentence can be accessed by clicking “OK”.

8. Refining the terms of the inquiry

The statistics permit the user to refine the terms of the statistical inquiry by adding or subtracting several sentencing factors. The matters include those referred to in s 241 of the POEOA headed “Matters to be considered in imposing penalty”. If the judge made no specific finding the field is left **blank** for the particular matter. The range of matters is as follows:

1. prior record (Y/N)
2. co-operation (Y/N)
3. contrition and remorse (Y/N)
4. prior good character (Y/N)
5. costs awarded (Y/N)
6. plea (not guilty/early/not early/late/other factors affecting utility of guilty plea)
7. means to pay fines (Y/N)
8. totality principle (applied/not applied)
9. objective seriousness (low/medium/high)
10. financial reasons (financial advantage/not financial advantage)
11. foreseeability of harm to the environment (Y/N) (s 241(1)(c) POEOA)
12. practical measures (Y/N) (s 241(1)(b) POEOA)
13. control over cause (Y/N) (s 241(1)(d) POEOA)
14. state of mind (intentional/negligence/accidental)
15. environmental harm (none/low/medium/serious) (s 241(1)(a) POEOA)
16. complying with supervisor order (Y/N) (s 241(1)(e) POEOA)

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