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SENTENCING PRINCIPLES

By Geraldine Mackenzie and Nigel Stobbs

FOREWORD

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This book accepts the daunting task of collecting and describing the Australian law on sentencing. To undertake that task, the authors have reviewed the entire landscape. They have assembled the main statutory provisions that govern general and particular sentencing principles; the procedures that are to be followed in imposing sentences; some special rules observed, as in the sentencing of juveniles, indigenous offenders and others; the range of non-custodial sentences and punishments for specific offences; the availability of custodial and mandatory sentences; and the rules that govern appeals against sentence. Interspersed with the many statutory provisions that now govern judges and magistrates in the imposition of sentences are the judicial elaborations of the legislation and the exposition by judges of the common law requirements for this most important public function.

The function is important because it involves the deployment of the power of the community over individual liberty, and the reputation,

* Justice of the High Court of Australia (1996-2009); President of the Court of Appeal of New South Wales (1984-96); Chairman of the Australian Law Reform Commission (1975-1984).

activities and monies of the convicted offender. Yet sentencing also now speaks to the victims of offences, their families, and friends; the community generally through the public media; the legal and judicial professions; and the writers of fact and fiction for whom judicial punishment constitutes a daily contribution of the courts to the standards that society demands of its members.

Readers of this book will be grateful to the authors for the taxonomies they have adopted; the principles they have extracted from the wilderness of instances; the light they have shone on the explosion of statutory law; and the lessons they have drawn in explaining (and sometimes criticising) judicial utterances (including some of my own). Because, as the authors point out, ninety percent of sentencing in Australia is performed in State and Territory courts, it is natural that many of the earlier respected texts on this subject have addressed the law as it applies in particular sub-national jurisdictions. One of the main contributions of this book is that it offers a national perspective. This will be useful to busy judges and legal practitioners and to law teachers and students, now increasingly engaged in this hitherto neglected corner of the law.

It is exactly thirty years since I helped put the finishing touches on the innovative report of the Australian Law Reform Commission, *Sentencing of Federal Offenders*¹. That report set out to engage the judiciary, practising lawyers, academics, social scientists and prisoner representatives in a way that had never earlier been tried in Australia. Until then, sentencing had not attracted much academic attention. In part, this was because the High Court of Australia had normally set its

¹ ALRC 15 (interim), 1980.

face against becoming involved in such issues. But, in part, it was also because sentencing was generally regarded as beneath the dignity of the nation's appellate judges. The absence, to that time, of much statutory law on sentencing and the predominance, in the task, of judicial discretion (that was largely immune from review), cut most sentencing off from detailed analysis.

In my four year law course at the University of Sydney, not a single hour was devoted to examination of sentencing. Neither in criminal law; nor in procedure; nor in jurisprudence. It was as if the whole great enterprise of criminal law, which was the centrepiece of law for most citizens, ended up in a whimper once the "legal" business of the trial was over. Yet, from the point of view of those on the receiving end, punishment was often the gist of the process. Still at that time, it was widely regarded as having no legal significance at all.

Some of the recommendations made in the Australian Law Reform Commission's report were translated into law². Many were not. However, as the authors of this book acknowledge, the report was to prove influential in bringing sentencing out of the shadows. Two further reports were written by the Australian Law Reform Commission³. Other reports were produced by State and Territory law reform and expert bodies. These are described here. They evidenced, and accompanied, political, professional, academic and community debate about the purposes of sentencing; what worked and what did not; and what should be done to achieve a fairer and more effective system.

² *Crimes Legislation Amendment Act (No.2) 1969 (Cth); Crimes Amendment Act 1982 (Cth).*

³ *Sentencing (ALRC 44, 1988) and Same Crime, Same Time (ALRC 103, April 2006).*

When, in 1980, I reported to the Australian legal convention on our first national report on sentencing⁴, I quoted Lord Kilbrandon's assessment that sentencing was the most "painful" and "unrewarding" of judicial tasks⁵. A lot of water has flown under the bridge in the intervening decades. There have been many more debates. The High Court of Australia has become more closely involved in the subject. Legislatures have enacted many laws. The result is that sentencing may remain "painful" for judicial officers. But the injection of principles and the active debates over their application has meant that the task is now less "unrewarding". Unstructured and unreviewable discretion, even when performed by judges, can be a kind of tyranny. The search over the past thirty years in Australia has been for ways to enhance the role of principle and to reduce the unreviewable discretions whilst acknowledging that, in the end, a leap to judgment is normally required on the part of those entrusted with sentencing.

All of these points are well made in this book. It reviews the debates that arose in the High Court of Australia concerning the so-called "instinctive synthesis" theory of sentencing and the role of a competing "principled" approach to the task⁶. Unusually these judicial interchanges elicited an interesting commentary from the standpoint of neurologists concerned the intriguing question of how judicial (or other) minds actually operate when evaluating multiple and complex considerations in approaching a convincing and satisfying conclusion⁷. Without digging too deeply into the judicial subconscious, the book marshals the debates

⁴ M.D. Kirby, "Sentencing Reform: Help in the "Most Painful" and "Unrewarding" of Judicial Tasks (1980) 54 *Australian Law Journal* 732.

⁵ Lord Kilbrandon, "Children in Trouble" (1966) 6 *Brit Journal Crim* 112 at 122.

⁶ *Markarian v The Queen* (2005) 228 CLR 357.

⁷ H. Bennett and G. Broe, "Judicial Neurobiology, *Markarian* Synthesis and Emotion: How Can the Human Brain Make Sentencing Decisions?" (2007) 31 *Criminal Law Journal* 75.

that have unfolded in Australia over sentencing in the thirty years since the Law Reform Commission published its first report suggesting legislative prescription of general principles and the judicial injection of more transparent approach to sentencing. It is timely to collect and evaluate these developments.

Not all of the debates over sentencing have been rational. Many of them are described here to explain what has occurred to bring us to the present state of the law:

- The growth in the number and importance of federal courts and crimes.
- The increased stridency of law-and-order campaigns involving electoral competition between politicians for perceptions of greater harshness.
- The introduction of guideline sentences and some of the problems they have produced.
- The initiation of victim impact statements.
- The recognition of the special challenges presented by indigenous prisoners.
- The great expansion in crimes involving the abuse against children.
- The theoretical and practical problems arising from the provision of discounts for guilty pleas.
- The mitigation of sentences for considerations of public opprobrium in the media.
- The suggested moderation of punishment for cases involving official entrapment.

Carefully, the authors tackle these and other issues as they seek to explain how, during the past three decades, Australia has joined the countries of the world with the highest levels of *per capita* imprisonment. Has this change made Australian society safer? Has it stilled the punitive instinct to which some politicians and media constantly call us? The authors pose these questions. The answers must often be given by those who hold the responsibility of imposing sentences on their fellow citizens.

Ultimately, sentencing is about values. This book attempts to collect many of the values that are in play. A human element in sentencing is inescapable. But it needs to be tamed, lest personal prejudices and individual reactions play too great a part. Especially because of the recent enlargement of the punitive element of sentencing in Australia, revealed in this book, it is important that all those involved should accept the responsibility of ensuring that what they do is at once lawful and principled, performed by just and rational procedures. For their contribution to these objectives of our law, when convincing outcomes are at a high premium, the authors deserve our thanks and praise. This book is careful, restrained, temperate and wise. Which is what sentencing itself should always strive to be.

Sydney

1 January 2010.

A handwritten signature in black ink, appearing to read 'Wraith', written in a cursive style.