

AUSTRALIAN INSTITUTE OF CRIMINOLOGY

NATIONAL SENTENCING SEMINAR: PROBLEMS AND PROSPECTS

CANBERRA, 20 MARCH 1986

THE SENTENCING COUNCIL REVISITED

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The Hon. Justice M.D.S. Kirby, CMG\*

The Proposal for a Sentencing Council

In its interim report Sentencing of Federal Offenders,<sup>1</sup> the Australian Law Reform Commission proposed the establishment of a national Sentencing Council to reduce the disparities in sentencing of Federal offenders in Australia, demonstrated in that report. I suggest that the reconsideration of this proposal is timely. In my view, it is time that the proposal was dusted off and given a chance to operate. I wish to make the following propositions:

- \* Community concern about apparent disparities in punishment of convicted offenders is one of the major sources of discontent with the Australian legal system.
- \* In the United States, the Reagan administration had secured passage of the Comprehensive Crime Control Act 1984<sup>2</sup> and the establishment of the U.S. Sentencing Commission in October 1985.<sup>3</sup>

- \* Sentencing Commissions have been operating successfully in a number of U.S. States for many years and have earned the support of the judiciary and the community.
- \* In a continental and federal country such as Australia, there are special needs for machinery to secure sentencing consistency.
- \* Appellate review of sentencing disparity is a poor substitute for guidelines to be applied at first instance. This is because of the proper reluctance of appeal courts to interfere in discretionary decisions, giving rise to the risk of unnecessary levels of disparity.
- \* Sentencing guidelines developed by a Sentencing Commission would not inflexibly bind judges and magistrates. But they would provide a bench mark, from which judicial officers could only depart for reasons which they gave.
- \* The main obstacle to introduction of rational sentencing reform in Australia appears to be Federal/State jealousies and "territorial claims" over criminal justice rather than rational opposition.

If need be, it is my view that the Federal authorities in Australia should proceed to establish a national Sentencing Council, similar to the Commission set up in the United States, to deal with Federal crimes only. It is my belief that, such a body would set a good example to the States, which they might, in due course, follow.

Learning from quangocide Reagan

If it is good enough for Mr. Ronald Reagan, with his well known tendencies to quangocide, to set up the United States Sentencing Commission and to appoint to it a distinguished group of interdisciplinary experts, the same should be achievable in Australia. What has been done by the Reagan administration is a response to real community concern in the United States about disparity in sentencing. Such disparity can be unfair to convicted offenders. But it can also be unfair to the community and to other offenders, where inadequate or unsuitable punishments are imposed. What is needed a little more science in the highly individualistic system of sentencing. This does not mean replacing judges with computers. It simply means an endeavour to reduce the largely individualistic approach to sentencing to a more systematic and normative one. Equal justice under law requires that we should do better. The disparities in prison levels in different States of Australia show the great differences in sentencing policy that exists in the judiciary of our country.

What is needed is a national interdisciplinary body, with judges, statisticians, criminologists and community representatives who can lay down guidelines. These guidelines should produce, in each case, a "presumptive sentence". It would then be open to the judge to vary this sentence. But he would have to give reasons for doing so. Those reasons could be reviewed on appeal. It is no good saying that we are different to the United States because we have a greater facility for appellate review of sentencing. It is natural that appeal courts should show caution in reviewing discretionary sentences

imposed at the trial. What we have to do is to try to get the decision at the trial right - and this means a little more science at that stage.

Judges are human too

The new Chairman of the U.S. Sentencing Commission, Federal Judge William Wilkins has explained the need for such a body. Judge Wilkins, in a recent interview said that the object of guidelines (which the U.S. Commission must send to Congress by April 1987) is not to make the sentencing process excessively mechanical. Some flexibility is needed to permit individualised sentencing. But Judge Wilkins has added:

"Judges are human and are blessed with the experience and common sense which should always be part of any decision they make. It is not our purpose or our intent to take this out of the process. I know from a lifetime affiliation with the courts - by watching my father in court when I was a boy, by participating as a lawyer myself, and now as a judge - that judges are human beings, show human virtues, but are also subject to human emotions, to inconsistencies. We sometimes make decisions in sentencing which could be better if the exercise of sentencing discretion were better structured. The result of sentencing practices today evidenced great disparity, a sense of uncertainty and sometimes unfairness in the criminal process. The end result is to some degree a loss of respect for our system. This is not good and this Commission was created to correct this."<sup>4</sup>

Similar observations could, in my view, be made about the Australian situation. That was why the Australian Law Reform

Commission in 1980 proposed a national sentencing council. It remains to be attained.

Support for sentencing body

At the inaugural Criminal Law Congress in Adelaide in 1985, the Chief Justice of Australia, Sir Harry Gibbs, indicated his view that a sentencing council was "prima facie a good idea". Discussions have proceeded in government circles in Federal, New South Wales and Victorian Governments and I understand that there is some support there. When he was Attorney-General, Senator Evans had accepted the idea of a Sentencing Council in principle, although limited to Federal offences. However, because of opposition from some States the proposal has apparently been shelved. The time had come, in my opinion, to resuscitate the proposal and, as in the United States, to give it a chance to work.

How sentencing guidelines work

Under United States Sentencing Commission procedures, a court officer has responsibility to prepare a "grid" and to "plot" the "mean sentence" of the convicted offender, according to publicly available guidelines. This "grid" allows weighted factors for matters relevant to the offender and matters relevant to the offence.<sup>5</sup> The resulting "mean sentence" is then made available to the prosecution and the accused. It focuses the judicial decision on consistent sentencing. It is this system which will be introduced by the United States Sentencing Commission. The time has come to consider it also for our country.

FOOTNOTES

- \* President of the Court of Appeal, Sydney. Formerly Chairman of the Law Reform Commission. Personal views only.
- 1. Australian Law Reform Commission, Sentencing of Federal Offenders (ALRC 15) (Interim) 1980 para 441. Note that the Commission under Mr. George Zdenkowski is continuing work towards a final sentencing report. It is considering the Sentencing Council proposal further.
- 2. 28 USC section 991 (b). See Annexure 'A'.
- 3. See The Third Branch, Vol 18, January 1986, 1.
- 4. The Third Branch, Vol 18, March 1986, 6.
- 5. For details on the operation of the system see M.D. Kirby, The Future of Sentencing, 47/83, paper for Conference of Stipendiary Magistrates, NSW, Sydney, 1 June, 1983.