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CONFERENCE OF NEW SOUTH WALES STIPENDIARY MAGISTRATES

STATE OFFICE BLOCK, SYDNEY

WEDNESDAY 1 JUNE 1983

THE FUTURE OF SENTENCING

May 1983

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The Hon Mr Justice M D Kirby CMG
Chairman of the Australian Law Reform Commission

THE PAINFUL AND UNREWARDING TASK

It has been said that sentencing convicted offenders is the most 'painful and unrewarding' task of judicial officers.[1] As judicial officers in the Bench of Magistrates, you have much more experience in sentencing than most judges of the higher courts. I can therefore assume either that you have developed a very high threshold to pain or that your natural and developed tolerance and charity are large features of your personalities. My speech on sentencing may be yet another painful task. I hope it will not be completely unrewarding. In my life, I have sentenced no one, at least in court. I therefore face with a measure of trepidation, a lecture on a subject of daily concern to you. It would be wrong for me to venture outside my relevant area of experise. One of your number, was even kind enough to suggest that I give an Advisory Opinion on specific aspects of the sentencing of persons convicted, following the introduction of random breath testing. I am too seasoned a campaigner to make the elementary mistake of delivering a highly practical, specific and useful speech. The advice on the law might be wrong. And then where would we be? I might spark another rift in Federal/State relations.

Accordingly, you will understand it, if I retreat to territory that is familiar to me. In 1980, the Australian Law Reform Commission delivered its report to the Federal Attorney-General on the sentencing of Federal offenders.[2] It is a large tome and not exactly bedside reading. But it was the first national consideration of sentencing law and practice every carried out at a Federal level in Australia. It was led by Professor Duncan Chappell. Some of the recommendations made have already passed into law.[3] The most important of these is the injunction on the use of imprisonment of convicted Federal

offenders and the planned availability of State alternatives to imprisonment for the disposition of Federal cases. I understand that only the sordid matter of money is holding up the implementation of this proposed facility.

The new Federal Attorney-General, Senator Gareth Evans, was one of the foundation Commissioners of the Australian Law Reform Commission. He has a keen interest in law reform and the criminal justice system. He has already expressed a desire to me that the sentencing project should be revived and completed. It is my hope that he will secure the appointment of a Commissioner able to see the project to completion. Already, Senator Evans has indicated his intention to proceed with the establishment of a Federal Sentencing Council. Such a Council would have a central function in the proposal offered by the Commission for the future of sentencing. The report deals with:

* a review of past moves for sentencing reform in Australia and overseas;
* a description of the Federal criminal justice system, with its mixed elements of decentralisation and centralisation;
* a consideration of the importance of prosecution decisions as they affect the punishment of Commonwealth offenders;
* a debate about the uniformity of treatment of Federal offenders, wherever they happen to be convicted in Australia;
* a consideration of the use of imprisonment and means for reducing that use;
* a discussion of prison conditions and grievence mechanisms;
* a consideration of the abolition or reform of parole in the case of Federal offenders;
* a discussion of non-custodial sentencing options;
* an outline of the Commission's proposals for improving the guidance available for the judicial discretion in sentencing; and
* finally, discussion of victim compensation and items for the future.

It was a major enterprise. It was facilitated by the National Judicial Survey which was distributed in the course of the reference. Although this procedure was criticised by one State Chief Justice, it was the only viable means by which the Law Reform Commission could reach out to the people actually engaged in the daily task of sentencing. Over 70% of judicial officers in each State and Territory, with the exception of Victoria, responded to the survey. Over 80% of magistrates and Federal Court judges responded. The lower overall response rate from State judges is explained by the low response from Victorian judges.[4] I pay tribute to the magistrates who took part in the survey, snatching hours in the midst of busy lives, actively to assist the process of reform. The profile of New South Wales magistrates' views, emerging from the survey is, I believe, a vindication of the increasing appreciation of the independent magistracy of New South Wales.

TAMING LARGE DISCRETIONS

The former Chief Stipendiary Magistrate at Bow Street, Sir Frank Milton, once wrote:

> The advantage of the English system is its elasticity. Over almost the whole of the criminal field, the court can deal with each case on its own merits or demerits. The corresponding disadvantage is that discrepancies are bound to occur, both between the sentences imposed by difference Benches, and between those passed by the same Bench on different offenders; this gives rise to a good deal of ill-informed comment, but also to some real and justifiable anxiety.[5]

This statement captured in a few lines the essential intellectual issue of the sentencing debate. What is it about? What principles should guide it? Is it to punish the offence? Is it to deal with the offender? Or in some curious and ambivalent way, is it to do both and many other things as well?

Nearly 150 years ago, the sentencing law and practice in England underwent a major change. It moved from largely manditory sentences of death (even in property offences) ameliorated sometimes by the exercise of the Royal perogative, to a system of discretionary punishment. Under the new system, imprisonment was to be the principal sanction. Few statutory criteria and no collection of stated principles of punishment were enacted at the time this radical reform occurred to assist judicial officers in exercising their discretion. Indeed, very little was done to help them to select a sanction : ranging from suspended sentences to fines or life imprisonment. The principal purposes of penal punishment with imprisonment were accepted by the judges and other writers of the day to be deterrence and retribution, in the sense of 'just deserts'. Imprisonment was to be carried out in such a way as to reform and reclaim members of 'the criminal class'. It was to do this through moral education and training 'in the habits of industry.[6]

Since this great reform took place, Australian Parliaments, from colonial days have acted, for the most part, to provide even wider sentencing discretions to the judiciary. This has been done by the development of probation, conditional and absolute discharges, intermittent imprisonment and so on. Very rarely have our legislatures taken steps to restrict or guide judicial discretion, whether through the imposition of mandatory minimum punishments or through the provision of criteria to assist the decision-makers. Courts have been left more or less on their own. Of course, they soon began to develop guidelines in the traditional manner of the common law. But the approach of

la.ₒe discretions is still very much at the heart of sentencing law and practice in this country. Inevitably, variation in the exercise of discretion leads to publicity and media and citizen outcry. As Sir Frank Milton said, the outcry is often misguided. But it has lately led judicial officers and criminal justice policy makers to go back to the drawing boards. With increasing urgency, they are asking about the purposes of criminal punishment. Concern about the offence and the offender is leading to a search for a better system to tame the broad discretions. It was that search which was a critical aspect of the Law Reform Commission's enquiry into sentencing of Federal offenders. Because we live in a continental country, and have delegate most sentencing of Federal offenders to State judicial officers, the problem of consistency and evenhandedness is exacerbated by institutional factors and distance. But in the United States, Canada and in other countries, a fundamental review of the criminal justice system is now underway. In part, the intellectual underpinning of the movement for reform is provided by advocates of 'just deserts'.

JUST DESERTS

The most influential of the advocates of 'just deserts' as the basis for sentencing reform have been from Von Hirsch (1976), Derschowitz (1976) and Singer (1978). The positions taken by these three writers is very similar. Each attacks the indeterminate sentence, crafted for the particular offender. Each questions the rehabilitative philosophy upon which, in large part at least, the indeterminate sentence is based. In place of indeterminacy and large judicial discretions, each writer suggests imposition of determinate sentences established on the principles of just deserts.

The essential of just deserts is retribution. The debate is summarised in passage from Von Hirsch quoted in the Law Reform Commission's report:

> Wide discretion in sentencing has been sustained by the traditional assumptions about rehabilitation and predictive restraint. Once these assumptions are abandoned, the basis for such broad discretion crumbles. On our theory, the sentence is not a means of altering the offender's behaviour that has to be essentially suited to his 'needs'; it is a desert penalty based on the seriousness of his past criminal conduct. In order for the principle of commensurate deserts to govern, there must be standards specifying how much offenders receive for different crimes. Were questions of offenders' deserts left mainly to the discretion of individual judges, no consistent scale of penalties would emerge:

> one judge could treat certain offences as serious and punish accordingly; another judge having a different sent of values could deal with the same infractions as minor ones.[8]

The essence of the just deserts theory is that sentences should be more determinate and that punishment should be proportional to the gravity of the crime. Fairness in sentencing include certainty and proportionality. The sentence should fit the crime. There is no doubt that a significant number of those who urge 'just deserts' are actually asserting that convicted offenders should be punished more severely that at present. Doubtless it is this reason that has lead to the growth of the competing school, urging the principle of 'parsimony' or 'economy' in the use of criminal punishment.[9]

One of America's foremost criminologists, Professor Leslie Wilkins illustrated his conversion to 'just deserts' as the basis for criminal punishment in words written more in sorrow than anger:

> I cannot do other than add my signature ... but I do so without enthusiasm: my difficulty is with the ... solution ... Had it been possible for a different model to apply — economic/rational or even humanitarian/therapeutic — I would have preferred it: but such models have proven even less appropriate. It seems we have rediscovered 'sin', in the absence of a better alternative.[10]

The practical effect of the revival of retribution and punishment and the thesis of 'just deserts' was the passage in the United States, in more than half of the States of that country, of legislation designed severely to limit judicial discretion in sentencing. Such legislation aims to produce more determinate sentences, sometime mandatory sentences. The legislation differs remarkably from place to place and in the extent to which judicial discretion is permitted or limited. But the sudden flowering of legislation of this kind, throughout the United States is a remarkable legislative phenomenon. We are not entirely immune from calls for mandatory punishment in Australia. But we are ambivalent about it. Within a year, New South Wales has modified the mandatory life sentence for murder. But within a week, Victoria has introduced a Bill to require mandatory imprisonment of bush fire incendiarists. This Bill is itself, one assumes, a legislative response of anger to the perceived unacceptable use of judicial discretion in modifying punishment for an admittedly serious crime, by reference to circumstances personal to the offender.

Whilst we wobble about in Australia, sometimes taking the path to determinacy and fixed sentences and sometimes enlarging judicial discretion, the moves in the United States have, until lately, very largely followed the path of 'just deserts'. In 1978, for example, California put into effect presumptive sentencing legislation. The legislation established four categories of offenses. It provided for a presumptive length of confinement for each category. To reflect the change from the most indeterminate criminal code in the United States to a determinate model based on retribution, the new penal mode of California states its proposition most bluntly:

> The purposes of imprisonment for crime is punishment.[11]

Since the implementation of the Code, two major developments have occurred. Both reflect what happens when a legislature of ordinary people get their hands on fixing criminal punishment. First, concerned with continuing crime and dissatisfied with the initial lengths of presumptive sentences, the legislature has revised that the severity of punishment upwards. Secondly, the proportion of individuals convicted and receiving a sentence of imprisonment has risen precipitously.[12]

SENTENCING GUIDELINES

Some of those who had called for a return of punishment and 'just deserts' were clearly of a conservative disposition, with great faith in criminal punishment to redress crime. But others were of a liberal persuasion, seeking to rein in the amplitude of judicial discretion, to reduce the lottery element of criminal punishment and to remove features reflecting the idiosyncracies of particular judicial officers. Reports from the United States suggest that the former camp continue to steel themselves for more and higher punishments. The consequence is that the prisons are overflowing and major programs for prison building in a country, which already has the highest rate of imprisonment in the OECD, are well underway. Shocked, somewhat, with this historical movement, those liberals who proposed the 'deserts' or 'justice' model for sentencing, and disillusioned that it has not lived up to its promises, are looking for something better. In the words of Cullen and Gilbert:

> The message being conveyed that the liberals' call for a 'justice model' promises neither to mitigate the injustices burdening the politically excluded and economically disadvantaged nor to lessen the victimisation of society's captives.

In an attempt to 'have it both ways' we are now seeing a 'second wave' in sentencing reform. It is, I believe, the wave of the future. It seeks to roll back the 150-year-old trust in large judicial discretions. But it seeks to avoid doing so by embracing the mandatory or highly determinate sentences that preceded discretion and that have been introduced in California and other States of the United States. The new movement is one which envisages sentencing guidelines, fixed by an independent body in which the judiciary is heavily represented. The guidelines would introduce greater determinacy whilst at the same time permitting principled inequality. What is involved is grafting onto judicial discretion, and to the informal tariffs that grow up under that system, a much more open and publicly accountable system. It is one that charts punishment by reference to factors relevant to the seriousness of the offence and identified factors relevant to the culpability of the offender. It is a system that preserves judicial discretion by permitting judicial officers to vary the result thus produced. But it requires them to state their reasons for doing so. It then submits any such variation to appeal review. The object is to infuse just a little more science in the painful and unrewarding task of sentencing. It is essentially the proposal put forward by the Australian Law Reform Commission. It is the approach to sentencing reform that has been adopted in a number of overseas jurisdictions, as I shall now describe. By announcing the new Federal Government's acceptance of the proposed national Sentencing Council, Senator Evans seems to be indicating that ,in the Federal sphere at least, for the punishment of convicted Federal offenders, we may well move in this direction. It is therefore important that Australian judges and magistrates should become familiar with the proposal. United States judges, now subject to sentencing guidelines, are generally favourable. They admit to having had reservations at the outset. Who would welcome a new system, where the old one is 150-years-old? Who would welcome the reduction of the scope of unreviewable judicial discretion? Who would not be concerned that reduction of discretion might not lead to harsher punishment? These are legitimate fears about the system of guidelines. But against these fears must be weighed the concern of the community, of convicted offenders, of their families and of judicial officers themselves that indeterminacy has bred unacceptable variance. Because most people plead guilty in our criminal courts and because a large respect is paid by appellate courts to discretion in sentencing, the opportunity of correcting idiosyncracies and injustices are limited.

Rather than describing the system proposed by the Law Reform Commission in its report, I want to refer to a March 1983 speech by the Chairman and Executive Director of the Pennsylvania Commission on Sentencing. They outlined Pennsylvania's embrace of sentencing guidelines. They evaluate its success and, whilst continuing to review the results, they pronounce themselves initially satisfied with the mix of determinacy and discretion.

In 1978, the Pennsylvania legislature created the Pennsylvania Commission on Sentencing. It was given the statutory duty to submit to the legislature a set of sentencing guidelines. These guidelines were to take into account the gravity of the current offence, prior felony convictions and a matter of special local concern, the use of deadly weapons. The Crimes Code of Pennsylvania already adopted the principle of parsimony, retribution and rehabilitation. The legislation establishing the Pennsylvania Commission instructed that the guidelines should also consider:

> The nature and circumstances of the offence and the history and characterists of the defendant; and the opportunity of the sentencing court to observe the defendent, including any pre-sentence investigation'.

The task before the Pennsylvania Commission was therefore to draft guidelines which did not reject individualised sentencing but which nonetheless introduced standards that would reduce unwarranted sentencing disparity, redistribute the use of penal sanctions 'such that its primary use is for serious, violent offenders'.[13]

The guidelines were adopted on mid-1982. As a result a numerically based system of assessing the gravity of the current offence and the prior convictions of the offender was introduced. The offence gravity score ranked offences from one (least serious) to ten (most serious). A number of principles were established to guide judicial officers in this statutory ranking. The prior record score varied from zero (no applicable prior conviction) to six (multiple serious felonies). A sentencing range chart was then developed. I attach copy of it as Table 1.For each combination of offence gravity score and prior record score the Commission provided three ranges of sentence. If a judicial officer sentenced in the aggravated or mitigated ranges or departed entirely from the guidelines, the reasons for such a decision have to be provided. These reasons can then form the basis of an appeal, either by the defence or the prosecution. The approach taken by the Pennsylvania Commission recognised two very important facts:

* First, crimes, as defined in legislation, inevitably cover a range of behaviour such that there is much scope for significant variation in the severity of the offence. Thus robbery with serious bodily injury can include cruel and deliberate injury to innocent people and injury occuring only in a spontaneous action to a threat to one's own life.
* Secondly, the Commission recognised that the ten categories represent an oversimplification and it planned to continue its work to evaluate better distinctions.

One function of the Pennsylvania Commission is to monitor the implementation of the guidelines and to revise them as necessary. The first batch of cases, nearly 1500, involving use of the guidelines have now been analysed. The results are encouraging:

* Conformity with the guidelines i.e. sentences within the range, is quite high. 94.3%. It is expected to settle down to about 80-85%.
* Conformity is higher in the less serious offences than for serious crime. Obviously this point has implications for a magistrates court.
* Departures from the guidelines overwhelmingly tend to go below, rather than above, the standard. The reasons given permit the Sentencing Commission to monitor the aggregate wisdom of the Bench.
* Measured against sentencing practices before the implementation of the guidelines, it is interesting to note that there were only 44.8% of sentences passed in 1980 which would have fallen within the guidelines. Above all, there was very great variation from one judicial officer to another. This is now significantly reduced. Furthermore, the offenders, their lawyers, prosecutors and the whole community have the tables available for discussion and for principled, opened argument about severity factors warranting higher or lower punishment.

THE GIST OF THE PROCEEDING

It is often remarked that the English system of criminal justice, which we have inherited in Australia, is most exquisite in the trial process but breaks down at the point of sentencing:

> An English criminal trial, properly conducted, is one of the best products of our law, provided you walk out of court before a sentence is given: if you stay to the end, you may find that it takes far less time and enquiry to settle a man's prospects in life than it has taken to find out whether he took a suitcase out of a parked motorcar.[14]

As was pointed out by Mr. Justice Stephen, who developed so many criminal codes for the British Empire:

> The sentence is the gist of the proceeding. It is to the trial what the bullet is to the powder. Unless it is what it ought to be, the counsel, the witnesses, the jury and the summing up, to say nothing of the Sheriff with his coach, javelin men and trumpeters, are a mere brutum fulmen -- they might as well have stayed at home, but for the credit of the thing.[15]

I ne sentence is the 'gist of the proceedings', we must pay more attention to the process and do more to introduce consistency. But we must achieve this end without turning the process over to the impersonal control of computers or to the harsh, unknowing, unrealism of mandatory punishments fixed by the legislature. The ways of reform are many. They include:

* Increasing the element of determinacy, such as is evidenced by the recent Victorian Bill on arsonists;
* Adjusting statutory maxima to be more in line with average sentences. But this proposal by the British Advisory Council caused a storm;[16]
* Creating separate tribunals of multi-disciplinary experts, if there is such as thing as 'expertise' in punishment;[17]
* Improving the procedures of appellate courts and perhaps by increasing the number of appellate levels for adequate review and improving the statistics and services available to such courts;[18]
* Providing better training for judges and magistrates, though here again such a proposal by Lord Justice Bridge in Britain led to a storm of outrage to judicial protests;[19] or
* Finding a better system of guidelines, not to destroy individualised punishment but to harness judicial discretion in the name of principled rather than idiosyncratic inequality of punishment.

I suggest to you that the last is the most hopeful solution for sentencing reform in Australia. It is not a peculiar idea. The Advisory Council in Britain suggested that it should be kept under close review.[20] In the Federal Republic of Germany, there has been a recent introduction of legally defined guidelines and a demand for the application of strict rule and the reduction of wide discretions as part of a move towards a process of more rational sentencing.[21] The moves in the United States in Pennsylvania are reflected in many other State jurisdictions. Furthermore, the May 1983 issue of the Third Branch, a bulletin of the Federal Court of the United States, indicates that similar developments are now happening at the Federal level. The Judicial Conference of the United States has adopted draft sentencing reform legislation for transmittal to Congress. The main provisions of the proposals include:

* introduction of determinate sentences;
* provision of sentencing pursuant to guidelines developed by a Judicial Conference Committee; and
* appellate review of a sentence at the request either of the defendant or the Government.

> The mechanism proposed by the Judicial Conference for developing sentencing guidelines differs from provisions of a Senate Bill that passed on a previous session of Congress. The Conference envisages that the Committee selected to promolgate and later to monitor, the sentencing guidelines, will be composed of four judges in regular, active service and three members who neither are nor have been Federal or State judges (at least one of whom must be a non-lawyer). Ultimately, each Committee member would serve a once renewable four year term ... The legislation requires that the guidelines take account of both the offender and offence characteristics and that they encompass parole eligibility dates as well as maximum term.[22]

THE PRICE TO BE PAID

In Australia, the Law Reform Commission's interim report on sentencing proposed a similar approach in 1980. It now seems that the Federal Government will proceed with the first step, following Senator Evans' announced intention to establish the Federal Sentencing Council.

I close on a note of special importance to New South Wales. The Minister for Corrective Services, Mr. Jackson, has embarked upon a major program of licensed release of sentenced State offenders. He has been motivated, I am sure, by a mixture of humanitarian and practical reasons. In part, he is using the powers of the Executive Government to reduce the prison population. In part, he is doubtless anxious about the very high costs of imprisonment; costs which must be borne by the law-abiding taxpayers of the community. In part, he is doubtless conscious of the fact that our imprisonment rates in Australia are high by world standards and New South Wales has imprisonment rates higher than the Capital Territory, Victoria and South Australia.

But the message of this action to the judicial branch of Government, from the Executive Government, is clear. Unless our branch of Government can develop sentencing along lines that will be generally acceptable to the community and to its elected representatives, the community and their representatives will increasingly put their stamp on criminal punishment. As it seems to me, it will be better for us to get our own judicial house in order than to turn criminal punishment over to Parliaments (through unvarying mandatory sentences) or the Executive (through license release, parole release and clemency). If this is the conclusion you reach, you will, like me, also reach the view that reforms to sentencing law and practice in Australia are needed. Those reforms will seek to marry the strengths of the past with a higher degree of science and improved institutions to promote consistency. The price of the continuance of judicial

pre-eminence in criminal punishment in Australia will be the introduction of a little more science into the system. And this means the establishment of a Sentencing Council and the development and publication of detailed sentencing guidelines as recommended by the Australian Law Reform Commission. I hope that these ideas will engage your earnest consideration.

FOOTNOTES

1. Lord Kilbrandon.

2. Australian Law Reform Commission, Sentencing of Federal Offenders (ALRC 15), interim, 1980.

3. Crimes Amendment Act 1982 (Cwlth).

4. ALRC 15, 494.

5. F. Milton, cited in R. Tarling, 'Sentencing Practice in Magistrates Courts' in D.A. Thomas (ed), University of Cambridge, Institute of Criminology, The Future of Sentencing, Occasional Paper No. 8, 1982 (hereafter 'Future').

6. Canadian Sentencing Handbook, 125.

7. See e.g. Canada, Department of Justice, The Criminal Law in Canadian Society, discussion document, 1982; report of the New Zealand Penal Policy Review Committee (Mr. Justice Casey, Chairman) 1981. See [1982] Reform 99.

8. Von Hirsch, Doing Justice, 1976, 66. See ALRC 15, 21.

9. M. Tonry and N. Morris, Sentencing Reform in America in Glazebrook (ed) Reshaping the Criminal Law, 1978, 434, 445.

10. L. Wilkins, 1976, cited in J.H. Kramer and A.J. Scirica 'Pennsylvania's Sentencing Guidelines: Just Desert Versus Individualised Sentences', paper presented to the 1983 Annual Meeting of the Academy of Criminal Justice Sciences, March 1983, mimeo, 1.

11. California Penal Code, s.1170(a)(1). See also R. Puglia, 'Determinate Sentencing in California' in Future 33.

12. Kramer and Scirica, 2.

13. Ibid, 3.

14. R.M. Jackson, The Machinery of Justice in England, (5th ed) 1967 254.

15. Stephen, The Punishment of Convicts cited in L. Blom-Cooper. The Language of the Law, 1965, 64.

16. Great Britain, Advisory Council on the Penal System, Final Report, Sentences of Imprisonment: A Review of Maximum Penalties, HMSO 1978. See A.J. Ashworth, Judicial Independence and Sentencing Reform in Future 45.

17. Tarling, 4.

18. M. Tonry, More Sentencing Reform in America, [1982] Crim LR 157, 166-7 'American sentencing debates today resemble the sentencing reform ferment in 19-Century England. The problem of unfair and unwarranted disparity is widely recognised as are the needs for the development of standards for sentencing and for some institutional system to review judicial compliance with those standards'.

19. Ashworth, 46.

20. Ibid.

21. B. Huber, 'Structure and Changes in Sentencing in West Germany' in Future, 10, 24.

22. Federal Judicial Center, The Third Branch, (Bulletin of the Federal Courts), Vol 15, No 5, May 1983, 1, 4.