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ISSUES, POLICY AND REFORM

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'SENTENCING: PROBLEMS AND PROSPECTS'
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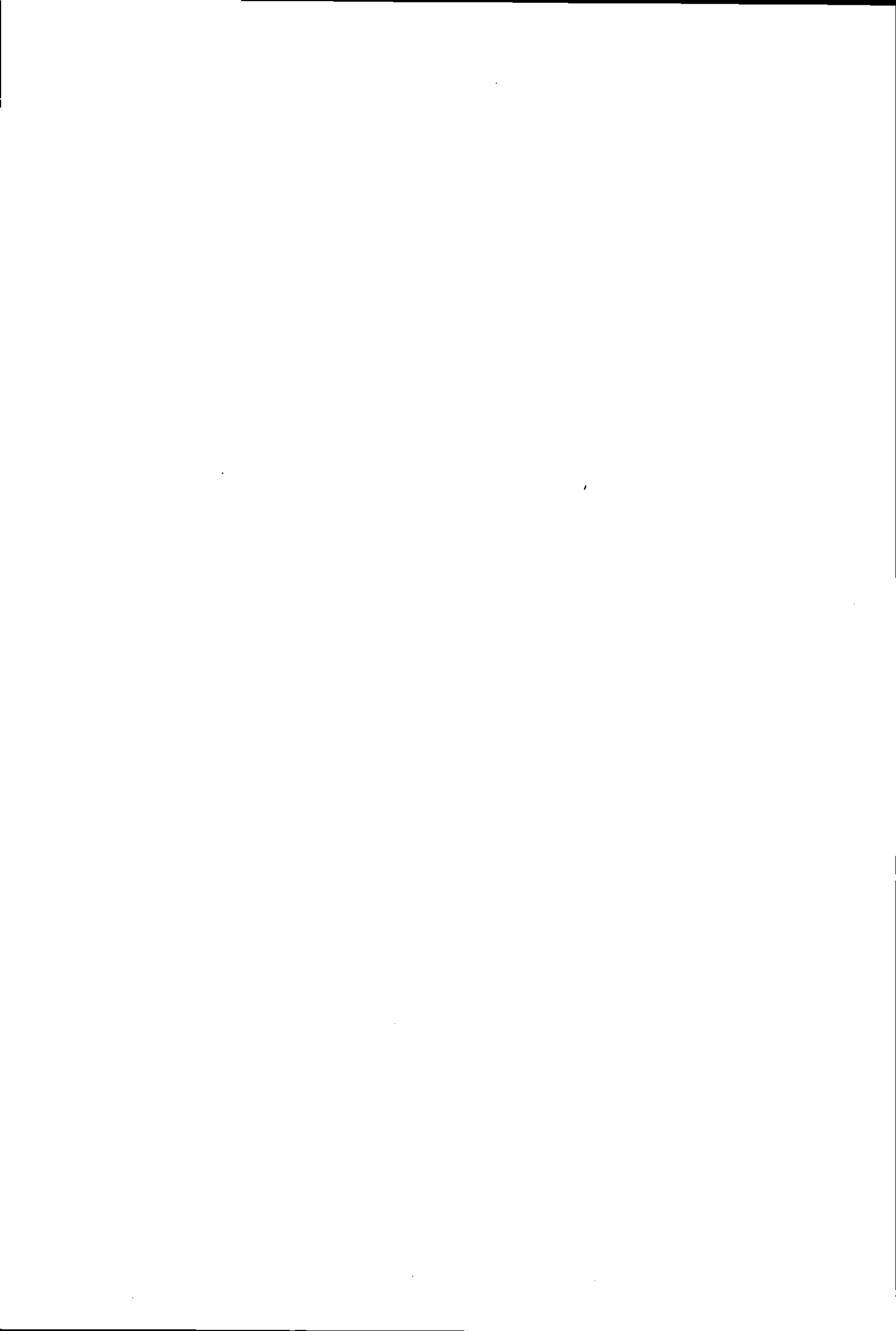
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SENTENCING IN AUSTRALIA: AN OVERVIEW OF PROCEEDINGS

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This collection of essays, articles and papers was compiled following a seminar entitled Sentencing: Problems and Prospects held at the Australian Institute of Criminology from 18th to 21st March, 1986. The seminar which was organised by the Institute in consultation with the Australian Law Reform Commission, had the basic aim of identifying key problem areas in Australian sentencing policy and administration, encapsulating both practical and theoretical considerations and was intended to identify future directions for reform. The success of the seminar was assured by the careful selection of speakers from the various States and Territories of Australia, as well as from the United Kingdom and the United States. Indeed, the perceptive, highly informative and thought-provoking contributions of the two overseas guest speakers, Dr Andrew Ashworth, from the Centre for Criminological Research, University of Oxford, and Dr Kay Knapp, Staff Director of the United States Sentencing Commission, Washington, D.C., served to broaden the debate and open up new directions for reform.

The seminar was unique in that it was constituted by a carefully balanced selection of well-informed persons from varying disciplines including judges and magistrates, legal practitioners, academics, law reformers, police, probation and parole officers, and prison administrators. Unfortunately, in view of the overall length of these proceedings, it was found necessary to omit a small number of papers from this work. Copies of papers omitted but referred to in this overview may be obtained upon request from the editor.

As the contents of these proceedings reveals, sentencing cannot adequately be treated in a narrow sense limited only to the problems confronting the sentencing judge. Sentencing is not an island unto itself but may be taken to include the whole range of discretionary decisions affecting the offender, whether taken prior to trial by the prosecutor at one extreme or involving the executive or administrative arms of Government (e.g. parole, remissions, early release decisions) at the other.

At the macro level there are questions asked and answered concerning the structure of the sentencing system. How do, or how should the various parts of the dispositional system fit together? Is the present common law system of sentencing, including appellate review of sentencing, adequate to meet the

needs of justice? What are the failings of our present system or subsystems of sentencing and how can these be overcome? These kinds of issues and more are thoroughly canvassed in the wide-ranging contributions contained in the pages that follow.

In his welcoming address to the one hundred delegates at the seminar, the Director of the Institute, Professor Richard Harding, quickly identified the overuse of imprisonment (particularly in relation to fine defaulters), and the plight of Aboriginals, as primary targets of sentencing reform in Australia. He then invited the Attorney-General and Minister of Corrective Services of the State of Victoria, The Hon. Mr Jim Kennan, to officially open the seminar.

In his presentation Mr Kennan observes that there is a lack of consensus upon the underpinning justifications and goals of sentencing practice. He speaks of the substantial cynicism relating to rehabilitation and to the techniques of predicting future behaviour. Amongst other things he puts forward the following set of principles upon which he believes there is general consensus:

1. That the courts should be the primary decision-makers and any administrative discretions which impact on the sentence should be governed by rigid, well understood guidelines.
2. That courts should have 'the widest possible range of sentencing options'.
3. That we should know more about the impact of sentencing options upon future criminal behaviour.
4. That the community should be educated to understand sentencing rules and the difficulties of sentencing.
5. That imprisonment should be used as a last resort.
6. That indeterminate sentences (such as life imprisonment) are undesirable and courts should be empowered to set determinate sentences, where appropriate.

In addition, Mr Kennan discusses at some length recent reforms and proposed reforms in the sentencing of offenders in Victoria. He refers to the setting up of the Sentencing Committee, chaired by recently retired Supreme Court Judge, Sir John Starke, to review current sentencing policy and practice in Victoria. Sir John and members of that Committee participated at the seminar. Mr Keenan also quoted statistics relating to the cost of imprisonment, and claimed that in Victoria the prisons were now substantially housing hard-core prisoners. These were persons who had committed serious crimes, or had a history of substantial

repetition of crimes. In view of the cost and limited resources, sentencing he argued had to be allocated on a needs basis and in particular only those that needed to be in prison should be in prison.

In thus setting the tone of the seminar it was Andrew Ashworth's turn. His presentation, entitled 'Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems' is quick to point out that sentencing, if designated as a 'primary instrument of crime control' can have but limited function with limited effects. In his view the aim of sentencing ought to be 'to impose on offenders a punishment that is proportionate to the seriousness of the offence, so as to restore the order disturbed by the criminal offence'. By the conclusion of the seminar Ashworth modifies this definition by referring to the 'two aims' - just deserts for offenders and reparation or compensation for victims, a view that is propounded by George Zdenkowski, another speaker at the seminar.

Ashworth argues that there are inherent weaknesses in the common law system of sentencing and speaks of a 'jurisprudential underdevelopment', that is 'borne of a failure to recognise the importance to good sentencing of accurate fact-finding and proper reference to previous authorities'. A further criticism relates to the reluctance of courts to take into account research findings which could assist and direct the exercise of sentencing discretion. In addition, he suggests that there exists an inadequate emphasis upon the financial effects of sentences. At the heart of all these problems, says Ashworth, there seems to be an absence of an agreed sentencing policy. Thus 'legislatures have tended to avoid fundamental issues, the executive has become concerned mostly about the economic implications of sentencing, and the judiciary has continued in the piecemeal fashion which is the natural result of a wide discretion and a narrow appeal system'.

The bottom line for Ashworth is that a primarily 'just deserts' or retributive model, modified by utilitarian considerations, should provide the fundamental policy or framework for sentencers. In this model the courts retain the role of determining the form and severity of the sentence, although the sentencing discretion is more carefully structured 'to ensure consistency and certainty as a means of promoting the rule of law and to limit the severity of punishment to that which the offender deserves'.

On commenting upon Ashworth's article, Mr Justice Nicholson enters what he describes as a 'foolhardy enterprise' given that he is a judge of the Supreme Court of Victoria, prepared to discuss extra judicially, matters pertaining to the sentencing process. Whether this is a foolhardy enterprise or not, he is joined in this endeavour at a later stage in the proceedings

by other members of the judiciary, including Mr Justice Vincent (Supreme Court of Victoria) and Mr Kevin Anderson (Deputy Chief Magistrate, New South Wales) who are prepared to discuss freely some of their major misgivings relating to the sentencing process. Their courage, rather than their foolhardiness reveals their concern for the administration of sentencing justice and demonstrates their willingness to contribute openly to the debate on how the system can be improved. This can only be to their credit. Contributions from such sources are indispensable, not merely by reason of their status but by virtue of the fact that they provide an insider's or a user's view of how the system operates in practice and so can more readily identify weaknesses within the system they administer.

In his paper, Mr Justice Nicholson criticises the rigidity of the 'error' principle of appellate review of sentencing in Australia, and argues that appeal courts do not give adequate guidelines in the matter of sentencing to the lower courts. He expresses the concern that if the courts do not perform their function properly then rigid legislative or other extra judicial guidelines may be imposed to replace the common law system. He supports the concept of judicial training, observing that the appointment to the Bench does not turn sentencers 'from a chrysalis into a judicial butterfly overnight'. Judges, he asserts, need more assistance than they are presently getting. His Honour does not emerge as being a strong advocate of 'just deserts' sentencing policy, and he expresses regret that the present 'humane containment' policy of Victorian prisons is interfering with the possibility of rehabilitating many offenders. Aspects of the parole system as it applies in Victoria, the dangers of excessive executive intervention, and the pitfalls of providing sentencers with a 'smorgasbord of options' are some of the issues discussed in the course of his Honour's commentary.

Dr Kay Knapp's presentation 'Discretion in Sentencing' reviews the sentencing reform movement in the United States, from essentially indeterminate to determinate (just deserts based) sentencing systems, and traces the creation and the development in Minnesota of their Sentencing Guidelines Commission. She is particularly well qualified to speak on the subject as she was Research Director of the Minnesota Sentencing Guidelines Commission before becoming Staff Director of the United States Sentencing Commission. She quickly points out that efforts to control discretion at one point of the system results in expanding the discretion elsewhere, and describes how 'this "balloon" or hydraulic paradigmatic view of discretion is often used to critique sentencing reform efforts ...'.

The result is that sentencing discretion is 'transferred from one component of the system, such as the judges, to another less desirable component, such as the prosecutors'.

Incidentally, it is just this inter-relationship between the constituent parts of the criminal justice system that justifies a broad view of sentencing, a consideration that is of great moment to those who propose law reform or wish to influence policies. It also presents a warning to politicians and legislators seeking to introduce mandatory penalties, the effect of such laws being to impact adversely upon judge or jury behaviour, or else shift decisions to the prosecutor (e.g. in determining what charges to lay) increase the adverse consequences of plea bargaining, or exert pressure on the correctional authorities which may be concerned to reduce prison populations by parole or other early release mechanisms.

Knapp states that whether or not sentencing discretion can be reduced, it most certainly can be structured, and this in turn entails 'the development of articulate, explicit policy to guide the exercise of discretion'. Guidelines can be promulgated by the legislature, a sentencing commission, a parole board or by correctional administrators. It is clear that she favours the approach adopted in Minnesota, based on an essentially just deserts philosophy. She explains how this system does not replace, but rather guides the exercise of judicial discretion. It is not a static system that merely reflects past sentencing values for (surprisingly) it promotes the development of case law in sentencing. In short, Dr Knapp's contribution is a stimulating and an educative experience. It is likely to be found provocative for those who cherish the status quo and holds the key to reform for those who feel that the common law system of sentencing has gone about as far as it can go. Whatever views one holds the issues canvassed in her presentation cannot be disregarded in any serious attempt to reform the law of sentencing in Australia.

She concludes her paper by pointing out that the Minnesota Sentencing Guidelines have contributed to the sharing of sentencing discretion, resulting in greater accountability of all the participants and in the promotion of 'truth in sentencing'.

The two main papers dealing with the prosecutor's role in sentencing were presented by Mr Ian Temby, QC, the Commonwealth Director of Public Prosecutions, and Superintendent John Murray from the Police Department of South Australia. Temby's paper cogently argues for greater involvement of the Crown during the sentencing stage of proceedings particularly in those jurisdictions which traditionally have seen the Crown adopt the policy of non-interference in matters of sentencing. This particular theme was adverted to by Temby at an earlier seminar conducted by this Institute (see Potas (ed.) Prosecutorial Discretion, Australian Institute of Criminology, Canberra, 1984 at page 66) and the present article presents a thorough and comprehensive analysis of this issue. John Murray's paper 'A View of Sentencing from the Police Prosecutor's Perspective' comments upon the responsibilities of a police prosecutor in contributing

to the sentencing process. Charge bargaining is discussed as is the need for fairness and candour on the part of the prosecutor. He also states that police prosecutions branches should have a documented policy and have guidelines for the decision to prosecute. In addition he argues that improperly founded pre-sentence and medical reports should be challenged and details relating to the impact of the offence upon the victim should be disclosed to the sentencing court. Regrettably space precluded the inclusion of the latter article in this volume although copies are available upon request.

Although it is generally assumed that the trial judge is given the primary responsibility for determining the sentence, Mr Justice Frank Vincent, QC, in a talk entitled 'Judicial Role in Sentencing' says that a strong argument can be mounted indicating that the judge's function is not to fix the sentence at all. This is because the term of imprisonment pronounced by the judge is rarely required to be served. The sentence lengths are affected by complex legal and administrative arrangements, including the availability of prison accommodation. He cites the example of some categories of offenders who in the recent past had been sentenced in Victoria to relatively lengthy terms of imprisonment being put through the 'revolving door' so that they were simply not required to serve any part of their custodial sentences. His Honour observes 'there is something farcical about the solemn imposition of a sentence when it is understood by all concerned that there is little, if any, possibility that it would ever be served'. Later he states:

It is not difficult to appreciate that this situation has produced a measure of frustration among members of the judiciary, an appearance of dishonesty on the part of governments, and provides a framework within which the more scandalous and hysterical media voices may be raised in exaggerated and ill-informed fashion.

Other criticisms include the lack of adequate statistics, the ability of some judges to avoid having their decisions overturned on appeal by 'the skilful enough manipulation of the cliches of sentencing', the unnecessary raising of legislative maximum penalties, and the general incongruity of legislatively prescribed penalty levels. The sentencing systems have grown up 'haphazardly' with 'no inherent worth or justification' and despite the changes it is still the poor and socially disadvantaged, His Honour observes, who fill the courts and penal institutions.

A paper presented by James Glissan, QC, entitled 'The New South Wales Court of Criminal Appeal: Philosophy and Practice', provides a public defender's perspective upon whether the Court of Criminal Appeal proffers adequate guidance and consistent

solutions to sentencers in that State. He observes that the High Court of Australia has largely abdicated its role in favour of the Courts of Criminal Appeal, and as a consequence there is inadequate uniform delineation of principle from that Court to provide the guidance that the lower courts seek. He does not criticise the actual decisions of the Court of Criminal Appeal themselves, but rather laments the fact that owing partly at least to pressure of work, that Court has failed to sufficiently critically evaluate the performances of the various actors in the sentencing hearing. The Court often corrects the original sentence but does not highlight the error of principle upon which the original sentence was (wrongly) predicated. There are, he argues, too few judgments containing statements of general principle, and fewer still that guide judges in the exercise of their sentencing discretion.

'Sentencing in Magistrates' Courts: The Magistrate as Professional Decision-maker' by Dr Jeanette Lawrence and Dr Ross Homel, attempts to develop an understanding of magistrates' courts through a multi-disciplinary approach. They review much of the research literature on sentencing disparity and find that no single approach has provided an adequate description of how the system works. For example, they note that it is not enough to identify differences in penal philosophies held by decision-makers because it is also necessary to show how their attitudes interact with case factors. The authors' aim is to combine the perspectives and techniques of sociological and cognitive psychological explanations of social behaviours in order to reveal how the various circumstances relating to the offence and the offender, together with social and institutional factors, interact with the magistrate's decision-making skills. The study is restricted to the sentencing of shoplifters, drink-drivers and drug offenders and treats the sentencer as a processor of information as well as a professional decision-maker. In the article they demonstrate how frames of reference and quality of information can influence a magistrate in his or her process of reasoning.

Finally the authors claim that the knowledge gained by the methods they suggest can be used to reduce the incidence of disparate sentencing decisions.

Still on the subject of sentencing disparity is the study by Kevin Anderson, Deputy Chief Magistrate of the Local Courts of New South Wales. He presents an analysis of sentencing exercises, given to groups of magistrates as well as to the participants of the present seminar. The results reveal quite dramatic variations in outcomes, despite the fact that each group was given the same information (derived from a number of actual cases) together with a finite number of sentencing options from which to select in order to reach their decision. As can be seen from the data that he sets out in his paper, the variations in the sentences given

by the magistrates in the exercises are quite alarming, and serve to demonstrate the seriousness of the problem. He claims that magistrates generally regard the District Court Judge's appeal decisions on sentence as idiosyncratic and not providing adequate guidelines for sentencing magistrates. Further he points out that magistrates are not directly informed of appeal decisions and states 'the whole area of sentencing appeals from magistrates in New South Wales cries for reform'. Further, Anderson reveals a strong disenchantment with the conservative attitude of judicial officers and criticises the dominance of such persons on a body such as a Sentencing Council. He expresses the view that legislation is the only path to reform because lip service only is paid to the principle that imprisonment should be a sentence of last resort and 'no significant change in sentencing attitudes can be expected so long as judicial officers enjoy their present broad discretion and relative freedom from justifying their sentences'.

Still on the subject of sentencing disparity Mr Justice Kirby, President of the New South Wales Court of appeal, applies 'mouth to mouth' to one of the key recommendations of the Australian Law Reform Commission's interim report on Sentencing. His paper, presented to the participants of the seminar as an after-dinner speech calls for the resuscitation of the concept of a Sentencing Council and provides a number of compelling arguments in its favour. This paper is but one of many presented at the seminar which advocates a more structured system to assist sentencers and thereby reduce the incidents of unjustified disparities in the sentencing process.

While most speakers seemed to be in favour of a sentencing commission or council of some kind, there were some participants who were critical of such a reform arguing either that the two-dimensional grid for determining sentence (offence seriousness and offender's record) is too simplistic and has considerable limitations as a basis for quantifying the tariff or else that an overly structured approach is likely to lead to more severe sanctions - an argument often levelled at the 'just deserts' approach to sentencing. Austin Lovegrove's article, 'An Evaluation of Judicial Models For Sentencing Guidelines', provides one view as to why a sentencing commission, whether based on a descriptive model (such as that developed by Leslie Wilkins and his colleagues) or a policy-based prescriptive guidelines model (such as that of the Minnesota Sentencing Commission) might fail to faithfully represent the structure of judicial thought, would fail to take account of the more commonly occurring case factors, and in short would fail to give effect to appellate court derived legal principles that cover the rules for combining information. He provides an alternative model that relies on the presentation of the relationship between case characteristics and sentence in the form of detailed sentencing statistics.

Two well-known Australian academics in the field of sentencing, Arie Freiberg and Richard Fox, attack the problem of sentencing disparity by advocating the development of a more systematic hierarchy of penal measures - a system which would match penal measures to offence seriousness. In their article, 'Sentencing Structures and Sanction Hierarchies', they explore the difficulties of establishing a sanction hierarchy and highlight many of the inadequacies of the Victorian Penalties and Sentences Act 1985. They ask:

How can consistency in sentencing be even approached if there is no agreement as to the relative severity of sentences, the principal purpose of each measure, and the order in which a sentencer should approach his or her task?

A number of articles focus on the greater use of alternatives to imprisonment. Dr Ken Polk's paper 'Deinstitutionalisation: A Description and Assessment' begins by describing what he means by decarceration (there are both 'front end' and 'back end' versions of these). He then proceeds to answer a number of questions such as, do decarceration programs lead to a reduction in crime, do they contribute to a 'net widening' of social controls, and finally, are the programs cost effective? He is sceptical as to the attempts at decarceration but concludes that the cost of imprisonment and overcrowding in prisons may eventually force a diminution in the use of imprisonment. The best approach to decarceration he advises, is through legislative and judicial action, by decriminalisation and reduction of penalties rather than through community-based treatment models.

Thomas Kattau and Louis Kyle have recently presented their report of an evaluative study of Community Service Orders in Victoria. Entitled 'Community Service Orders: Another Alternative to Imprisonment'. Their article which regrettably could not be included in these proceedings but is available from the editor has found that there is strong evidence that Community Service Orders in Victoria are not used so much as an alternative to imprisonment than as an alternative to other sentencing options. This lends support to the kind of criticism outlined in Polk's paper and also discussed in the opening address by Ashworth and therefore reinforces a warning to those who believe that the mere introduction of another alternative to imprisonment will automatically lead to fewer persons being sent to prison. In addition the authors call for sentencing guidelines in order to reduce confusion at the court level, again a theme that finds support in other articles including Ashworth's and that of Freiberg and Fox.

Nigel Stoneman's article, entitled 'Probation and Parole, Australian Capital Territory, New South Wales - More Problems Than Prospects', provides a highly critical appraisal of the

Probation and Parole Act 1983 (N.S.W.). He begins by saying that the legislation does not provide a clear rationale for future planning of sentencing and correctional systems, a criticism that is shared by a number of other commentators. He describes the legislation as incomprehensible, tending to increase prison populations and community supervision cases, lacking in credibility and lacking in community support. He advocates a complete overhaul of the system, with statements of aims and objectives and a genuine effort towards the use of alternatives to imprisonment and 'a real shift of financial resources to that area'. He presents an argument for a Determinate Sentencing Act, the essential feature of which would be that each prisoner would have

one release date varied only by incentive remissions. Length of sentence would be adjusted to equate to actual periods of imprisonment now being served, to safeguard against prison population increases. After-care supervision would be restricted and largely replaced by a resettlement program undertaken prior to release.

The proposed diminution of the role of parole and greater emphasis on certainty of duration of sentence implicit in Nigel Stoneman's paper may be contrasted with that of Ivan Vodanovich's article 'Has Parole A Future?'. Vodanovich, who is the head of the West Australian Probation and Parole Service sees two choices: first, to retain the 'safety valve of parole' albeit in an improved form or second, to replace it with the justice model. In his exposition of the development of parole and the struggle between indeterminate (rehabilitative) and determinate (retributive) sentencing systems, he draws heavily on United States and Canadian experience. He clearly prefers the Canadian approach with its greater emphasis on rehabilitation and he notes that the movement to abolish parole in many of the jurisdictions of the United States has slowed down considerably. He traces the development of parole in Australia and critiques the Australian Law Reform Commission's recommendation to phase out parole. Then he describes the parole system in his own State and concludes that parole does have sufficient merit to warrant its continued retention in Australian sentencing policy.

Another article dealing with the 'back end' of sentencing is the very comprehensive presentation 'Sentencing: Reflections of an Innkeeper' by John Dawes and Frank Morgan. This paper focuses on the South Australian prison and parole system and describes the impact of recent policy and legislative changes affecting prison sentences in that State. The authors document for example, the dramatic fall in prison numbers albeit in the short term, following the introduction of the Correctional Services Act 1982 (S.A.). The latter allows earned remissions of up to fifteen days per month to be deducted from the non-parole period, providing

(virtual) automatic release at the expiry of the non-parole period and removing the possibility of parole for sentences of less than twelve months. They praise the greater certainty, heralded by the new system of a definite release date, for this 'facilitates the development in a co-operative way with the prisoner of a sentence plan'. Further they observe that 'parole is no longer perceived as something of a lottery or capricious' and it also leads to the consequence that there is less tension and strain within prisons. They praise the concept of earned remissions and strongly support the idea of a uniform remission system for the whole of Australia. They believe that their current parole system is a valuable asset in prisoner management and that prisons themselves must be free from overcrowding if the system is to work properly. Their paper is supported by a number of appendices which contain almost everything-you-wanted-to-know-but-were-frightened-to-ask about the rules governing the administration of prisons in South Australia.

David Brown's 'Preconditions for Sentencing and Penal Reform in New South Wales: Some Suggestions Towards a Strategy for Contesting an Emerging Law and Order Climate' begins by reminding the reader of the 'law and order' public climate that presently prevails. This will ensure that 'the prison is not about to fade away in New South Wales in the 1980's'. Yet if prison reform is to come about he argues, an attempt must be made to contest and reconstitute those forces which are contributing to the current conservative climate. The forces include the increasing prison population and the discredit (and abatement) of various forms of executive release mechanisms, the cautionary approach to parole release, the increase in non-parole periods set by the courts, the impact of public judicial statements relating to remissions and early release of prisoners, various criticisms relating to the news media including the sensationalising of particular crimes, and so on. He does not believe there is a single blueprint for reform and warns that a 'just deserts' approach with a commitment to 'a wholesale reclassification of maximum penalties' is a dangerous path. He states as follows:

The political process of reform is not the wholesale adoption of a rationalist model or scheme in toto but a struggle over the adoption and implementation of specific issues and recommendations. Thus to premise recommendations like the abolition of parole, remissions and licence release schemes on the adoption of a 'just deserts' rationale (itself fundamentally retributive in character and legitimating in effect) a legislative commitment to some 'last resort' formula and a (highly unlikely in the present climate) downward legislative reclassification of the penalty structure is to invite the selective adoption of alleged reform recommendations which would have the effect of

increasing sentence lengths and sacrificing hard-fought for prisoners' gains won over decades of struggle.

Brown's path to reform involves, amongst other things, regulating (disciplining?) the media and 'socialising' (educating?) the judiciary, making these agencies more accountable for their actions. He supports the concept of a sentencing council, but stresses any such agency should proceed in an open way with 'the recording and attribution of views of all members and their public availability', being of primary importance.

The power of the media which is one of the central concerns of Brown's paper is of course well recognised in a number of papers. For example, early in the proceedings of the seminar, Mr Justice Nicholson referred to a proposal to appoint a media liaison officer for the Victorian Court system in order to improve communications between courts and the press, particularly in relation to sentencing matters. Similarly in a paper entitled 'Crime, Sentencing and the Media', Dr Paul Wilson, the Assistant Director of Research and Statistics of the Australian Institute of Criminology, outlined a study which he and a colleague propose to undertake on 'how news is selected and presented by journalists and editors'. He discussed the problems of imbalanced, exaggerated, incomplete and prejudicial reporting that inevitably lead to severe distortions in public perceptions. Ultimately this research project is intended to suggest 'methods by which journalists' own professional standards can be improved in reporting crime related matters'. Copies of Dr Wilson's paper are available upon request from the editor.

Professor Tony Vinson's article 'Correctional Services in the A.C.T.' compares the Territory's general approach to corrections with that of the Netherlands. In the course of his presentation he joins other commentators in stressing the importance of identifying what are the aims of penal policy, and he criticises the Australian Capital Territory correctional services on the basis that there is an absence of clearly formulated goals. He says:

Almost all planning is tentative and the developments that do occur are ad hoc ... There is no effective, informed leadership to convert ideas into practice.

After listing a number of specific issues requiring reform and better managerial competence in the A.C.T., his discussion focuses on the influences that 'give purpose and direction' to the Dutch penal system. While much of his analysis highlights the importance of prison management, and there is some interesting insights into the reformation of the Dutch system (particularly with respect to the relationship between prisoner and prison

officer) it is clear that many of the lessons gleaned are capable of being imported into Australia with beneficial results.

Ray Whitrod addresses the topic of 'The Victim's Role in the Sentencing Process'. He recounts recent initiatives both by the General Assembly of the United Nations, and in South Australia to provide victims with the opportunity of influencing the sentencing decision. He discusses the Declaration of Victims' Rights and the victim impact statements as well as some of the implications of greater involvement of victims in the decision-making process itself. He concludes by saying that victims want their voices heard, and expresses the view that 'many of them would not press for heavier penalties if they were satisfied that the sentencing authority had understood the harm that they had caused'.

Without a doubt one of the most perplexing issues in Australian sentencing policy relates to Aboriginal offenders. Those jurisdictions with high aboriginal populations, particularly the Northern Territory and Western Australia have by far the highest imprisonment rates in the country. In the introductory remarks Richard Harding says:

Australian Aborigines are the most imprisoned indigenous people in the free world. Year after year structured, apparently immovably, into patterns of Australian imprisonment there is a 16:1 Aborigine to non-Aborigine ratio.

Traditionally the bone has been pointed at the Northern Territory as the worst offender in this regard, but Doug Owston, in 'Aboriginals in the Northern Territory: A Statement' makes the surprising observation that 'Aboriginals are far more likely to be imprisoned outside the Northern Territory on a per capita basis than in the Northern Territory (where they make up 25 per cent of the population)'. Again, this short statement has not been included in the proceedings but is available upon request from the editor. For imprisonment data relating to Aboriginals from Western Australia refer to Table 4 of the statistics attached to Harding's introductory remarks.

Kayleen Hazlehurst's paper also deals with the problem of Aboriginals in the criminal justice system. Her presentation is entitled 'Sentencing: Perspectives on Aboriginal Offenders' and she notes that contrary to common belief suggesting that aboriginal offenders receive comparatively lenient sentences, some serve longer terms than their white counterparts. She suggests that:

Aboriginals are less likely than whites to be released early from prison on good behaviour, and more likely to have the term of their incarceration

extended as a result of further offences committed while in prison.

Similarly, imposition of fines only too often results in non-payment and gaol for Aborigines. Hazlehurst stresses that solutions lie not only with the criminal justice system. Specialised sectors - welfare, education and service agencies - must work more closely with police, courts and the aboriginal community in making the deterrence of crime their common denominator. As for general sentencing policy she approves of the scaling of sanctions but at the same time supports greater use of diversion to community justice or community rehabilitation programs. She recounts the importance of involvement of community elders in assisting the judiciary, and advocates the increased employment of Aboriginal officers in the courts. She also believes that many of the minor offences could be dealt with by the Aboriginal community itself rather than be brought before the ordinary law courts.

Maureen Kelleher's paper 'Federal and Australian Capital Territory Offenders: The Future of the Current Laws and Practices' presents a most thorough analysis of the difficult administrative, legal and policy issues relating to Federal and A.C.T. offenders. Complications arise with regard to both sets of offenders because those who are sentenced to imprisonment are detained in State institutions. There is no Commonwealth Parole Board and as a consequence such prisoners may be released on licence in accordance with a mix of legislative and administrative procedures. While the A.C.T. does have a Parole Board, the jurisdiction of the latter does not extend to life sentenced or Governor-General detainees, so that these categories of offenders may also be released on licence granted by the Governor-General. Further complications have resulted from the impact of recent N.S.W. legislation which allows remissions to be deducted from the non-parole period of State offenders, but not A.C.T. offenders. She describes how the Attorney-General Department's policy circumvents this impediment by administrative means to ensure that prisoners are not disadvantaged merely on account of their status. In conclusion she calls for simplified procedures and better publicity explaining how the system operates.

In 'A Matter of Comparative Injustice' David Biles, the Deputy Director of the Institute addresses the question as to what type of uniformity should be pursued in the sentencing of Federal offenders. He argues, contrary to a recommendation contained in the Australian Law Reform Commission's Interim Report on sentencing, that it is better to pursue the goal of intra State rather than inter State uniformity. He suggests, inter alia, that if greater sentencing uniformity is to be achieved across the nation, this may best be achieved through a comprehensive program of education and information dissemination. He approves of the

concept of a National Sentencing Commission (or Council) and adds that:

If such a Commission were able to gather detailed statistical information on sentences imposed for different offences in the different Australian jurisdictions and this information were widely disseminated in a readily understandable form, I believe that a self-correcting mechanism would start to come into play.

Biles approves of sentencing guidelines as an aid to sentencing but suggests that these should not be binding on individual judges and magistrates.

'Sentencing Options in the Australian Capital Territory' is the offering by Ron Cahill, the Chief Magistrate for the Territory. He regards the A.C.T. as poorly served by the available options and criticises the speed or more precisely, lack of speed with which community service orders were introduced into the Territory. He observes that imprisonment is the only custodial option available to the courts and this in turn amounts to transportation, since that the A.C.T. does not have a prison of its own. He regards the A.C.T. ideally suitable for minimum security farms and forestry camps, work-release hostels, and periodic detention centres. He also supports the introduction of a form of hospital orders, and presents arguments for an A.C.T. prison. He says that the Community Service Order scheme is working well, that media reaction to it has been excellent, and that a consultative committee on community-based corrections has been formed to provide a community check or public accountability of the scheme. Some time is dedicated to discussing the problem of sentencing the drug addict and to the difficulties relating to the treatment of the mentally ill. He reminds the reader that sentencing options are useless if the back-up resources and facilities are not available.

Janet Chan's article 'The Limits of Sentencing Reform' analyses the sentencing reform movement of the last two decades, and discusses the paradoxical nature of the problems involved. Further the results of recent reforms are explained in terms of the politics of power, interests and ideologies before she reaches her conclusions upon the limits of sentencing reform.

The contradictions inherent in reform are explained through an analysis of the goals of legitimacy and efficiency in sentencing. She notes that reform is exacerbated by fiscal problems. Relying on another commentator she writes 'the efficiency/legitimacy dichotomy is seen as a contradiction, a tendency inherent in the capitalist state "to destroy those very preconditions on which its survival depends", so that "the necessary becomes impossible and the impossible becomes necessary"'. .

In discussing reform solutions, the author discerns two contradictory reform approaches, rule creation (escalating state control over sentencing) and diversion (de-escalating state control). Reform is about re-allocating the state's power to punish and much of sentencing reform 'is concerned with the struggle over state resources, including the power to punish'.

She reviews Australian and overseas reform initiatives but concludes that the results of evaluative research have been largely negative, and presents a disappointing picture for reformers. Hidden agendas or consensus techniques may also inhibit or deflect reform. For example there is the suggestion that structuring discretion in the name of equity in sentencing may lead to overall harsher penalties and so might be supported by those who would otherwise favour mandatory minimum sentencing laws.

She describes law reform proposals emanating from the federal government as a 'crippling problem' because the federal government has limited powers to alter sentencing practice which essentially is a State concern. Bureaucratic or professional resistance to change however earns for her the position of being 'the most dysfunctional impediment to sentencing reform' and explains that 'prosecutors, lawyers, and judges have established practice shared norms and routinised procedures which are not easily re-oriented'.

She writes:

Sentencing reform is seen as an attempt to re-arrange the power to punish among the legislative, judicial and executive subsystems. The target of control depends on the perceived legitimacy and efficiency of the subsystem, as well as the relationship between the subsystem and its environment. Governments are more likely to tighten executive powers than judicial powers because of the political nature of reform.

Reform initiatives in the form of structuring discretion are resisted by the subsystems where their interests and ideologies differ from the reform interests and ideologies. Politics dominate the formulation and implementation of reform proposals.

Chan goes on to argue that state initiated or sponsored reforms have failed to overcome the contradictions of the legitimacy/efficiency function. Thus despite the setting up of reform enquiries (which may deflect for a time political pressures) 'the formulation and implementation of reform policies will inevitably bring up a variety of contradictory demands and competing

interests' which can only be resolved (short of revolution) by 'bargaining, manoeuvring and power struggle'. It is the bureaucracy that seems to be the great leveller. The result is, according to Chan, that there are extremely limited prospects for coherent and progressive reform. A strategy of 'moral pragmatism' adopted by those who recognise the limits to reform appears the only hope for those who struggle to create a more just and humane society.

The penultimate article in this collection, entitled 'Sentencing of Federal and A.C.T. Offenders: Some Reform Proposals' is presented by George Zdenkowski, the Commissioner-in-Charge of the Sentencing Reference at the Australian Law Reform Commission. He points out that the views expressed therein are not necessarily those of the A.L.R.C. (which in any event is to report on the subject in 1987) although of course, the work does provide an insight into a number of key issues with which the Commission is grappling. These include:

The development of a consistent, fair and understandable sentencing policy and procedure. This is to be achieved partly by recognising that the primary justification, or aim of sentencing is 'just desert for the offender and reparation for the victim'.

The continued movement towards deinstitutionalisation, with reduced emphasis on imprisonment and the expanded use of effective non-custodial sentencing alternatives.

The restructuring of penalty levels. This follows naturally from the acceptance of a deserts based sentencing policy.

The creation of a sentencing commission, which would assist in the task of structuring discretion. It would undertake the task of assisting in the development of relevant information about sentencing and sentencing policy, provide guidelines for sentencers without usurping the authority of the legislature.

The provision of fair and humane standards for prisoners.

The removal of certain civil disabilities from the consequences of conviction.

The provision of better sentencing information for both the participants in the sentencing process and for the community. Again a sentencing commission is identified as having a primary role here.

A sentencing statute which would codify so far as possible, all relevant law relating to the sentencing of federal and A.C.T. offenders.

This article is both comprehensive and detailed. It dovetails with many of the preceding papers as well as providing a glimpse at reform proposals likely to impact upon Australian sentencing policy and practice into the next century.

The last paper consists of a report of Andrew Ashworth's summing up. It is an offering that may best be appreciated after other articles have been read and digested. The talk was prepared during the course of the seminar and presents a remarkable synthesis of the competing models and policy issues that were highlighted over the four days' duration of the seminar.

WELCOMING ADDRESS

Professor Richard W. Harding
Australian Institute of Criminology
Canberra

Six years have gone by since the Australian Institute of Criminology last held a national conference on Sentencing. Quite clearly, the time is now apposite for another conference. Sentencing is a troubled topic, one which undoubtedly causes concern and confusion amongst the public, politicians and criminal justice practitioners. This concern and confusion is mirrored in the media.

In one way, at least, we are better placed to identify the problems and address the issues than six years ago. It is this: that the quality and range of information about the operation of sentencing practices is now far superior. In 1982 this Institute - which from 1976 had been collecting and publishing basic monthly information about prison receipt numbers and average rates - carried out a national census of Australian prisoners. The data thus generated enabled a profile of Australian prisoners to be constructed, relating for example to remands, fine defaults, long-term and short-term imprisonment, offence type, race, and so on. A similar census has been carried out annually since 1982.

Numerically, of course, community-based corrections is more important; approximately 35,000 persons are subject to some kind of order at any given moment as opposed to 10,000 who are in prison. Accordingly, on 30 June 1985 the Institute carried out the first ever national census of this population. To process the data has been a complex undertaking, but I am glad to say that this uniquely valuable body of information should be available before the end of June. An accurate overview of the operation of community corrections must assist in the development of purposeful policy.

Let me briefly highlight some of the matters we currently know about sentencing and some of the issues they throw up. Because imprisonment is the most serious sentencing option and because its use, or non-use, is the matter about which community concern and confusion most frequently manifests itself, I will confine my remarks mostly to that part of the sentencing continuum.

First, then, let me refer to the increasing use of imprisonment within Australia. In July 1984 there were 9,398 prisoners - a rate of 59.6 per 100,000. A year and a half later, in January 1986, there were 10,585 - a rate of 66.7 per 100,000. This rate

is not the highest it has been in the last decade; but the underlying national trend is certainly upwards.

It is obvious that increasing numbers and rates are putting a great strain on available physical resources. This, in turn, creates pressure for enormously expensive building programs. Moreover, much existing accommodation is sub-standard - for inmates and staff - and the need to replace it exacerbates the situation. Also, recurrent expenditure has started to run away from governments, for staffing levels inevitably increase and roster and shift systems become more complex and costly as numbers increase and conditions deteriorate. (It must also be said that recurrent expenditure also seems to increase as conditions improve; that seems to be a bind from which prison administrators do not yet seem able to escape.)

In this context, it is at first sight surprising that many of the pressures we see developing in our society at the present time would tend to increase the imprisonment rate and thus the capital and recurrent costs borne by the taxpayer. Somehow the link between these two notions - greater use of imprisonment and greater financial costs - seldom seems to feature prominently in the debate. This is probably because high imprisonment rates are glibly associated with more effective crime control. Just as most of us, where our individual health is concerned, seem to possess a limited capacity to analyse medical services in terms of general cost-effectiveness, so perhaps most citizens in their concern about what they perceive as enhanced personal protection against crime likewise possess a limited capacity to discuss the matter in terms of general cost-effectiveness.

The paradox, as Andrew Ashworth will point out, is that the correlation between imprisonment rates and crime control is extremely tenuous. The justifications for imprisonment are not primarily those of crime control or crime reduction. Once this point is grasped and accepted, the way is open for general debate about cost-effectiveness and equity. In this context, let me mention just three factors which stand out about the use of imprisonment in Australia.

The first concerns imprisonment for fine default. How many times has it been pointed out that if a fine is an appropriate penalty in the first place, imprisonment is not a suitable one in the second place. If our systems either punish a person for impecuniosity or encourage him to work off fines by the apparently soft option of a short period of imprisonment, then those systems are not working properly. At the present time, month after month, those five jurisdictions which break down receivals into 'sentenced to imprisonment' and 'received for fine default' show just over 50 per cent of total receivals falling into the latter category. The impact made by this intake upon the imprisonment rate per 100,000 is, of course, relatively small; but the general pressure upon physical resources and the impact upon recurrent costs is out of all proportion.

The second factor overlaps with the first. It concerns short-term imprisonment. His Honour Mr Justice Smith of the Supreme Court of Western Australia has provided a profile of Western Australian prisoners (attached at the end of this paper), which will be supplied to participants, from which it emerges that prisoners received to serve short sentences (i.e. less than three months) constitute an increasing proportion of the Western Australian prison population. Currently it is running at 62 per cent. This translates, in the case of Western Australia, into about 10 per cent of the prison population at any given time. Much the same pattern will be found in all jurisdictions. If no prisoners at all were received as a consequence of fine default, there would still be a sizeable number of persons sentenced to very short terms. Is this effective, either penologically or financially? I very much doubt it.

Finally, let me refer to a phenomenon which overlaps with each of the two previous matters - that of Aboriginal imprisonment. Australian Aborigines are the most imprisoned indigenous people in the free world. Year after year structured, apparently immoveably, into patterns of Australian imprisonment there is a 16:1 Aborigine to non-Aborigine ratio. Actually, the situation is even worse than this. Age-specific male imprisonment rates as at 30 June 1984 were staggering: for the eighteen year old group 5182 per 100,000; nineteen, 4972 per 100,000; and twenty to twenty-four, 5718 per 100,000. In one State the rate for the twenty to twenty-four years old group was 10,065, i.e. one Aboriginal male in ten was in prison at any given time.

What an abomination this is, Ladies and Gentlemen. We cannot seriously believe that Aborigines, as well as being the most imprisoned ethnic group in the free world, are also the most wicked. So when are we going to do something about it? If we will not do so from feelings of equity, can we not at least do so from concern for cost-effectiveness in criminal justice administration.

These three examples of issues crying out to be addressed are good ones in that none of them could be solved by any single component of the criminal justice system acting alone. Each requires changes in the law itself, in police discretion, in prosecutorial policy, in sentencing practice, in administrative conduct within prisons - or at least in a combination of several if not all of these factors. That is why the attendance at this Conference is so gratifying to the Institute; participants are drawn from all parts of the criminal justice system. Unless there is dialogue across the system, no progress can be made. In welcoming all of you, I will forego the temptation of singling out any of you, individually or as a professional group. None of us has an overweening importance in this project; or, to put the matter positively, we all have an equal importance.

Nevertheless, I must refer here to the role of the Australian Law Reform Commission. As you will all know, the Reference on Sentencing of Federal Offenders is now at an advanced stage. The timing of this Conference - the scientific program of which has been developed in consultation with the Commissioner-in-charge, Mr George Zdenkowski - is calculated to assist the deliberations of the Commission, and I trust it will do so. However, the objective of the Conference is of course wider than that - to assist in the Australia-wide debate, wherever and howsoever it is occurring, about the perennially difficult topic of sentencing.

It is now my pleasure to introduce to you the Honourable Jim Kennan, Attorney-General and Minister for Corrective Services of the State of Victoria. When I said earlier that the underlying trend of Australian imprisonment rates was upwards, I should have made a caveat. It is this: that the Victorian rate is remarkably stable; that rate, moreover, is at a low level. In January 1986, the rate was 45.8; a year before it was 46.2; in January 1984 it was 48.0; and when the Cain Government took office it was 44.9. There is no simple explanation for this. However, one can say with confidence that the setting up of a separate Office of Corrections by the previous Minister, Mrs Pauline Toner, and the development of a range of imaginative community corrections programs under the present Director-General, Mr Bill Kidston, has contributed to this achievement.

Mr Kennan, I surmise, is determined to keep the Victoria imprisonment rate low and to humanise the system to the extent that this is reconcilable with public perceptions of the purpose of imprisonment. Accordingly, late last year he set up a comprehensive Inquiry into Sentencing in Victoria. I understand that all the members of the Inquiry will be attending this Conference, and I welcome them, in particular the Chairman, Sir John Stark.

Mr Attorney, it is a privilege to welcome someone whose commitment to just sentencing laws and practice is as public and uncompromising as your own. I now have pleasure in inviting you formally to open the Conference.

PROFILE OF PRISONERS 1979/80 - 1984/85
WESTERN AUSTRALIA

Explanatory Notes

The prisoner profile data attached is a summary of information contained in Prisons Department Annual Reports over the last six years.

The following briefly explains the format of each table and provides an explanation of the terms used.

Table 1 - This table is a summary of prisoner receivals by major offence category, where major offence refers to the offence attracting the longest sentence length disregarding remission and non-parole periods.

Table 2 - Shows the number of prisoners received with sentences of different lengths.

Duration of sentence refers to the length of sentence handed down disregarding remission and non-parole periods. For prisoners with multiple offences the sentence length is determined by the cumulative effect of all sentences imposed.

Table 3 - Shows the number and percentage of remand prisoners received over the six year period.

Remand in this case refers to all those prisoners received in prison and either released without being sentenced or who were still held on remand at the end of each period.

Table 4 - Summarises the number of Aborigines in the prison system in terms of the daily average muster and the number of receivals. These figures are in turn shown as percentages of the entire prison population for each particular year.

Daily Average Muster refers to the average number of prisoners held on any one day during the course of a year.

Receivals refers to the admittance of prisoners into prison. Transfers between prisons and receivals after escapes are not included. As an offender may have been received more than once during the period, prisoners received does not count distinct individuals.

Table 5 - Shows the number and percentage of prisoners categorised by age at the time of receival. The figures in this case are based on distinct persons which refers to the number of individual persons received during the period.

TABLE 1
PRISONERS RECEIVED BY MAJOR OFFENCE GROUPS 1980/81 - 1984/85

OFFENCE	80/81	81/82	82/83	83/84	84/85
Offences against person	520 (13%)	472 (12%)	677 (14%)	573 (13%)	548 (12%)
Offences against property	1087 (26%)	1062 (28%)	1207 (25%)	1035 (23%)	999 (22%)
Offences against justice	252 (6%)	250 (7%)	358 (7%)	323 (7%)	391 (9%)
Offences against good order	774 (19%)	538 (14%)	655 (13%)	421 (9%)	387 (9%)
Drug offences	101 (2%)	129 (3%)	188 (4%)	224 (5%)	282 (6%)
Miscellaneous	1388 (34%)	1330 (35%)	1794 (37%)	1896 (42%)	1925 (42%)
TOTAL	4122	3781	4879	4472	4532

TABLE 2
DURATION OF SENTENCE OF PRISONERS RECEIVED 1979/80 - 1984/85

YEAR	Length of Sentence			TOTAL
	LESS THAN 3 MONTHS	3-6 MONTHS	MORE THAN 6 MONTHS	
79/80	2211 (57%)	689 (18%)	960 (25%)	3860
80/81	2415 (59%)	849 (21%)	858 (20%)	4122
81/82	2188 (58%)	674 (18%)	919 (24%)	3781
82/83	2921 (60%)	869 (18%)	1089 (22%)	4879
83/84	2692 (60%)	701 (16%)	1079 (24%)	4472
84/85	2813 (62%)	718 (16%)	1001 (22%)	4532

TABLE 3

REMAND PRISONERS RECEIVED 1979/80 - 1984/85

YEAR	NUMBER	% OF TOTAL RECEIVALS
79/80	588	13
80/81	681	14
81/82	702	16
82/83	891	16
83/84	850	16
84/85	1065	19

TABLE 4

NUMBER AND PERCENTAGE OF ABORIGINAL PRISONERS 1979/80 - 1984/85

YEAR	DAILY AVERAGE MUSTER		RECEIVALS	
	NUMBER	%	NUMBER	%
79/80	473	33	2085	54
80/81	504	35	2323	57
81/82	451	33	1867	50
82/83	518	35	2361	49
83/84	477	33	1973	45
84/85	466	32	1994	44

% - Percentage of total muster or receivals.

TABLE 5
AGE DISTRIBUTION OF PRISONERS 1979/80 - 1984-85

AGE		YEAR					
		79/80	80/81	81/82	82/83	83/84	84/85
Under 17	No	82	79	76	90	55	53
	%	2.5	2.2	2.2	2.2	1.4	1.4
18-19	No	508	491	492	595	621	611
	%	15.3	13.7	14.4	14.6	15.7	15.2
20-24	No	1037	1058	1011	1339	1218	1258
	%	31.2	29.5	29.6	32.8	30.7	31.2
25-29	No	624	705	729	809	831	832
	%	18.8	19.7	21.3	19.8	20.9	20.6
30-39	No	648	753	700	799	801	845
	%	19.5	21.0	20.5	19.6	20.2	21.0
40-49	No	265	326	267	302	297	280
	%	7.0	9.0	7.8	7.4	7.5	6.9
Over 50	No	159	164	142	146	145	151
	%	4.8	4.6	4.2	3.6	3.7	3.7
TOTAL		3323	3584	3417	4080	3968	4030

Figures based on distinct persons received during the year.

Of the 4532 prisoners received during 1984/85, 1797 or 39.7% of them were imprisoned for default of fine only.

Based on a sub population sample of the above, taken between 1/12/84 and 31/5/85 it was found that the average length of head sentence for fine defaulters was 19 days.

OPENING ADDRESS

The Hon. Jim Kennan, MLC
Attorney-General for Victoria

It gives me great pleasure to be able to open this important seminar. The seminar is to deal with a wide range of sentencing issues, including sentencing policy, sentencing process from the point of view of the prosecution, the court; the question of the future of imprisonment; alternatives to imprisonment; issues relating to parole and early release and problems of sentencing reform, including legislative structures and law reform.

I would like to use (or you may think abuse) the twenty minutes allotted to me to make some remarks from the perspective of an Attorney-General and Minister for Corrections of a State which is engaged in some wide-ranging sentencing and correctional reform and is pondering further reform principally through the vehicle of a committee headed by Sir John Starke.

In the Australian context at least this sentencing seminar is taking place against a background of some lack of confidence on the part of the community and on the part of those involved in the administration of the law about the sentencing process and the objectives of sentencing. Indeed, whilst it might have seemed not all that long ago that there was a reasonable consensus amongst criminologists, penologists and lawyers about the objectives of sentencing, that consensus has now broken down. Unrest about sentencing decisions, particularly about the issue of administrative discretion that often affects sentence length, as well as debate about the effectiveness of a wide range of sentencing practices, including the questioning of the philosophies upon which sentencing policy is based, makes it clear that we are no longer operating in an atmosphere of agreement of sure foundations about underlying principles. Indeed, the fact that this seminar is being held and that the Australian Institute of Criminology has been overwhelmed with a large number of persons wishing to attend the seminar, is sufficient evidence of the notion that the issues that are about to be discussed are wide open to debate by those involved in and interested in sentencing practice and law.

The old consensus, as I might term it, was based on the premise of rehabilitation, deterrence and protection of society as being the underpinning justifications and goals for sentencing practice.

There has now been, for some years, substantial cynicism about rehabilitation, whether it is thought to aim at reducing

recidivism or improving the life of the offender by the provision of skills, guidance and making available to the offender a range of opportunities thought to have been lacking.

Allied with the rehabilitative ideal was the development of techniques for the prediction of future criminal behaviour. It is now admitted that these forecasting techniques were both crude and imprecise, but still are better than no predictions at all. Notions of general deterrence found a dominant position in the thoughts and ideas of criminologists in the 1970's. It was argued that crime could effectively be reduced or contained through sentencing policies aimed at intimidating potential offenders more efficiently.

Another philosophy that has come to the fore is the 'just deserts' theory. This notion involves the idea of deserved punishment deemed to be proportioned to the blameworthiness of the criminal conduct being assessed. This theory emphasises the notion that the quantum of punishment is retrospective and that it should be based on the seriousness of the violation of the law and not influenced by the prospects of future behaviour or related to any anticipated improvement that the offender may experience whilst undergoing the sentence.

More recently, the concept of 'selective incapacitation' as a justification for sentencing of criminal offenders has been proposed and, in some jurisdictions, translated into practice. This notion is based on the idea that most individuals involved in criminal activity were only occasional criminals, but that there was a hard core who committed crimes with startling frequency and who must be selectively incapacitated. The focus then becomes on identifying the recidivists and imprisoning them. Whilst those advocating desert theories argue that sentences should be based on the seriousness of the criminal conduct, selective incapacitation supporters argue that the determination of future risk should be the main ingredient of sentencing policies.

The philosophies and concepts which I have briefly referred to are certainly being discussed in a number of places in Australia and overseas by those interested in the sentencing process.

But what are those of us who must endeavour to understand the wishes of the community, and who have the responsibility to administer the law here and now, to do? Can I indulge myself by giving you my view of the issues after having dealt with the problem first as Attorney-General and more latterly as Attorney-General and Minister for Corrections in a populous State? Like the Court of Criminal Appeal in Victoria, I might be said to be giving you my 'instinctive synthesis' and I am no doubt open to attack for doing that from academic commentators in the same way as the notion of instinctive synthesis has been attacked as a

proper approach for the evolution of a court sentence. Like democracy, I suspect that those of us who have to administer the law on a day-to-day basis may wish for a more perfect system but we cannot find one.

As part of the process of developing a response to community concern about sentencing practices and about administrative interference eroding the sentences of courts, last year I circulated in Victoria a Sentencing Discussion Paper suggesting various modifications to the existing law. Following the circulation of that Paper I then convened a meeting of judges, magistrates, police officers, prosecutors, defence lawyers, academics, officers from the Office of Corrections and representatives of interest groups concerned about victims of crime. Strangely enough, that meeting reached widespread and quite speedy agreement around a number of issues which are, I believe, reflected in these principles:

1. That the courts should be the primary decision makers in sentencing and that if administrative discretion reduces the sentence of a court by impact of remissions and pre-release schemes, then the impact of those discretions must be better understood and exercised in the context of both better understood guidelines and tighter guidelines.
2. That courts should have the widest possible range of sentencing options open to them including imprisonment, flexible community service orders, 'shandied' sentences involving imprisonment followed by community service orders, suspended sentences and fines.
3. That we need to know a lot more about the impact of various forms of sentencing options on future criminal behaviour of the person concerned.
4. That there is a need for a better community understanding about sentencing rules and the difficulties in sentencing practice.
5. That imprisonment should be a sentence of last resort and that there is a recognition that some people who may have been sentenced to a term of imprisonment for an offence twenty years ago might well be dealt with by way of an alternative disposition today but, on the other hand, a new range of offenders were emerging committing serious crimes such as drug trafficking which needed to be dealt with by way of substantial prison sentences.
6. That indeterminate sentences such as life imprisonment were undesirable and courts should be allowed to fix as far as possible a determinate sentence.

As a result of that discussion, we decided to consolidate as far as possible all the law relating to sentencing into one statute, the Penalties and Sentences Act 1985. This drew on an earlier Penalties and Sentences Act but substantially incorporated provisions from the Crimes Act, the Community Welfare Services Act and other Acts to provide in legislative terms a sentencer's guide to the relevant statute law affecting sentences. This Act has tightened up certain administrative discretions and abolished some obsolete rules such as the date of sentence commencing from the first day of the criminal sittings of the relevant court. But the Act also endeavoured to give the courts the greatest possible range of sentencing options. Therefore, suspended sentences were introduced, a wide-ranging community based order was introduced which disposed of the distinctions between probation, community service work and attendance centres, enabling a judge or magistrate to sentence the person to a community service order which would have certain core conditions relating to reporting and non-violation of the law and then to add such extra conditions as the court thinks appropriate. The Act also enables judges to combine a short term of imprisonment with a more extended term of community service order.

I believe that the legislative provisions we now have in Victoria are as advanced as we can presently safely go. I should add that we are shortly to introduce a provision to enable judges to fix a term of imprisonment other than life for murder. We are also taking steps to divert mentally ill offenders as soon as is reasonably possible into the mental health stream rather than having persons, for instance, who are unfit to plead to a charge and who have never been convicted, languish within the criminal justice system years after it has become practical to reasonably expect to hold a trial.

Recognising that there are issues involved in sentencing which cannot be readily canvassed and dealt with legislatively or administratively in the short term, I have appointed a Sentencing Committee under the chairmanship of Sir John Starke, recently retired as a long-serving member of the Victorian Supreme Court and as the Chairman of the Parole Board of Victoria. The idea of the formation of such a committee emerged following the meeting of interested persons which I referred to earlier. The Starke Committee is reviewing current sentencing policy and practice in Victoria and other places and is looking at a very wide range of issues including sentencing guidelines, just deserts concepts/sentences, the impact of custodial and non-custodial sentences on correctional administration, police administration, victims, prisoner morale; the impact of remissions, pre-release, parole and temporary leaves and other sentence shortening practices on the system; the information available to the courts and the impact of such information or lack of it on sentencing decisions.

I believe that there is now a recognition on the part of governments that sentencing law practices must have some alignment with community values. Unfortunately, community values cannot readily be ascertained in an informed way in the area of sentencing as the pressure of the media tends to sensationalise a few cases and to produce simplistic responses which members of the community would not necessarily reproduce were they charged with all the information and with all the problems. But, on the other hand, I believe that there is a growing acceptance within the community that sentencing and corrections are fundamentally a community problem.

The experience that we have had in Victoria with the systematic introduction of community based correctional centres is, I believe, highly instructive. For more than twelve months we have had community based corrections centres based at some twenty-five locations throughout Victoria. Each corrections centre has a small permanent staff and is supervised by a community-based committee. The community-based committee includes, very often, representatives of the police force and the magistracy and other persons who have an interest in correctional matters and persons who bring a community view to the running of the local community-based corrections centre. It is interesting to note that communities have accepted very well the community-based corrections centres and there is a growing acceptance amongst regional communities in particular that breaches of the criminal law are a community problem and must be addressed substantially within the community and that the community has a real responsibility for taking part in correctional programs rather than simply calling on governments to incarcerate offenders. The evidence for this recognition may be found in the excellent co-operation which the Office of Corrections is finding in local communities for the provision of programs of community service work as well as counselling and educational programs for offenders. Many of these programs could not exist without the community making available, for instance, jobs for offenders attending community based centres to carry out. We are now finding that there are a number of institutions which substantially depend on the community-based corrections system for the maintenance of buildings. Such institutions include hospitals, sheltered workshops and other needy and community minded institutions.

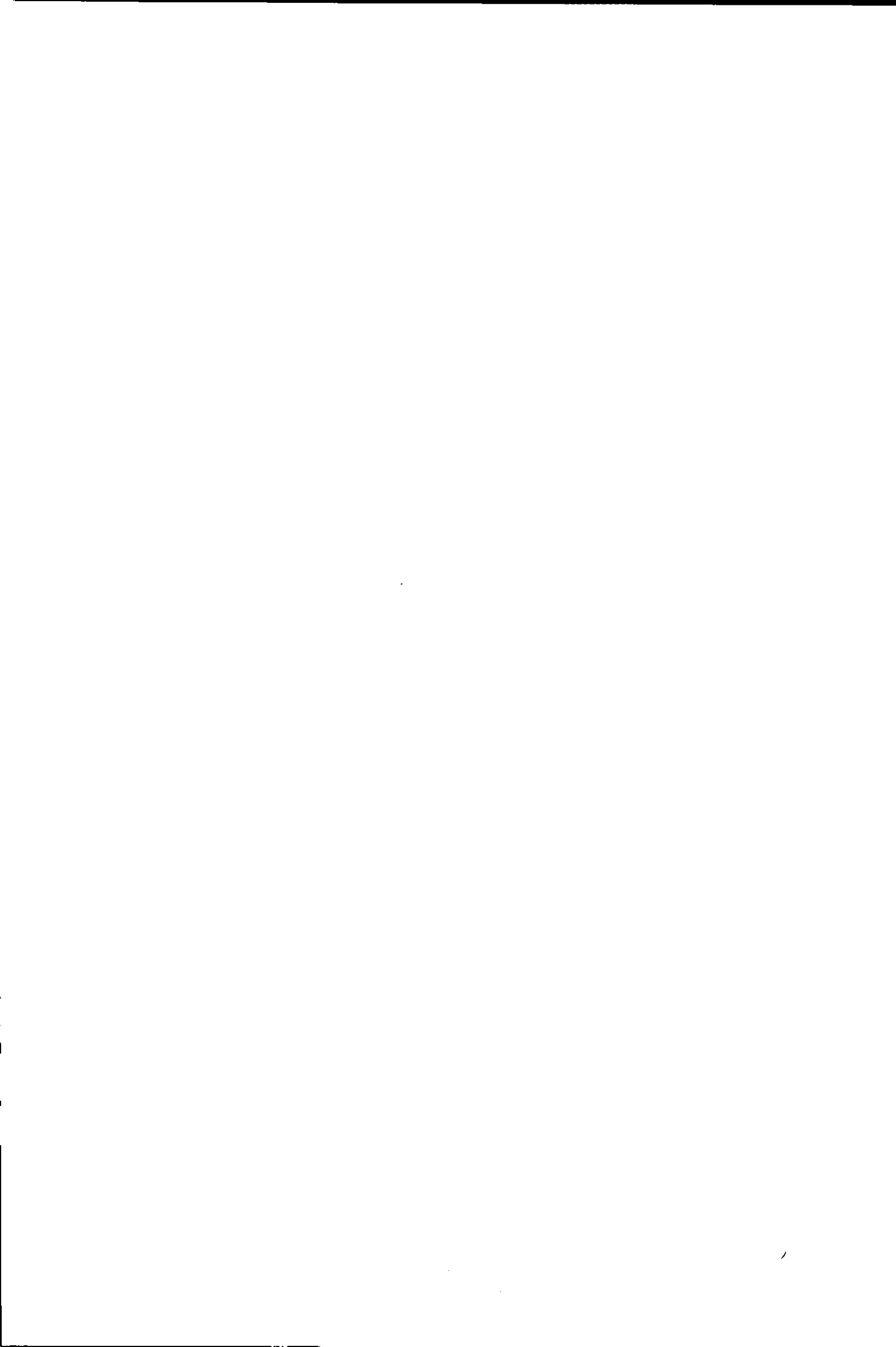
The early figures which we have assessing the impact of the extended based correctional system indicate that the breach rate of community-based orders is no worse and probably better than the breach rate for persons released from prison on parole. In addition, the community-based corrections centres serve to provide for a supportive mechanism for persons released from imprisonment on parole and help them adjust back into the local community.

We have more work to do in relation to the expansion of community-based programs and in relation to the assessment of their impact. However, the early results are very encouraging both from the point of view of effective correctional administration and from the point of view of developing responsible community attitudes to correctional matters.

Finally, I would like to stress a political point which I have made before. It is a political and community reality that our community does not want to pay more taxes. It is also a political and community reality that members of our community do not place a high priority on our prison system as a focus for expenditure of taxation revenue. This is so despite the appalling condition of some of our prisons. Therefore, the number of available beds in prisons will always be limited. The relative cost of keeping a person in prison is enormous compared with the same person being treated by way of a community based order. In addition, the cost of building new prisons in this country is running at close to \$200,000 per bed for a high security institution and some \$100,000 per bed for a medium to low security institution. When the legislature sets a statutory framework for sentencing and when courts sentence a person, they are engaged on one view, in a process of allocating community resources, or to put it more bluntly taxpayers' money. As with other decisions by politicians and administrators relating to taxpayers' money, the resources should be allocated on a needs basis. Such a notion might appear slightly startling and simplistic in relation to sentencing but it really comes down to this. Given that the number of prison beds in the current climate is likely to be near to or smaller than the potential demand for space, we must have a system which ensures that those people who need to be in prison should be in prison, and that we should not have in prison taking up that valuable and needed space those people who could be suitably dealt with by way of alternative disposition. In the last twenty years we have probably made substantial progress in getting this alignment closer to being correct. The prison population, at least in Victoria, no longer has, except in the most blatant case, persons who are defaulting on fines and no longer has any of the many people in it for the sort of relatively small offence by people with no substantial criminal history who one may have expected to find in a typical Victorian prison twenty or twenty-five years ago. In other words, our prison system is being increasingly made up of persons who have committed either very substantial crimes or who have a history of substantial repetition of crimes. I have found that prison governors and prison staff who have been in the system over twenty years have to deal on their account with an increasingly harder core of prison population. This indeed poses difficulties and challenges for prison administrators.

But the importance of a conference such as this is that it will assist all of us involved in the process to be able to make better judgments about the framework for making decisions about how offenders are to be dealt with and for better aligning the purposes of the criminal law, the purposes of sentencing with community expectations and resources.

Ultimately, I believe that there needs to be a recognition that there are limitations to the criminal law, the sentencing policy and the imposition of dispositions whether they be custodial or community based. We need to insist that when government intervention is proposed or taken through the criminal law it should be justifiable as serving some common good and that this intervention be moderated by considerations of fairness, justice and humanity. I wish you well in your discussions and I look forward to being better informed as a result of them.



CRIMINAL JUSTICE, RIGHTS AND SENTENCING:

A REVIEW OF SENTENCING POLICY AND PROBLEMS

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INTRODUCTION

This conference presents a timely opportunity for a fundamental re-appraisal of all aspects of the public process of sentencing convicted offenders. What should be the aims of sentencing? What ought to be the respective responsibilities of the legislature, the executive and the judiciary? What working principles should be adopted by those who pass sentence in individual cases? And, no less important than these theoretical issues, what approach to the sentencing of offenders is likely to prove most appropriate in the social and political context in Australia?

In this opening address, I shall try to initiate debate on a number of the issues which are bound to underlie many of the conference papers to come. I will argue that we should examine carefully the place and the potentialities of sentencing as one official response to crime: sentencing has a limited function and can have only limited effects, and we ought not to think, speak or write as if it is a primary instrument of crime control. The aim of sentencing should be to impose on offenders a punishment that is proportionate to the seriousness of the offence, so as to restore the order disturbed by the criminal offence. Proportionality therefore assumes central importance, and I shall plead for a re-kindling of interest in, scholarly attention to, and public discussion of the relative seriousness of the various crimes. Imprisonment and non-custodial measures continue to raise deep issues of rights and policy which should not be neglected, but the solution of sentencing problems will be handicapped unless and until there is systematic review of offence-seriousness and of the relevance of previous convictions to the official response to crime. In these areas, as in the decision-making process itself, there are issues of individual rights which have been overlooked too frequently in the arguments for judicial discretion. I begin, however, with a brief description of the general approach to sentencing which many common law jurisdictions have tended to adopt or to drift into, followed by some of the criticisms to which this approach has given rise.

THE COMMON LAW APPROACH

Although changes are being mooted in some jurisdictions, the prevailing 'common law approach' to matters of sentencing has been for the legislature to establish perimeter restrictions, for the courts to control the relatively large areas of discretion within the perimeter, and for the executive to adopt a 'servicing' role but to exert increasing influence through parole systems.

Thus the legislature typically lays down a maximum penalty for each offence, and it provides various forms of sentence for use by the courts within certain defined limits of offence and offender. To the courts are left the discretions to select a sentence from the available range, and to determine the quantum of that sentence to be imposed in each case¹. For a small number of offences sentencing may be controlled fairly closely by legislation: in England, a person convicted of driving with excess alcohol must be disqualified from driving for a minimum of twelve months unless the court finds 'special reasons', and in New Zealand a person who uses serious violence or creates serious danger in the course of committing an offence punishable with five years imprisonment or more must be sentenced to an immediate custodial sentence unless the court finds 'special circumstances'². A widely-used and less restrictive approach is the 'no other method appropriate' formula, adopted (for example) in Australian federal legislation, in Victoria and in slightly more structured form for young adult offenders in England³. But the predominant feature of sentencing in these jurisdictions is still judicial discretion. The principal reason for this is a strong belief that good sentencing requires the court's order to be tailored to the circumstances of the particular offence and to the characteristics of the individual offender. Justice requires not the mechanical application of general rules but the sensitive exercise of discretion in each case. Thus it is with maxims such as 'no two cases are the same' and 'each case depends on its own facts' that judges tend to defend their wide discretion in sentencing⁴.

Common law systems have generally developed towards appellate review of sentences, and this constitutes a limitation on the exercise of discretion in two ways - by providing a mechanism for challenging a particular sentencing decision, and by generating a jurisprudence of sentencing which courts are expected to take into account in future cases. However, the practical effect of these limitations should not be over-estimated: some systems allow only an appeal by the defendant and not by the prosecution, many systems require the leave of the court before an appeal against sentence may be heard, and even in the furthest-developed systems the jurisprudence of sentencing compares unfavourably with case law on other subjects, with less respect for previous

decisions among both advocates and judges⁵. Moreover, the vast majority of sentences are non-custodial or imposed by lower courts or both, and the relevance of appellate decisions to these spheres is often slender. The discretion of the court which passes sentence remains the salient feature of the common law approach.

In many common law jurisdictions the higher judiciary constitutes a considerable political force. The judicial insistence that the sentence must be tailored to the facts of each individual case may well be combined with a belief in the impracticability of general guidance on sentencing, and with a belief that legislative restrictions tend to be ill-conceived and to be more hindrance than help to the cause of justice. Whether it is in recognition of the strength of these arguments or of the power of the judiciary, there has been a tendency for the legislature and the executive to seek other means of exerting control over the effects of sentencing decisions. Parole is the foremost example, and it may fairly be said that the broader the ambit of a parole system, the more power over sentencing is shifted from the judiciary to the executive. This may indicate a spreading disenchantment with the former common law approach which left decisions largely in the hands of the courts. What might be the sources of this disenchantment? What criticisms of the common law approach ought to be taken seriously?

CRITICAL PERSPECTIVES ON THE COMMON LAW APPROACH

In jurisdictions where the common law approach to sentencing flourishes, the courts deal with their criminal business day to day, reaching decisions in cases which sometimes present considerable difficulty. Where legislatures fear to tread, where academics debate endlessly, judges and magistrates tackle the task of sentencing convicted offenders, doing their best to discharge the responsibility which the law leaves to them. Those who grasp the nettle so frequently are understandably sceptical or even contemptuous of others who offer armchair criticisms without apparently appreciating the full complexity and responsibility of passing sentence.

Yet the sentencing of convicted criminals has immense public importance. The criminal process is society's most severe formal sanction against those who behave anti-socially. Not only do victims and offenders have a close personal interest in sentences handed down, but there is a wider social interest which is manifested in newspaper and television coverage of certain sentencing decisions and sentencing changes, and in the readiness of almost any member of society to volunteer an opinion on the subject. It is therefore neither unsurprising nor illegitimate for sentencing policy and individual sentences to be scrutinised in a public forum. The roles of the legislature and the executive should be discussed, their priorities and other

policies having been openly stated. Equally, questions should be asked about the way in which the courts discharge their task, and whether and how this might be improved. The judges are right to emphasise the great responsibility of passing sentence: with this should go public accountability too.

Probably the most recurrent criticism of the courts takes the form of allegations of disparity and inconsistency in sentencing. Sometimes the criticism stems from a publicised contrast between two sentences passed at around the same time. Sometimes it appears in the more systematic form of research results showing considerable variations in the way in which courts in different areas use the many sentencing options open to them⁶. Sentencers themselves have taken some action in an endeavour to meet the criticism. In England, for example, the Magistrates' Association introduced its list of suggested basic penalties for motoring offences some twenty years ago⁷, and in 1980, in his first guideline judgment as Lord Chief Justice, Lord Lane called upon judges to adopt a 'uniformity of approach'⁸. There is, however, a tension between uniformity of approach and the courts' insistence on dealing with each case on its own facts; not a contradiction, as there would be between uniformity of sentence and the 'particular facts' argument, but at least a tension which calls for a careful examination of those general features which require a uniform approach and the particular factors for which flexibility may be thought desirable.

It is one thing to criticise the courts for a lack of uniformity in their approach to sentencing; it is quite another thing to spell out the approach which they ought to adopt. Disparity may be a natural result of uncertainty as to the aims of sentencing. The courts inevitably adopt various principles and priorities when passing sentence, sometimes expressly, sometimes impliedly. Some of the prevailing aims might be established inductively from a survey of sentencing decisions, but there have been few judicial attempts to formulate priorities among the competing justifications: retribution, deterrence, rehabilitation, incapacitation, and so forth. Neither the legal system nor society as a whole has a settled view on this, and it is perhaps unfair to expect an evolving body of appellate case-law to yield a comprehensive and self-consistent set of aims. This remains, then, an obvious source of disparity.

Another source of disparity is the divergence of views among sentencers about the relative seriousness of types of offence, about the relevance of various characteristics of offenders, and about the proper uses of different kinds of sentence. Confining our attention at this stage to the last-mentioned issue, we find evidence that some judges have markedly different conceptions of and attitudes to probation and community service orders, for example⁹. To some extent this may derive from differences of view about the aims of sentencing; to some extent it may be a

response to local arrangements. But what it also reflects is the lack of guidance on how these measures fit into the scheme of sentencing. When the community service order was introduced in England, there was an explicit official refusal to formulate guidance on the order's proper place within the range of options¹⁰. In the face of this kind of neglect, it is hardly surprising that sentencers have gone their different ways.

Sentencers may also differ in the account they take of public opinion. Some judges regard themselves as having a duty to take notice of public opinion but without yielding even to the strongest outcry in the popular press. This gives rise to the notion of seeking to reflect 'informed public opinion', a point made by some judges and which has obvious weaknesses¹¹. Here again, it is perhaps easier to criticise than to prescribe. Since sentencing is a function performed in the public interest, it is clearly right that the public's view be satisfactorily ascertained on matters of sentencing policy¹². How can it be ensured that the view is based on reliable information rather than prejudice or false impressions? If public opinion is to be relevant, ought it not to be incorporated at the policy-making stage, leaving the courts to apply the agreed policies without further reference to any views expressed by the public?

One consequence of the rather loose, laissez-faire approach described in the preceding paragraphs is that the conception of rights finds little place in sentencing. Neither the victim's right to receive compensation nor the offender's rights not to be dealt with in certain ways gain clear recognition or full protection. In England a court does not yet have a duty to consider making a compensation order whenever it passes sentence, although there is now a duty to give priority to a compensation order over a fine¹³. The idea of a victim's right to state compensation when the offender is untraced or unable to pay is slowly winning acceptance, but raises complex issues¹⁴. It can be said that an offender has the right not to be subjected to a sentence beyond the statutory maximum, but there is only dim recognition of a right not to be sentenced more severely than the offence warrants¹⁵, and possibly a rejection of the notion of rights when it comes to mitigating factors such as the absence of previous convictions¹⁶. To set against the arguments for flexibility and discretion, then, are the claims of a rights-based approach to criminal justice.

As with substantive rights, so with procedural rights there are grounds for criticism. The arguments in favour of discretion cut no ice here. The problem is rather one of jurisprudential underdevelopment, borne of a failure to recognise the importance of good sentencing, of accurate fact-finding and proper reference to previous authorities. Despite the obvious need to establish a sound factual basis for sentencing when there has been a guilty plea or an ambiguous verdict, progress towards a post-conviction

fact-finding procedure which meets the requirements of natural justice has been slow¹⁷, and the path littered by some prime examples of judicial casualness¹⁸. Turning from facts to law, should it not be normal practice for advocates to cite previous decisions in their submissions to the court on sentence? Indiscriminate citation would overwhelm, but the judicious use of previous decisions could only assist the proper development of sentencing principles, as well as preventing mistaken sentences¹⁹.

A more general criticism of the way in which sentencers exercise their discretion is that they appear to have little interest in the findings of research into the effects of sentences. There are isolated counter-examples: in England, Lord Lane CJ once stated tht 'many offenders can be dealt with equally justly and effectively by a sentence of six or nine months' imprisonment as by one of eighteen months or three years'²⁰. By and large, however, statements made by sentencers both in and out of court show an uncritical adherence to the assumptions that exemplary sentences actually achieve a general deterrent effect²¹; that the incapacitative effect of the occasional long custodial sentence is such as to reduce significantly the risk of victimisation in the community²²; that experts' predictions of the future dangerousness of offenders are reliable²³; that longer custodial sentences have a greater individual deterrent effect than shorter ones; and so on²⁴. Criminological research has its shortcomings, it is true. But at least it is able to puncture some of the general assumptions about the effects of sentences which seem to have passed into the lore of many sentencers and others. It can generate an awareness of the other side-effects of sentences, such as the implications of custodial sentences for the offender's family and future position in society. It can also make attempts to ascertain the views of members of the public on the general level of sentencing, a point which assumes considerable importance if retributive proportionality and desert become the leading aims of sentencing. In Britain the British Crime Survey is the best known of an increasing number of research projects which inquire about the attitudes of victims and other citizens towards the sentences handed down by the courts for particular kinds of offence²⁵. Speaking broadly, the findings do not suggest the level of punitiveness often manifested in the popular press, particularly when the alternatives are mentioned²⁶. Speaking from my personal experience, a fair number of English judges simply reject these findings as not true.

A criticism heard with growing frequency is that the courts seem to pay little regard to the financial effects of sentences. The carrying-out of many sentences requires public expenditure: sentencing decisions are therefore, in effect, allocations of public expenditure. The expenditure implications of custodial sentences are considerable, and the courts could reduce the

amount of taxpayers' money spent on the criminal justice system if they were to alter their pattern of sentencing by imposing fewer and shorter custodial sentences. In some American jurisdictions there have been attempts to control the numbers sent into custody by linking the permissible lengths of custodial sentences to the accommodation available in the prisons²⁷. Most English judges would reject that approach, maintaining that accommodation should not be the primary determinant and adding, if pressed, that the answer to a shortage of accommodation is to build more prisons. In principle, the amount of custodial accommodation available in a criminal justice system at a particular time should not be allowed to determine sentencing policy²⁸, any more than the number of persons unemployed should govern the amount which each receives from the state in unemployment benefit. The extent of the facilities may derive to some extent from historical accident. It is highly unlikely to have been devised carefully as a response to the aims of sentencing and the nature of crimes in that jurisdiction. Indeed, if more prisons were built the prison capacity argument might suggest that the courts ought to fill them, or might lead to a situation in which a decline in the birth-rate produces a higher proportionate rate of custody for that age-group²⁹. The prison capacity argument is little more than a tabula in naufragio, a plank in the ocean buoyed up by the humanitarian insistence that prisoners should not be incarcerated in conditions which violate their basic rights. I would not dispute the strength of that rights argument³⁰, but I would insist that the level of sentencing ought to be determined on wider social and philosophical arguments rather than upon what buildings are available. Of course the problem has an urgency, poignantly demonstrated by the actions of the legislature and the executive in England in invoking the parole system to relieve pressure on the prisons when the courts have failed to do so³¹. But the way forward is not to tie sentencing to the available accommodation. It is to take a more fundamental, long-term view of the aims and levels of sentencing.

The criticisms outlined in the previous paragraphs are largely a manifestation of one signal defect: the absence of an agreed sentencing policy. Legislatures have tended to avoid fundamental issues, the executive has become concerned mostly about the economic implications of sentencing, and the judiciary has continued in the piecemeal fashion which is the natural result of a wide discretion and a narrow appeal system. Moreover, the amount of discussion between the various groups has tended to be low; with the result that the concerns of each group often show little appreciation of the implications of their activities for the administration of criminal justice as a whole. The time has surely come for a public re-appraisal of sentencing policy as an official response to crime. Knowledge must be preferred to unsupported assertions. Assumptions must be challenged. Awkward questions must be given a public airing, for example about the

propriety of large-scale executive release of prisoners at an early stage in their sentence. The protection of individual rights should be kept firmly in mind, and we should aim for the rule of law not of persons. The conference here in Canberra reaches out to several of the issues which must be tackled if progress is to be made. In this paper I attempt to sketch some fruitful directions for inquiry.

SENTENCING AND CRIMINAL JUSTICE

Before discussing the crucial issue of the aims of sentencing, it is as well to ensure that the function of sentencing is understood. The act of passing sentence is the principal public act in respect of the offence and the offender, particularly in those cases (the majority) in which the defendant has pleaded guilty. The sentence itself and any observations made by the court are a public statement about the offender, the offence and society's formal reaction to it. These may not be the most important matters for the offender: the view may be taken that the police interrogation, or the decision to remand in custody before trial, or the decision to grant parole, impinges to a greater extent. From the public point of view, however, the sentence and any observations made by the court have a symbolic significance³².

Symbolism apart, what is the relation of sentencing to crime and criminal justice as a whole? It is known that a considerable number of offences are never reported to the police, for a variety of reasons. Generally speaking, the unreported crimes are the least serious ones, but that is by no means always true. There are various estimates of the proportion of crimes actually committed which are officially recorded³³, and for the present discussion we may assume that half of all notifiable offences are reported to and recorded by the police (the proportion is almost certainly lower). In England and Wales only 35 per cent of notifiable offences recorded by the police are 'cleared up': this represents some 18 per cent of all offences actually committed on the estimations here (i.e. 35 per cent of the 50 per cent of offences which are actually recorded). Of those offences which are 'cleared up', just over half result in the conviction or formal cautioning of the offender - around 10 per cent of the total. If one subtracts formal cautions from this figure, one is left with around 7 per cent of all offences for which the courts actually pass sentence³⁴. The Australian statistics which I have seen suggest that the position here is not dissimilar.

What effect can the action taken by the courts in respect of this 7 per cent of offences have upon the pattern of crime in our society? For some types of offence, especially the more serious offences against the person, the risk of detection is much higher than 35 per cent and it may be said that the potentialities of sentencing are correspondingly greater. But for the bulk of so-

called 'property offences' - theft, receiving stolen property, burglary³⁵ - the risk of detection is relatively low, and there is evidence that those who are about to commit such offences do not think much about the risk³⁶. In this sphere, then, it would be wise not to over-estimate the effect of sentencing on patterns of crime. What about an approach based on swingingly increased severity in the sentencing of convicted criminals? One might think that the natural consequence of such an approach would be heightened general and individual deterrence, with the result that fewer crimes are committed. The evidence suggests that this would not be so: the springs of human conduct are much more complex than a simple internalisation of court sentences, even if they are widely publicised, and the supposedly 'natural' consequences would be hampered by the low perceived risk of detection, other believed possibilities of avoiding conviction, and the failure of many offenders to reflect rationally on the consequences of being detected and convicted³⁷. Research clearly establishes that one well-publicised high sentence does not necessarily result in an abatement of that kind of offence³⁸. Whether a sustained policy of unusually high sentences would have a significant general deterrent effect is less certain, although it might be possible for some carefully calculated forms of offending such as illegal drug importation. To impose disproportionately long sentences on some offenders in an attempt to deter others would be to trample on the right of the sentenced offenders to be treated as worthy of equal concern and respect, specifically by violating their right not to be subjected to compulsory social intervention out of proportion to the gravity of the offence committed. Similar objections can be raised against policies of incapacitation or selective incapacitation³⁹, although it is arguable whether the objections should in all circumstances be treated as conclusive⁴⁰.

One aim of the criminal justice system as a whole is the management of crime, controlling or reducing the incidence of criminal offences. This aim can be linked to the protection of individual rights, in terms of protecting citizens from victimisation. The state has at its disposal a range of measures for crime prevention or crime reduction, although only in recent years has criminological research turned its attention to crime-reductive experiments in building design, bus design, car design, security systems in dwellings, and so forth⁴¹. Others see fertile avenues for crime reduction in other directions: in employment policy, or in socially inconvenient spheres such as the display of goods in superstores or stock control methods in commerce and industry. The introduction of steering locks on cars in West Germany in 1963 resulted in a 60 per cent fall in criminal takings of cars, apparently sustained⁴². Could this scale of change in patterns of offending have been brought about through sentencing policy? Only a draconian policy of high sentences would have had any prospect of inducing a change of

pattern, and that would have been both unfair on the offenders sentenced and inappropriate for an offence which stands relatively low on the criminal calendar.

Considering criminal justice as a whole, it is clearly wrong to expect a significant crime-reductive effect from changes in sentencing policy. The public must be informed that sentencers deal with only a relatively small part of the 'crime problem' (around 7 per cent of offences actually committed), and that society should therefore look elsewhere for measures to reduce the incidence of crime. Likewise, judges and magistrates should place less emphasis on the supposed crime-preventive effects of their sentences, both in their public pronouncements and in their private patterns of thought. Even Bentham, who placed great faith in the efficacy of deterrent strategies, declared that punishment should not be imposed where it is 'needless' in the sense that 'the purpose of putting an end to the practice may be attained as effectually' by other means which involved less 'pain' or none at all⁴³. The debate over 'what to do about crime' must be drawn away from discussions of sentencing to discussions of realistic and practical techniques of reducing crime. Another social goal which should not be neglected is reducing the fear of crime, which significantly impairs the quality of life for some citizens, especially the elderly and those living alone in urban areas. A few well-publicised swingeing sentences might reduce this fear, but that would be a hollow victory since they would hardly affect the actual risk of victimisation. The better path is surely to spread knowledge of the actual risks (which are usually lower than is believed, particularly for the groups who fear crime the most), and to seek crime-reductive measures which will diminish those actual risks⁴⁴. To try to solve the social problem of fear of crime through severity in sentencing would not only be a negation of the rights of offenders⁴⁵, but would also be to collude in the fallacy that sentencing should be regarded as a primary instrument of crime prevention. It cannot perform this task, certainly not in a society which has some respect for individual rights. Sentencers and criminologists have a duty to propagate this view.

THE AIMS OF SENTENCING

Despite the fact that there is no good reason to expect significant crime-reductive effect from any changes (within the realms of acceptability)⁴⁶ in the sentencing practices of the courts when dealing with a mere 7 per cent of all offences, the passing of sentence upon a convicted offender retains considerable social importance. It is a formal and public act which performs a symbolic or expressive function, as an official judgment on the offence committed by this offender⁴⁷. Moreover, it is a response which could be said to be required in a just society; those who offend deserve state punishment⁴⁸.

Now this assertion raises issues of genuine social, political and philosophical difficulty; issues too complex to be argued convincingly to a conclusion within a couple of pages of a conference paper, yet too seminal to leave untouched. The previous two sections of this paper should have demonstrated some of the practical weaknesses of a consequentialist approach to punishment which sees its justification only in its preventive effects. What, then, ought to be recognised as the primary aim of sentencing?

The fundamental reason for having a system of criminal law is to declare which forms of conduct are so anti-social as to call for state punishment, and to ensure that those who commit prohibited acts are subjected to state punishment in return. Punishment is justified if and insofar as it tends to 'restore an order of fairness which was disrupted by the criminal's criminal act'⁴⁹. The criminal law imposes various duties on individuals, many of which consist of the non-violation of rights of others. In committing a crime, it might be said that the offender casts off the burden of self-restraint which other citizens continue to bear, gaining an unfair advantage over the law-abiding citizens, which it is the purpose of criminal punishment to counter-balance⁵⁰. An individual deserves punishment because of, and to the extent of, the culpable failure to observe the duty of self-restraint imposed by the criminal law⁵¹, and the punishment is justified as an integral part of the restoration of benefits and burdens in society: compensation of the victim is the other part.

How much punishment should be inflicted in each case? The basis of this just deserts approach is that criminal liability itself should only be imposed on persons who have broken a reasonably specific law, and who could reasonably have been expected to know that such a law existed⁵². These requirements are based on the premise that individuals have the capacity to be autonomous and are entitled to equal concern and respect in exercising that capacity. On the same view, the quantum of punishment should be regulated by the principle of proportionality between the sentence and the gravity of the offence, an approach which guarantees to each person the greatest liberty to control or predict the consequences of actions which is compatible with a like liberty for all other individuals. The gravity of the offence is determined by two elements: (i) the magnitude of the harm inflicted, one function of the criminal law being to establish and declare which rights and interests are more highly valued than others; and (ii) the extent of the offender's culpability, starting from the view that intentional acts are more culpable because they 'involve easier and fuller opportunities to regulate conduct by principles'⁵³ but taking account of any element of excuse or justification in the conduct. The greater the harm inflicted and the higher the offender's culpability, the greater the extent to which the state is

justified in compulsorily taking away the offender's ordinary rights as a citizen.

Does this leave no place for such aims of sentencing as individual deterrence, incapacitation or rehabilitation? The pure retributivist or just deserts theorist would maintain that these other considerations should not intrude. On the one hand, it is an offender's right not to be punished more severely than is proportionate to the gravity of the offence. On the other hand, any lesser sentence constitutes a social injustice in that it depreciates the seriousness of the offence and fails to restore the balance upset by the conduct⁵⁴. There is, however, no logical reasons why this purity should be insisted upon. Whilst the simple listing of a number of competing aims of sentencing manifests philosophical indecision and will produce anarchy in sentencing practice, it is perfectly respectable to establish one primary aim of sentencing and to recognise that in certain sets of circumstances that aim may be qualified by another principle. Indeed, anyone who subscribes to a set of justifications for punishment which purport to be grounded in respect for individual rights cannot maintain an indifference towards variations in the crime rate, since most crimes involve violations of the rights of another. In general, as argued above, sentences imposed by the courts can have little more than a marginal effect on the incidence of crime. But if there are techniques of crime reduction through sentencing which offer good prospects of success, their claims should be considered even though their use would require a limited derogation from the primary aim of sentencing. The social implications of crime and punishment are profound, and there should be no place for dogmatic insistence on the pursuit of a single justification. Limited experiments should also be allowed. For the same reasons, attention should be given to arguments in favour of a principle of minimising the social and psychological side-effects of sentences.

What derogations from the primary aim ought to be considered? Whilst a general policy of selective incapacitation should be rejected on both empirical and philosophical grounds⁵⁵, there may be a small group of offenders who are predicted to constitute such a 'vivid danger' as to warrant a protective sentence going beyond that which would be proportionate to the offence⁵⁶. Of course this is controversial, and the criminological and philosophical arguments about this group must continue⁵⁷. But the acceptance of this exceptional category does not undermine the whole of the 'just deserts' framework. Indeed, it has a basis in the 'rights' thesis too, since it gives a limited preference to protecting the rights of potential victims over violating the offender's normal right not to be punished disproportionately to the actual offence committed. Less frequently heard is the argument in favour of another derogation from the retributive justification, in cases where there is a

diagnosed need for supervision and support of the kind which a criminal justice agency could provide. The main reason for proposing, in effect, less-than-deserved sentences for a group of offenders who are thought to need and are predicted to be likely to respond to rehabilitative measures must reside in a right to treatment. There is some acceptance of such a right when dealing with mentally disordered offenders⁵⁸. Thus, where a person's offending is adjudged to proceed from certain social or psychological problems, for which some help or treatment is available and is likely to have an effect, it may be argued that we ought to recognise the right to receive it. As with the group of 'vivid danger' cases, there is also the argument that to take special measures in these cases may be to protect the rights of potential victims, insofar as the predictions are reliable and most of this group would present a greater risk of re-offending if dealt with in the normal way. However, research findings on rehabilitative programs are mixed and are open to different interpretations⁵⁹. The English courts have from time to time placed their faith in diagnoses and predictions by probation officers in fairly serious cases⁶⁰: at present, these disposals are largely a matter of faith.

SENTENCING DISCRETION AND THE RULE OF LAW

Disparity is, as we have seen, one of the foremost criticisms of sentencing practice under the common law approach. It might be thought that this kind of deficiency is easy to remedy: a network of prescribed sentences based on type of offence and offender's criminal record could be established, the courts would apply this to the cases coming before them, and the legal values of consistency and predictability would be enhanced. This would indeed be the rule of law, not persons.

Before we consider the possible shortcomings of such a 'solution', we must ask whether it would actually eradicate disparity. The answer is that it would not, if the recent developments in parole in many common law systems were left untouched. The effect of the discretionary executive release of prisoners before the expiry of the court sentence is largely to distort the differentials arrived at by the courts, and this distortion would be even more noticeable if court sentences were controlled by an established framework. English sentencing is 'close to chaos' as a result of the new system of granting parole liberally to those serving sentences between ten and twenty-four months, in that the time actually served on sentences of nine, twelve, fifteen and eighteen months may be the same⁶¹. Equally difficult problems have been raised in Australia by developments such as the Probation and Parole Act 1983 (N.S.W.)⁶². It is manifest that any sentencing reform which fails to encompass the parole system and other aspects of executive release will have only a limited effect, and many American states have abolished parole as part of a re-organisation of the sentencing

system⁶³. The introduction of parole has been beneficial in some ways, as by strongly suggesting that custodial sentences have been longer than necessary for any crime-reductive aim, and that reducing the length of sentences does not significantly impair the individual deterrent effect of custodial sentences. The major drawbacks have been that systems of discretionary release have produced disparate treatment and feelings of injustice, whilst systems of automatic release may so emasculate the court sentences as to question the social significance of the process of passing sentence. In a society which respects individual rights, it should be for the courts to apply to individual cases the general principles established publicly beforehand, preferably by the legislature or by its delegated authority, and it should be for the executive arm of government to ensure the implementation of the sentences imposed. The task of fixing the form and severity of the sentence belongs to the courts, which is the proper forum to give effect to the offender's procedural and substantive rights, in considering whether there is sufficient reason to depart from a retributive sentence in favour of an incapacitative or rehabilitative sentence, and in assessing the seriousness of the offence and the relevance of the offender's characteristics. In declaring the sentence, the court performs an expressive and symbolic social function. To allow considerable executive interference with the declared sentence at a later stage may be to undermine - some would say, to make a mockery of - the sentence of the court and what it represents to individuals and to society at large.

Even if the large-scale intrusion of discretionary parole into custodial sentencing were repelled, would the 'solution' of confining the courts within a network of prescribed sentences be satisfactory? The experience of some American states suggests that these networks tend to draw crude lines and to place offences and offenders in rather gross categories. For example, the approach of dividing offences into some ten categories places a limit on the range and combination of aggravating and mitigating factors which may be taken into account. The number of previous convictions is the chief or sole offender-characteristic to be integrated into such networks, but there is often a lack of sensitivity towards the nature of those convictions, the length of time since last conviction, and so forth⁶⁴. These sentencing structures vary in the way they deal with multiple offenders, but often fail to reflect the subtle distinctions which ought to be drawn. There is sometimes little scope for personal mitigating factors, and often virtually no attention to the multitude of problems raised by non-custodial sentencing. The rule of law may be achieved by this 'solution', yet with the sacrifice of many other values.

The discussion, then, must return to the concept of disparity. The criticism is not met by the kind of arid, arithmetical consistency which many of the American sentencing structures

produce: indeed, such networks may be said to give rise to disparities of their own, by dealing in the same way with offenders who ought to be sentenced differently. The consistency we should seek is the consistent application of all those principles which are related to our concept of criminal justice. The classic statement of 'just deserts' sentencing in Doing Justice reduced these to a very few, insisting that 'equality before the law' ought to be accorded high priority⁶⁵. The later parts of this paper suggest a range of other principles, relating to offence, offender and type of sentence, which should be taken into account if court sentences are properly to reflect the concept of criminal justice which has developed in common law jurisdictions. Yet it is this notion of justice in the individual case which has led to the preservation of judicial discretion in sentencing and, in turn, to disparities in practice. Is the existence of discretion incompatible with the rule of law, and with respect for the rights of citizens? This depends upon one's conception of the rule of law. Stripped to its essentials, it is the doctrine that the making of particular laws and the enforcement of the law 'should be guided by open and relatively stable general rules'.⁶⁶ This is part of the very function of law in society: 'it is of the essence of law to guide behaviour through rules and courts in charge of their application. Therefore the rule of law is the specific excellence of the law'.⁶⁷ In practice, however, complete conformity to the rule of law is impossible, since some vagueness in the formulation of rules is inescapable, and maximum possible conformity with the rule of law may be undesirable in certain spheres. This is where the need for discretion re-emerges. What is discretion? In what kind of sphere ought it to be permitted? To what extent can the virtue of the rule of law be preserved if some discretion is conceded?

Discretion may be described as a power conferred upon a certain court or official to decide a certain issue according to some stated general standard. The justification for conferring discretion is especially strong where a decision requires consideration of a range of relevant factors, and where these factors may vary in their form and potency from case to case⁶⁸. If the list of relevant factors is lengthy and the number of possible combinations such that it would be impractical to attempt comprehensive rule-making in advance, there is a case for conferring discretion. To do so is inevitably to transfer a degree of power from one decision-maker to another (from legislature to judiciary, or from legislature to executive). But even discretion 'in a strong sense'⁶⁹ is not unfettered power, for it must be exercised according to relevant and not irrelevant criteria. In order to minimise the conflict between discretion and the values of certainty, predictability and continuity which are protected by the rule of law, it must be confined to the issues on which it is necessary and in those spheres it must be structured. It was in this context that K.C. Davis, in his path-

breaking treatise on administrative discretion, advocated openness in decision-making, reason-giving and other checks and balances on the exercise of discretion⁷⁰. This approach marked an important advance in consciousness about the sacrifice of procedural rights which may result from the conferring of discretion, but it does not ensure the substantive justice of the decisions reached. In addition to provisions for procedural justice, what is needed is a careful analysis of the kinds of principle, policy and other consideration which ought to be taken into account⁷¹, followed by an attempt to arrange them in a way which shapes discretionary decision-making without preventing a sensitivity to the combinations of factors in individual cases. Rules can be used, for example as a means of excluding irrelevant considerations, or as a means of resolving certain issues which can be treated generally. Relevant considerations should be refined and re-stated in a way which gives some indication of their proper application.

How this ought to be tackled depends to some extent on the social and political context. What is appropriate in one jurisdiction may be unsuitable for another. It is sufficient here to re-affirm that neither the virtue of the rule of law nor the protection of individual rights excludes the existence and exercise of discretion. Some ways of structuring discretion so as to maximise those values and other interests will be indicated after short sections on the three main aspects of sentencing - offence, offender and type of sentence.

HOW SERIOUS IS THE OFFENCE?

This is a key question in any system which adopts a retributive aim of sentencing. It has at least three principal dimensions: grading various forms of one offence into aggravated and less serious manifestations; comparing that offence with others, referring also to their internal gradations; and assessing the individual offender's culpability, by reference to his or her mental attitude and any elements of excuse or justification. Judges have occasionally given some systematic attention to aspects of these questions⁷². In those jurisdictions where there has been fundamental sentencing reform, attention has had to be given to these questions in drawing up guidelines, presumptive sentences, and so on. Sadly, academics have only rarely thought them worth sustained analysis and discussion⁷³, neglecting the wide implications of the answers given, and practitioners in the criminal justice system have not sought to rectify the imbalance. The answers are not merely relevant to statutory maximum penalties, to liability to certain forms of sentence, to decriminalisation, to prosecution policy, to the determination of mode of trial, to liability to arrest without warrant, to priorities in crime prevention, to the allocation of police resources, to parole policy, and so on. Even if different types of decision raise specific issues, the general question of the criteria of offence-seriousness applies to them all.

How should the criteria be selected? Individual culpability is an aspect of offence-seriousness which is relevant to sentencing more than to other criminal justice decisions, and its principles are closely connected with the very justifications for punishment. Legal scholars have given abundant, some would say excessive, attention to the list of recognised legal excuses and other defences to criminal liability, and to the definition of key terms such as intent and recklessness. Far less attention has been devoted to the related sentencing issues; what factors make each of the excuses more or less strong⁷⁴? How do the various forms of intention relate, in terms of culpability, to the various forms of recklessness? Judicial decisions provide some signposts, but there is a need for clear and systematic discussion of these issues, which sentencers deal with in practice day by day. For example, one judge might regard provocation over a long period of time as a strong ground of excuse, whereas another might regard it as a relatively weak form of mitigation⁷⁵. Much more could be said here, but I turn instead to the first of the issues with general significance for criminal justice: grading the various forms of one offence.

There must be reservations about approaching questions of offence-seriousness by way of opinion polls or ranking exercises with members of the public, the chief disadvantage being the uncertain factual foundations upon which these opinions might be based. Even victims of crime may soon relapse into a stereotyping of forms of offence; those without direct experience might be thought more likely to do so⁷⁶. It is essential to gather victims' views about the aspects of offences which they find most inconvenient, hurtful or damaging; neither criminologists nor anyone else should simply assume that this is obvious⁷⁷. But the victims of individual offences cannot provide a perspective on the various manifestations of a kind of offence. A firm factual basis must be established through wider studies of particular types of crime, and through more detailed studies of the sentencing statistics⁷⁸. In the final analysis, the task of ranking the various forms of, say, burglary or robbery is a normative one, dependent on value judgments. My plea here is for decisions reached openly and on the basis of facts rather than assumptions.

The second general issue involves the comparison of individual classes of offence with one another, so as to produce criteria for the guidance of decision-makers. All the kinds of material discussed in the previous paragraph will be relevant here too, but the additional element must be a theoretical framework which can be invoked so as to compare on a single scale such disparate offences as rape and shoplifting, perjury and taking cars, industrial pollution and receiving stolen goods, and so forth. The criminal courts are making such comparisons every day, albeit implicitly, and carefully gathered statistics on sentencing might reveal the criteria which the courts in fact employ. Judges have

divulged views on some of the questions⁷⁹. However, the pessimism of the Advisory Council on the Penal System in England was perhaps symptomatic of the prevailing approach: they sought to 'eschew all fresh and controversial value judgments' by resting their proposals 'squarely upon the contemporary practice of the courts'⁸⁰. This is an approach which should not and indeed cannot be taken. Some of the value judgments underlying current practice are controversial. Many of the issues in this area raise fundamental dilemmas of social policy and political preference. Recent inquiries into the justifications for protective sentences against 'dangerous' offenders have been forced to confront these problems and to take up a position: what are the values which justify such high measures of protection as to derogate from the rights of individual offenders⁸¹? Any thorough re-examination of a particular branch of the criminal law must broach these problems, for example, the current review of road traffic offences in England⁸².

There are some who would argue that the search for a consensus view on matters of this kind is naive and misguided. Law is the tool of the ruling class, it is argued, and any general views on offence-seriousness will have been shaped by the dominant social institutions and reinforced by the law. Indeed, the criminal sanction itself is a means whereby those in power can protect their position against others who take a different view of what values should be accorded priority⁸³. Now it is important that even those who are manifestly unsympathetic to this analysis of social and legal relations should not dismiss it out of hand. The analysis is clearly based on an exaggeration of certain features of political systems, for it neglects the considerable degree of consensus on some matters among different groups in a society and across societies with different economic and political structures. Moreover, the processes whereby such consensus is shaped and sustained are much more complex than is allowed by a crude theory of class-repression⁸⁴. However, the neo-Marxist analysis does urge us to re-examine the implicit and explicit value judgments which underpin our approach to corporate crime, to the creation of health hazards, to safety at work, and to minor thefts, for example. Many of these value judgments can be reduced to a preference for one kind of society over another, and these preferences should not be concealed. It can be argued that this is the level at which the real decisions are made: once the different kinds of offence are analysed in these terms, it is too late to 'join in the common human hope that the burden of choice will pass away'⁸⁵. The argument in this paper is that the choice should be made in favour of respect for human rights, including both individual rights and certain social and political rights, but that is too wide a subject to argue to a conclusion here.

If a 'rights' approach is taken, the criteria for determining offence-seriousness could be constructed in the manner proposed

by Feinberg, whose work has been adapted to the present task by von Hirsch⁸⁶. It cannot be set out in detail here, but its essence is to rank the individual's interests according to their centrality to his or her well-being (welfare interests, security interests and accumulation interests). Clearly there must also be a place for those social interests which do not affect particular individuals. In one sense the exercise is inevitably theoretical, but I would insist on retaining a firm empirical basis through the use of studies and statistics, gathered in the ways indicated above. It must also be a dynamic exercise. Judgments of the relative gravity of offences have changed noticeably in some spheres. In England, recent years have seen a tendency to revalue as more serious both burglary of dwelling houses and motoring offences such as drunken and reckless driving⁸⁷, whilst there has been a downward revaluation of many minor motoring offences⁸⁸ and there has been one proposal to do the same for routine, petty thefts⁸⁹. These shifts of opinion occur for a variety of reasons, and they raise issues which are far too important in social terms to be determined by courts in individual cases or indeed by appellate courts in their judgments. It is my belief that criminologists have spent far too little time on generating and informing this debate, by comparison with studies of the effects of sentences, etc., and that lawyers have been equally guilty of neglect. An early and essential step in any process of sentencing reform should be a thorough re-appraisal of the relative gravity of types of offence, summarising the available empirical research and generating more in order to fill the gaps. This is an opportunity for a major re-orientation of criminal justice to begin.

CHARACTERISTICS OF THE OFFENDER

To what extent should the sentencing decision take account of the characteristics of the offender? Once again, the principles which must be considered in answering this question have a much wider application in the administration of criminal justice, in terms of the proper response to first offenders (diversion from prosecution?), the relevance of previous convictions in criminal procedure (admissible in evidence? 'spent' after a number of years?), policy in executive release (parole?), and so on. The issues lead quickly to the very foundations of the philosophy of punishment. Sentencing offenders differently according to their personal characteristics may produce apparent inconsistency, if two individuals are in consequence sentenced in a different way for the same offence. That, in turn, raises the issue of whether or not it is fair to attribute considerable significance to an offender's 'character', and previous criminal record is the central problem.

In England, principle and practice seem to diverge. The principle is usually said to be 'progressive loss of mitigation':

first offenders should be given a significant concession or discount for their previous good record, but this source of mitigation diminishes gradually as the number of previous convictions mounts, so that after four or five convictions the offender should receive the full sentence for the offence. However, an offender should not be sentenced more severely thereafter: previous bad record does not become an aggravating factor, and the sentence should be limited by the 'ceiling' for the particular offence⁹⁰. The practice of the courts is somewhat less orderly, and the vagueness or non-existence of 'ceilings' for particular types allows courts to impose fairly severe sentences for relatively modest offences committed by offenders with long criminal records⁹¹. There can be little doubt that this amounts to a derogation from the just deserts approach, by violating the offender's right not to be punished more severely than is proportionate to the offence. But there remains the question whether the principle itself is compatible with the retributive justification.

To deduce the answer from retributive philosophy is not straight forward. Some argue that the punishment for each offence extinguishes the offender's desert for that offence, and therefore that there should be no reference to prior criminality when imposing sentence⁹². Others argue that respect for individuals as rational and autonomous, which underlies the retributive justification, requires a reduction in penalty for the first offender in order to respect that person 'as a moral agent presumed capable of responding to others' adverse judgments'⁹³. On this view the concession should diminish rapidly as convictions accumulate; in other words, progressive loss of mitigation until the ceiling for the offence is reached. The former view takes a narrow approach to culpability and the criminal sanction: so long as the offender had the mental attitude prescribed for the offence and had no excuse or justification for what was done, full punishment may be justified even if it is a first offence, whereas any account taken of previous offences in sentencing amounts to double punishment and is clearly objectionable. The latter view is surely to be preferred, however, because of its recognition of the 'process' element in criminal conviction and punishment and its recognition of the function of the law as a guide to human conduct. The sentence of the court for a first offender is no less a declaration of the wrongfulness of the criminal conduct if it incorporates a concession to the offender's lack of previous convictions; nor does it fail 'to restore the order of fairness disrupted by the criminal's criminal act'⁹⁴, since it may be said that one of the features of this individual's criminal act is that it represents the first experience of criminal conviction. That should not affect the victim's right to receive compensation or the offender's duty to pay it, but it is relevant to the question of the appropriate criminal sanction. Proportionality, on this preferred view, is a concept which

includes not just the objective seriousness of this type of offence but also the seriousness of this breach of law by this individual.

Even if this resolution of a thorny problem is accepted, it is only the beginning of a series of questions which must be answered if the relevance of previous record to sentencing is to be sensitively assessed. Previous convictions can be for more or less serious offences, and they can occur at more or less frequent intervals. It might conceivably be possible to integrate these considerations into a complex numerical approach, but I suggest that the most fruitful advance would be to articulate a set of sentencing principles for taking account of offenders' previous records⁹⁵. The most important step towards proper retributive sentencing of persistent offenders would be the agreement of bands or categories of offence, as discussed in the foregoing section. This would lead to the establishment of clear 'ceilings', and would thereby tackle what I regard as the foremost problem here: the over-punishment of the petty persistent offender. Beneath those ceilings, the discretion of the courts should be structured by a set of principles such as these:

- (a) no matter how bad an offender's previous record, the sentence should not exceed the ceiling provided for the type of offence for which there is now a conviction;
- (b) where the offender has no previous convictions, the sentence should be substantially reduced on this account;
- (c) where the offender does have some previous convictions, the general principle should be the progressive loss of mitigation; in other words, with only one or two previous convictions there should be a significant concession, but this should become progressively less. An offender with five or more previous convictions can expect no reduction of sentence below the ceiling on account of prior record, unless it falls within (d) below;
- (d) in assessing the effect to be given to previous convictions, the court should (i) accord less significance to convictions for offences of a similar or higher gravity than the present, and (ii) accord less significance to convictions which have been followed by a substantial period free from convictions.

One possible exception to principle (a) concerns the small group of offenders whose criminal records reveal that they present a vivid danger of causing grave harm. As stated above, there may well be a good case for derogating from the desert principle in

such cases if the forms of grave harm are defined and if predictive techniques achieve a satisfactory level of accuracy⁹⁶. This would be tantamount to a denial of the right to be punished no more than proportionately, justified (if at all) in terms of the protection of the rights of potential victims of the predicted grave offences. The point cannot be argued to a convincing conclusion here.

Apart from previous criminal record, the common law approach has customarily allowed courts to take account of a vast array of possible mitigating factors based on the characteristics of the individual offender. Unless the system of appellate review permits prosecution appeals or the reference of allegedly lenient sentences⁹⁷, it is unlikely that there will be any thorough consideration of the claims of the various personal factors. This is a sphere in which discretion has led largely to anarchy⁹⁸: before the structuring of discretion is contemplated the first step is to give careful consideration to the claims of the various factors. Why should the sentence be influenced by the fact that the offender is young or very old, has poor health, has shown genuine remorse for the offence, has suffered extreme social deprivation, has been subjected to financial worry or domestic turbulence, has already suffered in other ways as a result of the offence, has pleaded guilty, and so on? Several of these factors cannot claim any connection with the 'just deserts' approach. Some are linked to the rehabilitative approach. Others, such as the discount for pleading guilty, might work against the protection of rights at earlier stages in the criminal process (police interrogation, pre-trial choice of plea)⁹⁹. There is a strong argument that various social judgments on offenders should be specifically excluded from consideration (and from mention by advocates in mitigation): the Minnesota guidelines, for example, expressly forbid the use of race, sex, employment, educational attainment, marital status, residence or living arrangements as aggravating or mitigating circumstances¹⁰⁰.

TYPE OF SENTENCE

This is the area in which a large part of criminological research has been concentrated, and upon which several of the papers at this conference will bear. How do the courts use the various forms of sentence? What effects do these sentences have upon the offenders and others? It is also the area in which recent years have seen considerable legislative changes, usually resulting from committee reports which recommend the introduction of new measures. My aim in this section is simply to raise some general questions about the attention we devote to this area, about the strategy which has tended to flow from the common law approach, and about some principles and pointers for future policy.

Custodial sentences represent the legal system's strongest measure against convicted offenders. Criminologists and others

have contributed to a widespread appreciation of the detrimental effects of custody on the personal and social development of inmates, and there are now few who would disagree with the proposition that custodial sentences should be used sparingly. The difficulty lies in connecting this proposition with judgments about the seriousness of offences and the characteristics of offenders. On this, the contribution of criminology has been of a noticeably lower order. The issues have now been confronted in those American jurisdictions which have undertaken fundamental sentencing reforms, and it is clear that no significant advance in a sentencing system can be achieved unless the more serious offences are sub-divided for sentencing purposes and sentencing bands or ceilings assigned to them, and unless what Americans call the 'in-out' line between custodial and non-custodial sentences is tackled. The desultory attempts of the English legislature to require the courts to reason in a particular way before imposing a custodial sentence on a young offender or on an adult who has not previously been to prison have foundered, not merely because they do little to constrain but more specifically because of the absence of firm sub-divisions of the seriousness of offences. Whether the 'special circumstances' approach in New Zealand's recent Criminal Justice Act will meet with greater success remains to be seen, for its dividing lines are rather gross¹⁰¹. This re-emphasises the importance of devoting more discussion to the problem of assessing the seriousness of offences: reform of custodial sentencing cannot proceed much further without this.

One result of the concern about custodial sentences has been the introduction of new non-custodial measures. The proliferation of non-custodial and semi-custodial alternatives has been a hallmark of the common law approach in the last two decades. The assumption has been that if the courts are provided with new alternatives, the use of custody will decline. This naive policy has had little effect on custody rates¹⁰². The policy is naive because it is rarely accompanied by any detailed guidance as to the kind of offence and offender for which the new measure is appropriate, what relation the new measure bears to other non-custodial sentences, and so on. Without any effort to provide meaningful guidance on this, it is hardly surprising that individual sentencers have adopted their own views about how the measures should be used¹⁰³. This must be a major explanation for the disparate use of the various non-custodial measures by different courts.

Simply providing more and more types of non-custodial measure is unlikely to reduce the use of custodial sentences: that is a problem which must be tackled directly, through detailed discussion of offence-seriousness and offender characteristics. In deciding what non-custodial measures should be available, other considerations must come to the fore. To the extent that rehabilitative sentencing remains part of the system, relevant

measures should be available: the probation order, in its various guises, and orders for mental treatment would be examples. Otherwise, the possible crime-reductive effectiveness of a measure should not be the primary consideration. Research suggests that there are few differences in the reconviction rates following most forms of sentence¹⁰⁴, and in any event a retributive approach is more concerned with proportionate punishment than deterrent or reformative effect. I say more concerned because it would be wrong for a retributivist to support a form of sentence which had a crime-productive effect, since that would make for more victims and more violations of rights in society.

On a just deserts approach, the relevant criteria should be that the forms of sentence are generally thought to constitute a deprivation of punishment, that they should accomplish this with a minimum infringement of the offender's personal right to privacy and to pursue a conception of the good life, that they should be capable of calibration so as to reflect the differing degrees of seriousness and severity, and that this can be achieved without inflicting a markedly different degree of deprivation on individuals in a way which runs counter to the intended calibration¹⁰⁵. The fine and the community service order may fulfil these criteria if they are used according to carefully designed guidance.

Perhaps the first of the criteria deserves some further discussion here. It is that both offenders in general and members of the public should regard the measure as a punishment, and not as a matter of little consequence. What offenders think may be governed by the way in which the measure is enforced: if, for example, it becomes known or believed that offenders can fail to attend work appointments for community service with impunity¹⁰⁶, that would tend to undermine the status of the community service order as a punishment. Such non-enforcement would also be an injustice in the particular case, since the sentence would fail to redress the social imbalance created by the offence in the way it was designed to do. What members of the public in general think depends on the information they receive, and here one encounters the same problem of selective and sensational reporting which bedevils attempts to ascertain public opinion about offence-seriousness and sentencing levels. A plea for fuller and more accurate information might appear idealistic, optimistic and academic. At the very least, there should be wider knowledge about the limited crime-reductive effects of the various forms of sentence.

CONCLUSIONS

In this paper I have tried to suggest a framework for the re-examination of sentencing policy and problems: first, placing the sentencing process in its context within the criminal justice

system, then considering the aims of sentencing, then considering the respective claims of rules and discretion within a system which respects individual rights, and finally discussing briefly the three spheres of sentencing (seriousness of offence, characteristics of the offender, and type of sentence).

Three themes have been emphasised. First, sentencing should not be viewed as a primary instrument of crime reduction. This is not to suggest that crime control is irrelevant under a system of retributive or 'just deserts' sentencing. Rather that, in view of its slender relationship to the total number of crimes committed and its limited effects on rates of offending, sentencing should be viewed chiefly as the expression of official disapproval by the imposition of a penalty proportionate to the crime which may be regarded as counterbalancing the offence. The reduction of crime should be pursued through strategies other than sentencing. Second, assessing the seriousness of offences should become a major pre-occupation of lawyers and criminologists. Again, this is not merely a task relevant to sentencing, since there is a strong case for removing some of the least serious offences from the criminal process altogether. Prosecution policy should form part of an integrated strategy here¹⁰⁷. The implication for sentencing is that clear criteria of seriousness should be established and, where possible, offences should be sub-divided for sentencing purposes so as to structure the decision making of the courts, to ensure consistency and certainty as a means of promoting the rule of law, and to safeguard the rights of offenders not to be subjected to a punishment more severe than the crime deserves. This leads to the third theme, that sufficient elements of judicial discretion can be preserved within a framework which increases greatly the quantum of guidance, structures and rules in the sentencing process. I have not sought to bring within my paper a full discussion of the merits of the various approaches to the control of sentencing which have been devised and used in the United States and elsewhere, partly because there is to be full discussion of that later in the conference, but partly also because there are profound issues to be discussed before one reaches the stage of deciding on techniques for implementation. To stride forward towards a scheme for sentencing reform without a major re-orientation of thought and research on such matters as crime prevention, offence seriousness and the protection of rights is to risk superficiality and ineffectiveness.

There are, however, steps which should be taken as a matter of urgency, bearing in mind the importance of the three themes just outlined. One step is to set in motion the codification of the general principles of sentencing and procedural principles for sentencing. Now the term 'codifying' must be used with care here. The task cannot simply be one of re-stating the rules and principles adopted by appellate courts, because there is divergence on some issues. To some extent, therefore, it would

inevitably be a normative enterprise, and the reasons behind any choices would need to be plainly spelt out. The matters to be covered by the 'general principles of sentencing' would be the sentencing of persistent offenders, for which a draft clause was set out above¹⁰⁸; the sentencing of a multiple offender, who stands convicted of several offences for which sentence must be passed on one occasion; a descriptive list of excluded factors, which sentencers should not take into account; and some principles of aggravation and extenuation¹⁰⁹. Codification of sentencing procedures would also draw upon the experience of decisions in recent years, so as to establish various procedures and evidentiary principles for the finding of facts relevant to sentence¹¹⁰. Codes of this kind could be used on an experimental basis prior to legislative enactment.

Another step should be to begin establishing sub-divisions of offences, based on judgments of relative offence seriousness. This is an enterprise which must range from the lower end of the criminal calendar right up to the most heinous offences. Indeed, in England it is at the two ends of the spectrum that there has been the greatest advance. Many magistrates' courts have agreed sub-divisions of common offences such as theft and receiving stolen goods and have assigned 'starting points' to each sub-division. And the English Court of Appeal has promulgated guidelines on such offences as drug-dealing and rape, with the firm promise of more guideline judgments to come¹¹¹. There is every reason to build upon these early efforts, making use of their strong points and trying to remedy their weaknesses, but this is not a task for sentencers to tackle alone. Research should take on a major role, by uncovering the factors which appear to exert the greatest influence on sentences for particular types of offence¹¹², and by ascertaining whether sentencers' own conceptions and accounts of the practice are accurate¹¹³. There should also be more systematic research into the effects of offences on victims, the results of which should be taken into account when assessing those features of offences which should be regarded as more or less serious. The aim of the enterprise here would be to construct a network of starting-points and ceilings for the most common, and then the other, offences. The ceilings should be binding unless the court states special reasons for exceeding them: beneath that, a court would be expected to have regard to the appropriate general principles in the code in determining the sentence in the particular case. Even with the contribution of sentencing research and victim surveys, the enterprise of establishing offence-divisions and assigning penalties to them would be based on few solid touchstones. It would be controversial, but so is existing sentencing practice.

A third step, to which I have deliberately given less discussion in the present paper, must be a re-appraisal of the range of options available to sentencers. At the very least, some

relativities should be established between the fine and community service orders, between community service and custodial sentences, attendance centres, and so on. Each non-custodial measure should be accompanied by a set of principles for its use and for calculating the amount to be assigned. The quantum of fines is a clear example: my preference is for an approach based on the 'day fine'¹¹⁴. This is also the sphere in which the thorny issue of the in/out line must be grasped, for a network of starting points and ceilings will not provide firm guidance on when to impose and when not to impose an immediate custodial sentence. However, legislative devices of the type now used in England and New Zealand¹¹⁵ could be expected to bite more effectively when harnessed to more detailed sub divisions of offences rather than to broad and sweeping categories.

A fourth step concerns executive release. In relation to probation orders, there is a procedure whereby a probation officer can apply to the court for the discharge of the order if he or she believes that would be appropriate. The court retains control. But the various systems of parole and executive release from custody make no such provision. Offenders know or quickly learn about the extent of executive release. Members of the public at large tend not to know this, are not told, and would probably oppose the system if they were told. In some jurisdictions, it would hardly be an exaggeration to suggest that the legislature and the executive have conspired to outflank the courts and the public in this sphere. The aim should be to restore to judicial sentencing the task of determining relativities among offenders, and the adoption of consistent starting points and ceilings should assist this. Is it too idealistic to propose a 'trade-off' between the two factions (legislature/executive and judiciary/general public), the former restoring some reality to the relationship between sentences imposed in court and sentences actually carried out, and the latter being ushered towards a fuller understanding of the nature of crime and deviance, the prospects for prevention, and so forth?

The first two steps required a co-ordinated effort. My view is that these tasks should not be left to the judiciary. The judiciary has no constitutional claim upon the tasks. The higher judiciary lacks the breadth of experience of varieties of crime, and therefore any decisions should be taken by a body which includes sentencers from all levels of criminal court. Equally essential is to draw upon the experience of others who see crime from different points of view - prison governors, probation officers, and even the police - and to integrate a research program into the plan of action. The legislature should delegate the rule-making function to a body with wide representation in the field of criminal justice and with a considerable research capacity, which should be charged with the task of drawing up and promulgating guidance and guidelines of the kind outlined above.

In broad terms, the result should be a sentencing system which builds upon the best of the common law approach, preserving a sufficient discretion whilst according more thorough respect to individual rights and other social priorities. I have pursued these thoughts in detail in an English context¹¹⁶, and I am conscious that they would have to be adapted carefully for sentencing in Australia. However, detailed questions of implementation should be considered more properly towards the end of the conference; for today, the appropriate machinery is less important than the structure, the principles and the approach. Those are the issues I commend to you for discussion.

NOTES

1. For elaboration, see Ashworth (1983), 34-42.
2. For the latter, see s.5 of the Criminal Justice Act 1985 (N.Z.); s.6 of that Act is a converse provision, against the incarceration of certain property offenders unless there are 'special circumstances'. For the English provisions and general discussion, see Thomas (1974).
3. See, respectively, s.17(A)(1) of the Crimes Amendment Act 1982 (Cth), ss. 12-14 of the Penalties and Sentences Act 1985 (Vic), and s.1(4) of the Criminal Justice Act 1982 (U.K.).
4. See the findings of a study of Twenty Five English judges by Ashworth, Genders, Mansfield, Peay and Player (1984), 20, 60.
5. See Ashworth (1983), 35-42.
6. For Australian figures, see Chan and Zdenkowski (1985), 27; for English research, see Tarling, Moxon and Jones (1985).
7. See Hood (1972).
8. Bibi (1980) 71 Cr. App. R. 360.
9. Ashworth, Genders, Mansfield, Peay and Player (1984), 29.
10. See Ashworth (1983), 123-4.
11. Ashworth, Genders, Mansfield, Peay and Player (1984), 30-4.
12. See Hough and Moxon (1985), on the findings of the British Crime Survey.
13. Criminal Justice Act 1982, s.67 (U.K.).
14. Discussed extensively by Ashworth (1986a).
15. See the arguments of Bottoms and Brownsword (1983).
16. Thomas (1979), 46-8.
17. See the important articles by Fox and O'Brien (1975) in Australia, and by Thomas (1970) in England.

18. C.g. the trial judge in Newton [1983] Crim. L.R. 198, who sentenced the defendant to eight years' imprisonment without hearing evidence on a disputed issue of fact. See now Solomon and Triumph [1984] Crim. L.R. 433, Frankum, *ibid* 434, and Odey [1985] Crim. L.R. 55.
19. See Ashworth (1983), 425-6.
20. In Bibi (1980) 71 Cr. App. R. 360.
21. Cf. the empirical research by Baxter and Nuttall (1975), discussed by Ashworth (1983) 343-6.
22. Cf. the empirical research by Brody and Tarling (1981).
23. Cf. Floud and Young (1981), esp. at Appendix C.
24. For the information on effectiveness provided to English sentencers, see Home Office (1978).
25. Hough and Mayhew (1983), (1985).
26. Hough and Moxon (1985).
27. See, e.g., von Hirsch (1986b).
28. Ashworth (1983), 110-2.
29. See Riley (1986) for predictions in relation to custody for young offenders in England.
30. On which, see the essays by Richardson, Fawcett and Gostin & Staunton in Maguire, Vagg and Morgan (1985).
31. Criminal Justice Act 1982, s.33 (U.K.), discussed by Thomas (1985).
32. See Feinberg (1965), and Ashworth (1983), 299-305.
33. For an excellent discussion, see Hough and Mayhew (1985), 9-18.
34. Based upon Criminal Statistics, England and Wales (1984).
35. Whether burglary of residential premises should be classified as a mere property offence in view of the emotional and psychological effects upon some victims (see Maguire 1982) is arguable: see Ashworth (1983), 184-8.
36. Bennett and Wright (1984).

37. Beyleveld (1979), and Ashworth (1983) 336-40. See now Riley (1985), finding 'a sizeable minority of drivers' who are unlikely to be affected by deterrent strategies such as keener enforcement and higher sentences, for drunk-driving, and proposing other approaches.
38. Baxter and Nuttall (1975).
39. Von Hirsch (1985) chs. 9-12, summarised in von Hirsch (1986a).
40. Bottoms and Brownsword (1983), developed below at
41. See Clarke and Mayhew (1980).
42. Clarke (1983), 242, summarising the earlier research: the effect in England was also marked.
43. Bentham (1789), ch. xiii, para. 17.
44. See Maxfield (1984) for research findings and discussion.
45. e.g. the right not to be punished with a severity disproportionate to the seriousness of the offence: Richards (1982), Bottoms and Brownsword (1983).
46. 'It may be stated as a general principle that the adequacy of our knowledge of deterrence for policy purposes varies inversely with the political morality and feasibility of the proposed deterrence policy. In general, we have good reason to believe that immoral, unimplementable policies would 'work'; rarely reason to believe that more sane and realistic policies will achieve anything. This is quite simply because human behaviour is much more predictable in situations in which freedom of choice is severely limited,..' (Beyleveld, 1979, 147).
47. See note 32, above.
48. Von Hirsch (1976).
49. Finiss (1983), 128.
50. For slightly different elaborations of this approach, see Murphy (1973) and Sadurski (1985).
51. The terminology of Sadurski (1985).
52. Richards (1982), 274-5.
53. *ibid.*, 275.

54. Morris (1974).
55. Von Hirsch (1985), Part IV, summarised in von Hirsch (1986a).
56. Bottoms and Brownsword (1983), (1982).
57. Cf. Floud and Young (1981), Monahan (1981).
58. Ashworth and Gostin (1984), cf. Morris (1982).
59. See Clarke and Cornish (1983), 26-39.
60. See Thomas (1979), 20-2, and specifically Heather (1979) 1 Cr. App. R. (S) 139, Hannah [1983] Crim. L.R. 338.
61. See Thomas (1985).
62. See Weatherburn and Howie (1985).
63. Von Hirsch and Hanrahan (1979).
64. The American literature is immense: see von Hirsch (1982) for a discussion of the Minnesota guidelines, and Knapp (1984).
65. Von Hirsch (1976).
66. Raz (1979), 213.
67. *ibid.*, 225.
68. See Galligan (1981).
69. Dworkin (1977), 31-3.
70. Davis (1969).
71. See Baldwin and Hawkins (1984).
72. e.g., in England, Turner (1975) 61 Cr. App. R. 67 and Arama [1983] Crim. L.R. 271.
73. e.g. Cross (1981), ch/IV(2); Ashworth (1983), ch. 4; Feinberg (1984).
74. Shapland (1981), Wasik (1983).
75. See Ashworth (1983), 167-71.
76. Maguire (1982), 138-42; Hough and Moxon (1985).

77. Shapland, Willmore and Duff (1985).
78. For elaboration, see Ashworth (1986b).
79. Ashworth, Genders, Mansfield, Peay and Player (1984), 24-6.
80. Advisory Council on the Penal System (1978), para. 164.
81. See Floud and Young (1981), ch. 1, taking up the challenge laid down by Bottoms (1977).
82. North (1985), reviewed at [1985] Crim. L.R. 613-5.
83. e.g. Quinney (1972).
84. See Rock (1974) for elaboration.
85. Rorty (1980), 376.
86. Von Hirsch (1985), ch. 6, adapting Feinberg (1984).
87. See the judgment of Lord Lane, CJ, in Boswell (1984) 79 Cr. App. R. 277 on reckless driving. See Potas (1985) on levels of sentencing for burglary in New South Wales.
88. The effect of implementing Part III of the Transport Act 1982 (U.K.) later in 1986 will be to institute a fixed penalty system for over 100 motoring offences, drastically reducing the business of the summary criminal courts.
89. Ashworth (1984a): this proposal led to only a little published comment, mostly unfavourable.
90. Ashworth (1983), 209-12.
91. See Floud and Young (1981), 82-6, and Ashworth (1983), 213.
92. Singer (1979), Fletcher (1982).
93. Von Hirsch (1981) 603; cf. von Hirsch (1985), ch. 7.
94. See note 49 above, and text thereat.
95. These points are developed more fully in Ashworth (1986b).
96. See note 56 above, and text thereat.
97. England is again in throes of proposals for change: for discussion, see [1985] Crim. L.R. 61-2 and the recent White Paper on criminal justice (Home Office, 1986).

98. See the empirical research by Shapland (1981) into factors raised in mitigation in England.
99. The conclusions of English researchers on this point are drawn together in Ashworth (1984b), ch. 9.
100. Von Hirsch (1982), 203.
101. See note 2 above.
102. This appears to be true in Australian jurisdictions (Chan and Zdenkowski 1985) and in England and Wales: Ashworth (1983) 13-6 and, for the latest figures, see [1986] Crim. L.R. 137-8.
103. See Ashworth, Genders, Mansfield, Peay and Player (1984), ch. 3.2.
104. See Walker, Farrington & Tucker (1981), summarised in Ashworth (1983), 27-31.
105. On the principles of 'equal impact' and 'equality before the law', see Ashworth (1983), ch. 7.
106. Cf. Young (1979), 67, and Pease and McWilliams (1980), 113.
107. As the A.L.R.C. recognised some years ago: Australian Law Reform Commission (1980).
108. See above 29-30.
109. For details, see Ashworth (1986b).
110. See notes 17-18 above, and text thereat.
111. A major White Paper on criminal justice in England is expected to announce this in March 1986.
112. See Ashworth (1986b) and, for detailed research along promising lines in Australia, see Lovegrove (1985).
113. For some empirical research, see Ashworth, Genders, Mansfield, Peay and Player (1984), 50-6.
114. See Ashworth (1983), ch. 7.
115. See note 2 above, and text thereat.
116. Ashworth (1986b). See also von Hirsch (1986b), describing the Swedish approach.

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COMMENTARY UPON DR ASHWORTH'S PAPER

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Sir John Barry once said that 'It is almost certainly a foolhardy enterprise that a Judge who is still in office should discuss extra judicially and in public, the problems inherent in the exercise of the judicial function of sentencing convicted wrongdoers, particularly when critics to whom the opinions offered are unpalatable can assail them as reactionary and moulded by the "repressive role" of the judiciary'¹.

However, Sir John then proceeded to enter into such a discussion at some length, and thus heartened, I also propose to embark upon that foolhardy enterprise. It is my opinion that this is an area in which judges can and should usefully contribute to public discussion at gatherings such as this one, and indeed can also learn much from the interchange of ideas between professionals of different disciplines as occurs at a seminar such as this. It should not be forgotten that, apart from participating as a member of the Court of Criminal Appeal in the case of Supreme Court Judges, most judges have very little exposure to ideas and developments in sentencing theory in the course of their ordinary activities, other than that offered to them by Counsel in Court and by expert witnesses called by such Counsel. This is of necessity a limited exposure because of the traditionally silent role of the prosecutor on questions of sentence and because Counsel for the prisoner approaches the matter only from the prisoner's perspective which is of necessity a limited one.

Further, the guidance and assistance offered to a sentence served by the Court of Criminal Appeal is both limited and occasionally conflicting. In Victoria, at least, although copies of the judgments of the Court are distributed in a somewhat sporadic fashion to Judges of the Supreme Court, this distribution is carried out en masse without any attempt on the part of anyone to index or arrange the material. I have seen an index and summary of sorts which is apparently distributed amongst prosecutors, but judges have not so far been favoured with such assistance. It is, I think, too much to expect of a busy judge that he should sort, summarise and index this material himself, yet if this is not done, it is of very limited use to him. The absence of proper material is not merely a problem at the trial stage, but also on appeal. The judges who constitute the Court of Criminal Appeal vary widely from month to month and year to year and naturally vary in approach and attitude. This is an inevitable

product of a system where there is no permanent Court of Appeal, but it would be less serious a problem if there was ready access and availability to what the Court had done on other occasions.

I gather that in the United Kingdom the reporting of sentencing decisions commenced in the Criminal Law Review of 1954 and that there is now a regular series of Law Reports devoted exclusively to sentencing decisions. This or something like it is in my opinion most necessary in this country for the assistance and guidance of Judges and practitioners alike, but it is not, as Dr Ashworth points out in his book Sentencing and Penal Policy, the final answer to problems of disparity in sentencing². Apparently, despite the existence of these Reports, it is rare for the Court of Appeal to refer to its earlier decisions and equally rare for Counsel to rely upon earlier decisions of the Court in making a plea on sentence.

In Victoria we can, I think, be extremely grateful to Fox and Freiberg for their efforts in collating and assessing many of the previously unreported decisions of the Court of Criminal Appeal in Victoria in their very fine book on sentencing³. This has helped to temporarily alleviate the problem of lack of reporting, but the problem will remain in the absence of any attempt to provide a coherent system of reporting in the future. I should mention that at least at the level of the Court of Criminal Appeal a check does operate in the sense that the Presiding Judge is usually the Chief Justice or a senior Judge of the Court who may well remember similar occasions in the past and Counsel do attempt to refer the Court to similar cases, but the sheer volume of unreported decisions makes this task difficult. I think it clear enough from Fox and Freiberg's book that there have been unwitting diversions of approach on the part of the Court of Criminal Appeal⁴.

In Australia, as in the United Kingdom, most sentencing decisions are delivered ex tempore in relation to the particular matter before the Court and it is only occasionally, as the Court did in R. v. Williscroft⁵ that the Court gives more general guidance as to sentencing principles. Further, so far as I am aware, no Australian Court has adopted the practice of Lord Lane in the English Court of Appeal of delivering and circulating guideline judgments on sentencing⁶.

Although Dr Ashworth has not specifically referred in this lecture to what he perceives to be the limitations of the Court of Appeal in the area of sentencing, he did so at length in his book Sentencing and Penal Policy⁷ and I think there is much substance in the criticisms that he there made and to which I have in part referred. In Victoria at least there is one significant difference to the situation which prevails in England in that the Director of Public Prosecutions has a right of appeal against sentence. The Court of Criminal Appeal is thus not

constrained as is the Court of Appeal from dealing with cases where the sentence is too lenient, and thus should be in a better position to promote fuller guidance to sentencers.

I believe that the fact that Courts of Criminal Appeal have not done so as well as they might have is at least in part due to the interpretation which they have placed on the appellate role. In Victoria the Court has adopted an interpretation of s.568(4) of the Crimes Act 1958 which, together with s.567A(4) (dealing with Crown Appeals) provides the same question for the Court to consider on the hearing of sentencing appeals, i.e. does the Court think that a different sentence should have been passed?

The interpretation which the Court has adopted is that the Court will only interfere with a sentence if the appellant can establish that there was an error vitiating the exercise of the original sentencing discretion, but it will not interfere merely because the individual members of the Court think that a greater or lesser sentence should have been imposed⁸. A similar approach has been adopted in other States⁹. Whether this interpretation is correct as a matter of law has been the subject of controversy¹⁰, but in the absence of legislative interference, the error principle now seems to be firmly enshrined in the law. When this is coupled as it is with the lack of insistence by the appellate courts upon judges fully stating their reasons for sentence¹¹, it can be seen that the right of appeal against sentence can often be more illusory than real. It is no doubt true that certain robust judges have not hesitated to interfere with sentences when they have thought them to be unjust, but I believe this to have been a far from universal practice. It is true that the rigidity of the rule has been somewhat modified by the development of doctrines of non-specific error and the characterisation of sentences as manifestly excessive or lenient, but this still leaves a situation where a Court of Criminal Appeal may well permit a sentence to stand notwithstanding that it is a sentence greater than that which would have been imposed by each member of the Court.

Apart from the individual injustice which may be involved in the Court insisting on the error principle it can, I think, be seen that the guiding effect of the Court's judgments is greatly weakened if it will not interfere with sentences which its members consider to be too lenient or excessive. It is, I think, not without significance that a large number of appeals seem to be brought against the sentences of particular judges, and provided that those judges are astute enough not to descend to too much particularity as to their reasons for sentence, then in most cases the Court of Criminal Appeal will not interfere.

There can, I think, be no doubt that individual judges as human beings have their own idiosyncrasies and prejudices, however much they may try to overcome them. In the present somewhat clouded

picture as to what the aims of criminal punishment are, and in view of the fact that there is still general recognition of a number of aims of punishment, some of which conflict with each other, it is not surprising that different judges' views of the seriousness or otherwise of particular offences will vary, as will their interpretation of the same set of facts, and the sentence appropriate in a particular case. This is to be expected, but it is, I think, quite another matter when the system operates in such a way that the Court of Criminal Appeal will not correct disparities which emerge as a result.

I think that the past failure by Courts of Criminal Appeal to perform a real role in giving guidance to sentencers will only strengthen moves towards the imposition of legislative guidelines of a much more rigid kind, or at the very least, the introduction of a Sentencing Council of the type suggested by Dr Ashworth. As one who has a considerable respect for the capacity of the common law to provide a satisfactory framework of law, I think that any such development is unfortunate. However, I think that it is also true that in the area of sentencing the common law has failed or been allowed to fail for the reasons already mentioned. The question is whether it is now too late to remedy the situation. I do not think that it is, provided that the deficiencies of the system as it presently operates are recognised and remedied. In my opinion it is difficult to conceive of a greater injustice than that the punishment of an individual for particular conduct can vary markedly depending on the particular judicial officer before whom he is tried. Nevertheless, this happens and it happens every day. It seems to me that the only way this can be avoided is either by way of a system of guidelines or by substantial improvements to the present appellate control of sentences coupled with the supply of adequate information to sentencers, and perhaps some form of judicial training.

The latter suggestion tends to produce strong opposition from many judges. I do not think that this attitude is justified. Last year in Canada I attended a seminar on sentencing conducted by the Canadian Institute for the Administration of Justice over some four days. It was attended by judges from all over Canada and I found it to be a most stimulating and informative exercise as I believe did most of the others who took part in it. Apart from a lecture format such as is adopted in this seminar, there were workshop sessions where, for example, judges were asked to express views on the appropriate sentence for a particular individual given certain factual information which was then expanded and the judges were then asked to reconsider. I found this to be a very useful test in determining the factors which influence a judge in sentencing, and I found it particularly interesting to hear the expressions of views from my Canadian colleagues. Later I attended a one day seminar for newly-appointed Federal judges in Washington dealing with questions of

sentencing, and again I found the exercise to be most valuable. Speaking for myself, I would have appreciated having such opportunities at or about the time that I came on to the Bench, and many of my colleagues to whom I have spoken have expressed similar views. Further, I think that if such discussions are attended by a wide range of judicial officers of varying degrees of experience, then this of itself will tend to produce less disparity in approach to sentencing. I should say that I am not an adherent of the view that appointment to the Bench turns one from a chrysalis into a judicial butterfly overnight, and I think that we all need more assistance than we presently get. It is true that any judge or magistrate has the benefit of being able to consult more experienced colleagues about problems which confront him from time to time. I understand that this practice has been criticised by some academic writers, but for my part I regard this criticism as nonsense. The seeking of such advice is an informal but invaluable part of judicial training. It is not, however, enough in my opinion, and I welcome the advent of the Australian Institute for Judicial Administration as a possible vehicle for remedying existing deficiencies in the present system of judicial training.

THE AIMS OF SENTENCING

It is clear from Dr Ashworth's paper that he is a modified retributionist or a believer in just deserts. Nevertheless, I am delighted to see that he recognises that there is no place for dogmatic insistence on the pursuit of a single justification for punishment. For my part, I see the doctrine of just deserts as useful in setting an upper limit on sentencing so that no person receives a sentence which is disproportionate to the offence involved. In this way, it operates as a very real protection of the rights of the individual, such as, for example, the petty recidivist. It may, I think, also serve some purpose in setting a lower limit to punishment, although here I would see it as on many occasions giving way to other aims, in particular to rehabilitative aims. This view, without the reference to rehabilitation, has been advanced by Norval Morris¹² and criticised by von Hirsch¹³. The latter writer appears to insist that once the outer limits of the sentence have been established, then the principles of parity of sentencing require that similar conduct must produce similar results. I do not accept that sentencing principles can or should be applied with such rigidity, and as I apprehend it, Dr Ashworth does not do so either.

I would like at this point to express what is now an unfashionable view as to the rehabilitative aim of sentencing. In doing so, I think that it is important to firstly define what I am talking about. It seems to me that the process of labelling the aims of punishment has tended to produce knee-jerk reactions as one or other theory has vogue from time to time. If, when one

speaks of rehabilitation, one speaks of the alleged rehabilitative effects of imprisonment as such, or the use of prison conduct as a gauge of future behaviour on release, then I am in complete agreement with its critics. At its worst, it led to people being subjected to unusually long sentences and to what I believe to have been vain attempts to predict future criminality based upon doubtful past criteria. In Australia at least I do not think that the Courts have had these considerations in mind when they have spoken of rehabilitation as an aim of punishment. Rather they have used the prospect of some future rehabilitation on the part of a person as a limiting factor in the imposition of crushing sentences, and as a basis for the imposition of a merciful or non-custodial sentence in circumstances where deserts would otherwise require that such a sentence be imposed. In short, the Courts have recognised that persons can be rehabilitated, albeit usually by their own efforts, and usually outside the prison system. I think that anyone with any experience of prisons and prison systems must recognise that rehabilitation does occur, although it is often despite the system rather than because of it. In my opinion, however, it is a matter of regret that despair at the rehabilitative effects of punishment have led to the present policy of humane containment when it may well be that greater opportunity afforded to convicted persons for rehabilitation would lead to improvement in many individual cases.

This attitude has similarly led, in my opinion, to a complete abandonment of rehabilitative efforts aimed at persons coming out of the prison systems, leaving this entire area to well-meaning voluntary agencies. I have personally been involved with one such agency which is headed by a man with prior convictions for armed robbery which has, in the less than three years that it has operated, provided accommodation, arranged employment and provided counselling for hundreds of ex-prisoners, many of whom have been serious past recidivists. Its work has been applauded by all who have come into contact with it, and yet throughout its less than three years of existence, it has staggered from financial crisis to financial crisis. It has received the princely sum of \$13,000 from the Department of Corrections, which has not been enough to pay one typist for more than twelve months. At the same time, enormous sums are spent on the containment of prisoners. It seems to me that there is something essentially barren about a theory of punishment which concentrates solely upon deserts and containment and provides no recognition of the possibility of rehabilitation. Not only is such a policy barren, but it is also economically unsound. Rehabilitative efforts require a very low success rate to show a real economic return to the community. Apart from the rapidly increasing cost of keeping people in custody, there are the hidden costs of support of families by way of social welfare payments, the consequent detrimental effect upon children and the cost to the community involved in the detection and re-arrest of

a subsequent offender, to say nothing of the actual effect of such a person's subsequent crimes on victims.

It must be remembered that most non-custodial sentences have rehabilitative aims, as does the provision of pre-release and parole. If rehabilitation has no place amongst the aims of punishment, then little purpose is to be served by their retention.

I note that Dr Ashworth suggests that parole has been useful in establishing that custodial sentences have been unnecessarily long, and that reducing the length of sentences does not significantly impair the individual deterrent effect of custodial sentences. He would not appear to grant it any rehabilitative effect at all, and expresses the view that its major drawbacks are that a system of discretionary release produces disparate treatment and feelings of injustice, whilst systems of automatic release may so emasculate the court sentences as to question the social significance of the process of passing sentence.

I think that these criticisms are not necessarily valid, and I do not think that it can be said that there is no rehabilitative effect in a system of parole.

The parole system in Australia was first introduced into Victoria in the late 1950's and was subsequently adopted by other States, although not necessarily in identical form. In Victoria and in most other States, however, it is for the Court to determine when the Parole Board's jurisdiction commences by the fixing of a minimum term. The Victorian approach to the length of the minimum term has, however, been somewhat different from that employed in other States. The Victorian view has been that in general the potential parole period should not exceed two years except in the case of unusually long sentences, so that the typical Victorian sentence will be, for example, six years with a four year minimum, or ten years with an eight year minimum. The Court of Criminal Appeal has made exceptions in unusual cases to this principle, but this is the usual sentencing pattern to be found. The Parole Board in turn has adopted a policy of releasing first parolees at the expiration of their minimum term, regardless of their behaviour in prison or other contra-indicating factors, the only exception being when the prisoner's psychiatric condition is such that they cannot safely be released. In the case of second and subsequent parolees who had not breached their parole order, it had in the past been the policy of the Parole Board to add a term of approximately three months to the minimum, but this policy has recently been abandoned, and it is expected that these persons will also be released at the minimum date. Therefore, the discretion exercised by the Board is normally only exercised in relation to breaches of parole or in the case of persons who have breached previous paroles. Sine 1958 the number of persons who have

successfully negotiated their parole period has been steady at approximately 70 per cent. I believe that the system has had significant rehabilitative effects, and by reason of the fact that the Courts control the length of sentence and the discretion exercised by the Board is an extremely limited area, that it is not open to the criticisms made by Dr Ashworth. I would, however, accept the validity of these criticisms in relation to some parole systems. A more controversial system and one which is perhaps more open to such criticism has been operating in Victoria since April 1984. This is a system of pre-release which is also administered by the Parole Board. This scheme enables prisoners to be released up to twelve months prior to the minimum date for their sentence, subject to them having to serve two-thirds of their sentence, so that in the case of shorter sentences the time available is proportionately less and cannot be less than three months. There is no doubt that the political rationale for the introduction of this system was to reduce overcrowding in the prisons, but it has, I believe, developed as an interesting experiment nevertheless. Pre-releasees are required to attend at an attendance centre on two nights per week and from there either attend educational classes at nearby TAFEs or like institutions or carry out vocation work at the centre, and they are also required to perform community work on Saturdays. Psychiatric and medical supervision is arranged in appropriate cases, and in the case of drug users, the Parole Board normally imposes a condition that they submit to regular urine analysis testing. Entry into the scheme is somewhat selective, in that only 52.5 per cent of eligible prisoners have been granted pre-release under the scheme and not all of these for the full term for which they have been eligible. The disqualifying factors have usually been regarded as being the particular nature of the offence, the nature and number of previous convictions, and previous breaches of post-custodial orders. The Board has tended to grant permits to young offenders and 61 per cent of those twenty-five and under who are eligible have been released under the scheme. Approximately 50 per cent of those granted pre-release have a history of drug abuse and the Board has taken the view that these persons are more likely to benefit from the more intensive supervision offered by this scheme rather than parole. To date, the percentage of persons who have successfully completed the program without breach is approximately 72 per cent, although breaches by way of reconviction account for only about half of the actual breaches, the others being for breach of conditions of attendance etc. Of a sample of fifty pre-releasees released in the months of July and August 1984, sixteen had been reconvicted as at December 1985, twelve of these for offences committed during the pre-release period, and one whilst at large after the permit was cancelled. Of this group, fourteen received custodial sentences. It is, I think, at least encouraging that approximately two-thirds of this group had not been reconvicted by the end of 1985. It is, of course, much too early to make a proper assessment of the rehabilitative effects of this scheme in

the sense of reducing recidivism, but I consider that the results to date are at least encouraging and that it is an experiment which ought to continue. However, if rehabilitation is to have no place in the lexicon of the aims of punishment, it is clear that there would be no place for schemes such as this. I would concede that this scheme does exhibit some of the features in respect of which Dr Ashworth is critical in relation to parole, in the sense that it is selective and interferes with the sentences passed by the Courts. To date, however, the Board has not received a great deal of complaint based upon disparity in eligibility for the scheme. So far as the question of interference with Court sentences is concerned, this latter factor has produced some concern on the part of the judiciary, and the Victorian Government will, I understand, make modifications to the scheme, the details of which will be announced shortly, which I would expect to reduce the time available on pre-release and to confine its availability to prisoners serving sentences of a particular length.

GENERAL DETERRENCE

Dr Ashworth makes the point that in England and Wales and no doubt in this country also Courts only pass sentence upon 7 per cent of offenders. He argues from this that the role of sentencing as an instrument of crime control is necessarily a very limited one and makes the point that there may be other more effective methods of crime control, such as increased chances of detection, the design of security systems for houses and cars etc. I am not sure that this approach does not underplay the role which sentencing could perform in the area of crime control. There can be no doubt of course that one of the most significant deterrents to crime is the likelihood of detection, and I consider that much more attention should be directed towards this end.

I think, however, that if the media was to play its part in properly informing the public as to the sentences actually passed by the Courts upon offenders, that fact would surely have a significant effect upon members of the public who might be disposed to commit such offences. At present, the media tend to report only sensational trials and report the same very selectively. I have often thought it ludicrous for judges to talk about general deterrence when they address their remarks to empty courtrooms in the knowledge that the fact of a sentence will never be disseminated except perhaps by word of mouth in the prison system, assuming that a custodial sentence is passed. On the other hand, I think that if the public were to be made aware of the results of certain types of conduct, it would matter little that such consequences were only visited upon 7 per cent of offenders in the sense that the public at large would know what was likely to happen to them if they transgressed and fell into that 7 per cent. I think that an analogy can drawn in

relation to the effect of stringent anti drink-driving laws where the chances of detection are perhaps low and no doubt many offenders escape without conviction, but when they are detected, the result is certain and severe. In my opinion, these laws have brought about a revolution in community attitudes to drinking and driving in this country at least, and I think that sentencing in general can and should have this effect in a wider sphere. I think that this would be particularly so if sentences of the Courts were to be more widely publicised. It may be that the media are not entirely to blame for the fact that they are not. Courts are notoriously inaccessible as sources of information for the media, and they can only maintain limited staff to cover what takes place in the Courts. In Victoria the Committee on Sentencing which has been established by the Government and which is chaired by Sir John Starke is presently considering the question as to whether it should recommend the appointment of media liaison officers in the Victorian Court system to pass on information to the media as to what the Courts are doing, and in particular, as to what they are doing in the area of sentencing. It seems to me that this suggestion has considerable merit, and indeed that Courts might find such officers useful in a number of other ways. I should point out that in advocating the retention of general deterrence as an aim of punishment, I nevertheless must agree with Dr Ashworth that it would be wrong and unjust to impose disproportionately long sentences upon some offenders in an attempt to deter others. I also agree with his objections to adopting as an aim of sentencing policies of incapacitation or selective incapacitation for the same reason. Nevertheless I note that he concedes, as I think he must, that there may be a small group of offenders who are regarded as constituting such a vivid danger as to warrant a protective sentence going beyond that which would be proportionate to the offence.

SERIOUSNESS OF OFFENCES

I believe this to be one area where, whatever the correct aim of sentencing is or should be, much work needs to be done and I applaud Dr Ashworth's initiative in this regard. It is apparent that various offences acquire a significance at various times which often leads the legislature to prescribe heavy penalties, and yet as time goes by, the significance of such offences becomes much less. Further, sentences for particular offences become disproportionate to each other. Examples of this can readily be found in an examination of the relevant Acts of all the States. In Victoria, much work has been done in recent years to improve the situation, but nevertheless, an examination of the Crimes Act still reveals some curious provisions, e.g. s.6B provides a penalty of fourteen years' imprisonment for inciting or aiding and abetting suicide in circumstances where attempted suicide is no longer an offence. Section 65 provides a penalty of fifteen years' imprisonment for procuring an abortion, despite the fact that a substantial portion of the community do not

merely regard abortion as a non-criminal activity, but rather as a right. Section 74 provides a penalty of ten years' imprisonment for theft, and s.261 provides a similar penalty for intentional damage to property. It might be thought that these are disproportionate penalties which reflect an earlier age's determination to protect property rights at all costs. Finally, the forging of stamps of the United Kingdom is regarded as a particularly serious matter which carries a penalty of fifteen years' imprisonment pursuant to s.261, presumably reflecting a close imperial link which no longer exists. Many more such examples can be found where the sentence prescribed bears little relationship to the seriousness or otherwise of the offence. The proper classification of offences does, as Dr Ashworth suggests, require careful research and examination, both upon the basis of an overall test of seriousness and seriousness in relation to each other. In this regard, it is of interest to note how the Minnesota Sentencing Guidelines have deliberately attached more severe consequences to offences against the person than offences against property, and yet have maintained a similar level of prison population. If it be correct to say that in general offences against the person are more serious than offences against property or if this reflects a community view, then there is much to be said for such an approach. In the absence of such Guidelines, it is obviously helpful to undertake an exercise such as that suggested by Dr Ashworth. I would venture to suggest, however, that the responsibility for determining a ranking as to the seriousness of offences is a legislative rather than a judicial responsibility, although obviously judicial and criminological input should be received into such a process.

CHARACTERISTICS OF THE OFFENDER

Whether one characterises the effect of prior convictions as leading to a progressive loss of mitigation or as an aggravation of a subsequent offence, in my view it defies reason to suggest that a first offender should be dealt with in the same manner as a multiple recidivist as some just deserts advocates would do¹⁴. Nevertheless it is here that the just deserts aim of punishment is valuable in setting a ceiling for a particular offence. However I think that it is very difficult to do as has been done in Minnesota and develop a set of principles for dealing with prior convictions by number. The very nature and variety of offences provides the problem in this regard. It would, in my opinion, be unfair for a sentence to take into account serious prior offences of fraud in sentencing an offender for an offence against the person, to take one example. Normally the passage of time following a conviction would have the effect of lessening its weight but I question whether this is always so. Some offences are unique and/or notoriously difficult to detect and in such circumstances a conviction many years previously might be thought to still have considerable relevance.

Having said this I would agree with Dr Ashworth that the development of sentencing principles of the type suggested by him, whether by way of appellate decisions, legislation or sentencing council, might well be useful. I have already expressed a preference for the former, but however it is done the development of such principles would be of great assistance to sentencers.

I part company with Dr Ashworth, however, when he suggests that the myriad of personal factors relevant to a particular offender should be excluded from consideration. I can understand the necessity for doing so from a pure just deserts point of view or in the context of a rigid sentencing structure because it would be impossible to develop any guidelines which would give appropriate weight to such factors in individual cases. This is not, however, a valid argument for their exclusion. I believe that one of the hallmarks of proper sentencing is humanity and a regard for the individual. Is it really suggested that an elderly person in poor health merits the same sentence for the same offence as a healthy thirty year old or that both should receive the same treatment as a socially deprived aboriginal teenager? Should the Courts pay no regard to matters such as the ethnic background of an offender which may provide a ready explanation and real mitigation for the conduct complained of? If the answer to these questions or others like them is in the affirmative then I think that we have taken a giant step backward in our search for justice.

TYPES OF SENTENCE

I note with interest Dr Ashworth's remarks concerning the proliferation of non-custodial and semi-custodial alternatives. I agree with his comment that the mere provision of these alternatives is unlikely to reduce the incidence of custodial sentences; indeed it may well have the opposite effect. I say this for two reasons; first because the net-widening effect of such measures may well draw people who would not have otherwise been subjected to such sentences into eventual custody for breach of conditions and secondly because the granting to the courts of a discretion to pass 'tailored sentences' of so many months custody followed by other non-custodial measures may well give judges who believe in the 'short sharp shock' theory an opportunity which has hitherto been denied to them to impose this type of custodial sentence coupled with other controls. I note that Dr Ashworth in his book has been prepared to afford some legitimacy to this 'clang of prison gates' principle upon a general basis of common sense¹⁵. Speaking for myself I have very grave reservations about it. It has long been practiced and improperly practiced by the device of remanding for sentence when the sentencer knows full well that a custodial sentence will not be imposed. In my opinion such an approach is more likely to be destructive than salutary. I think that the real decision which

a sentencer must make is whether to fix a term of imprisonment or not. If the person does not deserve imprisonment they should not be subjected to short sharp shocks. If they should be imprisoned then the sentencer should fix the appropriate term before becoming eligible for parole and not attempt to tinker thereafter. The parole board is usually better equipped to deal with the prison's post-custodial disposition in the content of a system such as that which operates in Victoria to which I have referred. If the person is not to be imprisoned I see real dangers in affording the sentencer a smorgasbord of options, many of which are of doubtful efficiency or are unproved. It may make sentencers feel wise and humane to choose from such a range of options but it is doubtful whether either the offender or community will benefit. There must be non-custodial options but I think that we must take great care before imposing conditions which, if imposed in sufficient number may be more onerous than imprisonment and which may lead directly to imprisonment. I think that Dr Ashworth is correct when he says that relativities should be established and principles should attach to each non-custodial option.

It will be appreciated that I have not attempted to deal with all of the issues raised by Dr Ashworth. I commend his paper as a valuable and helpful contribution to this seminar and to the problems of sentencing generally. I would hope that my criticisms are looked at in this context. They are expressed from the perspective of a judge with some familiarity with parole and with prisoners.

Like most of my colleagues I still have much to learn about this area and the learning process has been greatly assisted by Dr Ashworth's contribution.

NOTES

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2. Ashworth (1983), Sentencing and Penal Policy, Weidenfeld and Nicholson, London, 37-41.
3. Fox and Freiberg (1985), Sentencing - State and Federal Law in Victoria, Oxford University Press, Melbourne.
4. Fox and Freiberg, 478, para. 11.506.
5. R. v. Williscroft, [1975] V.R. 292.
6. R. v. Begum Bibi, (1980) 71 Cr. App. R. 360.
7. Sentencing and Penal Policy (1983), Weidenfeld and Nicholson, London, 35-42; 69-71; 450.
8. R. v. Taylor and O'Meally, [1958] V.R. 285; R. v. Tutchell, [1979] V.R. 248.
9. R. v. Griffiths, (1977) 137 C.L.R. 293.
10. R. v. Whittaker, (1928) 41 C.L.R. 230, 234.5; R. v. Fahey, [1954] V.L.R. 460, R. v. Taylor and O'Meally, [1958] V.R. 285 at 295 per Smith, J.
11. R. v. Dole, [1975] V.R. 754.
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13. von Hirsch (1985), Past or Future Crimes, Rutgers, 38-46.
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DISCRETION IN SENTENCING

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Discretion in sentencing is a topic of enormous interest to those attempting sentencing reform as well as to those engaged in the study of sentencing. By discretion I mean the freedom to act according to one's judgment. By sentence I mean both the disposition of the punishment, including fines, community service, or imprisonment, and the amount of punishment including the length of imprisonment or the amount of a fine.

Discretion in sentencing is, on the one hand, maligned as the primary culprit responsible for disparity in sentencing. On the other hand, discretion is defended for the flexibility it provides to fashion the most appropriate sentence for each case.

Regardless of whether sentencing discretion is viewed as a relatively positive force or a relatively negative force, the necessity for the exercise of some sentencing discretion is accepted by virtually all reformers and scholars. Beyond that rather innocuous statement, however, there are many unresolved and, perhaps unresolvable, issues. For example, discretion is often portrayed as an unalterable quantity. In this view efforts to limit, restrict, or reduce discretion at one point merely result in its expansion elsewhere. This 'balloon' or 'hydraulic' paradigmatic view of discretion is often used to critique sentencing reform efforts. The conclusion of critiques from this perspective is generally that sentencing discretion has been transferred from one component in the system, such as from judges, to another less desirable component, such as to prosecutors¹.

Whether or not the absolute amount of sentencing discretion can be reduced, there is considerable agreement that sentencing discretion can be structured². Structuring sentencing discretion generally entails the development of articulate, explicit policy to guide the exercise of discretion. Sentencing policy can be articulated by a number of different actors, including the legislature, a sentencing guidelines commission, a parole board, or corrections administrators. One of the more interesting issues involving sentencing discretion is the extent to which the discretion is structured by explicit policy and the extent to which discretion is left to practitioners to exercise on their own.

Other interesting issues surrounding discretion in sentencing revolve around the location of sentencing discretion³. The

distribution of sentencing discretion among the various actors including the legislative body, judges, prosecutors, parole authority, and corrections officials has important political implications. Some participants are more politically accountable and politically vulnerable in the exercise of their discretion than other participants. Elected officials such as legislators tend to be somewhat more sensitive to perceived public opinion than, for example, corrections administrators. The distribution of discretion and its location in the system also have important philosophical implications regarding purposes of sentencing. It would be difficult, for example, to achieve rehabilitation as a primary goal absent significant sentencing discretion during the service of an offender's sentence. Generally such discretion is exercised by corrections or parole officials.

The way in which discretion is distributed also has implications for the accountability of actors in the exercise of their discretion. Locating the discretion to set actual prison terms in a parole authority physically and temporally apart from both the plea negotiation process and the judicial imposition of sentence, often fosters illusory plea negotiations and symbolic judicial pronouncements. This is particularly true when parole authorities base durations on 'real' offence behaviour, which they are prone to do, rather than on the conviction offence.

A number of sentencing structures have been instituted during the last decade in various jurisdictions in the United States to replace the long lived indeterminate sentencing structure. Legislatively imposed determinate sentences, mandatory sentences, and sentencing guidelines have all been implemented, sometimes in combination with one another. Each of these structures allocates discretion differently among the legislative, judicial and executive functions of government and among the various participants within each function. The sentencing structures also vary in the extent to which discretion is guided by articulated policy. All of these factors combine to create structures that differ considerably with respect to accountability, philosophy, and politics. Sentencing structures that have been implemented in the United States are briefly sketched below with particular emphasis placed on the structures' implications for sentencing purposes and political outcomes. The Minnesota Sentencing Guidelines system is described in somewhat more detail.

Indeterminate Sentences

In the United States, the authority to establish sentencing policy and sentencing structure ultimately lies with the legislature. Legislatures in the United States, however, have traditionally delegated significant portions of their sentencing authority to the judicial and executive branches of government.

The most dramatic example of massive delegation of sentencing authority is indeterminate sentencing which held sway in the United States throughout most of this century. Under the indeterminate system, the legislature defined crimes and established very broad parameters for sentences, with the minimum sentence generally set at zero (i.e., no imprisonment) and the maximum sentence generally set at a high level of five years, ten years, twenty years, or life imprisonment. Dispositional authority was left to the discretion of judges with virtually no policy provided to guide the exercise of the broad discretion to imprison or not to imprison. If the decision was made to place an offender on probation rather than to a sentence of imprisonment, the judge might in turn delegate much of the specific sentencing authority to a probation officer who served as an officer of the court. The probation officer often established and modified conditions of probation, effectively determined the length of probation, and substantially affected probation decisions.

Substantial sentencing discretion was also delegated to the executive branch. For offenders sentenced to prison, durational authority was invested in the parole board. Judges pronounced symbolic sentence ranges on the order of zero to twenty years, and the parole board determined when the offender would actually be released. Depending on the informal relationship that developed between the parole board and prison officials, the latter could often affect durations as a result of disciplinary action against inmates. Regardless of the relationship that developed, prison officials affected the sentence service if not the length of sentence through prison classification and transfer decisions. To some extent, the system need to control prison populations was served by investing sentencing discretion in the executive branch. It was a very imperfect control mechanism, however, because only sentence durations could be affected by prison and parole officials. Neither sentence dispositions nor correctional resources were under the control of those actors.

Indeterminate sentencing tended to insulate the politically sensitive legislature from political pressure because the legislature essentially did little to influence sentences. The high maximum sentences established by the legislature coupled with the dispositional flexibility given to judges generally satisfied the relatively uninitiated that to the extent there were problems with sentences the problems lay with actors other than the legislature. Removing the major policy-making body from effective decision making in the area denied the possibility of public debate of sentencing practices within the existing structure. When the issue of sentencing became prominent on the public agenda in the 1970's, the debate by necessity centred on the acceptability or unacceptability of the structure itself. There was no way to publicly debate the desirability of sentencing practices within the indeterminate structure.

Prosecutors in state systems, like legislators, tend to be relatively politically sensitive and somewhat vulnerable to public pressure. Also like legislatures, prosecutors exercised very little direct authority over sentencing in the indeterminate system. Because of the lack of sentencing authority, they also tended to be excused from public criticism regarding sentencing. Parole authorities and judges generally considered 'real' or 'total' offence behaviour in establishing sentence duration so the prosecutors' charging and negotiating practices did not significantly affect sentences. In fact, charge negotiations, while frequent, were generally inconsequential because of the enormous discretion exercised by actors later in the system.

Judges were less politically insulated than the legislature since they exercised real dispositional authority, which sometimes elicited public discussion on a case by case basis, but much of the sentencing authority was exercised by the politically insulated parole board and corrections officials. While it is true that there were occasional incidents of heinous crimes committed by recently paroled offenders that aroused the public, by and large parole decisions were not scrutinised.

The distribution of discretion under the indeterminate system was designed to facilitate utilitarian sentencing purposes, in particular rehabilitation and incapacitation. Not only was discretion exercised later in the sentence which is necessary for a rehabilitative approach, but it tended to be exercised by authorities trained in a legal tradition. That training is more conducive to thinking in terms of rehabilitation and its counterpart, incapacitation, than to thinking in terms of desert, the grounding of which is in substantive criminal law. It is not surprising in view of that tradition that as indeterminate sentencing came under increasing attack in the 1970's, and parole boards modified their practices and began to establish duration early in the sentence, the basis for those durations tended to be incapacitation rather than deterrence or desert⁴. The absence of specific legal bases for establishing sentences (i.e. specific sentencing laws, appellate review of sentences, and the reliance on psychological and social work experts) resulted in the sentencing system to be labelled 'lawless'⁵.

There are several key points to summarise regarding discretion in the indeterminate system. First, discretion was primarily lodged in the executive branch, particularly in a parole board. Some discretion was reserved for the judicial branch of government, with judges exercising discretion over dispositions. The legislative branch delegated almost all of its sentencing authority. Second, that distribution of discretion removed sentencing from policy makers and politically sensitive and accountable actors. There was essentially no public policy debate about sentencing within the indeterminate sentencing structure, nor could there be. Third, both as a result of the placement of

discretion in later stages of the sentencing process and the recruitment patterns for those exercising that authority, sentences were fashioned to serve rehabilitation and incapacitation goals.

Legislative Determinate Sentences

As the indeterminate sentencing structure was successfully challenged, legislatively imposed determinate sentencing became the most common replacement in the late 1970's with the states of California, Illinois, and Indiana leading the way⁶. Sentencing discretion was substantially re-allocated under determinate sentencing, with the legislature retaining significantly more sentencing authority than previously. Under determinate sentencing, the legislature defined relatively narrow sentencing ranges compared to indeterminate sentences. The legislature also generally defined aggravating and mitigating factors which, if present in a case, could be used to adjust the sentence by specified amounts.

Under determinate sentencing, judges generally still had considerable discretion to impose sentence dispositions. In addition, judges were usually given some of the authority to determine whether aggravating or mitigating factors were present in a case. This authority allowed judges to directly influence sentence length, which they generally could not do under indeterminate sentencing.

Prosecutors obtained much more discretion in sentencing with the determinate structure⁷. The conviction offence became more important in determining the sentence, and the prosecutors charging and negotiating decisions consequently significantly influenced sentences. 'Real' or 'total' offence behaviour did not disappear from the sentencing decision under the determinate structure, but the prosecutor largely determined whether evidence regarding an aggravating factor would be presented and the prosecutor could advocate for or against a mitigating factor.

The existing parole authority was eliminated with determinate sentencing. Generally, the parole function was eliminated as well. In some systems, however, such as in the state of Indiana, substantial discretion was effectively transferred from the parole authority to corrections administrators who were given the discretion to award 'meritorious good time' which could constitute up to 50 per cent of the pronounced sentence. Significant procedural due process issues accompanied the exercise of such considerable discretion by corrections administrators⁸. Most determinate sentencing systems have not, however, transferred such extensive discretion to corrections administrators.

Clearly, under determinate sentencing discretion was transferred to more politically sensitive, vulnerable, and accountable actors

in the system. That transfer brought sentencing into the public policy arena on a continuing basis. Accountability in areas of public policy is to be valued in a democratic society and there is little question that the move toward determinacy and articulated sentencing policy gave the public greater information and control over sentencing policy and practices. On the other hand, rationality in public policy is also to be valued. In an area like sentencing where there is considerable public emotion, not to mention demagoguery, extensive public control absent extensive public education regarding the issues does not necessarily lead to the development of rational public policy.

The system most often noted to exemplify the dangers of relatively uninsulated sentencing discretion is California's determinate sentencing system. Determinate sentencing as adopted in 1976 in California was a well articulated, coherent, desert based system. Every legislative session following implementation resulted in extensive modifications to the sentencing structure. The modifications were invariably to increase sentences, which has resulted in current and projected prison populations well beyond any planned capacity expansion. Efforts to increase the discretion of prison officials to award 'meritorious good time', which might relieve crowding but which would also alter the distribution of sentencing discretion, have failed. It should be noted that prison populations have also increased in indeterminate sentencing systems, and a straightforward relationship between determinacy and increased prison population does not exist. However, the problems experienced with inconsistency in sentencing policy and correctional resources suggest that some balance is needed to ensure both accountability and rationality in public policy.

While not inherent in a determinate sentencing system, desert based sentencing finds a much more hospitable home within determinate sentencing than in indeterminate sentencing. Discretion is exercised by actors closer temporally and informationally to the offence that was committed, and that might result in greater weight being given to culpability factors. Of more importance, however, is the fact that greater discretion is exercised by actors trained in substantive criminal law rather than social work. In addition to redistributing discretion with more discretion exercised by those trained in law, determinate sentencing also generally brings evidentiary standards to sentencing and some degree of appellate review, all of which is designed to rectify the 'lawless' nature of indeterminate sentencing.

To summarise, determinate sentencing more equally distributes discretion among the three branches of government, with the legislature articulating relatively specific sentencing policy. Judges retain dispositional discretion and perhaps gain some durational authority in specifying aggravating and mitigating factors. Probably somewhat less authority is exercised by the executive branch under legislative determinate sentencing than

under indeterminate sentencing. The discretion that is exercised in the executive branch under determinate sentencing, however, is exercised by the prosecutor rather than by the parole board. Determinate sentencing tends to be more desert based than indeterminate sentencing, to a considerable extent because of the different distribution of discretion in the system. Finally, legislative determinate sentencing is much more accountable to the public - some would say too accountable - to a public that is not fully enough informed on sentencing and correctional issues to develop sufficiently rational policy.

Mandatory Sentences

Another response to dissatisfaction with the discretion exercised by judges and parole boards under indeterminate sentencing was to institute mandatory sentences for specified crimes. Virtually every state system has mandatory sentences for some crimes. This constitutes a piecemeal approach to redistributing sentencing discretion. Mandatory sentences are incorporated into statute with the legislature generally specifying both disposition (usually imprisonment) and a minimum term of imprisonment. This approach represents the greatest attempt on the part of the legislature to exercise sentencing authority. In theory the judge and paroling authority are both stripped of sentencing discretion.

In actuality, it is the prosecutor who ends up with the most extensive discretion with mandatory sentences. Although it appears that the legislature is exercising all of the sentencing authority, the authority is somewhat illusory because the legislature cannot monitor or enforce the mandatory provisions. The prosecutor generally has the discretion to either charge or not charge elements that would trigger mandatory provisions, giving the prosecutor substantial bargaining power vis a vis defendants. Furthermore, even if a prosecutor charges elements that trigger a mandatory sentence, if the judge, prosecutor, and defence attorney agree not to sentence according to the mandatory provision, there is no authority to enforce its imposition.

Mandatory sentences tend to be popular with the public and with some politicians. Like piecemeal modifications of determinate sentencing, which is also popular with the public and certain politicians, mandatory sentences tend to create incoherent and inconsistent sentencing systems. The philosophical underpinnings of mandatory sentences are probably general or specific deterrence, incapacitation, or some combination of the two.

While mandatory sentencing is often viewed as the opposite of indeterminate sentencing, it is similar in that it tends to effectively invest most sentencing authority in the hands of the executive branch, albeit in the hands of the prosecutor rather than in the parole board.

Sentencing Guidelines

Legislatively authorized sentencing guidelines followed closely on the heels of legislative determinate sentencing systems. Sentencing guidelines are developed by a legislatively authorized commission which develops specific sentencing policy for judges to follow. Generally, judges impose real time sentences within the constraints of the sentencing policy, with parole eliminated. The motivation for establishing this type of sentencing structure was to correct the lack of accountability, lack of articulated policy, and broad discretion of the indeterminate sentencing system within a structure that would permit the development and maintenance of rational sentencing policy. More than any other sentencing structure that has been developed in the United States, sentencing guidelines provide specific articulated sentencing policy which attempts to structure the discretion of other actors, particularly that of judges. A monitoring function is generally structured into a guidelines system so that information is fed back to the legislature and commission for purposes of policy modification and enforcement.

The distribution of discretion is similar to that of legislative determinate sentencing except the legislature exercises its authority through the sentencing commission established by the legislature. Exercising its authority in this way accomplishes two things for the legislature that are lacking in legislatively established determinate sentences. First, the sentencing policy established is more specific than is possible for a legislature to write. Second, the sentencing commission serves as a political buffer for the legislature, hopefully creating the balance that allows both accountability and rationality in sentencing. In a very real sense, the legislature has more effective control over sentencing practices with a guidelines system than under any other system.

Trial judges and prosecutors both exercise more discretion under guidelines than under indeterminate sentencing, essentially sharing with the legislature and commission, the discretion that had been exercised by the parole board. In addition, the judicial branch exercises additional sentencing authority by writing case law in appellate review of sentencing. The specific standards provided in guidelines allow for meaningful sentence review for the first time in the United States. The judicial branch inevitably engages in some policy setting through its appellate review. As case law develops, it becomes an important part of the articulated public policy.

There appears to be more accountability in a sentencing guidelines system than other sentencing structures. In part it is because every actor exercises real sentencing authority. For example, under sentencing guidelines as in determinate sentencing prosecutors significantly affect the sentencing outcome through

their charging and negotiating practices, especially if sentences are based on the conviction offence⁹. Under sentencing guidelines, however, there is probably more accountability because the policy is more specific and consequently what the prosecutor has negotiated can be more clearly established¹⁰. Furthermore, the existence of a monitoring system which routinely provides information on prosecutorial and judicial practices is of tremendous utility in providing accountability.

As in determinate sentencing, the distribution of sentencing discretion as well as the establishment of legal procedures and appellate review encourage the use of a desert based system, although in both systems desert is more likely to be a limiting principle rather than a defining principle. All in all, the sentencing guidelines structure appears to be one that is more likely to provide accountable, rational, and principled sentencing than any other structure invented up to now in the United States. A more detailed discussion of the first such legislatively established guidelines system implemented in 1980 in Minnesota follows.

Minnesota Sentencing Guidelines

The Minnesota Sentencing Guidelines Commission was established by the legislature in 1978 following four years of legislative debate on sentencing reform. The legislature had reached a stalemate debating legislatively enacted determinate sentencing versus a continuation of Minnesota's highly indeterminate sentencing system. In light of the stalemate, the legislature created the Minnesota Sentencing Guidelines Commission and instructed the Commission to establish presumptive sentences for felons based on appropriate combinations of offence and offender characteristics. The legislature included five structural features in the reform mechanism, each of which contributed to successful development and implementation. They are legislative oversight, a broadly representative sentencing guidelines commission, appellate review of sentences, coordination of sentencing and correctional policies, and sentence monitoring¹¹.

Legislative Role: The role the Minnesota legislature chose to play in sentencing reform appears close to an ideal structure for responsible policy development. The legislature establishes parameters within which the Commission operates and oversees the work of the Commission. Since the legislature is ultimately responsible for sentencing policy, legislative involvement in the process is essential. Legislatures, however, tend to be more effective at setting general sentencing policy and providing oversight than in establishing specific sentencing policies. Setting specific sentencing policy requires more time than legislative bodies can generally give to the task, and it involves a level of attention to detail that legislative deliberations are ill-equipped to handle.

Commission Membership: The structure of Commission membership designated by the legislature also aided policy development and political acceptance of the guidelines. The Commission is comprised of a Supreme Court Justice and two trial court judges appointed by the Chief Justice of the Supreme Court, a prosecutor, a defender, a law enforcement representative, a probation or parole agent, and two citizen members appointed by the Governor, and the Commissioner of Corrections. The membership facilitates input from criminal justice groups with Commission members acting as liaisons between the Commission and their constituent groups. For the structure to work effectively it is necessary for Commission members to primarily serve the interests of the Commission and to secondarily represent the narrower sentencing interests of their constituent groups. That was the perspective adopted by Commission members during the development and implementation of the guidelines. The communication that is established and the knowledge that is gained with broadly based membership is a tremendous asset in policy development¹².

Appellate Review of Sentences: A third structural feature designated by the legislature was appellate review of sentences. Prior to sentencing reform in the United States, sentence appeals were limited to challenging whether the sentence was authorized by statute. 'Inappropriateness' was not a permissible basis on which to appeal a sentence. The legislation that established the Commission also established the right of prosecution and defence to appeal the appropriateness of sentence. The right to appeal sentences, coupled with standards and policy from which to judge appropriateness of sentences has resulted in a level of scrutiny of criminal sentencing that has not previously existed.

Appellate review of sentences has proved to be an essential enforcement mechanism for the sentencing guidelines system. There have been relatively few sentence appeals. Approximately 330 opinions were issued from 1980 to 1986 constituting less than 1 per cent of all cases sentenced during that period. During the first three years of appellate review when most of the case law was established, the appellate court affirmed the sentence in about half the cases and 'affirmed with modifications' the sentence in approximately half the cases.

The Commission developed sentencing policy rather than merely establishing a sentencing procedure¹³. The appellate courts have consistently read the sentencing guidelines substantively rather than procedurally. Instead of focusing primarily on the sentencing process (e.g., whether a sentencing hearing occurred or whether appeals were brought within the designated time frame), the appellate courts have focused on substantive proportionality and equity issues, such as the circumstances that constitute substantial and compelling aggravated or mitigated factors, the general limits to increases in sentences when

aggravating circumstances are present, and the treatment of co-defendants in sentencing. In reading the guidelines substantively, the clarity of standards for determining appropriate sentences has been enhanced substantially.

Co-ordinating Sentencing Policy with Correctional Resources: A fourth structural feature of the Minnesota reform is to co-ordinate sentencing practices with correctional resources. The impact of various sentencing policies on correctional resources was estimated throughout the development of the Minnesota sentencing guidelines¹⁴. Statements reflecting legislative intent, philosophies of sentencing, and past sentencing practices played important roles in determining the structure and content of the sentencing guidelines. Concern with the impact of sentencing policy on correctional resources merely reflected a recognition that resources were required to implement the policy and that the legislature, not the Commission, was the appropriate authorisation body.

Sentence Monitoring: The final structural feature designated by the legislature is the monitoring of sentencing practices. This provides information to the legislature and Commission for modifying sentencing policies and for co-ordinating sentencing practices and correctional resources. It also provides the basis for evaluating the impact of articulated sentencing policy on sentencing practices.

Description of the Guidelines: The Minnesota legislature created a favourable structural setting for sentencing reform. The legislature decided the fundamental issue of where sentencing discretion would be exercised - essentially by the courts within the constraints of the sentencing guidelines, with parole eliminated. Issues that were transferred to the Commission for resolution, subject to legislative review, included the relative weight to accord past sentencing practices and current correctional resources, and the primary purpose of sentencing. The Commission was instructed to submit the guidelines to the legislature in January, 1980 for review. The legislature did not reject them and they went into effect for crimes committed on or after May 1, 1980.

The Minnesota Sentencing Guidelines Commission determined that sanctions should be based on the seriousness of the offence of conviction and the offender's prior criminal history. The presumptive sentences embodied in the sentencing guidelines are summarised in Figure 1. The vertical dimension of the grid indicates the level of severity for the conviction offence. The offences listed in each category are the most frequently occurring offence(s) at each severity level. A measure of an offender's criminal history is provided with the horizontal dimension of the grid. The line running across the grid is the dispositional line - all cases that fall in cells below the

TABLE 1
SENTENCING GUIDELINES GRID

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

Offenders with nonimprisonment felony sentences are subject to jail time according to law.

SEVERITY LEVELS OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
Unauthorized Use of Motor Vehicle Possession of Marijuana	I	12*	12*	12*	13	15	17	19
								18-20
Theft Related Crimes (\$250-\$2500) Aggravated Forgery (\$250-\$2500)	II	12*	12*	13	15	17	19	21
								20-22
Theft Crimes (\$250-\$2500)	III	12*	13	15	17	19	22	25
						18-20	21-23	24-26
Nonresidential Burglary Theft Crimes (over \$2500)	IV	12*	15	18	21	25	32	41
						24-26	30-34	37-45
Residential Burglary Simple Robbery	V	18	23	27	30	38	46	54
					29-31	36-40	43-49	50-58
Criminal Sexual Conduct, 2nd Degree (a) & (b)	VI	21	26	30	34	44	54	65
					33-35	42-46	50-58	60-70
Aggravated Robbery	VII	24	32	41	49	65	81	97
		23-25	30-34	38-44	45-53	60-70	75-87	90-104
Criminal Sexual Conduct 1st Degree Assault, 1st Degree	VIII	43	54	65	76	95	113	132
		41-45	50-58	60-70	71-81	89-101	106-120	124-140
Murder, 3rd Degree Murder, 2nd Degree (felony murder)	IX	105	119	127	149	176	205	230
		102-108	116-122	124-130	143-155	168-184	195-215	218-242
Murder, 2nd Degree (with intent)	X	120	140	162	203	243	284	324
		116-124	133-147	153-171	192-214	231-255	270-298	309-339

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

At the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation.

Presumptive commitment to state imprisonment.

*one year and one day

dispositional line receive presumptive imprisonment sentences, and cases that fall in cells above the dispositional line receive presumptive non-imprisonment, unless a mandatory minimum sentence applies. The single number at the top of each cell is the presumptive design of the sentence, in months, that should be stayed or executed. Any sentence within the ranges shown in cells below the dispositional line can be imposed without deeming the sentence a departure from the sentencing guidelines. A sentence outside of the range can be imposed if the judge provides written reasons as to the substantial and compelling circumstances of the case that warrant departure. The judge can also depart from the presumptive disposition (that is, imprisonment or non-imprisonment) if he or she provides written reasons. A short non-exclusive list of aggravating and mitigating factors are contained in the sentencing guidelines. The adequacy of reasons for departure as applied to an individual case is judged by appellate court review if the case is appealed by either the defendant or the state.

The sentencing policy adopted by the Minnesota Sentencing Guidelines Commission differed significantly from past sentencing practices in Minnesota. The guidelines recommend that more offenders who are convicted of serious person offences be sent to prison and that fewer offenders convicted of property offences be imprisoned.

In addition, the Commission ultimately chose a dominant sentencing goal - that of just deserts - as the primary basis for sentencing. Indeterminate sentencing in Minnesota incorporated multiple sentencing goals. Sentences were usually fashioned to achieve the utilitarian sentencing goals of rehabilitation, incapacitation, or deterrence. Such sentences are designed to achieve an end other than the sentence itself, namely to reduce crime by means of (1) rehabilitating offenders so that they refrain from committing additional crimes; (2) incapacitating offenders by removing them from society and preventing or delaying criminal acts against society during the period of incarceration; or (3) imposing such sentences that others are deterred from committing crimes. Just deserts or punishment is a different kind of sentencing goal in that the sentence is an end in itself - that is, punishment for the crime - rather than a means to a different end. Undoubtedly retribution was the primary purpose in some indeterminate sentences, but the predominant purposes were utilitarian.

The simultaneous pursuit of multiple goals in a single sentence, combined with simultaneous pursuit of different goals in different sentences, results in maximum discretion for decision makers. Not only did substantial discretion exist in imposition of sentence, it also existed in determining the basis of each sentence. This resulted in a situation in which the same case, heard in two different courts, could receive quite different

sentences simply because each court emphasised different sentencing goals. The pursuit of multiple goals contributed significantly to the problem of sentencing variation. The outcome of the sentencing system often appeared irrational in that an emphasis on one goal, such as rehabilitation, might lead to a sentence that was indefensible on retributive grounds. With limited standards to determine which goal to emphasise, sentences appeared to be highly inequitable.

The Commission also established policy for the permissive application of consecutive service of sentences. Essentially consecutive sentences are permissive if there are multiple person offences against different victims. Imposition of consecutive service for property offences constitutes a departure from the guidelines and written reasons to justify the consecutive service must be provided. The Commission has so far declined to establish guidelines for conditions of probation. The conditions, which can include up to a year in a local jail or workhouse, are left to the discretion of the judge. If, however, the defendant finds the conditions of probation more onerous than the guideline term for an executed sentence, he or she can demand execution of sentence.

The guidelines provide relatively clear sentencing policy for application by judges. Commission adoption of a primary sentencing goal provides a basis for determining when the recommended sentence is appropriate and when an aggravated or mitigated sentence is appropriate. It also provides a standard for appellate review, which is the enforcement mechanism for the sentencing policy.

Impact on Sentence Proportionality: Sentencing practices substantially conformed to the articulated sentencing policy during the first year following implementation. There was a 73 per cent increase in the imprisonment of offenders with low criminal histories convicted of serious person offences. There was a 72 per cent reduction in the imprisonment of offenders with moderate to high criminal histories convicted of property offences. Sentencing practices reverted to earlier patterns to some extent in 1982 to 1984. An increasing proportion of commitments to prison were property offenders compared to 1981 sentencing practices, and a concomitant decreasing proportion of commitments were person offenders. In 1981, 37 per cent of offenders committed to prison were property offenders. In subsequent years the percentages were 43 and 50, similar to the preguideline percentage of 47 per cent of offenders committed to prison for property offences. The percentage of commitments that were for person offences similarly regressed. A percentage of 50 in 1982 and 43 in 1983 and 1984 contrasted with a percentage of 39 per cent prior to the guidelines.

Several factors contributed to the reverted sentencing practices. The most significant factor is changes in prosecutorial practices. Changes in 'horizontal' charging and negotiating (that is, related to the criminal history score dimension of the guidelines) have resulted in more property offences charged and more convictions obtained for selected property offenders, resulting in higher criminal history scores and therefore more presumptive commitments for property offences. Prosecutors apparently began 'targeting' to the dispositional line (the heavy line governing the imprisonment decision) in 1982. The percentage of offenders with criminal history scores of four or more, which separates imprisonment from non-imprisonment for many property offenders, increased from approximately 8 per cent in 1981 to 12 per cent in 1982 (a 50 per cent increase) and 14 per cent in 1983 and 1984 (a 75 per cent increase from 1981).

Another factor that contributed to the rise in property offenders committed to prison is an increase in aggravated dispositional departures, in other words commitment to prison when the guidelines presume a non-imprisonment sanction. The aggravated dispositional departure rate was 3.1 per cent in 1981, 3.5 per cent in 1982, 4.5 per cent in 1983, and 4.0 per cent in 1984. Because of Minnesota's relatively low rate of state imprisonment (approximately 20 per cent), a change in departure rates of 1 or 2 per cent can have a substantial impact on the nature of prison commitments. For example, the difference from 1981 to 1983 of 1.4 per cent in aggravated dispositional departures is approximately eighty additional commitments to prison. With 1000 annual commitments, the eighty additional commitments results in an 8 per cent increase in commitments, virtually all of which are for property offences.

More interesting than the rates of aggravated dispositional departures, however, are the reasons provided for the departures. The increase is largely due to defendant preference for prison as opposed to a non-imprisonment sanction that can be more onerous than a prison sentence. A non-imprisonment sanction can include incarceration for up to a year in a local gaol or workhouse at the discretion of the judge, restitution, community service, treatment, and long periods of probationary supervision. The case law has supported defendant requests to have their sentences executed, in effect requiring the judge to depart from the presumptive sentence¹⁵. Aggravated dispositional departures at the request of the defendant numbered 38 in 1981, 73 in 1982, 111 in 1983 and 86 in 1984.

The shift in proportions of person and property offenders committed to prison is primarily the result of increases in property offenders sent to prison. There has, however, also been an increase in mitigated dispositional departures, that is, non-imprisonment sanctions given when the presumptive sentence is imprisonment. The increase in mitigated dispositional departures

has been for cases involving a serious conviction offence with a low offender criminal history score. Mitigated dispositional departures are particularly prevalent for sex offences with child victims which are generally intrafamilial offences and which are being prosecuted at an increasing rate.

Impact on Sentence Uniformity: Sentences were more uniform in 1981 than they had been prior to the guidelines. They were particularly more uniform in terms of the disposition as to who goes to prison, with a 52 per cent increase in uniformity. The dispositions in 1982 to 1984 were more uniform than dispositions prior to the guidelines, but the level of dispositional uniformity in imprisonment decreased somewhat from that found in 1981. Dispositional departure rates were 6.2 per cent in 1981, 7.2 per cent in 1982, 8.9 per cent in 1983, and 9.7 per cent in 1984. Approximately half of the departures are aggravated and half are mitigated departures. Sentencing practices prior to the guidelines would have yielded a departure rate of 17 to 18 per cent if the guidelines were applied to those sentences.

Durational uniformity is more difficult to assess because no stable durational practice existed prior to the guidelines. The durational departure rates for imprisonment cases have varied between 20 and 24 per cent from 1981 to 1984 with about one-third of the departures aggravated and two-thirds mitigated.

Recently, durational uniformity increased in one important respect over 1981 and 1982 durations. When the guidelines were first implemented judges unused to pronouncing 'real-time' sentences would not infrequently aggravate durations to the statutory maximum sentence (for example, from a 24 month presumptive sentence to 20 years). In very rare cases, the statutory maximum sentence was appropriate to the seriousness of the offence, but in many of the cases the extensive aggravations resulted in non-proportional sentences. In 1981 the Supreme Court established the standard of double the presumptive sentence as the general limit for aggravating durations when substantial and compelling reasons are present¹⁰. The average increase for aggravated durational departures among offenders sentenced to prison went from 56 months in 1981 to 46 months in 1982 to 28 months in 1983 and 25 months in 1984.

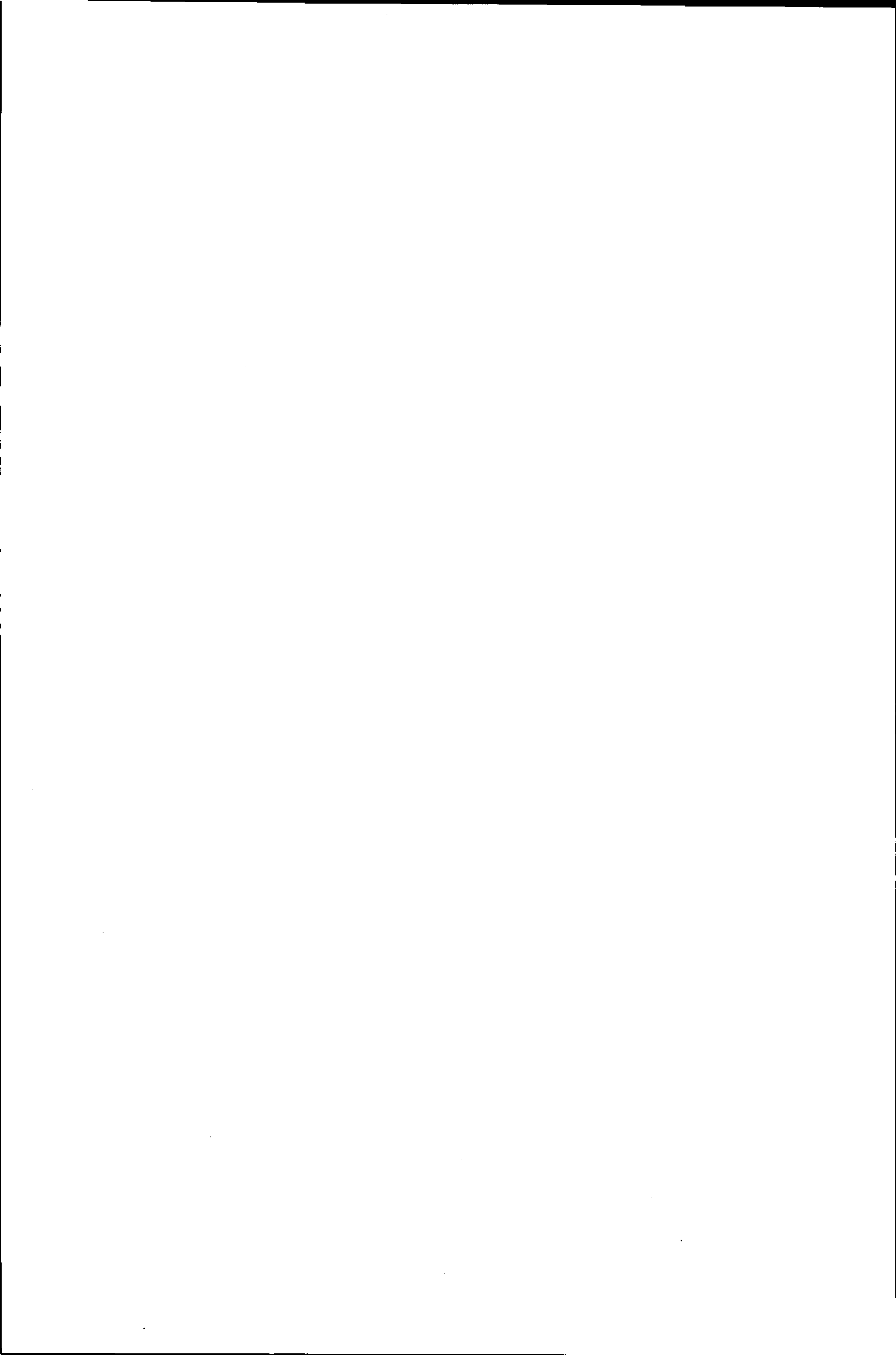
While sentencing practices have not remained at the high level of compliance found in the first year following implementation with regard to sentence proportionality and uniformity, it is clear that sentences are more uniform than they were prior to the guidelines. Furthermore, a substantial body of case law now exists to guide decision-making in sentencing. Sentencing processes and procedures established to implement the guidelines have gained widespread support throughout the system. All sentences and all departures from the guidelines are monitored by the Commission. Sentencing policy is co-ordinated with other policies in the system such as correctional policy.

Sentencing discretion is widely shared under the Minnesota Sentencing Guidelines, and its exercise is structured to a greater degree than under indeterminate sentencing. The establishment of 'truth in sentencing' where realistic sentences are pronounced in public settings coupled with a monitoring system has increased the accountability of all sentencing participants. While not a panacea, legislatively authorised sentencing guidelines have addressed many of the criticisms aimed at the 'law-less' nature of indeterminate sentencing as practiced in the United States, and have added relatively few problems of its own.

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THE ROLE OF THE PROSECUTOR IN THE SENTENCING PROCESS

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Canberra

INTRODUCTION¹

An accused person has pleaded guilty, or been found guilty following a contested trial. It remains for the prisoner to be sentenced. This is a most important part of the criminal trial, but is not always treated as such. The question addressed in this paper is: what role should the prosecuting lawyer² play in the sentencing process? The dispassionate lay observer might expect that the role would be a positive one. It is after all the case that the prosecution is supposed to perform its tasks in the interests of the community, and undoubtedly the public is concerned to see that sentences imposed are appropriate. However, in some parts of Australia the prosecution appears to treat the sentencing process with disdain, the judge and the prisoner being the only participants in that phase.

It may be thought surprising that the answer to the question posed, derived from practical observations throughout Australia, differs markedly. In some places - broadly the eastern seaboard - what will be described as the traditional view prevails. The prosecution does not address on penalty, and generally plays no part in the sentencing process save to ensure that specific errors of fact or law do not occur. Elsewhere, that is to say in South Australia, Western Australia and the two internal Territories, the prosecution generally plays a more positive role, and is encouraged by the courts to do so. What justification is there for this difference in approach? If there is none, what is the proper course for the prosecution lawyer to follow? It will be suggested that an active role can properly be played, this arising in the main from the universal right - in this country, as opposed to England - of the Crown appeal against sentence.

OBLIGATIONS ON THE PROSECUTION

One may start by pointing to two duties upon the prosecution, which are relevant for present purposes. The first is to be fair, and the other to assist the court. As to the former, Denning L.J. (as he then was) said this in The Road to Justice³:

In England today every counsel who is instructed for the prosecution knows how essential it is to be fair. The country expects it. The judges require it. He

must not press for a conviction. If he knows a point in favour of the prisoner, he must bring it out. He must state the facts dispassionately, whether they tell in favour of a severe sentence or otherwise ... Furthermore no counsel is allowed to suggest to the judge what the sentence should be. That is for the judge alone. No counsel must attempt by advocacy to influence the court towards a more severe sentence: though he may, and often does, draw the attention of the judge to any mitigating circumstances, which may induce a lesser sentence.

The second duty was spoken of by Showell Rogers as long ago as 1899 in these terms⁴:

... (it is) a generally recognised principle in criminal prosecutions in this country that counsel for the Crown should regard himself not as a mere advocate for a party, striving to win a verdict, but as an assistant to the Court in fairly putting the whole case before the jury, and in ascertaining the truth according to the law. He is 'really a part of the Court - a kind of minister of justice filling a quasi-judicial position' ... Counsel for the Crown appears to be anything rather than the advocate of the particular private prosecutor who happens to be proceeding in the name of the Crown. When there is no private prosecutor, and the proceedings are in the most literal sense instituted by the Crown itself, the duty of prosecuting counsel in this respect is even more strictly to be performed.

Both duties were referred to by Newton J and Norris A.J. in R. v. Lucas⁵:

It is very well established that prosecuting counsel are ministers of justice, who ought not to struggle for a conviction nor be betrayed by feelings of professional rivalry, and that it is their duty to assist the court in the attainment of the purpose of criminal prosecutions, namely, to make certain that justice is done as between the subject and State. Consistently with these principles, it is the duty of prosecuting counsel not to try to shut out any evidence which the jury could reasonably regard as credible and which could be of importance to the accused's case. We may add that these obligations which attach to prosecuting counsel apply, in our opinion, to officers in the service of the Crown, whose function it is to prepare the Crown case in criminal prosecutions.

What has been said to date does no more than establish first principles, with which nobody would quarrel⁶. Are these duties antipodean to the adoption by the prosecution lawyer of an assertive role in the sentencing process? Prosecuting counsel must be fair, must assist the court, must not be betrayed by personal rivalry or desire for esteem⁷. In case this sounds unduly passive, these axiomatic statements must be balanced by the observation that a prosecuting lawyer at whatever level is appearing in adversary context, and has the task and responsibility of presenting the case with maximum effect so as to obtain a conviction if that can be done fairly and in the interests of justice. The prosecutor should not shirk from presenting a strong case. As Christmas Humphreys, a prosecutor of great experience, said: 'I believe in hard hitting, but with blows that are scupulously fair'⁸. Rule 20 of the New South Wales Bar Association Rules, which in this respect is representative of the rules throughout Australia, in part provides that:

... he (Crown counsel) shall not press for a conviction beyond putting the case for the Crown fully and firmly. He shall not by his language or conduct endeavour to inflame or prejudice the jury against the prisoner. He shall not urge any argument of law that he does not believe to be of substance or any argument of fact that does not carry weight in his mind.⁹

CROWN APPEALS AGAINST SENTENCE¹⁰

The right of the Crown to appeal against sentence is wholly statutory. There is no inherent power in courts of criminal appeal to entertain such appeals except by the exclusive authority of some statute¹¹. As Barwick C.J. said in Peel v. R.¹² it is not a traditional right of the Crown and it 'cut(s) across time-honoured concepts of criminal administration'. A man's freedom is not to be lightly treated: 'still more should we respect the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal'¹³.

All of the Australian States and Territories have enacted legislation vesting in the Crown a right to appeal against sentence¹⁴. The first such right was conferred in New South Wales in 1924¹⁵ and the last in South Australia in 1980¹⁶. The right to appeal against sentence is not limited to appeals from trials upon indictment. There are provisions which permit appeals against sentences imposed in summary matters¹⁷, although the most frequently discussed provisions are those permitting appeals from sentences imposed in indictable matters.

Section 5D of the Criminal Appeal Act 1912 (N.S.W.) is broadly representative of the statutory provisions. It provides:

The Attorney-General may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper.

Some initial considerations arise from the terms of this provision. In the first place the right is one conferred upon the Attorney-General. No problems arise when a court is exercising State jurisdiction: the Attorney-General for the State may appeal. When the State court imposes a sentence in the exercise of Federal jurisdiction it has been held, not without dissent, that the Commonwealth Attorney-General, by virtue of s.68(2) of the Judiciary Act 1903, may exercise such rights of appeal as are otherwise open to a State Attorney-General¹⁸. The raison d'etre was explained by Dixon J in Williams v. R.¹⁹:

The New South Wales section gives the right of appeal against sentence to the Attorney-General of the State. It gives it to him in virtue of his office. He is the proper officer of the Crown in right of the State for representing it in the courts of justice. When sec.68(2) speaks of the 'like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth' it recognises that the adoption of State law must proceed by analogy. The proper officer of the Crown in right of the Commonwealth for representing it in the Courts is the Federal Attorney-General. I do not feel any difficulty in deciding that, under the word 'like' in the expression 'like jurisdiction', the functions under sec.5D of the State Attorney-General in the case of State offenders fall to the Federal Attorney-General in the case of offenders against the laws of the Commonwealth.

By s.9(7) of the Director of Public Prosecutions Act 1983 it is provided that where the Director of Public Prosecutions has instituted, taken over or carried on a prosecution for an offence against a law of the Commonwealth he has such rights of appeal as are exercisable by the Attorney-General in respect of that prosecution.

Section 5D permits the Court of Criminal Appeal 'in its discretion' to vary sentences. There are some statements in various cases which suggest that this discretion is absolute²⁰. So it is said that the appeal court, with due respect to the views of the trial judge, 'is free to make the sentence such as will best express the court's opinion as to the proper duration of the punishment awarded, in the circumstances disclosed by the

evidence'²¹. The authorities now deny such an absolute discretion. The views of Higgins and Isaacs J. (in dissent) in Whittaker v. R.²² have been upheld²³. Isaacs J.²⁴ said that the decision of the primary judge must:

be regarded as prima facie correct, and, in order that it should be displaced, as the Court of Criminal Appeal has said, that it is 'not merely inadequate, but manifestly so', because the learned judge imposing it either proceeded upon wrong principles, or undervalued or overestimated some of the material features of the evidence.

It is clear that appeal courts apply the same principles whether the appeal is by the Attorney-General or a convicted person²⁵. It is not sufficient that the members of the appeal court would have imposed a different sentence or that they think the sentence too severe or too lenient. In Harris v. R.²⁶ the High Court endorsed the following passage from its earlier decision in Cranssen v. R.²⁷:

There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised. This may appear from the circumstances the court has taken into account. They may include some considerations which ought not to have affected the discretion, or may exclude others which ought to have done so. The court may have been mistaken or been misled as to the facts or an error of law may have been made. Effect may have been given to views or opinions which are extreme or misguided. But it is not necessary that some definite or specific error should be assigned. The nature of the sentence itself considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the discretion has been unsound. In short, the principles which guide courts of appeal in dealing with matters resting in the discretion of the court of first instance restrain the intervention of this court to cases where the sentence appears unreasonable, or has not been fixed in the due and proper exercise of the court's authority.

Of course it is clear from this passage, and from the other authorities, that a manifestly disproportionate sentence will lead the appeal court to infer that the exercise of the sentencing discretion has miscarried although a particular error cannot be identified²⁸. An appeal court quite naturally exercises a general supervisory jurisdiction. The detection of an error of law or fact or a misunderstanding of the case, it has been said, 'presents a comparatively straightforward appellate

task: greater difficulties, however, are encountered when the court is called upon to determine whether a sentence is manifestly disproportionate compared with other sentences of a like nature²⁹. The set range of penalties for an offence is known as the tariff³⁰. Significant departure from an established tariff prima facie suggests an error in the exercise of sentencing discretion. As much was said by Barwick C.J. in Griffiths v. R.³¹ where he commented:

No doubt, consistency in the sentences imposed by the judges of the District Court is a desirable feature of criminal administration. Gross departure from what might in experience be regarded as the norm may be held to be an error in point of principle. Thus, in an appropriate case, the Court of Criminal Appeal may exercise its influence towards such consistency of sentence.

A similar case arises where there is a marked disparity between sentences imposed upon co-offenders. This may of itself, unless explicable of the varying backgrounds of the offenders, lead to appellate intervention³².

Sufficient discretion must be left to the sentencing judge. He is the one who has heard the oral evidence and observed the demeanour of the defendant and of the witnesses: 'he is uniquely well placed when it comes to exercising a discretion'³³. Regard must, however, be paid to the views of the appeal judges who have the advantage of an overview of sentences imposed at first instance. They have the duty to maintain consistency. Indeed in R. v. Holder³⁴ Street C.J. said that where the proceedings before the trial judge are largely formal, such as on a plea of guilty, appeal judges may more readily conclude that a sentence is manifestly disproportionate. This is to be contrasted with cases where the trial judge has presided over the trial and heard all of the evidence. In such cases, 'the threshold barrier to appellate intervention is properly higher'.

At this juncture two further points need to be recalled. First, appeal courts possess a residual discretion to dismiss an appeal, including a Crown appeal against a sentence, notwithstanding that an error may be demonstrated³⁵. Secondly, in cases where the Crown does establish that the sentence passed was manifestly inadequate this may not result in the same sentence as ought to have been imposed in the first instance. Thus, in R. v. Tleige³⁶ it was said:

In determining what the quantum of sentence should be we have, as not infrequently occurs in the case of Crown appeals, borne in mind that the respondent has been twice in jeopardy in the matter of sentence. It will be distressing in the extreme for him to suffer

the sentence passed on him some time ago being increased. This leads us to determine a sentence which is more lenient than would properly be appropriate if the matter were coming forward for sentence for the first time.

This approach will not be justified in the majority of cases³⁷. It will be more readily adopted if there is present some other factor which favours the prisoner, such as an inordinate period between imposition of the sentence and the hearing of the appeal.

The courts do not discourage the Crown from appealing against sentence³⁸, but there has been judicial comment on the proper role for the Crown in considering whether to bring such an appeal. In Griffiths v. R. Barwick C.J. said³⁹:

... an appeal by the Attorney-General should be a rarity, brought only to establish some matter of principle and to afford an opportunity for the Court of Criminal Appeal to perform its proper function in this respect, namely, to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons.

And in R v. Osenkowski⁴⁰ King C.J. in the Supreme Court of South Australia, after noting that there must always be a place for the exercise of sympathy by a trial judge, said:

The proper role for prosecution appeals, in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience.

Of course the attainment of consistency in sentencing, the correction of errors and the formulation of guiding principles is not confined to appeals against inadequate sentences. Errors may be made which result in a sentence which is over-severe. The Crown can be aggrieved by it, as it offends the same principles as a sentence which is inadequate, and quite properly the Crown could appeal against it. The Crown is concerned with achieving a 'satisfactory sentence whether it be more or less severe than the one originally passed'⁴¹.

A particular problem which arises in the Federal sphere concerns differences in prosecuting procedures in relation to Federal offences as between the various States and Territories of Australia. To some extent those differences can produce differing sentences and that must be accepted into the Federal system where

Commonwealth offences are prosecuted in the various State and Territory courts. This does not, however, support the imposition of sentences which are clearly wrong in law. Prior to the commencement of s.8 of the Crimes Amendment Act 1982⁴² which provides for a greater range of sentencing options for Commonwealth offenders, Commonwealth prosecutors were constantly required to explain why State sentencing alternatives were not available to Commonwealth offenders, despite the clear intention in s.8 that they should be. Officers engaged in Commonwealth prosecutions have reported that on many occasions courts have reluctantly imposed what they acknowledge to be inappropriate sentences, often with the attendant criticism of the delay in proclaiming s.8. Moreover, it has sometimes occurred that a State Magistrate or Judge has imposed a State sentence alternative despite submissions - undoubtedly correct - from the prosecution that they were not legally available in respect of Commonwealth offenders⁴³. It is hoped this will no longer be the case with the increased range of options shortly to be available in respect of Commonwealth offenders.

There is also the question of consistency of sentencing for Federal offences. Put simply, Commonwealth offenders should not be subject to markedly differing penalties simply because they are sentenced in different jurisdictions. On this very matter, White J. in the Supreme Court of South Australia has said:⁴⁴

There cannot be complete uniformity in that tariffs are no more than guides while the combinations and permutations of circumstances of individual cases vary almost infinitely. Nevertheless, some measure of even-handed justice for similar offenders against the same law, applicable throughout Australia, should be an achievable goal. As our Court of Criminal Appeal said in R. v. Jackson and Jennett⁴⁵: '[the sentencing judge] will, when exercising Federal jurisdiction, remember that Australia is one country and that policies (of sentencing) laid down elsewhere in Australia by superior courts, although not technically binding on him, ought to receive a very great attention by him, as it is desirable that there should be similarity of approach by sentencing authorities with respect to Federal offences'.

Finally, there are what may be termed the 'principles of punishment'. They were summarised by Lawton L.J. in R. v. Sargeant⁴⁶:

... the classical principles of sentencing ... are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind...

In all Crown appeals against sentence these principles must be considered as a matter of first importance. Juxtaposed with them are multifarious factors that vary greatly between the cases. For example, the age, health, character and antecedents of the offender, the degree of criminality and culpability, co-operation with the investigation, psychological factors such as the effect of the proceedings thus far, and so on.

Needless to say Crown appeals of this sort should be taken with some rarity, and only in the more obvious cases where there has been a significant error in principle or the sentence imposed is distinctly outside sound discretionary judgment or perhaps where some important point of principle needs to be resolved at appellate level. Even where there is no time limit imposed by statute⁴⁷ appeal papers should be filed promptly, ideally within one month of the sentence being handed down. This latter matter accords with common sense, avoids oppression to the prisoner and increases the probability of a successful outcome⁴⁸. It is also well to recall the words of Brennan J. in Channon v. R.⁴⁹:

The necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the law proscribes. Punishment is the means by which society marks its disapproval of criminal conduct, by which warning is given of the consequences of crime and by which reform of an offender can sometimes be assisted. Criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; not to an extent beyond what is necessary to achieve that purpose.

It is regrettable that the sentence ultimately arrived at, after a careful consideration of the circumstances of the case, may subsequently be arbitrarily reduced by remissions both from the head sentence and the non-parole period. A sentence pronounced to have one effect may have another. This tends to undermine the credibility of the judicial system and have a damaging effect upon the body politic⁵⁰.

THE ROLE OF THE PROSECUTION LAWYER⁵¹

The passage previously referred to from Lord Denning's Road To Justice encapsulates the traditional position of prosecution counsel upon sentence. To the same effect is Mr Christmas Humphreys, who wrote:

When the summing up is reached, the duty of Crown counsel is largely discharged, for in the matter of sentence he will exercise no grain of pressure towards severity, and will leave his opponent to say what he may in the matter of mitigation⁵².

It has been said that the generalisation that the prosecution plays no part in sentencing 'is so plainly wrong that it does not deserve serious attention. The involvement of the prosecution in selecting charges, determining the mode of trial and negotiating for a change of plea is intimately related to sentence'⁵³. It must be recalled that in the United Kingdom there is no legislation permitting Crown appeals against sentence, nor has there ever been. Consequently, English pronouncements must be treated with some caution in jurisdictions where that right does exist⁵⁴.

Indeed, it is this right which has acted as the catalyst for a more active participation by the Crown in the sentencing process. This was made quite clear by the Full Court of the Federal Court in R. v. Tait and Bartley⁵⁵ although this was not the first occasion on which it had been said⁵⁶. It may not have been the only reason. In South Australia, Crown appeals against sentence were not, as has been noted, conferred until 1980. However, in 1979, Sangster J. in R. v. Cartright⁵⁷ said:

... Crown counsel should participate in the sentencing process. At the present time we only hear the prisoner's argument on sentencing. I for one would welcome the assistance of the prosecutor. At least then I would not have the task of fossicking out the facts and thinking up the argument against the prisoner and then have to judge between what I have thought up and what has been argued in favour of the prisoner.

In considering the extent to which the prosecution should participate in the sentencing process, it is well to begin with some incontrovertible propositions which involve no departure from established principle. First, the prosecution must adequately present the facts to the court. In a contested matter if this is not done then it is likely that the accused will not be convicted. It is from this factual basis that the Judge or Magistrate forms his own view of the circumstances of the offence upon which the sentence is based⁵⁸. This view must not conflict with the verdict of the jury. If there are circumstances of aggravation relied on they should be charged in the indictment and be the subject of a finding of fact⁵⁹. In a plea of guilty, though this is an admission of all facts essential to the offence⁶⁰, nevertheless the Crown is 'expected to put before the sentencing judge the broad nature of the factual allegations upon which the Crown relies as constituting the offence to which the accused has pleaded guilty'⁶¹.

Secondly, the prosecution should provide the court with an antecedents' report⁶². Street C.J. in R. v. Gamble⁶³ pointed out that such reports are expected of the Crown and it is a 'duty which the Crown customarily undertakes'. He continued:

Antecedents' reports are expected to be furnished by the Crown showing such of the subjective material elicited in relation to the accused as is necessary to present a fair picture to the sentencing judge. The material is also expected to canvass the accused's earlier criminal record, if any.

Thirdly, although it is the normal case for defence counsel to say what he may be way of mitigation, this is not their exclusive preserve. Prosecution counsel may quite properly draw the attention of the court to any mitigating circumstances, particularly in the case of an unrepresented defendant⁶⁴.

Fourthly, the preferment of charges has an obvious effect on any sentence which may be imposed. It is the case that not all charges which are initially preferred are proceeded with. The term 'charge-bargaining' has been invoked to describe discussions between the defence and the prosecution in relation to the charges to be proceeded with. This is to be distinguished from 'plea-bargaining', by which is meant discussions with the trial judge as to the likely sentence which would be imposed if the defendant pleaded guilty. Such discussions should not take place⁶⁵. Charge-bargaining is supportable provided it is not initiated by the prosecution, the charges to be proceeded with bear a reasonable relationship to the criminal conduct, the charges provide an appropriate basis for sentence and they are supported by the evidence⁶⁶. In no circumstances should the prosecution entertain charge-bargaining if the defendant maintains his innocence with respect to a charge or charges to which he has offered to plead guilty.

Thus, and according to the traditional approach, the prosecution has a significant influence on the sentence which may be imposed. But the recent trend of authority is to the effect that the role of the prosecution does not cease with these matters. In this regard the most frequently cited case is R. v. Tait and Bartley⁶⁷ where Brennan, Deane and Gallop J.J. said:

It would be unjust to a defendant to expose him to double jeopardy because of an error affecting his sentence, if the Crown's presentation of the case either contributed to the error or led the defendant to refrain from dealing with some aspect of the case which might have rebutted the suggested error. ... It remains true that the Crown is required to make its submissions as to sentence fairly and in an even-handed manner, and that the Crown does not, as an adversary, press the sentencing court for a heavy sentence. The Crown has a duty to the court to assist it in the task of passing sentence by an adequate presentation of the facts, by an appropriate reference

to any special principles of sentencing which might reasonably be thought to be relevant to the case in hand, and by a fair testing of the defendant's case so far as it appears to require it. If the proposition that the Crown is not concerned with sentence was ever construed as absolving the Crown from this duty, it cannot be so construed when a Crown right of appeal against sentence is conferred.

The extent and type of submissions which the Crown may make will obviously vary greatly between the cases. It is difficult to formulate any dogmatic principles. In R. v. Travers and Davies⁶⁸ Legoe J. proffered this outline:

I am comforted to know, and I think it worth recording, that the learned Crown Prosecutor indicated a tentative view as to the practice of Crown counsel. He told us that Crown counsel normally direct their attention in these circumstances to the following matters: (1) to straighten out any factual disputes; (2) to point out to the sentencing judge any error or apparent error in the defence presentation of the facts; (3) if necessary (or if asked) when the crime can clearly be said to fall within a certain scale of penalties; and (4) in the appropriate case when suspension of the sentence is out of the question.

This seems unduly restrictive, but represents a useful starting point. If the court is mistaken or has been misled as to the facts then it is incumbent upon prosecution counsel to correct the error⁶⁹. Of course this does not require that at the conclusion of a contested matter the prosecution should reiterate the evidentiary matters which were canvassed during the course of the trial. This would be otiose⁷⁰. It simply means that if the judge is under a misapprehension then it should be corrected.

Similarly the prosecution should not knowingly allow an error of law to be made. An example, to which reference has previously been made, is the use of a sentencing option which is not legally available. Of course this may extend no further than a reference to the relevant statutes, with a consequential appraisal of the range of sentences available⁷¹.

Turning to more specific matters, the attainment of consistency in sentencing, as has been noted, is of considerable importance in the determination of appeals against sentence⁷². Thus, it is appropriate to refer to the sentences imposed in comparable cases, always remembering that no two cases will be identical. This is particularly important in the case of Commonwealth offenders who are sentenced in State courts⁷³.

In the normal course of events the seriousness of the offence will manifest itself as the evidence unfolds. This is not,

however, always the case. As Wells J. observed in Shrubsole v. Rodriguez⁷⁴:

There are some cases, especially where the facts are within what might be termed the usual range of seriousness, on which no address or even comment is necessary. Where the facts are plainly more or less serious than the usual case, some remarks may well be appropriate - even obligatory. The distinction is, of course, clear between, on the one hand, drawing attention to the prominent features of a case, advancing submissions as to whether or not a particular form of order should be considered, and suggesting, in general terms, the degree of seriousness represented by the facts as a whole (including, it may be, some reference to prevalence or other matter of local concern), and, on the other hand, addressing in terms calculated to influence the emotions of the court against the prisoner, and straining over-zealously, to persuade the court to impose a more severe penalty than would otherwise have been imposed. The former class of submissions is entirely proper; the latter would be disapproved of by all courts...

What this entails is a submission from the prosecutor which draws the court's attention to any prominent features of the case, the degree of seriousness of the offence indicated by the facts before the court and, if relevant, the prevalence of the offence or any other matter of concern.⁷⁵ It may be appropriate to mention a scale of possible penalties.

So, too, when a particular option is clearly inappropriate prosecution counsel should make a submission to that effect. This was illustrated by King C.J. and R. v. Wilton⁷⁶ where he said:

In particular where a submission is made by counsel for a convicted person that a sentence should be suspended or a possible suspension is mentioned by the judge and this course is regarded by the prosecution as beyond the proper scope of the judge's discretion, a submission to that effect should be made.

The final matter is whether it is appropriate for the prosecution to urge the imposition of a specific sentence? The judgment of the Victorian Court of Criminal Appeal in R. v. Burchelli⁷⁷ is representative:

We certainly do not envisage the development of a practice under which prosecutors make submissions on the extent of the punishment to be imposed.

This is to be contrasted with the position in Canada. In R. v. Simoneau⁷⁸ Matas J.A. (for the majority) said:

The Criminal Code makes specific provision for an appeal by the Crown with leave from a sentence imposed by a trial court. Obviously, Crown counsel in arguing the case on appeal would contend that the sentence was too lenient and that the appellate Court should substitute one which is more severe. I do not see the logic in Crown counsel being authorised to make that kind of argument in this Court but being precluded from recommending a more severe sentence to the trial judge. It has been suggested that it is objectionable for counsel to mention a specific term ... Most often Crown counsel therefore [will not] name a specific term but will confine their suggestion to the type of sentence. However, I see nothing wrong in being specific where the circumstances call for it ... it should be possible to permit particularity.'

What consequences flow if the prosecution fails to address on sentence, and later appeals against the sentence imposed? In New South Wales it is generally considered inappropriate for the Crown, at least upon its own initiative, to refer to matters other than those traditionally dealt with such as the facts of the matter and the antecedents of the prisoner. In R. v. Gamble⁷⁹ Street C.J. said (Lee and Enderby J.J. concurring):

The further question arises, however, regarding the existence of a duty on the Crown to press upon the sentencing judge forensic considerations adverse to the persons standing for sentence. It has not been the practice in this State to impose upon the Crown such an obligation. I do not read the passage that has been cited from R. v. Tait as necessarily differing from what has been regarded as the traditional and proper role of the Crown, that is to say, a role of abstention from forensic urging upon the court of considerations adverse to the person standing before it for sentence.

Contrast that approach with the second part of the formulation in Tait and Bartley⁸⁰ which was in these terms:

The Crown is under a duty to assist the court to avoid appealable error. The performance of that duty to the court ensures that the defendant knows the nature and extent of the case against him, and thus has a fair opportunity of meeting it. A failure by the Crown to discharge that duty may not only contribute to appealable error affecting the sentence, but may tend to deprive the defendant of a fair opportunity of

meeting a case which might ultimately be made on appeal. It would be unjust to a defendant, whose freedom is in jeopardy for the second time, to consider on appeal a case made against him on a new basis; a basis which he might have successfully challenged had the case against him been fully presented before the sentencing court ... there would be few cases where the appellate court would intervene on an appeal against sentence to correct an alleged error by increasing the sentence if the Crown had not done what was reasonably required to assist the sentencing judge to avoid the error, or if the defendant were unduly prejudiced in meeting for the first time on appeal the true case against him.

What arises in such circumstances is in the nature of estoppel. Where it is concerned with the failure by the Crown to adduce sufficient factual evidence, or acquiescence in the facts as presented by the defendant, it is probably no more than an application of the rule that appeal courts will not permit fresh argument which could have been cured by further evidence taken below⁸¹, or an application of the rule applicable to defendants that fresh evidence will not normally be admissible upon an appeal against conviction⁸². The circumstances must be exceptional before the court will allow the prosecution, on an appeal against conviction, to put submissions which were not put below⁸³. This will particularly be so where, on a plea of guilty, the Crown does not challenge the version of the facts presented by the defendant⁸⁴.

An illustrative example is R. v. Jones⁸⁵. The defendant was charged with three counts under s.233B of the Customs Act 1901. He pleaded guilty to each of the offences and was convicted and released upon him entering into a recognisance in the sum of \$5,000 to be of good behaviour for a period of five years and submit himself to the supervision of a probation officer. The Crown appealed, and argued that the offences called for the imposition of a custodial sentence. Counsel for the Crown, consistent with what was then Commonwealth practice in Western Australia, had not before the sentencing judge suggested a custodial sentence, and expressly declined the judge's invitation to make submissions upon his intention to impose a non-custodial punishment.

The Court of Criminal Appeal unanimously dismissed the appeal. The Crown had failed to avoid 'appealable error'. Burt C.J. said⁸⁶:

In those circumstances, the respondent having being discharged from custody as he was and he having been at large and presumably complying with the conditions of his bond for some two and a half months, it would

seem to me to be wrong and simply unfair that the Crown should now contend that the trial judge was wrong in doing what he did. And it has been so held. [He then referred to R. v. Tait and Bartley and continued.] I would understand the Court to be there saying that notwithstanding error, an appeal court on a Crown appeal may decline to intervene to correct it and so decline to displace 'the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal' - Whittaker v. R. (1928) 41 CLR 230 per Isaacs J. at 248 - if the Crown has failed in its duty to assist the sentencing judge to avoid the error and a fortiori if the Crown with knowledge of what the sentencing judge intended to do has, by its counsel acquiesced in, and to that extent encouraged him, to do what he did.

WHAT SHOULD BE DONE?

The risk of a kind of estoppel, operating against the Crown, positively requires that the Crown put submissions as to sentence to the trial judge. Whatever merits the traditional view may have had, it is now simply incompatible with the right, which the Crown now has in all jurisdictions, to appeal against the sentence. In particular Commonwealth prosecutors should follow a generally consistent practice throughout the country, and should address on penalty. While such an address ought in the main be directed to assisting the court in relation to factors relevant to sentence, it should not be limited to the traditional matters of relevant law, facts on guilty pleas and the like.

The prosecutor could, for example, draw attention to any aggravating circumstances or the presence or absence of extenuating circumstances. The appropriateness of the various sentencing options can properly be canvassed and, in appropriate cases, the prosecution might urge a particular option on the court. However, it is not contemplated that the prosecution would urge the imposition of a specific sentence, such as saying the case called for imprisonment of two years or thereabouts. The permitted submissions will, of course, not fetter the discretion of the court⁸⁷.

In making such submissions the function of prosecution counsel must be recalled. The methods and motivations must be completely dispassionate: at all times counsel remains a minister of justice, assisting the court, rather than the advocate of a particular interest. The position is succinctly stated by Ashworth⁸⁸:

Counsel should no more use passionate and loaded rhetoric in support of severity of sentence than in support of a conviction ... if the prosecution tradition is as strong as commonly supposed, the task should be fairly carried out.

NOTES

1. The research upon which this paper is based was done by Shaun McElwaine, B.Comm, LLB (N.S.W.) and is gratefully acknowledged.
2. 'Prosecuting lawyer' includes all those persons, whether solicitors or barristers, who prosecute in a criminal court (see 'The Duties and Responsibilities of Prosecuting Counsel' (1955) Crim. L.R. 739) and it is axiomatic that they are all subject to the same standards of professional conduct. The same is true for police prosecutors who appear in State courts: Disney et al., Lawyers, 2, 685; Williams, (1956) 'Advocacy by Police and Justices' Clerks', Crim. L.R., 59. At times, however, rules are promulgated as if only applicable to counsel for the Crown (see for example rule 20 of the N.S.W. Bar Association Rules).
3. (1955) at 36.
4. (1899) 59 L.Q.R. 259 at 259-60.
5. [1973] V.R. 693 at 705. See also Smith ACJ at 696.
6. See Harris's Hints on Advocacy, 18th ed., ch. 12; Humphreys, The Duties and Responsibilities of Prosecuting Counsel, supra n.2; Brown, 'The Role of Counsel for the Crown', in (1975) The Prosecution Process; Barry, 'The Ethics of Advocacy', (1941) 15 A.L.J. 166, 201; (1980) Code of Conduct for the Bar of England and Wales, rules 159-63, N.S.W. Bar Association Rules; r.15, r.20, Guide to Professional Conduct, Law Society of the A.C.T.; Boulton, Conduct and Etiquette at the Bar, 6th ed., 74.
7. Orkin (1957), Legal Ethics, 116-20.
8. The Duties and Responsibilities of Prosecuting Counsel, supra at 741.
9. See also Canadian Bar Association (1974), Code of Professional Conduct, 29; Code of Conduct for the Bar of England and Wales, rules 159-63.
10. See generally Rinaldi 'Crown Appeals Against Sentence in Australia', (1984) 8 Crim. L.J. 1.
11. Griffiths v. R., (1977) C.L.R. 293 at 299, 309.
12. (1971) 125 C.L.R., 477 at 452.
13. Whittaker v. R., (1928) 41 C.L.R., 230 at 248 per Isaacs J.

14. N.S.W., Criminal Appeal Act 1912, s.5D; Victoria, Crimes Act 1958, s.567A; Western Australia, Criminal Code 1913, s.688(2); South Australia, Criminal Law Consolidation Act 1935, s.352(2); Tasmania, Criminal Code 1924, s.401(2); Queensland, Criminal Code 1899, s.669A; A.C.T. and N.T., Federal Court of Australia Act 1976, s.s.24, 25.
15. Act No. 10, 1924.
16. Criminal Law Consolidation Act Amendment Act 1980.
17. See Victoria, Magistrate's Court Act 1971, s.74 (where the right is given to the State Director of Public Prosecutions); Queensland, Justices Act 1886, s.209; W.A. Justices Act 1902, s.197; Tas., Justices Act 1959, s.107. In South Australia although it is not expressly enacted that a complainant may appeal against the inadequacy of sentence it has been held that s.163 of the Justices Act 1921 permits this: Schwerdt v. Talbot (1962) S.A.S.R. 155, Page v. Winkler (1975) 12 S.A.S.R. 126, cf. Zanol v. Newton (1974) 10 S.A.S.R. 199. Quere whether the right exists in N.S.W. by s.101 of the Justices Act 1902 only if an error of law can be demonstrated.
18. Peel v. R. (1971), 125 C.L.R. 447, R. v. Carngham (1978), 140 C.L.R. 487, Williams v. R. (1933), 50 C.L.R. 551.
19. supra at 561-2.
20. Whittacker v. R. (1928), 41 C.L.R. 230, R. v. Beevers (1942), 42 St.R.Qd 230, R. v. Cuthbert (1967), 86 W.N. Pt 1 (N.S.W.) 272, R. v. Hull (1969) 90 W.N. Pt 1 (N.S.W.) 488, R. v. Gosper (1928) 45 W.N. (N.S.W.) 105. In Queensland, it has been so enacted: s. 669A(1) inserted by the Criminal Code and Justices Amendment Act 1975, s.34.
21. R. v. Cuthbert, supra, at 273-4.
22. supra.
23. Griffiths v. R. supra, R. v. Holder (1983) 3 N.S.W.L.R. 245, R. v. Liekefett (1973), Qd.R 355, Skinner v. R. (1913), 16 C.L.R. 336 at 339-40, House v. R. (1936), 55 C.L.R. 499 at 504-5, Harris v. R. (1954), 90 C.L.R. 652, R. v. Tait and Bartley (1979), 24 A.L.R. 473, Quinn v. Given (1980), 29 A.L.R. 88.
24. At 249. See also Higgins J at 252.
25. R. v. Tait and Bartley, supra at 475, R. v. Leikefett, supra at 362, R. v. Molina (1984), 13 A.Crim.R. 76 at 77.

26. (1954) 90 C.L.R. 652 at 655-6.
27. (1936) 55 C.L.R. 509 at 519-20.
28. See for example R. v. Tait and Bartley, supra, at 467, R. v. Wilton (1981) 28 S.A.S.R. 362 at 363.
29. R. v. Holder, supra at 254.
30. See Thomas, Principles of Sentencing, 2nd ed. at 29.
31. (1977) 137 C.L.R. 293 at 310. Jacobs J at 326 is to the same effect. See also Lowe v. R. (1984), 58 A.L.J.R. 414 at 415, R. v. Jurkovic (1981), 6 A.Crim. R 215 at 220.
32. Lowe v. R. (1984), 58 A.L.J.R. 414, R. v. Molina (1984), 13 A.Crim.R. 76 at 79.
33. R. v. Holder, supra at 254.
34. supra at 255.
35. This is discussed by Street CJ in R. v. Holder, supra at 255. See also, Rinaldi 'Dismissal of Crown Appeals Despite Inadequacy of Sentence', (1983) 7 Crim L.J., 7, 306.
36. Unreported 19 November 1982. Referred to in R. v. Holder, supra at 256.
37. See e.g. R. v. Holder, supra at 256.
38. R. v. Holder, supra at 255.
39. supra at 310.
40. (1982) 30 S.A.S.R. 212 at 213.
- 41.. R. v. Campbell (1981), 6 A.Crim.R. 208 at 211 per Wickham J.
42. On 16 December 1985. See Statute Law (Miscellaneous Provisions) Act (no. 2) 1985, s.2.
43. R. v. Langford, unreported N.S.W. C.C.A. No. 206 of 1983, 11 November 1983, R. v. Watson and McLellan, unreported N.S.W. C.C.A. 254 or 1980, 23 April 1981. See also Bantick v. Blunden (1981), 36 A.L.R. 541.
44. Scherf v. R. (1985), 61 A.L.R. 701 at 707.
45. (1972), 4 S.A.S.R. 81 at 91-2.
46. (1974), 60 Cr.App.R. 74 at 77.

47. Except in Victoria (Crimes Act 1958, s.567A(3)) and for appeals to the Federal Court (Federal Court of Australia Act 1976, s.25, Federal Court Rules, r.15) there is no time limit for the lodginn of Crown appeals against sentence.
48. Courts have often adversely commented on dilatory appeals by the Crown and if the delay is inordinate a successful appeal may mean no effective increase in penalty: see for example R. v. Sieczkowski, unreported, N.S.W. C.C.A. 7 December 1984 (No. 175 of 1984) where Street C.J. said (at p.4);

A difficulty which arises at the outset in this appeal is that, serious though the respondent's breaches undoubtedly were, both in their consequences and in themselves, there was a lengthy delay in the initiation of this appeal ... There is no explanation for this delay and the respondent is entitled to make strong protest ... against the Crown being permitted to bring the matter forward for appellate review by an appeal initiated so long after the sentencing procedure ... In some cases inordinate and unexplained delay may in itself be such as to result in this Court dismissing a Crown appeal.

49. (1978), 20 A.L.R. 1 at 5.
50. Paivinen v. R. (1984), 59 A.L.R. 368 at 377, R. v. Yates [1985], V.R. 41 at 43.
51. See generally Campbell 'The Role of the Crown Prosecutor on Sentence', (1985) 9 Crim. L.J., 9, 202.
52. 'The Duties and Responsibilities of Prosecuting Counsel', supra at 747-8. See also Parpika v. Board of Trade (1944), 1 K.B. 327 at 332; Boulton, Conduct and Etiquette at the Bar, 5th ed., 75; R. v. Simoneau (1978), 40 C.C.C. (2d), 307 per Monnin JA (dissenting).
53. Ashworth 'Prosecution and Procedure in Criminal Justice', (1979) Crim. L.R., 480 at 485-6.
54. R. v. Williams and White, unreported 15 May 1975, C.C.A. Brisbane, referred to in Rinaldi, 'Crown Appeals Against Sentence in Australia', supra at 3.
55. (1979), 24 A.L.R. 473 at 476-7.
56. R. v. McKeown (1940), St.R.Qd 202 at 214; R. v. Simoneau, supra at 314.
57. (1979), 21 S.A.S.R. 564 at 566.

58. R. v. Harris [1961], V.R. 236.
59. Kingswell v. R. (1985), 62 A.L.R. 161.
60. R. v. Dickens [1976], 2 N.S.W.L.R. 250; Slater v. Marshall (1965), W.A.R. 222; R. v. Tonks [1963], V.R. 121.
61. R. v. Gamble [1983], 3 N.S.W.L.R. 356 at 359.
62. R. v. Murphy [1947], Q.W.N. 4; R. v. Gamble, supra at 359.
63. supra, at 359.
64. Boulton, Conduct and Etiquette at the Bar, 5th ed. at 75.
65. R. v. Marshall [1981], V.R. 725.
66. (January 1986), 'Prosecution Policy of the Commonwealth', a paper presented to the Parliament by the Honourable the Attorney-General, paras 4.6-4.11.
67. (1979), 24 A.L.R. 473 at 476-7.
68. (1983), 34 S.A.S.R. 112 at 116.
69. R. v. Tait and Bartley was a case of errors of fact arising from the procedure by which they were prosecuted.
70. R. v. Gamble, supra at 359.
71. R. v. Marshall, supra at 735.
72. For example, the comments of Barwick CJ in R. v. Griffiths, supra at 310.
73. As discussed above.
74. (1978), 18 S.A.S.R. 233 at 236. See also R. v. Beresford (1972), 2 S.A.S.R. 466 at 450.
75. R. v. Travers and Davies, op. cit.; R. v. Boyd [1984], W.A.R. 236 at 243.
76. (1981), 28 S.A.S.R. 362 at 368. See also R. v. Gamble, supra at 359, R. v. Jones [1984], W.A.R. 175 at 183-4.
77. Unreported, 10 June 1977. See also R. v. Marshall, supra at 735.
78. (1978), 40 C.C.C. (2d) 307 at 314-315.
79. supra, at 359.

80. *supra*, at 477.
81. Suttor v. Gundowda (1950), 81 C.L.R. 418 at 437-8.
82. R. v. Collins (1979), 21 S.A.S.R. 38 at 40; Ratten v. R. (1979), 131 C.L.R. 510 at 520; R. v. Parks [1961], 3 All ER 633; R. v. Jordan (1956), 40 Cr.App.R. 152.
83. R. v. Wilton (1981), 28 S.A.S.R. 362 at 367-8.
84. R. v. Aloia (1982), 6 A.Crim.R. 345.
85. [1984], W.A.R. 175. See also R. v. Wilton, *supra* at 367-8, R. v. Aloia, *supra*; R. v. J. (1982), 45 A.L.R. 331; R. v. Gamble, *supra*; R. v. Acrebi (1983), 11 A.Crim.R. 90.
86. At 179.
87. R. v. Simoneau, *supra* at 315.
88. Prosecution and Procedure in Criminal Justice, *supra* at 486.

JUDICIAL ROLE IN SENTENCING

The Honourable Mr Justice Frank Vincent QC
Supreme Court
Victoria

I must confess that I experienced a measure of embarrassment on being requested to participate in this seminar, and in particular to speak about the judge's role in sentencing. Although I had worked as a barrister in the criminal courts for many years, this role is, of course, new to me. Nevertheless on the basis that perhaps some benefit may be derived by drawing attention to some of the responses and impressions of a recently appointed judge presented with the task of determining appropriate sentences, this contribution is made.

First of the questions is obviously, what is the role of a sentencing judge? A strong argument can be made out that although the judge speaks as if he is doing so, in many cases with which he has to deal, his function is not to fix the sentence at all. I would suggest that over recent years it would be relatively rare for the sentence imposing a term of imprisonment pronounced by the judge to be that which is in fact required to be served. It has become clear to me from my work on the Parole Board, that frequently the judge may have only the most limited of understanding as to the actual effect of the sentence which he hands down, and in all probability he will never know what portion of that sentence was actually served. Apart from the complex administrative and legal arrangements which have effect upon the calculation of the period of the sentence, including the date upon which it commences, the arrangements which are made administratively as to the place in which, and the circumstances under which it will be served, there are calculations to be made as to remissions earned or lost, or where terms of imprisonment are imposed for early release and the like. Special arrangements have been made when there were simply not enough beds available within the gaols to accommodate persons sentenced to imprisonment. At one stage in Victoria in the relatively recent past, this situation had the effect that a number of persons convicted of culpable driving, among other offences, were put through what was termed 'the revolving door'. People sentenced to periods of imprisonment for anything up to two to three years' were not required to serve them.

The ability of persons outside of the courts to affect the operation of the sentence does not always operate to the advantage of the offender, as the previous example would appear to indicate. A sentence imposing a period of detention at a youth

training centre may well have no such effect as a consequence of administrative action which I consider to be a particularly significant matter. By virtue of the operation of various administrative provisions, in Victoria at least, it is possible for individuals to be transferred out of one system into a significantly different system without either reference back to the court at all or any ability on the individual who is so transferred to appeal or to have that particular matter challenged in any adequate fashion.

It is probably more correct therefore to say that the sentencing judge determines the parameters within which the sentence actually undergone must be confined. I am by no means unmindful of the various steps which have been and are being, taken in different parts of the country to attempt to resolve the questions to which I have referred. There have been questions which have provided a great deal of public interest and at least an apparent media concern over the last few years. There is, it would seem to me, a widely held perception, shared I must say by many members of the judiciary, that there is something farcical about the solemn imposition of a sentence when it is understood by all concerned that there is little, if any, possibility that it would ever be served. It is not without point to refer in this particular context to some of the curious side winds which are produced for example, an argument which was presented before the Court of Criminal Appeal in Victoria in a matter of Yates in September 1984.

The man in that case was sixty-eight years of age and had been sentenced to a term of imprisonment of ten years with a minimum of eight years to be served before he became eligible for parole. The sentences were related to a number of sexual offences which he had committed on young boys. He appealed on the basis that the sentence imposed was manifestly excessive in view of his age and in the absence of any criminal history of such offences for many years.

The argument was raised in response to his application for leave to appeal that the sentence might well be excessive if there was any realistic prospect that he would ever be required to serve it but that the reality of the situation was that he would not be required to do so. How does one deal with the question of the manifest excessive character of a sentence where all concerned could be quite confident that the offender would not be serving anything remotely approaching the maximum penalty which had been imposed? The Court found itself in a position where it was unable to consider the practicalities of the matter and the application for leave to appeal was dealt with on the assumption that the applicant may have had to serve every day.

More recently, a prisoner undergoing a life sentence for murder was convicted of the manslaughter of another prisoner in gaol.

He was sentenced to a term of imprisonment to be served concurrently with the mandatory life sentence. The Victorian Director of Public Prosecutions appealed essentially against the order of concurrency, on the basis that it was generally understood that the life sentence clearly did not have the effect of doing anything more than rendering the imprisonment of the offender indeterminate and that as a matter of practical sentencing the period to be served in respect of the manslaughter would be fixed by some administrative process completely independently of the courts. The matter has a further significance in that it appears likely that there will be legislation introduced into the Victorian Parliament in the near future for the purpose of abolishing the mandatory life sentence for the crime of murder. It is likely that all persons currently undergoing such sentences will be re-sentenced and in all probability fixed terms imposed. In this situation there will be a number of persons who have been sentenced to terms concurrent with their life sentences. The task confronting judges required to re-sentence in respect of the murder convictions will be difficult enough but it is likely that there will be some incongruities, particularly when on all existing sentencing principles it would be improper to take into account subsequent gaol offences.

Again, the court was unable to look at the practical situation and there could be no consideration of the reasonableness of the order for concurrency. It is not difficult to appreciate that this situation has produced a measure of frustration among members of the judiciary, an appearance of dishonesty on the part of governments, and provides a framework within which the more scandalous and hysterical media voices may be raised in exaggerated and ill-informed fashion.

Again, in the context of side winds, I do not think that it is sensible to conduct the kind of discussion in which we are presently engaged without reference to the social climate in our community at the present time. Structural deficiencies of the type to which I have referred have been, and are being, exploited for blatant political purposes by various organisations.

There can be little doubt for example, that they have been used by police agencies and associations as indicating a lack of concern by governments with the problems posed by criminal behaviour generally, and to assist in the on-going push for increased powers of one kind or another. As far as I am concerned I do not have any difficulty with the proposition that there should be some degree of administrative flexibility in the operation of the sentence which is imposed or that there should not be some mechanism built in for adjustment of a sentence or its impact according to the needs or considerations which may become evident after the initial imposition. The disparity

unfortunately (at the present time) is often so substantial that the system appears to be, and I think to some extent is, inherently dishonest. It is accordingly very difficult from the community's point of view, to possess any sense of confidence in the administration of criminal justice when so much blatantly dishonest activity appears to be occurring around, and in this system.

Ignoring then, for present purposes, the possibility that the sentence imposed will not be served or will not be served substantially, the problem I think which is most frequently discussed in the relation to the judicial role in sentencing arises from the obvious degree of inconsistency in philosophy and sentencing practice adopted by sentencers. Again, from a purely individual perspective, these difficulties do not appear to me to arise from an inability to determine what is the practically available range of responses in any particular situation. It is not difficult to ascertain whether or not custodial or non-custodial sentences would be generally regarded as appropriate for the particular offence and the offender.

There are albeit grossly inadequate statistics available which provide some assistance in that regard. In my own case, and that of many others who have to perform this role, there is a background of experience as a practitioner in the area, upon which one can rely to some extent. The Court of Criminal Appeal, even allowing for the many curious inconsistencies which emerge from time to time as their composition changes, at least provide some guidelines and parameters within which the decisions can be made. I do not see a particular problem with selecting a penalty which falls within the range of the practically available options. If a judge is sufficiently sensitive about such matters, I would suggest that in the vast majority of cases he would be able to secure himself against interference by an appellate court in the exercise of his discretion by simply selecting a penalty close to the middle of that range. Realistically it would be difficult to argue such a disposition was either manifestly excessive or inadequate. You will recall, of course, the principles upon which an appellate court will operate when it is contended that there has been some miscarriage of discretion. It is actually possible, for a judge not only to protect his decisions in this fashion, but by skilful enough manipulation of the cliches of sentencing to develop a reputation of being good at it. Yet he may never need to face, if that is the approach that is adopted, any of the hard issues at all.

Much of the discussion concerning sentencing tends to be expressed, as I have found it, in terms of this kind of inconsistency. However what must never be forgotten is that in the final analysis the sentence which is to be imposed is going to impact on a human being whose dignity, rights and fundamental values simply have to be recognised. The sentences are imposed

by individual human beings who struggle with those problems. It is interesting how your perception does change as you watch that struggle occur over the years. It was not for some time that I began to appreciate how it affects even the most tough minded members of the judiciary - those persons who my good friend John Coldrey once described as having the ability to temper justice with an appropriate measure of sadism.

The problem arises not because it is not possible to achieve consistency, but because that is not a value which, in the sentencing area is regarded by judges as being of paramount importance. Sentencers are faced with a whole range of problems. In many occasions it may be difficult to determine precisely for what an individual is being sentenced. Obviously the classic manslaughter verdict could be considered in that context. Frequently the law itself makes limited sense to the sentencing judge. For a long period of time in Victoria the courts operated on the basis of the decision in Palmer's case in relation to excessive self defence. I have not yet heard anyone demonstrate what was wrong with that particular case and why the approach adopted by the High Court in Viro was superior. I haven't heard a sensible argument as to why an individual who has acted honestly in his own self defence, should be subject to any penalty because his response is regarded as objectively excessive - a state of affairs which he was not able to determine at the time.

The rationale of dealing with an individual may be very difficult to determine when one comes to consider the kind of problem which arises in relation to provocation manslaughter. What is the basis for sentencing an individual who it has been found (and I am putting it in the positive fashion at this stage) to have been caused by the provocative behaviour of the deceased to act at a time, out of control, and that the actions which that individual engaged in at that time might have been performed by some other ordinary person? Where does one see a basis upon which such an individual could be sensibly regarded as responsible for his behaviour to the point that the kind of custodial dispositions which are in fact imposed, become justified?

Assuming a judge has that type of situation, he may find it extraordinarily difficult to determine precisely for what the individual is being sentenced.

At one time we had a spate of armed robberies in Victorian. It was determined that the maximum penalty, which to my knowledge had never been imposed upon anybody, was inadequate. Nobody had even received a sentence which was within years of the maximum penalty of twenty years' imprisonment. I would have thought, and I may be again somewhat unenlightened about this, that twenty years' imprisonment would probably not occur to me to be an inadequate penalty. What happened, due to a considerable amount

of publicity at the time, was that the government chose to increase the penalty to twenty-five years. From the point of view of deterrence I really do not feel that the conduct of any rational human being would have been substantially influenced by this increase in legislature maximum. As far as I am aware no offender has yet been sentenced to twenty years' imprisonment, and certainly no offender to my knowledge has ever been sentenced to a term of between twenty and twenty-five years for an armed robbery offence.

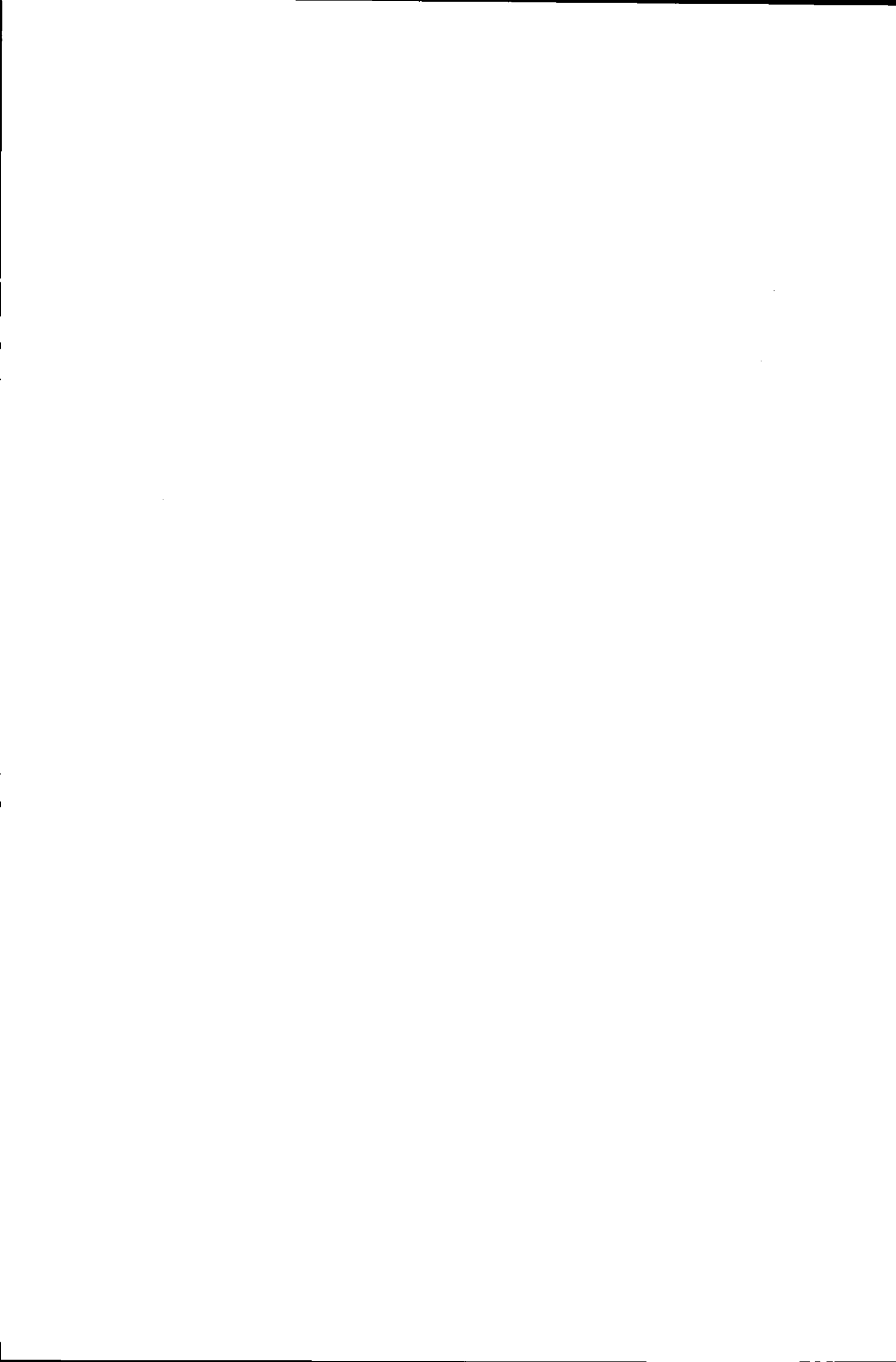
The practical reality is that all that has occurred is that a statement has been made by the government for public consumption which provides very little assistance to those persons who are engaged in the sentencing process and which may have a number of distorting effects upon the system. For example, consider the circumstance that I mentioned a little while ago in connection with the abolition of the mandatory life sentence. Murder has been traditionally, and I suppose properly, regarded as the most serious crime in the criminal calendar. Presumably therefore, one might anticipate that the kinds of sentences which are imposed in respect of it will be greater than those which one might expect to be imposed for other offences. You may not, by the increase from twenty to twenty-five years in relation to armed robbery, have affected the sentencing of persons charged or convicted of the crime of armed robbery. You may well have increased the practical penalty suffered by some individual convicted of murder or some other crime.

Again, if one attempts to look for some balance based upon the relative seriousness of offences within the existing system, it becomes obvious that little if any attempt has been made to assess the relative social seriousness and dangerousness of serious forms of anti-social behaviour. In that framework we have in Victoria an offence of armed robbery which carries, as I have said, a maximum penalty of twenty-five years, whilst manslaughter carries a maximum penalty of fifteen years, and conspiracy to murder carries a maximum penalty of ten years. If one includes as well, a situation with which I was faced relatively recently in connection with a particular kind of Commonwealth offence, it becomes even more absurd. A number of persons who have been charged with offences of tax evasion of one kind or another have been proceeded with under Section 86 of the Commonwealth Crimes Act. The maximum penalty available for those offences until the end of 1984 was three years. It was considered to be more serious to steal somebody's video recorder than to steal literally millions of dollars. Now that proved to be something of an embarrassment. What occurred? The penalty in respect of those offences was increased to five years, still staggeringly out of all proportion, although I understand the matter is again under review. On the very day on which I had to sentence in respect of that offence, a young female drug addict who had gone down with her boyfriend to steal some drugs out from a

chemist shop by means of a robbery also pleaded guilty before me - the kind of offence about which the courts make cliché statements, and which ordinarily carries very substantial terms of imprisonment. To look at those situations in terms of the criteria that have significance to me, and those criteria include as important factors the knowledge, power of choice and level of understanding possessed by the offender, different significances attributed to various forms of anti-social behaviour could not possibly be justified.

We employ a range of dispositions in the criminal justice system, yet the justification for most of them is, at least, unproven. No one has been able to tell me what particular efficacy there is in gaoling any individual for any particular period of time, or why it is for example an armed robber might be sentenced to seven or eight years. What purpose do we intend to achieve in the fixing of such a tariff? These systems have just grown up haphazardly, they have no inherent worth or justification that has ever been established as far as I am personally concerned. I find still that in spite of all of the changes which have occurred in our society that the people who fill the courts and the penal institutions are still the poor, and those who are socially disadvantaged, whose options are reduced, whose moral culpability is probably of the lower order, or the individuals whose behaviour is not really influenced by the esoteric concepts of deterrence, who probably only know about the criminal justice system from what they learn from watching the television. Many do not derive the benefit of reading the learned judge's dissertations on these matters because they cannot read anyhow. These are the people who in fact we are sentencing for the most part.

When judges are faced with this combination of difficulties what they do is what they have always done. They try within the practical parameters of the options which they see open to them to achieve some measure of justice according to the standards of the time.



THE NEW SOUTH WALES COURT OF CRIMINAL APPEAL:
PHILOSOPHY AND PRACTICE

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PRELIMINARY

In the overall context of the sentencing process, the State Courts of Criminal Appeal hold a position of enormous legal and social significance: they now stand at the apex of the judicial hierarchy in all but the rarest of cases, and are expected to guide trial judges and ensure consistency. That circumstance obtaining, the question of the practice and philosophy of the Court assumes a major role in any assessment of both sentencing problems and prospects. The questions must be asked: does the Court in its day-to-day work identify the problems for either judge or practitioner; and does it, by its judgments, attempt to proffer guidance and consistent solutions? The danger is that the high workload and desire for rapid turnover in the Court can result in too simplistic analyses of problems and too facile solutions - should the Court be content with results 'within the range', or should it, in its supervisory role, analyse and correct the reasoning by which judges below reach their decisions?

How many beans make five is the principle question in sentencing in the Court of Criminal Appeal in New South Wales: when is a sentence too long or too short? Tariffs, discretions, and conclusions of fact all complicate the equation. Crown appeals are by their very nature more likely to succeed than appeals by prisoners: they are comparatively rarer; they are more extreme cases; and, in any event, it is easier to assess whether a sentence is too light than too heavy.

Before turning to the central question of philosophy and practice in the Court, the preliminary point arises: WHY does the Court of Criminal Appeal play such a role?

This paper refers by title to the Court of Criminal Appeal in New South Wales and indeed it is to the working of that Court that I have turned in its preparation. I venture to suggest, however, that the New South Wales Court is nationally representative for two reasons. (I am heartened in this by what Nicholson said earlier. The question is not whether the appellate court can recognise the elephant, but rather whether the Court below recognises it, and the definition is for that Court, not the Court of Criminal Appeal.) First, the laws of the States which allow criminal appeals are all based on the English

model - all allow a person convicted on indictment to appeal to the Court of Criminal Appeal with the leave of that Court against the sentence imposed, and on appeal the Court is entitled to substitute any other sentence whether more or less severe, which it considers warranted. In South Australia, the power to increase the sentence has been restricted to cases of appeal by the Attorney-General. Sir Harry Gibbs has said, referring to the power to increase:

The power to increase a sentence on the prisoner's appeal was no doubt intended to discourage frivolous appeals; it has since been repealed in England and may be regarded as anomalous, if not as obsolete, since by later legislation the Attorney-General (or other person representing the Crown) has been given an appeal as of right against sentence (except in Tasmania, where leave is necessary). The power has nevertheless been retained in the Federal Court of Australia Act 1976 (Cth) (see s.28(5)) and in the Criminal Code recently enacted in the Northern Territory. The decision of the High Court in Neal v. The Queen (1982) 149 C.L.R. 305 should however serve as a warning of the difficulties that may arise when an attempt is made to increase a sentence when an appeal is brought by a prisoner and none is brought by the Crown.

The second feature, and the answer to the question posed above, why does the Court of Criminal Appeal play the central role, is to be found in the same speech of the Chief Justice as the passage just quoted. That speech, Who Decides?, was delivered to the first International Criminal Law Congress, on 6th October 1985.

The Chief Justice said:

The question which is asked by the title of this paper 'Who Decides', can therefore be confidently answered: 'in general, not the High Court'. The dominant influence on sentencing policy in Australia is exerted by the Courts of Criminal Appeal. Their power, frequently exercised, to review sentences claimed to be either manifestly excessive or manifestly inadequate, enables them to furnish constant guidance to trial judges, and thus to ensure consistency and moderation in the sentences imposed. It is the function of the Courts of Criminal Appeal to correct judges who, in the exercise of the difficult task of sentencing, fall into error. If, for example, one judge, in the pursuit of uniformity, relies more on computer records of past sentences than on the circumstances of the case and his own commonsense or

another indulges his own idiosyncratic views, or has been influenced by trends of public opinion which make it fashionable to tolerate one particular crime or to regard another with particular abhorrence, it is for the Court of Criminal Appeal, in providing relief against the manifest inadequacy or excessiveness of the sentence, to show by its reasons the sound path which the judge ought to tread. If the Court of Criminal Appeal, in its turn, falls into error, the High Court has a wide power to intervene, but decisions of the High Court on matters of sentence are the exception rather than the rule.

Perhaps it would be too optimistic to answer the question 'Who Decides?', by replying; 'the Courts of Criminal Appeal'.

Perhaps indeed. By closing the quotation at that point I concede I do violence to the sense of the Chief Justice's remarks - but it may be that in that form they more accurately represent the fact.

The Chief Justice was at pains, as the High Court has been for some time, to point out that 'though the present practice of the Court is well established and has good reasons to support it, it is not to be thought that the practice is unduly rigid and unchangeable'. That practice is, in a nutshell, that in the absence of a jurisdictional point, sentence appeals founder at the stage of special leave if there is no 'gross violation of the principles which ought to guide discretion in imposing sentences'. Rigid or not, practitioners will agree that Special Leave is harder to come by in criminal than in civil cases, and harder still in sentence matters. Indeed, the exceptions, - Veen, Paivinen, Walsh and Neale, all exhibit some unique point.

So it is that the High Court, for whatever reasons, has largely resigned the field in favour of the Courts of Criminal Appeal of the States. One can only regret that fact and hope that the tide may turn in favour of uniform delineation of principle before the legislature intervenes to restrict or revoke the judicial discretion as to sentence altogether.

PRACTICE OF THE COURT

How, then, does the Court of Criminal Appeal function - what is its practice and what the philosophy which informs its decisions - or is there one to be discerned at all?

In the period 1/7/84 - 30/6/85 (the most recent statistics available, kept by the Criminal Appeals Section of the then Public Solicitor's Office in New South Wales) the New South Wales Court disposed of some 225 matters over approximately eighty days on which it sat. Of those matters, four went on to the High

Court. In one only was special leave granted - a sentence appeal: R. v. Walsh, which involved technical questions of the operation of Commonwealth and State penal legislation.

Of the remaining matters, 165 involved appeals by prisoners against sentence, and of these 81 were abandoned, but still listed before the Court for applications for ancillary orders. There were in the same period in addition twenty Crown appeals.

The Court therefore heard and determined 84 appeals by prisoners against sentence and twenty Crown appeals. Before turning to an analysis of the results of those appeals, let me deal with the practice of the Court generally in relation to abandonments. An appellant who abandons his appeal is subject to an order of the Court dismissing this appeal, as arguably the only orders which the Criminal Appeal Act permits the Court to make are: (1) an order refusing Leave to Appeal; (2) allowing, or; (3) dismissing the Appeal. It is, therefore, the practice, and in recent times the invariable practice of the Court, to list abandoned appeals for dismissal and thus enable the appellant to make an application to the Court for an order that the period of imprisonment spent between the date of lodgment of Notice of Appeal and of dismissal to count towards his sentence.

Such an order is made necessary by s.18(3) of the Act, which provides:

(3) The time during which an appellant, pending the determination of his appeal, is at liberty on bail, and (subject to any directions which the Court may give to the contrary on any appeal), the time during which an appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment or penal servitude under his sentence. Any imprisonment or penal servitude under such sentence, whether it is the sentence passed by the court of trial or the sentence passed by the court shall, subject to any directions which the court may give as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and if he is not in custody as from the day on which he is received into prison, under the sentence.

Orders for time to count are only rarely refused in the case of abandonment.

The Court, being a creature of Statute, has presented additionally, problems of jurisdiction. For example, the New South Wales Justices Act provides for a dissatisfied defendant an appeal as of right from the order of a magistrate to the District Court, which appeal is a venire de novo before the District Court

Judge, sitting alone. From any sentence imposed by the District Court Judge, there is no avenue of appeal to the Court of Criminal Appeal, unless by stated case on a pure question of law (s.5B Criminal Appeal Act New South Wales).

Let me return to the 104 sentence appeals. Of the twenty Crown appeals, eight were upheld and twelve dismissed - an apparent success rate of 40 per cent. However, in reality, the Crown was successful in 100 per cent of its appeals during that year. All Crown appeals dismissed related to sentences imposed by judges which contained technical or mechanical errors in relation to the calculation of non-parole periods which, after calculation of remissions, were said to be 'manifestly inadequate'.

In R. v. Cunningham (unreported 23/11/84) the Court held that such cases should attract the attention of the Parole Board, rather than be the subject of Crown Appeals. In giving its judgment, the Court referred to the large number of similarly placed Crown appeals waiting in the wings. Twelve so-called 'Cunningham orders' were made between November 1984 and February 1985.

In each of the other eight appeals by the Attorney-General under s.5D, the Crown succeeded.

I should say I do not criticise the result. As I said above, Crown appeals are, in the nature of things, rarer and more likely to succeed. From both a curial and adversarial perspective, it is easier to recognise a sentence which is manifestly inadequate than one which errs on the side of severity, unless the error is gross. It follows that if the Crown Law authorities are discharging the offices which they hold properly, Crown appeals should always succeed - in principle at least - for the Court will occasionally decline to interfere on the 'double jeopardy' principle.

Of the remaining appeals by prisoners, sixteen were allowed and sixty-eight dismissed (a success rate of about 20 per cent). In fact the success rate was considerably lower (I am informed 5-10 per cent only) if the test applied is restricted to sentences held by the Court to have been 'manifestly excessive'. The majority of successful appeals involved the Court correcting technical errors by the sentencing judge, two examples of which are R. v. Sealey (unreported 22/2/85; miscalculation by sentencing judge of date of commencement of sentence and non-parole period); and R. v. Tsui (unreported 4/4/85; failure to fix a non-parole period without reasons and where circumstances did not warrant such a course). Few sentences were meaningfully reduced by intervention of the Court.

So far as I am able to ascertain, all unsuccessful appellants during this period received the benefit of a discretionary order under s.18(3): i.e., time to count.

A practice has developed over recent years of allowing time unless the Crown advances powerful reasons to the contrary, mitigating the harshness of some earlier decision of the Court: see, e.g., R. v. Cuthbertson (unreported 16/8/74) where the Court said:

the time may have come to take a closer view of the legislative policy in s.18(3), and prospective appellants should not necessarily assume that merely because the sentences of imprisonment are lengthy they thereby have some initial basis for anticipating that if their appeals fail the discretion under s.18(3) will be exercised in their favour. Having regard to 'what has heretofore been perhaps an impression which has been held' time was in that case allowed to run.

In an article in the Australian Law Journal (Volume 50), Mr Rinaldi, citing the passage just quoted, remarked at p. 16:

Some disagreement between the Chief Justice and the Public Defender as to when the current practice originated is evident in the following exchange in R. v. Renshaw (13th September 1974) in which it will be seen that the Chief Justice played down the magnitude of the change:

Chief Justice: The section indicated a legislative intention that an unsuccessful appellant should not have his time included as part of his sentence. I am aware that there may be some slight change of emphasis in taking that view of it; but that has been the view taken in the last few months.

Mr Purnell: Yes - in the last few weeks.

Whatever its origins, and whatever might be the unarticulated reasons which prompted this change, the Court reasserted in R. v. Haining and Barrett (3rd July 1975) the the 'usual approach' is that 'failure of such applications will result in the time being served awaiting hearing not being included as part of the sentence'. Refusal to allow appeal time to count was also said to be 'the ordinary application of the section' in R. v. Bajada and McWilliam (20th June 1975).

It appears, however, that the current lenient view of unmeritorious appeals may be changing. During argument in R. v. Coombe (unreported 13/3/86) the Chief Justice of New South Wales indicated that the Court was of the view that it should start refusing time in appeals which clearly lacked merit, but where the appellant insisted on the matter being argued.

If such a fundamental change in the view of the Court is to occur, it is to be hoped that it will first be the subject of a reasoned judgment, and not merely a remark *arguendo*.

PHILOSOPHY

In the portion of Gibbs C.J.'s paper I relied on at the outset, reference was made to Neal v. The Queen, and the difficulties attending an attempt to increase sentence by a Court of Criminal Appeal where there is no appeal brought by the Attorney-General.

As was pointed out in Neal's case by Brennan J (149 C.L.R. 305 at 322):

The Court of Criminal Appeal of its own motion ought not ... pass a more severe sentence ...

The Court was there referring to a prisoner's appeal which failed. There are, however, a number of recent New South Wales cases in which an EFFECTIVE increase of sentence was the practical result of a prisoner's appeal WHERE THAT APPEAL SUCCEEDED.

Two such cases were R. v. Lambert and Williams (unreported 7/12/84) and R. v. Bennett (1985, 1 N.S.W.L.R. 410).

In R. v. Lambert and Williams, the successful appellant Williams entered the Court of Criminal Appeal with an invalidly imposed head sentence and a non-parole period expiring on 10/10/86, but left it with one which expired on 8/5/88.

Williams' sentence was unclear. At the time, he was on licence (not revoked). The transcript records that Collins D.C.J. intended to impose a cumulative sentence, but in fact imposed four years penal servitude from 10/10/83 with an aggregate non-parole period to expire on 10/10/86. However, the reverse side of the indictment records the following sentence above the hand of the sentencing judge and dated 27/1/84; 'Licence revoked. Sentence four years penal servitude to be served cumulatively upon sentences presently being served. Aggregate non-parole period to expire 10/10/86'.

On appeal evidence was tendered on behalf of Williams with a view to establishing that the revocation of the licence and the imposition of the cumulative sentence as recorded on the indictment took place later in Chambers in the absence of the appellant. The Crown, without conceding the accuracy of the contention, invited the Court to deal with the matter on the assumption that the appellant's assertion was well founded; this the Court did.

The Court held that this was an appropriate case in respect of Williams for the application of s.6(3) of the Criminal Appeal

Act. It would be manifestly wrong to allow the first sentence imposed by Judge Collins to stand, particularly bearing in mind that the offence was committed whilst on licence. Clearly a case for the imposition of a cumulative sentence although some reduction from the sentence of four years was called for. Williams: appeal allowed. Both sentences and non-parole periods quashed. In lieu, three years penal servitude cumulative upon existing sentences. Aggregate non-parole period of ten years six months from 8/11/77.

This is, in my view, a case which calls for consideration and for comment. The appellant did not contend that the sentence was manifestly excessive, nor did the Crown appeal on the basis that it was manifestly inadequate. The appellant's complaint, conceded, in effect, by the Crown, was that an accumulation passed in the absence of the prisoner after he had been validly sentenced concurrently in his presence could not stand. This was supported by powerful authority (see R. v. Cornwall (1972) 2 N.S.W.L.R. 1; Lawrence v. The King (1933) A.C. 699).

In the event, the Court of its own motion quashed the sentence of four years, rather than affirming that the accumulation was an error of law and could not stand, and then, pursuant to s.6(3) proceeded to impose a valid cumulative sentence, of slightly shorter duration (three years rather than four).

R. v. Bennett provides a different perspective of the same problem. Bennett appealed to the Court of Criminal Appeal against the sentence imposed by His Honour Judge Ward at Goulburn District Court. That order was imposed on 10/8/84 on a charge pursuant to Section 97 of the Crimes Act to which the appellant had pleaded guilty on 8/8/84. The charge itself alleged an 'Armed Robbery' at Cooma. It involved a rather nasty offence committed in the company of three men, Bronson, Kelly, and Farly. It was a nasty offence in that they went into a home, tied up the residents, who were old, and stayed some hours in the premises.

The judge at first instance imposed a sentence of eight years to commence at the expiry of the sentence which the appellant was then serving, that being a sentence of five years imposed in the Australian Capital Territory Supreme Court on 1/3/84 on a charge of armed robbery. The trial judge fixed a non-parole period of six years to commence on 10/8/84, the date of sentence. This accumulation was clearly in breach of Section 24(2) of the Probation and Parole Act as it then was.

When the appeal was argued in the Court of Criminal Appeal, Mr Norrish of Counsel argued the following submissions:

1. That the cumulative effect was unlawful.
2. That His Honour had no power to cumulate the sentence of 10/10/84 on the sentence of 1/3/84 (this being on the basis of Longford's case).

3. That His Honour erred in principle in not sufficiently distinguishing on the objective and subjective matters between this appellant and his co-offender Bronson, giving rise to a consideration of the principles of disparity and the question of fairness in sentencing.
4. That on consideration of the principles of totality that the sentence and the non-parole period were excessive having regard to the subjective circumstances of the appellant.

At the Court of Criminal Appeal, the appeal was upheld. Their Honours agreed that Longford's case established that the trial judge had had no power to accumulate upon the Australian Capital Territory sentence. Consequently, His Honour Judge Ward's sentence was quashed and their Honours ordered that the accused serve a sentence of eleven years penal servitude from 10/8/84 with a non-parole period of six years to date from 10/8/84.

In other words, the appellant's appeal was successful and yet his appeal resulted in an increase of some three years on the head sentence, i.e. from eight years penal servitude with a non-parole period of six years to an eleven year period with a non-parole period of six years.

This amounted to a sentence substantially greater than Bronson, who was conceded to be the principal offender, and who in addition had a more substantial criminal history than Bennett.

Bennett's case is at present the subject of an application for Special Leave to Appeal to the High Court.

In the light of these interpretations of Neal v. The Queen let me return to Sir Harry Gibbs' paper, 'Who Decides?':

It is the function of the Courts of Criminal Appeal to correct judges who, in the exercise of the difficult task of sentencing, fall into error ... their power enables them to furnish constant guidance to trial judges, and thus to ensure consistency and moderation in the sentences imposed.

How well does the system work for the purposes for which it was designed? - viz. reviewing the exercise of discretion; establishing and pronouncing on a body of principle to guide sentencing judges; and correcting error? In practice, my answer is: not well!

The Court, in exercising its task, faces many problems. Some are insoluble, such as the shortage of judges for the Court and the workload placed upon it. Others, in my view, are of its own making.

The Court is too ready to excuse judges, especially of the District Court, who fail to give any or any adequate reasons to support the sentences which they impose; who use catch-all phrases like 'I have taken into account the subjective material' without identifying it; who refer to one or other 'principle' of sentencing but disregard, as far as the record reveals, a whole body of material. It is too indulgent to practitioners, who have failed to put the case for prisoners (or the Crown) properly.

If I can borrow Carlton C.J.'s reply to Dr Ashworth, the reasons for what I perceive to be the failures of the system lie not in the RESULTS of appeals; by and large the Court cannot be so criticised. There will always be the odd exception, such as Hayes' case (1984) 1 N.S.W.L.R. 740, or similar drugs cases, where the Court departs from earlier decisions without warning. Rather the criticism lies in the failure of the judgments of the Court to advert to and apply a consistent body of principle. So it is that the judgments of the Court in sentence matters - and remember I limit my remarks to appeals against sentence - fail really to address the problem.

In Crown appeals, error is redressed by imposing a sentence in or towards the 'middle of the range'. The difficulty is that the result is corrected, but usually, NOT the error of principle.

The Court is a pleasant one in which to appeal; it is one in which, far more usually than is generally the case, the result is JUST. An appellant who has suffered a sentence which is unjust, or grossly excessive, will be rewarded with success - but the majority of judges do not err grossly, or at least not often.

It is a Court of great strengths: where it becomes necessary to make an alteration in sentencing patterns, that is done clearly, and cogently.

So, the criticism I make of the Court is certainly NOT one of lack of fairness to appellants. Nor is it one of being too facile - argument is heard and considered: it is weighed and the sentence balanced in its light.

BUT THE COURT IS OVERWORKED (and not OVERSEEN).

The problem is that because of the workload - lists of six to eight matters a day including conviction appeals; and the shortage of experienced judges available to the Court which prevents it sitting beyond one or two days a week, except for special fixtures, the result is too often translated into ex tempore judgments which do not have the benefit of reflection and polishing; so that statements of principle which could truly be used to guide the judges at first instance are obscured or occasionally completely overlooked, rendering the decision in a given case useless as a statement of principle. It becomes merely a judgment on a given set of facts.

Moreover, there is no apparent philosophy for dealing with those cases, which are not uncommon, in which the judge below sentences on the basis of serious errors of principle, but those do not result in errors of the quantum of sentence. To what extent is principle required in the sentencing process?

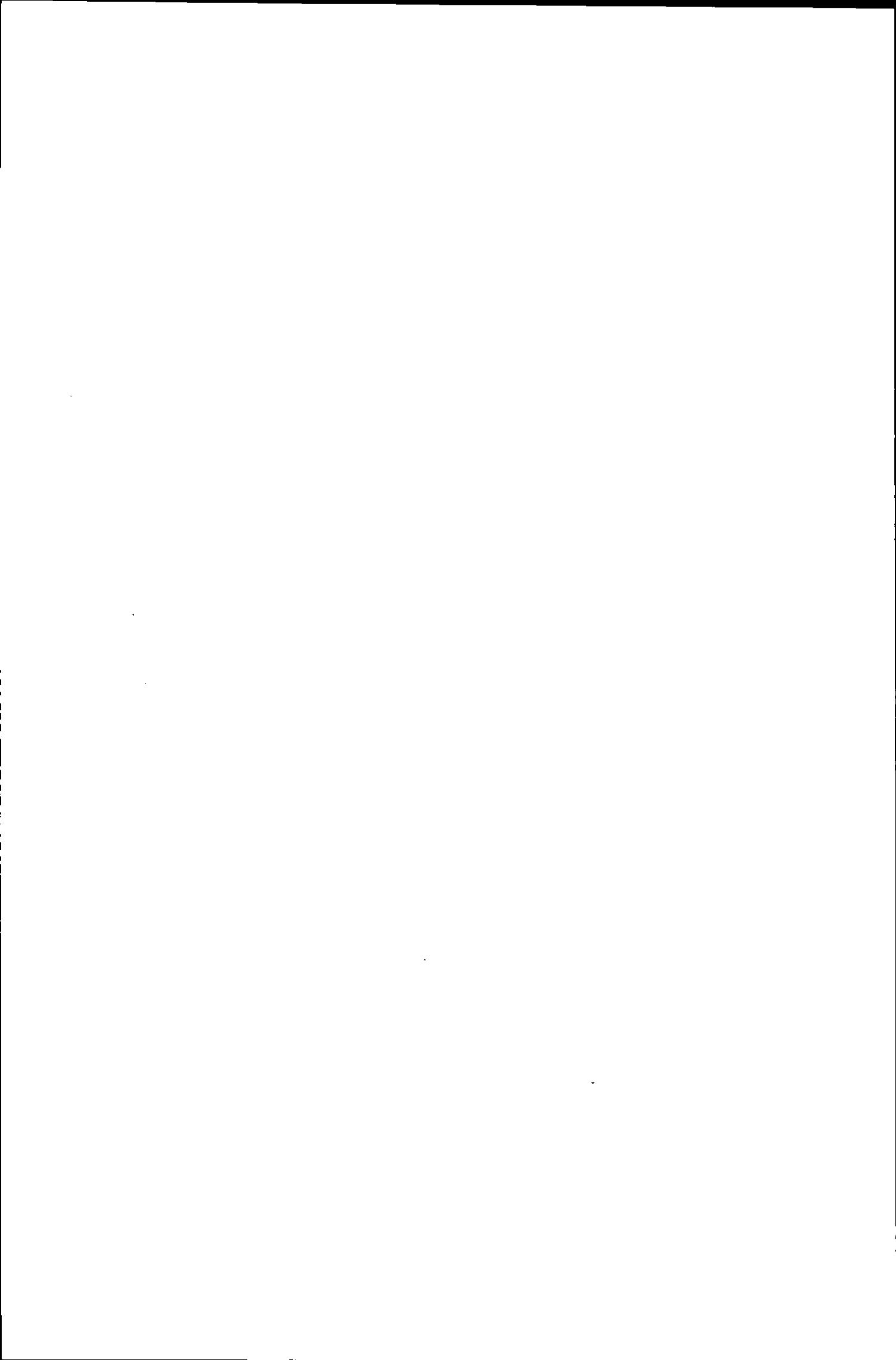
There are too few judgments which contain statements of general principle - and even fewer to guide judges on the very difficult task of assessing the relative importance of competing sentencing principles. (The policy adopted in Court of Appeal (Crim. Div.) in England by Lord Lane provides a stark contrast to this - or so I thought until I heard Dr Ashworth.)

It is in this area, apparently because of lack of time, that the Court may be said to fail.

Watson J. has from time to time said to me that I should be sixty years older than my stated age: 'no-one', he says, 'could be so conservative and be under 100!'. To that I plead guilty. I believe in the system. I only wish to see it applied. I do not believe it has sufficient faults to warrant its massive alteration. Nor do I believe we will be well served by so-called reform by the legislature.

I do not remember, probably the Earl Halsbury, who said 'the common law is commonsense and is the glory of the country. The other law is made by politicians'. But I see a danger that unless we voice a complaint to common lawyers, to the common judiciary, that we require them to perform their tasks according to legal principle, that common law will be swept away by politicians.

I do not wish to see that happen. The exercise of a judge's commonsense discretion on sentence is a great buffer against the modern state. One need look no further than New Guinea, or even the Motor Traffic Acts to see that. Mandatory penalties are abhorrent. But unless our judges JUDGE, and the Criminal Court of Appeal judges judges, rather than 'balances' sentences, I will live to see them introduced.



SENTENCING IN MAGISTRATES' COURTS:
THE MAGISTRATE AS PROFESSIONAL DECISION-MAKER

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Judicial sentencing is one aspect of public life where outcomes are of great importance for the individual offender, and for the well-being of the community. Sentencers are given considerable discretion to make punishments fit crimes and criminals, and a vast literature has revealed disparity in the penalties handed down for similar crimes, even among cases dealt with by the same judge, or by a group of judges or magistrates within the one court (Diamond, 1981; Douglas, 1980). Not only have sentencing disparities between judges or magistrates become a popular topic for investigation, so have disparities in penalties imposed on different social groups, particularly lower class or minority groups. However researchers have seldom dealt with differences in sentencing outcomes and individual judges' reasons for their sentencing behaviours simultaneously.

If one comes to the literature hoping to gain an understanding of even one aspect of court functioning, such as the process whereby a penalty is determined after guilt is established, one is likely to be disappointed. While there is uncharacteristic agreement among social scientists that disparities between magistrates exist and are a major factor in the observed distribution of penalties, there is little agreement on reasons. Local community factors, magistrates' characteristics, attributes and sentencing philosophies, and aspects of court organization are all advanced as explanations. With regard to social class bias in sentencing there is a marked lack of unanimity that bias even occurs on other than a random and sporadic basis, despite 50 years of research, mainly in America. For investigators hoping to learn something about the distinctive nature of Australian courts the problems are even greater, since comparatively little comprehensive research into these questions has been undertaken.

A number of Australian studies have involved archival analyses. These include Australian Law Reform Commission (1980), Broom and Cushing (1980), Cashman (1982), Grabosky and Rizzo (1983), Homel (1980, 1981, 1983 [b]), Lovegrove (1984), Mugford and Grofors (1978), Vinson (1974) and Vinson and Homel (1973). Others have employed qualitative and observational analysis of courtroom processes (e.g. Douglas [1980, a, b; 1982]; Lawrence [1984]; Lawrence & Browne [1981]) or an experimental methodology (Francis

& Coyle, 1976, 1978). There has not been a thorough pursuit of outcome and process variables in coordination, and results are a confusing mix of variables and methodologies.

There are at least three reasons for the confusion in the literature concerning fundamental questions about sentencing practices. Methodologies vary enormously. Even within the dominant approach of correlational analysis of data derived from court records, a great variety of statistical techniques are employed, some of which do a certain amount of violence to the data. A common example is the assigning of numerical scores to penalty outcomes, such as bond, fine and prison, on the basis of some a priori weighting scheme (e.g. Tiffany, Avichai & Peters, 1975). A second fairly obvious source of confusion is the heterogeneity and complex interactions of the phenomena being studied. It is difficult to extrapolate findings from, say, an American local court in New Haven, Connecticut (Feeley, 1979) to Australian local courts, or perhaps even to other American courts (Ryan, 1981). A further barrier to clear understanding of sentencing outcomes arises from the general tendency to analyse the sentencing process while ignoring the key factor of the influence of the sentencing judge or magistrate.

This last problem is a manifestation of a more fundamental difficulty in the whole field of sentencing research: the variety of theoretical orientations which guide researchers. Most research has been predominantly sociological in orientation and has tended to minimize the importance of individual actors in the courtroom drama, preferring to focus on the ways in which large-scale social structures and processes, like community values and social inequality, are translated into the courtroom setting. A smaller body of research, psychological in orientation, emphasizes the role of individuals, especially the judge or magistrate, perhaps to the detriment of a concern for the social structure of the court and the social framework within which it is embedded.

This paper reports some aspects of a research project in which we address the problem of divergent theoretical perspectives and methodologies. The research has two specific but interlocking purposes. The substantive aim is to develop a comprehensive analysis of sentencing which accounts for both social and psychological factors. The allied theoretical and methodological aim is to combine the perspectives and techniques of sociological and cognitive psychological explanations of social behaviours. Antecedents of the research are Homel's (1982, 1983[b]) multivariate model of social and institutional influences on the sentencing of drinking drivers, and Lawrence's (1984; in press) cognitive model of magistrates' decision processes. We propose to use the two models to complement each other to explain how broad social influences, institutional factors and individual offender and offence details interact with presiding magistrates' perspectives and decision-making skills in the sentencing of shoplifters, drink-drivers and drug offenders. In practical

terms this means both the collection of statistics from court archives and interviews with magistrates about their role as sentencers.

In the next section of this paper we set out in more detail the theoretical approaches which have dominated sentencing research, following which we explore in some detail the literature on the sentencer's contribution. We then discuss the strengths and weaknesses of archival data, and present a summary of some findings from Homel's research on the sentencing of drinking drivers. It is demonstrated that using archival data, indicators of magistrate 'sentencing styles' can be constructed which have considerable predictive power and which also interact with offender/offence characteristics, providing evidence that magistrate sentencing style influences the selection and weighting of information about the offender and the offence.

In Lawrence's research indepth interviews of magistrates follow recent procedures which have been developed by cognitive psychologists to study the way professionals use information. Studies of professional and academic reasoning typically present a subject with a simulated or real-life task to solve while thinking out loud, e.g. medical diagnosis (Lesgold, Glaser, Feltovich and Wang, 1981), expert computer programming (McKeithen, Reitman, Reuter and Hirtle, 1981) and studying at university (Dodds and Lawrence, 1983). This method of thinking aloud while working on a problem or decision provides rich evidence of the steps to solution and ways in which information is used coupled with probing general interview questions. The methodology has allowed us to work on a model of sentencing which essentially sees the magistrate or judge as a processor of information and a professional decision-maker (Lawrence and Browne, 1981). Such an approach takes the contribution of the sentencer out of the realm of personal attributes to a focus on the cognitive work used on the sentencing task. We will present a theoretical model of sentencing which combines case and sentencer factors in complex interactions. Our focus is on sentencing processes and outcomes of case and sentencer interactions which can be found in courtroom archives. The model is proposed as a more comprehensive representation of courtroom proceedings than current theories which confine themselves to either sociological perspectives or too simplified psychological accounts.

Theoretical Perspectives on the Courts

At the risk of some over-simplification we may assert that four theories or theoretical orientations to courtroom activities are generally recognised. Three are essentially sociological, reflecting the traditions bequeathed by Durkheim, Marx and Weber respectively. The fourth perspective is basically psychological, concentrating as it does on the characteristics of the key individuals who enact the courtroom drama, especially the judges.

Consensus Model

In the Durkheimian consensus model punishment serves to maintain social cohesion. The function of repressive justice is to express the indignation felt by all 'healthy consciences' when a crime is committed. For this reason, minute precautions are taken to proportion punishment as exactly as possible to the severity of the crime. In modern societies, the power of reaction is given over to courts and government functionaries who act not on their own behalf, or on behalf of one segment of society, but for the whole society.

In this model the courts are very much subject to external influences, particularly through the legislature, although the influence also runs in the opposite direction. Punishment is geared to the seriousness of the offence and to the blameworthiness of the offender with even-handed disinterest. Thus severity of punishment should be determined by the legally defined seriousness of the case (as a measure of the extent of society's disapproval), by the number and seriousness of the offender's previous convictions and by the 'facts' of the case, generally seen as the harm or potential harm to the community caused by the offender in the commission of the offence.

There are a number of fairly obvious problems with this 'official' version of how the courts operate. Apart from the naivety of the assumption of a common set of values in society, the consensus model almost totally ignores the complex web of interactions between the numerous actors in the court process. Individuals, and the subtleties of court organization and pre-trial interaction, are submerged in a grand-scale impersonal dramatisation of social solidarity and consensus. Not surprisingly there have been numerous attempts to develop approaches which incorporate more of the real-life complexities of the courts.

Conflict Model

In stark contrast with the consensus model, the conflict model is predicated on the assumption that,

... society is composed of groups that are in conflict with one another and that the law represents an institutionalised tool of those in power which functions to provide them with superior moral as well as coercive power in the conflict. (Chambliss and Seidman, 1971, p. 504.)

Conflict theory is often linked with a Marxist theory of the state. For example, Quinney (1974) asserts that in an advanced capitalist economy the state is organised to serve the interests of the capitalist ruling class. The contradictions of advanced

capitalism require that the subordinate classes remain oppressed by whatever means necessary, including coercion by the legal system.

Subordinate classes consist of more than the working class. Chambliss and Seidman (1971) speak in addition of the poor (who are often not in the workforce) and of ethnic minorities. Social class, employment status, ethnicity, age and sex all have been identified as 'extra-legal' factors which may affect the sentencing process in ways that are not predicted by the consensus model. Neither age nor sex has received the same degree of attention as class and ethnicity, although recently there has been much more research on the special oppression of women (e.g.: Curran, 1983; Chesney-Lind, 1978; Anderson, 1976; Hiller, 1982).

It is important to note that conflict theory does not necessarily predict direct discrimination in the sentencing process due to extra-legal factors, although this assertion is often made (for example by Chambliss and Seidman, 1971). A weaker version of the theory would assert that discrimination occurs at a number of earlier points in the system; the confrontation with the police, the granting of bail, the process of plea bargaining and so on; and that subordinate groups are disadvantaged at these points in so many ways that the strength of their case in court is diminished even if the sentencing process itself is non-discriminatory.

Within conflict theory there are many descriptions of the actual mechanisms of discrimination at the court level. Chesney-Lind (1978) argues, for example, that although the actual process of sentencing may be non-discriminatory with regard to the sex of the offender (for example for the offence of shoplifting after controlling for the value of the items stolen), when women engage in personal crimes they are punished more harshly than their counterparts who commit property offences because the former represent a violation of their gender role as well as the law. From a Marxist perspective, Carter and Clelland (1979) distinguish traditional crimes against the person and property from crimes against the moral order, in terms of their relative impact on the social relations of production. Since the 'risk of danger' from crimes against person and property cross class lines, they predict no discrimination in these cases.

Bureaucratization Thesis within Conflict Theory

Chambliss and Seidman (1971) have acknowledged that their general position is not sufficient to account for all aspects of the legal order, and have added the notion of bureaucratization to help explain oppression of subordinate groups. They do this by expanding on some of the themes introduced by Blumberg (1967), who argued that the adversary model of criminal justice, concerned with due process and the rule of law, has given way to

an 'administrative, ministerial, rational-bureaucratic' model concerned with efficiency, maximum production and career advancement. Blumberg modified Weber's ideal type of rational bureaucracy to include such factors as manipulation as a supervisory device and the 'panopticon effect' (official behaviour is arranged to suit those who will be 'watching'). Following this emphasis, Chambliss and Seidman argue that officials structured into a bureaucratic society will respond to the demands of the rich and powerful unless sanctions or other controls are introduced. More exactly, at each level of a bureaucracy, including law-enforcement agencies, officials possess considerable discretion in the performance of their duties. Rules will be created and enforced when this increases rewards for the agencies and officials; enforcement will not take place when such action is conducive to organizational strain. Given the values of the rule makers and the many social advantages of the upper classes, the enforcement of laws against persons who possess little political power will generally be rewarding to legal agencies, while the enforcement of laws against the politically powerful will be conducive to strain for those agencies.

Organizational Theories

The bureaucratization thesis has been trenchantly criticised since its original formulation. For example Hagan (1977) and Cloyd (1977) demonstrated that increased bureaucratization seemed to result in equity and efficiency, not discrimination against minorities. Whatever its defects, the bureaucratization thesis has the singular virtue that it focusses on the actual structures of the courts and on the social relations between the actors within the system. Both the consensus and conflict models are grand theories in which court officials, including judges and magistrates, act largely as a response to large-scale social forces. However, the idea of bureaucratization is really only one perspective within a broader organizational theory framework. Several authors have attacked the view of courts as bureaucracies, at least in the senses described above, but have acknowledged the importance of some theory of court organization, emphasizing the 'open' nature of the court system.

Feeley (1979) in a study of a lower court in the United States has argued that the criminal court must be seen not as a bureaucracy but as an open system, exposed to continuing and not always predictable influences from the environment. In addition, the personal notions of justice held by court officials are a major determinant of what they do - in fact, echoing Durkheim, this is one of the ways in which the courts give expression to deeply felt sentiments within society. In essence, the criminal court is more like a marketplace than a bureaucracy, 'a complex bargaining and exchange system, in which various values, goals, and interests are competing with one another' (p. 12). Hagan, Hewitt and Alwin (1979), following Feeley, have described the

courts as a 'loosely coupled system' which can easily take on new appendages demanded by changes in the external environment, (such as probation). Consequently, court-related variables will be important: plea, bail, the prosecutor's recommendation for sentence (in the U.S.), the recommendation of the probation officer, and the 'residual discretionary power' of the judge.

Individual Factors Model

Reference to the discretionary powers of judges and magistrates brings us to a major orientation on sentencing as a 'human process' (Hogarth, 1971). The essence of this position can best be captured by quoting Hogarth whose study of the judiciary is one of the most highly regarded,

...it appears from the analysis that we can explain more about sentencing by knowing a few things about the judge than by knowing a great deal about the facts of the case. (Hogarth, 1971, p350)

This approach emphasizes 'that justice is a very personal thing', determined largely by the psychology of the presiding magistrate, and the interaction between this psychology and the perceived attributes of offenders. Thus the focus is on beliefs, philosophy, attitudes, personality traits and background characteristics of magistrates, and to some extent the effects of environment on these characteristics. The behaviour of magistrates is seen not as irrational, but as generally consistent and explicable in terms of the interaction of external environmental and internal psychological processes.

Hogarth (1971) saw his model as phenomenological. For want of a better term we will use the more general (and less controversial) label of individual factors. This label captures the psychological flavour of the model while allowing the role of actors other than the magistrate. There is for example a growing body of literature which focusses on the specific behaviours and presentation of the defendant in court (e.g., Finegan, 1978). It is important not to consider 'psychological factors' only in terms of personality, temperament or other clinically-based concepts of the lay person's view of psychology. Advances have been made within the cognitive approach to focus on the working thinking of decision-makers. Without disregarding personal characteristics, we can put them in their proper perspective of background to the task of making sense of a body of information.

In addition to the study of Hogarth (1971), there are a few clues in the literature that the sentencing philosophy of the magistrate is of importance. Sentencing philosophies exist in the cognitive or intellectual functioning of the sentencer. A magistrate's or judge's views on the aims of sentencing and on the status of a particular offence as a crime may have a direct effect on how he processes information about such matters. For

example, Hood (1972) has argued that to the extent that a motoring offence is regarded as normal behaviour the magistrate is likely to apply a tariff approach to sentencing, largely ignoring the personal characteristics of the offender, apart from his previous convictions for similar offences. The overriding principle of the tariff is that of proportionality between offence and sentence (Thomas, 1980), which also is a key element of the consensus model. Thus predictions are possible concerning interactions between the philosophy, perspectives and resulting style of the sentencer and selected aspects of the offender and his or her offence.

In summary, it should be apparent that despite their widely varied characters, the four theoretical perspectives tend to flow into one another at the boundaries. Theories of court organization cannot ignore the consensus model. There is evidence of the strength of community norms, at least in the mind of the magistrate (Hood and Sparks, 1972). One major version of the conflict model depends on a particular theory of court organization, and we cannot be sure if its insights would hold up without the undergirding Marxist perspective. There is some evidence of distinctions of person versus property crimes in sentencers (Green, 1961), and distinctions of crimes perceived to be associated with different racial groups (e.g. Bullock, 1961). All the sociological theories assume implicitly that the social processes they describe are translated into concrete reality for the offender via the intentional behaviours of court officers. This kind of assumption about the direct application of environmental forces and influences is rather naive, given what we know about the complexities of any individual's constructions of meanings and interpretations (Bartlett, 1932; Berger, Berger & Kellner, 1973; Spiro, 1977).

While it is likely that all four orientations capture different aspects of the sentencing process, and that elements from all of them will be necessary to explain observed patterns, our argument is that all of these external factors contribute to the total picture of what happens in court, but that they are filtered through the perspectives and reasoning of individual people. Chief 'imposers of sense and meaning' are magistrates and judges, although the cognitions and intentions of other actors in the courtroom also exert considerable influence on proceedings. We turn now to a more detailed examination of the role of the sentencer. This is necessary because the explanatory powers of all the other approaches really depend on a satisfactory theory of how judges and magistrates operate, and in particular on how they perceive their world and the worlds inhabited by the stream of defendants appearing before them.

The Sentencer's Contribution

Although lip service is paid to the contribution of the sentencer in all the models of courtroom proceedings that we have reviewed,

there has been little systematic examination of how the individual sentencer's contribution operates on particular case details. Perhaps this deficiency in the empirical literature emanates from the range and obliqueness of sentencer variables which are investigated, when the task of the sentencer primarily is to process information. Criticisms of the methodological impracticability of trying to isolate single offender details apply equally well to attempts to unravel features of a sentencer's life and predispositions which may influence courtroom processes.

The complexity of attitudes and personal styles which experienced professionals bring to daily tasks does not permit easy identification of individual dimensions. But more importantly, background and personality do not map directly onto decisions. Rather, experience influences expectations and procedures decision-makers use. The task in court is to process information, and that processing essentially is a cognitive or reasoning activity. Yet when researchers look for sentencer correlates of penalizing patterns they mainly have looked for factors in the sentencer's background, not in information-handling perspectives and procedures, and the search for background factors has met with varied success. Nevertheless, there are some significant indicators in the literature of influences on a sentencer's perceptions and inferences.

Sentencer's Background

Some researchers have sought to show how the social location and environment of sentencers indirectly influence courtroom attitudes and decisions. Hood (1962) found that middle class English magistrates were more likely to be severe in sentencing than their colleagues from the working classes. In contrast, working class magistrates in Hogarth's (1971) Canadian study tended to be most punitive. City magistrates were less severe than their rural and small town colleagues. Although Hogarth's findings seem to contradict the punitiveness that Hood (1972) found in magistrates from small towns, the two sets of data agree at another level of interpretation. In each, magistrates' attitudes and beliefs reflected prevailing community norms and local values.

In relation to the consensus and conflict models, it has been shown that judicial attitudes towards different types of crimes by offenders from lower social strata are not predictive of penalties unless cultural norms are taken into account. (Bottomley, 1973; Bullock, 1961; Green, 1961). Bullock, for example, interpreted the harsher treatment meted out to blacks in his early sixties study in terms of the greater significance given to inter-racial crimes like burglary, than to intra-racial crimes of rape and murder in his Texan community.

The tendency for the bench to reflect community values (Bottomley, 1973) is consistent with its social composition. While some judicial officers naturally belong to more privileged classes, for others middle class status has been attained along with professional preferment (Weber, 1980). Inevitably, justice is dispensed by a fairly homogeneous group of judges at one level and magistrates at another. Background variability may be difficult to discern, and is too modified by professional socialization to be a predictor of sentencing variability (Hogarth, 1971). Professional enculturation and individual working styles are more powerful indicators than something back in the past, but even then interactions of judge and offender social histories demand special reckoning (Nagel, 1969).

When background variables are invoked, they usually appear as complex configurations without direct causal links to sentencing disparities, as Hogarth demonstrated. Even the punitive attitude of urban magistrates was mitigated by age, education and, more importantly, professional affiliation and collegiality. Attempts to isolate single demographic variables are not only counter-productive but are permeated by social climate.

Given that society's values and norms are reflected in its courtroom outcomes, it is reasonable to ask how social norms actually are internalised by sentencers to affect their processing of evidence and how they are expressed by individual magistrates. Disparities in suburban and city courts, and even in the same precincts points to personalized interpretation and working-over of cultural and professional norms to guide individual decision-making. Cultural and professional norms may provide a persuasive set of general values, but individuals assimilate for themselves the messages they have acquired in society. It would not be sensible to allow that children reinterpret social norms for themselves (Kohlberg, 1966), and then fail to attribute similar constructions and reconstructions to professional adults well practised in their art (Spiro, 1977). The individual sentencer's intellectual and motivational characteristics play an integral part in how community's wishes and values are interpreted in general, and more specifically, how they are applied to individual sets of facts.

Sentencer's Personality

Sentencer's personality structures and professional attitudes are two likely influences on sentencing trends. Again, empirical specification of these variables has met with limited success, and evidence of their predictive power is fairly weak. Judge's personality provides no clearer picture of sentencing outcomes than judge background experiences.

Smith and Blumberg (1967) provide a good example of one approach which loosely specified influential personal factors. They

argued fairly strongly that the wide variation in judicial treatment of similar cases,

...can in all likelihood be explained by the differences in the personality of the judges, and the differential impact of public opinion. (Smith & Blumberg, 1967, p96)

Their statement is representative of a tendency to group together any individualized, covert variables, call them 'personality' factors or traits, and use them interchangeably with a 'non-rational element' in judging. They appear to have confused intuitive, unmonitored thought with the emotional dimensions of a person's total make-up. For example, they interpreted as non-rational the prejudices of Oliver Wendell Holmes' confessions and Chancellor James Kent's claim that 'I might once in a while be embarrassed by a technical rule, but I almost always found principles suited to my view of the case' (quoted by Smith & Blumberg, 1967, p.96).

An alternative interpretation is that Holmes and Kent had an inkling of their own perspectives and tendencies (Bartlett, 1932; Lawrence, 1984) and honestly reported self-observations of how personal values and frames of reference guided their attention to certain details and their inferencing processes. Recent developments in cognitive psychology have shown that it is not necessary to consign unawareness of cognitive processes to the domain of blind emotion (Brown, 1982).

Another personality study showed the futility of searching for measures which can link stable, affective predispositions to sentence consistency. Lemon (1974) distinguished magistrates who viewed cases from concrete versus abstract perceptual systems, but their 'personality' test of concreteness and abstractness could not be separated from the dynamic interaction of judge-related and case-dependent factors. Thus his data support Green's (1961) seminal claim that judges' predispositions towards leniency or severity work in dynamic relation to offence and offender characteristics. In fact, Lemons' study highlights a major difficulty of studies where the judge-factor is broken down into single personality indices. Measurement decisions and instruments make it difficult to separate personality factors from other individualized characteristics such as attitude and intellectual style. Lemon wittingly opted for a limited measure of personality which correlated highly with attitude, but in doing so, admitted that he severely constrained the generalizability of his findings.

Even when a reliable index with high construct validity does permit the empirical isolation of a trait, it still is questionable whether that trait or characteristic will be strong and enduring enough to be unaffected by environmental influences (Gibson, 1978; Mischel, 1982). The intrusion of environments on processing is even greater when it is those very environmental

(offence and offender) factors which the sentencer must take into account and weigh in making a decision.

Sentencer's Attitudes and Styles

The human process of Hogarth's individual factors theory was neither random nor grounded in personality or background. Rather, it was attributable to judicial attitudes and penal philosophies which carried with them certain style. Consistencies found in individuals came from those legal aspects of a magistrate's approach,

Once one knew the social purpose that a magistrate attempted to achieve through sentencing, the whole of the penal philosophy unfolded as a logical extension of it. (Hogarth 1971, p.361).

Similarly Hagan (1974) who used Hogarth's instrument, found a significant interaction between judges' attitudes to law and order and legal and extra-legal factors of cases. Seriousness of offence was the dominant predictor of whether or not judges obtained high scores on a Law and Order Scale. Judges with strong dispositions to maintain order concentrated on the seriousness of the offence to the exclusion of other variables. In contrast, those judges with less concern for order looked at offender characteristics alongside legal variables, as for example, putting a defendant's race into the equation with a prior record. They did not discount the relevance of a crime's gravity, but gave added weight to factors which promoted compassion towards the offender.

Yet concepts of stable traits or style do not contribute a great deal to the prospect of reducing disparity, unless some of the particulars of style can be identified for discussion, and for the guidance of practitioners. Diamond's (1981) work pushes the search to our own cognitive position. She tested two possible explanations after finding disparity in 37% of cases judged in Chicago, and 46% in New York. Either judges were focussing on different characteristics, or they were weighing the same factors differently. With some limited support to the different characteristics hypothesis, she confirmed that the judges gave differential weightings to case details. She argued from these data that it is not enough to discover the significance of different judges' penal philosophies or sentencing predispositions. Such philosophies and attitudes as they hold interact with case factors, and this interaction can produce the appearance of inconsistency.

We cannot look to the legal and extra-legal characteristics of cases as single effects any more than sentencer characteristics (Green 1961 ; Karpardis & Farrington, 1981; Softley, 1980). The mix is complex, and it is given its shape within the sentencer's perspectives. Gibson's (1978) exhaustive analyses indicated the

mediating and shaping effect of judges' definitions of their own role, whereas their penal attitudes showed very little influence. Absence of attitude-behaviour consistency could be explained by 'judges' beliefs about what variables can properly be allowed to influence their behaviour' (p.917). He was able to dichotomize his sample of judges into one group that narrowly defined their function, and another that placed greater emphasis on extra-legal factors.

What factors are emphasised or overlooked can vary enormously, depending on general views and individualized sentencing objectives. Softley (1980) argued that the tendency for sentences to be more severe on defendants with repeated offences could reflect, among other things, sentencers' attempts to deter recidivists from committing further offences. However, even general punitive attitudes do not necessarily issue in punitive sentencing (Lemon, 1974). Just like social status, the personal characteristics and attitudes brought to the bench may not be fixed, unalterable states (Bond and Lemon ; 1981). Bond and Lemon's lay magistrates became more punitive after their first year of experience on the bench. Significantly for our present discussions, the tendency towards severity could be mitigated by training during that first year. These researchers had the unique opportunity to assign novice magistrates to one of two training conditions. The gentling influence of training was seen in several ways, not least in greater sympathy for defendants.

If experience and training can have such dramatic effects on novice lay magistrates, and if Bond and Lemon's initial severe sentencing patterns hold up with new stipendiary magistrates, then it is reasonable to expect that severe tendencies of new professional magistrates could be monitored with profit, and some training programmes instituted in this country. At the lowest level of interpretation, their study suggests that judicial attitudes can be influenced towards severity by unmonitored, natural exposure to the new experience of judging and away from severity by training in judging procedures. We would flag training for new magistrates as one possible prospect for discussion at this conference.

It remains to be demonstrated if other predispositions can be influenced by intensive training of magistrates. In general, influences on a sentencer's perspectives can be assumed to involve complex configurations of environmental and personal factors. Some elements of conscious reflection on possible influences could be a useful part of training. Methodologically, the totality of possible influences defies easy breaking down into components. In addition, findings of interactions of offence, offender and judge variables, such as those of Green, Hagan and Softley suggest that even multidimensional models of sentencing procedures must be able to cover both routine cases, and those unusual cases which elicit special attention to details.

As Hood and Sparks, Diamond and McKnight have argued, the dynamic weighing of the attributes of individual cases is significant in relation to general magisterial perceptions. Even with multidimensional models, further insights should be grounded in the meaning which the individual judge imposes on contributing factors, and these factors can shift and change. Green (1961), for example, discovered that judicial perceptions were not as influential in clearly minor or serious cases as they were in cases of intermediate gravity, where there was greater ambiguity. Disparity was located in sentences imposed in these middle-range cases. The problem with Green's data, Hogarth claimed, was that his labelling of individual sentencers as 'lenient' and 'severe' was dependent on post hoc analysis of their sentencing statistics. We discuss that criticism below, and our whole approach is a case for coupling archival analyses with evidence of sentencers' meanings, and Green's work only strengthens our argument. Identification of the areas of ambiguity and inconsistency point to the possibility that sentencers operate more from their own conceptualizations when evidence is not easily categorized.

It would seem that socialization influences, background factors and induced or personally-generated attitudes all find a place in the interpretations and meanings with which magistrates frame common, then unusual, cases. Associations of various judge factors with sentencing trends have not explained how a magistrate constructs his working assumptions and procedures, although a few researchers have moved beyond surface differences in sentencers to look for the kinds of perspectives that may emanate from the magistrate's experience and professional objectives, but are worked out as attention to and use of case details.

Sentencer's Processes

A first attempt at a theoretical model of the components and flow of judicial decision-making was made by Hood and Sparks (1972) who drew on Hood's (1972) and Wilkins and Chandler's (1965) evidence of sentencers' use of information, and other trends in the literature. They tried to incorporate the magistrate's orientation in a way that would explain how he or she used information, and what information was considered relevant. The legal environment, statutes and conventions, judge factors, offence and offender variables were integrated into a model which explains how magistrates bring generalized sets of attitudes to sentencing, based on personal and professional background. All these factors influence how sentencers view cases and assess information. As the magistrate receives information, he or she applies it to an aim. The categorization of a case and its seriousness feed back into penal objectives and modify objectives when necessary.

Thus Hood and Sparks emphasised the two recurring themes of the significance of incoming information, and the structuring of that information by the sentencer's personal constructs. Unfortunately, we know of no conscious attempt to test their model. We will argue that Lawrence's cognitive model picks up the main concepts of Hood and Sparks, but takes them further to suggest the kinds of interactions of strategies for handling cases and broader perspectives that McKnight (1981) also observed. Even so, our central thesis is that the cognitive and archival models work most powerfully in combination to provide some realistic ways of answering the need for explanation of the complexities of the courtroom as we outlined above. Therefore before describing our particular approach, we will consider some significant criticisms of using archival data at all, and report some of Homel's multivariate findings. Evidence of the interactions of offence, offender and sentencer factors will bring us back to the cognitive model for interpretations that go beyond environmental or individual oblique influences.

Use of Official Records in Sentencing Research

It is not unproblematic to use outcome data when focussing on sentencing processes, and it requires careful and time-consuming work to obtain high quality information from official court records. Several authors have expressed doubts about the appropriateness of such outcome material, and since our work depends partly on the construction of statistical models from archival data, it is necessary to consider some of the criticisms before summarising aspects of our models. It will be convenient to refer to Hogarth (1971) and to Feeley (1979), both of whom attempted to use archival data with apparently limited success.

Criticisms of Archival Studies

Hogarth (1971) has characterised the method of analysis employed in many studies, in which offender and offence characteristics are correlated with disposition and penalty, as 'the black box model of sentencing', since nothing is known about the judges or magistrates apart from the decisions they make. Hogarth's criticisms of the black box model focus on the circularity of imputing attitudes from sentencing behaviours in order to explain behaviour. In any case, attitudes cannot be inferred solely from behaviour. Tough penalties, for example, do not necessarily indicate a retributive philosophy (e.g. Wheeler, Bonacich, Cramer & Zola, 1968; McFatter, 1977).

He further pointed to the possible intrusion or exclusion of information other than that known to the researcher from official records and how this may affect the decision of the court. Researcher and magistrate may differ in the weights attached to information actually considered, that is, statistical records cannot tell us about magistrates' cognitive processes.

Hogarth compared the predictive power of the black box model with his 'phenomenological' model (which incorporated the facts of the cases as perceived by the judges). He extracted 12 pieces of information from court records, and used them to predict outcome (institution, fine, suspended sentence or probation) and length of imprisonment. His independent variables were crime seriousness, type and sex of victim, offender's relationship to the victim, number of separate charges, plea, age, sex, marital status, occupation, length of criminal record and recency of offender's previous conviction. He concluded that while the black box analysis yielded statistically significant patterns which could be interpreted, the predictive and explanatory power of the phenomenological model was much greater. Comparing the regression models for length of imprisonment, the phenomenological model yielded an R^2 of .5 compared with .09 for the black box approach. Moreover, fact patterns added no significant variance to the phenomenological model, in other words, facts had no predictive power over and above the magistrate's perception of the facts.

We readily accept some of Hogarth's arguments. In particular it is clear that without some independent information from the magistrates it will never be possible to be sure about the relationship between 'psychological weights' and 'statistical weights'. This is one of the main reasons why we have adopted a research design which combines both sources of information. However, it is also necessary to point out some defects in Hogarth's arguments.

Beginning with his comparison of the two types of models, it should be noted that the comparison is not quite as fair as he claims. Firstly, he argues that there is no measure of predictive power for a multivariate model, and hence he makes no comparison of the predictive power of the two types of models for the outcome (disposition) analysis. Yet Wilks' λ statistic can easily be interpreted as a measure of unexplained variance (Tabachnick & Fidell, 1983). Secondly, his black box model contains no information about who the presiding judge was, a serious omission given the evidence for disparity between judges. Thirdly, he made no attempt to relate the apparently meaningful patterns found in the black box analysis of outcomes to the findings based on magistrates' perceptions. The concepts of 'criminality' and 'culpability' which came out of the black box model may well have been as useful in some circumstances as the attitude measures or the magistrates' definitions of social constraints.

With respect to Hogarth's other arguments, several points should be noted. Although one cannot impute judicial attitudes from sentencing behaviour, it is possible to construct measures of sentencing style on the basis of behaviour, and these can be incorporated as predictors in a statistical model in the manner described for drink-driving and shoplifting in the next section.

However, the link between sentencing style and judicial philosophy or attitude is complex, and requires data from magistrates, as Hogarth correctly points out. In regard to the appropriateness of some items of information, if the researcher takes account of information not before the court, this information should drop out of the model unless it is correlated with some factor before the court which the researcher did not include. In this case the variable included in the model would have the status of a surrogate indicator. On the other hand, there is no doubt that official records omit relevant information, but even Hogarth with his detailed phenomenological models failed to account for 100% of the variance. Behaviour is rarely explained perfectly in the social sciences by any technique.

As a final observation on Hogarth's arguments, it should be remembered that he was not concerned with the role of extra-legal factors in the sentencing process. His focus was on the psychology of decision making, and it is natural that he should have concentrated on measures of magistrate attributes. There is an additional weakness in the type and mode of attribute investigated. The questionnaire data on attitudes can only yield general information, and certainly does not address the question of the interaction between magistrate characteristics and extra-legal attributes of offenders (Hagan, 1974). If he had looked for the interactions of case details with magistrates' generalized style and focussed use of information, then he would have needed greater use of court records, and finer analysis of magistrates thinking.

Feeley (1979) also has questioned the usefulness of a quantitative approach based on court records, although for pragmatic rather than theoretical reasons. Since he also obtained low R^2 values and few interpretable patterns, he was led to explore the court as a human organisation, concentrating on the subtle interplay between police, court officers, lawyers and defendants. His criticisms of a reliance on court records partially echo those of Hogarth, but in addition he emphasises that a host of organizational factors can influence case outcomes. These factors are difficult if not impossible to trace by reading case files. For example, there may be an informal quota of 'nolles' (dismissals) allowed for a particular defence attorney on a given day. Moreover, the human complexities of the criminal court system affect the strength of a case and the types of dispositions a prosecutor is willing to seek. For example, clerks sometimes lose files, many defendants out on bail are often re-arrested on new charges and pretrial service programs generate long delays and circuitous routes to disposition.

The essence of Feeley's argument is that court records provide information which is too simplistic and static to be of much value in building an explanation of the sentencing process. Given his description of the operation of the New Haven court, it is difficult to disagree with him. However, if it were possible

to demonstrate that in another situation the conditions described by Feeley did not apply, or did not apply as strongly, the use of records and statistical models may be defensible (see Ryan, 1981). For example, Homel (1982, 1983 a, b) argued that drink-drive offenders in New South Wales are dealt with in a routine and bureaucratic fashion which minimises the importance of the kinds of factors discussed by Feeley. Plea bargaining for drink-drive matters would seem to be rare, bail is not often an issue, there is usually no presentence report, the Australian prosecutor is not directly involved in the recommendation for sentence, and there is an objective measure in the blood alcohol level of the seriousness of the offence. Moreover the statistical power of linear models for the sentencing of drink-drivers is frequently quite high (Homel, 1982), providing some empirical support for the view that Feeley's factors are not critical in drink-drive matters. A similar argument could probably be put for other high-volume offences like shopstealing, although the power of statistical models may be less.

It appears that the usefulness of court records as a basis for research into sentencing in magistrates' courts depends on meeting a number of conditions. First, some measure of individual magistrate input is required. This could be accomplished by the construction of measures of magistrate sentencing styles from the statistics on outcomes for each magistrate, as well as by obtaining information directly from magistrates. Both approaches are adopted in our research. Secondly, it needs to be demonstrated that organizational factors are less important than in Feeley's (1979) analysis, or alternatively some measures of these factors should be included in the analysis. In our current study, for example, we contrast the sentencing behaviours of magistrates in two courts which are known to differ both in terms of organization and in terms of philosophy of sentencing. Thirdly, statistical models based on court records should explain a substantial portion of the variance in penalties to engender confidence in their usefulness in explaining the sentencing process. At the same time, Lovegrove's (in press) warning that legal significance, rather than percentage-of-variance, should be the critical criterion must be heeded. However, the alternatives need not be mutually exclusive.

Finally, the development of statistical models from court records, and the construction of statistical rather than legal or psychological weights for specific factors, do not depend for their validity or usefulness on a theory of the sentencing process in which all magistrates consciously assign weights to all aspects of the case. One value of the statistical approach is that factors which are perhaps not consciously considered by the magistrate, like age or social class, may be revealed to be important in the sentencing process. With respect to factors explicitly considered by the magistrate, Lawrence and Browne (1981) have presented evidence that some magistrates do think quite concretely in terms of weighting various factors. For

example, when sentencing drinking drivers one magistrate multiplied the blood alcohol concentration by four to determine an appropriate fine. However, as noted earlier other magistrates use procedures best described in terms of sifting and sorting, employing an iterative process of checking and rechecking to arrive finally at a sentence or verdict.

The present argument is that the behaviour of a magistrate can be simulated by a statistical model, thereby possibly revealing the importance of factors unsuspected by the magistrate, even if he does not explicitly operate by weighting factors. Dawes (1982) points out that such paramorphic representations of (lay) judges' psychological processes have been extremely successful in a number of contexts. The interpretation of these models will however entail careful consideration of both the legal framework and the cognitive strategies of the magistrate.

Sentencing the Drinking Driver: An Analysis of Court Records

Homel (1982; 1983 a, b) has reported the analysis of penalties imposed on 14,311 drink-drivers convicted in New South Wales in 1976. The primary aims of the study were to compare the factors predictive of outcome with those correlated with recidivism (Homel, 1981), to test the predictions of conflict theory with respect to social class, sex, age and legal representation, and to demonstrate that magistrate sentencing style was important not only in its own right but as an influence on the effects of other factors.

There was clear evidence in favour of the predictions of conflict theory, with all factors listed above contributing to the outcome, although consensus model factors like previous at a greater advantage, with the benefits gained by older offenders being proportionally greater the higher their status. Those not in the workforce tended to get lower fines but longer disqualification periods, evidence for the 'compensation theory' rejected by Hood (1972). Overall, unemployed and student first offenders were dealt with most harshly.

Housewives (who were generally older and without previous convictions) were treated most leniently among those not in the workforce, but were dealt with more severely than employed offenders (nearly all of whom were male). Since there is strong evidence that most women are screened out at the stage of apprehension (Homel, 1983 a), those passing through to the stage of sentence were probably seen as particularly troublesome, or as chronic alcoholics acting in a manner contrary to stereotypes of acceptable female behaviour. This finding, consistent with some recent literature in feminist criminology (e.g.: Chesney-Lind, 1978), reinforces the value of direct information from the magistrate on how he views the offence, what he sees as the purposes of punishment, and how he perceives women offenders.

These findings with respect to the role of extra-legal factors are important, since they were derived from a very large sample and survived rigorous statistical controls. After a careful review of a large body of literature, Braithwaite (1979) concluded that 'the tide of evidence is turning against the assumption that there is an all-pervasive bias against the lower-class offender in the criminal justice system' (p. 43). Whether or not the bias is 'all-pervasive', it is clear that there is a class bias in the processing of drink-drivers, and indeed in the processing of shoplifters according to our more recent analyses, and these biases require theoretical explanation. The bureaucratization thesis of Chambliss and Seidman (1971) doesn't help much, and Homel (1983 b) has argued that the way the magistrate sees the world and his own role is likely to lead to better explanatory models.

The analysis of the drink-drive data furnished some results which underline the centrality of the individual magistrate in the sentencing process. It is easy to demonstrate disparities between courts in penalties imposed, with imprisonment rates varying between zero and 9.4%, and the rate of S. 556A dismissals and recognizances varying between zero and 20.9%. Moreover, these kinds of variations were not explained by variations in the characteristics of offenders appearing in different courts. Homel's (1982) magistrates differed along three or four basic dimensions, reflecting such things as their relative toughness or leniency, their propensity to individualise the penalty through the use of restricted licenses or to apply a simple tariff in the form of a fine, and the balance which they struck between period of license disqualification and amount of fine. These variations in sentencing style explained about 21% of the total variance of the model, making magistrate variations second only to previous drink-drive convictions (31%) in predictive power.

What was of greater significance than these marked variations between magistrates was the fact that the impact of both legal and extra-legal factors (particularly previous convictions and age) on the penalty was partially dependent on the sentencing style of the magistrate. Sentencing style, in the sense of the dimensions outlined above, seemed to reflect not only a preference for certain kinds or levels of penalties but a way of organizing information and assessing the characteristics of offenders. There was an interaction of a magistrate's location on the toughness-leniency dimension with two variables, prior offence and age. Lenient magistrates were relatively generous in their treatment of first offenders, while tough magistrates penalised 18 year old offenders more severely. Magistrates characterised generally by the use of heavy fines made greater use of imprisonment for young offenders, but were quicker to grant a dismissal or recognizance to offenders around the age of 50 years.

Magistrates who used restricted licenses frequently tended to be tougher on 18 year olds in not granting them that privilege. Two

lenient groups of magistrates tended not to use imprisonment, even for second offenders. Cutting across the 'tough' and 'lenient' distinctions was the extent to which a magistrate used a tariff rather than an individualised approach to sentencing. The tariff group tended to base their penalties primarily on a 'deserved' amount of fine and period of disqualification. However, the tariff was reserved more for older offenders, with younger offenders receiving bonds and prison in addition to tough fines and disqualification periods.

A final interaction of great interest involved legal representation. Tough magistrates appeared to be much more affected by representation (or its absence) than lenient magistrates. Although in all cases the represented group was more likely to receive a 556A or bond with a short disqualification period and were less likely to get long disqualification periods or go to prison (after adjustment for other factors), this trend was more pronounced among offenders appearing before tough magistrates. This suggests that the cost of a lawyer is worthwhile if one needs one's car and is likely to appear before a tough magistrate.

The incorporation of magistrate dimensions, and the interactions of these dimensions with selected offender and offence characteristics, produced a rich array of findings which are suggestive of the central importance of the magistrate's sentencing philosophy, his views on drinking and driving and his theories about the most dangerous drinking drivers. Indeed the concept of 'danger to the public', derived from consensus theory, is probably a key to understanding many of the complex interactions outlined above. However, there is a limit to how far explanation can go in the absence of information direct from the magistrate. We have made the case throughout, that the most relevant information about magistrates will be related to their work, that is, their professional decision processes. If that is so, then the statistical simulation, as well as the corporate body of wisdom will inform, and in turn be informed by, an account of magistrates' functions in terms of their processing of case data.

Sentencing as Cognitive Processing

All human processors of information approach evidence with prior expectations and patterning tendencies which either sharpen or blunt their abilities to choose and weigh evidence (Kahnemann, Slovic and Tversky, 1982). Any comprehensive model of cognitive processes used in sentencing must take account of two kinds of cognitive activity as they are used on information; the frames of reference that set up and structure the handling of evidence, and the procedures used for selecting and drawing inferences from that evidence. The present account of magistrates' sentencing procedures combines the kinds of framing and value-laden perspectives emphasised by Gibson and McKnight, with the emphasis

on processing of case details which Green, Diamond and Hood and Sparks argued would be necessary to explain disparity.

A model of magistrates' sentencing processes was grounded in magistrates' accounts of their courtroom cognitions (Lawrence, 1984; Lawrence & Browne, 1981). Fifteen stipendiary magistrates described their own judgment processes in individual interviews. The terms in which they spontaneously spoke of reasoning on the bench could be grouped into the two types of general and procedural cognitive activity.

Magistrates' cognitions involve procedures for working on case evidence, and the frames of reference which they bring with them to each case. Sentencers' cognitive processes are not unfettered flights of imagination, and the courtroom reasoning they can accomplish is constrained by external factors such as statutory laws, human intentions and heavy case loads. The model of the sentencer's cognitive processes is shown as Figure One to illustrate how frames of reference and information-handling procedures interact within their legal and human constraints.

Actual procedural steps for working on evidence are shown in the centre of the figure, and involve attending, selecting and evaluating information on offence and defendant, and making inferences from that information which lead to reasonable decisions. Information is obtained from police facts and reports, a defendant's statement to the police, witnesses' testimonies, reports and exhibits. Common types of inferences include belief or disbelief about the veracity and relevance of evidence, weighing, summing and the application of reasonable doubt. Decisions which establish guilt and penalties flow from selection and inferencing procedures. These procedures are described in magistrates' own words in Lawrence (1984).

The inside border in the figure identifies the presence and operation of frames of reference and expectations which generate and give perspective to the processing of evidence. Frames of reference can intrude at any point in the attending and inferencing process, and can be illuminating or distorting. We have shown how influential framing perspectives include penal philosophies or decision-rules of individuals, immediate sentencing objectives, a magistrate's view of the severity of a particular crime, and his or her definition of the judging role in relation to particular cases (Hogarth, 1971; Gibson, 1978; Kapardis & Farrington, 1981; McKnight, 1981). Yet even those individual factors are set within legal and extra-legal parameters.

The extreme outside parameter of the model illustrates the environmental factors which constrain and influence a magistrate's processing. We have considered above the kinds of societal and organizational influences which have been emphasised in conflict and consensus accounts of courtroom procedures. The model takes account of such environmental forces, and gives them

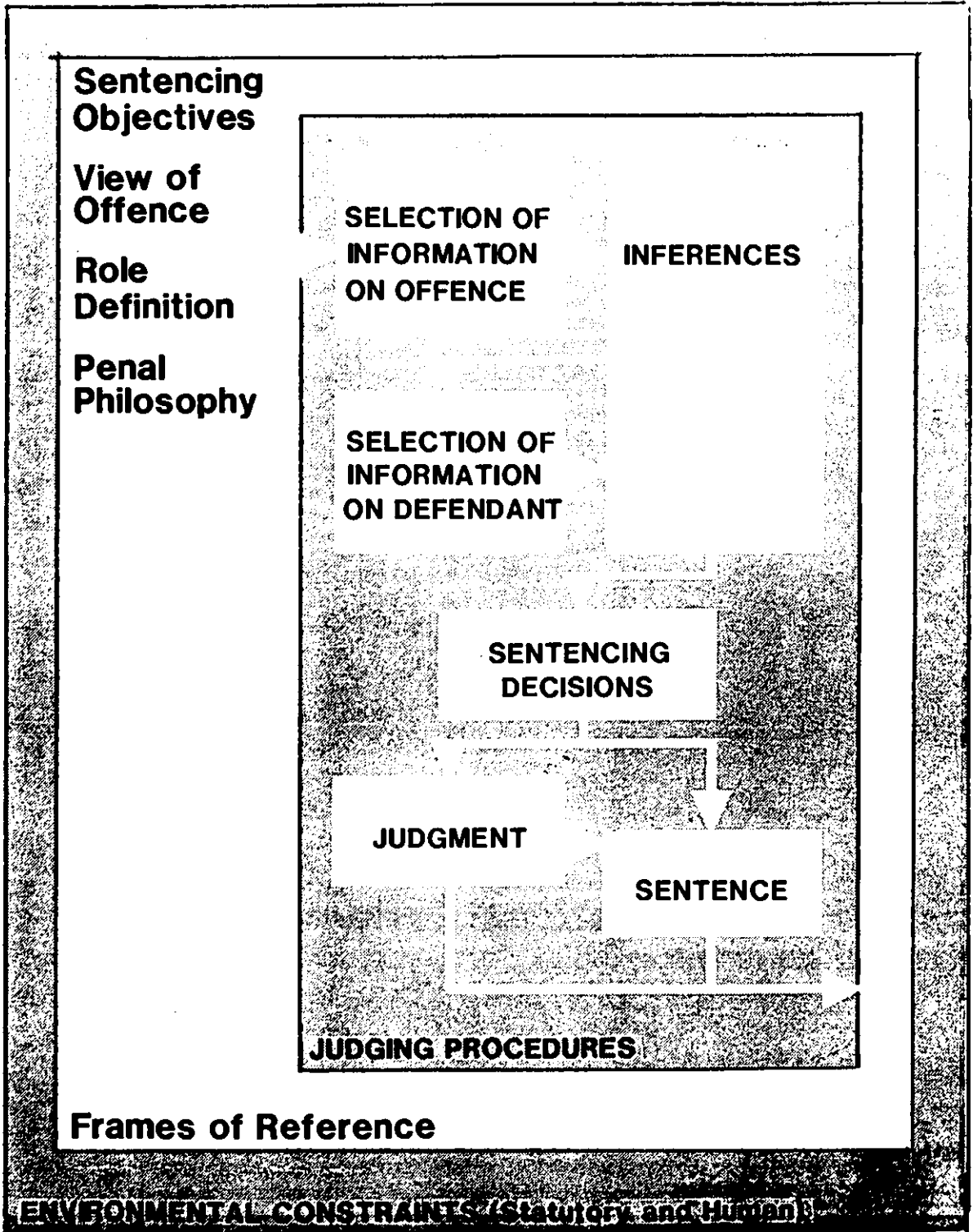


Figure 1 : The Sentencer's Cognitive Processes

due significance by identifying them as potential boundaries on the individual sentencer's search for evidence and truth. Some constraining factors are legislative, some are human, and others are related to temporal and bureaucratic demands.

Our original magistrates had expressed awareness of the possible effects of factors outside themselves. The laws of evidence determine the information that can be used as legitimate evidence, and parliament lays down statutory penalties. Intentions and abilities of prosecutor, counsel and witnesses expose or cloak pertinent details. One of our magistrate subjects observed, 'The facts are only as good as the people who give them. That's the problem in our area'. A skilled magistrate must recognise the limits imposed on him, and try to maximize the quality and quantity of information he uses. 'All you can do is push the sides out ... you are still constricted at some stage', was one magistrate's way of expressing his efforts not to be contained by external influences (Lawrence 1984).

External constraints, frames of reference and information-handling procedures interact on each other, and the model can trace input through the levels illustrated in the figure to judgment and sentence solutions. For example, a sentencing objective influences the information that is selected as relevant, and that information selection in turn affects inferences that can be made, and the nature and content of inferences determine the sentence that is the outcome.

As it stands, the model may look too rational and analytic to describe the swift, repetitive decisions made in lower courts. Its purpose is to act as a generalized prototype of the dimensions of a magistrate's cognitive work on a case, that allows us to postulate and investigate environmental and personal factors which are mediated and applied in practice. When applied to particular acts of judicial decision-making, the model provides a way of diagnosing the points where offence, offender and sentencer factors intersect, and how individual influences on outcomes are expressed.

Analyzing Sentencing Processes

In an initial study, the model was used to analyze the sentencing processes of two experienced magistrates and a chambers magistrate in a simulated sentencing exercise. The study was an examination of professional expertise and referred to the two men who had been on the bench for years as 'Experts One and Two' and the chambers magistrate as a 'Novice' (Lawrence, in press). The two representative cases reported here were amongst several taken from court archives.

A particular type of simulation technique was devised, called a 'chambers simulation' to reflect the environmental setting and the closeness of the sentencing simulation task to magistrates'

actual cognitive work and everyday working situation. Other jury and parole simulations of judicial processes of thought often have to use contrived tasks in laboratories, and their findings need heavy extrapolation to the courtroom (Konecni & Ebbeson, 1981). The information from actual case files was read to a magistrate in his chambers then handed across the desk as it would be in court. The magistrate worked through the file, verbalizing his thoughts, making comments and inferences freely, and requesting any extra information he wanted from the file in any order. Each participant said he was comfortable with the procedure, and was used to processing file data, and to receiving case details on the spot without preparation. Magistrates were asked how they would use pertinent information not on file, and then to work with the information that was available.

Each magistrate discussed his views of common crimes and sentencing objectives and processed cases over three separate interviews within a two week period. Although natural human sources of information and exchange were not present, the chambers simulation provided a way of getting verbal reports of magistrates' processing of typical cases, without interfering with sensitive court proceedings.

Audiotapes of the magistrates' on-line verbal processing of each case were analyzed as each statement in which a piece of information was mentioned and/or commented upon, to cover all the information attended and all inferences. Then attended information and inferences were reduced to their basic concepts to permit comparison of each of the three magistrates' handling of each case.

A scheme was developed for representing the structure of information use in the major concepts of the model. We will illustrate how the model works as a tool of analysis by describing and comparing three magistrates' processing of two simulation cases (drink driving and shop stealing). 'Henry' was a 51 year old homeless man who pleaded guilty to a charge of driving with the higher prescribed concentration of alcohol, (BAL of 0.280). 'Sarah' was a middle-eastern migrant who pleaded guilty to stealing goods worth under \$14 from a large city store. She had sufficient money with her to pay for the goods. Tables 1&2 lay out information selections and inferences expressed by the three magistrates while processing these two cases.

Each table shows magistrates' views of the offence and sentencing objectives at the top of the columns which then represent information use. Information selected about an offence is identified in rows 01 to 0o, and about a defendant in rows D1 to Dd. Inferences made about the information are shown in rows I1 to Ii together with identification of the information from which it was inferred. Sentencing Decisions are shown in rows Sd1 to Sdsd. A plus (+) in a row/column conjunction indicates that a subject made that statement. Reading down a column reveals the information-inferencing structure of an individual's

verbal reasoning. Looking across a row gives a comparison of the three men's information use.

Sentencing a Drink Driver

In the case of Henry the drink driver the experienced magistrates (Experts One and Two) differed from the chamber magistrate novice in their frames of reference for the case, and in the inferences they made about the available data. The three noticed and worked on similar information about Henry, although the experienced men made more use of the circumstances of the arrest. Expert and novice inferencing structures differed, with the experienced magistrates evaluating prior and possible penalties (I6 to I8).

They made more inferences than the novice overall, especially in relation to the offence (I1 to I4). The first expert also referred to the defendant's problems (I5). Sentences also were different. Experience and treatment objectives led the two experts to seek more professional information and alternative penalties to the novice's fine, which would automatically mean gaol. Both the practising magistrates wanted more information and were unwilling to sentence finally without it.

Looking down the three columns also shows individual reasoning processes. The first expert stated his commitment to an intervention and treatment goal. The second wanted to know if a family would be adversely affected by gaoling Henry, even though no family was mentioned in the file. Individualization was his ideal but time constraints sometimes meant using a tariff penalty with new offenders. In this case an individualized sentence coincided with the treatment approach of his colleague. The inexperienced novice's bureaucratic processing was revealed in his sparser inferencing structure and imposition of a monetary penalty.

If these men were following individualized styles, then the experienced men's treatment goals and the novice's bureaucratic approach should be able to be observed in other cases. On the other hand, if their approaches were artifacts of Henry's case, or of drink driving offences, then we should not anticipate that they would be consistent. For example, it would be significant to discover whether Expert One saw himself as intervening in the life-style of offenders. If that was his usual approach then we would want to know if such a role definition guided his perceptions to certain defendant characteristics, e.g. psychological problems.

The novice saw drink driving as a minor offence with a wide range of potential offenders. Would his bureaucratic concern with generating a sentence on a parity with general courtroom trends persist for cases with more information, and cases other than a traffic offence? In order to explore whether individual style manifested itself in verbalized processing, and to see if the effect of more information, the concepts of the model were

Table 1: Expert and Novice Magistrates' Processing of a Drink Driving Case

STATED FRAME OF REFERENCE Sentencing Objective	Expert One	MAGISTRATE Expert Two	Novice
	Treatment to prevent re-offence	Treatment to prevent re-offence	'Deterrence' (unspecified) Reasonable, parity penalty
View of Offence	Serious, danger to public	Serious, danger to public	Minor unless dangerous
INFORMATION SELECTION			
On Offence			
01. Blood Alcohol Level very high, .280	+	+	+
02. Circumstances of offence: Collision	+	+	.
03. Times of events: Last drink 9.30am, collision 11.25am	+	.	.
On Defendant			
D1. Previous offence in year, Blood Alcohol Level, .300	+	+	+
D2. Unemployed, homeless, living in motor vehicle	+	+	+
D3. Previous sentence: Heavy fine, \$600	+	+ heavy	+ heavy, \$600
D4. Unlicensed driver because disqualified	+	.	.
INFERENCE			
I1. All-night binge	+ from 01,03	.	.
I2. Defendant is alcoholic	+ from 01,02,D1,I1	+ from 01,D1	.
I3. Alcoholism, drunkenness cause of collision	+ from 01,I2	+ from 01,I2	.
I4. Defendant is danger to the public	+ from 02,I2	+ from 02,I2	.
I5. Defendant has other problems, no motivation for change	+ from 02,03	.	.
I6. Heavy fine would mean jail	.	+ from D2,D3	.
I7. Previous penalty was ineffective	+ from 01,D1,D3	+ from 01,D1,D3	.
I8. Jail would not deter	+ from I7	+ from I7	.
I9. No mitigation of penalty possible	.	.	+ from 01,D1,D3
I10. Last fine high by current court standards	.	.	+ from D3
SENTENCING DECISIONS			
SD1. Adjourn, ask for presentence, medical, social reports	+	+	.
SD2. Assess reports	+	+	.
SD3. Ask defendant for explanation of life circumstances	.	.	+
SD4. Penalty	drug clinic probation supervision three year disqualification	drug clinic or weekend jail and community service three year disqualification	fine, \$400 . three year disqualification

applied to a shopstealing case. Sarah's case allowed examination of the interactive features of magistrates' processing when more data were injected from a Presentence Report after the initial file material had been processed.

Sentencing a Shop Stealer

Again, the two experienced magistrates' initial sentencing objectives, and inferences were different from the novice's as shown in Table Two. The frames of reference of the experienced magistrates included the sentencing objective of preventing reoffence, an objective that was explicitly associated with their perceptions that there was too much stealing from stores. In ultimate costs to the community, the offence was more serious than Sarah's minor act of theft, although it was not considered grave. They both said they sought to prevent re-offence by treatment which would assist individual shop stealers to change their life-styles. In contrast, the chambers magistrate again described his task as devising a fine that would fit court norms. Shop stealers could be penalized with tariff fines, and did not elicit the kind of treatment approach he would use on offenders who needed help, for example, drug addicts. This view changed when the presentence report revealed that Sarah was under psychiatric care (shown at D 5 & 6, I8 & 9).

The novice selected less information for attention, and made fewer inferences (I1, I4 & I9). Expert One selected the most information from the files, mentioning legal and extra-legal details. Initially the novice only noticed that goods were taken from several parts of the store (O1), and he only extracted information about the mother's illness from the file (D4). Expert Two paid attention to legal details such as plea and prior offences more than to personal characteristics.

Both experts, but not the novice, mentioned that Sarah's plea of guilty would be acceptable, because she was represented by a solicitor and therefore had advice (I1). Expert One's attention to detail was sustained in the kinds of inferences he made about this shopstealer and his general expectations about her kind. He drew his own conclusions about Sarah's personal problems and emotional state, and her intention to steal the goods. Inferences I2, I3 and I4 show that he had a patterned expectation which was activated as soon as the charge was read, and the defendant's name, sex and age revealed. She would be an ordinary shopstealer (I4) and

She's undoubtedly married. Yes, and probably got two children, and I'll be told all this later. There's an immediate suspicion that things aren't good at home and that she's in fact, a repressed housewife which may be the root of the offence.

(Lawrence, in press)

Table 2: Expert and Novice Magistrates' Processing of a Shoplifting Case

STATED FRAME OF REFERENCE Sentencing Objective	Expert One	MAGISTRATE Expert Two	Novice
	Treatment to prevent re-offence	Treatment to prevent re-offence	'Deterrence' (unspecified) Reasonable, parity, middle-range fine
View of Offence	Economic cost to public, prevalence	Economic cost to public, prevalence	Not an offence for treatment (change after D6)
INFORMATION SELECTION			
On Offence			
O1. Took goods from several parts of store	+	.	+
O2. Goods of minor value, \$14	+	.	.
On Defendant from Files			
D1. Plea of guilty	+	+	.
D2. Represented by solicitor	+	+	.
D3. 34 year old migrant woman, poor English	+	.	.
D4. Mother's illness	+	.	+
On Defendant from Presentence Report			
D5. There was a previous offence	+	+	+
D6. Depression, under psychiatric treatment	+	+	+
D7. Outgoing, intelligent	+	.	.
D8. Mother's death	+	.	+
INFERENCE			
I1. Plea acceptable because represented	+ from D1,D2	+ from D1,D2	.
I2. Average, ordinary shoplifter	+ from O1 (assumption)	.	.
I3. Housewife with home problems	+ (assumption, changed)	.	.
I4. Deliberate theft, not forgetfulness	+ from O1,D1	.	+ from O1
I5. Long-standing problem, caused by life-style	+ from O1,D5,D6	.	.
I6. Inconsistencies in Presentence Report	+ (D6 vs D7,D4 vs D8)	.	.
I7. Police report deficient	.	+ from D5	.
I8. No sympathy possible	.	.	+ from O1,I4
I9. Mitigating circumstances exist	.	.	+ from I8,D6 (change)
SENTENCING DECISIONS			
SD1. Adjourn, ask for presentence, psychiatric reports	+	+	.
SD2. Assess reports	+	+	.
SD3. Ask police about mother's illness	.	.	+
SD4. Penalty	bond, 3-5 yrs probation supervision psychiatric treatment	bond probation supervision psychiatric treatment	bond probation supervision psychiatric treatment

He too, had to change his assumption when the Presentence Report revealed that Sarah was a single Lebanese migrant. But he had another set of expectations for that. 'Why was she staying in Australia if she was a single, middle-eastern woman, and alone?' In contrast Expert Two focused on legal information (I1, I7), using the Presentence Report to confirm his early decision that if Sarah was under psychiatric care, he would order its continuation (SD4). He was perturbed that the police report had not documented a prior offence (I7).

The novice's inferences clearly demonstrate the interactive nature of the sentencing process, and how new information can be effective. His inferencing and solutions were changed by extra information. Because Sarah took goods from several different parts of the store, he induced deliberate theft (I4). He could have no sympathy for her (I8). However once he knew of her illness, he interpreted that as a mitigating factor, and consciously adapted his approach. The switch is shown at I9 and in his view of the offence.

The experienced magistrates differed from the novice in their early request for a presentence report that they would assess (SD1,2), instead the novice said he would seek special information from the police officer in court, as he had done in Henry's case (SD3), although the additional information was influential (SD4).

In summary, the two cases revealed several places where experience made a difference, and where frames of reference and quality of information can influence the process of reasoning. The experts' intentions and perspectives were different from the novice's and influenced the types of inferences they made about case details. They saw the defendants as individuals to be dealt with according to their circumstances.

The chambers magistrate worked from a tariff approach which paid lip service to deterrence, but actually defined outcome penalties against his own intention of keeping within court norms. In that sense, these data echo and may help explain Bond & Lemon's evidence that novice lay magistrates initially are severe. With that kind of punitive goal, our novice had little need to make inferences about causes of offences beyond determining any mitigating circumstances which would reduce standard penalties.

Major experience/inexperience differences occurred at the levels of what magistrates brought to the cases and their reasoning. Experts had more patterned approaches, and were directed by their treatment objectives to assess cause of the defendant's behaviors, and their prospects of responding to treatment and individualized approaches. Although the novice knew and responded to ritualized evidence-gathering procedures, he seemed to work with single details.

The judicial system has no simple criteria for assessing expert behaviour. A magistrate whose decisions are seldom taken to appeals courts may be more inefficient than another with frequently challenged judgments. Imposition of standard tariff penalties like the novice's, probably would not provoke strong reactions. Peer evaluation is not common. There were consistent trends in experienced sentencers' approaches, as well as indications of personal style.

Further Applications

The usefulness of the model's concepts and tabulation scheme have extended beyond simulation exercises. Two actual defended cases were examined in court where Lawrence attended for two full day cases and questioned the magistrate before and after the hearing, and in the lunch break. Questions and courtroom observations followed the concepts of the model. The defended cases involved charges of dangerous driving causing death or grievous bodily harm.

Analysis revealed consistencies in the magistrate's objectives across the two hearings, his view that the crimes focused on the single issue of establishing whether the defendant actually drove dangerously, and his use of evidence to meet his objectives. The investigation of actual court proceedings, with focus on the magistrate's cognitive work is reported in full in Lawrence (in press). For our present purposes, extension of the concepts and relationships of the theoretical model to real-life proceedings strengthens the argument for looking at the individual factor. But more, it gives encouragement to the search for methodologies which can break out of the confines of laboratories and go into court.

Cognitivists have a penchant for validating their models by computer simulations of decision-making, instead, we have moved closer to natural environments. In addition, the robust analyses of outcomes of the same magistrate's decisions feeds into the interpretive model, thus taking the combined analyses beyond black boxes, and also beyond aseptic mental gymnastic exercises.

Work in Progress: Combining Archival and Process Analyses

The multivariate and cognitive models are being used separately, then will be combined to converge on the individual magistrate factor in sentencing patterns for cases of drink driving, shop stealing and minor drug offences. Data on comprehensive approaches to sentencing trends and problems require evidence of outcomes of sentencing behaviours and of the cognitive processes by which those sentences are generated. Working from Homel's multivariate model, archival evidence is being obtained from case files on the three offences at two courts with more than one magistrate. A common problem of archival research involves early

bureaucratic decisions to limit recording of information for the sake of efficiency and economy. Repeated trials have convinced us of the need to collect extensive and high quality information from court files. For example, it is critical to record all offences and charges that are concurrent with drink driving, stealing or drug offences because magistrates commonly distribute a notional penalty across the total number. In addition, as Homel's previous study demonstrated, it is important to record detailed data on previous offences, because these influence current sentences. Multivariate analyses of shop stealing cases are confirming the existence of a sentencer's style factor along the lines found in the drink drive data.

Concurrently, Lawrence has been conducting indepth interviews with each of the magistrate and attending list courts. Interviews involve at least two sessions on magistrates' views, objectives and use of information on the three offence types. A feature of the approach will be a return visit for comments of the participating professional, and for feedback on, and extension of original interview material. This method of collaboration with participants has been used effectively with other professionals, e.g., teachers and administrators. It gives participating professionals opportunity to make their own observations on the data, and consequently makes the information more viable than single interviews where interpretation is confined to the researcher, answering some of Hogarth's disquiet. The more traditional theoretical approaches that we have reviewed seem to be either ideologically blinkered and single-minded, or focussed on a wider canvas too far removed from the actualities of list days in courts of petty sessions. Yet each has some insights to offer, if those insights can be related to the legal, human and individual dynamics of the courtroom. The strength of our descriptions and explanations lie in the grounding of concepts in magistrates' own accounts (Lawrence and Browne, 1981).

Conclusion

Taking the individual magistrate factor seriously involves dealing with the cold evidence of sentencing disparity, the realities of sentencing styles and conditions under which magistrates operate, and the individualized meanings and inferences which are the stuff of sentencing processes. Our own and other studies indicate several areas for attention if we are to assist magistrates towards consistency on the one hand, and perceptive recognition of the unusual on the other hand.

The quality of information available to the sentencer can vary enormously, and is significantly related to the availability of other services, for example, duty probation officers. Given good quality evidence, magistrates need to satisfy their own and community expectations. That task requires constant inferencing. Information selection and use are cognitive skills which can be

enhanced with experience, awareness and knowledgeable reflection. The significance of self-observed and less consciously held framing tendencies cannot be overlooked, although magistrates are not alone in that regard. Researchers and court commentators may be insufficiently aware of their own mental sets. However, if Bond and Lemon's lead can be followed, suitable initial training should be considered as one aspect of selection procedures. Our burden is that handling information and monitoring personal frames and sentencing styles should be the focus of training and in-service exercises.

In addition, Homel's drink driving study leads to the suggestion that the most powerful predictors of disparity can be identified and fed back to sentencers as a way of modifying inconsistent trends. Given the bureaucratic pressures upon individuals it may be possible to provide them with short, simple guides to central and extreme sentences for similar offences. For example, for drink driving cases, a two way grid of previous convictions and blood alcohol level could simply show consistent and disparate penalties from single and multiple courts. This type of aid may provide an extra dimension to inferencing. What we are suggesting, then, is that those interested in sentencing reform address ways of pushing out the boundaries on professional decision-making that magistrates themselves have reported.

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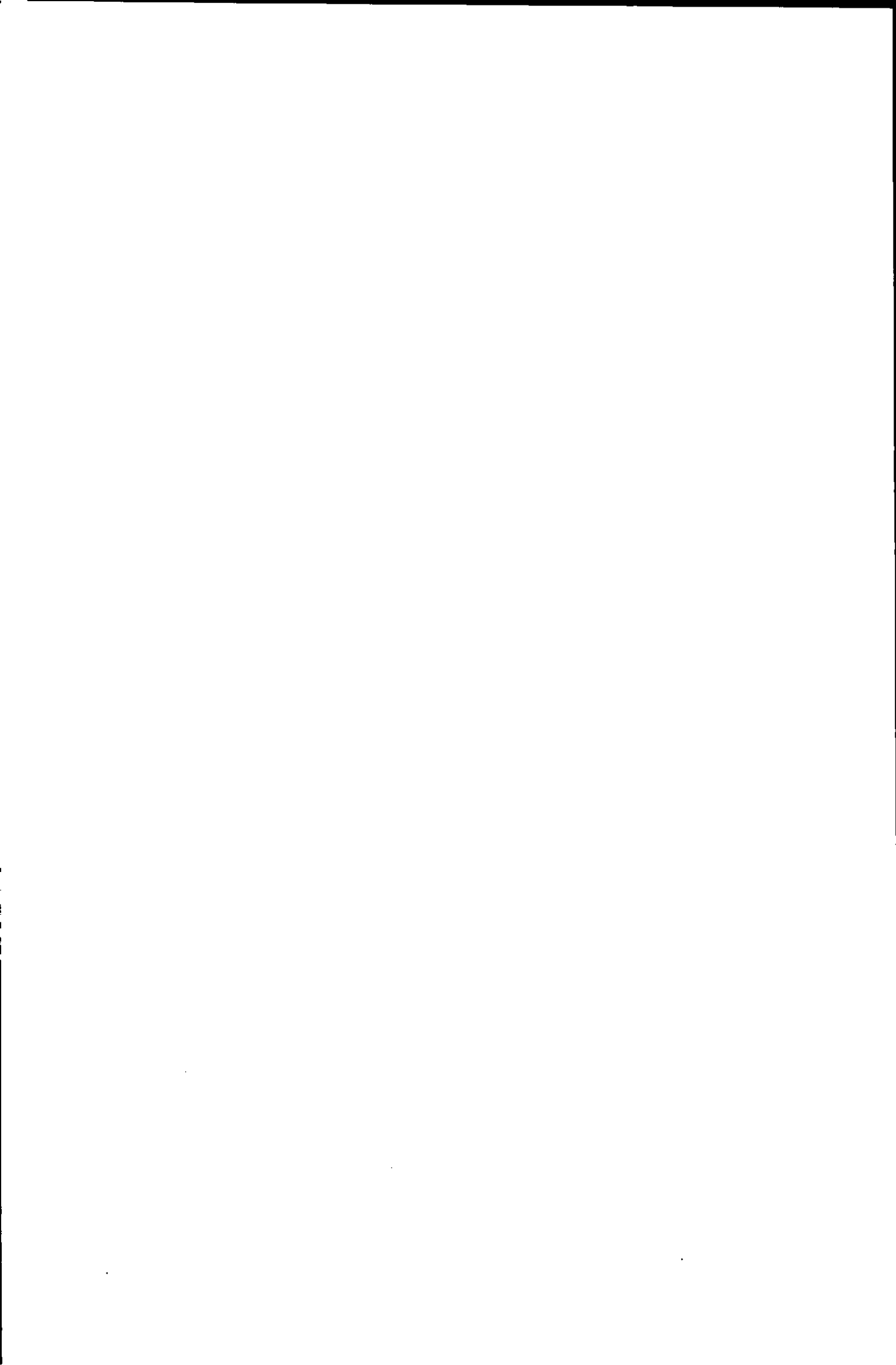
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SENTENCING IN MAGISTRATES' COURTS

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A few years ago as part of a continuing legal education program for NSW Magistrates a sentencing exercise was conducted at Bathurst, NSW. Eighteen Magistrates were invited to attend. They were divided into three groups of six Magistrates. Each Magistrate was given an identical set of cases to consider. These were in the main, actual cases which had been heard in the previous few months at the Central Court, Sydney. The material given to each Magistrate included photocopies of the actual charge sheets, the prosecution 'facts sheet' which is read out in Court on a plea of guilty, the list of previous sentences, if any, and any pre-sentence report, psychiatric report, references as to character, etc. The Magistrates at the seminar thus had the same material as was available to the Sentencing Magistrate, with the exception that they did not have whatever was put orally to the sentencing Magistrate in mitigation by the defendants or their legal representatives.

The seminar Magistrates were asked to consider the cases in their separate groups of six, to try to achieve consensus as to the appropriate sentences, and to report back to a plenary session when the sentences would be collated, compared and discussed.

One of the cases used was that of Denise:

Prior Record - Denise Age 25

Charge - Stealing one pair of sandshoes and one pair of sunglasses, of the total value of \$38.94, the property of Waltons Store Pty Ltd.

Prior Record:

NZ Childrens' Court at age 15, receiving placed under supervision for one year.

NZ Magistrates' Court, at age 22, for false pretences (15 charges) and forgery (15) involving cheques for amounts under \$100, sentenced to non-resident periodic detention for six months with probation for 18 months.

NSW Magistrates' Courts at age 20, stealing food from retail store, fined \$100.

At age 20, stealing food from retail store, sentence deferred on entering a recognisance to be of good behaviour for two years and accept Probation Service supervision.

At age 23, stealing from retail store, fined \$100 and sentence of imprisonment deferred on entering recognisance to be of good behaviour for three years and accept Probation Service Supervision. At age 25, stealing cigarettes from counter of retail store, fined \$200.

Pre-Sentence Report:

Response to first period of supervision was unsatisfactory but response on second occasion had improved.

Defendant single, residing as a live-in housekeeper without salary, receiving a Supporting Mother's Benefit. The third of six children. Happy family life until father died when she was 10. Mother formed a relationship with a younger man. Defendant's attitude to him was 'rebellious'. She remained in close contact with her family and was extremely close to her mother in New Zealand.

Left school at 14. Cared for youngest child, who had a medical condition, while her mother worked. Later worked as a waitress and clerical assistant.

At age 17 gave birth to a son, as a result of a long-term liaison with a young New Zealand man. Relationship terminated two years ago. Has custody of son and appears to be a loving and caring mother.

The probation officer in his assessment spoke of her as 'intelligent', pleasant but complex ... 'basic insecurity...' 'Naive and tends to view life unrealistically ...' 'voluntarily sought assistance at Community Health Centre ...' 'is gaining some insight into her problems ...' 'there is no doubt she is extremely remorseful about the offence.' The officer suggested an adjournment for several months under supervision, to allow for a more positive assessment.

Psychiatrist's Report - obtained through the Community Health Centre. 'She was quite open in stating that the incident occurred at a time of financial difficulty and she did not feel that there was any major psychological reasons which could explain her behaviour'. 'But she had been anxious and depressed since injury to her seven year old son in a motor vehicle accident and his prolonged hospitalisation'. 'She is obviously very attached to her child and I have every reason to believe

that their relationship is close and healthy. At his age, he would be particularly vulnerable to separation from his mother. Her mental state may have contributed to her behaviour but, more importantly, the integrity of the mother-child relationship should be maintained if possible - particularly for the child's welfare.'

The following sentencing options were available in respect of Denise.

1. Having regard to good character, age, health, circumstances of offence, or other reason, without proceeding to conviction, either dismiss charge or discharge defendant on entering recognisance to be of good behaviour for a stated period and appear for conviction and sentence if called upon (Section 556A Crimes Act, 1900 NSW)) (and comply with Probation Supervision).
2. Convict, but defer passing sentence on recognisance to be of good behaviour for a stated period and come up for sentence if called upon (and comply with Probation supervision) (Section 558 Crimes Act, 1900 (NSW)).
3. Fine not exceeding \$1,000.
4. Community Service Order - not exceeding 200 hours.
5. Periodic (weekend) detention not exceeding 12 months.
6. Imprisonment not exceeding 12 months.
7. Imprisonment not exceeding 12 months plus fine of \$1,000.

Actual Sentence

The sentencing Magistrate imposed a fine of \$600 and allowed some months for payment.

This case was selected for use at the sentencing seminar as it was thought to illustrate an outrageously inappropriate penalty having regard to the defendant's means.

Seminar 'sentences'

The best result Denise would get from these 'sentencers' was three months periodic detention, and one group would have sentenced her to 12 months gaol.

- Group A - 3-6 months periodic detention.
 B - 12 months imprisonment, 6 months non-parole period.
 C - 3 months imprisonment.

When challenged, in discussion, as to the appropriateness of a sentence of imprisonment for this sole parent, for stealing less than \$40 worth of goods from a retail store, the 'sentencers' pointed to her prior record, the high incidence of shoplifting, the need to deter others and 'the seriousness of such offences, which increase the cost of goods for all of us'.

A number of questions arise. How was it possible for Denise to be fined \$600 for stealing goods worth \$38.94? How could she be gaoled for 12 months? Part of the answer is that section 501 of the Crimes Act 1900, provides a penalty for larceny in summary proceedings, where the value does not exceed \$2,000 or 12 months imprisonment, or \$1,000 fine, or both.

How did the sentencing Magistrate think she could pay a \$600 fine when her only income was a supporting mother's benefit? Did the seminar Magistrates consider the plight of her child when deciding on gaol sentences, even periodic detention, for Denise? What consideration did they give to the psychiatrists' opinion that the child would be particularly vulnerable to separation from his mother and that in the interests of his welfare the integrity of the mother-child relationship should be maintained? Did they consider the cost of keeping her son in an institution 'in care', where he probably would have gone? Why didn't they explore the possibility of a community service order? What did they hope to achieve by sending her to gaol? Do they really think their sentences would have any effect at all on the incidence of shoplifting? Would they transport Denise to Van Dieman's Land for life if they had the power?

It may be apposite to set out here some extrapolations from the 1979 National Survey of Judges by the Australian Law Reform Commission.

In New South Wales,

- . 1 out of 3 Magistrates favoured more imprisonment
 Nearly 1 in 2 Magistrates favoured no change
 Nearly 4 out of 5 Magistrates favoured either more gaol
 or no change.
- . Nearly 1 in 5 Judges favoured more imprisonment
 Nearly 1 in 2 Judges favoured no change
 More than 3 in 5 Judges favoured either more gaol or no change
- . More than 1 in 2 Magistrates would restore hanging for some offences
 More than 2 in 5 Judges would restore hanging for some offences
- . 15 per cent of Magistrates would restore corporal

punishment for some offences and some offenders
 10 per cent of Judges would restore corporal punishment
 for some offences and some offenders

- . 4 out of 5 Magistrates believed fine defaulters should automatically be imprisoned
- . Nearly 3 out of 4 Magistrates opposed statutory requirement to consider defendant's means when fining 1 in 2 Judges opposed statutory requirement to consider defendant's means when fining
- . 4 out of 5 Magistrates opposed legislation to set out principles and guidelines for imposing gaol sentences
- . Nearly 3 out 4 Judges opposed legislation to set out principles and guidelines for imposing gaol sentences

That survey shows that the sentencing attitudes of New South Wales Magistrates and Judges are harsh, autocratic and resistant to suggestions of control of sentencing discretion. The same can be said for the Survey results as to judicial sentencing attitudes Australia-wide.

The attitude of NSW Judges and Magistrates are at least partly responsible for the higher imprisonment rate in NSW compared with Victoria. Those States may be regarded as homogenous so far as population is concerned. There is no breakdown in law and order in Victoria. Nobody would say there is more criminal activity there or that it is less safe than NSW. It appears that more people are imprisoned in NSW than necessary.

In NSW a number of strategies have been pursued over the years with the object of achieving greater rationality and consistency in sentencing. For at least 20 years most people appointed as Magistrates have, in addition to the usual legal qualifications, completed a course in criminology and penology, usually the Diploma in Criminology of Sydney University.

Residential Seminars have been held, for about 18 Magistrates at a time, for a week's duration. The emphasis has been upon sentencing. Sentencing exercises have been conducted, as described above. Participants have visited gaols and institutions. They have spoken with prisoners and ex-prisoners. They have been shown films such as 'Stir'. They have been addressed by Probation and Parole staff concerning the range of services available to Magistrates from that service. Community Service Orders and periodic detention as alternatives to imprisonment have received emphasis. Magistrates have been addressed by critics of imprisonment of status and credibility, such as Mr Justice Nagle and Mr Justice Stewart.

Pre-sentence reports are readily available from a much augmented Probation and Parole Service. Duty probation officers are available at some courts. They can assist the Magistrate in innumerable ways, but particularly in interviewing defendants on the spot, advising whether in their opinion a pre-sentence report is indicated, perhaps giving a verbal report, providing referrals to appropriate agencies, assessing defendants' suitability for a community service order, etc. The Drug and Alcohol Court of Assessment Programme (DACAP) has been available to a number of courts for some years and is proliferating.

Conferences of Magistrates are held annually. Sentencing and alternatives to imprisonment are recurring themes.

For all this, sentences like those in Denise continue to occur.

What can be done?

There are proposals to establish a National Judicial College for judicial officers. The course might include a critical examination of sentencing practices. Such a college and course would have value but an individual judicial officer would attend for a few weeks only, perhaps once or twice in a judicial career. Not much attitudinal change would be likely. It is also likely that such a College would be largely under the control of judges, and given established judicial attitudes, no radical change in sentencing attitudes would be likely.

It is proposed to establish a Sentencing Council. The Australian Law Reform Commission has said:-

... the task of formulating sentencing guidelines which are likely to work can only be undertaken by an independent body which commands the respect of the courts and enjoys the involvement of judicial officers. The Sentencing Council of Australia should comprise nine members, five of whom should be judges. The presence of this judicial majority among the membership of the Council would assure the continuing independence of the judiciary and its pre-eminence in matters of sentencing. (Sentencing of Federal Offenders ALRC Report No. 15, p.270).

The Report envisages the Sentencing Council formulating sentencing guidelines would be designed to assist, not coerce sentencers.

A Sentencing Council consisting of judicial officers has been foreshadowed by the Australian Institute of Judicial Administration. The dominance of judicial officers on these Councils and the avowed primary objective of achieving uniformity are likely further to entrench current conservative attitudes.

Dr Andrew Ashworth in his paper 'Criminal Justice, Rights and Sentencing' at this seminar cited the Advisory Council on the Penal System in England: 'they sought to "eschew all fresh and controversial value judgments" by resting their proposals "squarely upon the contemporary practice of the courts"'.

It appears that the only path to sentencing reform is through legislation. No significant change in sentencing attitudes can be expected so long as judicial officers enjoy their present broad discretion and relative freedom from justifying their sentences.

Many people have said that imprisonment should be a sentence of last resort. Lip-service is paid to that statement, but it is often ignored in practice. If it is to become a canon of sentencing practice, it must be by legislation. It is proposed therefore, that legislation should declare that imprisonment is a sentence of last resort.

It is submitted that, for imprisonable offences at least, courts should be required to consider all sentencing options in a particular case in an ascending order or severity, giving reasons in writing at the time of sentence why a less onerous sentence is not imposed before passing on to a more onerous option, giving reasons in writing for the eventual sentence.

As Boehringer and Chan have pointed out, there is a case for the reduction of maxima for all offences and abolition of the use of minima.

So long as it is possible to fine a petty shop-lifter up to \$1,000 or sentence to gaol for up to 12 months, or both, sentences like those in Denise's case, above, will occur. The same can be said of penalties under the Poisons Act, unchanged in the Drug Misuse and Trafficking Act, 1985, for possession of or smoking marihuana: A fine of \$2,000 or 2 years imprisonment or both. Although most magistrates impose a small fine, and this appears to meet community expectations, some magistrates feel gaol sentences are justified, particularly for a second offence, because they have been given the power to gaol for 2 years.

In New South Wales an appeal from a Magistrate's sentence lies, by way of re-hearing, to the District Court. The defendant only may appeal. (There is no Crown Appeal on sentences, even for the vast number of indictable offences now heard summarily by Magistrates with the consent of defendants following devolution of jurisdiction by various amendments to s.476 of the Crimes Act). Magistrates do not look to the District Court for guidance on sentencing. Magistrates generally regard the sentences of District Court Judges on appeal as idiosyncratic and not

providing a coherent guide to sentencing in Magistrates Courts. Magistrates are not directly informed of the appeal result and may never know. The whole area of sentencing appeals from Magistrates in NSW cries for reform.

WORKSHOP - SENTENCING IN MAGISTRATES COURTS

Three cases were put to the seminar participants.

Case 1 - Denise - Details of this case are set out earlier in this paper.

Case 2 - Lindy - (Details given below)

Case 3 - Alex - (Details given below)

Cases 1 (Denise) and 2 (Lindy) were actual cases heard at the Central Court, Sydney. Case 3 was composed to illustrate the sentencing difficulties in some drink-driving cases in rural areas.

Case 2 - Lindy, Age 19

Charges

1. Did supply a prohibited drug, diamorphine (heroin).
2. Goods in custody reasonably suspected of being stolen or unlawfully obtained, namely, money to amount of \$290.
3. Possess Indian hemp.

Facts

Supply Heroin - Police arrested a man R. at Bondi; he was in possession of 2 small bags of heroin with a total weight of 13 grams. Defendant had been seen in a vehicle with R. and was nearby when he was arrested. She admitted she had set up a 'buy' in which R. was to supply another man with heroin. She was to receive \$300 from R. as her fee. She intended to use the money to purchase heroin for herself as she was currently using about 2 grams a day.

Goods in Custody - \$290 was found in her purse. She said it was part of a \$300 fee from a 'buy' she had arranged earlier that day.

Possess Indian hemp - In the police vehicle she was seen to secrete a small plastic bag of Indian hemp. She said it was hers, for her own use.

Prior record - possess Indian hemp, s.556A recognisance (conditional discharge without conviction) granted 18 months before. Terms of the recognisance would not expire for another 18 months.

Pre-Sentence Report - Defendant has been under supervision on her current bond. The bond required her to live with her parents and she was living with her mother. Her father, a professional man, had died soon after her last court appearance. She had been reporting fairly regularly to the Probation Service. The youngest of 3 children, she had a comfortable home life. Educated at a private school. Obtained a good pass in matriculation. Left school at 17. Was unemployed for a year and then obtained casual work as a telephonist and sales representative. Admitted heroin use, up to three injections a day, but not regularly and mainly because of boredom. 'Impresses as a friendly, intelligent and unconventional young woman.' 'Has rejected her parents more conventional values but the fact that she has moved home may indicate some change ...' 'Her mother's patience was diminishing but she now accepted her back into their home.'

PSYCHIATRIC REPORT - LINDY

Extracts: No evidence to support she suffers or has ever suffered from any form of formal psychiatric illness or any form of neurotic illness.

Appears to be of average or above average intelligence. No personality disorder. Resents strongly her parents' and now her mother's constant interference and constant attempts at directing and advising her; she feels utterly frustrated and impotent in her attempts to become a person in her own right.

Excessive punishment at this stage would be seen by the accused as further 'triumph' against her mother and against her father's reputation: it would seem that there would be little point in alienating the accused though some form of legal surveillance will be essential. Attendance at a psychiatrist for 'psycho-therapeutic' sessions would be an advantage, leaving open channels for further family interviews aimed at further realistic and effective family reconciliations.

LINDY - SENTENCING OPTIONS

1. Section 556A dismissal or recognisance.
2. Section 558 recognisance.
3. Fine of up to \$2,000 for each of drug charges, \$400 for goods in custody. Community Service Order, up to 300 hours for drug charges, 100 hours for goods in custody.

4. Periodic (weekend) detention not exceeding 18 months for drug charges, 6 months for goods in custody.
5. Imprisonment not exceeding 2 years for each of drug charges, 6 months for goods in custody.
6. Imprisonment as in 5 plus fines as in 3.
7. Cumulative sentences of imprisonment, not exceeding 3 years in all.
8. Cumulative imprisonment as in 8, plus fines as in 3.

Case 3 - ALEX, Age 40

Address: Tullibigeal

Charge: PCA

Facts: Defendant was angle-parking his car in main street of Condobolin outside cafe at 8 pm when he collided with another car which was correctly parked, causing damage to headlight and fender of other car. Police were called. Breath analysis of defendant showed reading of .175. Defendant stated that he had been playing bowls during the afternoon and had a few beers at the Club.

Previous Record: Driving for 23 years. 3 speeding fines, last 4 years ago. Fined 2 pounds in 1962 for after-hours drinking.

In mitigation it is submitted: Defendant is a farmer and grazier on a comparatively small property 65 km from Condobolin. He is married with 3 children, eldest is 14 and attends high school in Condobolin, and the others attend primary school in Tullibigeal. It is put that any suspension of licence or disqualification would cause extreme hardship for these reasons: He has to drive children 15 km from his property in Tullibigeal to Condobolin. No neighbour can drive the children. Defendant's wife does not have a driver's licence. She tried to get a licence years ago but repeatedly failed the test. Her aged mother lives with them and needs to attend Condobolin for medical attention once a fortnight. The general store in Tullibigeal is very run down and defendant needs to go to Condobolin regularly for supplies. He also has to carry stock and produce. He has to drive his tractor along public roads occasionally to get from one part of his property to another. There has been a succession of poor seasons; the property is heavily mortgaged; the defendant has been operating an overdraft for running and household expenses. He has no employees.

Alex - Sentencing options

1. Section 556A dismissal or conditional discharge on recognisance. USE OF THIS SECTION AVOIDS CONVICTION.
2. Section 558 recognisance.
3. Fine \$1,500.
4. Community Service Order, not exceeding 200 hours.
5. Periodic detention not exceeding 9 months.
6. Imprisonment not exceeding 9 months.
7. Imprisonment not exceeding 9 months, plus fine not exceeding \$1,500.

Disqualification

IF DEFENDANT IS CONVICTED, he is automatically disqualified from holding a driver's licence for 3 years. The Magistrate may reduce this, but no lower than 6 months.

IS USE OF SECTION 556A WARRANTED?

SENTENCES

Sentence of the Magistrate in the actual case at Central Court:

Case 1, Denise - Fined \$600.

Case 2 - Lindy

Supply Heroin: Deferred sentence s.558 recognisance for 3 years, subject to Probation and Parole Service supervision and condition she receive counselling for drug addiction.

Goods in custody]
Possess Indian hemp] Fines totalling \$400

Case 3 - Alex

This is a fictitious case.

Sentences of the Magistrates at Bathurst sentencing seminar

Case 1 - Denise

- Group A - 3-6 months periodic detention
 B - 12 months imprisonment, 6 months non-parole period
 C - 3 months imprisonment

Case 2 - Lindy

Group A - 12 months period detention

B - Supply heroin - 12 months gaol
 Goods in custody - 3 months gaol
 Possess Indian hemp - 3 months gaol
 ALL concurrent
 No non-parole period

C - 6 months gaol for supply. Fines totalling \$500 for other charge (1 dissenter in this group would defer sentence on s.558 recognisance with Probation supervision).

Case 3 - Alex

No group could agree on the sentence. Of the 18 Magistrates, half would convict and fine Alex on amounts ranging from \$150 to \$400 and disqualify him for the minimum period of six months, and half would, under s556A refrain from conviction, so that he could retain his licence.

Sentences of the participants in Sentencing workshop at Australian Institute of Criminology, Canberra

There were 49 respondents. Their stated professional backgrounds were as follows:-

Practising lawyer:	20
Judges:	5
Magistrate:	6
Police:	3
Academic/Criminologist:	8
Probation:	3
Corrections	1
Bureaucrat	1
Unstated	1

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Case 1 - DeniseSentence -

S.556A	6
558	26
Fine	3 (Range \$75 - \$200)
Fine and S.558	1
CSO	12 (Range 50 - 200 hours)
Periodic detention	1

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Comment

All Judges would defer sentence under S.558. 2 magistrates would defer under S.558, 1 would fine and 3 would impose Community Service Orders. 2 of the 3 police would give a lesser sentence than 3 of the 6 magistrates.

CASE 1 - Denise

Disposition by sentencers background

	556A	558	Fine	Fine & 558	CSO	PD
Lawyer	3	10		1	6	
Judge		5				
Magistrate		2	1		3	
Police		2				1
Academic/ Criminologist	1	3	2		2	
Probation	1	1			1	
Corrections		1				
Bureaucrat		1				
Unstated	1	1				
	6	26	3	1	12	1

CASE 2 - LindySentence

No response ('no time')	1
S.556A	1
S.558	7
Fine	1
Fine and 558	1
CSO	27 (Range 500-300 hours)
PD	5 (Range 6-12 months)
Imprisonment	6 (Range 6-24 months)

Comment

The responses covered the whole sentencing spectrum from S.556A to 2 years gaol.

Disposition by sentencers background

	556A	558	Fine	Fine & 558	CSO	PD	IMPT
Lawyer	1	2	2		13		3
Judge		2			1	1	1
Magistrate		2			2	2	
Police					2	1	
Academic/ Criminologist				1	5		1
Probation					2		1
Corrections					1		
Bureaucrat					1		
Unstated		1					
	1	7	1	1	27	5	6

CASE 3 - AlexSentence

S.556A	31
S.558	5
Fine	10
CSO	3

	49

Comment

Four of the five Judges, 15 of the 20 lawyers, two of the three police, but only one of the six magistrates would avoid convicting Alex, so that he could retain his driving licence.

Disposition by sentencers background

	556A	558	Fine	CSO
Lawyer	15	3	1	1
Lawyer	4		1	
Judge	4		1	
Magistrate	1		5	
Police	2		1	
Academic/ Criminologist	4	2	1	
Probation	1		1	
Corrections	1			1
Bureaucrat	1			
Unstated	2			
	31	5	10	3

ADDENDUM

Shortly after the presentation of this paper Mr Anderson placed the same three cases (Denise, Lindy and Alex) before some 84 New South Wales magistrates at their Annual Conference in 1986. The results were as follows:

Denise

<u>Sentence</u>	<u>Per cent</u>
1. Imprisonment from 3 to 6 months	25
2. Periodic detention for 3 to 6 months	15
3. CSO (100 to 200 hours)	37
4. s.558 recognisance	8
5. Griffith's bond (adjournment for 6 months on conditions)	15
	100

Lindy

<u>Sentence</u>	<u>Per cent</u>
1. Imprisonment from 3 to 6 months	70
2. Periodic detention for 3 to 6 months	8
3. CSO (100 to 200 hours)	1
4. s.558 recognisance	13
5. Griffith's bond (adjournment for 6 months on conditions)	8
	—
	100
	—

Alex

<u>Sentence</u>	<u>Per Cent</u>
1. s.556A	40
2. Convict, fine and disqualify	60
	—
	100
	—

THE SENTENCING COUNCIL - REVISITED

The Hon. Justice M.D.S. Kirby CMG*
President of the Court of Appeal
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THE PROPOSAL FOR A SENTENCING COUNCIL

In its interim report Sentencing of Federal Offenders¹, 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 Control Act 1984² and the establishment of the U.S. Sentencing Commission in October 1985³.
- . 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, where inadequate or unsuitable punishments are imposed. What is needed is 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 exist 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 from 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 United States 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 this⁴.

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 has come, in my opinion, to resuscitate the proposal and, as in 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 '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.⁵ 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.

NOTES

- * President of the Court of Appeal, formerly Chairman of the Law Reform Commission. Personal views only.
- 1. Australian Law Reform Commission (1980), Sentencing of Federal Offenders, A.L.R.C. 15 (Interim), 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, 18, April 1986, 1.
- 4. The Third Branch, 18, March 1986, 6.
- 5. For details on the operation of the system see Kirby, M.D., The Future of Sentencing, 47/83, paper for Conference of Stipendiary Magistrates, Sydney, N.S.W., 1 June, 1983.

AN EVALUATION OF JUDICIAL MODELS FOR SENTENCING GUIDELINES¹

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This chapter is divided into three sections. The introduction examines the nature of the problem of quantification as it has been perceived by the courts. Following this, there is a review of two current approaches to quantification: Wilkins' empirically-based descriptive guidelines and the Minnesota Sentencing Commission's policy-based prescriptive guidelines. Of particular concern is some of the problems which would arise with the adoption in Australia of either of these American solutions. The source of these difficulties can be traced to differences between the sentencing system in Australia - a system modelled closely on the English system - and the American model. Finally, the main principles which should govern an alternative approach to the problem of quantifying the tariff are outlined briefly.

THE PROBLEM OF QUANTIFYING THE TARIFF

In order to propose or evaluate any solution to the problem of quantifying the tariff it is necessary to have a clear understanding of the issues. This paper is confined to judicial views bearing upon quantification as they are to be found in appellate court decisions. An examination of relevant judgments revealed two issues.

First, the courts want statistical information on their current sentencing practices: detailed sentencing statistics showing the relationship between the type and quantum of sentence and various combinations of case (offence and offender) facts. Consider the judgment of Adam and Crockett JJ in the Victorian Court of Criminal Appeal in Williscroft (1975, 301). Here, the court, in calling for statistical data on sentences imposed in the state for the type of offence before it, said '... a judgment as to what is appropriate by way of sentence must depend upon knowledge of sentences for the same or similar offences ...'. This view was qualified by Young CJ, again in the Victorian Court of Criminal Appeal in Yuill and Besson (1975). There, he warned that statistics which are not differentiated according to certain offence and offender characteristics are of little if any use to the courts in their task of determining the appropriate sentence. The significance of such statistics is that in Victoria an appeal may be allowed if the sentence imposed in the case is deemed by the appellate court to be manifestly, not merely arguably, excessive or lenient. However, it appears that the position in England on this matter is less clear (see Thomas, 1985).

There is a second matter of judicial import. It would appear that the courts are conscious that their approach to sentencing is not sufficiently uniform and that uniformity of approach is the standard sought. Consider the words of the Lord Chief Justice of England, Lord Lane, in Bibi (1980, 179): '... we are not aiming at uniformity of sentence ... we are aiming at uniformity of approach'. May I venture several comments on this view?

An implication of this position is that consistency of sentence is an undesirable criterion since there is an inherent danger, arising from the failure to define 'like', that material differences between cases may be ignored and, thereby, disparity in sentencing may be fostered. Rather, a safer criterion for consistency is being offered; sentences would be acceptably consistent if we had consistency of approach. And what is required for 'consistency of approach'? Surely, it means that there must be agreement upon: determination of material case factors; weighting of case factors; rules for combining case factors; and the types and levels of sentence appropriate for various combinations of case factors. I should say in parenthesis that the preceding points are a behavioural scientist's translation of the grounds upon which appellate intervention is allowed, as they were set out by the Victorian Court of Criminal Appeal in Taylor and O'Meally (1958).

There can be no doubt that the current curial approaches to sentencing are less than satisfactory. The appellate courts have recognised this with their call in Victoria (Willisroft, 1975) and in other Australian jurisdictions (see Law Reform Commission, 1980) for more detailed sentencing statistics and the innovation in England of guideline judgments. In these judgments the court, when determining an appeal against sentence, takes the opportunity of setting out some of the patterns of offending for that particular legal category of offence and then laying down an appropriate range of sentence for each of the patterns. In this way the court shows the joint effects on sentence of particular combinations of several case factors. Nevertheless, Lord Lane LCJ recognized the limitation of these judgments when he observed that it is difficult to give any precise indication of the appropriate sentence for any particular offence in advance since there are so many possible variations in the commission of any offence (Gould, 1983). I draw attention to this passage because I intend to concentrate on the matter it raises; namely, the problem of describing how information about cases is weighted and combined and, accordingly, showing the effects on sentence of any combination of a substantial number of case factors.

It may be concluded, then, that any attempt to quantify the tariff must address these two matters raised by the Courts: provision of a detailed statistical description of current sentencing practice; and assistance in the move towards uniformity of judicial approach in the determination of sentence.

There are a number of aspects to the sentencing judgment. One matter concerns determining the appropriate aim or mix of aims for a case. This paper deals with the problem of describing how information about the circumstances surrounding an offence ought to be combined in order to determine the culpability of the offender and the appropriate quantum of punishment, i.e., quantifying what is frequently referred to as the tariff (Thomas, 1979). This is the most intellectually challenging of the problems associated with quantification.

CURRENT QUANTITATIVE APPROACHES TO SENTENCING

Wilkins' Empirically-based Descriptive Guidelines

In this approach correlational techniques (multiple regression) are applied to actual data from cases determined in the courts to identify, weight and combine the major independent case factors associated with the quantum of sentence. The results of these analyses form the basis of the quantification of the tariff.

To apply this system to a particular case, points must be allotted in terms of the extent to which it is characterised by the offence and offender characteristics identified in the statistical analysis. Then, the scores on the two dimensions are used to identify the appropriate cell in the table and this provides sentencing data for that particular combination of case characteristics.

Relatively few case factors are incorporated in the guidelines - in one of the major studies, the dimension of offender included only six items of information and these covered only some aspects of criminal history and employment record. (See Kress, 1980; and Wilkins, Kress, Gottfredson, Calpin & Gelman, 1978.)

Limitations of this approach as a basis for describing current sentencing practice: developing detailed sentencing statistics (see Lovegrove, 1984a). One difficulty is that some of the assumptions underlying multiple regression are inconsistent with the structure of judicial thought and, consequently, some of the complexities of judicial thought processes cannot be adequately represented. For example, the sentencing principles governing the role of an offender's criminal history cannot be applied faithfully by the simple addition of a (negative) score quantifying priors to the score representing offence seriousness or mitigation (see the later discussion). Moreover, the valid application of multiple regression rests on the assumption that averages can be used to represent sentencing policy. This would be acceptable if it could be assumed that there is an established sentencing policy and that judges give effect to it with a high degree of consistency and accuracy. Clearly, studies suggest this is not so (e.g., Palys & Divorski, 1984; Lovegrove, 1984b); indeed, if this was the case, there would be no point in attempting to provide detailed sentencing statistics. The effect

of these two problems associated with construing case data according to the mathematical model of multiple regression is that the quantification of the tariff would be imprecise, i.e., there would not be a high correlation between the actual tariff (sentencing policy) and the tariff as it was quantified from the multiple regression equation.

Additionally, the quantification of the tariff must of necessity be limited to showing the combined effects on sentence of the more common case characteristics. Its function then is merely to provide a reference point against which judges can exercise their discretion in allowing for the effects on sentence of any unusual case characteristics. Now, the danger is that if the statistics were based on a mathematical technique which was not understood by judges and which did not conform to the structure of their decision making, then judges would find it difficult to make correct allowance for the effects of the unique elements in relation to the common elements.

Finally, this approach to quantifying the tariff could not readily incorporate appellate court decisions effecting changes to sentencing policy since it would be necessary to wait until a large number of cases had been sentenced by judges cognizant of the new ruling. Clearly, there would be many periods when the statistics lagged behind current sentencing practice.

Limitations of this strategy as a basis for moving toward uniformity of approach. The preceding limitations are similarly applicable here. However, there is an additional objection. It is inappropriate to treat the quantification of the tariff as a problem in prediction, since the consequent solution comprises the minimum number of variables which independently provide a substantial correlation with the outcome. Under these conditions case factors which are correlated with a second case factor are omitted when the second case factor is more strongly associated with sentence. One reason why age may be expected to find its way into such an analysis only rarely is that its predictive capacity is almost certainly subsumed under prior record; also, case factors which are infrequent, even though they may exert a substantial effect when present, similarly do not find their way into the solution: the playing of a secondary role in the offence may be one such case factor. As a consequence, the mathematical equation is not an explicit statement of current judicial sentencing policy, despite claims to the contrary by Wilkins and his associates.

Rather, for the results of a quantitative analysis to help us move towards uniformity of approach they must represent such a statement and, accordingly, must include and show the effects of all or at least most of the case factors which are to be found in legal analyses of the principles of sentencing, such as the analysis of Thomas (1979). Clearly, the results of the mathematical analyses fall well short of this standard (see also, Vining & Dean, 1980).

In summary, one's objection to Wilkins' approach is that it deals inappropriately with the problem of describing how case information is combined to quantify the tariff.

Minnesota Sentencing Commission's Policy-based Prescriptive Guidelines

These guidelines comprise a two-dimensional grid: one dimension representing the seriousness of the offence and the other defining the extent of the offender's criminal record. The scale of offence seriousness has ten levels (groups), each of the groups comprising a substantial number of legal categories of offence. Criminal history is defined by four elements; points are allotted to a case, having regard to the offender's number of prior felonies, juvenile offences and non-traffic misdemeanours and the offender's custodial status at the time of the current offence. Each cell in the table shows whether a sentence of imprisonment is appropriate for that particular combination of offence seriousness and criminal history and, if so, the length (presented as a relatively narrow range).

In the construction of the table, empirical or other analyses of past sentencing practices played a minimal role. Rather, after debate, a policy was adopted - it was determined that the dominant goal of the penal system should be retribution and that the severity of the sanction should be proportional to the seriousness of the offence and, to a lesser degree, the extent of an offender's criminal history. The setting of the sanctions was treated primarily as a normative problem; consequently, it was necessary to determine according to the policy what was appropriate by way of sentence for each particular combination of offence seriousness and criminal history.

Although judges may impose penalties which fall outside the presumptive ranges, this course is generally permitted only when the reasons are compelling and substantial, and such departures should occur only rarely (see Minnesota Sentencing Guidelines Commission, 1984).

Limitations of this approach as a basis for quantifying the tariff. First, it would entail gross changes to current sentencing policy and practice in Australia, since various combinations of common case factors which now not infrequently may have a substantial effect on what is considered appropriate by way of sentence would, under this system, rarely exert more than a minimal impact. This can be deduced from the fact that even though the guidelines recognize only coarse distinctions between cases (seven categories of prior record for each of the ten broad groupings of legal offence category) the ranges of sentence considered appropriate for the various cells are quite narrow. The associated problem is not merely that judicial discretion would be reduced; rather, it is that the extent to which a sentence could be individualized to allow for the

variation in case characteristics would be dramatically curtailed.

I said quite deliberately that the Minnesota system entails this problem. The solution does not lie in the widening of the presumptive ranges of sentence or in permitting frequent departures from them, since specific guidance would no longer characterize the statistics and their would be no point to them. The source of this dilemma leads me to the second objection. This is that this system seeks uniformity of sentence not through uniformity of approach but at the expense of it; alternatively, it may be said that the Minnesota system does not solve the problem of quantifying the tariff, rather it largely avoids the issue.

Current sentencing statistics in Victoria (Victoria Law Department, Management Information Section, 1984) readily tell us the precise range and distribution of the sentences imposed for any particular legal offence category, but no more. Accordingly, quantification of the tariff requires a framework to which a sentencer can refer in order to determine what features of a particular case are relevant, what weight should be attached to each of them as well as how this information should be combined, so we are not left to guess where particular cases lie in that distribution of offence by sentence.

The importance of that last aspect - rules for combining elements of information - cannot be over-emphasised, since without it the system cannot be used to estimate the effects on sentence of any combination of a substantial number of case characteristics. Now, the alternative - the direct representation of the effects on sentence of particular combinations of case factors - becomes more and more unwieldy as the number of case factors increases. Consequently, the system adopted by Minnesota cannot provide guidance for more than a small number of case factors.

Moreover, even if it were practicable to represent the effects on sentence of any combination of a substantial number of case factors, there remains a problem concerning the way in which sentences for the various combinations would be determined. In the Minnesota system the presumptive sentences were determined intuitively and each one represents what is thought to be an appropriate sentence based on a retributive philosophy for that particular combination of offence seriousness and criminal history. Now, the intuitive determination of each sentence still entails applying weights and rules for combining information, even though they are not stated explicitly. The critical question is whether these intuitive judgments are internally consistent. This can be checked rigorously only if the means of combining the information is specified so that quanta of sentence determined according to the rules can be compared with the quanta of sentence determined intuitively. However, in the Minnesota system, the means of combining case information is not dealt with

adequately and so it is not possible to test the internal consistency of the intuitions.

Finally, the current Minnesota system was developed without detailed reference to their previous sentencing system: a system in which a large number of case factors had potential significance in the determination of sentence. There was no serious attempt to use the earlier system as a basis for reform and the present system does not provide a structure which can be employed to make this comparison. Again, the reason for this is that they did not develop a means of representing the effects on sentence of any combination of a substantial number of case factors. While this was not a significant problem in Minnesota, since their system of sentencing underwent a radical change, it would be if reform were to take the form not of an abandonment of the current system but of a strengthening and refinement of it, i.e., re-weighting factors, and the like.

In summary, the Minnesota approach is an unsatisfactory basis for quantifying the tariff as we understand the problem in Australia, and as it is treated in England, because it does not deal with the problem of describing how information about cases ought to be combined.

AN ALTERNATIVE STRATEGY FOR QUANTIFYING THE TARIFF

The purpose of quantification is twofold: (1) to develop detailed sentencing statistics describing current sentencing practice, and (2) to assist in the development of sentencing policy and, consequently, the move towards a more uniform approach to sentencing.

The main problem identified in the preceding analysis as requiring a solution is the provision of a means of describing how information about case characteristics is combined to determine culpability or seriousness and, hence, type and quantum of sentence.

The proposed solution involves the development of a legal model describing judicial decision making in regard to the determination of sentence. The model should have three characteristics - each one is outlined briefly below and the author's study of the feasibility of developing detailed sentencing statistics is used to illustrate these points. In this study the orientation of the model is the way judges ought to determine sentence (i.e., sentencing policy), rather than how judges actually determine sentence.

(1) A faithful representation of the structure of judicial thought. Thomas (1979) has developed the only legal model of judicial decision making and his model is used as a basis for the current approach. Thomas assumed that within any legal category of offence a variety of factual situations relating to the

offence recur, and that within each set of factual situations there are upper and lower limits within which the sentence is presumed to fall. The upper limit of the appropriate sentence for any particular offence is determined by identifying the group to which that version of the offence belongs and then adding (or subtracting) the effects of aggravating (or extenuating) factors within the range for that group. Allowance is then made for the effects of any available mitigation, having regard to the personal circumstances of the offender (including criminal history).

On the basis of an inspection of the case factors considered in sentencing judgments (aided by systematic legal analyses such as in Thomas, 1979) and having regard to empirical studies of patterns of offending (e.g., Maguire, 1982), three groups were used to describe burglaries: commercial premises, dwelling houses, public buildings.

The precision of Thomas's approach was improved by the following modification; within each of the groups, offences were differentiated according to a set of dimensions and categories common to the four groups (e.g., total value of the theft: see the next point).

(2) Incorporate most of the case factors which are to be found in legal analyses of sentencing judgments such as in Thomas (1979). In the burglary study, the offence was differentiated in terms of four dimensions: number of counts of burglary, total value of money and property stolen, degree of personal injury and property damage, and extent of the organisation (defined by twelve elements). For the offender, the factors were: age, previous good character, reason for the offence, role in the offence, remorse (including confession, reconciliation, current character, rehabilitation prospects, action taken for rehabilitation), whether there had been a breach of trust, and various considerations of mercy, as well as prior convictions (defined by eight elements covering number, frequency, seriousness, recency and similarity to the present offence). The point here is to ensure that all the more commonly occurring material case factors are included in the model.

(3) Give effect to legal principles, enunciated in appellate judgments, covering the rules for combining case information. For example, consider one of the principles for prior convictions (Fox & O'Brien, 1975; Thomas, 1979). Offenders cannot be sentenced on their records; even despite an extensive past record the characteristics of the present offence set the ceiling for the appropriate quantum of sentence. The consequence of this principle for quantification is that an offender's score for prior convictions cannot simply be added as a negative quantity to the other case characteristics to determine culpability.

The above solution incorporates all the information necessary for showing the relationship between the characteristics of a case

and sentence - namely, the material case factors and their weights, the rules for combining the elements, and the types and levels of sentence deemed appropriate for various combinations of case characteristics. It fulfils this function by providing a framework for constructing sentencing data: case data are fitted to this model of judicial decision making in order to show the relationship between this construction of seriousness and the sentences imposed in the courts. This exercise has been undertaken for offence characteristics of armed robbery (Lovegrove, 1983) as well as for offence and offender characteristics of burglary (Lovegrove, 1985), and the degree of association was found to be remarkably high. The presentation of the relationship between case characteristics and sentence is the detailed sentencing statistics, and the high degree of fit simultaneously supports the validity of the strategy.

This solution has several advantages. First, it is capable of showing the effect on sentence of any combination of a substantial number of case factors because the model specifies rules for combining the elements of a case. Accordingly, it solves the problem which is the source of all the difficulties identified in Minnesota's approach to guidelines. Secondly, since case data are construed according to a model representing the structure of judicial thought (cf. a mathematical - multiple regression - model) the representation of the relationship should be more accurate and it should provide a standard against which judges could more precisely, intelligibly and comfortably make allowance for unique case characteristics. Thirdly, the model is an instant construction of the way in which judges ought to determine sentence (i.e., sentencing policy) rather than a description based on an analysis of past practices, and so it could be readily modified to reflect changes in sentencing policy. Finally, in this approach the units of analysis are the elements of the decision underlying the sentencing judgment (e.g., the factor weights) rather than the decision itself (i.e., the sentence). Under these circumstances the use of averages is a legitimate approach.

In order to preserve judicial independence, it would be necessary for senior judicial officers to inspect the model developed by the researchers to determine whether it faithfully represented current sentencing policy and to modify it where it was incorrect. In a similar vein the model could be used by judges to develop sentencing policy - to provide precision on matters, such as the appropriate weighting of case factors, where currently there is imprecision. In this way the model would act as a first quantitative draft of sentencing policy - a framework upon which the judiciary could set out more precise guideline judgments. Of course, it is beyond the scope of this chapter to detail the appropriate techniques. But until these matters of sentencing policy have been resolved with precision the goals of detailed sentencing statistics and uniformity of approach must remain but a hope.

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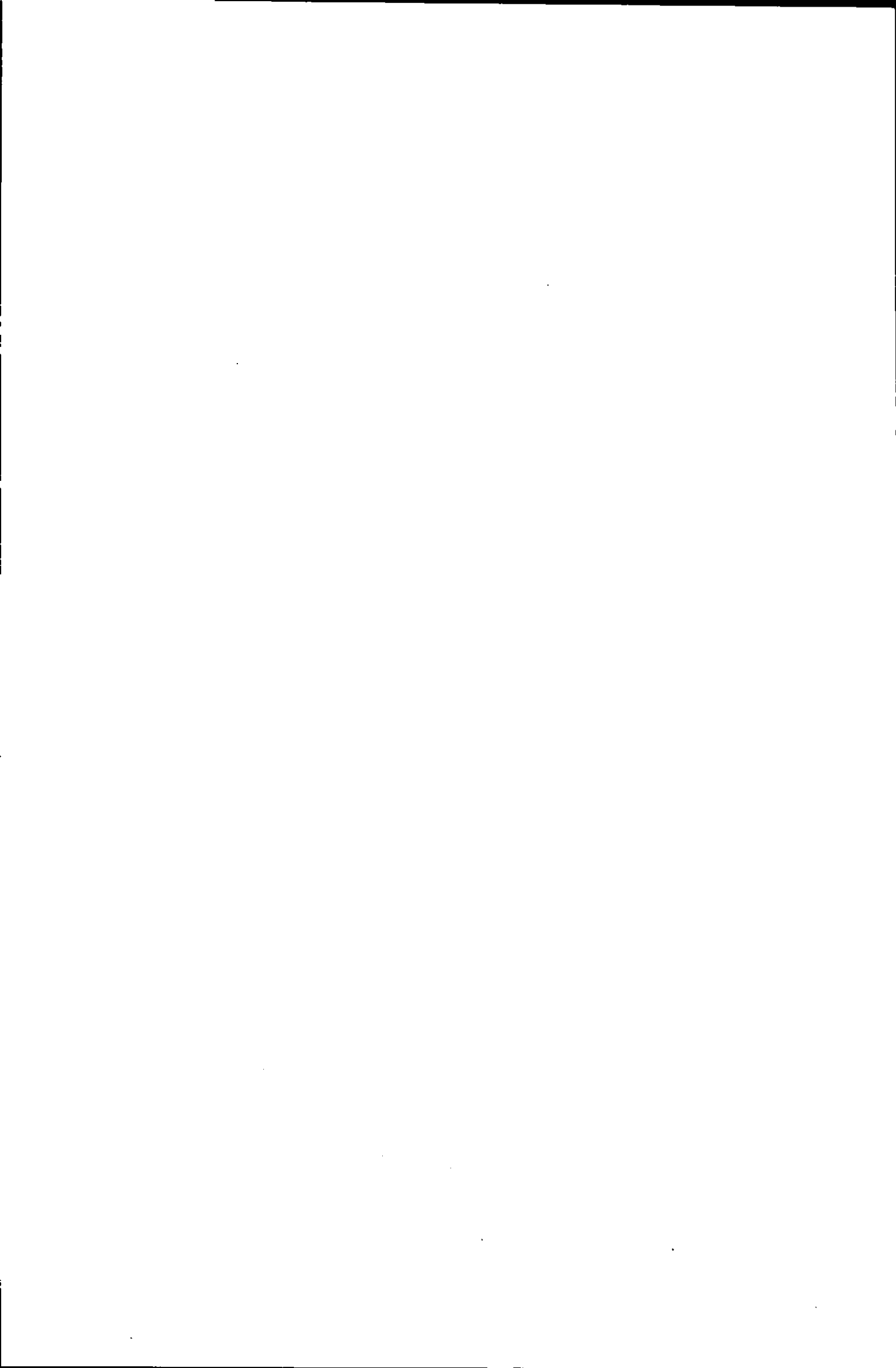
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ENDNOTE

1. This chapter is based on a paper which was also presented at the Conference on 'Criminal Sentencing: Approaches to Disparity, Consistency and Effectiveness' held at St Catherine's College, Oxford, 14-16 April 1986, and a similar version of the paper will be published as part of the Proceedings of that Conference.



SENTENCING STRUCTURES AND SANCTION HIERARCHIES

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In 1978 the Australian Law Reform Commission received a reference to review and report on the laws of the Commonwealth and the Australian Capital Territory relating to the imposition of punishment for offences. It was required to have special regard to the 'need for greater uniformity in sentencing, with particular reference to the laws in respect to the grading of offences and orders...'. The Commission's interim report, published in 1980, (Australian Law Reform Commission, 1980) did not address itself to this issue apart from demonstrating the existence of inconsistencies. It is the purpose of this paper to focus on the 'grading of orders' in designing a sentencing structure. The issue is examined in the context of changes being made to Victorian sentencing laws by the Penalties and Sentences Act 1985.¹ The problem of inadequate sentencing structures has vexed law reformers since early in the last century when the Commissioners on the Criminal Law in England drew attention to serious illogicalities in the existing statutory sentencing framework and to the difficulties in determining the proper scope for judicial discretion in sentencing (see Thomas, 1978, 19). Their attempt to construct a graduated scale of penalties, embodied in legislation independent of the definition of offences, so as to be uniform and consistent across the whole criminal law was never enacted. The legacy of that failure, an ad hoc 'system of specifying the punishment for each offence in association with its definition (Thomas, 1978,34) remains a chaotic heritage to this day.

A sanction hierarchy is said to be needed for three main reasons (Sebba and Nathan, 1984, 221): first, criminological research on deterrence requires some measure of severity against which to measure the relative effectiveness of sanctions. Secondly, the development of 'just deserts' models of sentencing requires graduated sanction scales to match the newly created graduated scales of offence heinousness. Finally, the lack of a sentencing hierarchy exacerbates or creates problems of disparity in sentencing. Without some workable scale of severity, problems arise in deciding whether one sentencer has been more punitive or lenient than another, or whether, on appeal, a sentence has been increased or mitigated (White, 1973). Apparently inconsistent sentences contribute to communal disillusionment with the way in which criminal justice is administered and the addition of new non- or semi-custodial sentencing options to the armoury of sentencers without explaining their role in the hierarchy of sentencing only serves to compound existing difficulties.

Severity

By comparison with the amount of work done on scaling the seriousness of offences, there is surprisingly little research available on the relative severity of sentences. Developers of just deserts models of sentencing have created sophisticated taxonomies for ranking the severity of offences, but have tended to ignore the reciprocal problem of grading sanction hierarchies. The practice has been to reduce sentencing alternatives to the stark dichotomy of imprisonment or non-imprisonment, or merely to set out broad dispositive options or combinations of options. If just deserts models find legislative supporters in Australia (indeed, examination of just deserts concepts is listed as one of the terms of reference of the Victorian Sentencing Committee²), the sentencing reformers will have to confront fundamental policy questions pertaining to the relationship between offence seriousness and penalty across the entire range of offences, summary as well as indictable.

The establishment of sanction hierarchies has, in the past, generally been assumed to be non-problematic, intuitive and self-evident. Twenty years' imprisonment is obviously more inflictive than ten and a \$1,000 fine more severe than one of \$100. Leaving aside the problem of comparing unlike sanctions, e.g. whether imprisonment is always graver than a fine, even the simple view that more is worse than less is open to closer examination. As Sebba (1978, 248) observed:

How much more severe is three years' imprisonment than one year (or a \$3,000 fine than a \$1,000 fine)? Is there a functional relationship between them, and if so, is it linear? [and] what is the relationship, in terms of severity, between a combined penalty - for example, imprisonment and a fine - and the sum of its two component parts? Are these components additive, or is the impact reduced (or inflated) by the simultaneity of imposition?

To date, such questions have rarely been posed, let alone answered. The first matter to note in exploring the problem of the scaling of sanctions is that sentences can be regarded as having three relevant features for the purpose of judging their severity - type, quantum and the manner of imposition. There are three variations of the last - immediate, suspended and deferred (Kress, 1980). Secondly, severity is not an objective property of punishment (Erickson and Gibbs, 1979; Buchner, 1979³). While measures of physical restraint, economic deprivation, social stigma, quantum and immediacy may be developed to give some index of the inflictive nature of a sanction, punishments are perceived quite differently by those who impose them, those who receive them, and those who observe the process. Perceptions of the meaning of legal penalties can vary between jurisdictions, between groups in the community and over time, just as, for example, the significance of motor vehicle licence suspension or cancellation varies between groups according to the status attached to car ownership and use, or the social inconvenience occasioned when there is poor access to alternative public forms of transport.

The issue of relative severity is central to the imposition of monetary penalties. It has long been realised that the impact of a fine upon an offender will vary

according to the offender's wealth. Attempts to relate fines to means by ensuring that indigent offenders are not fined when they do not have the ability to pay do not address the problem of equalising the penal impact of the fine across all income groups. European day fine systems are one of the few examples of severity scaling based on offender characteristics. Legislatively prescribed higher fine maxima for corporate offenders are a similar, but crude, attempt to adjust for an assumed greater corporate capacity to pay. However Australian legislation does not compel the pre-sentence disclosure of individual or corporate assets, nor allow for an increase in the monetary penalties imposed upon the wealthy solely in order to achieve parity in correctional impact.

Little is known of sentencers' views. The Australian Law Reform Commission's survey of the opinion of 350 judges and magistrates throughout Australia only addressed the question of the availability of sentencing options and not their ranking (Australian Law Reform Commission, 1980, 445). Different sentencers no doubt have different opinions of the gravity of each available measure, but Ashworth (1983, 52) asks:

[D]oes he see them as forming a kind of 'penal ladder', with absolute discharges on the bottom rung and immediate imprisonment on the top rung and the other measures ranged in between? Or does he reject the analogy of a ladder and argue that certain measures are appropriate for some types of offence and offender and not for others?

The first view has been advanced by Sparks (1971, 397) who has said:

[T]he penal system is rather like a ladder, with nominal penalties comprising the bottom rung and imprisonment the top rung: as offenders climb the ladder, i.e. continue to appear before the courts, they receive measures of increasing severity, until they reach the top rung and are sent to prison.

The difficulty with this ladder analogy is that there is no settled ranking of the nominal and non-custodial sentences. Many seem to be regarded by sentencers as alternatives resting on a common horizontal plane rather than being steps on a vertical dimension. Likewise, when Parliament introduces new sentencing measures, such as suspended sentences or community based orders, as is being done in Victoria, it is not clear whether it is the legislative intention to lengthen the ladder or simply provide alternative rungs.

The opposing view was expounded by the Criminal Law and Penal Methods Reform Committee of South Australia (1973, 17):

The question has arisen whether as a matter of legislative policy the various types of sentences should be legislatively graded in an ascending order of seriousness, ranging from perhaps unconditional discharge at one end of the scale to imprisonment at the other. In our opinion such a step is both impracticable and undesirable. No doubt many persistent offenders will undergo an experience of this kind, but this is not necessarily

so. It depends, among other things, on what sorts of offences he commits. In the supposed middle range of such a hierarchy of sentences, comprising perhaps fine, supervised probation, suspended sentence and other possible non-custodial sentences, there is no necessary or even desirable order of seriousness because such measures are not conceived of as a correctional progression. They are alternatives made available to the sentencing authority to enable it to adapt its sentence with as much flexibility as possible to the particular offender and the circumstances of his offence. Any attempt to arrange them in a pre-determined order of seriousness runs counter to this flexibility of operation.

If the ladder analogy is being used by sentencers, it seems to be applied to recidivists committing offences of moderate gravity and not to all offenders (Ashworth, 1983, 434). Particularly when rehabilitative considerations are to the fore, courts are inclined to cast aside the desert calculus in favour of searching for the measure most effective in meeting the offender's needs, irrespective of its place in the hierarchy.⁴ Conversely, sentencers reserve the right to bypass lesser options and to order imprisonment even for first offenders if the offending is appropriately serious.⁵ If the drafting of a legislatively mandated hierarchy is to be attempted, it would have to allow for a means by which progression is unusually accelerated or retarded.

Few studies have been undertaken to test communal perceptions of the relative severity of sentences. One based on a questionnaire survey (Sebba and Nathan, 1984), required four different groups⁶ to rank the severity of thirty-six penalties which differed, not only in type, but also in quantum. The results revealed that while there was consistency in that, within the same type of sentence, a higher level penalty attracted a higher mean severity score than a lesser one,⁷ differences and inconsistencies were found in the evaluation of the comparative severity of different forms of penalty. Thus a fine of \$50,000 was considered more severe than imprisonment for five years and probation for ten years was considered more severe than a fine of \$5,000. A fine of \$250 was rated as worse than a suspended sentence of six months. Generally, suspended sentences of imprisonment were regarded as being more lenient than almost any sentence of peremptory punishment. Possible custodial sentences were perceived as less burdensome than immediate probation supervision, or financial penalties (Sebba and Nathan, 1984, 231). The same problems of inter-sanctional comparisons were found by Kapardis and Farrington (1981) in studying English magistrates. Their work suggested the following penalty scale in increasing order of severity existed: absolute discharge; one year bind over; conditional discharge for one year; £10 fine; £40 fine; deferral of sentence for six months; 2 years' probation; £100 fine; 60 hours community service; 6 months' imprisonment suspended for 2 years; six months' immediate imprisonment; committal to Crown Court for sentencing. The same problems of inter-sanctional comparisons are seen to exist in this ranking.

Just Deserts Models

'Just deserts' models of sentencing have as their central tenet the principle that the severity of the punishment be commensurate with the gravity and blameworthiness of the criminal conduct (von Hirsch, 1983, 211). Included in the elements of proportionality is the requirement that the ranking and spacing of penalties relative to each other should reflect the seriousness-ranking of the criminal conduct (von Hirsch, 1983, 213).⁸ However, exponents of such models admit to grave difficulties in determining both the seriousness of offences and the criteria for judging the relative severity of sentences. This problem has been reduced by constructing sentencing models which concentrate on the decision whether or not to incarcerate⁹ and by assuming such an immense gap between the two types of sanction that the possibility of overlap is minimised (Singer, 1979, 54). In most American models, non-custodial options are simply relegated to the broad band of probation or fines. The literature concentrates heavily upon the serious offence categories and pays little regard to minor offences. Of course the vast majority of offenders are in fact disposed of in the lower courts by sentences that do not involve incarceration. While the importance of the decision to imprison or not should not be underestimated, the American innovations are of little utility when considered in the context of sentencing discretions exercised by magistrates since these are predominantly concerned with the need to choose between non-custodial possibilities (Tarling, 1982, 7).

Thomas (1982, 75) makes the same point about the unbalanced nature of American models with their concentration on custodial orders and their failure adequately to deal with the full range of sentences. He also laments the failure to develop a theory of non-custodial sentencing and notes the 'penal ambiguity' of newer measures such as the suspended sentence and the community service order.

PROBLEMS IN ESTABLISHING THE VICTORIAN HIERARCHY

In Victoria, at the end of last year, the Penalties and Sentences Act 1985 was passed, one of the purposes of which was to 'have within the one Act all the general provisions dealing with the powers of the courts to pass sentences.' This legislation was enacted concurrently with the establishment of a special committee to review sentencing law in the state. The government's insistence on enacting the new legislation prior to receiving the report of the committee starkly reveals the problem inherent in legislative reform carried out in the absence of any vision of a larger coherent sentencing structure. What follows is a listing of the problems that have to be faced in attempting to deduce the current sentencing hierarchy in Victoria.¹⁰

Imprisonment

The death penalty was abolished in Victoria in 1975. In its absence, imprisonment is the gravest penalty currently available to sentencers. This assertion is a value judgment based on the assumption that the severe deprivation of physical liberty which imprisonment entails is more serious than lesser forms of restraint or forms of monetary or property deprivation. The view that imprisonment is the sanction of last resort is reinforced by s.11 of the Penalties and Sentences Act 1985 which

directs that a court must not impose a sentence of imprisonment unless it has considered all other available alternative sentences and decided that no other measure is appropriate in all the circumstances. The Commonwealth Crimes Act 1914, by similar wording in s.17A, likewise places imprisonment at the top of the federal scale of penalties. But, even within this sanction, problems of ranking exist. Different forms of custody, anomalous maximum sentences, differences between real and nominal custodial sentences and the gulf in levels between the statutory maxima and sentences actually imposed, all contribute to uncertainty as to what is the 'real' sentence being awarded. Any ranking of sanctions in terms of onerousness must address the problem of whether to classify measures by reference to their theoretical or their actual operation.¹¹

Forms of Custody: The two principal custodial orders in Victoria are imprisonment and detention in a youth training centre. The latter is an option which may be used in relation to offenders under twenty-one. By confining the younger offender in a separate educationally oriented setting, away from the corrupting influences of a prison environment, youth training centres are regarded as offering a more rehabilitative potential than the standard penal institution. An order for detention in them is thus seen as less serious than being sent to prison.¹² However there is a high degree of interchangeability between the two types of institution and administrative transfers from one form of custody to another (usually from the lesser to the greater) can take place after sentence without the courts' knowledge or consent.¹³ Even within the same system, administrative arrangements for the classification and placement of prisoners or detainees within different institutions or parts of institutions can significantly change the meaning of the custodial order. Settings may be of maximum or minimum security and regimes of varying strictness. Though the Victorian Full Court acknowledges that service of a prison sentence in isolation from other prisoners, as is likely in the case of an informer, adds to the arduousness of a sentence, it is reluctant to accept the quality of the regime to be faced by the prisoner as warranting a reduction in the length of his term. Variations in the quality of prison life are seen as something for the Classification Committee and not the sentencer.¹⁴

Real vs. Nominal Sentences: Assessing the relative severity of prison terms is also complicated by the existence of parole. Although it would seem logical to make the head sentence the benchmark for comparing sentences, the fact that most prisoners are released on or near their parole eligibility date may mean that the length of the minimum non-parole term is the more relevant period by which to judge severity. This might have to be so despite the fact that it is judicially decreed that the possibility of executive reduction of time in custody through parole, remissions and pre-release, is to be ignored in passing sentence.¹⁵ Minimum term disparities can, after all, be the subject of an appeal by the Crown or the prisoner even though the length of the full sentence is not challenged. While it is rare for the Full Court to interfere because two co-offenders have been given different minimum terms (Fox and Freiberg, 1985, 9.707), the basic principle remains that assessments of both severity and disparity take into account the fixing of the minimum non-parole period as well as the head sentence.

Anomalous Maximum Penalties: The level at which the legislative maximum is set is one of the ways in which the legislature can make known its views of the gravity of an offence. Theoretically, the classification of offences and their accompanying maxima provide a crude but logical grading of offences according to seriousness. In practice this is not so. One of the first tasks undertaken by the Australian Law Reform Commission was a computer aided search and analysis of the range of penalties which provide for imprisonment for offences under Commonwealth Acts. The study revealed 'a lamentably confused morass of sanctions, which lack any consistency, rationale or planning' (1980, 251). Studies in other Australian jurisdictions have recorded the same phenomenon (e.g. Johnston, 1963) and, in Victoria, a cursory glance at the Crimes Act 1958 will reveal the following progression of custodial maxima in years: one, two, three, five, seven, ten, fourteen, fifteen, twenty, twenty five, and life. The apparent subtle difference between one crime carrying a fourteen year maximum and another warranting fifteen years is illusory for, within this imprisonment scale, there is one set of maximum penalties based on multiples of seven traceable to the lengthy terms originally attached to orders of transportation, and another built on multiples of five reflecting the shorter periods authorised when transportation was replaced by the sentence of penal servitude (Thomas, 1978). The bottom end of the scale is derived from the convention that misdemeanours should not be punished at common law by more than two or three years imprisonment.

In most jurisdictions, the maximum punishment for manslaughter tops the bill after the mandatory life sentences prescribed for treason and murder. In Victoria, however, the heaviest discretionary custodial sentence is for armed robbery (twenty-five years), followed by rape with aggravating circumstances and burglary with aggravating circumstances (each twenty years) and only then comes manslaughter (fifteen years). Armed robbery was raised to its anomalous position by Parliament in 1977 in response to an increase in the incidence of armed robbery and to perceived public pressure for a more effective deterrent. Though, in Moyle,¹⁶ the Victorian Full Court acknowledged that this crime was now legislatively graded as higher in heinousness than manslaughter and said that: 'This means, in our view, that Parliament has indicated that armed robbery is to be treated as an offence of the most serious character with the result that a greater range of severe sentences is open to the Court', sentencers have in fact treated this escalation as the anomaly it is and have been unwilling to accept the offence of armed robbery as warranting significantly greater punishment than manslaughter (cf. Fox and Freiberg, 1985, Chapter 12, Tables 1 and 23). As Mr. Justice Crockett noted,¹⁷ 'there would appear to be little statistical evidence to suggest that the courts have responded to any perceptible degree to the statutory invitation. Doubtless, this is due to the ingrained curial repugnance to the imposition of a crushing sentence unless very special circumstances appear to make such a sentence unavoidable'.

Prescribed vs. Imposed Penalties: But even apart from such passing anomalies, there is a much wider problem of disparity between the scales of gravity applied in curial practice and those defined by legislation. This can be illustrated by a brief examination of sentencing practices in the higher courts of Victoria. The ordering of crimes according to the severity of their maximum statutory penalties bears little relationship to their ranking according to the sentences actually

imposed. A small sampling of the median sentences imposed by the Supreme and County Courts in respect of a number of the major offences tried in 1984 (Fox and Freiberg, 1985, Chapter 12)¹⁸ reveals how readily the courts are prepared to disregard the penalty scales in assessing the severity with which they view an offender's criminality. Though burglary, aggravated burglary, and handling stolen goods are crimes whose maximum prescribed sentences of between fourteen and twenty years designates them as falling within the most serious categories of crime, they are disposed of by median sentences of little more than a year. This represents between five and ten per cent of the possible maximum. By contrast, crimes of rape, wounding with intent to cause grievous bodily harm, manslaughter and aggravated rape which carry similar maxima are punished by median sentences of imprisonment of between five and six years. This is between thirty and fifty per cent of the legislatively permitted maximum. While it is possible that all the property offences during the year under examination were of a minor nature and those against the person were all the more serious examples of that class of crime, it is far more likely that the judicial view of the hierarchy of seriousness is very different from that which appears in the Crimes Act. The twenty years for aggravated burglary is simply not seen as having the same imperative as the twenty years for aggravated rape and is less likely to be acted upon.

Offence	Median Sentence	Legislative maximum	Median as % of max.
Manslaughter	6 years	15 years	40
Aggravated rape	6 years	20 years	30
Armed robbery	6 years	25 years	24
Rape	5 years	10 years	50
Wounding with intent to cause GBH	5 years	15 years	33
Sexual penetration of child under 10	3 years	20 years	15
Culpable Driving	3 years	7 years	42
Using firearm to resist arrest	3 years	14 years	21
Robbery	2 years	20 years	10
Maliciously inflicting GBH	1yr. 9months.	7 years	25
Burglary	1yr. 3months.	14 years	9
Aggravated burglary	1 year	20 years	5
Handling stolen goods	1 year	14 years	7
Obtaining property by deception	6 months.	10 years	5

The English Advisory Council on the Penal System, in reporting a similar phenomenon in the United Kingdom (Great Britain, 1978), recommended that maximum penalties be rationalised by adjusting them downwards to the actual penalties presently being imposed. This proposal has been rightly criticized as abrogating the responsibility of the legislature for reform in favour of the judiciary and leading to ad hoc and unprincipled changes in sentencing standards (Radzinowicz and Hood, 1978). In considering the possibility of sanction hierarchies, those charged with review of sentencing law and practice will also have to address the problem of how to make use of different penalty levels within each separate sanction. The Australian Law Reform Commission itself called for a review of the 'entire usage and structure of the penalties provided for under Commonwealth laws which create offences', but it recommended that the task be undertaken by a Sentencing Council (1980, 131). Nothing further has eventuated on this front and the review may yet have to be undertaken by the Commission. A similar review ought to be high on the list of priorities for the Victorian Sentencing Committee.

The Life Sentence: Where is the life sentence to appear in the hierarchy? Does its indeterminate nature make it a graver sanction than a determinate sentence? Or should the imposition of a very long fixed term sentence be treated as a more draconian measure than the awarding of a life sentence since the latter inevitably means something less than life?¹⁹ In *Blake*,²⁰ an argument that a forty-two year sentence was excessive because it was deliberately designed to be longer than the effective term of a life sentence, was rejected by the English Court of Criminal Appeal. Sentencers were not to have regard to the possibility, or indeed likelihood, of the Home Secretary releasing the prisoner on licence. A life sentence was to be accepted on its face value as a sentence of detention for the entire life of the prisoner.²¹ Hitherto Victoria has had no discretionary life sentence on its books, but the current recommendation of the Victorian Law Reform Commission that the mandatory life sentence for murder be abolished in favour of life as a maximum penalty will create problems in placing it in the sentencing hierarchy (1985, 10). The Commission rejected the possibility of recommending a determinate maximum sentence in place of the indeterminate life sentence because such a sentence might have to be set at about thirty years which would mean that judges might then feel constrained to award longer terms than currently were being served as life imprisonment (1985, 10). It recognized that there was nothing to prevent judges from imposing very long fixed term sentences if the mandatory life sentence was changed to a discretionary one, but asserted that awareness of parole practices for life prisoners would tend to restrain excessive sentences (1985, 16), a view that does not readily square with the general judicial attitude that parole release practices are irrelevant to sentencing.²²

Another illustration of the problem of relating the life sentence to a determinate sentence is to be found in the sentencing of drug offenders. Maximum prison sentences for drug offenders at the upper end of the range can be as high as twenty-five years or life depending on the type of drug and the quantity. In *Zeccola*,²³ Tadgell J of the Full Supreme Court of Victoria explained the difficulties in sentencing offenders under the present Customs Act 1901 (Cth.). The maximum possible sentence in that case was life imprisonment:

The very width of the discretion reposed in a court to sentence a man to imprisonment "for life or for such period as the Court thinks appropriate" is apt to conduce to perplexity. For one thing, the necessarily uncertain duration of a man's life renders practically impossible any advance comparison between the duration of a sentence of life imprisonment and any sentence for a term of years which might be intended to be less than a life sentence. Further, the absence of any stated determinate upper limit for a period of imprisonment on the high scale makes it difficult to discover what kind of sentence the legislature regarded as appropriate for offences not deserving life imprisonment to which that scale applies. Moreover, the task of sentencing on the high scale is, I think, very much complicated by the presence in the scheme of what I have called the second scale alongside the high scale. Presumably, the fixing of a maximum term of 25 years for offences to which the second scale applies is intended to suggest that offences punishable according to the high scale could merit imprisonment exceeding 25 years but short of life imprisonment. Yet the notion that a determinate period substantially exceeding 25 years is in reality more lenient than one of life imprisonment, although conceivable, is not easy to grasp. It would be very difficult to apply as a matter of accepted sense in practice.

Suspended Sentences of Imprisonment

The next level on the Victorian sentencing hierarchy appears to be the suspended sentence of imprisonment.²⁴ Despite the clear indications that a custodial sentence should only be imposed when imprisonment is truly appropriate, evidence from Victoria and other jurisdictions indicates that the tendency has been to regard a suspended sentence as equivalent to a completely non-custodial disposition.²⁵ In Halewyn,²⁶ an immediate sentence of five years with a three year minimum for a \$140 armed robbery was increased on appeal to seven years with a five year minimum for the purposes of treatment of the offender's heroin addiction even though the sentence, as a period of immediate punishment for the crime in question, would have been unacceptable. The effect of suspended sentences is to escalate the use of imprisonment in cases where it would not have been justified and to inflate the length of sentence (Ashworth, 1983, 114; Bottoms, 1979, Bottoms, 1981). If introduced as a means of reducing the prison population, it will fail because, although apparently second only to immediate imprisonment on the sentencing hierarchy, it is treated in practice as an option much lower down the ladder.

The immediate release of a convicted person pursuant to an order which formally imposes a custodial sentence, but which suspends its immediate execution, has been available in Victoria since 1974 under s.13 of the Alcoholics and Drug-Dependent Persons Act 1968. It is now also available, in an extended form, for all sentences of up to a year under s.20-24 of the new Penalties and

Sentences Act 1985.²⁷ The suspension of the sentence of imprisonment under the Alcoholics and Drug-dependent Persons Act 1968 is subject to the prisoner undertaking to seek and submit to treatment in a treatment centre for a period of at least six months. The utility of s.13 is limited in that, in theory, it is available only for the more serious offences, namely those warranting imprisonment of at least six months. If the offence does not justify such a sentence, it is wrong in principle to inflate the penalty in order to bring the offender within the operation of s.13 for the court must address the possibility that a breach of the treatment undertaking will result in the activation of the suspended sentence and the offender being called upon to serve the entire term in custody. Likewise, under the Penalties and Sentences Act 1985, it is declared that a wholly or partially suspended sentence is not to be imposed 'unless the case appears to the court to be one in which a sentence of imprisonment for the term of the suspended sentence would have been appropriate'.²⁸

Community-Based Orders

The soon to be introduced community-based order is an amalgam of a number of discrete orders which were available under the previous legislation for imprisonable offences and now bridges, or perhaps blurs, the gap between custodial and non-custodial measures. It is designed to replace probation (a non-custodial sanction which in Victoria is deemed to be neither the result of a conviction, nor a sentence), orders for attendance at an attendance centre (which are a semi-custodial means of serving a term of imprisonment and which are the product of both a conviction and a sentence), and community service orders (which are a form of compulsory labour following conviction and sentence, but which do not depend on a prior order of imprisonment).

A community-based order of up to two years may be imposed instead of a term of imprisonment, or in addition to it. In the latter case, the prison term must not exceed three months.²⁹ In addition to a standard six 'core' conditions, each order may have any one or more of the following eight 'program' conditions attached to it (some 245 combinations are possible):³⁰

- (1) attendance for educational or other purposes as directed by the Office of Corrections for a period of not more than one year and for not more than 400 hours of attendance;³¹
- (2) performance of unpaid community work over a maximum period of one year and for not more than 500 hours;³²
- (3) supervision by a community corrections officer;³³
- (4) assessment and treatment for alcohol or drug addiction or medical, psychological or psychiatric treatment or assessment;
- (5) submission to testing for alcohol or drug use;
- (6) residing in specified premises;
- (7) refraining from associating with specified persons;

(8) any other conditions the court thinks necessary or desirable.

The community-based order is deemed not to be a conviction (even, it seems, if additional to a term of imprisonment), unless the court otherwise directs,³⁴ but the making of such an order does not prevent a court from also making ancillary orders for costs, damages, compensation, or licence disqualification, nor from imposing a fine.³⁵

The community-based order is an ambiguous sanction, or rather a group of sanctions. By conflating the attendance centre order with probation, it is unclear whether such an order is an alternative to imprisonment or simply another non-custodial sentence, or whether this is an appropriate question to ask at all. The previous attendance centre order was supposed to be an alternative means of executing a prison sentence, whereas the community service order was made instead of any order for imprisonment. In a sentencing hierarchy, an attendance centre order would be expected to be ranked higher than a community service order and both would be further up the scale of gravity than a probation order. It is true that attendance centre orders were not always treated as a true alternative to imprisonment, particularly in the lower courts (Fox and Challenger, 1985), and that community service orders have led to confusion as to whether they were intended as a measure for those truly facing imprisonment or were just another non-custodial order (Pease, 1978; Perrier and Pink, 1985), but, by and large, it seemed that the escalating order of sanctions was generally understood to be probation, community service orders and attendance centre orders. All this will be gone on the proclamation of the new legislation. Under the previous law, to discharge a sentence of imprisonment of a year by attendance at an attendance centre would require 936 hours of attendance if the maximum rate of 18 hours of attendance per week were demanded. Community service orders which also were to be discharged within one year called for a maximum of 360 hours of obligation. Probation imposed no minimum number of hours of contact although the order might run for between one and five years. That part of the new community-based order which refers to attendance abandons the direct nexus with imprisonment and reduces the maximum total period of attendance from 936 hours to 400. Because the weekly requirement is reduced from 18 hours to 8, it may still take up to a year, at the maximum rate, to work off the obligation. Nonetheless, the order is a pale shadow of its precursor. Does this mean that it is no longer to be regarded as a measure that is just one small step away from prison?

And what is the relationship between the community-based order which follows a sentence of imprisonment of up to three months and the partially suspended sentence of imprisonment? Is the purpose of the former to ensure supervision after imprisonment as a form of parole, when parole would not ordinarily be available, while the latter is a form of unsupervised release? Again, what is the relationship between community-based orders and other special orders available for young persons. Community-based orders to be open to those between 18 and 21 years of age, so too are youth attendance orders. The latter are reserved for those between 15 and 21 years of age, who would otherwise be sentenced to detention in a youth training centre. The 18 to 21 year old age group appear to

straddle two sentencing systems which produce two forms of custody and two forms of attendance order as well as all the other possible elements of a community-based order plus every other measure applicable to adults. Without guidance from the legislature, or a serious effort at coordinating this conglomeration of penalties, the result is truly a sentencer's nightmare. Unless there is agreement between sentencers, or directives from the Full Court, or guidance from the Office of Corrections, there will inevitably be unequal treatment of offenders sentenced by different courts. If one court considers the community-based order to be intended as an alternative to a real threat of immediate imprisonment then, subject to sufficient resources being available, short-term term sentences of imprisonment will be rare. But if another court takes the view that it is not something to be used instead of imprisonment then, for a similar offence, it will more likely impose a suspended sentence of imprisonment, or even immediate imprisonment. Likewise, on default, a court is more likely to deal with an offender by imprisonment than by the other options of fine, or variation of the order.³⁶

Neither the present legislation controlling community-based orders nor the background material preceding its introduction contains any guidance as to how a sentencer should approach his or her task. It is simplistic in the extreme to create such a compendious order in the interest of promoting sentencing flexibility and to hope that these issues will somehow resolve themselves. To adopt and paraphrase Ashworth in the context of the English attendance centre order, but in terms singularly apt to the present problem (1983, 118):

"How should the [community-based order] relate to the...suspended sentence, to the fine and to immediate imprisonment? [The community-based order] may well have been a 'good idea' but on many levels it [is] also a vague idea. It stands as a prime example of the failure of those concerned with penal policy-making to pay sufficient attention to the sentencing implications of what they do."

Bonds

There is a confusing group of non-monetary sentencing options involving release without formal supervision which go under a number of names such as 'adjournment', 'discharge', 'dismissal', 'deferred sentence', 'conditional release', 'good behaviour bond', 'common law or statutory bond', and the like which are urgently in need of rationalization. The Penalties and Sentences Act 1985 purports to draw major classificatory distinctions between conditional release on bonds³⁷ and conditional release on adjournment without conviction.³⁸ In truth, this is a largely cosmetic transferral of statutory provisions from one Act to another without any re-consideration of their underlying principles or the purposes to which such orders are to be put. At the moment it is possible to discern within the legislation four different paradigms:

- (1) The immediate release of an offender pursuant to a final order dismissing the charges laid. No conviction is recorded. The release is subject to

conditions, but not ones which expose the offender to a new sanction for the original offence.³⁹

- (2) The immediate release of an offender pursuant to provisional order adjourning the further hearing of the charges laid. No conviction is recorded. The release is subject to conditions which, if complied with, result in the court formally dismissing the charges. Non-compliance allows the hearing to resume and the court to proceed to conviction and sentence.⁴⁰
- (3) The immediate release of an offender pursuant to an order formally discharging or releasing him. Ordinarily a conviction is recorded. Such an order is a sentence but is subject to conditions. Breach of these may expose the offender to further sanctions including recall for re-sentencing.⁴¹
- (4) The immediate release of a convicted offender pursuant to an order which defers the final imposition of sentence.⁴²

This farrago of options, left unreconstructed in the latest revision and consolidation, does not speak to the question of priorities. It is at least arguable that conviction-based orders are more stigmatic than non-conviction orders, or that release with sentencing deferred⁴³ is more restrictive than other forms of conditional discharge that do not expose the offender to any further sanction for the original offence.

The generic name 'bond' is given to this group of orders because, usually though not always, the conditions upon which release is granted are enforced by the entering of a recognizance. This creates a form of double or triple jeopardy for the offender since a breach of condition may expose him to resentencing for the original offence, forfeiture of the recognizance itself, and possibly additional punishment for the conduct that constitutes the breach. Further, the duration of these recognizances and the conditions they contain can be oppressive and may involve sentencers assuming powers over offenders not open to them under the normal sentences authorised for the offence in question. These factors must be taken into account if criteria are to be developed for differentiating sentences. What might appear, on its face, to be one of the least restrictive sanctions, can turn out to be a savage measure because of the absence of adequate controls over the conditions that may be attached to it, or because of harshness in its enforcement mechanisms.

Multiple Orders

The difficulty of combinations of penalties and their concurrent or cumulative operation also must be faced if the development of a hierarchy of sanctions is to occur. Sebba and Nathan's study of the scaling of penalties attempted to explore whether 'the combination of penalties produces a severity score equivalent to the combined severity of its component parts, or whether it produces a consistently higher or lower score' (1984, 235). They found no consistent relationship. In the past the courts have questioned even the simple

practice of combining fines with imprisonment. Now the possible new combinations perplex even the most clear-minded sentencer or correctional administrator. The various 'programme' elements of community-based orders can be internally combined without limit in addition to being added to other types of sanction, e.g. on the first count a court might impose immediate imprisonment for two months to be followed by a community-based order consisting of supervision by a community corrections officer for 18 months plus a fine; on the second count, a community-based order requiring performance of 200 hours of unpaid community work and compulsory psychiatric assessment and treatment, plus motor vehicle licence cancellation, plus an order for payment of compensation. The order on the second count is valid if it is likely that the offender will be discharged from custody within three months.⁴⁴

Combinations of this sort invite reconsideration of a suggestion made by Singer (1979, 31-2 and 46) that we might measure elements of punishment in points or punishment units, so that two years on probation might be treated as the equivalent in points or units of four months actually in prison, or one year of confinement in a maximum security institution is equivalent to two years in a minimum security institution. It is the multiplicity of dishes that are now being placed on the sentencing smorgasbord without instruction as to their use that will give the courts indigestion and leave the defendant complaining, if not of dyspepsia, then of disparity.

It is implicit in the concept of disparity that one sentence is more severe than another. How, for example, do attendance centre orders and imprisonment compare? Or detention in a youth training centre and imprisonment? Both have been the subject of appeals to the courts on the ground of disparity (Fox and Freiberg, 1985, 11.704). In *Haines*,⁴⁵ the applicant had been sentenced to twelve months' imprisonment to be served by way of attendance at an attendance centre. His co-offender received nine months' immediate imprisonment. The applicant contended that the period of twelve months' imprisonment should be regarded as his substantial sentence and that, in such a case, there was too great a disparity. The Full Court agreed that there was a disparity, but one which favoured the applicant. He was deprived of his liberty only when being actually required to attend at the centre; his co-offender was deprived of his liberty continuously for the duration of the sentence. When comparison between sentences of imprisonment and orders for detention at youth training centres has been made by the courts, the usual result is that the latter are regarded as less severe.⁴⁶ But, as the Victorian developments show, the possible sentencing permutations are now so numerous that they can no longer be solved by simple judicial guidance of this sort. The problem might be alleviated by backing away from the current proliferation of options and by reducing the number and type of sanctions provided that this was accompanied by firmer guidelines in their use. If diversity of choice without guidance is insisted upon, then its price will be disparity.

CONCLUSIONS

Hitherto the predominant feature of the legislature's role in the sentencing process has been to create a range of dispositive possibilities leaving the courts

with an extensive, though not unfettered, discretion regarding their use. Slowly the legislatures have been prepared to give more explicit instructions. The directions as to the use of imprisonment as a last resort and the awarding and activation of suspended sentences are two recent examples in Victoria. But it is only a beginning. For some time in Australia there have been suggestions for the creation of general penalty classifications appropriate to crimes of different levels of gravity. The Draft Criminal Code for the Australian Territories (1975, Part VI) and the South Australian Criminal Law and Penal Methods Reform Committee (1977, 388-393) each call for use of this technique, but no legislation giving effect to the idea yet been enacted in those jurisdictions.

Interestingly enough it is in the Defence Force Discipline Act 1982 (Cth.)⁴⁷ in which one can find an elementary scaling of punishments:

Section 68 (1). Subject to sections 68A and 68C, the only punishments that may be imposed by a service tribunal on a convicted person are, in decreasing order of severity,⁴⁸ as follows:

- (a) imprisonment for life;
- (b) imprisonment for a specified period;
- (c) dismissal from the Defence Force;
- (d) detention for a period not exceeding 2 years;
- (e) reduction in rank;
- (f) forfeiture of service for the purposes of promotion;
- (g) forfeiture of seniority;
- (h) fine, being a fine not exceeding-
 - (i) where the convicted person is a member of the Defence Force - the amount of his pay for 28 days; or
 - (ii) in any other case - \$500;
- (j) severe reprimand;
- (k) restriction of privileges for a period not exceeding 14 days;
- (m) stoppage of leave for a period not exceeding 21 days;
- (n) extra duties for a period not exceeding 3 days;
- (p) reprimand.

The recent Carney Report (Victoria, 1985, 443) on child welfare laws in Victoria provides another instance of this in its recommendation for a graded hierarchy of dispositions. The ranking specifies certain types of order according to three criteria: the degree of intervention in the life of the young person; the degree to which the court monitors the orders; and the severity of the measures available to the court if the order is not complied with (1985, 443). The Level 1 Minimum Intervention Order allows for four possible dispositions - dismissal, reprimand, undertakings from the child or family, or third party undertakings.

The Level 2 Medium Intervention Order includes the accountable discharge (or good behaviour bond), fines, supervision orders, restitution orders, probation and community service orders. Level 3 Maximum Intervention Orders are the custodial or semi-custodial care options of attendance centres, youth training centres and, in limited circumstances, gaol.

Should the sanction hierarchy be made explicit? We believe that to attempt to do so would be an improvement on a system which already contains a hierarchy in default, but one which is implicit, inchoate and inconsistent. How can consistency in sentencing be even approached if there is no agreement as to the relative severity of sentences, the principal purposes of each measure, and the order in which a sentencer should approach his or her task? Ashworth, in his book on Sentencing and Penal Policy, has argued that not only is it important to re-examine the form and function of each sanction, 'it is essential to develop criteria for the use of each measure, and to establish the relationship of each measure to the others. ... The beginnings would be tentative and painful, but this is necessary if the system is to become more principled and consistent, and less anarchic than at present' (1983,439).

This is the high priority task for the newly formed sentencing committee in Victoria and the reconstituted Australian Law Reform Commission inquiry into the sentencing of federal offenders.

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FOOTNOTES

- ¹ As at 1st March 1986 only sections 1-4 and sections 20-24 (suspended sentences) had been proclaimed.
- ² The Chairman of the Committee is Sir John Starke, former Judge of the Supreme Court of Victoria and Chairman of the Adult Parole Board.
- ³ Methodological issues are discussed in Allen and Mason (1985).
- ⁴ But the High Court has reminded sentencers that greater weight is to be placed upon proportionality than upon protective or treatment considerations: Veen (1979) 143 C.L.R. 458. See also Langley (1970) 70 S.R.N.S.W. 403; Freeman v. Harris [1980] V.R. 267.
- ⁵ Subject to statutory restrictions such as Crimes Act 1914 (Cth), s.17A; Penalties and Sentences Act 1985, s.11.
- ⁶ Trainee police officers, inmates of a medium security prison, probation officers and undergraduate criminology students.
- ⁷ I.e. longer periods of imprisonment were scored as being more severe than shorter periods.
- ⁸ Another element of proportionality is the requirement that a reasonable proportion be maintained between the absolute levels of punishment and the seriousness of the criminal conduct, (von Hirsch, 1983, 214).
- ⁹ And on the appropriate length of incarceration; Kress (1980, 236).
- ¹⁰ Cf. England where Ashworth suggests the following hierarchy of sentences. Starting with the most lenient, he lists absolute discharge, conditional discharge, fines, probation orders, deferment of sentence, community service order, suspended sentences, partly suspended sentences and immediate imprisonment (1983, 3-9).
- ¹¹ As in the case of Yates [1985] V.R. 41.
- ¹² Cooper 5/10/77; cf. Graham 4/3/83.
- ¹³ In Harrop [1979] V.R. 549 the offender was transferred to prison from a youth training centre shortly after sentence notwithstanding the trial judge having deliberately rejected use of imprisonment.
- ¹⁴ Bruzzese 8/12/82.
- ¹⁵ Breckenridge [1966] Qd.R. 189; Menz & Royce [1967] S.A.S.R. 329; Yates [1985] V.R. 41.

¹⁶ 6/6/79

¹⁷ Zakaria 18/4/84.

¹⁸ Note that a number of the offences against the person and the penalties have been altered by the Crimes (Amendment) Act 1985 (Vic.).

¹⁹ For example, between 1970 and 1979 the average length of imprisonment for convicted murderers in Victoria was 13.5 years (Potas, 1982, 64).

²⁰ [1962] 2 Q.B. 377.

²¹ This refusal to accept the reality behind the life sentence is well established Foy (1962) 46 Crim.App.R. 290; Farlow [1980] 2 N.S.W.L.R. 166; Jolly [1982] V.R. 46.

²² Bruce [1971] V.R. 356; Poulton [1974] V.R. 716; cf. Crusius (1982) 5 A. Crim. R. 427 in which Starke J. noted that although the maximum penalty for manslaughter was fifteen years, convicted murderers had been released on parole, on average, after twelve to fourteen years in custody and therefore the worst cases of manslaughter should be seen in that context.

²³ (1983) 11 A.Crim.Rep. 192.

²⁴ It is not only sentences of imprisonment which may be suspended. The Defence Force Discipline Act 1982 (Cth.), s.79 allows for the suspension of fines in whole or in part and Walker has also noted that the power to bind an offender over with recognizances is similar in effect to a suspended fine (N. Walker, 1969, 108).

²⁵ It is of interest to note that the empirical studies discussed above showed that suspended sentences were usually regarded as less severe than almost any immediate sentence, be it custodial or non-custodial.

²⁶ 8/3/84.

²⁷ If a court passes a sentence of imprisonment for a term of not more than one year it may suspend the whole, or not more than three-quarters and not less than one quarter of the sentence of the imprisonment awarded: s.21(1).

²⁸ Section 21(2)

²⁹ Section 28(1).

³⁰ Section 29(2).

³¹ Though the offender is required to report initially to a 'community corrections centre' (formerly known as an attendance centre) the new legislation does not compel the attendance to be at such a centre.

³² This is similar to community service orders under Part II of the Penalties & Sentences Act 1981.

³³ This takes the place of the former probation order.

³⁴ Section 39(1).

³⁵ Section 41. Cf Section 39(1) which provides that the conviction is not to count for the purpose of any enactment imposing or authorising or requiring the imposition of any disqualification or disability on any convicted person.

³⁶ Section 33(2).

³⁷ Part 8.

³⁸ Part 9.

³⁹ Section 81(a).

⁴⁰ Section 83.

⁴¹ Section 81(b).

⁴² Section 88.

⁴³ See Jones (1983) for discussion of where deferral of sentence fits into the sentencing hierarchy.

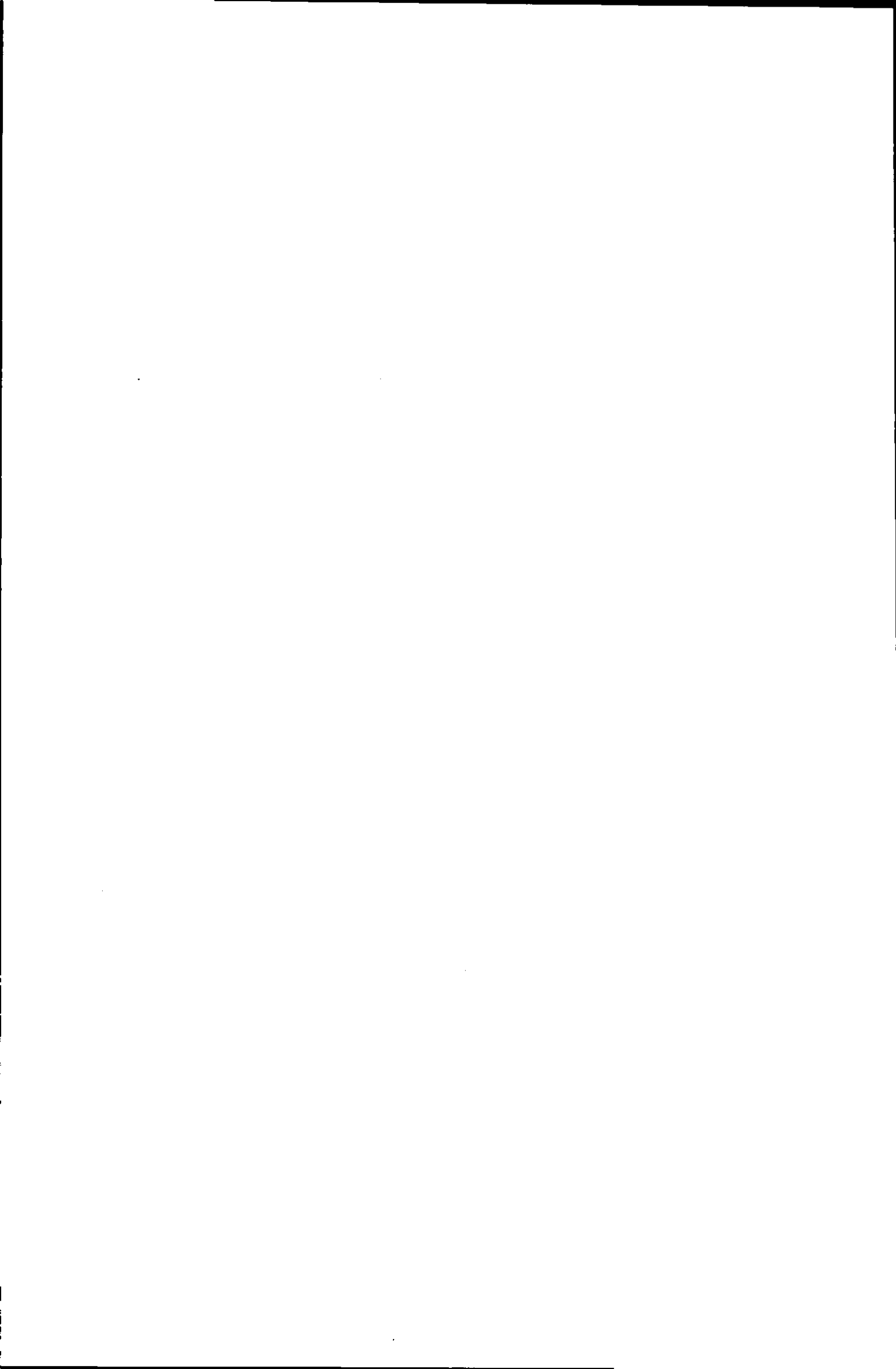
⁴⁴ Section 28(3).

⁴⁵ 7/6/79

⁴⁶ Cooper 5/10/77; see also White (1973, 390-2).

⁴⁷ As amended by the Defence Legislation Amendment Act 1984 (Cth), s.35(a).

⁴⁸ Emphasis added.



DEINSTITUTIONALISATION: A DESCRIPTION AND ASSESSMENT

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The purpose of this paper is to both describe and assess the impact of what has come to be termed 'deinstitutionalisation' or 'decarceration' (the terms shall be used interchangeably). Much of the interest in deinstitutionalisation has come with the wave of reform of the past twenty years that has seen as well the development of such procedures as diversion, decriminalisation, divestment, decentralisation, among others. While there have been long-standing community alternatives to imprisonment such as probation and parole which originate in earlier progressive reforms, in recent years especially there have evolved broadly based pressures for expanded forms of 'community corrections', of which decarceration is but one part. Limits of space force us to defer the important question of why these pressures have evolved, and we shall instead move directly to the question of what is decarceration and how is it different from other suggested alternatives to more traditional justice system processing.

WHAT IS DECARCERATION?

One of the initial problems in carrying out an analysis of contemporary attempts at decarceration is to specify with some clarity what the term means. For some, almost any of the attempts to reduce the scope of the justice system can be included in the same phrase:

Decarceration, deinstitutionalization, diversion -
under whatever name the process currently masquerades
- the movement to return the bad and the mad to the
community has led many to anticipate (or even
announce) the advent of the therapeutic millennium.
(Scull, 1977, 41)

While this collapsing of terms is useful for the general thrust in the argument being developed by Scull, if one is taking seriously the task of examining the post-adjudication alternatives to a prison sentence, then it may be useful to draw somewhat clearer lines between the various methods that have been proposed for reducing the scope or reach of the criminal justice system.

If we start with the concept of the 'funnel' of justice (as found in the works of, for example, Eaton and Polk, 1961 or Empey,

1982), which heuristically calls attention to the consistent drop-off of cases that occurs as cases move through the justice process from 'causes' to 'acts' downward through to ultimate custodial sentencing (see Figure 1), we can see the major strategies of de-structuring (the term Cohen, 1985, suggests for this range of options) which have been suggested and found their way into policy initiatives, including:

1. Delinquency or crime prevention (Figure 2) whereby policy initiatives are undertaken to alter the workings of the causal forces which lead to law violations.

2. Decriminalisation, (Figure 3) which consists of direct changes in the criminal law so that specific acts no longer are grounds for action by the criminal justice system. Decriminalisation can take three major forms: (a) 'true decriminalisation' where a particular act is removed from the codes and no alternative action is proposed (as has been the case with many forms of consenting sexual behavior between adults); (b) 'reduction of sanction', where an act which previously might have brought about serious penalty within the justice system is now relegated to minor or trivial sanctions (as is true for possession of small amounts of cannabis in many jurisdictions); or (c) 'transfer of authority' where a particular problem is transferred from the criminal justice system to some other institutional network (as is the case in the U.S. in most instances where states have 'deinstitutionalised' status offenders by re-writing laws so that problems of dependency and status offence behaviours are transferred to the welfare component of the juvenile court).

3. Diversion, (Figure 4) which consists according to most accepted definitions of processes for removing offenders from the justice system at points after initial contact or arrest but prior to a finding of guilt or an adjudication. Thus, to be diverted one must initially 'penetrate' the justice system.

4. Decarceration or deinstitutionalisation (Figure 5) which in its narrowest meaning refers to procedures to reduce the size of the population of sentenced persons flowing into or through the prison system. Such procedures may involve 'front end' approaches (a term suggested by Austin and Krisberg, 1985) which attempt to deflect sentenced individuals prior to prison (such as probation, attendance centres or community service orders) or that can be 'back end' options which result in persons serving less time in prison than they otherwise might (this including, parole traditionally, and in more recent years half-way houses, work-release and educational release programs, among others).

TWO METHODS OF REDUCING PRISON POPULATIONS

If one is concerned with the task of reducing the number of persons incarcerated in prisons, conceivably any of these procedures designed to reduce the overall size of the criminal

FIGURE 1
THE CRIMINAL JUSTICE FUNNEL

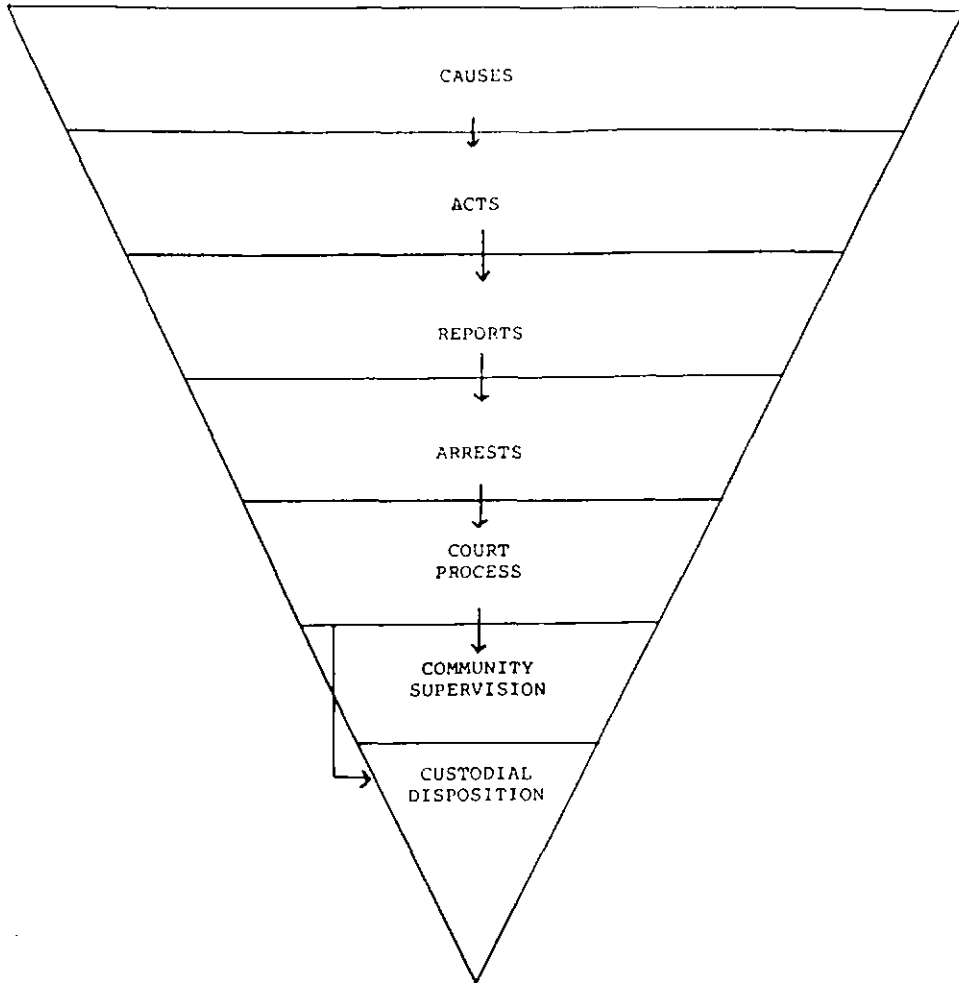


FIGURE 2
THE LOCATION OF DELINQUENCY PREVENTION

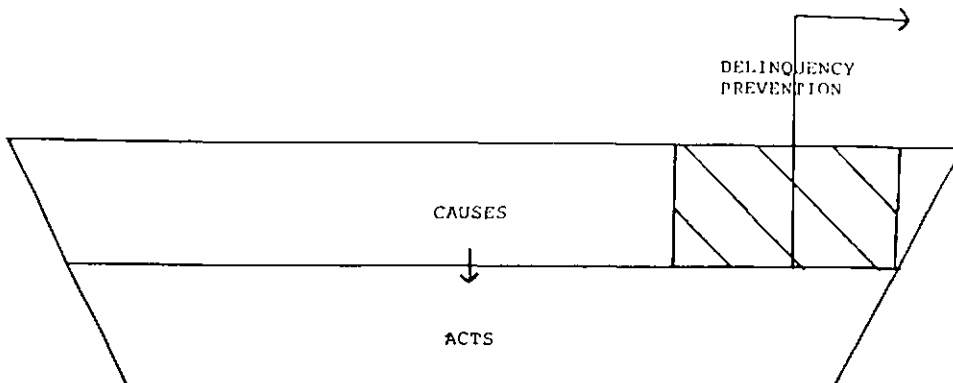


FIGURE 3
THE LOCATION OF DECRIMINALISATION

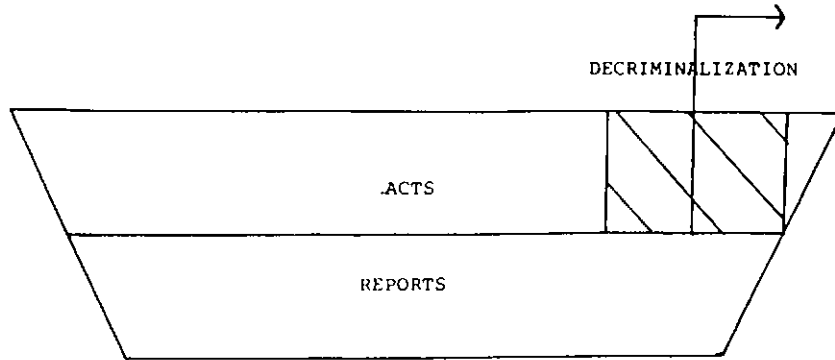


FIGURE 4
THE LOCATION OF DIVERSION

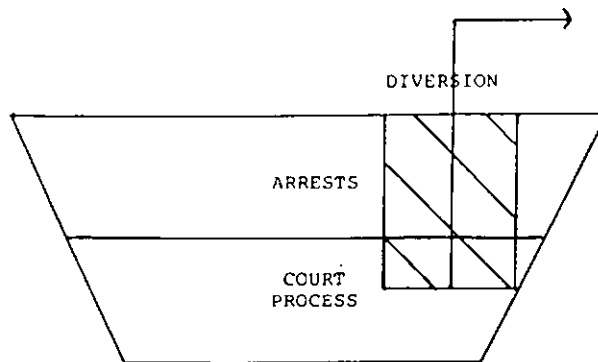
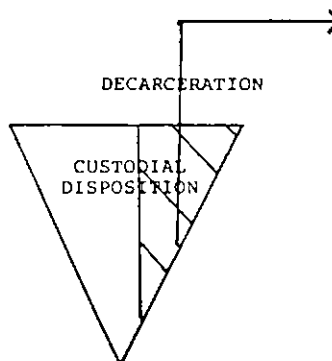


FIGURE 5
THE LOCATION OF DECARCERATION



justice funnel would then result in a smaller population at the bottom end of that funnel. In actual practice, however, there are few serious contenders in terms of programs designed to prevent adult criminal behaviour that can claim to be effective, and most diversion programs are (a) designed for juveniles and/or (b) are designed for the less serious, trivial offenders who would not be at risk of a custodial sentence (Klein, 1979). One established way of accomplishing this task, however, is to reduce the pool of offenders who might become liable for custodial sentence through direct alteration of the criminal law, i.e., through some form of decriminalisation.

Clearly, re-writing the criminal law such that the custodial disposition is no longer available might be a major vehicle for achieving reduction in prison populations. Two recent illustrations of this process are available. First, in many jurisdictions after the onset of the 1970s the laws with respect to the possession of small amounts of marijuana were revised so that for this crime only relatively trivial fines might result. In jurisdictions such as California, a reasonable case might be made that this alteration of the law accounted for much of the drop in both total felony arrests and prison sentences in the immediate post-1975 period (when the law was changed), especially since arrests for property and violent crimes did not decline to the same degree (see Galvin and Polk, 1983, 155-7). Shortly after this, however, revisions of the criminal law both to increase penalties for most felonies and to provide for determinant sentences produced a steep rise in the prison population in California, which produced a doubling of the prison population between 1976 and 1986 (compare the figures in Galvin and Polk, 1983 with those reported by Gibbons, 1986, forthcoming).

The second illustration is the cause of deinstitutionalisation of status offenders (D.S.O.) in the United States. This took the form of a Federal initiative emanating from the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice. While the evidence is mixed, and the case a cloudy one (as shall be discussed below), nonetheless one set of evaluators of this effort were able to conclude that as a consequence of the D.S.O. initiative, '... it seems clear that a reduction in secure placement of status offenders did take place during the program period'. (Kobrin and Klein, 1983, 310-11).

Probably the most commonly sought path to reduce the size of prison populations has been to create one or another of the decarceration programs. Among the front-end options, early in the period of progressive reform we find the emergence of probation. In Australia on top of such other non-custodial options as fines or suspended sentences, in recent years major programs aimed at decarceration have included the establishment of Community Service Orders and Attendance Centres. The back-end options include well-established parole procedures, and in more recent years such programs as half-way houses, work-release

programs, education-release programs and other 'early release' schemes.

DECARCERATION: AN ASSESSMENT

There are three major questions we can ask to guide an assessment of decarceration programs. One, are these effective in terms of lowering subsequent levels of offense behaviour? Two, do these programs remain as true alternatives, or do they contribute to an actual widening of the net of social control? Three, are these programs, in fact, cost-effective?

The first of the questions, that concerning the impact of decarceration on subsequent criminality, is not an easy one to answer, partly because of data problems, partly because of issues of logic. For the Australian audience, it is unfortunate that existing assessments of decarceration programs in this country, while useful for some important purposes, do not have the comparison groups necessary to make claims of program effectiveness. Thus, the research of Fox and Challenger (1985), McKay and Rook (1976) or Varney (1976) all report some form of post-program criminal history data, but are unable to provide a reasonable base of comparison by which these data can be evaluated.

There does tend to be a uniform finding to the overseas data on decarceration specifically, and alternatives to justice system processing more generally. That finding is that groups who experience the community option without exception are no worse off than are those who experience further processing, especially institutionalisation. This way of stating the results actually turns to a different angle the frequently observed finding of 'no difference' which some have interpreted as 'nothing works' (e.g. Martinson, 1974). For example, the well resourced, large scale national evaluation in the U.S. of the deinstitutionalisation of juvenile status offenders concluded that '... the D.S.O. program did not appear to have a beneficial effect with respect to client recidivism', this finding resulting from the observation that '... the difference in recidivism rates between the preprogram and the evaluated program groups was not statistically significant in most of the sites'. (Kobrin and Klein, 1983, 310).

In a New Zealand study using a matched group design comparing offenders sentenced to community service orders contrasted with a group sentenced to non-residential periodic detention, it was reported that it is unlikely that there are any differences in reconviction rates between the community service and periodic detention groups (Leibrich, 1974, cited in Chan and Zdenkowski, 1985, 54). A similar matched group design was used for a Canadian evaluation of a community service orders program for juveniles, also producing results of 'no difference' between the community service experimentals when contrasted with a matched control group in terms of police charges, school performance and

self-report delinquency, although some differences were observed in police cautions (Doob and Macfarlane, 1984, also cited in Chan and Zdenkowski, 1985, 54).

In a somewhat tighter experimental study in California, the Empey and Lubeck (1971) study of the 'Silverlake' experiment which contrasted a group of repeat, juvenile offenders assigned to a private residential facility with a group of similar offenders who underwent a community program again found that the community based strategy was not superior to the institutional approach as defined by further involvement in lawbreaking.

There are at least two additional studies of potential interest. In the report on the Provo Experiment, again focused on juveniles, Empey and Ericson (1972) report data for four groups: experimentals (i.e. program participants) drawn from a probation and from an institutional population, and probation controls and institution controls. What is remarkable in the findings of this study was that the reoffending rates for all of the groups that remained in the community (i.e., probation experimentals, probation controls and institutional experimentals) were lower on measures of recidivism than were the institutional controls. Put crudely, regardless of the form of treatment, those who remained in the community had lower rates of law violating than the group who went on to the institution (Gibbons, 1986, 254 does warn, however, that design flaws make these findings suspect).

In a recent report (Klein, 1986, forthcoming) which used a similar four groups design with random assignment to the groups (in this case the further juvenile justice processing consisted of referral to the juvenile court, so the findings are not strictly comparable to the institutionalised groups), consistent differences were found in terms of lower levels of recidivism to the groups not inserted into the justice system in contrast to the group that received further system processing (although there were no consistent differences between 'untreated' and 'treated' community groups). At the same time, there were no differences between the four groups in terms of self-report delinquency, suggesting that further processing is more tied to subsequent justice system action than it is to law violating behaviour itself. Perhaps the most important function of these two investigations is that these emphasise that in studying the effect of community options to incarceration, comparisons need to be made not only between the community-based experience group and the incarcerated group, but with a group receiving some form of routine community experience (such as probation) as well. Thus, to make the case for a community program, it would seem important to be able to argue that it is something particular about the community program, rather than simply the benefits of remaining in the community in contrast with the potential harm of incarceration, that produces any results observed.

In summary, while there are some studies showing positive effects for community alternatives, the general weight of the available

literature suggests that the safest conclusion for now is that a case cannot be made that community alternatives produce lowered rates of subsequent offending than would occur in more traditional institutional sentences (for an overview of these issues, see Gibbons, 1986). At the same time, this finding of 'no difference' does suggest that at least offenders are no worse off, that is, pose no greater risk in terms of subsequent criminal behaviour, than would result from incarceration.

THE ISSUE OF NET WIDENING

In virtually all the discussions of deinstitutionalisation, an assumption is made that the new process will serve as an alternative to a custodial disposition. If the programs that are created actually are used in addition to the existing sentencing options, then there is a danger that the gains of decarceration will be illusory. In this case, we are able to draw upon relatively strong data from Australia to assess to some degree the results of existing deinstitutionalisation initiatives. First, in terms of indirect evidence, examining various trends in the last decade in Australia, indicate that there has been: (1) a slight increase in the parole rate; (2) a large upward trend in the rate of probation; (3) a similar upward trend in the use of community service orders; but (4) the rate of imprisonment has remained relatively stable (Chan and Zdenkowski, 1985, 19-28). If the community based alternatives were functioning as deinstitutionalisation processes, it would be reasonable to expect a downward trend in the rates of persons imprisoned, running parallel with the increased use of community alternatives.

More direct evidence regarding the potential for net widening comes from the recent examination of attendance centre orders in Victoria conducted by Fox and Challinger (1985). The clear legislative intent of this program is that it should be seen strictly as an alternative to prison, such that the court in imposing a sentence of imprisonment for more than a month, but less than twelve months, for either an indictable or summary offence may order that the sentence be served in an attendance centre (Fox and Challinger, 1985, 6). The assessment of this decarceration effort commented that although these attendance centre orders:

... should be seen strictly as an alternative to imprisonment and not a measure for person otherwise eligible for non-custodial sentences, the connection between the announced sentence of imprisonment and its service by way of attendance at an attendance centre is not a secure one. (Fox and Challinger, 1985, 7)

This investigation observed that among those persons who were initially sentenced by the court to the attendance centres but

who were then refused admission into the program, where if the program were a true alternative to incarceration it would be assumed that there would be virtually an automatic imposition of a prison sentence, instead:

... a third of those who were refused admission escaped any form of custodial sentence and many of the participants in the system, both offenders, lawyers and sentencers (especially in the lower courts) failed to recognise the disposition as one inexorably tied to a decision to imprison. (Fox and Challinger, 1985, 15)

In an evaluation of the Saturday work order scheme in Tasmania, Varne (1976) reported that many of those sentenced to work orders would not have gone to prison, i.e., that the program was functioning as an addition, rather than an alternative, to imprisonment. Rook (1978) attempted to refute Varne's conclusion by showing that an interrupted time series design suggests that the rate of imprisonment in Tasmania in the post-program period (after 1972 and up to 1976) was well below the levels that would have been reasonably projected from the pre-program trends (i.e., the upward trend in imprisonment observed from 1967-72). However, since similar declines were observed in Victoria, South Australia and West Australia (where the program was not operating), the conclusion that there is some factor (other than the work order scheme) operating in common across these states which might account for the observed drop in imprisonment cannot be easily rejected, at least without further data.

Overseas assessments support the conclusion that decarceration and its related de-structuring policies may be widening the net of formal justice functioning. In a Canadian study, Hylton (1981, 1982) examined the effects of community corrections program introduced in Saskatchewan from 1962 to 1979, concluding that not only did these not reduce the size of the prison population, they actually resulted in a three-fold increase in the proportion of persons under formal state control. One of the conclusions of the national evaluation of the deinstitutionalisation of status offenders project in the U.S. was that the programs were clearly biased to heighten the intake of the less serious offenders, '... including many who would not have been caught up in the referral network had the program services not been available'. (Kobrin and Klein, 1983, 303) In the general review of research relating to such policy initiatives as decarceration, Austin and Krisberg (1981) suggest that instead of reducing the size and scope of the criminal justice system, many reforms instead may be contributing to the development of wider, stronger and different nets, a theme echoed in Cohen's recent major work, Visions of Social Control (1985). Austin and Krisberg observe that even decarceration outside of the justice system may have implications inside the system:

Decarceration can create new nets. One example is the deinstitutionalisation of mental patients ... As the mental patients were pushed out of mental institutions, there was an accompanying rise in jail populations. And increasingly, those jailed were persons with histories of placement in mental institutions. With referral to mental hospitals of marginal 'criminal' cases - persons apprehended for disorderly conduct, indecent exposure, drunkenness or miscellaneous property offenses -- no longer possible, the population was transferred to a new net with fewer mental health resources. (Austin and Krisberg, 1981, 173).

In sum, at this point one could not conclude that in Australia the development of community-based programs has contributed to a significant decline in prison populations. While programs such as the attendance centres in Victoria may serve as an alternative to a prison sentence for some, there is clear evidence of a 'spillage' of offenders who previously would have received a non-custodial sentence into the program. While more exacting evaluation data are needed, such net widening is clearly contrary to the judicial and legislative intent behind the deinstitutionalisation policy.

COST EFFECTIVENESS

One of the clear appeals of a community alternative is the apparent cost saving. As justification for such programs, it is common to compare the average cost per offender in the community program contrasted with the costs of a prison sentence. In the Tasmanian scheme, for example, Rook (1978) reported that the average weekly costs for those on work orders was \$3.73, compared with \$145.34 for a prisoner (in 1975 dollars). In Queensland, the average daily cost (in 1981-82) for offenders under community service orders was \$1.52, compared with the daily prison costs of \$49.13 (Leivesley, 1983 reported in Chan and Zdenkowski, 1985). The costs of attendance centres in Victoria is, as expected, somewhat higher, but still there is a large difference between the \$2,500 a year for the offender in the attendance centre contrasted with the \$14,000 per year costs for the prison offender (Fox and Challinger, 1985, 4).

At first glance, these figures are, as Fox and Challinger (1985, 4) observe 'persuasive'. Indeed, in virtually all of the arguments for one or another of the community alternatives the appeal of cost savings will be addressed. For a true costs saving to be realised, however, specific conditions have to apply. First, there has to be a significant number of offenders referred to the community program, and a corresponding decrease in the number of offenders sentenced to prison. Second, the decline in numbers of persons sentenced to prison would have to lead to some proportionate decline in funding for the prison

system specifically, and for the corrections system overall.

I can find no evidence of this happening anywhere on a systemic basis. Instead, in Australia despite the increased use of community alternatives to prison over the period of the late 1960s through the early 1980s, Chan and Zdenkowski (1985) report an enormous growth in outlays for prison and corrective services (from \$22 million in 1968-69 to \$276 million in 1981-82) and capital outlays (from \$6 million to \$39 million in the same period) within the correctional system. In their review, Chan and Zdenkowski (1985, 57-9) conclude that similar increases of expenditures have accompanied the development of community-based alternatives in both Canada and the U.S. While theoretically a shift to community alternatives might under very specific conditions create lowered correctional costs, the reality is that the failure to reduce prison populations, and then reduce prison costs, means that in its present form community corrections costs more. Further, even if prison populations could be reduced in real terms, it may not reduce correctional costs significantly, on the one hand because a prison population composed of the most serious and intractable prisoners will still be expensive (i.e., simple proportionate budget reductions are unrealistic), while on the other hand, new and perhaps hidden costs will have to be anticipated in terms of the resources needed to provide housing, income supports, health care, training, and similar services to the new community clientele.

THERAPY, COERCIVENESS AND COMMUNITY PENETRATION

This brief review suggests that the actual results of decarceration may be rather different than what was intended. What accounts for this difference? The answer to that question depends upon the stance one takes to social change, social control and criminal justice. Cohen (1985) suggests in his lengthy and erudite analysis of this problem that there are three basically different responses: (1) 'give it a chance' which argues that while there are problems in the way the programs were implemented, with more resources, fine tuning of the alternatives, and plenty of good will, more of the reform should produce better results; (2) 'we blew it' where decarceration becomes another illustration of how good intentions go wrong, in large part because entrenched and powerful bureaucrats embraced the innovations but then converted these to their own ends, providing another historical example that benevolence is to be mistrusted; or (3) 'it's all a con' which derives from the pessimistic view that decarceration reflects the intentions and ideology of the capitalist order, and its results (i.e., the expansion of control under the guise of decarceration) are deliberate and purposive.

Space and time unfortunately precludes a full discussion of these issues. Let me say briefly that it is my belief that an understanding of the problems of decarceration are best

understood by some variant of the second option ('we blew it'), especially if it is possible to trace the key ingredients of these reforms that produced the unintended consequences.

The first of these, I would argue, is that the community alternatives maintained a powerful commitment to a therapeutic model, shifting the locus of that model from the institution to the community. When we examine in detail the specific elements of this view it has, typically, three elements. First, there is the observation that 'prisons have failed', as, for example, the observation by Tomasic and Dobinson:

... it seems clear to most disinterested observers that prisons as we know them now have failed disastrously as humane and effective means of dealing with persons who offend against the dominant legal and moral order of any society ... It has become clear that prisons have failed to achieve the objectives of rehabilitation, deterrence and reform that their proponents have seen them as fulfilling (Tomasic and Dobinson, 1979, 1-3).

Second, there is the establishment of the principle that 'the community' is an appropriate environment for intervention:

Crime and delinquency are symptoms of failure and dysfunctioning of the community as well as of the individual offender. The community has its share of responsibility to bear for conditions conducive to crime and as a result must share in the responsibility to deal with results of these conditions. With the recognition that traditional penal institutions have not adequately performed their rehabilitative functions, community programs such as halfway houses are being developed in order to reduce the flow of individuals into those institutions ... The best opportunity for successful integration or reintegration of the offender seems to lie with the community itself. (McCartt and Mongogna, 1977, 43)

Third, and especially critical, there is a sophisticated theoretical principle that the specific treatment can best, if not only, be done 'in the community':

Delinquents must be forced to deal with the conflicts which the demands of conventional and delinquent systems place upon them. The resolution of such conflicts, wither for or against further law violations, must ultimately involve a community decision. For that reason a treatment program, in order to force realistic decision making, can be most effective if it permits continued participation in

the community as well as in the treatment process.
(Emey and Rabow, 1961, 683)

Once elaborated, then, this community therapy model requires that the program be 'decarcerated', i.e., it provides a rationale for working not in the institution, but in the 'natural setting' of the community. At the same time, since the intervention originates from the criminal justice system, and in the case of decarceration after a finding of guilt or adjudication, a further ingredient is that the program becomes legally coercive. Failure to participate can become grounds for re-insertion back into the criminal justice process. This coerciveness can create a number of hidden effects. From the viewpoint of the 'clients', it can generate motivations to conceal and manipulate, in order to avoid the threat of return to prison. From the viewpoint of the program, since the client group are 'in the community' and visible as a group of 'criminals', there are strong pressures to maintain stringent controls over client behaviour, such controls when effective potentially creating conflict with client groups, when ineffective producing conflict with local neighbourhood residents.

Further, the programs are virtually always designed to 'cream' off the 'softest' cases. Most such programs will not take 'serious' offenders, since these pose too great a 'risk' to the program. It is precisely this focus on the less serious offender that facilitates spillage from comparable offenders at less deep points in the justice system (i.e., net widening).

In addition often such programs, especially community-based decarceration programs, offer forms of badly needed services. For example, many persons who find their way relatively deep into the justice system, are likely both to have limited financial resources and to need a place to stay. How many community organisations willingly throw open their doors, let alone their beds, to 'known criminals'? In the case of residential programs, in other words, clients may be enrolled not because they meet the 'criteria', or because they have a 'problem' appropriate for therapy, but more practically because they need a bed to sleep in, and the program is one of the few places where one is to be found.

Finally, in some instances the pursuit of correctional programs into community settings can have the effect of extending the logic of coercive control inappropriately into other non-justice agencies in the community. As education, employment, family service or other agencies become involved with correctional programs, and accept the conditions of working with offenders, these may begin to take on the coerciveness and social control functions of the criminal justice system. For example, Pratt (1983) has observed that the spread of correctional programs in the U.K. into such deinstitutionalisation efforts as 'Intermediate Treatment' (I.T.) and their involvement in personnel and education arenas has the result that:

The effects of these inter-connected provisions seem likely to involve longer and more intensive regulation of a large section of the youth population: indeed, earlier intervention and longer follow-up has been the regular demand of social workers on IT programmes; equally, the growth of this matrix has generated its own management structure and overlap between professional agencies; the scope of this intervention can mean that there is no qualitative distinction between offenders, the unemployed and all the other sub-divisions of the 'at risk' category: there are merely degrees of 'need', to be assessed by various case conference teams, justifying their intervention in terms of the extent to which they are beneficial to young people ... (Pratt, 1983, 356, emphasis in original)

AN ALTERNATIVE: MINIMAL AND FAIR CONTROL

While it is tempting to see the 1960s and 1970s as a period of homogeneous treatment reformism, in fact running through this period one can find voices calling for an alternative that is based on reducing penalties within the correctional system to a minimum (and assuring that these are fair), while at the same time arguing that where resources and services are needed, these should be organised well outside of corrections. In part, this 'hands off' approach has its roots in labelling theory (e.g., Becker, 1973 or Lemert, 1972) and the concern of that perspective for the potential damage of correctional labels. In its extreme form, it produces such directives as 'leave the kids alone whenever possible'. (Schur, 1973)

Often this approach provides an explicit attack on the theoretical relevance, appropriateness and justification of the psychological treatment that is at the core of most reintegration approaches. One influential group of writers assert:

... in our view, treatment mixed with coercion is scientifically unfeasible and morally objectionable. Coercing persons into treatment routines or imprisoning them and making their participation in rehabilitation programs a condition of their release has not, in any sense we can measure or evaluate, made them into less criminal and more contented or more effective individuals ... we must conclude, after decades of experimentation, that treatment has failed miserably. Not only has treatment not produced any desirable changes, it has increased the numbers and suffering of those receiving the treatment. (American Friends Service Committee, 1971, 146)

The 'hands off' approach in fact has two components. In terms of the justice system, the argument is that punishment ought to be fair (and thus control of discretion is necessary) and at minimum to fit the crime. At the same time, steps should and could be taken to improve wider conditions of education, employment, housing, etc., not just for prisoners, but for wider populations of vulnerable persons. Thus, as Schur (1973) argues, some of the most important crime prevention strategies will not appear to be about crime at all.

The influential Struggle for Justice argued:

In recommending the separation of helping and coercive functions of the criminal law, we may have conveyed the impression that we support abandoning the goal of helping the defendant or prisoner. This is far from the truth. We envision a vast expansion of the range of educational, medical, psychiatric, and other services available not only to prisoners but to all people. Quality services now enjoyed by an elite should be made free and accessible to all (A.F.S.C., 1971, 152-3).

Thus, in this 'hands off' perspective, programs would not be designed solely for prisoners (since then stigma and coercion would prove unavoidable), but for wider groups of persons in the community (e.g., Polk and Kobrin, 1972). While often the recommended forms of decarceration will contain such elements derived from the 'hands off' perspective, in fact virtually all reforms are maintained within the existing correctional bureaucracies and, in fact, represent an extension of older humanistic and reintegration approaches. In Australia, for example, some of the most significant initiatives for offenders may be found in programs such as the traineeship scheme recommended in the Kirby Report, or the Youth Guarantee Program in Victoria, both of which are being organised well outside of correctional or justice bureaucracies.

CONCLUSION

From the foregoing review, it might be presumed that this writer is pessimistic about either the possibility, or the appropriateness of attempts at decarceration. This would be far from the truth. If nothing else, the sharp rise in the costs of imprisonment suggest that at some point policy makers must begin to treat imprisonment as they would other scarce and expensive resources, to be allocated carefully, judiciously, and only where the circumstances dictate that such an extreme sanction is appropriate. If you will, prison sentences are too precious to waste.

The one observation that can be made from an examination of the trends in prison populations over time is that these are

exceptionally vulnerable to combined legislative and judicial action. Joint undertakings between legislative and judicial groups, in other words, could produce just and uniform penalties which called for greater use of probation as an alternative to imprisonment in clearly specified cases, and for a shortening of prison terms where appropriate. Such actions could have the result of decreasing the number of persons incarcerated. It might be added that the failure of legislative groups to address responsibly such solutions when prisons are dangerously over-crowded (or at least to provide additional resources to correctional authorities) is what creates the tempting pressures to seek 'back-end options' such as early release which was a point of concern of the Full Bench of the Full Court in Victoria in R. v. Yates (see the comment of Fox, 1986).

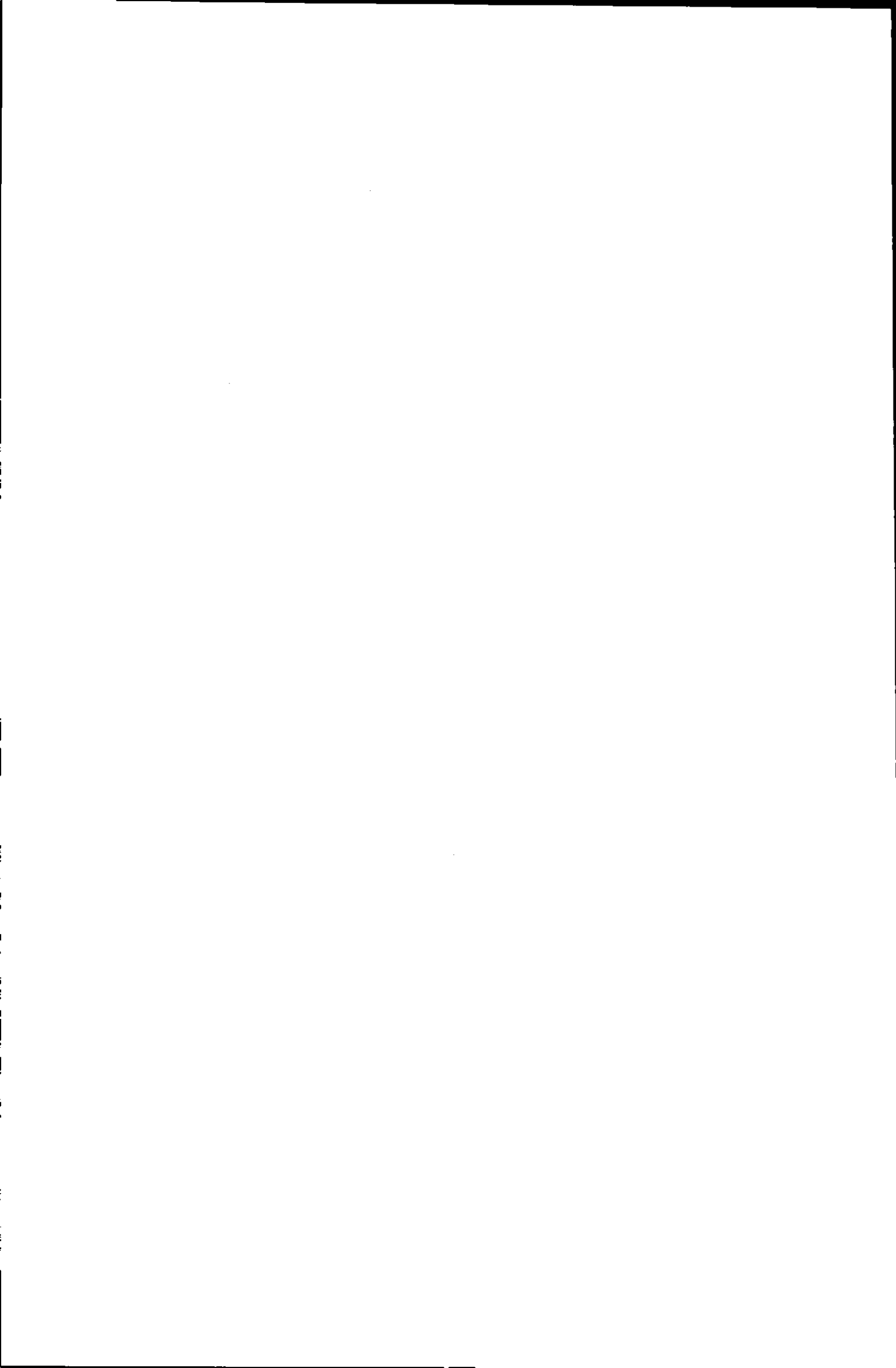
In terms of the general processes discussed earlier in this paper, the conclusion is that actual reductions in the size of prison populations are more likely to be achieved, it would appear, from legislative and judicial action in terms of one or another form of decriminalisation (especially reduction of levels of penalty) than from the creation of decarceration programs, especially those based in community treatment models. At the same time, such efforts to reduce prison size may depend upon the simultaneous development of wider programs expanding resources for employment, education and housing (among others) not just for prisoners, but for all citizens. Ultimately, the specific and narrow concern for prison reform may have to be cast within a wider framework of social justice for all. Lacking this wider concern for social justice, decarceration may contribute directly to the expansion of the very forms of coercive control that it appears to be designed to narrow.

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PROBATION AND PAROLE
AUSTRALIAN CAPITAL TERRITORY, NEW SOUTH WALES
MORE PROBLEMS THAN PROSPECTS

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SUMMARY

This paper is highly critical of the Probation and Parole Act 1983. It argues that it does not have the clear rationale and practicality upon which to organise the sentencing and correctional systems of the next two decades.

In addition, it criticises reactionary policies with respect to correctional issues. It argues that repeated political disruptions to the operation of corrective services is frustrating good administration and is generally non-productive.

It mentions the following problems for Sentencing and Corrections:

1. difficult and incomprehensible legislation;
2. increased prison population tendencies;
3. increased community supervision cases;
4. unnecessary widening of State control trends;
5. lack of concerted effort by criminal justice agencies;
6. lack of credibility;
7. lack of community support.

It forecasts the following prospects:

- a. That current legislation will continue to cause problems, over the next decade, especially as far as credibility is concerned.
- b. That real progress towards community corrections will be impeded by this legislation.
- c. That costs of running corrective services will escalate sharply because of the Government's lack of flexible options to meet the public conservative reaction.

It recommends pro-active Government policies towards sentencing and correctional practice:

- a. That there be a comprehensive review and overhaul of sentencing legislation to make it relevant to modern needs.

- b. That there be drawn up a statement of aims and objectives for the criminal justice system, not just strategic plans for its disparate parts.
- c. That there should be a genuine effort to create alternatives to imprisonment and a real shift of financial resources to that area.

OVERVIEW

Whatever the State or Territory in Australia, there are a number of qualities which will be demanded of a criminal justice system.

1. That law and order is maintained at an acceptable level.
2. That there be a general feeling in the community of personal safety and security of possessions.
3. That offenders are apprehended and brought to justice expeditiously.
4. That justice is done fairly and consistently for all persons.
5. That the law can be understood by the average person and enjoys the broad support of the general public.
6. That the various parts of the system are committed to its basic principles and are pulling together.
7. That the major types of sentencing options are understood by the general public.
8. That offenders are punished according to humane principles and that all reasonable attempts are made to rehabilitate them.
9. That victims of crime are, of course, looked after.

There can be many improvements to the above list but it will do for my purpose. I believe that the criminal justice system in New South Wales over the last decade has failed at some time in every aspect of the list. Nowhere is this contention more amply illustrated than in the Probation and Parole Act 1983¹.

This Act fails to present a clear rationale for its operation and, consequently, little is understood by either my staff or the public of its principles. It is complex and clumsy. Two years after its commencement, operatives still do not know how to process a breach of an after-care probationer. As recently as February 1986, a Magistrate, Probation Officer and Police Prosecutor admitted in court that they did not know how to proceed.

Institutional officers appear to be confused about their role towards prisoners with after-care probation orders and are often surprised by many release arrangements because of the effect remissions have in bringing forward release dates.

The archaic remission system, long threatened with reform, seems to be a survivor. It would appear that not enough powerful persons have understood its complexities long enough to ensure its demise. After a public and judicial outcry over the effects of remissions in reducing non-probation and non-parole periods, the State Government has now fore-shadowed amendments to the Act to allow judges discretion to stipulate that remissions will not apply to the non-probation and non-parole periods.

While this reaction may please some, it simply adds another variable to an already difficult situation and does little to improve the operation of corrective services.

In my view the system by which we sentence and release offenders needs complete overhaul. Attempting to modify the system as problems arise is analogous to trying to get the Mihael Lermontov to safety with kayak paddles. There are more problems than prospects. Once a large complex system is on the rocks, you need either a miraculous repair job or another ship. I would strongly recommend another ship.

At this point of time when the New South Wales prison population has reached critical levels, when the supervision caseload of the Probation and Parole Service has increased noticeably in recent years and when there is public dissatisfaction with the system, it is significant to note that the current situation was forecast in some detail by my Association in December 1981. I quote from the paper entitled 'Parole: Comments on Proposed Changes in the Parole System', December 1981, by the Probation and Parole Officers' Association of New South Wales - page 11².

That current parole proposals stemming from the Muir Committee Report³ lack the clear rationale and administrative practicality upon which to base the Corrective Services system in the 1980's and 1990's.

Even as experimental, transitional measures, it is considered that the proposals will not be beneficial and without full Government guidelines, will not achieve a stable nor decreasing prison population.

It is recommended that the Government initiate the major review recommended by the Muir Committee with terms of reference to enable a co-ordinating role in such matters as remissions, probation legislation and other sentencing factors.

In the following brief exercise I will attempt to draw out some of the major issues from a Probation and Parole Officer's viewpoint in what has been a very interesting decade in correctional history. In addition, I will outline what parole and after-care work means in practice and, finally, I intend to look ahead to some desirable objectives in the conduct of criminal justice and corrections.

PROBLEMS

In 1982 the New South Wales Government introduced the new Probation and Parole Act, after the basic legislative proposals had been side-lined for five years. The Act had its origins in the Report of the Royal Commission into New South Wales Prisons, in 1978,⁴ and the Muir Committee Review of the Parole and Prisoners Act of 1966, published in February 1979³. Whatever its origins, however, the real stimulus came with the huge controversy surrounding the operation of the Release on Licence Scheme introduced in 1982 by the then Minister of Corrective Services, Mr Rex Jackson.

Therefore, the Act can be said to have been implemented because of past problems and in the midst of current problems. What were the issues behind this situation?

Parole Criticism

The parole system in 1976 seemed to be relatively stable. It was well run and there was not a hint of scandal. Yet, when the Royal Commission began its hearings, prisoner grievances about parole were very prominent and very effective. Moreover, not only were prisoners critical but also Corrective Services staff, in particular Probation and Parole Officers. The Probation and Parole Officers' Association first commented on prison problems in its submission to the Royal Commission into New South Wales Prisons in 1977⁵. However, the Association rapidly determined on a policy of determinate sentencing after comprehensively summarising the features of the parole system in its paper, 'Towards An Alternative Approach to Sentencing', in May 1978⁶. These criticisms were concisely defined in 'The Minority Report' by Ken Lukes, Director of Probation and Parole Service, in the Muir Committee Report, pages 64-6³ and are worth repeating in some detail.

'Deficiencies Affecting and Expressed by Prisoners'

1. No appearance before Parole Board.
2. No representation.
3. No access to documents, therefore do not know what is said about them.

4. Uncertainty of actual release.
5. Release is dependent on the opinion of others, not on objective criteria.
6. There are no formal means provided to question these opinions.
7. No right of process of appeal from adverse decisions (Minority Report, 64).

To a large extent most of these issues have been addressed in the new Probation and Parole Act. It is probably too early to assess the effectiveness of new measures in the above regard, but I am prepared to concede that they will probably be successful with one exception, namely uncertainty of actual release.

With or without the Government's amendments to allow judges discretion to stipulate that remissions will not affect non-parole and non-probation periods, there will be ongoing uncertainty over parole releases. Moreover, certainty of release on sentences of three years or less when applied, is hardly likely to meet with the approval of the offender, nor provide any incentive for that prisoner to comply with prison officer instructions.

Probation and Parole Officer Criticisms of the Parole System

There were a number of related problems, but essentially officers were complaining that they were involved in a vast assessment process for all prisoners with non-parole periods when the great majority were being released by the Parole Board anyway. The difficulty with accurate assessment in an artificial environment and the anxiety it causes among prisoners were seen by officers as detracting from a worthwhile role as counsellors towards an inevitable release for the prisoners concerned.

In summary, officers were complaining that:

1. there were too many assessments,
2. assessments were often invalid or for no real purpose,
3. that the system's priorities with assessments prevented them from doing worthwhile work.

Community Complaints

The community complaints which have continued right up to the Government's recent amendments on remissions centre on the credibility gap caused by a system that imposes a long head sentence but a much shorter non-parole period. The effect of remissions off non-parole periods increases the discrepancy in

the public's eye and it is a weakness in the system which is easily exposed by the media. For example, on Sunday, 16th March, 1986, the Sunday Telegraph published a short article by Ellis Glover on page 11, entitled 'Drugs Doctor Could be Free in Seven Years'. I quote, in part, because the article is more informative than most.

Doctor Nick Paltos, sentenced to 20 years jail for conspiracy to import seven tonnes of cannabis resin, could be freed in seven years under the conditions and system of remissions governing his sentence.

... Paltos, as a first offender, is entitled to a remission of one third of the effective sentence of 13 years (minimum sentence). This reduces his sentence of thirteen years to eight years and eight months. Paltos is further entitled to an Industrial Remission of two days a month for working while he is in prison which will further cut his time to be served by 208 days.

Then, when he is transferred to a prison farm or low security jail, he is entitled to a Programme Remission of a further two days a month for the time he is there.

This will reduce the time he will serve to approximately seven years.

This type of press article with less information has occurred regularly over the last five years and has cemented in the public mind the belief that prisoners are being let out early before they have completed their sentences, rather than in accordance with intentions of sentencing authorities. It would be logical to assume the press believes that the concept of parole does not have the respect of the general public (this subject has been fully covered in Association papers listed in the Notes and in the Law Reform Commission Report No. 15 Interim, Sentencing of Federal Offenders, 179-215).

Political Involvement

Most Western governments have had problems with crime control and prison administration in the last few decades. New South Wales, therefore, is by no means unique in that regard, but its approach to sentencing matters is rather baffling to say the least.

The exercise in setting up a Royal Commission into New South Wales prisons and working patiently through prison reforms can be seen as a good piece of pro-active political involvement. So too can the more recent setting up of a Police Board and the new drive towards community policing policies. However, in regard to sentencing matters there have been a mixture of knee-jerk reactions, apathy and excitement.

Examples of:

a. Reactions

1978 - restrictions on Work Release following isolated incidents.

1978 - setting up of the Muir Committee to review the Parole of Prisoners Act in only two months.

1983 - implementation of Muir Committee proposals, after furore over release on licence scheme.

1986 - amendments to allow judges to prevent remissions being applied to non-parole periods after several grisly crimes in New South Wales.

b. Apathy

No positive action to implement Muir Committee proposals for five years.

No action on Probation Act proposals.

No substantial action on remission system.

No positive action on drug offender treatment (e.g. methadone treatment availability) in the face of widespread drug use and crime.

No coherent Opposition Party policies on corrections.

c. Excitement

Rex Jackson's Release on Licence Scheme 1982-83⁸ must go down as the most pro-active political involvement in correctional matters since Governor Macquarie released 11,000 convicts on licence 170 years ago.

It is worth reflecting on the rise and fall of the scheme.

In a short period of time, hundreds of prisoners who had been literally marking time because of long sentences rather than posing a risk to the community, were released with a large degree of success. The system and the public had been softened up by what appeared to be an initial clearing out of minor offenders. The Release on Licence Scheme was, however, extended to longer term prisoners who could be released after only a quarter of their effective sentences (non-parole periods in most cases). The most beneficial effects of the licence scheme came in regard to the then mounting collection of life sentence and Governor's Pleasure Prisoners. Many of these prisoners had been repeatedly recommended by the Probation and Parole Service for release because suitable arrangements, in keeping with the community interests, were available. However, the releasing authorities tended to be very conservative and operate on a 15 years equals life principle. Under the Jackson scheme, more of these prisoners were released in one year than ever before and all indications are that there have been few problems with those released.

The role of the Probation and Parole Service, together with Superintendents of Gaols, in the implementation of the licence release scheme was to cull out of the process prisoners considered to be unsuitable for early release. It caused the Probation and Parole Service enormous difficulties in meeting 'bring forward lists' but it was effective in reducing pressure on the prison population at that time.

Had the licence release scheme been a deliberate, once only, culling of the prison population in preparation for a new system to be legitimised by legislation, it might today have been hailed as a brilliant strategy. In the end it failed because it was applied too long. Such a scheme on a long term basis made a mockery of the established sentencing authorities and alleged wrong-doing ensured the demise of the scheme.

The end result was, I believe, a long-term disaster. The controversy over the release to licence scheme gave the Government the needed impetus to pass the long side-lined Probation and Parole Act which represented the thinking of five years previously. The bonus of its implementation was the reduction of the prison population caused by the transitional measures of the Act which accorded existing prisoners similar entitlements to remissions of effective sentences as new prisoners under the incoming Act. This greatly relieved the pressures on the prison population and enabled the Department to withstand a prolonged Prison Officer strike soon afterwards on an industrial issue. The full-time prison population fell to below 3,000 - a situation which had been previously reached during Dr T. Vinson's administration.

The situation has since changed dramatically. At the 22nd December 1985, the total prison population, according to Departmental Prison States, was 4,234 and the total in full-time custody was 3,795. There were 713 unsentenced prisoners in the system. Whenever the prison population exceeds 4,000 serious overcrowding occurs in the prison system. Without the effective executive power to release large numbers of prisoners to relieve the situation, Royal Visit remissions may be the only bright spot on the horizon.

For those who have to be pre-occupied with the level of the prison population, some heart can be taken that similar levels have been reached before and they have receded for a variety of reasons other than direct manipulation of releases. However, there are warning signs which beg the following questions:

- a. To what extent is the increase in the prison population and after-care supervision caseload attributable to the workings of the Probation and Parole Act?
- b. What has been the effect of increased police numbers and efficiency in such programs as Operation Noah aimed at drug offenders and an Anti-Theft Program aimed at curbing burglaries?

- c. Has there been a real increase in crime in the community?
- d. Has a decade of controversy fuelled a conservative reaction from a no longer apathetic community?

AFTER-CARE PRACTICE

It has always been difficult to draw out the under-pinning rationale for the Probation and Parole Act. There is a vague notion of imprisonment for the least appropriate period and, certainly, access to information measures are fairly clear. However, when one wishes to look at why the Act has divided the after-care supervision into two categories of after-care probation and parole, it is necessary to go back to the papers drawn up by Probation and Parole Officers to effect change⁸.

By way of a brief summary the basic changes sought were:

- a. greater simplicity in legislation and procedures;
- b. less time on assessment work;
- c. more time in providing direct and worthwhile assistance to offenders;
- d. less time in after-care supervision of offenders.

GREATER SIMPLICITY

This has not been achieved. Legislation and procedures are clumsy and complex. A few brief quotes from the Act will suffice:

A court may not sentence a person to a term of imprisonment for an offence under subsection (1) so that -

- a. the term would be required to be served cumulatively upon, or partly cumulatively upon and partly concurrently with, another term imposed upon the person by another sentence; and
- b. the total term of imprisonment to which the person would be sentenced, were both terms to be imposed by a single sentence (giving effect to the requirements relating to the order in which the terms are to be served), would be more than 3 years.

LESS TIME ON ASSESSMENT WORK

There is little doubt that there has been a saving in terms of assessment work which is no longer required on sentences of three

years and under. General inquiries indicate that other assessment options have opened up with reports to Immigration authorities, Licence Release Board, Parole Board appeals, for escaped prisoners, etc. It seems that Probation and Parole Officers being trained and good at assessment and report writing are tending to be type cast in that role. Therefore, savings appear to have been eroded.

MORE TIME IN PROVIDING ASSISTANCE

This area will vary considerably depending on the goal and the officers involved. Experience indicates that institutionally based officers are being continually surprised by early release dates on after-care probation order cases and that few programs are being undertaken in the belief that because release is automatic, no intramural casework is necessary. This is being addressed by management.

LESS TIME IN AFTER-CARE SUPERVISION OF OFFENDERS

The Act provided for parole supervision to be no more than three years and the parole order itself no longer than five years. The Parole Board is also approachable in terms of suspension of supervision when good progress and stability have been achieved. The great majority of parole supervision periods are less than three years and for real savings to occur suspension or supervision must be exercised consistently. I doubt that this is being done for reasons I will cover later on.

With after-care probation, far from spending less time with supervised offenders, I believe there has been a net widening effect caused by the legislation. The original concepts leading to after-care probation in the new legislation were that long-term formal supervision of ex-prisoners was ineffective and wasteful of resources. It was argued that, after relatively short periods of imprisonment, the main objective should be to re-settle the offender in the community as quickly as possible and then let go. Short after-care recognisances were envisaged to help in that resettlement. Breaches of such recognisances would not have incurred the penalty of a balance of the original sentence¹⁰.

However, during the tortuous passage of the legislation, this concept was changed - first to a composite sentence and then to being considered as part of the period of imprisonment, i.e., the entire period of the sentence including the period covered by the probation order is considered a period of imprisonment.

In most respects, after-care probation now parallels automatic parole. Therefore, instead of offenders undergoing a short supervision period, the supervision is taken to the expiry of the full sentence. Once again, control of supervision time rests with the Probation and Parole Service to terminate supervision early by application to the courts.

The reason why I consider Probation and Parole Service controls will not work to curb after-care probation and parole supervision times are as follows:

- a. Service needs to set standards for casework involvement require officers to assess cases as priority or non-priority. There is a definite tendency to consider ex-prisoners as priorities.
- b. Procedures take time and effort.
- c. Terminations and suspensions are seen as prime measures for control of workload and, therefore, tend to be used more in offices under workload constraint and less in others, i.e., one office may retain a stable case for a full term while another office may elect to terminate. When one considers that all supervision types are a form of punishment, this factor has ramifications for the consistency of sentencing.

In the limited statistics available to me at the time of preparing this paper, there would appear to be a net widening effect in after-care supervision. The following statistics supplied by the Probation and Parole Service are compiled from monthly statistics.

After-Care Supervision

At 31/12/82	1,870	Parolees
	384	Licencees
	<u>217</u>	Short term Licencees
Total	<u>2,471</u>	
At 31/12/83	1,573	Parolees
	425	Licencees
	<u>299</u>	Short term Licencees
Total	<u>2,297</u>	
After the transition to the new Act		
At 31/12/84	1,900	Parolees
	463	Licencees
	<u>422</u>	After-care Probationers
Total	<u>2,785</u>	
At 31/12/85	1,558	Parolees
	330	Licencees
	<u>837</u>	After-care Probationers
Total	<u>2,725</u>	

After-Care Supervision

Care must be had in assessing these figures because of the short time the Act has been working and the effects of transitional measures. What should be noted is that despite determined efforts to reduce the prison population in 1982 and 1983 the totals for after-care supervision were 2,471 and 2,297 respectively. Whereas, after the commencement of the new Act, the totals had increased to 2,785 and 2,725 respectively. Moreover, sustained pressure can be expected on the supervision caseload because of the increased prison population.

PROBATION AND PAROLE SUPERVISION IS A PUNISHMENT

The typical condition on a court recognisance is 'to accept the supervision and guidance of the Probation and Parole Service'. 'Guidance' is clearly a helping role but it is not generally recognised how much punishment is involved in 'supervision'. Consider for example the following factors:

- a. loss of offender's time in travelling to reporting centres and waiting to be interviewed by an officer;
- b. cost of travel from home to reporting centre;
- c. further constraints on the offender's leisure time and freedom of action because of directions by officers regarding treatment, lifestyle and referral to other agencies;
- d. the fact of being supervised and reported upon by an officer without choice for long periods of time;
- e. being subject to extra penalty if he/she re-offends.

The punishment of supervision is little recognised by judges, magistrates, public or media. Being placed on probation or parole is seen as being let off or released from punishment. Inadvertently, therefore, a lot of power to further punish or not punish has been passed on to the Probation and Parole Service by its control of termination and suspension practice.

I would like to put the proposition to my colleagues and to this Seminar that after-care supervision should be used as sparingly as possible with the principal aim of resettling the offender in the community. Once settled, it is more appropriate for the general community agencies to assist the ex-prisoner in long-term adjustment problems than for that person to be retained in the criminal justice system and to be identified as an offender for unnecessarily long supervision periods.

If non-parole and non-probation periods represent the minimum amount of punishment necessary to deter offenders, what is the

point of even longer periods of punishment and assistance following release? Why not organise determinate sentences short enough to be comparable to non-parole periods and apply a revised system of earned remissions not to exceed, say, 30 per cent of the sentence?

As a supportive measure to compensate for some of the helping roles fulfilled by after-care supervision, I would suggest more resources should be directed towards providing direct assistance to prisoners on release. The arguments for these measures are well summed up in John Braithwaite's work - 'Prisons, Education and Work', 1980, 2-27¹¹. Better gate money, vocational programs, work release and accommodation assistance may prove cheaper and more effective than long-term supervision.

SOME DESIRABLE OBJECTIVES

Review and Overhaul of Legislation

I recommend a comprehensive review and overhaul of sentencing legislation to make it relevant to modern needs. This should particularly aim at strengthening community corrections. Attention should be paid to a Probation Act setting out the obligations of both the offender and supervisor as well as the purpose of probation. Day Attendance legislation is also desirable in New South Wales.

The main aim of the overhaul must be the Probation and Parole Act. It is recommended that it be replaced with a Determinate Sentencing Act similar to the legislation proposed by the Australian Law Reform Commission⁷. The essential features of such determinate sentencing would be that each prisoner have one release date varied only by incentive remissions. Lengths of sentences would be adjusted to equate to actual periods of imprisonment now being served, to safeguard against prison population increases. After-care supervision would be restricted and largely replaced by a resettlement program undertaken prior to release.

CRIMINAL JUSTICE CO-ORDINATION

It is recommended that a statement of aims and objectives be drawn up for the criminal justice system. This would lay down principles in the operation of the system from pro-active community policing through sentencing and corrections to crime prevention and victims of crime treatment. Punishment would be relegated to a strategy in the process and the major aim would be to resolve the problem created by the commission of a criminal offence. In this way the system would have an obligation to deal with both the offender and the victim and to aid in a return to normalcy for both.

Some frameworks are largely in place. The Police Board of New South Wales' Annual Report 1984-85, ch. 2¹², outlines a number of priorities from protecting life to facilitating safe and free movement of people and traffic. Corrective Services and Justice need to mesh in with the police program to ensure that they are not pulling in opposite directions.

ALTERNATIVES TO IMPRISONMENT

It is recommended that there be a shift of financial resources to create practical alternatives to imprisonment.

The general principle of imprisonment as a last resort which is expressed in the Corrective Services Strategic Plan could apply to any regime depending on their concept of last resort. Government has the power to plan for a full-time prison population of less than 3,000 or less than 50 per 100,000 of the general population. In other words, set precise targets and implement strategies to achieve them.

Worthwhile community corrections are being restricted because there has been little change in the relative resources allocated to prisons and community corrections. To date, increases in Probation and Parole staff have been the main method of increasing resources in community corrections. The danger of cloning Probation and Parole Officers to do more of the same, i.e., assessment, supervision and counselling, is the possibility of widening the criminal justice net rather than reducing the prison population. What is required are much more material resources and operational flexibility to provide Day Attendance Centres, Probation and other hostels, intensive supervision programs and other new or experimental methods. Just as we demand that the prison population should be limited, we must also put limits on the number of persons subjected to the community corrections. Quality must be put before quantity.

PROSPECTS

Assuming no substantial changes to probation and parole legislation, the following prospects are forecast:

- a. That current legislation will continue to cause problems over the next decade, especially as far as credibility is concerned.
- b. That real progress towards community corrections will be impeded by this legislation.
- c. That costs of running corrective services will escalate sharply because of Government's lack of flexible options to meet the public conservative reaction.

A REACTION

The time has come for us to say what we want to happen in our communities as far as crime control and sentencing is concerned. We are ourselves prisoners of a historical framework locking us into concepts of punishment, retribution and rehabilitation. We run round our prison changing the wallpaper redesigning the bars and changing the menu.

As long as we hold the same attitudes towards punishment as the aim of our system rather than a last resort strategy we will continue to have high imprisonment rates and high numbers supervised on community corrections.

We will twist and turn, think up this alteration and that, but because we still hold the same basic attitudes we will label and treat people as offenders in roughly the same numbers. Only the surroundings will be changed to protect the image of progress.

We need an attitudinal revolution. If we look around the world for communities which appear to have low imprisonment rates e.g. Japan, Holland, Sweden, we find countries with different attitudes or changing attitudes. They are countries which have decided that they do not want to live with the ugliness of large scale imprisonment and want to do something positive about crime prevention in their communities.

Emphasis on punishment is a 'cop out'. It allows basic problems of both offenders and victims as well as the community, to be ignored. Imagine constantly punishing a child for making too much noise when you could take him to another room and find a suitable distraction for him. The rational loving parent tends to solve problems rather than punish. Sure, they get upset when a cricket ball breaks the neighbours windows but they then find another place for the kids to play cricket or another game.

The important strategy is to resolve the disruption caused by a crime or conflict as quickly as possible. This is an important aim of the criminal justice system in itself. In this way we develop a community process which deals with both offender and victim. If we have a choice, and we do, we want to deal with the matter swiftly and stop labelling both offenders and victims for long periods of time.

The best solution for the community is for both offenders and living victims to identify as normal persons albeit with handicaps, in the shortest possible time.

Criminal justice must look at its productivity and its ultimate aim.

We cannot afford to spend \$100 000s of dollars and years of effort punishing and rehabilitating one offender.

We cannot afford to allow victims of rape to live the rest of their lives around that event. We need to design programs aimed at faster resolution of the initial problem. We need to make more use of our strongest weapons, praise and disapproval.

Because of our emphasis on punishment we have not cared for either offenders or victims. Because of our other emphasis on guilt or innocence and legal rights we are effectively prevented from caring effectively for victims and offenders at the time they need it most - near in time to the crime. Victims in particular have been fobbed off with compensation months and years after the event. Monetary Compensation in itself is not caring - it can be a form of not caring.

There will always be crime and social conflict as the community meets new problems in its development, but if we expect a certain level of crime, accept a level of punishment we will obviously get both. We should not be deterred from developing civilised correctional programs because of a relative handful of criminals and thugs who defeat our immediate efforts. We must say what we really want and work towards it.

I would say we need:

Faster, more natural correctional measures.

Shorter supervision periods with specific objectives.

We need better legislation - which the average person can understand, which school children can recite.

We need less punishment, more crime prevention, more caring, more sense of community, less resort to criminal justice.

NOTES

1. Probation and Parole Act 1983. This Act replaced the Parole of Prisoners Act 1966. It provided for courts to stipulate a non-probation period for sentences of three years and under. Basically this provision meant an automatic release to after-care supervision or an unsupervised probation order instead of a Parole Board decision. For sentences above three years the reconstituted Parole Board still decides on release and revocation matters. On both non-probation and non-parole periods remissions apply. Remissions tend to reduce head sentences and non-probation/parole periods by at least one third and often by as much as 40 per cent.
2. Probation and Parole Officers' Association of New South Wales (1981), 'Comments on Proposed Changes to the Parole System', December. This paper was invited by the Minister of Corrective Services because of the strong reservations the Association had in regard to parole proposals. The paper dealt with the likely credibility gap with the public, administrative difficulties, prison population effects, and the absence of a rationale for the proposed legislation.
3. (1979), Report of the Committee Appointed to Review the Parole of Prisoners Act 1966, New South Wales Government Printer. His Honour, Judge Muir, headed an expert team. This was truly an amazing committee effort. Appointed on 28th November 1978, the Committee was asked to report by 31st January 1979. It did so on 6th February 1979. The Committee operated in the wake of the Royal Commission and revelations which demanded better treatment of prisoners and also a series of public outcries over parole, work release and correctional breakdowns which demanded a tightening up of the system. The basic dichotomy of its recommendations for automatic release on probation for sentences of three years and under, and parole with stricter criteria for sentencing over three years reflects the dilemma of catering for two incompatible aims. The tightening of parole, apparently demanded by the public through the media, and the liberalising of the system demanded by prisoners and others, called for a re-think of the whole system of criminal justice, much more time than allowed and a strong rationale. (There was a Minority Report attached recommending Determinant Sentencing, by Mr K. Lukes, Director, Probation and Parole Services.)
4. (1978), Report of the Royal Commission into New South Wales Prisons, New South Wales Government Printer, April. His Honour, Mr Justice Nagle, was the sole Commissioner and heard a tremendous volume of evidence from prisoners, prison officers, administrators and others. As the title suggests,

the Commission was about prisons, mostly prisoner bashings and riots. It was not until the last months of the Commission that it became aware of the full range of Corrective Services in New South Wales, in particular the work of the Probation and Parole Service. The Report is a watershed in correctional progress and sets out basic principles to be adopted in the sentencing and imprisonment of offenders. The over-riding principle was the use of alternatives to imprisonment as extensively as possible, but it also made some precise recommendations that there should be automatic parole for prisoners serving less than four years and that revised remissions (Victoria) should apply to both the head sentence and the non-parole period (RCR/1391 Muir Committee).

5. Probation and Parole Officers' Association of New South Wales Submission to the Royal Commission into New South Wales Prisons.
6. Stoneman, Nigel, et al. (1978), 'Towards an Alternative Approach to Sentencing', May.
7. The Law Reform Commission (Australia) (1980), Report No. 15 - Interim. Sentencing of Federal Offenders, Watson, Ferguson and Co., Brisbane, 179-215. This was a remarkable survey of criminal justice issues, some 636 pages long. The section on parole ends with a recommendation for the abolition of parole for Federal offenders. It describes the process whereby an offender is given a long head sentence and a short non-parole period as an unconvincing charade (215).
8. The Hon. Mr Rex Jackson, Minister of Corrective Services, 1981-83.
9. Weekly States, Research and Statistics Division, Department of Corrective Services. Each weekly state provides a breakdown by sex, institution, classification and program. Numbers of prisoners can be compared to the number of cells available and with previous high and low states.
10. Stoneman, N. (1979), 'Determinate Sentencing: Well worth the effort if carefully planned', Parole and Prospects Seminar, Institute of Criminology. This paper summarised criticisms of parole and set out a determinate sentencing model.
11. Braithwaite, J. (1980), Prisons, Education and Work, University of Queensland Press.
12. Police Board of New South Wales, Annual Report 1984-5, 5-17.

HAS PAROLE A FUTURE?

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ORIGINS OF PAROLE

Although the term parole was not used until 1846, the concept of conditional release reaches much further back, traceable to the original systems of conditional pardon, clemency indenture, transportation of criminals and ticket-of-leave. The Order of the English Privy Council of 1617 made it government policy to transport convicts overseas. Soon these convicts were being sent to the new world as indentured servants. After serving their time or purchasing their freedom many of these convicts became settlers whose branches spread into our present civilisation.

With the advent of the revolution on the North American continent, England sent convicts to New South Wales in Australia where the Governor was given the power of granting conditional pardon which developed into the ticket-of-leave system.

The ticket-of-leave process is the root of 'good time' or remission principle. It was the last step of a graded system through which the convicts had the opportunity to progress. Progress was measured by 'marks' carried through good conduct and labour. The various stages were: strict imprisonment: sustained industry or hard work: periods of partial freedom: finally ticket-of-leave during which the convict was required to report to the local constabulary and conform to a series of rules.

As these various requirements indicate, there are significant parallels between the ticket of leave system and the contemporary parole system¹. What then is parole? The general consensus is that it is a procedure whereby a sentence imposed by a court of justice may be varied by administrative action. As a consequence of this process selected inmates may be let out of prison in advance of their expected day of release, but on condition that they agree to accept supervision². A further requirement is that they understand they are still under sentence and liable to be recalled to prison if they misbehave or reoffend. In general parole boards are the authorities established by legislation to authorise the granting or cancelling of parole.

The Rehabilitation Ideal

In 1959 an American academic lawyer, Frances A. Allan, set out the main tenets of what he first termed the rehabilitation ideal³.

It is assumed first that human behaviour is the product of antecedent causes. These causes can be identified as part of the physical universe and it is the obligation of the scientist to discover and describe them with all possible exactitude. Knowledge of the antecedents of human behaviour makes possible an approach to the scientific control of human behaviour. Finally it is assumed that measures employed to treat the convicted offender should serve a therapeutic function.

In the 1950s and 1960s reform became rehabilitative - that is, religious and moral impulses in reformation became secularised, psychologised, scientised⁴. There was consequently in this period a strong liberal consensus of informed penal thinking that supported the rehabilitative ideal and this approach was overwhelmingly accepted and it led to a wider acceptance of the parole process. Parole was undoubtedly one of the most important initiatives in penal policy for approximately twenty years in the English speaking world. In practical terms, in relation to the offender it was considered parole should normally fulfil two important functions. First to ease the transition from prison to normal life by providing practical help: secondly to give the parolee continuous support and control over some period of time till he could manage on his own to lead a law abiding life.

The Rehabilitation - Parole Crisis

Towards the end of the 1960s and in the early 1970s the theory and practice of the rehabilitation of offenders began to be seriously questioned and what initially was a gradual retreat from this ideal eventually hardened into direct attacks on the parole system. An early indication of this was featured in a publication 'People in Prison in England and Wales 1969' when rehabilitation was apparently displaced by 'human containment' as the primary objective of the prison system⁵. This view was popularised by an American criminologist Robert Martinson in an article in 1974 entitled 'What Works'. His answer was nothing works. This became the basis of a new ideal for prisons and it evolved into what is now known as the 'just deserts' revival in penal thinking⁶. It gained wide acceptance in the United States of America, then spread to Scandinavia and in more recent years has found a foothold in some of the correctional systems in the British Commonwealth. Just deserts or the justice model is a philosophy where there is an almost total rejection of the individual treatment model as a basis for penal policy but where there is less unanimity as to what should replace it as a basic penal objective⁷.

Professor Nigel Walker, Director of the Cambridge Institution of Criminology England in 1983 criticised⁸ Robert Martinson for the latter's 'original careless article' on rehabilitation, particularly as Martinson in a later article admitted that he had oversimplified his views on this subject⁹. The Martinson viewpoint naturally relates to the United States of America's experience where there is increasing concern about the high rate of crime which in a significant number of States led to a movement to abandon the parole system. Eleven States, including California, did in fact abolish parole release for most offenders in favour of a fixed or determinate sentencing system. The fear of crime, however, tended to obscure the reality that the parole systems and even the fixed time system, respectively, both have their own decided advantages. In 1982, for example, California legislators passed a law permitting inmates to earn reductions up to 50 per cent in their sentences by participating in work or study programs. This kind of early release of course is just parole by another name¹⁰.

In England it appears that in the prison system there is as yet no coherent discernible alternative that has replaced the rehabilitation ideal. The justice model which has been influential in the United States of America has limited academic support in England¹¹. In the 1981 Home Office review of Parole in England and Wales the judicial model of parole was rejected and the English criminologist A.K. Bottomly identified the English Official approach in these terms:

Parole has increasingly been shaped and will continue to be shaped by practical rather than ideological concerns.

Significantly, when the Sixth United Nations Congress on The Prevention of Crime and The Treatment of Offenders was held in Caracas, Venezuela in 1980, it appears the Western Country participants went to the Congress prepared to support the concept that the rehabilitation ideal had largely evaporated and was now replaced by the just deserts ideal. They were confounded to find that the Third World participants, who seemed to be in the majority at this conference, had just discovered the rehabilitation ideal and were most supportive of it¹². It then became obvious that a new term was required to replace that of rehabilitation but as yet a more acceptable term has not emerged.

Is There a Rational Choice?

The preceding outline of trends in penal policy indicates that with the collapse of the rehabilitation ideal there appears to be no justification for parole in its original form. Arising out of the ferment of controversy, what then is exactly wrong with parole? It seems parole in practice raises many issues, particularly as to the means by which prisoners are or should be

released, the desire to counteract the wide disparities between sentences imposed by different courts for similar offences and as a means of relieving the pressure on prisons. It was also meant to provide an incentive for good behaviour and also to provide greater incentive for change by serving part of the sentence in the community. Uncertainty and doubts about these aims began to grow, particularly in the United States, and a sense of injustice too developed about the very processes by which parole was granted or revoked. The official attitude, however, was that as a prisoner was already sentenced, parole, if granted, was a privilege and not a right. It was a matter of executive discretion and not of due process of law¹³. As the controversy grew, some proposed retaining the present system. Others would improve it by adding legal safeguards, and the right of appeal in the case of denial of parole¹⁴. Some would prefer the courts rather than the parole boards to control release. Others again would abolish parole obligations and replace it by straightforward finite sentences which of course would mean release without any conditions. The choice really comes down to two options - whether to retain the safety valve of parole in spite of all its imperfections, but preferably in an improved form, or to replace it with a justice model which also has its own limitations¹⁵.

An Evaluation of Parole in North America

The movement to abolish parole has always had the strongest support in the United States of America. Following on from this attitude there has developed a growing acceptance of the need to re-appraise the basic assumptions underlying penal policies in that country in the wake of confused attitudes to the rehabilitation ideal. Curiously, this has brought together a peculiar coalition of academics, criminologists, liberal prison reformers, conservative get-tough-on-crime politicians and concerned citizens, and intellectuals of various stripes, all with different and conflicting goals in mind. They all seem to have jumped too readily on the 'attack on parole' bus, but not many have bothered to look down the road ahead to see where the journey will end. What then is the situation in the United States to parole today?

First it should be noted that there are a diversity of penal policy models at the Federal and State level because each jurisdiction has its own criminal code. A most significant trend in the United States that has emerged over the past ten years is the national trend towards mandatory and determinate sentences of statutorily fixed terms that leave little discretion to the sentencing judge and none for parole board members¹⁶.

Forty-six States have mandatory sentencing laws and twelve States have passed some form of determinate sentencing laws, both of which frequently result in longer average time served than indeterminate sentences. Under the determinate sentencing

statutes in these states, prisoners are now given presumptive or flat sentences which they must serve in full¹⁷. From the standpoint of release decision making, parole has been more or less abolished in key states. With more people going to prison for determinate periods that allowed no adjustment by parole authorities, there was a sudden change in prison rates. The prison population mushroomed at an increasing degree and in 1982 saw the total imprisoned population increased by 11.6 per cent, after a record increase in 1981 of 12.1 per cent. On 30 March 1983 there were 425,678 inmates in Federal and State prisons and some 10,000 prisoners were backed up in local jails awaiting the opening of a bed space in prisons. Forty states were then currently under court order or involved in litigation to reduce prison populations¹⁸.

Laws establishing mandatory minimum prison terms for specific offences have gradually reduced the parole boards' release powers over the past ten years in forty states¹⁹. For example, with California's shift to determinate sentencing in 1979, the preparation of parole releases that were mandatory, as opposed to discretionary decisions of parole boards, increased dramatically from 10,375 to 25,508 while the number of parole authority releases dropped from 90,584 to 84,287. However, thirty-two states still retain parole boards with the power to release most prisoners after one third to one half of their sentence, and eight States have boards with power to release most prisoners at any time after their imprisonment²⁰.

Part of the reason for the continuing survival of parole appears to be that the sentencing systems that have replaced it have not necessarily proved to be any fairer, more predictable or less confusing. There is also the additional factor that during times of sudden upsurges in prison populations lawmakers have grown fearful of closing off the safety valve, although there is no evidence that the availability or absence of parole release has had any effect on current prison overcrowding²¹.

Significantly, although parole release decision making has been almost entirely abolished in the United States, parole supervision still persists in the determinate sentencing jurisdictions²². Particularly noteworthy in this regard is that whereas Maine was the first State to abolish parole and parole supervision in 1976, steps have now been taken to re-establish a parole release agency²³. To sum up the situation in the United States at present, it would appear the movement to abolish parole has not stopped, but it has slowed considerably.

It is interesting to contrast the United States approach to parole with that of Canada where 'the rehabilitation ideology is still well and alive'²⁴. The Canadian criminal scene is quite different from that in the United States. Canada has one criminal code, the Federal code, implemented across ten provinces. Crimes of violence in Canada, using the FBI index or

its Canadian equivalent, represent one third of the United States rate per 100,000 inhabitants. Crimes against property represent half of the American rate. The rate of imprisonment in Canada is 100 per 100,000 inhabitants, whereas it is 250-300 in the United States²⁵.

Canada's parole systems are not turning to the right or the left. Rather it remains at the extreme centre. There is no significant new emphasis in control and punishment and there is no significant movement towards the abolition in one way or the other of the parole system²⁶.

In 1984 the Government of Canada published a policy statement on sentencing to accompany and supplement a major legislative initiative to provide the basis for more effective, equitable, realistic and appropriate sentencing of criminal offenders. With respect to parole, the Canadian Government is convinced that there must continue to be some system providing for conditional release from sentences of imprisonment²⁷. First, the existence of some system of early release fulfils the humanitarian and very practical function of providing hope to imprisoned persons who might otherwise have none. Second, humanness and common sense dictates that some possibility be provided for relief from the conditions of sentence in cases where there has been a genuine change in the offender or in the circumstances relevant to his or her incarceration. Third, provision for early release is incentive for good conduct in prison and can assist markedly in control of prison populations. Fourthly, early release can, through the provisions of flexibility in the choice of the best time and method for conditionally releasing an offender, assist in the re-integration of the offender in the community.

Discretion is still an essential part of the decision to parole in Canada and rehabilitation is still regarded as a part of the policy of early release²⁸.

THE AUSTRALIAN PERSPECTIVE ON PAROLE

Between 1788 and 1868, 163,201 convicts, of whom 24,960 were women, were sent to Australia and they eventually became the first offenders in this country to become subject to conditional release²⁹. Today the Federal system and the respective States and Territories that make up the Australian Commonwealth all have either a separate criminal code or their own relevant criminal legislation. Each jurisdiction apart from the Commonwealth itself (Federal jurisdiction) has its own parole board.

Commonwealth Parole

Because the constitution provides that federal offenders will serve their sentences in State prisons, the consequence of this is that conditional release on parole is provided by the existing

State or Territory services. There are two acts which govern the release of prisoners who have been convicted of federal offences. They are:

1. The Commonwealth Prisoners Act, which allows for the release of a Commonwealth prisoner on parole; and
2. The Commonwealth Crimes Act, which authorises the release of persons on licence.

In both cases the established practice is to prepare the necessary documentation and reports, as is done for State and Territory Parole Boards, and this material is sent to the Attorney-General's Department in Canberra. The officers of the Attorney-General's Department in Canberra having examined the information provided and the recommendation made, refer the matter to the Attorney-General. He in turn, if satisfied, refers the matter to the Governor-General for his signature, either for release on parole or for release on licence. All subsequent major developments regarding federal parole cases, such as breach of parole, are required to be processed through the Attorney-General's Department Canberra. The situation, then, is that there is no Commonwealth Parole Board, nor are there any Commonwealth prisons in Australia to provide for the specific needs of federal offenders. At present the States and Territories provide this service. The following table indicates the extent and location of federal prisoners and federal parolees (and those on licence) throughout Australia.

	<u>Federal Prisoners</u> ³⁰	<u>Federal Parolees</u> ³¹	<u>Federal Offenders On Licence</u> ³¹
N.S.W.	119	48	162
Vic.	47	27	29
Qld.	32	0	29
W.A.	43	21	16
S.A.	27	7	4
Tas.	-	9	2
N.T.	4	-	-
A.C.T.	1	46	-
<hr/>			
AUSTRALIA	273	158	242
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The total number of federal offenders on parole or on licence in the community is 400.

State and Territories Parole

It is pertinent at this point to contrast sentenced prisoners and those subject to parole who are not federal offenders in each jurisdiction in Australia.

	<u>General Population in thousands</u>	<u>Total Prisoners</u> ³²	<u>Total Parolees</u> ³³	<u>Rates Parolees per 100,000</u> ³³
N.S.W.	5461	3833	1888	34.6
Vic.	4118	1910	904	21.9
Qld.	2546	2028	555	21.8
W.A.	1403	1537	760	54.2
S.A.	1367	758	435	31.8
Tas.	446	253	66	14.8
N.T.	144	397	85	59.0
A.C.T.	259	74	62	23.9
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AUSTRALIA	15744	10790	4755	30.2
<hr/>				

An examination of the statistics provided above indicates that the States and Territories have a greater mandate of responsibility for parolees, approximately twelve times greater than the Commonwealth. Whether Federal or State offender, however, the end result is that the States jurisdictions are expected to provide the resources that will ensure humane and effective correctional systems.

Parole was first introduced into Australia in the State of Victoria in 1957 and then subsequently extended into other Australian jurisdictions over the next twenty years. Most of the jurisdictions provided for the setting of a minimum non-parole period as a part of the sentences but Queensland and Tasmania preferred that minimum sentences be determined by statute. In the late 1970s the groundswell of opposition to parole that was being experienced in other countries reached Australia. In an article entitled Parole Review in Australia³⁴, which commented on two reports on parole which had been released simultaneously in February 1979 - The Muir Report New South Wales and the Parker Report Western Australia - the author stressed parole should not be examined in isolation. 'What is needed is a wholesale review of sentencing and penal policy, in which parole is seen as an integral part of a larger sentencing whole.'

Seminar on Parole - Canberra

It was perhaps with this aspect in mind that the Institute of Criminology held a three-day seminar on 'The Prospects for Parole'³⁵ in August 1979. The seminar focused on a proposal to abolish the Commonwealth parole system. A joint paper prepared by the Australian Law Reform Commission, The Law Foundation of New South Wales and the Centre for Educational Studies, University of New England, featured the results of research of three groups involved in the debate about parole in Australia. The three groups were the community, prisoners and judicial officers and it was hoped that the opinions of these groups would assist in the formulation of new policies for parole. Fifty-seven per cent of respondents polled were in favour of making parole hard to get. It was stated a basic complaint from prisoners was that parole practices and procedures were unfair. A majority of the 75 per cent of judicial officers who responded to the survey favoured retention of the existing parole system in their State or Territory. However, almost a third said that the system should be modified in some form. In conclusion, the joint paper stated that the significant groups examined had confirmed that dissatisfaction with existing parole practices was widespread³⁶.

In contrast the then Chief Justice of the Australian Capital Territory Supreme Court, Mr Justice Blackburn, in opening the seminar opposed the proposal to abolish parole. He said he supported the parole system in as much as it allowed an element of flexibility in the sentencing process by the reconsideration, at a later stage, of the original sentence. However, he stated that he was opposed to the determination of parole by parole boards and said that in his opinion parole should be part of the judicial process. Chief Justice Blackburn said that at the time of sentencing a judge had only a limited amount of material on which to decide a proper sentence and he warned that a prisoner's circumstances could substantially change after the sentence was passed. He criticised the 'excessive concern' of the Australian Law Reform Commission's discussion paper with disparity of sentences and said extreme disparity could be corrected by appeal courts. In conclusion Chief Justice Blackburn said some form of reorganised system of parole would have to remain to return prisoners to the community under control³⁷. The issues at this seminar received a very mixed and heated reception but at least it brought matters of concern about parole out into the open - and not undaunted the Federal Law Reform Commission pushed ahead with its own proposals.

Report on Sentencing of Federal Offenders

On 21 May 1980 the Report on the Sentencing of Federal Offenders was tabled in Federal Parliament and a major proposal of this report related to the abolition of parole or alternatively the

reform of parole. The report stated parole had many failings³⁸. These were considered to be as follows:

- . it promotes indeterminacy and uncertainty in criminal punishment.
- . it is founded on the unacceptable assumption that conduct in society can be safely predicted on all, and specifically can be predicted on the basis of conduct in prison.
- . its proceedings are conducted in secrecy and parole decisions, which affect the liberty of individuals, are unreviewable.
- . it is a 'charade'. The spectacle of a long sentence of imprisonment no longer deceives the community, which knows that the offender will serve a much shorter period in prison before being released on parole.

It was claimed of all the defective systems of parole in Australia the Commonwealth's system is the most defective and that current administrative procedures are too complicated. Of greater concern, however, was the lack of uniformity in the application of federal parole in different parts of Australia. The stated preference of the report was to abolish parole for Federal prisoners and to return to a system by which judges impose sentences which are actually meant to be served, less standard and uniform remissions for good behaviour and industry.

If the proposal to abolish parole is not acceptable or if its acceptance had to be delayed for a time it was considered urgent steps, nevertheless, were needed to radically reform parole for Federal offenders. These steps include:

- . amendments to the Commonwealth Prisoners Act so that it applies in terms uniformly throughout Australia.
- . introduction of standard non-parole procedures and remissions for Federal prisoners.
- . the giving of reasons for the refusal of parole.
- . prisoner access to records considered by parole authorities, save in exceptional and defined circumstances.
- . prisoner participation and representation in parole hearings affecting his liberty.
- . the nomination of an identified Commonwealth officer responsible for providing parole information to prisoners for release decisions.

- the creation of a Commonwealth Parole Board to replace current procedures by which parole decisions are recommended to the Governor-General by the Federal Attorney-General.

Australian Ministers Conference On Parole

Shortly after the tabling of this report the annual conference of Ministers in Charge of Prisons, Probation and Parole was held in New South Wales between 28 May - 1 June 1980. Significantly, one of the agenda items was State and Federal Roles. If the earlier seminar at the Institute of Criminology was controversial and heated this meeting could best be described as stormy. The resolution³⁹ in relation to this agenda item was:

The Administrators note the possible relevance of the forthcoming report of the Australian Law Reform Commission to the parole of Federal prisoners and recommend that State Ministers hold discussions with the Federal Attorney General on any differences of philosophy and practice that may exist.

As far as I am aware no real progress in this direction has been attained, although the Federal Law Reform Commission is still actively engaged in advancing the proposals for sentencing reform in relation to federal offenders.

Parole in Western Australia

Having examined some new directions for Commonwealth parole, the perspective on parole in Australia now needs to be seen in balance in relation to the other jurisdiction. Rather than gerrymander over eight different parole systems, each of which has been shaped by its own needs and traditions, I have chosen one as reasonably representative and the one with which I have the greatest familiarity - Western Australia.

Parole was introduced into Western Australia on 1 October 1964. The Parole Board established under the Offenders Probation and Parole Act (1963-83) is an independent body which is presided over by a Supreme Court Judge. It comprises the Chairman and six other members. Every case which comes before the Board has been before a court and rights of appeal have already been exhausted or not availed of⁴⁰. In most cases the court has determined the maximum length of time during which the individual may be imprisoned; it has determined also whether or not he should be eligible for parole during that time; the minimum term which must be served in custody; and it has committed to the Board the decision as to whether, and if so when, the individual is eligible to be released on parole⁴¹.

Prisoners in Western Australia are eligible to receive a remission (on the maximum sentence) of one third; hence if not

paroled the prisoner is released to freedom on the two-thirds time. Prisoners who have been given a minimum term also receive a special remission of three days for every completed month of the minimum term imposed.

Parole is a privilege, not a right, and it is seen as a progression of the resocialisation program which is begun as soon as the offender is imprisoned. New prisoners eligible for parole are assigned to a parole officer soon after they enter prison. Approximately half of the daily prison population of 1500 in Western Australia are eligible for parole. Eighty per cent are released on parole on their earliest eligibility date (EED) and another 14 per cent are released on parole within a week of the EED - a total then of 94 per cent⁴². Another 5 per cent are released a week to six months after the EED and 1 per cent are released after six months.

The following statistics are an indication of the effect of the parole process in Western Australia, since parole was introduced into the State's criminal justice system in 1964.

Total release on parole to 30/6/85	8086
Total completions of parole to 30/6/85	5094
Total cancellations to 30/6/85	2303
Number currently on parole	689
Per cent completed (excluding those currently on parole)	68.8%
Total parole considerations to 30/6/85	9996
Total denials to 30/6/85	1843 (18.4%)

An offender in Western Australia eligible for parole does not have to accept parole release. He may instead prefer the two-third time option. Most offenders on parole serve a minimum term which is usually between a third and a half of the head (maximum) sentence. The Chairman of the Western Australian Parole Board⁴³, in a recent report to the State Attorney-General, stated that the courts imposing sentences do not proceed upon the view that the period which the sentence exceeds the minimum term is merely a period of supervision; and he advised that the effect of introduction of automatic parole will not mean that the present minimum terms will equate with a new level of finite sentence. He points out that the paramount consideration is the protection of the community. The parole system involved the dual safeguards of consideration first by the courts and secondly by the Parole Board before a prisoner is released. The essence of the problem for consideration by the Board is to balance the likely advantages of phased and controlled rehabilitation against the risks of re-offending in each case. He cited in support of this view comment by Dr D.T. West, Lecturer in Criminology, Darwin College Cambridge, and a former member of the Parole Board in England.

So long as the granting of parole does not actually lead to an increase in crime, it can be justified on both humanitarian and economic grounds. Men in prison are largely idle and unproductive. It costs a lot to keep them closely guarded and meantime their dependants often have to be supported at public expenditure. If prisoners can be got out into the community and arranged to perform normal social functions, the benefit to their own morale as well as to their families and to society at large extend far beyond the statistics of re-convictions.

FUTURE DIRECTIONS OF PAROLE

Fogal⁴⁴ argues that the justice perspective in corrections is concerned first and foremost with the justice of administration rather than the administration of justice. He contends it is important that all offenders, especially those who are incarcerated, should feel that their sentences are fair and just. In this regard the discretionary power granted parole authorities is the target of most of the criticism of parole today⁴⁵.

Wilkins⁴⁶, moreover, highlights the point that in the light of the philosophy of 'just deserts' it seems that the problem of disparity could be dealt with by abolishing discretion.

Galligan⁴⁷ warns, however, that a fundamental problem with the just deserts approach is that only backward-looking factors are relevant to deserts. In this sense it could be argued the effort to reduce discretion by eliminating parole would create a situation where there is just as much discretion in the system as ever. It's just been moved back to a less visible, less measurable point⁴⁸.

In his article 'Don't Throw The Parole Baby Out With The Justice Bath Water', Allen Breed⁴⁹, former Director of the National Institute of Corrections, Washington, D.C. gives three reasons for the continuing survival of parole in the United States.

- (a) Sentencing systems that have replaced parole have not proved to be any fairer, more predictable or less confusing.
- (b) Parole boards that have put their own house in order by establishing term-setting guidelines have done much to eliminate the capriciousness to which the conviction process is open.
- (c) Studies over several years clearly indicating that parolees had a revoke rate of only 24.8 per cent as compared to the mandatory releases whose return rate was 30.9 per cent.

Breed's thesis was that the data indicated that discretionary selection of inmates reduces criminal behaviour of persons released from correctional facilities over mandatory release. Furthermore, on the basis of the three criteria above, he urged policy formulators to start undoing the damage already done by returning discretion to the judiciary and to the parole authorities⁵⁰.

Followers of the just deserts would probably find Breed's arguments unconvincing. In Australia various proposals have been made to affect the alleged shortcomings of parole. Ivan Potas⁵¹, Criminologist at the Institute of Criminology Canberra considers that the promotion of an ordered judicial direction demands the type removal from the statute books of maximum/minimum type sentencing which are out of step with present day values. He proposes:

The parole system should be altered to a system permitting automatic release after the offender has served a fixed proportion of the sentence (two-thirds). The last one-third would involve conditional release. Remissions would no longer be necessary and to compensate for their abandonment substantially shorter sentences than at present should be imposed.

Conclusion

The overview that I have presented in this paper, on parole in this country and elsewhere, has been prepared with intention of highlighting the complex and diverse range of problems in relation to this topic that have yet to be resolved.

On the question of whether parole has a future the reply is categorically Yes. Parole still has a place in sentencing policy.

Some Observations

- . Ideally the overall situation would be that much easier if there was only one criminal code for all of Australia.
- . Ideally too Parole Board Guidelines that are acceptable to all States, Territory and the Federal jurisdictions would improve the status and effectiveness of Parole Boards in the eyes of the judiciary, the public and with offenders.
- . Because of the anomalies that have developed in the parole process in the course of time it behoves all jurisdictions, including the respective parole boards, to put their own house in order if respect and credibility are to be maintained. This is already happening. South Australia

has turned to mandatory parole. West Australia passed legislation on 17 February 1986 which now enables a court to pass a sentence without including a minimum term. Later in 1986 West Australia is to have new parole legislation that will reduce present criticisms to the system.

- . The Federal system may eventually have to establish its own parole board, institutions and after-care service if it wishes to achieve its aims.
- . Federal offenders are subject to State and Commonwealth parole systems when they also commit State offences and this can be confusing administratively.
- . Little attempt is made in reports to evaluate the benefits of existing parole systems.
- . A minimum term is not a sentence in its own rights and should determinate sentencing be introduced it would not necessarily equate with the former minimum term.
- . Parole Boards are greatly concerned with the protection of the community in considering conditional release.
- . Parole Board members possess a lot of common sense, are conscientious, and can be compassionate or firm but always exercise discretion with a balanced view towards the needs of the community or the individual. To my knowledge, all parole boards in Australia have the confidence of their respective Governments.
- . Rehabilitation as an expression and ideology is very much alive as seen by the courts, politicians, the media and the community.
- . Most parole systems in Australia adhere to the philosophy that parole is a privilege not a right, as a consequence Parole Boards' discretion is administrative rather than judicial.

As to the future:

I adhere to the view, like that held in England, that parole is more likely to be shaped by practical, than ideological concerns alone.

ADDENDUM

The 'California Determinate Sentence Law' has been examined very carefully by Jonothan D. Casper, Professor of Political Science, University of Illinois, and two Australian co-authors, David Brereton, Department of Legal Studies at La Trobe University Melbourne, and David Neal, Law School, University of New South Wales. Their article appeared in the Criminal Law Bulletin, Boston, Massachusetts in October 1983. They concluded:

Determinacy has removed the power of the parole board and is forcing 'weak' judges to impose long terms, which they have proved (in this scenario at least) less than willing to do. Law enforcement interests may turn to some form of indeterminate sentences for prisoners who continue to be dangerous. Re-introduction of indeterminate sentencing and a parole board may thus appear as a 'solution' to the problem seen by both camps. Due process liberals, long unhappy with increased prison-rates and terms, may welcome the chance to get the legislature out of the business of setting prison terms, even though it may be at the cost of re-introducing the discretion of the parole board. As a result, the new 'solution' to the 'problem' of sentencing may eventually be adopted, and it may look quite like the old ISL (but perhaps, with somewhat less open-ended terms).

Keeping the foregoing comments in mind let us now look at a penetrating observation made by Michael H. Tonry, School of Law, University of Maryland, in his article, 'More Sentencing Reform in America', Criminal Law Review (U.K.), 1982.

America has had the distressing habit of adopting English legal traditions or practices and retaining them long after England has renounced them. American courts, legislatures and lawyers, for example, still struggle with usury laws, grand juries and the Rule in Shelley's case. American sentencing debates today resemble the sentencing reform ferment in nineteenth century England.

The observations made in these two articles makes me feel very uneasy about just deserts measuring up to the claims made on its behalf. The fact remains prisons in the United States are bulging with offenders and the whole situation seems to be getting more complicated as to whether the rights of the individual offender or the rights of the community should prevail.

Colin Bevan, Assistant Director, Australian Institute of Criminology, in a paper entitled 'Probation and Parole in

Australia, A Parliamentary Evaluative Survey', and presented at the annual conference of Ministers in Charge of Correctional Services in 1978, made this observation:

Parole comes to be regarded as the prisoner's right, rather than the right of the community to parole him.

Persons on parole are in the 'hard basket' of the criminal justice system, and I adhere to the view, like that held in England, that parole in Australia is more likely to be shaped by practical, rather than by ideological, concerns alone. There are some aspects of just deserts that are reasonably attractive, but as a concept it needs to be modified to suit Australian sentencing conditions, and this includes the parole process. Offenders must have the opportunity for change during their sentence and there must be the opportunity for resettlement and resocialisation on release.

Lord Devlin puts it this way:

The appropriate punishment is sometimes treatment and the appropriate treatment is sometimes punishment.

I maintain the parole process meets both these requirements, and the courts in this country are well aware that they can use it to good advantage as a part of the sentencing process.

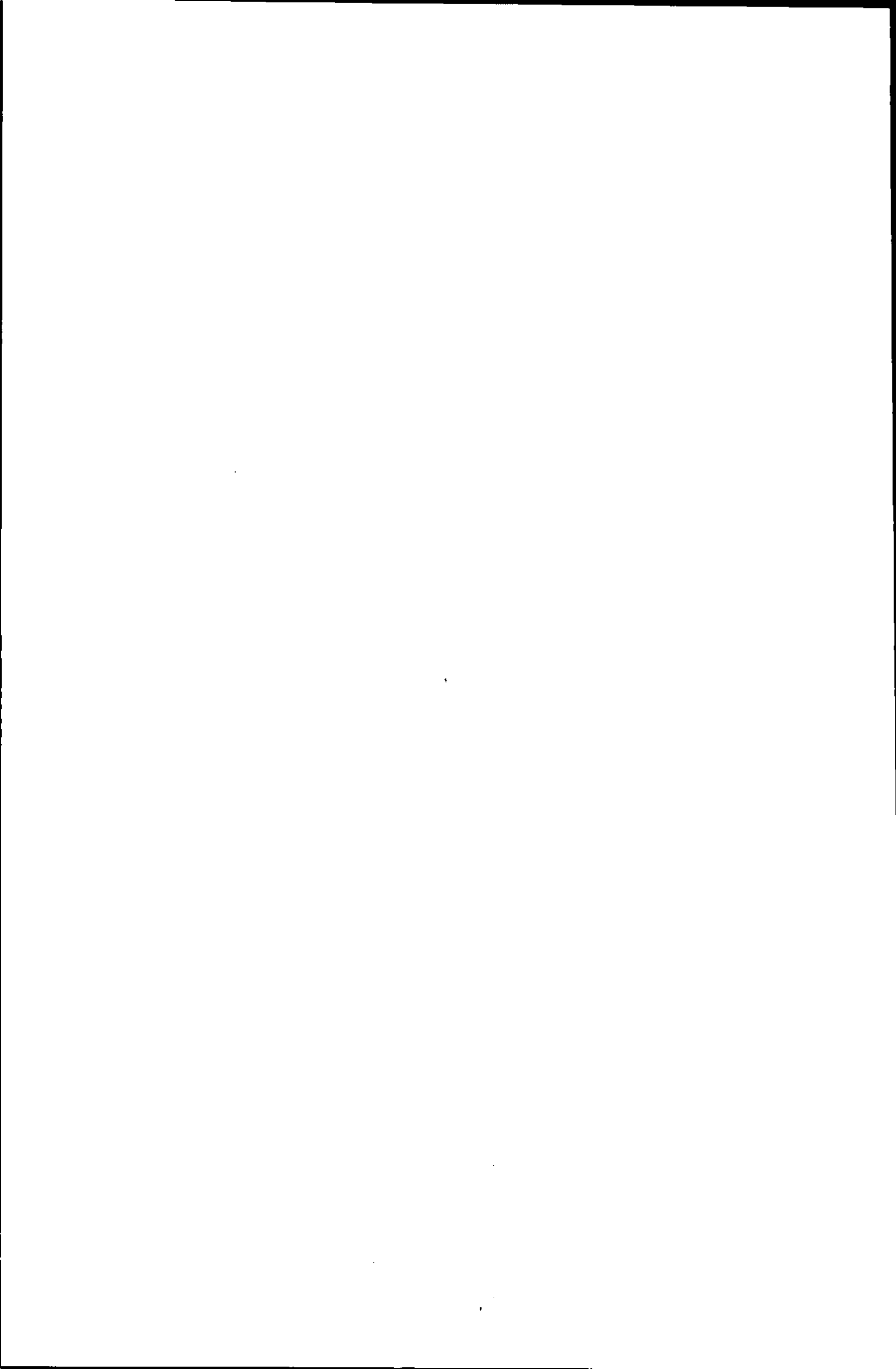
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SENTENCING: REFLECTIONS OF AN INNKEEPER

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INTRODUCTION

Overcrowding has far-reaching implications and not just in modern penal institutions. Imagine if nearly 2000 years ago the Innkeeper had found Mary and Joseph a spacious room in his comfortable Inn, or even if he squashed them into an already overcrowded room. How different would then be the reports of this crucial event in our history. We Innkeepers do not always realise how significant our role is, and I suspect that if I were to make a habit of turning people away and saying I had no room, such actions would soon fill the pages of the local press. It is worth making the point that prison administrators do not control who comes to prisons as guests or how long they will stay, other than through the use of remissions, and in many cases what type of accommodation can be offered.

Our paper attempts to describe the recent trend in correctional populations in South Australia, examine the impact of changes to the parole laws in December 1983, and highlight some areas which, with appropriate legislative and administrative change, might impact upon the prison population by reducing the number of short term prisoners and specifically fine-default prisoners who come into the South Australian system.

The paper will examine prison sentences, the number of prisoners in custody, and analyse some of the component groups within the population. Some specific difficulties facing prison managers dealing with overcrowding on a day-to-day operational basis will be described together with legislative and other 'safety valves' available to management to make adjustments. The Department's authorised capacities will be examined and the extent of overcrowding revealed.

BACKGROUND ON PAROLE AND REMISSION

Before dealing with the central themes of the paper I should explain very briefly the sentencing context in South Australia which was significantly altered by new parole legislation proclaimed in December 1983 and now incorporated in the Correctional Services Act 1982.

Most importantly the new legislation:

- . allowed for earned remissions of up to fifteen days per month to be deducted from the non-parole period (see Appendix 1);
- . determined that prisoners must be released on parole at the expiry of the non-parole period less earned remission, provided they accept conditions set by the Parole Board;
- . removed the possibility of parole for sentences of less than twelve months.

It placed the responsibility of determining release dates clearly with the courts and removed from the Parole Board the power of determining date of parole.

The 1983 legislative changes may be seen as an extension of earlier changes in 1981 which reduced Parole Board discretion by introducing mandatory non-parole periods and therefore imposed a minimum term of imprisonment. There are still South Australian prisoners, most with life sentences who do not have a non-parole period. In the case of lifers an application must be made to the Supreme Court for a non-parole period to be set to enable release. In these instances, the Court must act in a similar way to the old Parole Board, but in all new cases a non-parole period is set soon after the prisoner is convicted.

PRISON SENTENCES - FAIRNESS OF ADMINISTRATION

One of the major strengths of the present South Australian sentencing system is that the function of imposing a sentence and determining the limits of that sentence is within the hands of the court system. The courts do know that in sentencing a prisoner the Department has capacity to reduce the non-parole period and therefore the time served in prison by up to one-third on a monthly basis, through the exercise of remission.

I believe that due process is ensured by having the courts, with their established mechanisms of appeal, representation and evidence set the date for release. Parole Boards with the power to set release dates are far more likely to be susceptible to short-term changes in political pressures, making the grounds for release vary unfairly among prisoners.

A further advantage of court set release dates is that the process of sentencing is more open to public scrutiny. In the case of the most serious offences, however, this confronts society at a point where the thoughts and feelings of its citizens are at their most ambiguous and where knowledge of previous parole practices is poor. For the most serious offences such as murder, non-parole periods have been significantly increased. Since December 1983 the courts have set non-parole periods for twenty-one life-sentenced prisoners, thirteen of

whom were in prison for some years prior to the setting of a non-parole period. If one calculates the average time served or expected to be served the figure is thirteen years five months, even assuming maximum remission earnings. The actual times served by lifers (over a long period of time) prior to this period averaged out at between nine and ten years.¹

Despite this projected increase in terms for lifers there has been criticism from some quarters on the 'leniency' of sentencing and several Crown appeals against the inadequacy of sentences have been mounted.

A particular area of public interest occurs when the symbolic life sentence is followed by the setting of a definite non-parole period. The non-parole period appears 'soft' yet there is ample evidence that mandatory sentences of death and life imprisonment have always been honoured more in the breach than in the observance (see Appendix 2 for details).

CERTAINTY

Certainty in time to be served is a great bonus to correctional administrators. In the South Australian system it has enabled the Department to develop a sound approach to assessing security ratings and determining when prisoners might move from high to medium and medium to low and open institutions. In other words a definite release date facilitates the development in a cooperative way with the prisoner of a sentence plan.

It appears that correctional officers as well as prisoners in South Australia have supported the introduction of definite sentencing. Correctional officers appear to have accepted the benefits of a prison system which is more stable, has few serious incidents involving groups of prisoners, has prisoners easier to manage, and with a structured incentive system. All of these things have worked to improve the prison system and facilitate the Department's implementation of the Government's Code of Occupational Safety and Health. The prison system is safer for staff who are employed to supervise and maintain safe custody of prisoners. The Department's temporary leave program, including opportunities for prisoners to participate in work and study release, is based upon knowing the absolute release dates of prisoners. Prisoners are eligible for other programs in the community when they have obtained minimum security status which they can apply for after completion of 50 per cent of the sentence, less remission.

There is always tension between the need to be able to justify and defend the decisions of the Department in matters of assessment and placement of prisoners' security ratings status, access to programs such as temporary leave of absence and to manage people differentially based on the views and

recommendations of professionals such as medical officers, psychiatrists, social workers and the prisoners' legal representatives. The Department has moved further away from the latter approach towards a systematic approach based on known guidelines simply because decisions made differentially based on the best interests of the prisoner were so often later presented as precedents and locked the Department into time-consuming debates with external agents, particularly the Ombudsman.

The present sentencing system in South Australia supports a systematic approach to sentence planning and management by the Department with prisoners. The present sentencing system has brought the sentencing system out into the open, 'up front', and has given the general public a better awareness of the lengths of time actually served. The present, more predictable, system has also enabled the Department to discuss openly through its Annual Report to the Minister and Parliament the factors affecting overcrowding, sharing of cells, incidents within prisons and the stress and strain on staff which results.

There is also strong support by both prison and community staff because parole is no longer perceived as something of a lottery or capricious. This has minimised the incidents where staff bear the brunt of prisoners' anger, because prisoners unfairly but understandably have blamed them (secret reports or messages) for parole being refused.

I do not intend to discuss in any detail the often held, but inaccurate in my view, assumption that behaviour in prison is a guide to future behaviour on release.² Participation in prison programs has become under South Australian sentencing law and practice a voluntary matter which does not have an impact on parole release.

SENTENCING TRENDS

Especially given the availability of remission earnings, it is interesting to examine the trends in sentencing since the changes in legislation. Figure 1 is based on data collected for the parole research project conducted jointly by the South Australian Office of Crime Statistics and the Research and Planning Unit, Department of Correctional Services.³ The figure illustrates:

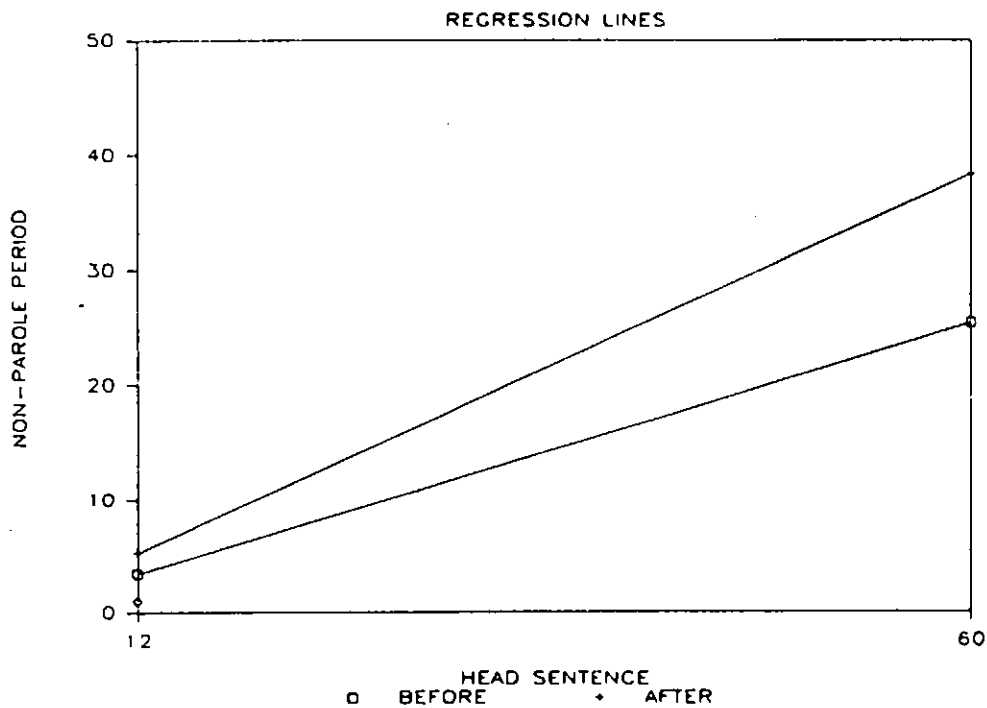
- a. the increase in non-parole periods set after the legislative change; and
- b. that these increases in non-parole periods have been approximately 50 per cent over a range of sentence lengths.

An increase in non-parole periods of 50 per cent means that on average prisoners now become due for release on parole at approximately the same time as before providing they earn maximum remissions. (This does not necessarily occur - see latter section on remissions.) This is illustrated by the following example:

Old System: N.P.P. = 2 years
 New System: N.P.P. = 3 years
 Less 1 year (full remissions earned)
 Time to release: = 2 years

FIGURE 1

NON-PAROLE PERIOD AGAINST HEAD SENTENCE



Note: Head sentence and non-parole period are in months.
 Regression equations:

Before: $NPP = -2.02 + 0.46S$
 $R^2 = 0.77$

After: $NPP = -2.95 + 0.69S$
 $R^2 = 0.88$

NPP = Non-parole period (months)
 S = Head sentence (months)

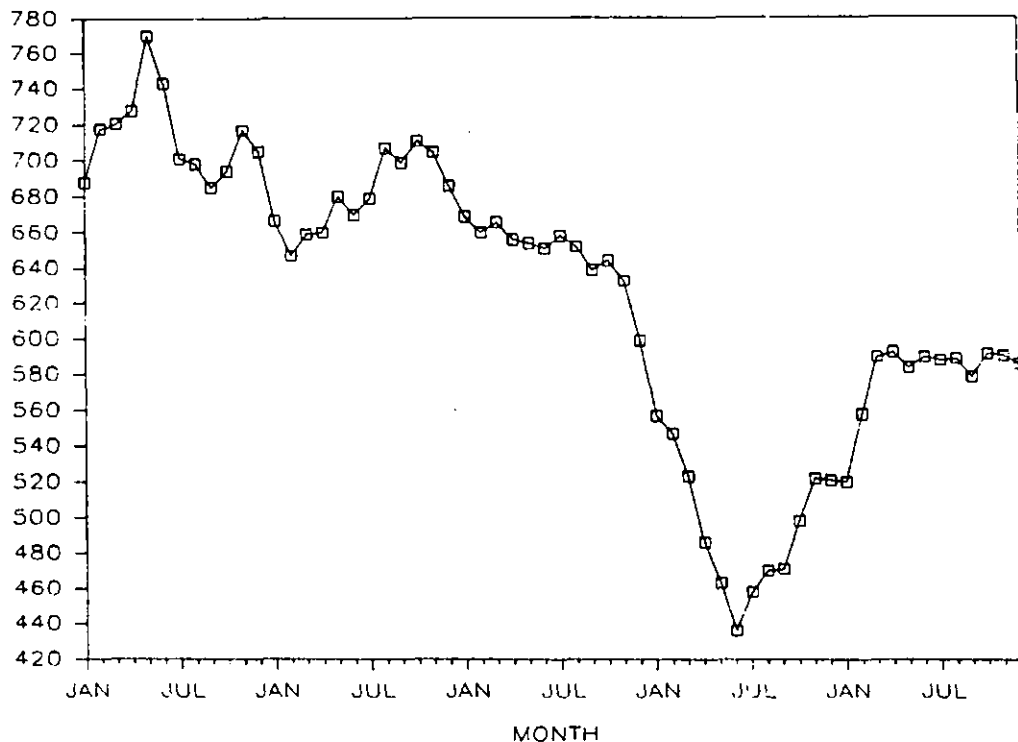
TRENDS IN NUMBERS OF PRISONERS AND PAROLEES

The parole changes have had a significant impact on the size and composition of the South Australian prison population. These changes are illustrated in Figures 2, 3 and 4. Of most significance is Figure 2 which shows the large variations in the number of sentenced prisoners. Numbers dropped quickly in the first six months after the introduction of the legislation as prisoners whose non-parole periods had expired were paroled. This was followed by a steady climb in the numbers as the impact of sentencing variations described above made themselves felt.

Even though the time to actual parole eligibility has not changed greatly the number of sentenced prisoners has not returned to pre-1984 levels. This is a net effect of two opposing factors.

FIGURE 2

SENTENCED PRISONERS JANUARY 1981 TO DECEMBER 1985



First and most significantly is that almost all prisoners with sentences of twelve months or more are now paroled. The only exceptions are prisoners who choose not to accept parole release conditions and elect to serve the sentence less remission earned.

Very few prisoners now take this course of action. This contrasts with the previous situation where large numbers of prisoners were not paroled by the Parole Board. In the eighteen months prior to legislation changes prisoners with sentences of twelve months or more were paroled compared with prisoners who served their full sentence less remissions.

The second effect is due to the abolition of parole for prisoners with sentences of three and twelve months. Table 1 indicates the number of prisoners in these categories taken at 30 June 1983, 1984 and 1985. Such information is published in the National Prison Census publications produced by the States and the Australian Institute of Criminology (1985 yet to be published).

TABLE 1
NUMBER OF PRISONERS BY LENGTH OF SENTENCE

	<u>3-12 months</u>	<u>more than 12 months</u>
June 30 1983	109	462
June 30 1984	75	316
June 30 1985	129	370

The changes to date, in the number of long term prisoners have been far more significant than the changes in short term prisoners.

FIGURE 3
UNSENTENCED PRISONERS
JANUARY 1981 TO DECEMBER 1985

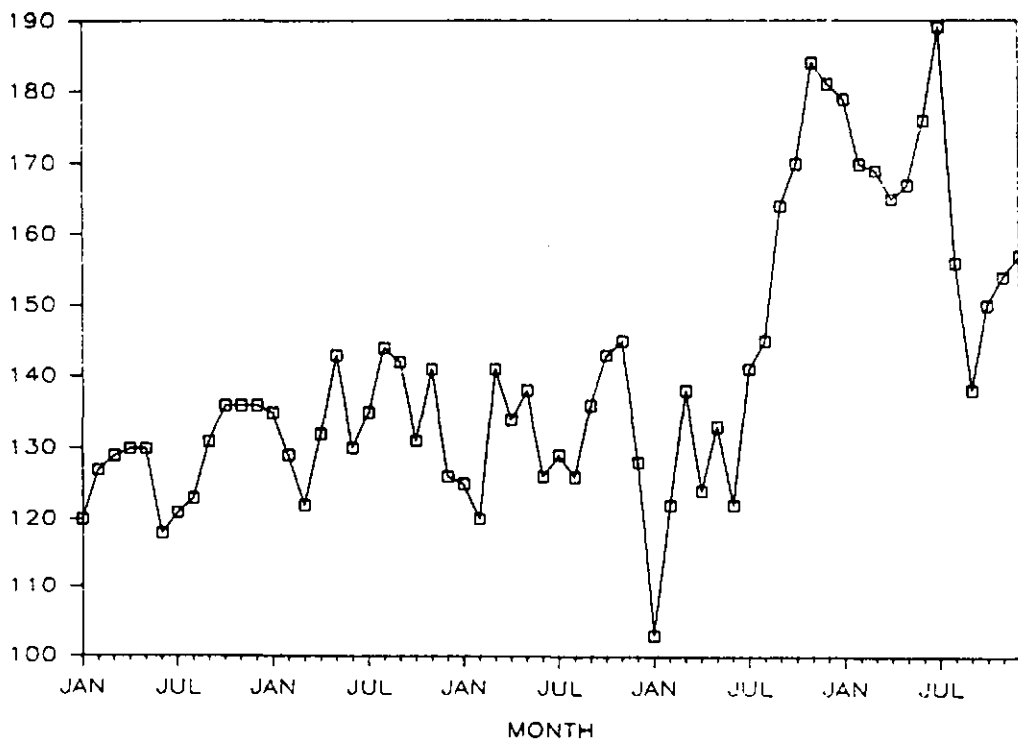


FIGURE 4

ALL PRISONERS
JANUARY 1981 TO DECEMBER 1985

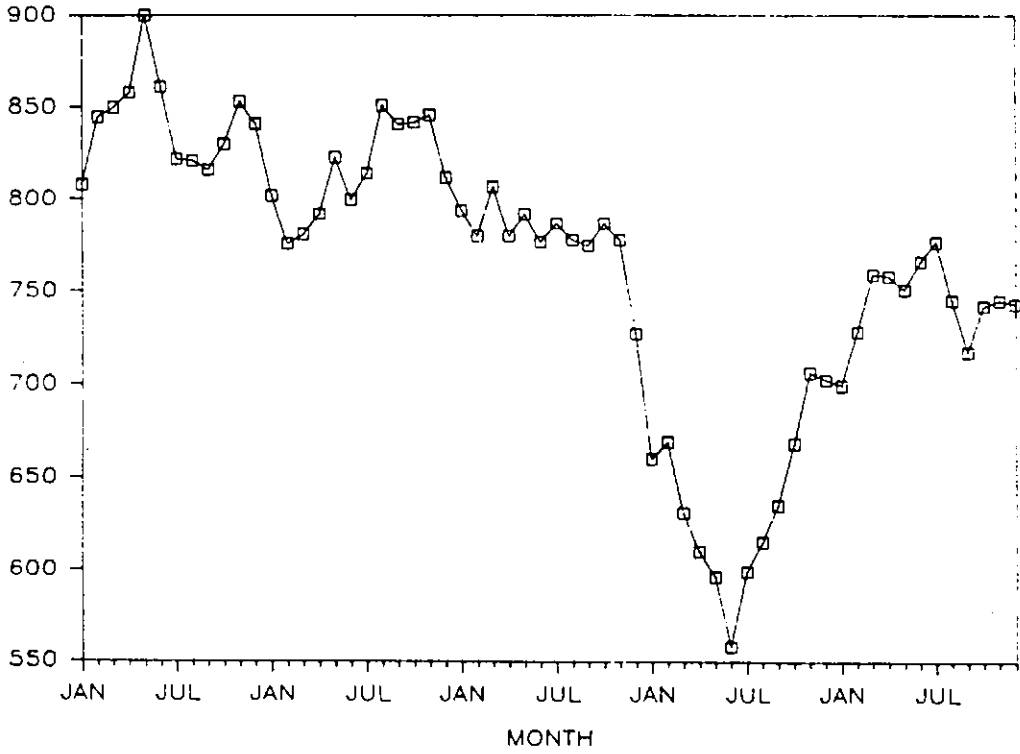
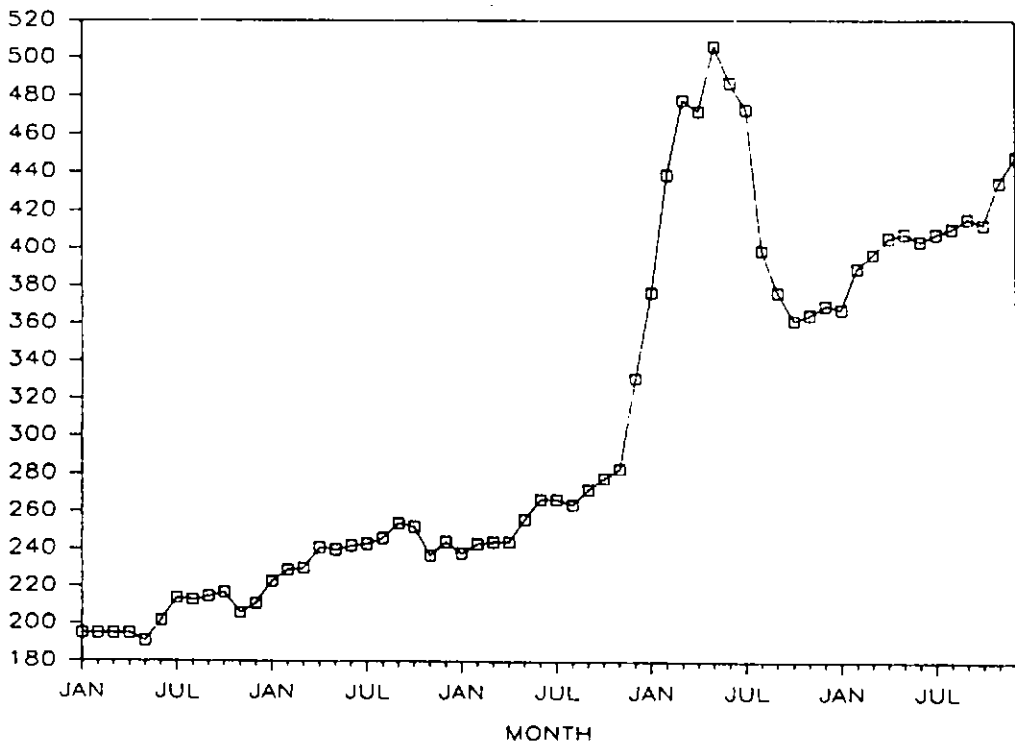


FIGURE 5

PAROLEES
JANUARY 1981 TO DECEMBER 1985



Figures 3 and 4 indicate variations in the number of unsentenced prisoners and the total number of prisoners in South Australia. They show that reductions in the number of sentenced prisoners have been offset by increases in the number of unsentenced prisoners. This had led to the total prison population returning to levels experienced in 1983.

Figure 5 indicates the variation in number of parolees during the years 1981 to 1985. The graph shows the significant increase in parole numbers brought about by the changes in December 1983.

REMAND IN CUSTODY

South Australia's remand rate varies between second and fourth in the nation. As a proportion of the total prison population remandees in South Australia are often the highest in Australia.⁴

South Australia's Bail Act 1985 provides a general presumption in favour of remand on bail, capacity for supervised bail bonds and variations in conditions of bail, including non-monetary conditions.

Figure 3 illustrates the actual number of remandees in custody and shows large variations over time. South Australia's remand conditions at Adelaide Gaol are notoriously inadequate but are due for replacement with the commissioning of the Adelaide Remand Centre later this year. The capacity for remandees at Adelaide Gaol is eighty and, as the bulk of remandees are housed there, we have a vivid illustration of the difficulties confronting administrators in attempting to meet United Nations Minimum Standards (for example separating remandees from sentenced prisoners).

CROWDING

During the period covered in this paper South Australian prisons have experienced serious overcrowding. The chief factor has been loss of capacity at Yatala Labour Prison. This was caused chiefly by a riot and fire in March 1983 which destroyed 'A' Division. The removal of low security dormitories and unavailability of cells due to a rebuilding program has led to a reduction in capacity from 410 to 115 cells. The greatest burden of numbers has been borne by Adelaide Gaol which is an institution over 140 years old and has no sewerred cells. Typically, Adelaide Gaol has experienced 50 or 60 per cent overcrowding.

The only institution which has spare accommodation is Cadell Training Centre but the Department of Correctional Services has experienced difficulties in moving Adelaide Gaol prisoners to Cadell because of the very short terms served by many of the

sentenced prisoners at the Gaol. (Typically 60 to 70 per cent of sentenced prisoners received in South Australia have terms of imprisonment less than one month.)

Table 2 indicates the rated capacity of each South Australian prison and the actual population on 26 February 1986.

The figures on crowding are worrying from the point of view of:

- . totally inadequate standards of accommodation; and
- . problems in controlling prison incidents in situations of overcrowding.

There are several studies which have tied overcrowding to increased incidence of prisoner assaults, self-mutilation, suicides, illnesses and post-release recidivism.⁵

REMISSIONS

Practice prior to December 1983 was to award full remissions to prisoners at the beginning of imprisonment and then for visiting justices to impose penalties, including remission losses, for instances of prison regulation breaches. This practice has now changed and a maximum of fifteen days remission is earned monthly. Departmental Instruction 64 sets out the required behaviour allowing five days for work performance and then for good conduct (see Appendix 3).

As well as changing the concept of remission as something to be earned rather than an automatic grant, there has been a change in the number of remission days actually earned by prisoners.

This is illustrated by some case examples of life sentenced prisoners.

Remission earning of three such prisoners are as follows:

<u>Prisoner</u>	<u>Possible Remissions</u>	<u>Remissions Earned</u>	<u>Percent Earned</u>
A	239	198	83%
B	255	235	92%
C	255	224	88%

A further illustration of the operation of the current system comes from sampling fifty current prisoners at Adelaide Gaol and Yatala and comparing with fifty prisoners released prior to December 1983. The samples indicate that only two out of fifty prisoners under the old system lost remissions through a visiting justice charge. Under the new system, however, forty out of fifty

TABLE 2
WEEKLY COUNT
(For Wednesday of the week ending 2 March 1986)

Institution		Male		Female		Total	Previous Week	Equivalent Wk last yr
		Remand	Sent	Remand	Sent			
Y.L.P.	Capacity		185			185		
	Population	-	133	-	-	133	136	133
A.D.G.	Capacity	80	144			244		
	Population	159	152	-	-	311	319	280
C.T.C.	Capacity		152			152		
	Population	-	119	-	-	119	100	94
Port Augusta	Capacity	18	75		12	105		
	Population	5	77	-	5	87	90	77
Port Lincoln	Capacity		42		4	46		
	Population	1	44	-	-	45	44	41
N.P.C.	Capacity		40		39	79		
	Population	-	28	10	19	57	55	54
N.S.H.	Capacity				38	38		
	Population	9	13	1	2	25	25	22
Mount Gambier	Capacity	3	21		3	27		
	Population	5	20	-	-	25	26	27
TOTAL	Capacity		856			856		
	Population	179	586	11	26	802	795	728

Y.L.P.'s actual capacity at present is 115. Excluding N.S.H., the total number of men's beds is 690, the total men's population is 743.

did not earn full remissions and the average earnings were approximately thirteen days out of the maximum fifteen per month.

The Department of Correctional Services takes the position that the current remissions system is an essential tool in the successful management of prisoners. The system:

- . has been responsibly used by prison managers;
- . is a formal, legal and accountable system; and
- . is well accepted by staff and prisoners.

The system now applies with equal force to prisoners with non-parole periods and those with sentences of less than twelve months, now that Parole Board discretion to release has been removed. For longer term prisoners this provides a system which is well understood in place of the older parole system which caused confusion and great prisoner unrest.

In the context of definite release dates, the remissions system provides the key mechanism for the encouragement of good behaviour and application to work. In the absence of remissions there is a real probability that there would be a return to informal, illegal and ad hoc mechanisms of prisoner control of the kind discredited by the 1980/81 Clarkson Royal Commission.

The Australian Law Reform Commission in its report 'Sentencing of Federal Offenders' saw differences in remissions system between States as a problem which should be reduced in future developments in sentencing of Commonwealth prisoners. The Australian Law Reform Commission also saw a number of difficulties with parole, almost all of which are addressed by South Australia's current system.

The most effective means of assisting sentencing consistency among States would seem to be the gradual convergence of administrative means of managing sentenced prisoners.

At present all Australian States have remissions systems which vary in value between one-quarter and one-third of sentence. In addition, South Australia, New South Wales and Victoria have systems which allow for remissions to be deducted from non-parole periods.

This is of more than theoretical interest since it has real meaning for prisoners who are transferred between States under legislation agreed to by all States. Further, there are enough interstate prisoners in any one State's system to be able to focus discontent on significant differences between regimes among States.

FINE DEFAULTERS - A DISTINGUISHING CHARACTERISTIC OF THE SOUTH AUSTRALIAN PRISON POPULATION

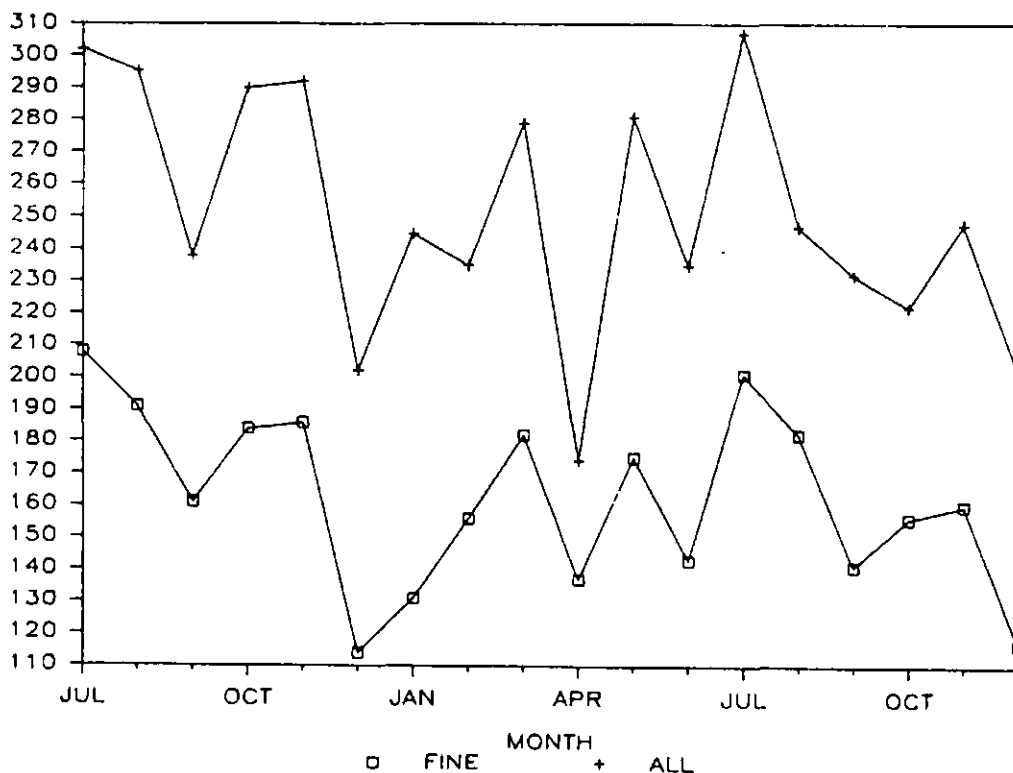
Those of you who read Australian Prison Trends published monthly by the Australian Institute of Criminology will be aware of the very high numbers of fine defaulters imprisoned in South Australia. This group is currently the focus of some government attention and may through appropriate legislative change be given other options.

Trends in the number of fine defaulter received into custody are shown in Figure 6 and are reported on in a Departmental report.⁶

Figure 6 shows some impact due to the abolition of the offence of public drunkenness in South Australia in 1984, but fine defaulters still constitute over 50 per cent of sentenced prisoners in South Australia and disproportionately involve Aboriginals (36 per cent of all defaulters), and the 'not employed' (84 per cent of defaulters). Over 70 per cent of defaulters have default periods of a week or less and it is hard to imagine that society cannot find a more constructive solution for offenders in this category.

FIGURE 6

DEFAULTERS V. SENTENCED PRISONERS RECEIVED
JULY 1984 TO DECEMBER 1985



DETERRENT EFFECT OF SEVERE SENTENCES

As society strives to reduce crime it is tempting to believe that increased sentences for convicted offenders will help.

In many categories of crime, however, it is unlikely that such action will have a significant effect. This applies in particular to crimes which:

- . have a low probability of detection;
- . are committed by offenders with diminished understanding of their actions or diminished self control.

The full range of options available to society must be used if crime is to be reduced. In South Australia, and in other places, some interesting examples have been the introduction of random breath testing and experimentation with the neighbourhood watch program. Random breath testing has been generally recognised as an important factor in limiting dangerous drink driving. This has been more successful than the more punitive approaches which saw larger numbers of drink drivers go to prison.

Neighbourhood Watch schemes also show promise in reducing high volume crimes such as breaking by encouraging greater community concern and awareness. A State which cares about the well-being of its citizens may be vigilant while avoiding a severely punitive approach and may achieve more in reducing crime at the same time. The speculative ending to Chaiken and Chaiken's paper on drug offenders' rings true when they discuss the importance of the environments which may encourage or inhibit the development of dangerous offenders.

The South Australian Department of Correctional Services wishes to play its part in the reduction of crime and administration of a just and humane correctional system. It believes that the current parole system is a valuable tool in its management of prisoners as is the maintenance of prisons which are free from overcrowding.

NOTES

1. Departmental Statistics and Freiburg, A. and Biles, D. (1975), 'The Meaning of Life: A Study of Life Sentences in Australia', Australian Institute of Criminology, Canberra.
2. See for an alternative viewpoint Morris, N., 'The Future of Imprisonment', in Studies in Crime and Justice, University of Chicago Press, Chicago.
3. Roeger, Leigh (1986), unpublished paper.
4. For a detailed interstate comparison of remand practices see Walker, J. (1985), 'The Outcomes of Remand in Custody Orders', Australian Institute of Criminology, Canberra.
5. See, for example, McCain, G., Con, V. and Paulus, P. (1980), 'The Effect of Prison Crowding on Inmate Behaviour', U.S. Department of Justice; and Farrington, D.P. and Nuttall, C.P. (1980), 'Prison Size, Overcrowding, Prison Violence and Recidivism', Journal of Criminal Justice, 8, 221-31.
6. Weber, L. (1984), 'Fine Default in South Australia', unpublished.
7. Chaiken, M. and Chaiken, J., 'Offender Types and Public Policy', Crime and Delinquency, 30, 2, 195-226.

APPENDIX 1CORRECTIONAL SERVICES ACT - SECTIONS ON REMISSION

Section 79 of the Correctional Services Act 1982 provides:

- (2) Subject to sub-section (3), the Permanent Head shall at the end of each month, consider the behaviour during that month of each prisoner to whom this section applies and may, if he is of the opinion that a prisoner has been of good behaviour, credit him with such number of days of remission, not exceeding fifteen, as he considers appropriate.
- (3) The Permanent Head shall not, in considering the behaviour of a prisoner for the purposes of sub-section (2), take into account unsatisfactory behaviour in respect of which the prisoner is likely to be dealt with under any other provision of this Act, or any other Act or law.

APPENDIX 2COMMUTED DEATH SENTENCES AND THE TIME SERVED FOR 'LIFE' SENTENCES

This data is taken from Griffiths ARG, Capital Punishment in South Australia and Australian and New Zealand Journal of Criminology 3, 4 (1970).

1. In the time from 1836 (foundation of the colony of South Australia) to 24 November 1964 (the date of the last hanging in South Australia) the outcomes of death sentences were:

- . Hangings - 65
- . Commuted - 108

Some of these with commuted death sentences were pardoned, others transported to Tasmania and others had the sentence commuted to a fixed term.

2. In the period 1892 to 1932 twenty-seven prisoners had their death sentences commuted to life imprisonment and were released on probation. Griffiths gives only the number of whole years served by each of these prisoners and the average appears to be between seven and eight years.

While sentences of death and life imprisonment have their symbolic value they have not been systematically carried out over the period of South Australia's history.

The death sentence was abolished in 1974.

APPENDIX 3DEPARTMENT OF CORRECTIONAL SERVICES

DEPARTMENTAL INSTRUCTION NO 64

Head Office Contact: Assistant Director Programs

Telephone: 213 4111

DCS 1634/83

First Issued: 17/5/84

Re-Issued: 8/8/84

Re-Issued: 2/10/85

REMISSION OF SENTENCE - CORRECTIONAL SERVICES ACT, 19821. OBJECTIVES

- 1.1 To describe the system of remission set down in Section 79 of the Correctional Services Act 1982 (hereinafter referred to as 'the Act').
- 1.2 To describe the administrative procedures required to award and record remissions.
- 1.3 To describe procedures for the calculation of the release date for prisoners entitled to earn remission.

2. SCOPE

This instruction applies to all Departmental staff, unconvicted persons and prisoners.

3. INSTRUCTION3.1 General

- 3.1.1 Paragraph 65 of the United Nations Standard Minimum Rules for the Treatment of Prisoners and Related Recommendations proposes that the treatment of prisoners shall include, as an objective, the establishment, in prison, of independence and conformity to the law prior to return to the outside world. Society operates on the basis of rewards for independence via education, work and contribution to the community, and punishments for unlawful behaviour. It is appropriate that the prison environment should reflect this and remission is one method for modelling what occurs in the community.
- 3.1.2. In keeping with this principle, Section 79 of the Act, specifies that eligible prisoners may earn a maximum of fifteen days per month of sentence.

3.1.3. Eligible Prisoners

Under Section 79 of the Act, remission is available to:

- (1) All prisoners serving sentences exceeding three months. This includes prisoners serving sentences imposed under Federal Acts (Section 19 of the Commonwealth Prisons Act, 1967).
- (2) All prisoners serving a sentence of life imprisonment who have non-parole periods fixed.

(Prisoners currently serving a life sentence with no specified non-parole period may apply to the sentencing court for a non-parole period to be fixed.)

3.1.4 Ineligible Prisoners

Under Section 79 of the Act, remission is not available to prisoners who have been declared:

- (1) Insane.
- (2) Habitual criminals; or
- (3) Incapable of controlling sexual impulses. (See Section 77a of the Criminal Law Consolidation Act, 1935); and
- (4) Prisoners returned to prison after 20 December, 1983, upon revocation of release on parole under Section 42ne of the Prisons Act 1936 (now repealed) or Section 74 of the Act.

3.1.5 Section 79 of the Act, specifies that remission is applicable only to a sentence of imprisonment. Not all persons detained in prison are serving sentences.

Remission is not available to persons who have been imprisoned:

- (1) For failure to pay a fine imposed under the Income Tax Assessment Act, 1936 (Cth). In this case the term of imprisonment is proportional to the amount of the fine and is considered to be a substitute form of expiation, not a sentence.
- (2) Under a monetary warrant. As in (1) above, imprisonment consequent upon a failure to pay a fine is regarded as a substitute form of expiation, not a sentence of imprisonment.

- (3) For an indeterminate length of time for contempt of any court, i.e., detained until they purge their contempt.

N.B. Persons imprisoned for contempt, except by the Family Court, for a determinate period exceeding three months, are entitled to be granted remission.

3.2 Granting/Earning Remission

The crediting of all remission is at the discretion of the Permanent Head or his authorised delegates. The fifteen days per month which may be earned are divided as follows:

10 days for good general conduct
5 days for performance in industry/education

3.2.1 General Conduct

(1) Good Behaviour

Prisoners earn remission by good behaviour. Prisoners may earn up to 10 days per month served by not engaging in any of the behaviours listed in Appendix A. This list is a supplement to the classes of conduct prohibited by the Regulations made under the Act.

Appendix A does not include all extremely serious acts like murder or rape which would be dealt with by the police and external courts.

The behaviours listed in Appendix A have been divided into two categories depending upon severity:

- (i) Alleged offences which managers would normally refer to hearing by a Visiting Tribunal.
- (ii) Alleged offences which managers would normally deal with themselves. Clearly, there will be occasions where categories will be interchangeable.

(2) Duties of Managers

When managers receive reports of prisoners committing prohibiting behaviours, as set out in Appendix A, they shall ELECT whether to:

- Deal with the matters SUMMARILY by REFUSING TO GRANT between 1 and 10 days of remission to each prisoner concerned for the months in which the breaches occurred;

OR

- CHARGE the prisoners with breaches of the Regulations pursuant to Section 43(1) of the Act, and referring the alleged breaches to a Visiting Tribunal for hearing and determination pursuant to Section 44(1) of the Act.

OR

- Refer the matter to the police for investigation and, if necessary, prosecution by the police in an outside court.

In making such an election, managers shall have regard to the following:

- The desirability of dealing with a matter as quickly as possible;
- The seriousness of the offence - managers can refuse to grant between 1 and 10 days of remission, whilst a Visiting Tribunal can order the forfeiture of between 1 and 30 days of remission previously granted to a prisoner;

Only a Visiting Tribunal can -

Fine a prisoner up to \$50.00;

OR

Order a prisoner to pay compensation (up to \$200.00) where loss or damage to property has occurred.

N.B. The refusal by a manager to grant remission is an administrative act which is not subject to review or appeal. Prisoners who offend cannot insist upon a hearing before a Visiting Tribunal.

The number of days of remission not granted may be determined as follows:

Those behaviours in Appendix A which are regarded as category (ii) have been further subdivided into high (h), medium (m), and low (l) severity. The following is a list of the number of days per month which should not be awarded corresponding with severity level:

high	6-10 days
medium	3-7 days
low	1-4 days

N.B. If a behaviour is the subject of an alleged offence which is likely to be dealt with either by an outside court or a Visiting Tribunal, managers shall not take the matter into account when awarding remission (see Section 79(3) of the Act).

(3) Reporting Prohibited Behaviour

Appendix B is the form for reporting on general conduct. It shall be completed by a divisional chief, Correctional Industry Officer, any other officer including professional staff, only when any behaviour listed in Appendix A has been observed.

3.2.2. Performance in Industry/Education

(1) Effort

Officers shall refer to the document 'Wage Rates and Conditions of Employment for Prisoners', (WRCEP), distributed August 1984 and amended 27 November 1984, paragraph 3.3.1. In brief, prisoners may earn up to five days per month according to effort (see WRCEP, paragraph 3.6 for assessment of effort). The form for calculating and noting the amount of remission earned appears in WRCEP, paragraph 3.2.3 (3).

(2) Prisoners attending Work and Education

If a prisoner is attending both industry and education, then the officer in charge of the activity in which the prisoner spends more than 50 per cent of his or her time shall complete the form. The officer shall liaise with the person in charge of the lesser activity in order to ascertain attendance. In the case of a 50-50 split, the Correctional Industry Officer shall complete the form after checking on education attendance with the Education Officer.

(3) Absence

Prisoners who are absent from the work and/or education because of ill health, or legitimate visits (including consultations with professional

officers) shall not suffer any loss of remission provided recognised supporting documentation has been lodged with the supervising Correctional Industry Officer (see WRCEP, paragraph 3.4). This applies to prisoners admitted to any hospital.

3.2.3 Prisoners on Remand

(1) Backdating of Sentence

Remission is earned from the first day of sentence. Sometimes the court may backdate a sentence to include the whole, or part, of a remand in custody. Therefore, a record of 'provisional remission' shall be kept for all prisoners. The amount of 'provisional remission' shall be determined by good general conduct only, even if a remand prisoner chooses to work. Of course, for 'provisional remission', good general conduct shall be worth fifteen days per month. Upon the handing down of the prisoners' sentences, their 'provisional remission' will then become actual remission.

(2) Awarding of Remission from day of Sentencing

From the day of sentencing the prisoner shall be awarded remission in accordance with Section 3.2.1 and 3.2.2 providing the prisoner is in, or is placed, in custody on that day.

3.3 Recording Remission and Calculating Release Dates

3.3.1 Record Form

The remission card (Appendix C) is the master record for all remissions.

From left to right the columns provide for:

- (a) Month and year sentence begun.
- (b) Possible remission for that month. In the case of incomplete months at the beginning and end of sentence, the possible remission will, of course, be less than 15 days.
- (c) Actual remission earned under the two categories described in Section 3.2.1 and 3.2.2 of this Instruction.
- (d) Monthly adjustment of non-parole period expiry date.

(e) Monthly adjustment of earliest head sentence discharge date.

3.3.2 Effect of Remission

Effect on Non-Parole Period

Where a prisoner has a non-parole period fixed, remission will reduce the period to be served in prison by up to one-third.

Effect on Head Sentence

Where a prisoner has no non-parole period fixed (generally because his sentence of imprisonment is less than 12 months) remission will reduce his sentence by up to one-third.

Effect on Discharge Date of Parole

Where a prisoner accepts the conditions determined for his/her parole, and is released on parole, he/she will remain on parole from the date of release on parole until the head sentence expiry date less remission granted PRIOR TO 1/6/84. That is, Remission granted AFTER 1/6/84 shall be recorded for the purposes of reducing both a prisoner's non-parole period and his/her head sentence, but upon the prisoner accepting release on parole, the remission recorded in relation to head sentence is then 'disregarded' for the purpose of calculating the expiry date of that prisoner's parole.

2. OTHER CONSIDERATIONS

- (a) If the non-parole period commencement date is prior to 20 December 1983 then five days for each month served should be taken off the non-parole period up until 20 December 1983. Between 20 December 1983 and 1 June 1984, 15 days per month should be deducted from both the non-parole period expiry date and the head sentence discharge date. This applies irrespective of when the non-parole period expiry date is set by the court. After 1 June 1984, remission should be credited in keeping with this Instruction.
- (b) As indicated in Section 3.1.3 (2), from 1 June 1984, prisoners with a life sentence for whom a non-parole period has been fixed, may earn remission which is deducted from the non-parole period expiry date. As in (a), this applies irrespective of when the non-parole period expiry date is set by the court. It is

anticipated that most life-serving prisoners for whom no non-parole period was prescribed at the time of sentencing, will apply to the court for a non-parole period. Therefore, a record of 'provisional remissions' shall be maintained. The assessment of 'provisional remission' shall be conducted in the same manner as for prisoners with determinate sentences (Section 3,2.3 (1) of this Instruction).

- (c) In the case of prisoners with determinate sentences, any forfeiture of remissions ordered by a Visiting Justice before 20 December 1983 can apply to head sentence discharge date only. After 20 December 1983, the forfeited amount should be added to both non-parole expiry date and head sentence discharge date. In the case of life serving prisoners, any forfeiture of remissions ordered after 1 June 1984 should be added to a non-parole period expiry date irrespective of when that non-parole is set.
- (d) 'Special' Remission: Remission granted by the Governor for special reasons (e.g. strikes etc.) will only be applied to non-parole periods IF granted AFTER 20/12/83. Except for the block remission of 5 days per month referred to in (a) above, no remission is applied to non-parole periods for time served in prison before 20/12/83.
- (e) Prisoners transferred under the Prisoners (Interstate Transfer) Act, 1982; or the transfer of Prisoners Act 1983 (Cth). The amount of remission earned in the participating state should be specified on documents accompanying the order of transfer.

3.4 Prisoner Transfer Within South Australia

When a prisoner is transferred from one prison to another, the officer in charge of remissions at the prison of origin shall forward all records of remission to the officer in charge of remissions at the prison of destination.

3.5 Notification of Remission

In accordance with Section 79(4) of the Act all prisoners entitled to earn remission are to be notified at the end of each month of (a) the amount of remission earned during that month, and (b) the reasons for awarding/not awarding remission. The notification form for this purpose appears in Appendix D.

If prisoners are dissatisfied with the information contained in their notification forms they may seek a more detailed explanation by a written request to the Manager.

3.6 Calculating Remission - Examples

Example 1: Prisoner Given Determinate Sentence

Prisoner X: 16/10/80 - sentenced to 11 years imprisonment;
 - no non-parole period fixed;

2/8/84 - non-parole period fixed of 5 years TO COMMENCE 16/10/80;
 - maximum non-parole period end date is 15/10/85.

To calculate date of earliest release on parole:

(1) Months served prior to 20/12/83 = 38 months 4 days

Therefore, remission @ 5 days/month = 191 days

Deduct 191 days from 15/10/85 = 7/4/85

Compute remission @ 15 days/month from 20/12/83 to 7/4/85 = 171 days

Therefore, earliest date of release on parole assuming maximum remission is 18/10/84.

Example 2: Prisoner Given Life Sentence

Prisoner Y: 11/3/80 - sentenced to life imprisonment;
 - no non-parole period fixed;

15/10/84 - non-parole period of 18 years fixed to COMMENCE 11/3/80;
 - maximum non-parole period end date is 10/3/98.

To calculate date of earliest release on parole

Compute remission at a maximum rate of 15 days per month from 1/6/84.

(Signed) EXECUTIVE DIRECTOR
 5/9/85

TABLE 1: PRO RATA-REMISSIONS - START OF SENTENCE

The remission system operates on a calendar month basis. This means that pro-rata remissions will need to be calculated to take some sentence commencement dates up to the beginning of a calendar month. The following table allows this to be done assuming maximum remissions are earned.

<u>Days Remaining</u>				
<u>28 day month</u>	<u>29 day month</u>	<u>30 day month</u>	<u>31 day month</u>	<u>Remission</u>
-	-	-	1 day	Nil
1-2	1-2	1-2	2-3	1 day
3-4	3-4	3-4	4-5	2
5-6	5-6	5-6	6-7	3
7-8	7-8	7-8	8-9	4
9-10	9-10	9-10	10-11	5
11-12	11-12	11-12	12-13	6
13-14	13-14	13-14	14-15	7
15	15-16	15-16	16-17	8
16-17	17-18	17-18	18-19	9
18-19	19-20	19-20	20-21	10
20-21	21-22	21-22	22-23	11
22-23	23-24	23-24	24-25	12
24-25	25-26	25-26	26-27	13
26-27	27-28	27-28	28-29	14
28	29	29-30	30-31	15

APPENDIX APROHIBITED BEHAVIOURS IN CORRECTIONAL INSTITUTIONS

1. (1) No prisoner shall make preparation for an escape by having in his possession any unauthorised article or thing, plan or document which may or is likely to assist such prisoner or any other prisoner to effect an escape or to attempt an escape from a correctional institution (ii)(h).
- (2) No prisoner shall make any preparation for an escape by the employment of any artifice or device or other means of conduct as may be conducive to effecting the escape of such prisoner or other prisoner (ii)(h).
2. No prisoner shall engage in any act of sexual intercourse of any kind or any other sexual act with any other prisoner (ii)(h).
3. No prisoner shall demand sexual favours from another person under threat of assault or informing (ii)(h).
4. No prisoner shall commit any act of indecency or use any abusive, insolent or obscene language or make any such gesture or commit any such act to or in relation to or in the presence of any other person (ii)(h).
5. No prisoner shall assault, attempt to assault or threaten to assault an officer or any other person (i).
6. No prisoner shall fight with another person (ii)(h).
7. No person shall engage in extortion, blackmail, or conducting protection (demanding or receiving money or anything of value in return for giving protection to others, under threat of bodily harm, or under threat of informing on others) (i).
8. No prisoner shall wear a disguise (ii)(m).
9. No prisoner shall have in his possession cash over and above allowance for telephone (ii)(l).
10. No prisoner shall loan property for profit (ii)(l).
11. No prisoner shall engage in counterfeiting, forging, or unauthorised reproduction of any document, or article of identification (ii)(h).
12. No prisoner shall fail to participate in parade (ii)(l).
13. No prisoner shall interfere with the taking of the count (ii)(l).

14. No prisoner shall be unsanitary (fail to keep his cell or quarters in accordance with required standards) (ii)(1).
15. No prisoner shall during a visit of any kind behave in manner contrary to the Rules of the Correctional Institution (ii)(1).
16. No prisoner shall, without permission, leave the place at which he is directed or authorised to be (ii)(m).
17. (1) No prisoner shall disobey any lawful order or direction of any officer (ii)(h).

(2) No prisoner shall obstruct or hinder any officer carrying out his duties including a search upon him or refuse any search to be carried out upon him in pursuance of Section 37 of the Correctional Services Act, 1982 (ii)(h).
18. (1) No prisoner shall have in his possession any article or thing not authorised by the Manager or by the regulations under the Correctional Services Act, 1982 (ii)(m).

(2) No prisoner shall have in his possession any item or plan prohibited by regulations under the Correctional Services Act, 1982 (ii)(m).
19. (1) No prisoner shall have in his cell or place in any other part of the Correctional Institution any item or plan prohibited by regulations under the Correctional Services Act, 1982 (ii)(m).

(2) No prisoner shall have in his cell or place in any other part of the Correctional Institution any item or plan prohibited by regulations under the Correctional Services Act, 1982 (ii)(m).
20. No prisoner shall, without being authorised to do so, alter, modify or convert any article or thing of any kind (ii)(m).
21. No prisoner shall wilfully destroy, damage or interfere with any property, including clothing of the Correctional Institution or that of any other person (ii)(h).
22. No prisoner shall wilfully inflict injury upon himself (ii)(h).
23. No prisoner shall tattoo himself or any other person (ii)(m).
24. No prisoner shall practice any form of gambling (ii)(h).

25. No prisoner shall consume alcohol of any kind except such specific kind of alcohol which he may be authorised by a medical officer to consume of a specific medical or other authorised purpose (ii)(h).
26. No prisoner shall use, administer or consume or administer to any other person any unauthorised drug (ii)(h).
27. No prisoner shall keep or accumulate any authorised medicine or drug for use or consumption by him or any other person during any other time or for any other purpose other than that prescribed by the medical officer (ii)(h).
28. No prisoner shall behave in a disorderly manner, commit any nuisance or conduct himself in any manner so as to cause undue disturbance or annoyance to any other person (ii)(l).
29. No prisoner shall accumulate deposit or place any waste material, dust, noxious or corrosive substance, fruit peelings, parings, chemical or vegetable matter, rubbish or litter in any place other than a receptacle or bin specifically provided for such purpose (ii)(l).
30. No prisoner shall at any time enter any other prisoner's cell without the express direction of an officer permitting him to do so first had and obtained (ii)(l).
31. No prisoner shall knowingly fake an illness or falsely pretend to have any physical incapacity or disability (ii)(l).
32. No prisoner shall treat any other person in a contemptuous manner which is intended or designed to cause offence to such other person (ii)(l).
33. No prisoner shall incite or provoke any other prisoner to commit riot or engage in any riotous behaviour or disturbance of the peace of any kind (ii)(h).
34. No prisoner shall commit riot or engage in any riotous behaviour or disturbance of the peace of any kind (ii)(h).
35. No prisoner shall steal any money article or thing from any person or authority (h).
36. No prisoner shall refuse or neglect to conform with the regulations under the Correctional Services Act, 1982 or rules of the institution, or shall aid, abet, counsel or procure, incite or encourage or otherwise assist any other prisoner to commit any breach of the regulations under the Correctional Services Act, 1982 or rules of the institution (ii)(h).

37. No prisoner shall poke or project any matter or thing from his cell or place where he is being held or detained (ii)(1).
38. No prisoner shall set fire to or cause to be set fire to any matter or thing (1).
39. No prisoner shall make or prefer any false or frivolous complaint or charge nor make any false report or give false information to or concerning any officer or person employed or engaged by or on behalf of the Department or any other Department (ii)(h).
40. No prisoner shall fail to follow safety regulations (ii)(1).
41. No prisoner shall without proper and sufficient excuse refuse to work or refuse to carry out any task assigned to him as prison work.*
42. No prisoner shall wilfully mismanage work or any task assigned to him as prison work.*
43. No prisoner shall carry out work or any task assigned to him as prison work in a careless manner or fail to comply with all applicable safety procedures notices and directions pertaining to any work or task.*
44. No prisoner shall use any equipment or machinery without authority.*

* Behaviours 41-44 are related to work and/or education. Failure to observe these, and other behaviours at the place of work and/or education, may (a) result in the nonawarding of two out of the ten days per month allocated for general conduct and (b) degrading of basic daily wage (see 'Wage Rates and Conditions of Employment for Prisoners', distributed August 1984 and amended 27 November 1984, paragraphs 2.2.3 and 3.3.1).

GENERAL CONDUCT REPORT FORM

To the Manager

Prisoner's Surname..... Given Names.....

Document No.....

The aforementioned prisoner was observed to perform behaviour No....

at.....on.....

(time) (date)

Signed.....

Name of Reporting Officer

To be Completed by the Manager

In respect of the above I authorise the following

.....
.....
.....

Number of days not given as result of the behaviour.....

Signed.....

Manager

To Officer in Charge of Remissions to note.....

To Assessment and Classification Clerk

Date Filed.....

To Assessment and Classification Clerk

Date Filed.....

APPENDIX D

REM 6

MONTHLY REMISSION ADVICE

Prisoner's Surname.....Given Name.....

In accordance with Section 42ra (4) of the Prisons Act, 1936-83, this is to advise that you have been credited with.....days remission for the month of

The reasons for this decision as as follows:

CIRCLE AS APPROPRIATE

GENERAL BEHAVIOUR	GOOD
PARTICIPATION IN INDUSTRY/EDUCATION	GOOD

Your total amount of remissions has been reduced by.....days as a result of proof of charges.

.....
.....
.....
.....

heard by the Visiting Justice or Director on.....

DATE: SIGNED.....

THE DIRECTOR OR AUTHORISED DELEGATE

PRECONDITIONS FOR SENTENCING AND PENAL REFORM IN NEW SOUTH WALES
SOME SUGGESTIONS TOWARDS A STRATEGY FOR CONTESTING
AN EMERGING LAW AND ORDER CLIMATE

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INTRODUCTION

Attempting to embark on a paper under the heading 'The Future of Imprisonment' for presentation at a sentencing conference has been unusually difficult. For the task of speculation on the future of imprisonment is in turn dependent on being able to speculate on the broader economic, political, ideological and social climate and arrangements within which some future imprisonment will be located.

One difficulty here is in being in some sense captive in a particular New South Wales (N.S.W.) context. In that context: a rapidly rising prison population, judicial reaction and the constitution of an increasingly law and order public climate, any attempt to envisage the likely contours of an 'imprisonment of last resort' is a somewhat schizophrenic exercise.

Another difficulty stems from the rejection of theoretical approaches to penalty which would inscribe it within the logic of a single cause, level or instance, such as Rusche and Kirchheimer's history of the emergence of the prison as an instrument of labour discipline. The problems with such explanations emerge clearly in Rusche and Kirchheimer's belief that imprisonment as an institution would no longer be required under the conditions of advanced capitalism. Or as Melossi puts it 'the changes in that social model upon which the prison had been shaped, mainly the capitalist management of labour, make the institution, in its deep structural core, both obsolete and incapable of fitting its primitive functions'. (Melossi, 1978, p. 81; for a brief review see Zdenkowski and Brown, 1982, ch. 1).

While it may be correct that the importance of the prison has declined vis a vis the development of a network of 'community corrections' and other forms of welfarist discipline, control and normalisation, what Cohen terms the 'dispersal of social control' (Cohen, 1979) it is evident that the prison is not about to fade away in N.S.W. in the 1980's. Clearly explanations of the function of the prison other than a direct and unmediated link with the economic are called for.

More sophisticated accounts in a radical tradition (Foucault, 1977; Garland and Young, 1983; Garland, 1985) have argued that the relationship of punishment to society should not be seen as one of externality and that penalty should be conceived as a 'specific institutional site which is traversed by a series of different social relations' which 'operate through it and are materially inscribed in its practices' (Garland and Young, 1983, p. 21).

Thus in addition to Foucault's insistence that we reject the conception of the power to punish as merely negative sanction and stress the productive, positive characteristics of disciplinary power (Foucault, 1977, p. 194) we can now recognise the array of relations which are fused and condensed in the penal realm. Garland and Young illustrate this well:

Individual penal sanctions condense a number of different relations and it is necessary to acknowledge this, if an analysis capable of supporting political action is desired. An offender who is sentenced to imprisonment becomes the object of a relation of force (resistance will be met with physical coercion and violence 'if necessary'), which is at one and the same time legal (it is an authoritative order of the court, the prison is a legal authorised place of detention, its officers have legal powers at their disposal, the law specifies that prisoners shall not have the rights and capacities available to other citizens, etc.); political (the basis and limits of that authority and that force are ultimately political, as is the definition and enforcement of the criminal law; the form of the sanction is politically conditioned, etc.); ideological (the prison carries specific symbolic connotations which mark the prisoner, his act and his family; prison architecture and practices carry particular signifiers - isolation, work, reward, discipline, obedience, etc.); and economic (the prisoner will be made to labour, his family will be financially disadvantaged, his work record and national insurance contributions will be interrupted, he will have difficulty regaining employment, the 'free' labour-market will be deprived of his labour, he will be de-skilled, etc.). Of course, if the offender happens to be female she will be subjected to a number of differential practices (as indeed will certain male 'sex offenders'), indicating the real pertinence of sexual relations in this realm. No doubt the forms of assessment, classification and supervision which occur during and after the prison sentence will also invoke various criminological, psychiatric or social work knowledges and the therapeutic or client relations which these establish. (Garland and Young, 1983, p. 22-3.)

Such conceptions of penalty which stress imprisonment as a complex condensation of a whole series of relations renders some unitary and linear prediction of the future difficult. And more concretely, I have not had the necessary time to engage in the scholarly review of and reflection on the relevant literature and trends which will no doubt mark some of the other papers at this conference and which might have provided a means of detaching myself from the local context.

The upshot of these introductory remarks is that I have been unable to fulfil the expectations of the conference organisers, as implied in the section title 'The Future of Imprisonment' and as contained in a set of questions issued with preliminary conference material. For this I apologise.

The scope of this paper will be much narrower, political and programmatic in nature. In the first section I will attempt to identify, in point form, some of the component elements or forces that are feeding into and constituting the current conservative climate in relation to criminal justice, sentencing and imprisonment in N.S.W. My argument will be that any serious project of reform in these areas must inevitably involve attempts to contest and reconstitute various of these forces which create conditions of possibility of change. The second section of the paper will thus be a checklist of some of the general tasks and issues that I suggest will need to be addressed if we are to succeed in creating a climate more favourable to criminal justice, sentencing and penal reform.

THE N.S.W. CONTEXT: AN INCREASING PRISON POPULATION AND THE EMERGENCE OF A LAW AND ORDER CLIMATE UNFAVOURABLE TO CRIMINAL JUSTICE, SENTENCING AND PENAL REFORM

Let us firstly, then, outline in bald summary form some of the components of the current N.S.W. context.

1. A dramatic increase in the N.S.W. prison population over the last eighteen months with consequent prison overcrowding following the suspension of the early release on licence scheme after allegations of corruption in the operation of the scheme which have led to criminal charges being laid.
2. The consequent discredit which has publicly attached to various executive forms of release. This discredit has been bolstered by a failure to publicly defend the legitimacy and social advantages of executive release schemes separately from the issue of alleged corrupt implementation.
3. The activities of the N.S.W. Parole Board in administering the provisions of the N.S.W. Probation and Parole Act, 1983. Monitoring has revealed a dramatic decline in the

Parole Board's preparedness to grant full remission entitlements to prisoners sentenced under the 1966 Act ('Transitional prisoners'). At the time of the commencement of the new Act, the Parole Board was releasing about 90 per cent of eligible transitional prisoners. Within six months this rate had fallen to about 30 per cent. Furthermore, the monitoring report (N.S.W. Bureau of Crime Statistics, March 1984) found that this reduction was largely unrelated to the seriousness of the offence or to the prior criminal record of the offender.

4. The activities of sections of the N.S.W. judiciary in increasing non-parole periods (N.P.P.) to counter the effect of the 1983 legislation which provided for remissions to come off the N.P.P. (Weatherburn, 1985). Such increases were clearly contrary to the intent of the legislation and ran directly against the decision of the N.S.W. Chief Justice in R. v. O'Brien, Court of Criminal Appeal, May 3rd, 1984.
5. The activities of sections of the N.S.W. judiciary in politically attacking the remission provisions from the judicial pulpit. Florid judicial homilies delivered to pre-alerted press benches gain wide circulation in the popular press and thus have significant political effects.
6. The substantial failure of the media to be critical of judicial attacks on parliamentary sovereignty and the uncritical promotion of generalised and obscurantist claims of 'judicial independence', 'separation of powers' and 'the rule of law'.
7. The extreme difficulty facing critics of judicial pronouncements and politics in gaining access to the media, letters columns, etc. and the contrasting ease with which traditionalist defenders of judicial power and its extension gain privileged access to the means of circulation of their views.
8. The historical amnesia exhibited in the media in debates over sentencing, parole, and remissions in N.S.W. A recent Sydney Morning Herald Editorial (18/1/86) referred to the establishment of parole in 1966 in N.S.W. as 'the beginning of serious executive interference in judicial determinations of punishment'. But the history of an executive role in determining release dates goes back to the foundation of the colony and the 'ticket of leave' system.
9. The exploitative and sensationalist coverage of individual cases, such as the Anita Cobby murder, by the media.

10. The promotion of an approach to crime and criminal justice issues in contemporary debates over organised crime and corruption that is heavily dependent on moralism, the metaphors of cancer and disease, the assumption that complex problems can be reduced to the struggle between good and evil and that more powers and resources for law enforcement agencies are the primary 'solution'.
11. The media promotion of particular, socially and politically conservative commentators, to the status of expert, primary definer and moral hero (Bottom, Beck, Moffitt, etc.).
12. The development of an hysterical climate of moral panic over the issue of illegal drug use and the suppression of research which questions some of the basic law enforcement assumptions that so permeate the drug debate. A good example of this was the complete failure of any journalists or news media to report the careful review provided by Grant Wardlaw in his paper to the Organised Crime Seminar at the Sydney Institute of Criminology last week. This is to be contrasted with the mass publicity accorded the paper 'Control of Organised Crime with Reflections on Sydney' delivered at the same seminar by Frank Costigan QC. This is despite the fact that much of Wardlaw's analysis challenges many of the basic law enforcement assumptions riddling Costigan's paper. And further, that Wardlaw's paper was available weeks in advance while Costigan's paper was carefully press released on the day of the seminar and was not made available to seminar participants.
13. The basic opportunism of the N.S.W. political opposition in their response to criminal justice issues. The broad approach is to exploit any crime-related issue unhindered by policy or principles save that of exploiting government embarrassment over scandals, escapes, violent crime, police corruption, etc. A notable departure from this general pattern was the forthright opposition of Nick Greiner to the reintroduction of the death penalty.
14. The weakness and internal division of reform groups in the criminal justice area against their visibility, prominence and unity in the 1970s.
15. The neutralisation of internal prisoner protest activity when compared with the high levels of militancy throughout the 1970's, partly through the pacification effect of extensive heroin use in the prisons.
16. The failure of the N.S.W. Australian Labor Party to politically campaign in an open and positive fashion to create a broad, popular climate of support for reform oriented policies. Rather, the government appears

continually to be forced into a series of defensive, pragmatic and ad hoc responses. The failure to engage in broad popular education campaigns and to contest some of the basic punitive assumptions around which law and order campaigns on a range of criminal justice issues are mobilised only demoralises those seeking a principled stand and prepares the ground for further opposition campaigns and further defensive responses.

17. The indications that a complex of very diverse and specific issues in the criminal justice area are being woven into a unity. The unifying thread is a simplistic form of law and order politics which seeks to suggest that 'no nonsense solutions' to these varied issues exist in the form of increased law enforcement and increasing retributive and punitive sentiments and practices in sentencing and imprisonment.

SPECIFYING A STRATEGY: SOME SUGGESTIONS

This section of the paper will suggest in a very cursory and general way some tasks or directions that might be components of a broad political strategy. Such a strategy would seek to reconstitute various of the elements creating the current unfavourable conditions for reform identified above in such a way that a more favourable climate might be created. The suggestions will be fairly baldly stated rather than elaborately argued and will move from the more general and theoretical to the more concrete and practical.

THE SEPARATION OF PENAL DISCOURSE AND PRACTICE

One of the first tasks is to remind ourselves, especially in conferences such as this, that penal discourse is not the simple description of penal practice but is itself a form of representation. This is not to suggest that penal discourse is necessarily a fraud, mystification or form of false consciousness. Nor that it is an effect of some single unifying and determining instance or logic (the labour market, capital, law, state, etc.). The point is that representations require 'reading', and that the relationship between penal discourse and practice is not given but a question of analysis.

David Garland in a significant history of British penal strategies conducted by way of a rigorous study of official penal disclosure, reports, statements, texts, legislation, etc. concludes that 'penal disclosure is as much concerned with its projected image, public representation and legitimacy as it is with organising the practice of regulation' (Garland, 1985, p. 261).

The point of conceiving of penal disclosure as a separate realm requiring analysis and 'reading' is that it is in this realm that

public knowledge and information about penal practice is constructed, the limits and possibilities of various policies sketched out, issues and approaches defined. To subject the discursive and ideological elements of the penal complex to analysis rather than to read official representations in their own terms as descriptive of practice is to radically broaden the potential types of questions (and answers) that can be asked. This can assist in challenging central notions such as penalty as a negative response to crime and the localisation of social responsibility in individuals (Garland and Young, 1983, p. 17).

DEVELOPING A SOCIAL ANALYSIS OF PENALTY

Another major task of a general nature is to insist on a social analysis of penalty in order to reconnect penal issues with broader political struggles. To conceive of penal relations as an issue of social policy involves a rejection of the traditional view that penal relations are simply a response to crime. It also involves a refusal to address penal relations in the terms of the philosophy of punishment. Discussions which endlessly dissect the idea of punishment rather than examine specific penal practices or approach the notion of punishment as a working social category have the effect of promoting abstract and universalist moral debates which are a barrier to apprehending the basically social and political nature of penalty.

CONTESTING INDIVIDUALISATION

One element of a social analysis of penalty would be an attempt to shift discussion away from the individual as the central object or unit of analysis. As Garland and Young argue:

There is no reason to follow legal ideology and individualistic psychologies in always locating 'responsibility' at the level of the individual: there are alternative means of ascribing social accountability (which could be applied to corporate entities, firms, public agencies, etc. as well as individuals), which do not rely upon this process of individualisation. Such a system would ensure that 'corporate crimes' and the social harms promoted by public agencies were no less real and amenable to intervention than the trespasses of individuals' (1983, p. 35).

THE FUTILITY OF SEARCHES FOR A BLUE-PRINT FOR REFORM

There are no magic blue-prints for reform nor is there some central essence, logic, fulcrum, rationality, from which the complex of penal relations can be changed or reformed. Indeed the construction of a rationalist model or framework for reform based on the adoption of some central rationale for sentencing

such as 'just deserts' and a commitment to a wholesale reclassification of maximum penalties (Boehringer and Chan, 1985) is replete with many dangers.

For the political process of reform is not the wholesale adoption of a rationalist model or scheme in toto but a struggle over the adoption and implementation of specific issues and recommendations. Thus to premise recommendations like the abolition of parole, remissions and licence release schemes on the adoption of a 'just deserts' rationale (itself fundamentally retributive in character and legitimating in effect) a legislative commitment to some 'last resort' formula and a (highly unlikely in the present climate) downward legislative reclassification of the penalty structure is to invite the selective adoption of alleged reform recommendations which would have the effect of increasing sentence lengths and sacrificing hard-fought for prisoners' gains won over decades of struggle.

ADDRESSING SPECIFIC ISSUES

Thus where possible, issues such as parole, remissions, licence release, internal discipline, etc. should be dealt with in their specificity, against the background of a detailed empirical knowledge of their localised history and struggles. Such an approach tends to minimise the dangers of the pick and choose type of political response to reform proposals outlined above where recommendations involving the abolition or diminution of prisoners' entitlements are detached from a series of prior recommendations upon which they depend and adopted for implementation without the compensating recommendations being adopted.

However, as outlined in the first section, one of the characteristics of the emerging law and order climate in N.S.W. is precisely the gathering or weaving together of a range of diverse and contradictory criminal justice issues into a unity. Specific issues are thus being swamped in an overriding discourse, articulated within a wider set of meanings organised around a 'get tough' approach. In such a climate individual crimes of spectacular violence and brutality can immediately produce dramatic effects on the operation of existing prison programs, classification procedures etc. as though these issues were linked in a direct causal relationship. In thinking how we might combat such a linking of issues around a set of law and order concerns and motifs we need to turn to the question of regulation of the media.

REGULATING THE MEDIA

Rhetorical invocations of free speech, references to the prerogatives of private ownership of media monopolies, giving

people 'what they want', journalistic 'ethics' etc. are hardly adequate justifications for a wide range of media practices which sensationalise and exploit criminal justice issues and fashion from them the stuff of contemporary morality plays on the themes of good and evil, human nature and commonsense.

It is as much to the point to discuss the pressing issues of media regulation and accountability when considering sentencing and penal reform as any issue internal to the legal or penal system, so influential are the media in constructing and constituting the 'public opinion' which will largely shape the outer limits and provide the public context within which particular reform measures will be considered.

That a different, socially responsible and non-sensationalist approach to criminal justice issues in the media is possible is illustrated clearly in the Dutch experience (Downes, 1982). The fact that considerable restraint is exercised in the small amount of space allocated to crime in general and individual crimes in particular, the low priority accorded in terms of location, format and placement and the restrained form of treatment, the absence of metaphorical and emotive language: all these factors clearly assist in the creation of a mature, humane, civilised climate of public opinion in Holland within which low imprisonment rates, short sentences and relatively liberal prison regimes by international standards are not just tolerated but actively understood and supported. Of course this climate of public opinion has complex and specific national historical and cultural roots and cannot therefore be 'copied' or merely implanted in an entirely different national context. Nor is the Dutch experience fixed; the broadly rehabilitative ethos of the Dutch criminal justice and penal system is currently under challenge from more punitive forces mobilising around the drugs and crime issue. Plans for a number of new prisons have been announced recently by the Minister for Justice (DeHaan, 1985, 1986).

For our purposes the Dutch experience shows the possibility of another way. It shows that 'public opinion' is not a fixed entity, is not innately or inherently punitive (cf. Hawkins, 1984; Brown and Zdenkowski, 1985) and is partly constituted by the manner and form of media treatment of issues. It shows that public attention and information can be devoted to many of the other dangerous, harmful and anti-social activities that occur in a routinised way in society. It shows that the focus of intervention need not be solely that of individual responsibility but that corporate, public, governmental etc. activities can be the object of regulation and social policy which will have effects in relation to both crime and other forms of social injury and loss. It shows a welcome recognition that the criminal law is only one of a wide range of forms of regulation; an often inefficient one in that its emphasis on individual responsibility

and guilt precludes the formulation of social policy which would address the social and economic contexts within which individual acts are committed and rendered meaningful.

It is not within the scope of this paper to review current forms of regulation of the Australian media such as the Broadcasting Tribunal, the Press Council, the Journalists Code of Ethics etc. in an attempt to identify at what institutional points and with what strategies the sensationalist excesses in media treatment of criminal justice issues might be curbed. My general point is that such a thoroughgoing extension of regulation, on clearly articulated criteria, is necessary and that arguments for such regulation should be stepped up. Just to throw in one specific example: just what would be objectionable about a prohibition (whether through self-regulation or some other form) on the publication of photographs of defendants, witnesses etc. prior to and during the conduct of criminal trials? Is it beyond our competence as a society to reach some basic decisions about competing social priorities and policies and to back such decisions with the force of regulation? Or must the generalised and absolutist claims of 'free speech' (which as Phillips points out, in this day and age makes as much sense as speaking about a 'free market' or 'freedom from gravity' (Phillips, 1984, p. 3)) and the 'public right to know' continue to operate as a shield to protect sensationalist, unarticulated and unaccountable criteria of newsworthiness.

As Phillips argues:

The reasons for publishing one story or another, or for putting forward one view rather than another, will not be primarily that which is in the best interests of society, regardless of the intelligence or moral virtue of the journalists involved. Rather, the pressures which determine the choice of a particular subject matter will involve a group of criteria including aesthetic, commercial judgments, cost effectiveness, and logistics.

He concludes:

Power over what people read is too crucial to us all to be allowed to rest with self-appointed moral guardians, who lack even the accountability of politicians and who are in the employ of major corporations which in the end obey the laws of the market place. Just as police, judges, medicine manufacturers and warders need to be monitored, regulated and made publicly accountable so do the media (p. 5).

SOCIALISING THE JUDICIARY

Another central task in the attempt to create more favourable conditions supportive of sentencing and penal reform we might describe generally as socialising the judiciary. It is not one task but many and must be conducted on numerous fronts. I have discussed some of these issues elsewhere (Brown, 1984, 1985) and can only offer a brief overview here.

One of the central conflicts that has emerged in recent debates over sentencing, parole and remissions in N.S.W. is that between the judiciary and the legislature and the judiciary and the executive, over their respective roles, responsibilities, capacities, powers and spheres of control. In these debates the more vocal and publicity conscious sections of the N.S.W. judiciary have attempted to portray executive-based schemes such as licence release and remissions as incursions in judicial spheres of operation. Such conceptions have been largely backed by the media; reference has been made above to a Sydney Morning Herald editorial which proclaimed that the 1966 Parole of Prisoners Act (N.S.W.) marked 'the beginning of serious executive interference in judicial determinations of punishment'.

Apart from the historical amnesia involved, executive attempts to regulate the imprisonment rate via mechanisms such as remissions, parole, release on licence can only be concerned of as an 'interference' if we assume that the field of sentencing and penal practice is the sole prerogative of the judiciary.

Clearly such assumptions are open to question. Democratically elected governments with at least some mandate and relation of representation wholly lacking in the judiciary, pass laws, set penalty structures and provide for the financing, building and administration of prisons and other penal measures. Governments and more broadly the voting and revenue producing public they (however inadequately) represent and are answerable to, have an interest in such issues as imprisonment rates, which incidently vary dramatically across national and state boundaries independently of crime rates. In short, imprisonment rates and the complex of processes that produce them (legal, judicial, etc.) are matters of general social policy, not the sole preserve of the judiciary. Any more than the question of the B.H.P. takeover should be the sole preserve of shareholders or the remuneration levels for surgical operations carried out in public hospitals should be the sole preserve of surgeons.

It has not been the case historically in Australia nor is it currently the case in other jurisdictions that the judiciary are the only nor indeed necessarily the most suitable agency to determine length of sentence or release date. Specific debates should thus be conducted as questions of social policy, as amenable to political reconstitution, and not as mystical,

undemocratic and fundamentalist assertions of judicial power. Opposition from within the N.S.W. judiciary to proposals for a Sentencing Council on the basis that it would be anathema to have people other than judges advising on general issues of sentencing policy should be condemned in the same terms we would condemn any sectional interest that sought to isolate its informational and decision-making processes from greater social and public accountability in the utilisation of public resources.

DEVELOPING A MORE CRITICAL APPROACH TO GENERALISED CLAIMS OF 'JUDICIAL INDEPENDENCE', 'SEPARATION OF POWERS', ETC.

One of the components of an attempt to socialise the judiciary would be the adoption of a far more critical approach to generalised claims of judicial independence, separation of powers, the rule of law etc. For while public debate is conducted in such a way that this trinity is accorded the reverential status of an unquestioned, self-evident good, then it will be difficult to secure support for particular strategies and practices which might assist the socialisation of both the judiciary and the wider field of penalty.

Again, the argument is not that these doctrines are a fraud or form of ideological mystification but that when invoked in general terms they tend to preclude a more critical focus on the specific work processes, routines and practices of the judiciary and the extent to which these might be rendered more open to concrete mechanisms and conditions of accountability, regulation and review (Brown, 1985, p. 9).

CREATING FORUMS FOR DEBATE AND INTERCHANGE

One of the most objectionable features of claims of judicial 'independence', 'neutrality', and non-partisan and non-political status is that such claims are in direct contrast to judicial conduct and practice in various respects. In the N.S.W. context for example the fact is that the judiciary are consulted by the executive on certain matters of law reform such as proposed changes to parole and remissions. They make collective submissions. Their views are taken seriously and carry great weight.

Understandably, for governments are well aware of the power of the judicial pulpit. A florid judicial homily delivered to a pre-alerted press bench, claiming to express community values, can help bring legislation down, as arguably happened with the N.S.W. street offences provisions.

What is objectionable here is not that the judiciary are consulted, nor that they subsequently launch judicial attacks on reform legislation. What is objectionable is that the consultation takes place in private and in such a way that the

judiciary cannot be held to, questioned or joined in debate over their expressed views. What is objectionable is the exercise of very considerable political power and influence behind a rhetoric of 'independence' and 'impartiality'. What is objectionable is the recourse to judicial independence to simultaneously justify judicial homilies and extra-judicial pronouncements and to justify a refusal to justify judicial homilies and extra-judicial pronouncements.

What is required, then, are institutional mechanisms by which judicial opinions over sentencing and penal issues can be accorded a formal and open status, can be attributed to their utterers. This is a basic precondition for any proper debate or discussion. A debate cannot be conducted with a party who expresses forceful opinions carrying considerable political weight and simultaneously under cover of 'independence' and 'neutrality' denies the holding and expression of opinion, refuses its attribution and thus avoids the normal processes of justification and account. No other group in society is accorded this privilege, nor should they be.

A SENTENCING COUNCIL?

One proposal for an institutional forum in which judicial views might be accorded a more open status and become the subject of debate is the proposal of the Australian Law Reform Commission in its Interim Report on sentencing in 1980, for a Sentencing Council. (A.L.R.C. 15, 1980) Boehringer and Zdenkowski (1985, p. 23-33) outline some of the responses to that proposal. Although I have argued in other, especially law enforcement contexts, that we should be aware of the dangers of the continual proliferation of new agencies, some of them open to the challenge that they were established to avoid the difficult task of tackling reform in existing agencies, it may be that now is the time to push for the establishment of a structure of state and federal sentencing councils.

Obviously there is room for considerable debate as to the structure, functions and personnel of such councils. My own view is that such a council in the N.S.W. context should not necessarily be a data collection agency monitoring sentencing matters in its own right, nor that the major concern should be with the issues of sentencing disparities and consistency.

The major thrust of a Sentencing Council could be as a forum for the development of an approach to sentencing that stressed sentencing as social policy, rather than as the narrow and technical legal response to criminal conviction. In order to develop such a conception the questions of the openness of its procedures and deliberations, the recording and attribution of views of all members and their public availability, would be of primary significance.

Another major thrust could be a recognition of some form of judicial responsibility for monitoring the conditions pertaining in prisons and in other non-custodial penal programs. There is already a provision in the N.S.W. Prisons Act giving a statutory right of entry to prisons to the judiciary. It is a matter of considerable regret that few see fit to exercise it. Presumably it was enacted for some purpose, conceivably it was felt that the judiciary should be under some obligation to view firsthand the conditions pertaining in institutions to which they have consigned people. One of the tasks of a Sentencing Council then, could be to organise judicial compliance with such responsibilities.

Another area of concentration might be that of imprisonment rates, with regular information on respective (national, state, jurisdiction) imprisonment rates being supplied to the council and through them the judiciary and being the the subject of debate. An attempt should be made to emphasise the social construction of imprisonment rates, thus laying the groundwork for arguments that imprisonment rates can be lowered through broad economic, political, welfare and legal reforms as a matter of conscious social policy.

DEVELOPING POLITICAL INITIATIVES

The reconnection of issues of penal practice with broader political struggles and the development of a social analysis of penalty need also to be pursued at a formal political level. The development of criminal justice policy in all major political parties is weak in the extreme. Contrary to media assumptions that government is 'in command' criminal justice politics are often conducted as a form of defensive and ad hoc reaction to events such as particular violent crimes, escapes, corruption etc. which are constituted in the media as scandals and exploited by the political opposition in similar terms.

Such responses as are made tend to emanate from the Premier, the Attorney-General, or relevant minister, such as the Minister for Police or Corrective Services. Rarely is reference made to party policy - even where there is party policy in the area, which often there is not. Responses on criminal justice issues are often elicited through journalists' questions in the course of press conferences held by the Premier about other issues. This can only give the appearance of ad hocery [sic], even when that is not the case and the issue has been under lengthy consideration. It also promotes the view that the responses are those of the Premier or individual minister, rather than the considered response of the N.S.W. A.L.P. in government. Sometimes, as in the Premier's comments about 'animals' in the context of the Anita Cobby murder, the response is open to charges of an opportunist attempt to appeal to perceived populist sentiment.

It is in the nature of the forum, then, that press conferences, especially those called to announce initiatives in other areas, are far from the ideal mechanism for the sober and considered announcement of government policies and programs in the criminal justice area. Despite the considerable skill of individual politicians such as the Premier in dealing with the media, and his status as a primary definer, it is nevertheless the case that the question and answer sequence in a press conference removes the possibility of reconceptualising the field of possible interpretations, pre-structured as it is in the often sensationalist, moralistic and individualistic terms of media notions of newsworthiness. A clear example of this was the persistence of the media in asking whether individual politicians or members of their family had used certain drugs, a classic individualisation and trivialisation of the important broad social issue of the use and regulation of legal and illegal drugs in our society.

A greater commitment is needed from the A.L.P. in government to routinely release various monitoring and research reports, internal departmental reports etc. governing the operation of remissions, parole, the prison population, prison release programs, imprisonment rates etc. together with a considered political comment in more popular terms which interprets such monitoring and explains the apparent benefits of various of these schemes. Such information should not be reserved for annual reports, glossy brochures on some auspicious occasion such as the opening of a new prison, or in response to the latest escape incident or shock horror internal scandal leaked from within a department for particular sectional purposes. Such information could assist in a broad popular education program, aimed at both journalists and the general public. It could then provide the background for a more open, considered, less defensive response to a particular event such as an escape on work release. It might enable such incidents to be turned around into a discussion about the benefits and successes of such schemes and their long-term public advantages.

Within the A.L.P. itself there could be a greater recognition at a local level of the political ideological and social importance of criminal justice issues and the necessity to foster broader political debates around such issues. One manifestation of this might be a greater openness to various of the autonomous social movements and their organisations operating in the relevant field. The thrust of such an approach should not be to 'incorporate' these social movements but rather to 'open out to' them in the form of a loose alliance.

REGROUPING THE LAW REFORM/PENAL REFORM LOBBY

This brings us to the current standing of the law reform/penal reform lobby. In The Prison Struggle George Zdenkowski and I

identified and discussed the range of prisoner support groups, law reform bodies, independent legal centres etc. which combined with internal prisoner groups in the specific conjuncture of N.S.W. in the 1970s following the Bathurst riot in 1974 to agitate for and around the Nagle Royal Commission. The effective articulation of these various groups was one of the factors leading to a significant shift in public information about and consciousness of penal practices (ch. 6). Even as recently as 1982 an alliance of groups under the banner of the Nagle Defence Coalition was able to hold a large public meeting.

In recent years, however, these groups have not provided as effective or public a lobby. Of course this is not something wholly within their control, access to the media being crucial. In a drift to a more law and order climate media outlets tend to regard such groups as more marginal than was previously the case. However this process is assisted by internal splits and feuds, adventurist and ill thoughtout public claims (such as that recently claiming possession of prison plans and a preparedness to assist escape attempts) the divisive effects of certain 'lines' or campaigns such as 'crim control' which have alienated long-term middle-class and professional supporters, elements of macho style and culture, offensive to women, and the difficult and divisive issue of heroin use in prison movement, political and welfare organisations.

There is a definite need for a broad, respectable reformist organisation with access to government, and considerable resources, such as N.A.C.R.O. in the United Kingdom. N.A.C.R.O. produces a wide range of broadly progressive research reports on a range of penal issues, lobbies effectively, holds regular seminars and meetings and generally keeps the liberal reform voice alive in U.K. penal debates. There is also a broader need to develop, as Peter Baldwin recently suggested, progressive 'think tanks' that might stimulate organisationally powerful groups such as the trade unions to embark on joint campaigns over criminal justice issues of the sort recently waged against privatisation in the lead-up to the South Australian election.

INTERNAL PRISONER ORGANISATION

As stated previously, levels of prisoner militancy, organisation and protest have fallen away significantly in the 1980s. There are many reasons for this and there are dangers in being overly conspiratorial or over-emphasising any one cause of this decline. Apart from anything else, conditions did improve in the aftermath of the Nagle Report. The routine, institutionalised bashings ended, Katingal was closed, representation was granted at Visiting Justice hearings, among other changes.

Nevertheless it would be dishonest not to mention the significant effects that have been generated by the development of widespread

heroin usage in maximum security prisons in N.S.W. over the past five years. Conservative estimates from prisoners put current heroin use in the maximum security prisons at around 50 per cent of prisoners, according to availability. The difficulty in discussing the issue is that such statements are immediately seized upon as scandals of prison management, allegations of corruption or as justifying a massive increase in security, body searches, sniffer dogs, harassment of visitors, cell searches (ramps), increased surveillance, transfers, etc.; in short, a whole repertoire of disciplinary measures.

Let me make it clear that I do not wish to discuss heroin use in prisons in terms of 'who is to blame' for heroin distribution. If there is a demand for heroin from prisoners, which there is, and a cultural tradition of heroin use in prison, which is developing, then heroin will find its way in, one way or another. I am more concerned for the purposes of this paper with some of the effects of heroin use.

One of the major effects, independently of the intentions of particular prison officers or prison management is that of pacification. Such a pacification effect is not purely the result of the perceived pleasurable physical and emotional effects of the drug, the tendency to quiescence, a sense of well-being and an unconcern with external arrangements. It also stems from the absorption into the internal rituals, codes and material practices of arranging and maintaining a regular supply, organising payment, engaging in a network of reciprocal exchanges, securing and secreting possession, the process of administration itself and the complex of interactions required in a prison setting to guarantee a regular market.

Apart then from the time involved and the centrality of the securing of a regular supply attains in the otherwise rather circumscribed limits of daily prison routines, there arises an interest in the organisational maintenance of existing channels and conditions of supply that brings the prisoner into a relation of greater toleration, even co-operation with the prison regime and authorities. Certainly actions that would de-stabilise that regime, such as activities of protest over conditions of perceived injustices, bear a potentially greater cost, not only to the individual prisoner in terms of transfer, charges, loss of privileges and amenities, reclassification, isolation etc. but also to other prisoners in terms of disruptions to sources and arrangements of supply. Quite simply political protest and agitation is less popular and support for it can be more easily undermined by threats to disrupt networks, playing on and manipulating divisions.

Another effect of high levels of heroin use in prisons is to confirm and consolidate the crime/drug link among those without access to the means of sustaining regular use, such as well paid

employment. A deeper criminalisation results, in which the criminal/junkie becomes a confirmed career and form of classification. The criminal justice system and the prison serve only to circulate and manage this 'criminality/addiction' towards 'a career of catalogued delinquency' (Donzelot, 1979, p. 113).

Somehow attempts must be made, by prisoners and prison movement organisations, to resist the criminalisation and delinquent cataloguing of heroin users. (For a discussion of various suggestions in relation to women prisoners see N.S.W. Task Force, 1985). Specific practical material programs are required together with broader social and political strategies which contest the hysteria of the drug debate and highlight the significant impetus criminal regulation and law enforcement programs provide to the constitution of illegal markets, crime and other socially harmful effects.

BREAKING UP THE LINKAGES OF LAW AND ORDER

Finally, there is the task of dis-associating or breaking up the emerging unity that is being forged by conservative forces through their linking of a range of specific and contradictory criminal justice issues into a bloc around a basically law and order theme. It is of course important not to overstress this development. It is far from complete, uneven, an emerging tendency rather than a fully articulated social movement. Its bearers come from disparate political traditions, some formerly from the libertarian left.

But danger signs are there. Thus the moralism and correctionalism of the organised crime and corruption debates is linked to the obsessive concern with illegal drugs, judicial homilies on the theme of a disintegrating society, a series of spectacularly brutal and random murders, calls for the reintroduction of the death penalty, media sensationalism in constituting and political opportunism from all political parties in responding to various criminal justice issues and 'scandals', judicial sabotage of legislation attempting to reduce the length of sentences, prison overcrowding, escapes, debates over remissions and parole, attacks on prison conditions, the promotion of heroes and villains, the list goes on.

We ignore the attempt to link these issues in a law and order campaign demanding greater social and moral authoritarianism at our great peril. On the other hand, as some of us have argued elsewhere (Boehringer et al., 1983) an adequate progressive response does not lie in the libertarian romanticism of a 1970's radical criminology which would disregard the anti-social character of much conventionally defined crime and thus leave the law and order field open to the conservative construction of authoritarian populism.

CONCLUSION

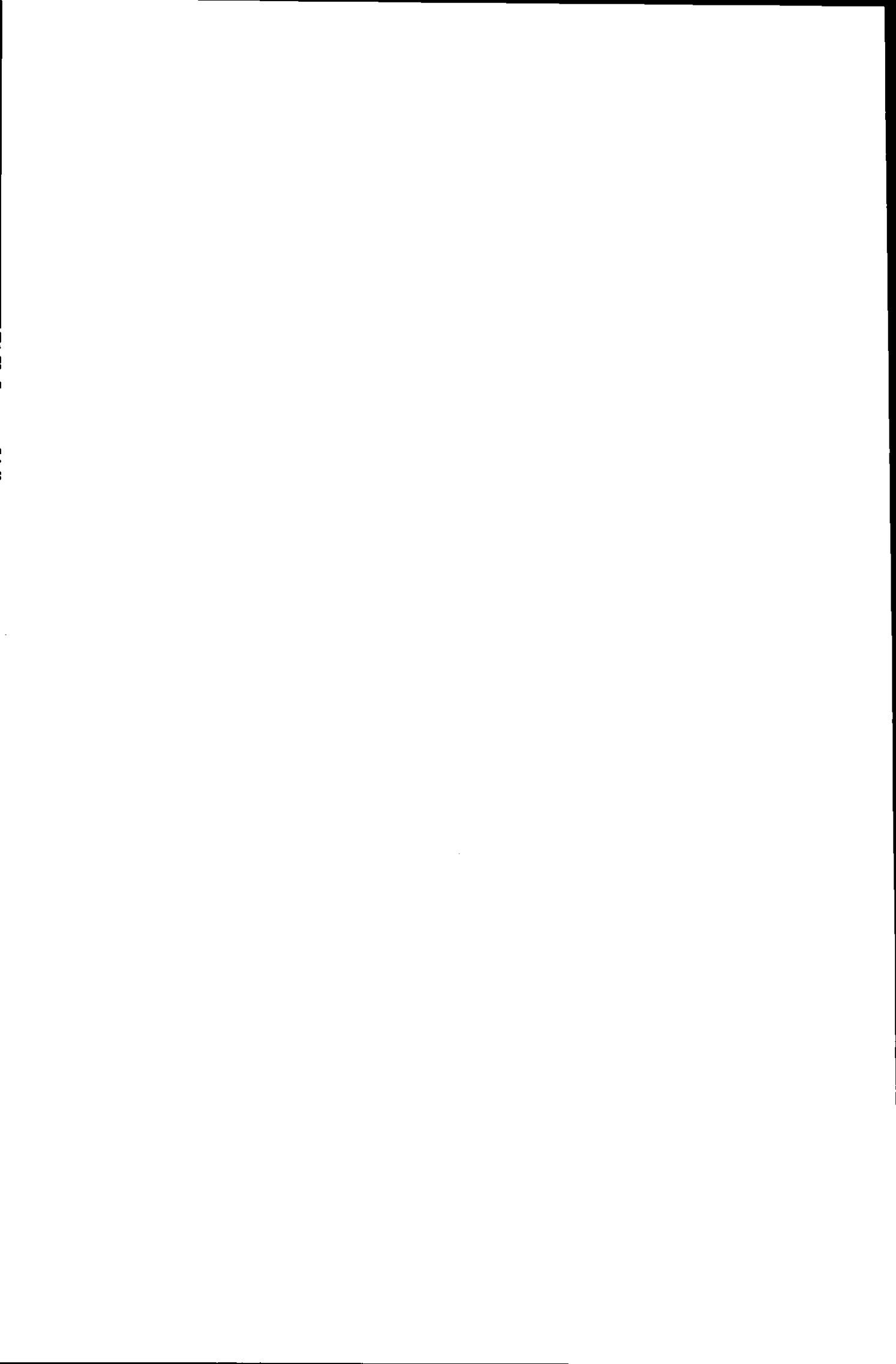
The foregoing suggestions have concerned only a few of the possible issues and strategies that might be considered part of the general project of creating some of the pre-conditions for criminal justice, sentencing and penal reform. Perhaps by now the failure to specify the likely shape of an 'imprisonment of last resort' looks less like an evasion and more like a tactical reading of the current conditions of possibility of progressive penal change in contemporary N.S.W.

Those conditions are, to put it bluntly, unfavourable. But such a recognition should not give rise to cynicism or despair. One of the central theses of this paper has been that the complex of relations constituting the field of penalty are not fixed, that struggles are not won 'once and for all' and that just as a balance of forces unfavourable to penal reform is established, so fresh surfaces of emergence of struggle open new challenges and new prospects. The task of taking up those challenges lies before us.

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CORRECTIONAL SERVICES IN THE A.C.T.

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I have been asked to comment on the correctional services that exist in the A.C.T. and to compare the Territory's general approach to corrections with that adopted in the Netherlands. The conference organisers obviously had in mind the fact that I chaired a Government Review of A.C.T. Welfare Policies and Services in the second half of 1984 and conducted a study of the Dutch prison system between April and June of 1985.

The first thing to make clear is that there is no shortage of ideas about how sentencing options should be broadened, and adult and juvenile corrections improved, in the A.C.T. Proposals, papers, reviews and committees abound. There are, however, two formidable barriers to the achievement of practical reforms. I will briefly describe the nature of these two main obstacles to progress, explain why I think they deserve special attention, and then contrast the situation in the A.C.T. with the developments that have taken place in Holland over the past ten to fifteen years.

I may, at first, appear to dwell on general policy and administrative concerns rather than specific sentencing and correctional reforms. The reason for this emphasis is that enduring achievements in the correctional field, such as those made in Holland, depend on everyone concerned (including politicians, judges, administrators, officials and interested citizens) knowing what the aims of penal policy are. Otherwise you get the 'hit or miss' and, in the long run, wasteful reforms that continue to be a feature of A.C.T. corrections.

The two most important impediments to the improvement of A.C.T. correctional services are:

- A. The absence of any clear policy objectives or clearly formulated goals. Almost all planning is tentative and the developments that do occur are ad hoc.
- B. There is no effective, informed leadership to convert ideas into practice. Those who know what is needed lack influence, those with influence lack understanding.

LACK OF POLICY, PLANNING

Fifteen months have passed since the Review of Welfare Policies and Services in the A.C.T. was completed. An Inter-departmental

Committee has examined the Review's recommendations, presumably endorsed some of them, and rejected others, but the Government has remained silent on the question of its overall response to the recommendations. That is not to say that there have been no improvements. There have, some of them recommended by the Review.

Oddly enough, the official silence on the matter has resulted in the creation of a somewhat bleaker impression of what has been achieved than is warranted by the facts. This is especially true of juvenile corrections. However, it is characteristic of the lack of direction and poor management of the welfare system in the A.C.T. that no one in a responsible position appears to be capable of answering the question, 'How many of the Review's recommendations have been implemented?' One would have thought a simple index would have been instituted for this purpose, along the lines of the post-Nagle Royal Commission into N.S.W. Prisons quarterly reports illustrated in Appendix A.

Some people have explained the absence of such an elementary exercise in administrative accounting in terms of 'the present Minister playing his cards close to his chest' or 'everything being in abeyance until the self government picture becomes clearer'. I suggest that no such explanations are necessary for we simply are continuing to witness the same lack of purpose that has long characterised the administration of welfare and corrections in the A.C.T. In fact, some decisions have been taken in the past twelve months that have involved quite substantial expenditures (for example, extensions to the Belconnen Remand Centre). As a result, the A.C.T. Administration has reduced the planning options available to it, a perfectly acceptable consequence when you are moving towards the achievement of clearly stated purposes or goals. But the Administration proved incapable of articulating those purposes during the course of our Review and I have seen no evidence that the situation has changed.

Unclear policy, especially when coupled with uninformed leadership, can also result in missed opportunities to introduce worthwhile but relatively inexpensive reforms. For example, basic literacy programs that a TAFE College had indicated a willingness to introduce in the Remand Centre, have failed to materialise. The same fate has befallen another of the Review's recommendations - actually a request from the Magistracy - that would actually have saved time and money. This was a proposal that court reports be structured and compressed along lines that would serve the needs of the courts.

All of these developments suggest organisational drift of a kind that is far less likely to occur in Holland. Before showing why that is the case, I will briefly review some current and proposed developments in the A.C.T.'s correctional services. I will acknowledge that, even in the absence of effective planning,

there have been some recent changes that are 'pluses', compared with the situation that existed fifteen months ago.

RECENT DEVELOPMENTS

First, the field of juvenile corrections. The Review deplored the fact that children of ten years of age and under had been detained in a Canberra Shelter (Quamby), housed in what were euphemistically referred to as 'cabins' but were better described as cells. It is worth recalling what we had to say so that recent changes can be acknowledged:

They (the units) contain not one feature that could be justified in terms of modern design. They are lined with red faced brick that is very cold and forbidding in appearance. The windows are made up of thick glass blocks which permit no view or sound of the outside world. There is a toilet but no handbasin: there is no decoration of any form: there are no furnishings beyond a small mat, a bed, and a fixed wooden table. It is within these austere, cold surroundings that children as young as eight years of age are housed.

The catalogue of unacceptable features did not stop there but space does not permit further elaboration. The Review concluded that Quamby was unsuited to its present purposes and would more appropriately be used as a centre for community based correctional programs. The Department of Territories has adopted a different view for it has proceeded to extensively upgrade the centre and, in the process, it has overcome the most serious of the criticisms made of the children's cabins. They now have windows and are more appropriately furnished. The amenities available to detainees and staff have expanded although there is scope for further improvements.

Plans exist for the construction of an Attendance Centre on a site adjacent to Quamby. The physical planning of the building seems to have preceded clarification of the functions it will serve. It appears, however, that the Review's general proposal that a single centre should be a common base for both attendance programs (including opportunities to acquire work, education and life skills) and community service, will be upheld. The Centre should be operating by 1987.

Another positive development has been the creation of a Remand Hostel under the auspice of the Richmond Fellowship, to enable the more selective detention of juveniles in Quamby. The Review complained that not only were very young children and so-called 'status offenders' (especially girls) being housed in Quamby, but that they often found themselves in the company of older youths, some with well established criminal histories. Therefore, the

creation of a less institutional but supervised remand hostel is to be welcomed. The only difficulty with the scheme is the familiar one - unclear purpose and lack of planning. For example, even Richmond Fellowship, it seems, is uncertain about how the Department of Territories wishes to use the three hostels which it supports financially or has undertaken to support.

One would be happier about the steps that have been taken if there were grounds for believing that they formed part of a larger conception, albeit one that differed from that entertained by the Review Panel, of the desirable development of A.C.T. corrections. There is no evidence that such a plan exists. For example, Quamby shortly will begin to operate as a Committal Centre for juveniles. The A.C.T. Children's Court should, at long last, be in a position to specify conditions of detention and treatment with some hope that its recommendations will be implemented and not ignored following a child's transfer for detention in another state. It is intended that education and work release programs will be introduced.

However, all of these developments will be based on the refurbished Quamby Centre. One cost of not proceeding with the recommended construction of a new centre for juveniles is that both at the remand and committal stages, youths and young children will continue to be housed together. The two alternatives that the Department has left itself with are both unsatisfactory. One is an unacceptably small compound in which to house 'security' cases. The other is to transfer 'difficult' youths to the adult remand centre, which is an equally unacceptable solution. Without implying any criticism of the sincerity of the current efforts to improve and humanise Quamby, its retention as a centre for juvenile detention will almost certainly prove to be a short sighted decision.

In the sphere of adult corrections there is not only a lack of organisational purpose but a continuation of that state of inertia to which the Welfare Review drew attention more than a year ago. A training program has been conducted for the staff of the Belconnen Remand Centre but then that was virtually arranged in the course of the Review. A plan for handling security problems, drawn up in the course of the Review, has been adopted and necessary equipment obtained. A weekday nursing service has been introduced. Capital works have included the construction at the Remand Centre of an enlarged outdoor recreational area (endorsed by the Review) and additional cells. Recommended modifications to existing cells are planned for the near future. It seems the Review was also successful in averting the planned construction of security cells with individual exercise yards, a proposal which, had it gone ahead, would have attracted justified criticism from authorities here and abroad.

The continuing inertia really becomes apparent when questions are asked about the larger purposes to be served by the modified Remand Centre. What part will it play in an expanded A.C.T. prison system? If such a system is developed, will it cater for all categories of prisoners or will it serve the more restricted purposes recommended by the Review? Ultimately, these are questions for resolution by Government but there is still no evidence of any considered departmental view on the issues.

The absence of any settled policies is hardly to be wondered at - the Department of Territories has recently acquired its fifth Director of Corrective Services in three and a half years! Meanwhile, a range of recommended improvements that would have required a little energy, experience and quite modest financial outlays, remain where they were left at the conclusion of the Review. The physical and social environment of the Remand Centre remains drab and claustrophobic. Significant parts of its grey concrete block walls remain unpainted. Recommended basic literacy courses (which a TAFE college was anxious to provide), and kitchen work for interested detainees, have not been implemented. The television room is still the main 'activity' centre at the institution.

This list of missed opportunities could be considerably expanded but it is more instructive to ask whose responsibility it should be to manage the institution and develop its facilities and programs. There is a clear answer to this question which the Department of Territories has steadfastly refused to accept. It is that the Superintendent must bear the responsibility for the day to day management of any prison and must possess the authority to control both its staff and inmates. The shortcomings in the A.C.T. Remand Centres Regulations are unique in my experience in leaving the Superintendent without effective power to charge officers for serious derelictions of duty. As the Review reported, the Superintendent does not even have the authority to discipline officers for permitting acts by detainees which pose a threat to the security and good order of the institution (such as drinking alcohol). Good management demands that the Regulations be altered to overcome this crippling limitation on the Superintendent's authority. Fifteen months after the completion of the Review, nothing has been done to rectify this problem. The fact that the legitimate exercise of force by officers also remains undefined is equally unacceptable. The officers' union publicly acknowledged in the course of the Review that there had been occasions when excessive force has been used on detainees.

Prior to the Review, the A.C.T. lagged behind most other Australian jurisdictions in the development of alternatives to imprisonment such as community service orders, periodic detention, an attendance centre and bail and probation/parole hostel services. A basic problem in developing these programs is the small offender population to be served in the A.C.T. The

Review believed that the key to solving this problem was to use common premises and staffing to provide a range of clearly defined, separate alternatives to imprisonment. We argued that Quamby lent itself to this purpose rather than use as a centre for juvenile detention.

A second problem is that the resources available for community based corrections are quite limited. Whenever possible, savings must be effected in other parts of the correctional program. The Magistrates' request that court reports focus on the needs of the courts represents a missed opportunity to economise on professional time and effort. More promising has been the recent decision to classify probation cases according to the degree of service they require. This is an example of the type of managerial thinking that is long overdue in Welfare Branch. Since an adult community service order scheme is the only 'alternative' to have been implemented since the Review¹, it is to be hoped that the limiting staffing and other resources being devoted to it, will not be diverted to other forms of work. The community service scheme appears to be operating quite effectively.

How does the approach to corrections in the A.C.T. compare with that which has been adopted in the Netherlands? An adequate answer to this question would require more time than is available here. It should, for example, include an examination of the reaction of Dutch prison staff to the tasks they are now required to carry out as part of their Government's penal policies. Instead, given the administrative confusion that characterises the A.C.T. approach, I will concentrate on the influences that give purpose and direction to the Dutch system. It will be seen that those influences originate in the clearly articulated wishes of the Government. Before outlining the way in which the system continually is being developed, first a word about the penal institutions themselves.

Between April and June of last year, I visited seven Dutch prisons (three 'open', one 'semi-open' and three 'closed') and eight Houses of Detention (remand prisons). These institutions were located in different regions of Holland and, in their physical appearance, were remarkably reminiscent of Australian gaols. The wings and landings looked the same, cells smelt much the same and work and recreational activities were squeezed into totally inadequate spaces. Redecoration, especially of common areas, showed a little more finesse. Institutional cream, green and brown were less in evidence. I was surprised to find that almost three quarters of the cells in closed prisons in Holland remained unsewered and without running water. However, the cells were generally larger than in Australia and for comparatively shorter periods of the day they hold one prisoner whereas Australian cells often accommodate three.

If the physical environment in some of the older prisons was sometimes disappointing, the social environment was strikingly different to that to which I am accustomed. In the wings, the workshops and recreational and communal areas there was a noticeable lack of tension. Prisoners and detainees wore ordinary clothing and the officers' 'uniform' was anything but militaristic in style. Standard fittings and furnishings were used in buildings that in Australia would bristle with locks, bars and hardened glass. Staff and inmates freely intermingled. The social environment was generally friendly, robust and devoid of the point scoring that tends to characterise staff/inmate relations in Australian prisons.

Part of my study involved gauging the reactions of a sample of prison officers to twenty-one separate changes that have occurred in the prison system during the past ten to fifteen years. The detailed findings have been published by the Netherlands Ministry of Justice, but brief reference to a number of changes that have occurred may convey an impression of the role of the prison officer:

- (i) individual members of staff are now assigned to work with the same group of inmates and officers are expected to lead a variety of group activities;
- (ii) within the limits of maintaining essential order, officers are encouraged to motivate prisoners to co-operate rather than simply rely on the use of authority;
- (iii) staff, among other things, are responsible for the welfare of the prisoners. This responsibility may result in staff consulting social workers, psychologists and psychiatrists on behalf of the inmates but it may also result in prison officers directly undertaking welfare tasks, and;
- (iv) officers are organised in 'work teams' that enable two-way communications between prison officers and management. The teams are involved in reviewing the progress of individual prisoners and the achievements and shortcomings of various programs. They are also forums for the exchange of ideas and provide an opportunity for mutual support.

In the past ten to fifteen years, prisoners and detainees have come to enjoy longer visits. Fewer restrictions are placed on communication with the outside world, including the right to have interviews with journalists under specified conditions. Visits by outside groups are permitted, cell amenities have improved. Prisoners wear their own civilian clothing, may form prisoners' committees, run their own newspaper and they may complain directly to a Complaints Commission.

For me, the most compelling evidence that staff generally have accepted the requirements of current policies resided less in what they had to say about their job than the way they said it. There was nothing laboured in the way they discussed their work. The tone was, rather, one of the self-evident nature of the issues under discussion with the occasional question or quizzical expression asking, in effect, 'Is there any other way of doing the job that makes sense?'. One officer summed up the views of many when he said:

We need to have a good 'Social IQ', meaning that we can talk easily, hold opinions of our own and be confident in our interactions with prisoners and in the way we handle work situations ... I'm talking about the ability to understand, feel for and work with, the prison community.

These sentiments were widely supported by officers interviewed in my formal survey. Support was particularly strong among staff with long experience in the Netherlands prison service. An amusing encounter with two officers with long experience of working in a maximum security prison helped throw some light on this recurring feature of the survey findings. The officers jokingly complained that they now felt they were working in an 'Old men's home' because, compared with former times, there was so little staff conflict with the prisoners. 'We've been here long enough to know how things were under the old system. We know which system we'd rather work under, which is better for the guards as well as the prisoners.'

The achievements of the Dutch prison system did not materialise by chance. They have been carefully managed. The first step in the management plan has been a clear declaration of the Government's policy intentions. Most staff appeared to be very familiar with these objectives. Many referred in discussion to the 1981 Departmental Memorandum outlining the nature of what has come to be called 'Standardised institutional structure' and a 1982 Ministry publication on the task and future of the penal system. The main objectives set for the system include:

- (i) the maintenance of security and good order;
- (ii) the humane application of the prison sentence;
- (iii) the avoidance of the discredited objective of 'rehabilitation' and in its place the provision of appropriate educational, social, creative and treatment opportunities; and
- (iv) minimising the harmful effects of detention.

Of course, these general objectives still need to be interpreted in the light of the concrete circumstances of each institution. This requirement has stimulated a great deal of analysis and inventiveness on the part of the local Directors (Superintendents) as they have struggled to come up with development strategies that suit their particular institutions. An enlightened recruitment policy has produced a pool of extremely talented Directors of varied professional and disciplinary backgrounds. It is usual for these officers in the early stages of their careers to be assigned to positions of Adjunct Directors. They gradually assume increasing management responsibilities over a period of four or five years before being appointed as Directors of their own institutions.

There is no question in the Dutch system of a Superintendent being other than 'the captain of his own ship'. Within the framework of Government policy, the Superintendent must devise a draft development plan, discuss it with other Directors in the same region, and ultimately submit the plan for approval to the Ministry. Because of differences in prisoner populations, the age and size of prison buildings, regional variations and differences in the backgrounds of the Directors, no two development plans are identical. I found that in each of the institutions that I visited, it was possible to discern a groundplan or main strategy that linked the various developmental activities being undertaken. Institutional managers have not necessarily restricted themselves to a single development strategy but usually there is a dominant one.

My discussions with the Directors and managerial staff of fifteen houses of detention and prisons revealed seven distinct strategies which I have summarised under three main headings:

- A. To change the organisation
 - (i) by aligning staff goals
 - (ii) by integrating functions
 - (iii) by improving communication
- B. To change relations between staff, inmates
 - (i) by altering the ground rules
 - (ii) by joint participation in programs
- C. To change the prisoners
 - (i) by developing personal insight
 - (ii) by providing work experience.

Time does not permit the discussion of more than two strategies but that should be sufficient to illustrate the Directors' responsibility for managing their institutions. The first example is the strategy I have called 'aligning staff goals'. The organising of staff in teams is one of the most characteristic and tangible manifestations of recent Dutch penal policy. The problem, as one Director explained, is that staff groups are not inevitably committed to the support of management goals. 'They can be a strong force supporting progress or they can oppose it.' It is largely a matter of whether the informal norms of the teams happen to be consistent with the institution's objectives.

The development strategy of one penal institute is based largely on this realisation. Its main focus is the alignment of the goals of the three main staff groups, senior management (Director and senior staff), middle management (senior custodial officers), and prison officer teams.

The Director commented that the formation of teams at first had the 'reverse effect' to that desired by management. Given a recent history of serious disturbances in the institution, the direction in which the teams saw the personal security and best interests of their members preserved was frequently the opposite of that required by official policy. The management strategy that has evolved focuses on the role of middle management in bridging the requirements of the directorate and the basic work teams. Depending on their degree of sympathy for management's aims, senior custodial staff are in a position to link the values and beliefs of the work group to the fulfilment of management's objectives or to opposition to them. Therefore, it was considered a vital first step to gain the senior custodial officers' co-operation.

The main way of achieving this has been to involve them in dealing with the challenges and problems facing management, including the requirements of official policy. The advice of senior officers has been sought in the handling of matters that were previously the preserve of the directorate and, whenever possible, responsibilities have been delegated to them. Much the same process has been used, per medium of team leaders, to gain the co-operation of the prison officers. In the assessment of the Director, the teams started to serve a more positive function only when they were challenged by requests for help in solving problems.

A House of Detention (remand centre) that has been operating for more than fifty years is the setting for another development strategy that aims to change the traditional attitudes of staff and detainees. The institution shares with other Dutch prisons the fact that everyone, staff and detainees, is active for the greater part of the day. Work and cultural/group activities alternate and in the evenings and at weekends active and passive

recreational activities take place. A wealth of activities is available: wood carving, plastic modelling, car-technics, first-aid, Dutch language, general education, sports, conversation groups, viewing video and films, are some of the courses and developmental opportunities on offer.

These activities are part of a management strategy that attempts to dismantle the traditional cultures of officers and inmates. The first step in this strategy is to help officers not to retreat into defensive attitudes at first sight of traditional inmate behaviour. It is expected that many prisoners will construe the supportive gestures of staff as opportunities to be exploited. The Dutch proverb 'Give them a finger and they'll take the hand' was invoked to describe the common response of prisoners to the new style of relationship. Staff are encouraged not to be surprised or unbalanced by this reaction. The officer is helped to understand that not all prisoners are engaged in deception. When a specific instance of deception is uncovered it should be seen as an opportunity to 'dampen down' such behaviour, starting often with constructive confrontation: 'My friend, I offered you a finger and you took the hand ...'. The result of such interactions is expected to be an increased openness and directness of communication.

Another element of this strategy involves helping prisoners who want to be independent to escape the controlling influence of the inmate group. Traditional attitudes make it difficult for prisoners to raise problems with staff. This is especially the case if prisoners share cells and feel obliged to maintain an 'anti-staff facade'. Hence the policy of separate cells in Holland has a significance beyond the granting of privacy and protection. It can represent a necessary condition for prisoners to 'be themselves' and relate to officers as fellow human beings rather than group defined objects of suspicion and hostility.

A third element of the strategy concerns mutual help among officers in finding constructive ways of dealing with problems that arise. A case in point is the handling of the considerable verbal aggression that exists in the institution. Instead of simply responding in kind and initiating punishment, the system now permits (and this particular institution encourages) discussion among staff of what is prompting a prisoner's aggression and the best way of handling it. Another facet of the strategy is to resist the inmates' customary division of staff into 'nice guys' (psychological and social helpers and specialist staff) and those whose duties are of a more routine custodial nature. There is continual consultation between the parties. All staff are reminded of the need to observe security requirements and do nothing to denigrate the standing of custodial officers.

Finally, the strategy takes account of the vulnerability of the prison officer who steps outside the traditional confines of his

or her role. Sensible limits are maintained on efforts to help inmates by observing a simple rule: the tasks that are undertaken should be carried out in service time. Otherwise, as the Director pointed out, 'The officer loses contact with the institutional structure and engages too closely in the affairs of the inmates'.

These are but two brief examples of the many management plans devised by the local Directors of prisons. The success of those plans testifies to the necessity of having on the spot authority, not only with regard to general institutional programs but also in maintaining staff discipline and institutional order. Dutch Superintendents can and do impose summary discipline although, as I have already indicated, there is a system of checks and balances.

I need hardly stress how the Dutch system, which I have but briefly described, contrasts with the administrative and managerial confusion that characterises the A.C.T. system. Of course, other Australian jurisdictions can also learn a great deal from the Dutch system. Recently there has been a major political debate in Holland over the necessity for expanding the size of the prison system. Although it was decided to increase the number of places by approximately 1200 to avoid delays in the execution of sentences, the Government remains committed to its previously outlined objectives and to the type of institutional structure that has humanised the prison environment, to the advantage of both staff and inmates.

APPENDIX 1EXTRACT FROM POST-NAGLE ROYAL COMMISSION AUDIT OF IMPLEMENTATION OF RECOMMENDATIONSPrisoners' Amenities and Conditions (Chapter 22)

	<u>Visits</u>	<u>Response</u>	<u>Action</u>
98.	The regulations relating to visits to prisoners should be re-examined.	Adopted	New Prisons Regulations concerning visits to prisoners came into force on 6th July, 1979 - Government Gazette No. 90.
99.	Contact visits should be permitted for prisoners in all institutions.	Adopted	Contact visits are now available at all institutions. Prison rules which prohibit contact visits have been repealed.
100.	Visiting hours and the length of visits should be expanded.	Adopted	Implemented. The Prisons Regulations have been amended to accord with this recommendation - gazetted on 1st May, 1981.
101.	Monitoring of conversations between prisoners and visitors should cease.	Adopted	Implemented. Embodied in new Prisons Regulations gazetted on 6th July, 1979.
102.	The surroundings in which visits are conducted and the facilities provided for visitors should be made as pleasant as possible.	Adopted	A visiting facility improvement program is being prepared.
103.	No visitor should be excluded or visit cancelled except where there is reasonable evidence that the visitor poses a threat to security or a prisoner declines to accept the visit.	Adopted	Implemented. Embodied in new Prisons Regulations gazetted on 6th July, 1979.

Travel Vouchers

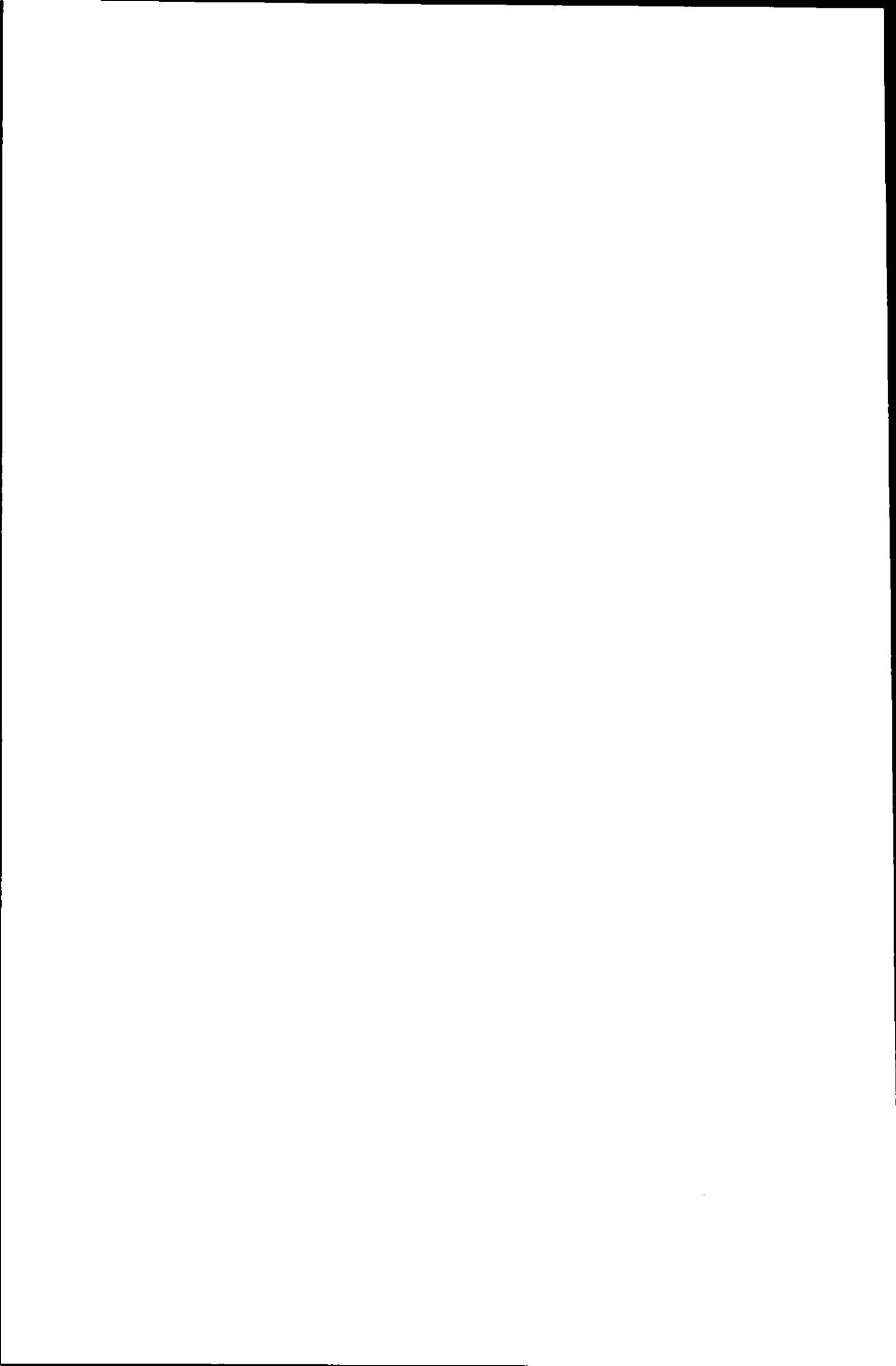
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| 104. Where the cost of travel to visit prisoners would cause hardship, the Prisons Commission should issue travel vouchers. | Adopted | Current policy. Availability of travel vouchers has been publicised to officers and prisoners. A press release has also been issued to publicise availability of travel vouchers. |
|---|---------|---|

Legal Visits

- | | | |
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| 105. Legal visits should not be restricted in any way. Prisoners should be given unlimited access to bona fide legal representatives in conditions that permit private conversation and joint access to documents. | Adopted | Implemented. New Prisons Regulations concerning legal visits to prisoners came into force on 25th May, 1979 - Government Gazette No. 71. |
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NOTES

1. A juvenile version of the scheme made a brief appearance but has lapsed, awaiting it is said, amendments to the Child Welfare Ordinance.



THE VICTIM'S ROLE IN THE SENTENCING PROCESS

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A specific issue nominated for discussion at this Sentencing Conference is whether victims should have a greater role in the sentencing process.

Not all participants may be aware of recent moves by the General Assembly of the United Nations, and also in South Australia, to provide increased opportunities for victims to influence sentencing decisions. This short paper gives a brief outline of these developments.

AT THE UNITED NATIONS

On 29 November 1985, the United Nations General Assembly adopted a Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power. A copy of that document is not yet to hand, but it is understood that few, if any, alterations were made to the Draft Declaration. This Draft was submitted to the General Assembly as a recommendation from the Seventh Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, 26 August to 6 September 1985.

Section A Clause 6 of the Draft Declaration read as follows:

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

- (a) ...
- (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.

Section A Clause 1 defined 'victims' as persons who:

individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions which are violations of criminal laws

operative within Member States, including those laws which proscribe criminal abuse of power.

Australia played a leading role in securing unanimous approval for the Draft. The principal speaker for the Australian delegation was the Hon. C.J. Sumner, the Attorney-General for South Australia.

The most recent advice from the United Nations is that there will be a meeting of 'experts' in Siracusa, Italy, 14-18 May 1986, to discuss ways to secure implementation of the Declaration. Australia will be represented at this gathering.

IN SOUTH AUSTRALIA

On 26 February 1985, the Statutes Amendment (Victims of Crime) Bill was passed by the House of Assembly. It had earlier successfully passed in the Legislative Council where it had been introduced by the Hon. C.J. Sumner.

In his introduction the Attorney General pointed out that:

For centuries the State has assumed responsibility for the administration of criminal justice in order to keep the peace and obviate personal retaliation. In common law jurisdictions this has made the criminal trial a State/offender relationship. The State, not the victim, is responsible for identifying, prosecuting and punishing the offender; the principal parties are the offender and the State - each represented by others who speak for them. The victim's involvement is almost entirely limited to that of giving testimony.

Recent increasing attention on the needs of victims has arisen partly from such humanitarian reasons as concern for the victim's loss or suffering, partly from the view that the State owes an obligation to the victim and partly because the success of the criminal justice system is dependent upon the co-operation of victims and witnesses of crime¹.

When introducing the Bill, Mr Sumner also presented a Declaration of Victim Rights. The Declaration consists of seventeen principles. These have been approved by Cabinet, and all Government departments are expected to comply with them. This is already occurring. The Police Force, for example, has already created a position for a Victim/Witness Scheduling officer.

The principles include the right to be advised of the charges laid against an accused, and of any modifications to the charges.

Victims also have a right to be advised of justifications for accepting a plea of guilty to a lesser charge, or for accepting a guilty plea in return for recommended leniency in sentencing. They have a right to be advised of justification for entering a nolle prosequi. Principle 14 is that courts should have before them information on the effect of the crime on the victim.

The Declaration of Victim Rights was not incorporated in any new legislation, but some aspects were included in the Statutes Amendment (Victims of Crime) Bill. A new section to be inserted as an amendment of the Criminal Injuries Compensation Act 1978 reads:

Where, in order to assist it in determining the sentence for an offence, a court requests that a written report be prepared on the character, antecedents, age, health, or mental condition of the offender, the report must also contain particulars of any injury, loss or damage suffered by any person as a result of the offence, being particulars not already known to the court and reasonably ascertainable by the person preparing the report².

The Attorney-General intimated that the persons preparing these reports would be parole officers. Earlier he had announced on 19 August 1985, prior to going to the congress that Cabinet had agreed to the development of victim impact guidelines for prosecutors.

DISCUSSION

This last decade has seen, for the first time, organised activity by victims, their organisations and supporters, to enlarge their role in the criminal justice system. With its main impetus coming from campaigns launched successfully in the United States, the concept spread elsewhere. Duncan Chappell, then a Commissioner of the Australian Law Reform Commission, in an address in Sydney in July 1979, drew attention to a new procedure in a number of United States jurisdictions which require that a 'victim impact' statement be prepared and presented to a sentencing judge. He noted that a recent case (R v MacDonald) heard in the Court of Criminal Appeal on 14 June 1979, well illustrated a deficiency in the information available to the sentencing court³.

One of the first activities of the newly formed Victims of Crime Service in Adelaide was to ask the then Attorney-General, the Hon. C.J. Sumner, in late 1979, to introduce victim impact statements in South Australian courts. Shortly afterwards the South Australian Government, following an election which was won by the Liberal Party, established a Committee of Inquiry on

Victims of Crime. Recommendation 50 of that Committee, consequent upon their interviews with a number of victims, was that prior to sentence the Court should be advised as a matter of routine of the effects of the crime upon the victim⁴.

In 1980 the Australian Law Reform Commission's Report on Sentencing of Federal Offenders, in a brief note about 'victim impact' statements, said that such statements are intended to provide a balance to the information considered by a judicial officer when imposing punishment. It pointed out that victim impact statements had not yet been introduced in any Australian jurisdictions⁵.

In September 1981 at the First National Symposium on Victimology held in Adelaide, Peter Sallmann presented a most informative paper on the role of the victim in plea negotiations. It seems not to have attracted the attention which it deserves.

In his paper which deals mainly with the situation in Victoria but nevertheless has wider application, he concludes that:

... the practice is not to settle if the settlement is going to cause trouble, particularly trouble of a public and political nature ... Victims are involved and consulted as a matter of expediency.

What this means for the vast mass of victims in the more ordinary, less controversial, run-of-the-mill cases is that plea negotiations can be conducted between the prosecution and the defence without any necessity for victim consultation or involvement.

Many victims have a very strong sense of the need to be involved in their case but lack the knowledge and the confidence to express their point of view forcefully and constructively. Victims in this position, if not consulted formally or informally, about a plea negotiation arrangement are going to be left very high and dry if such a deal is carried off. Many are likely to feel antagonistic towards the legal system and alienated from it⁶.

Sallmann goes on to note that the appeal courts, particularly the English courts, which have had many occasions on which to pronounce upon the subject of plea bargaining, have always been at great pains to consider its impact upon the accused but rarely, if ever, is the position of the victim given an airing.

AT ZAGREB

At the Fifth International Symposium on Victimology which was held at Zagreb the week preceding the United Nations Congress, some interesting paper were presented on the role of the victim

in the criminal justice process. Professor Marek, Director of the Institute of Criminal Law and Criminology, Turun, Poland, drew attention to the practice in Germany and Poland of the appointment of victims as subsidiary prosecutors. This gave them the status of a party to the proceedings⁷.

Dr Damaska, Ford Foundation Professor of Law at Yale, observed that the rise of the public prosecutor's monopoly in North America had not been accompanied by the development of ancillary rights of the victim to participate in the criminal process as was the case on the Continent. He noted, however, that the Federal Victim and Witness Protection Act 1982 now requires that the victims of serious crime be routinely consulted by the prosecutor, and occasionally by the judge, on a variety of matters. Nevertheless this arrangement does not accord victims the standing to participate in the trial process.

Damaska went on to explain the structure of the Anglo-American trial as a contest between two parties, the State prosecutor and the defendant, before a neutral decision-maker who has no prior knowledge of the case. He said it is important to realise how difficult it is for a third party to intervene in this bi-polar contest without adversely affecting it. He commented that it is no accident that judges seldom inject themselves into the presentation of evidence, and that 'they limit themselves to the role of reactive arbiters of incidental conflict between the prosecution and the defence over the propriety of procedural steps'.

Damaska considered that the situation changes as the sphere of the contested trial is left. This is the reason why reform efforts in the United States focus on giving the victim a role to play in various types of pre-trial hearings, or in the post-conviction stage of sentencing. He pointed out that the pre-sentence hearing before the judge very much resembles the Continental trial. The judge has studied the pre-sentence report and he is active in the proceedings.

Damaska also drew attention to difficulties which he believed would arise if victims were given the right to participate in the plea-bargaining procedure. He claimed that in the United States the vast majority of criminal cases are actually decided without a contested trial, and there is a fear that victims would often pressure the prosecutor for a more serious charge and a stiffer penalty. As a result, the prosecutors would be less ready to grant concessions leading to more contested cases and a greater volume of trials. An already overburdened system would labour under an increasing strain⁸.

Yet O'Neill is able to point out that some American States now require victims to be granted a right of allocution which enables them to voice their views during the defendant's sentencing

hearing. He states there is a growing feeling that a criminal prosecution in the United States must concern itself with more than simply the rights of the criminal defendant. He says that the American Supreme Court's

tilt towards the new model in criminal appeals has been paralleled, and perhaps even prompted, by the enactments of the various state legislatures and the proliferation of victim-oriented groups. The cumulative effect is that the long-established principle that 'a private citizen lacks a judicially recognisable interest in the prosecution of another' is under fire⁹.

AT MILAN

The Seventh United Nations Congress agenda listed five topics for discussion. For the first time there was an item on victims of crime. This was Topic Three which had as a sub-topic 'Consideration of a Draft Declaration on Justice and Assistance for Victims'.

From the perspectives of the victims, the push for their expanded role has come from the common-law countries of the United States, Canada and Australia. In general, the victims' groups on the Continent, and in other non common-law areas appear less dissatisfied with their system of procedure, and like their lawyers, are not greatly fussed about any improvement. The lack of interest shown by the English victims' organisation springs, perhaps, from the nature of their activities which tend to emphasise welfare aspects rather than seek reforms.

In his subsequent report of the debate on this item, the rapporteur, Richard Harding, stated that it had been stressed that victims should have access to criminal justice mechanisms to the extent necessary to ensure their rights were upheld and services became effectively available. It had been noted that the lack of suitable arrangements and insensitive treatment of victims during the trial process could lead not only to their dissatisfaction with the outcome, but victims would withhold their co-operation from the criminal justice system. This might lead to vigilantism and other undesirable responses. It was seen as essential that the community, including victims, should have confidence in the system. Without that, social justice could not be effectively pursued¹⁰.

In the rapporteur's view there was little support for the proposal that a victim should have a right to be heard, or to participate in any direct way with regard to the sentence to be imposed upon an offender, notwithstanding the general finding.

My own impression of the Congress response was that he could equally have reported that there was little opposition to the proposal. It is true that there was an absence of vocal support for the particular proposal, but the objectors themselves were few in number when compared to the total number of delegates present.

The problem was that there had been unofficial advice previously circulated to the effect that to ensure the best possibility of Congress recommendations being accepted later by the General Assembly, resolutions at Congress needed to be passed by general consensus. In practical terms this meant that any reported conflict of views in Congress outcomes might jeopardise the subsequent acceptance by the General Assembly. So quibbling over one clause could mean the rejection of the whole. A determined minority, in these circumstances, was therefore in an advantageous position. In retrospect I have wondered about the impartiality of that advice.

As though to exploit this situation, the United Kingdom's representative spoke in vehement terms when she described her country's objection to the principle of victim participation. Indeed, amongst the common-law countries there seems to be an almost instinctive reaction by lawyers against the proposal. The air of finality which accompanied the United Kingdom delegate's rejection suggested to me that there was indeed nothing further to be said on the matter.

A sociologist could well have assessed that the principle of the nob-involvement of victims, other than as witnesses, had reached a high level of reification. In other words, it was fast approaching the status of 'a sacred cow' - a man made social institution whose continued existence was now beyond questioning.

In informal discussions with some of the delegates from other than common-law countries, and they were easily the majority, the extended victim-participation appeared to be regarded as no threat, and they might well have voted for it, or at least abstained, if the discussion had been allowed to go that far. It was not.

COMMENT

There is a well established principle of organisational theory - the survival of a social institution depends upon its capacity to respond to change. The criminal justice system tends to be vulnerable at this point because of the influence of the importance of precedent in its reasoning.

As Sallmann has made clear the professionals in the criminal justice bureaucracy look largely on victims as resource material.

Perhaps this view does not correspond with the real situation but we lack data to refute or confirm. The absence of any sustained attempt to discover just how satisfied the community or just how satisfied the victims are with the system provides some confirmation that the Sallmann view has general application.

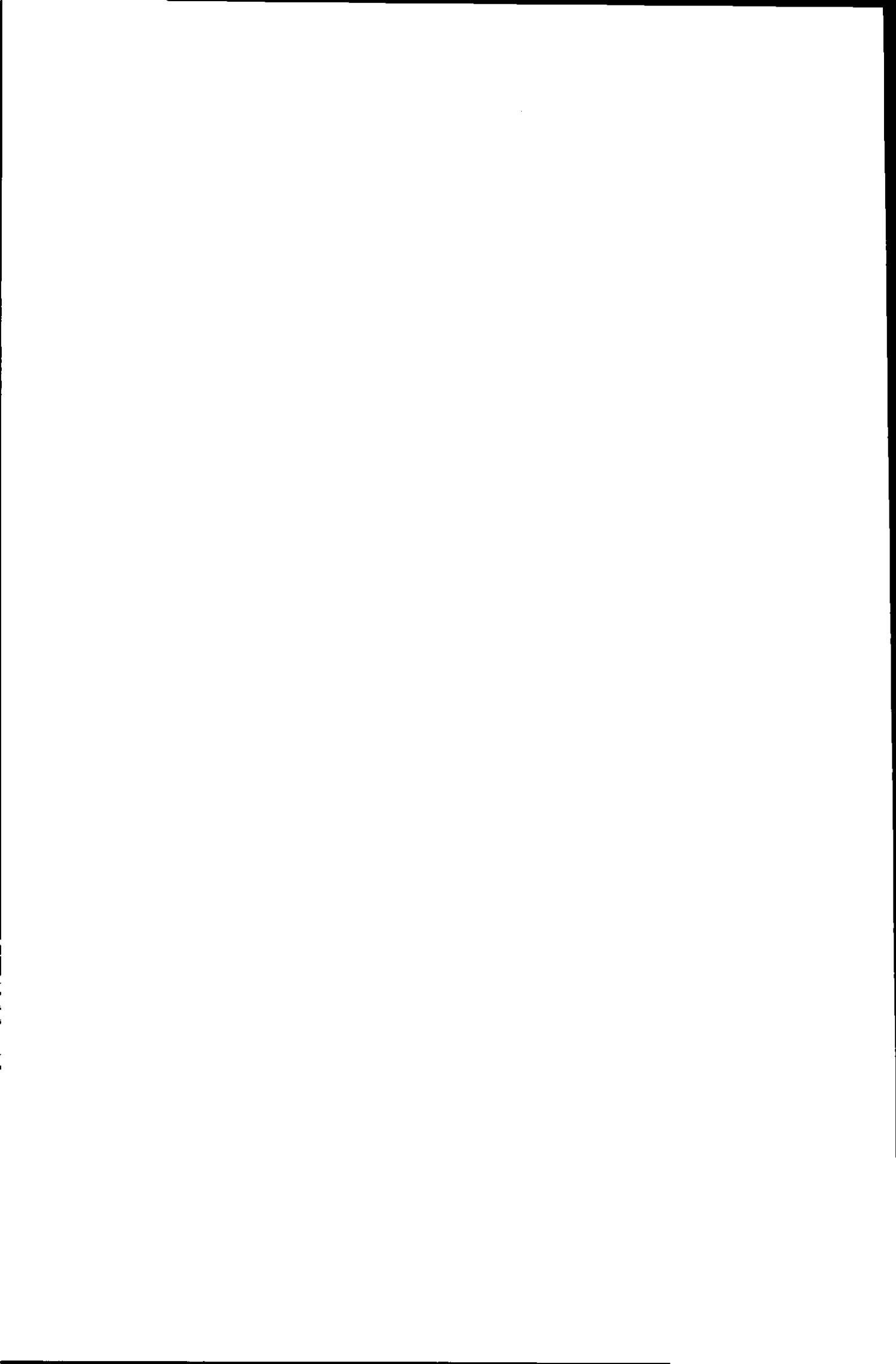
In his analysis of Victorian plea-bargaining arrangements Sallmann found that experienced prosecutors were able to sense possible 'trouble' cases, especially 'trouble' of a public or political nature. This did not seem to arise often, for victims of crime have been unorganised, uninformed and usually unfinancial. But the social climate has changed. Victims are becoming organised. In Victoria alone there are over 300,000 members of Neighbourhood Watch who demonstrate a keen interest in the efficiency of the criminal justice system.

The South Australian Attorney-General has made more than a token gesture in response to the need for change. In the milieu of the legal practitioners he has made significant alterations. To the impatient victims and their supporters his moves are modest. He now requires victims to be informed, which is a significant advance. Victims want to participate. Victims want to have recognised as a right their access to the court to express their views either personally or by counsel.

From talking to victims of serious crime frequently in the past seven years, my impression is that many of them would not press for heavier penalties if they were satisfied that the sentencing authority had understood the harm that they had been caused. Regularly they tell me that it was their impression that the judge was not told fully what had happened to them. They hear pleas for leniency advanced for the offender, often long and detailed. The description of their injuries seem to be brief and technical. The planned use of a parole officer to present the impact statement, and then only if a pre-sentence report on the offender is called for, has caused some confusion. They see the parole officer looking first at how he can serve the offender, 'his client' and they cannot understand why the impact statement could not be supplied in all serious cases, especially of violence.

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SENTENCING: PERSPECTIVES ON ABORIGINAL OFFENDERS

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Much has been said and written about the problems of Aboriginals in the criminal justice system (Hazlehurst, Ivey and Hill, [1986]). The judiciary is confronted not only with demands for greater sensitivity towards the difficulties and handicaps of Aboriginal offenders, but with compelling demands from the general public to show that justice has been done. Punitive feelings within the community are frequently excited by sensationalist press reports of allegedly excessive leniency in the imposition of penalties, or of individual cases where sentences are diminished by remission to less than a quarter of the nominal periods.

Less is heard of the cases where a relatively short sentence expands into years. Yet for Aboriginals this is a common experience. As one prison officer recently remarked: 'Give me an Aboriginal for two years and I will have him for ten'. Aboriginals are less likely than whites to be released early from prison on good behaviour, and more likely to have the term of their incarceration extended as a result of further offences committed while in prison. (The causes of these discrepancies, and especially the degree to which elements of racial tension and/or provocation are contributing factors to the commission of fresh offences, are important questions, which unfortunately cannot be discussed here.)

In weighing the conflicting demands and expectations of our justice system as well as considering the circumstances of individual cases, increasing numbers of Australian justices are taking account of the likely consequences of prison sentences or a substantial fine on Aboriginal offenders. It has been demonstrated that, in the majority of cases, imprisonment of Aboriginal offenders leads to longer or later imprisonment. The imposition of fines usually results in non-payment and the ultimate imprisonment of the offenders.

The decriminalisation of public drunkenness has alleviated pressure upon the courts, and has been accompanied by more rehabilitative approaches in the treatment of alcohol related offending, but this has not dealt with all of the gaps in our administration of the bulk of Aboriginal minor crime. In policing and sentencing discretion, and penal and probational

administration, there remain critical points of decision in the handling of Aboriginal offenders to which attention needs to be paid.

It is my strong belief, detailed in 'Community Care/Community Responsibility' (Hazlehurst, 1985d), that it is inappropriate that the criminal justice system alone should come under examination in the review of these dilemmas. In order to restore confidence and harmony between the courts and the community a good deal of soul-searching will also be required on the part of the Aboriginal community itself. On the other hand, officials of our undeniably powerful and intrusive justice systems must also understand the necessity and the urgency of encouraging Aboriginal leaders, organisations, and community conscience (in whatever form it arises) to undertake that process of self-examination.

The interest and patronage of individual judges and magistrates in the areas in which they serve could provide crucial incentives to greater community collaboration in the search for ways to reduce Aboriginal crime. Increased community involvement in the selection and management of sentencing alternatives, and a genuine commitment to rebuilding the fabric of Aboriginal social life, cannot begin until some degree of mutual respect and recognition of Aboriginal autonomy occurs.

We have no choice but to give this recognition and encouragement. The processing of Aboriginals, from the police to the courts to the prisons, is a dehumanising experience. There is also a grave danger that these encounters with the criminal justice system will become incorporated in Aboriginal life-styles and self-perceptions. Once these experiences become embedded in Aboriginal cultures they will become even harder to reverse.

In communities conscious of generations of deprivation and injustice, parents have a significant role in inculcating the respect, fear or hatred of the police and courts which will influence their children's behaviour. The criminal justice system can do little directly to moderate the domestic environments which reproduce a depressing cycle of conflict with that system. In far too many Aboriginal communities each new generation is initiated by the former into a life style of crime, courts, prisons, fines, and officialdom. This must surely appal even the most punitive of judges or magistrates. The criminal justice system can no longer afford not to make the effects of this process its business. It can no longer afford to neglect ways in which courtroom and sentencing reform might help to break this cycle.

THE BURDEN OF EFFICIENCY

We have in Australia an interest in international trends towards

the deinstitutionalisation of corrective services; a willing experimentation with community service orders and other sentencing alternatives particularly with respect to juveniles; and a growing recognition of the special handicaps confronting Aborigines and other minority groups before the courts.

We are constantly reminded that sectors of the press and the public, less tolerant of such alternatives, are fearful of change and are ready to decry any signs of leniency and apparent disinclination to apply 'just deserts' principles.

The judiciary must steer its own course between surviving nineteenth century views of the penal system as a place for the punishment and isolation of the offender from society; and more recent philosophies of judicial discretion, individualised sentencing, and stronger emphasis upon the rehabilitation and ultimate reintegration of offenders into society. The judiciary must heed legislation that reflects changing social values and beliefs. In more subtle ways judges are unavoidably affected in their own attitudes by tides of social and political opinion. In Australia, where reports of the clash of interests over land rights and mining, or violence in country towns, confront us almost every day it would be unusual indeed if the expectations of the different interest groups involved did not affect court and police decisions in some way.

When judicial discretion goes in favour of an Aboriginal offender, the Aboriginal community may prefer judicial discretion to remain intact. When a sentence seems unusually harsh, or different from sentences for similar offences by other offenders, queries are made about the inconsistency of judicial decision-making. In some country towns in particular there are counter-currents. Non-Aborigines, alienated from neighbouring Aboriginal populations contend that Aboriginal offenders are treated too softly by the courts. The black populations of these towns, on the other hand, allege police discrimination and harassment. The courts inevitably become arenas in which the consequences of racial hostility must be faced.

To the extent that inter-racial tensions are increased by perceptions on both sides of inequitable treatment of offenders, it may be thought worthwhile to explore the possibility of introducing a system of determinate sentencing. Should Australian jurisdictions go the way of the 1976 Californian Uniform Determinate Sentencing Bill (Senate Bill 42) which heralded a hardened approach towards crime in California? 'The purpose of imprisonment for crime is punishment' (section 1170a of the Californian Penal Code). This law, which came into effect on 1 January 1977, represented 'an approach consistent with the desire to move either towards a retributionist or back to a "Justice" system of sentencing', commented Malcolm Davies. 'It reversed a 60-year-old sentencing system based on indeterminate

sentences. Fixed-time determinate sentences were to replace the open-ended prison terms of the rehabilitative era' (Davies, 1985, 2).

The purpose of the Californian fixed term sentencing system, Davies explained, was to ensure that court orders were consistent with the seriousness of the offence, and to provide that there were no discrepancies between the length of sentences for similar crimes:

The judge, except in the case of a mandatory prison sentence, still retained the right to decide whether to give a prison sentence, as not all dispositions need be for punishment. There are still probation, fines and various Youth Authority commitments for judges wishing to impose an individualised sentence (ibid).

I would not like to see a reversion to more punitive sentencing policies in Australia. But some standardisation of sentencing practices in relation to Aboriginal offending need not necessarily represent a decline of emphasis upon rehabilitation in favour of punishment, as appears to be the case in California. There is a range of minor crime which might be amenable to precise identification. The scaling of judicial sanctions, according to the seriousness of particular crimes, could go hand-in-hand with the diversion of lesser offences to community justice or community rehabilitation programs.

Under the conflicting public and political pressures of this era of protest, land rights, and inter-racial confrontation, the judiciary may well be carrying more than its share of Solomon's responsibility. There is much which the community could be doing, if allowed and if encouraged, in shouldering some responsibility for juvenile delinquency, vagrancy, domestic violence, and drunken disorderly disturbances. In the long term it is arguable that the administration of justice through alternative community-based programs, could have far more potential to revitalise Aboriginal social institutions than the impersonal passing of judgment in the formal courts.

Our concern should be that the high rate of Aboriginal offending should not simply be more efficiently administered by the Australian justice system, but that there be provision in that system for the increasing involvement of Aboriginal people in the settling of community disputes, the handling of youth problems by adult counselling, and the running of community services that treat causes rather than symptoms. By community commitment and responsibility Aboriginals may themselves deter present and future generations from these cycles of offending. But one cannot expect a display of community spirit when most of the

features of self-government and social control have been stripped from community life.

Australian society as a whole, not just Aboriginal society, has suffered from the modern trends of abandonment of family and social responsibilities. We should, I believe, speak of 'community delinquency', or 'community irresponsibility' as much as of 'juvenile delinquency'. While there is no doubt a strong property protection motive in the recent spread of Neighbourhood Watch Schemes, there are other encouraging signs of community regeneration in the creation of Safe Houses, community policing, juvenile rehabilitation programs and the popularity of Community Justice Centres in New South Wales.

COMMUNITY-BASED OPTIONS

The argument against fines and imprisonment for Aboriginal offenders has been twofold. First, they seem not to deter future Aboriginal offending and may even encourage it (Lowe, , 1985, 35 and editor's notes in Hazlehurst, 1985e, 227). If this is so, they offer little in the way of community protection. Secondly, fines and imprisonment leave innocent victims in their wake. They punish and severely deprive the families of the already underprivileged, not only in the loss of already limited income, but also, at times, in the loss of a family supporter.

For minor crime, the advantage of sending someone away to serve a term of imprisonment is open to question. A minor offender might more sensibly be made to pay restitution to an injured community, by way of community service, while still maintain his or her family responsibilities. If such treatment is appropriate for a single case, it could equally apply to multiple offences. Individuals who are prone to committing an offence every six months for some twenty years of their lives would, under this system, be required to atone on each occasion by community service. It is unlikely that such people - the habitual drunk, the petty thief - will change their ways either by isolation from their community or by further financial deprivation. But there is some possibility that a sense of community responsibility may develop through the repeated physical re-enactment of restitution and atonement to that community - particularly if these offenders are in their youth. 'If people are answerable to their real peers,' observed one indigenous leader, 'they are much more susceptible to reform'. Shame may be a more powerful deterrent than we have hitherto understood.

The real 'punishment' and 'deterrent' content of community service orders was described in a recent article on the Canberra program:

It meets all the objective standards of punishment
... The work is hard (but not degrading) and

offenders must give up what for many is their leisure time of the week ... All four men [working] at the Senior Citizens Club agreed that they were being punished. But they also realised that they could easily have gone to gaol. (The Canberra Times, 8 March 1986).

Although the program is not explicitly designed to rehabilitate offenders, administrators acknowledge that 'a great deal of rehabilitation goes on'. Without the stigma of a gaol record, participants experience a whole new range of people and activities (ibid). A further aspect of these programs is their potential to actually involve ex-offenders in their administration, in helping and guiding younger offenders. Quite frequently ex-CSO participants have continued to work voluntarily for the organisation which they served, or become understanding and effective administrators of a later program.

The community stands to benefit in two ways. Firstly, community justice programs should in time strengthen existing community infrastructure in the new role and purpose which they provide.

Secondly, if these programs are carefully co-ordinated with other government or community development schemes (land development, housing, training and education schemes, cultural programs, business enterprises or simply community maintenance activities) the labour of members serving community service order sentences would be directly productive.

Although these measures are punitive in that they impose restraints, they entail a significantly lower financial burden than judicial processing and incarceration. They also represent a recognition of the value of allowing the offender to remain in the community to develop or renew a sense of commitment to that community rather than experience detachment and probably face a later problem of reintegration.

In his address at the opening of the Australian Institute of Criminology's 1978 conference on Alternatives to Imprisonment, the Hon. Mr Justice W.E. Forster, then Chief Judge of the Supreme Court of the Northern Territory, expressed the view that:

... regardless of which philosophical basis one used for sentencing - retribution, punishment, deterrence or most likely a combination of these concepts - bearing in mind the welfare of the offender's family and the expense to the State of his/her imprisonment - an increase in the availability of alternatives to imprisonment should increase the chance of the sentencer making the right decision in individual cases (paraphrased by Kingshott, 1978, 4).

Justice Forster indicated that sentencing options 'such as weekend detention and community service orders, etc. would be welcome by the judiciary' in the Northern Territory (ibid). Following a personal study tour of North American diversionary programs last year, the then Northern Territory Minister for Community Services, Mr Coulter, announced that his government would consider a range of community-controlled orders and correctional options in an attempt to reduce prison populations in the Northern Territory (Canberra Times, 7 November 1985). Other States have also shown an interest in this area.

In the light of the expenditure of public funds on the housing and administration of Aboriginal offenders in corrective institutions, there is a clear need for investigation into the value of expenditure upon a range of alternative mechanisms. Where possible, I would recommend that pre-trial diversion be introduced, as a matter of course. For clearly defined categories of offences, referrals could be made by police, schools, welfare agencies and social workers, to community justice or community rehabilitative programs of the appropriate jurisdiction. Once established, and successful, these programs may also be chosen by the Courts as post-trial, or sentencing options.

In the community court or tribal court models of New Zealand and the United States a range of minor offences and of community administered penalties has been defined. Penalties or restitution may include community service orders; elder or adult supervision; limited victim or community compensation; and rehabilitation, detoxification and/or retraining programs. Both the selection of appropriate orders and their supervision are decisions to be made by the responsible community body - their capacity and jurisdiction in this regard being given a formal place in the criminal justice system by legislative decree (Hazlehurst, 1985d, and Appendix, Hazlehurst, 1985e; Morse, 1980).

The shape of community support systems necessary to play this role of community justice will need to be explored at the State level, and tailored to fit demographic and regional variations. In some areas this community justice role may be most easily grafted upon an existing tribal or elder advisory body, by extending the role of this body into community tribunal and dispute settlement responsibilities. In other areas new institutions, such as Aboriginal JPs, Aboriginal honorary probation and parole officer or prisoner's friend appointments might prove to be more easily adopted. In a recent Western Australian study it was suggested that the Aboriginal justice of the peace scheme worked better in the more modern, semi-urbanised, inter-tribal communities, than in traditional communities where customary law and elder leadership were still

prevalent (Hoddinott, 1985a; Hoddinott 1985b; Hazlehurst 1985f).

It is desirable that small pilot projects should be established in different areas throughout the States where community interest is demonstrated. The key to the success of Aboriginal community justice programs and their associated rehabilitative, retraining, and resocialisation programs, will rest in their being optional. That is, as options which provide minor offenders with a 'second chance' to redeem themselves in their communities, they should appear more attractive than the proposition of being processed through the formal system. However, if individuals do not wish to be handled by their own people, the formal system should be always available to them. A clear definition of the jurisdiction, limitations, and opportunities of community-grounded diversionary and sentencing options is essential to ensure that the rights of offenders may be maintained.

What of the rights of the public to expect that justice will be done? As in any diversionary or community service order, probation, parole, or work release schemes, a breach of these privileges should bring the offender immediately back to the body which imposed the penalty. If further efforts by this body with the offender fail, the case can then be referred to the formal court where, in the case of a particularly recalcitrant offender, the more severe penalties available (such as imprisonment) may be enforced.

THE DANGERS AND THE POTENTIAL OF DIVERSION

Diversion schemes were widely hailed in the United States in the 1970s. But after just a few years their ineffective implementation became apparent in those areas where, Palmer said, their goals and functions had been 'poorly conceptualised' (1979, 14). The success of these programs also strongly depended upon the cooperation and support they received from the police, juvenile agencies, judiciary, and funding sources. Police who viewed diversion as a 'lucky break' for the juveniles were disinclined to make a referral to a diversion program when they felt offenders should come before the court and have this on their record. On the other hand, an even less expected net-widening effect was noted. In some cases juveniles, against whom police might otherwise feel they had insufficient evidence, were being picked up and referred to these programs. Diversion had the effect of increasing apprehension! This secondary effect upon due process rights was not anticipated:

Thus diversion programs have the potential for becoming dumping grounds for those juveniles the police wish to make adjustments on, but against whom they have little hope of making a formal case ... There is little reason to believe that police are

committed to the goals of diversion (Decker, 1985, 207-16).

In Canada, diversion was first experimented with in British Columbia. By 1977 it had been widely introduced throughout Canada, but some argument had developed over its advantages and disadvantages. O'Brien (1984) concluded that diversion programs for juveniles had been 'a worthy correctional innovation'. In Alberta, where the programs were judged to have failed, this was attributed to a squabble between the Federal Government, the Alberta provincial government, and various Native organisations over their ultimate control and operation.

Despite misgivings among some observers and participants there are few countries today which have not made available to the courts some form of 'diversionary' and/or 'preventative' forms of treatment. In the case of the indigenous offender (or, indeed, in the case of any offender from a strongly identified ethnic minority), the introduced element of community accountability through these programs offers greater potential for resocialisation and reform than the impersonal processes of the wider criminal justice system. In the area of juvenile crime these programs have particular relevance to all communities.

In Britain, according to Muncie (1984, 172) the 1969 Children and Young Persons' Act 'anticipated an end to a custodial system for juveniles, and its replacement by care and treatment in the community'. Under this Act the 'Intermediate Treatment' program (IT) was established to provide 'a halfway stage between a supervision order and a care order, and as an alternative to custody. Activities on these programs includes attendance at youth camps, sports clubs, Outward Bound adventure schemes, and weekend centres in addition to the traditional attendance centres for a specified period. By 1980, 94 centres had been opened across England and Wales (Muncie, 1984, 173-74).

All of these programs will depend for their success on the clarification of their jurisdictions and powers and the co-ordination and securing of common objectives between the relevant agencies. However, the vital element is likely to be the willingness and responsiveness of the community itself. The criminal justice system alone cannot sustain the burdens of declining standards of social values and social action. It is an ill-conceived belief that this system should act as substitute parents or good neighbours.

It is the issue of community irresponsibility, of the recognised need for greater community care and commitment to the socialisation and moral control of its members, which rests at the heart of diversionary and preventative programs. Aboriginal leaders could be called upon to define the practical needs of their people within the criminal justice system, and to consider

possible community-based alternatives in such areas as dispute settlement, juvenile care, and intoxicant rehabilitation. But it will require the blessing of the courts for Aboriginals to gain a greater input into the wider system by way of employment and advisory participation, administration, and the introduction of mechanisms for community regulation.

ABORIGINAL/COURTROOM DILEMMAS

Sentencing may be influenced in a variety of ways by the apparent demeanour of the offender and the conduct of an offender's case. The unique problems which criminal courtroom arrangements and procedures pose for Aboriginals, and the strategies which Aboriginal people have developed to cope with them have been clearly documented (Lieberman, 1980; Hennessy, 1984; Hazlehurst, Ivey and Hill, 'Courts', [1986]).

The courtroom dilemmas experienced by Aboriginals, uninformed of courtroom ways, are as much cognitive as they are legal. To many it is a foreign and frightening place, controlled by uncomprehended rules, rituals, and agendas. 'The ordinary flow of events in a court of law', wrote Lieberman:

... presents Aboriginal people with the structural task of determining a sense of structure which can guide their activities. Matters as simple as standing when required, holding the Bible, leaving the witness box at the completion of testimony, and speaking only to questions are problematic for them. Finding a correct place within the procedures of the court to fit their movements and comments is an abiding concern.

... Aboriginal witnesses anxious to give testimony find the ritual preliminaries of the court an impediment to their finding a proper place to begin their testimony. It is not only the usual contingencies of turn-taking in conversation which are a problem here, but what entire order of phenomenon is transpiring may be at issue ([1980]).

Magistrates complain that Aboriginal defendants frequently withdraw from the proceedings altogether, mumbling minimal replies to questions or gazing at the floor or out of windows. Pertinent evidence may never emerge. Thus Aboriginals may frequently undermine their own defence.

These problems are exacerbated by genuine linguistic handicaps (poorly understood questions or answers), and by the defendant's desire to provide the questioner with a positive response, even if a negative response would be more accurate. In his work as a defence lawyer in the Northern Territory, John Coldrey has also

pointed out the vulnerability of Aboriginal victims of crime, particularly in the absence of a competent interpreter:

For example, in R v. Banjo Anglitchi and Others (1980) the evidence of the young prosecutrix was so mutilated in cross-examination at the preliminary hearing that the Crown was forced to accept pleas of guilty to conspiracy to rape but not the complete offence ... Aboriginal witnesses are also nonplussed when Legal Aid lawyers, who are supposed to help and empathise with Aboriginal people, attack the veracity of their evidence in the courtroom setting (Coldrey, 1985).

A description of these cultural and conceptual difficulties was outlined over a decade ago by part-Aboriginal Jim Lester:

Aboriginal people don't understand court language and procedures, and they make mistakes and have to be corrected, which then makes them embarrassed. I have heard the magistrate say, 'Take your hat off when you come into court'. The people then become confused and afraid. Aboriginal people are severely limited in their understanding of English. Court language is very hard to understand and most people don't understand the charges against them. Sometimes it is hard even for the interpreter to understand, to put in the Aboriginal language. The same problem applies in the police station ... They are confused about places. If asked, 'Did you go into his house?', they will say 'Yes'. It may have been only in the driveway, or inside the fence, but that means 'in the house' to them.

As soon as Aboriginal people enter the courtroom they feel different, they become afraid. I have felt old men shaking with fear. When I ask them 'What is the matter?', they say 'I don't know what's going on'. The people are afraid of authority in the court ... They are frightened to speak. Cross-questioning confuses the people, especially about details of time and place ... Fear of payback also affects the people in court ... This makes the people afraid sometimes to be a witness against another man ... People who are frightened of court will often plead guilty, even when they are innocent, so as to get finished and out of court quickly (Lester, 1973).

Although the Aboriginal Legal Aid Service (ALAS) has helped to alleviate some of these communication problems many, of course, are still with us. The ALAS constantly reminds us of the

immensity of their task and the limitations of their staff resources to properly advise their clients. Unless some formal educational process can be introduced for judges, magistrates, lawyers, police, probation and parole officers, Aboriginal interpreters, and the Aboriginal community itself, this same incomprehensibility between these sectors may well be with us for another decade or two (Lyons 1983; Brennan 1979; Hazlehurst, Ivey and Hill [1986] 'Courts'; The Age, 29 and 30 May 1985).

In recognition of these difficulties, the Australian Law Reform Commission was given a special reference upon Aboriginal customary law; on how it relates to, and could be possibly accommodated by, Australian law in order to reduce such conflicts. While there may be clear areas of compatibility there will also be areas in each which will present insurmountable obstacles to any proposal for a homogeneous system. I have pointed out elsewhere that in those areas where traditional systems seem irreconcilable with Western law some degree of separation and autonomy may need to be maintained. But, in less traditional communities, a closer working relationship by means of the establishment of bridging institutions could be developed. The working of this middle-ground through processes of advisory, mediatory, and intermediary institutions and practices will be vital to the improvement of black/white relations in Australia (Hazlehurst, 1985e, 242).

IMMEDIATE AND LONG-TERM OPTIONS

Considerable power lies with the judiciary for leadership and exploration into sentencing and procedural options which could alleviate some of the difficulties which arise in part from social and cultural differences.

Deterrence and recidivism is naturally on all our minds. The criminal justice system, should not simply have formal objectives of deterrence and community protection. Effective deterrence and protection must be sought through continual reappraisal of laws, systems, and the environments in which they operate.

Where Aboriginals are imprisoned seventeen times more frequently than non-Aboriginals and, in some areas, where they reoffend 70 to 80 per cent of the time, we cannot believe that we are achieving either 'deterrence' or 'community protection'. We therefore have little choice but to reexamine the compatibility of the justice system with the phenomenon it is meant to control, namely Aboriginal crime.

It is not sufficient that this examination occur at an abstract level, nor in the rarefied environment of a national inquiry. Real answers will only come when these questions are posed at the practical level where the system functions and processes Aboriginal offenders.

The recognition that collaborative and more effectively orchestrated efforts between police, courts, correctional authorities, and the community are required, does not imply that people are ready to collaborate. In the present climate of hardened attitudes separating Aboriginal and justice administration sectors, a period of sensitive exploration, and the gradual building of working relationships will be necessary. This may take years to achieve.

In addition to becoming more informed about the communities which they serve, some innovative members of the Australian judiciary have invited Aboriginal elders and senior members to advise them about the background of the cases before them. These magistrates and judges have built up over time a deeper knowledge of the kinship, and the social and political frameworks of their jurisdictions.

In the introduction of alternative sentencing or post-trial diversionary programs in the future, this background knowledge of the judiciary will be essential. When placing an Aboriginal youth, for instance, under the supervision of a particular adult or elder, or when placing an adult offender in a community service program or into a detoxification or retraining scheme, the decision of the magistrate must be guided by this knowledge of community diversionary resources and of the community kinship structure. It is necessary to know who the offender feels accountable to, in order to arouse his or her sense of community obligation.

In the rare case studies of Aboriginal community justice programs in Australia, perhaps the most innovative in the recognition of this principle is the Elcho Island experiment, established in the Northern Territory in September 1983. This project is described by Stephen Davis as follows:

The Aboriginal Community Justice project was initiated with the aim of providing a justice program which sought to accommodate, wherever possible, Aboriginal law and social control mechanisms within the present judicial system of the Northern Territory.

This has been implemented by involving senior Aboriginal custodians with the magistrate in discussion prior to sentencing an offender after close and detailed pre-court consultation with the defendant's nuclear and extended family.

The Aboriginal Community Justice Project sought to support existing social controls evident in the community and strengthen such mechanisms within the contemporary life of the community.

With the permission of the participating clans this project developed a genealogical index which is now used as an important reference in the identification of the defendant and his or her traditional kinship responsibilities. Detailed reports on the social backgrounds of the defendants are also supplied to the magistrates with each case (Davis, 1985, 187-9).

The option of post-trial diversion, of course, will be severely limited unless there exists in the community a willingness to provide real supervisory support. Willing though they may be to use them, and even though the legislation may already be in place to provide the necessary sanction, the judiciary cannot exercise sentencing options unless the community infrastructure is ready and able to support diversionary schemes. Therefore, a two-way process of development must be followed. The question this raises is, 'is it the place of the judiciary to urge their establishment?' 'Is it the place of the police, public servants, Aboriginal leadership or independent researchers to take the initiative?' There can only be one answer. No one who is involved can disclaim responsibility for taking whatever constructive action is possible.

The Western Australian Aboriginal justice of the peace scheme resulted from the open-minded efforts of a Kimberley magistrate to involve the community elders in his deliberations. The West Auckland Maori community court took its momentum from the blessing bestowed upon it by an innovative Maori judge. The North Queensland Aboriginal community court scheme was engineered by the Department of Community Services following a study of area needs. This project also seems to have considerable support and referrals from the police in that region.

The Australian, New Zealand, and North American schemes, which have been incorporated into legislation, now provide working models of innovative justice administration for indigenous peoples (see Bayne, 1985; Brown, 1985; Hazlehurst, 1985d; MacDonald, 1985; Syddall, 1985; Hoddinott, 1985; Davis, 1985; Coombs, 1985). The precedent has been set for the judiciary to take an active role in the establishment of a range of community-based programs which could ultimately provide post-trial sentencing, and even pre-trial diversionary, options. It remains in the hands of the respective states and territories to explore Aboriginal personal and community organisational resources which could take part in these projects.

A third and obvious area in which the judiciary may expand its relationship with the Aboriginal community is in the employment of Aboriginal officers in the courts - court interpreters, court welfare workers, prisoners' friends, liaison officers between the police, the victim, defendant, and the court. By examining the areas of need and by consulting community leaders these gaps which presently make for a dysfunctional criminal justice

administration might be filled. They might also provide the foundation for a future relationship of shared responsibility upon which more developed diversionary programs could be built.

CONCLUSION

What are our long term objectives? Changes in sentencing policy unaccompanied by changes in other elements of the system would be of limited value. We should be looking to dovetail innovations and reforms in legislation, in penal and police practices and attitudes, in court policy and procedures, and in the perceptions, social responsibility, and autonomy of the Aboriginal community itself.

In my own experience I have learnt never to underestimate the power of ordinary people to change their own environments, particularly when they are given the opportunity and encouragement to do so. Perhaps most promising in this is the possible effect of the revival of community social control mechanisms drawing on the strength of Aboriginal society itself. Under the tribal court system operating upon Indian reserves in the United States almost all minor crime with the exception of 'State crimes' - such as rape, murder, drug related crime, violent assault - remain under the jurisdiction of the respective Indian communities. A substantial proportion of Aboriginal offending, which we might call 'nuisance crimes' - theft, disorderly behaviour, minor assault, delinquency, etc. (see Table 1.), could also be diverted away from the formal court system in Australia.

Community dispute settlement, community restitution, juvenile care and training, alcohol rehabilitation, community maintenance and development programs, family support programs, employment and training could become a part of the community justice infrastructure. This would not only ease the pressure of multiple-offences upon the wider justice system, it would also make a lot more sense that they be handled and treated by the community itself - that the community might become more aware of, and more apt at responding to local needs.

All Australians would benefit from a criminal justice system that dealt more sympathetically with Aboriginal offenders. For Aboriginal society, new justice concepts and practices may serve to restore something of the social structure and values which were so carelessly and sometimes brutally dissolved by the imposition of alien cultures and laws.

TABLE 1
 NUMBER AND PERCENTAGE OF PRISONERS BY MOST SERIOUS OFFENCE AND
 ABORIGINALITY - AUSTRALIA

OFFENCE	ABORIGINALS, TORRES STRAIT ISLANDERS		OTHER		UNKNOWN		TOTAL	
	NO.	%	NO.	%	NO.	%	NO.	%
Homicide	68	6.4	718	67.5	277	26.1	1063	100.0
Assault	131	19.8	416	62.9	114	17.2	661	100.0
Sex Offences	117	13.5	490	56.5	261	30.1	868	100.0
Other Against Person	9	8.6	77	73.3	19	18.1	105	100.0
Robbery	68	5.2	964	74.0	271	20.8	1303	100.0
Extortion	1	3.3	27	90.0	2	6.7	30	100.0
Break and Enter	193	11.4	1215	71.6	288	17.0	1696	100.0
Fraud and Misappropriation	12	3.0	288	70.9	106	26.1	406	100.0
Receiving	17	11.7	96	66.2	32	22.1	145	100.0
Other Theft	103	11.4	602	66.4	202	22.3	907	100.0
Property Damage	11	6.9	101	63.5	47	29.6	159	100.0
Government Security	2	13.3	9	60.0	4	26.7	15	100.0
Justice Procedure	46	17.3	209	78.6	11	4.1	266	100.0
Prostitution	-	-	4	100.0	-	-	4	100.0
Offensive Behaviour	5	14.3	25	71.4	5	14.3	35	100.0
Unlawful Weapon	1	4.8	14	66.7	6	28.6	21	100.0
Other Good Order	27	26.5	57	55.9	18	17.6	102	100.0
Possession, Use Drugs	2	.9	130	57.5	94	41.6	226	100.0
Trafficking Drugs	7	1.3	447	83.2	83	15.5	537	100.0
Manufacture Drugs	1	1.1	59	64.1	32	34.8	92	100.0
Driving Offences	80	16.8	227	47.8	168	35.4	475	100.0
Administrative Offences	85	20.8	249	60.9	75	18.3	409	100.0
Other Traffic	3	11.1	16	59.3	8	29.6	27	100.0
Other	29	23.0	44	34.9	53	42.1	126	100.0
Unknown	-	-	-	-	16	100.0	16	100.0
TOTAL	1016	10.5	6484	66.9	2192	22.6	9694	100.0

Source: Walker and Biles, National Prison Census - June 1984, 66

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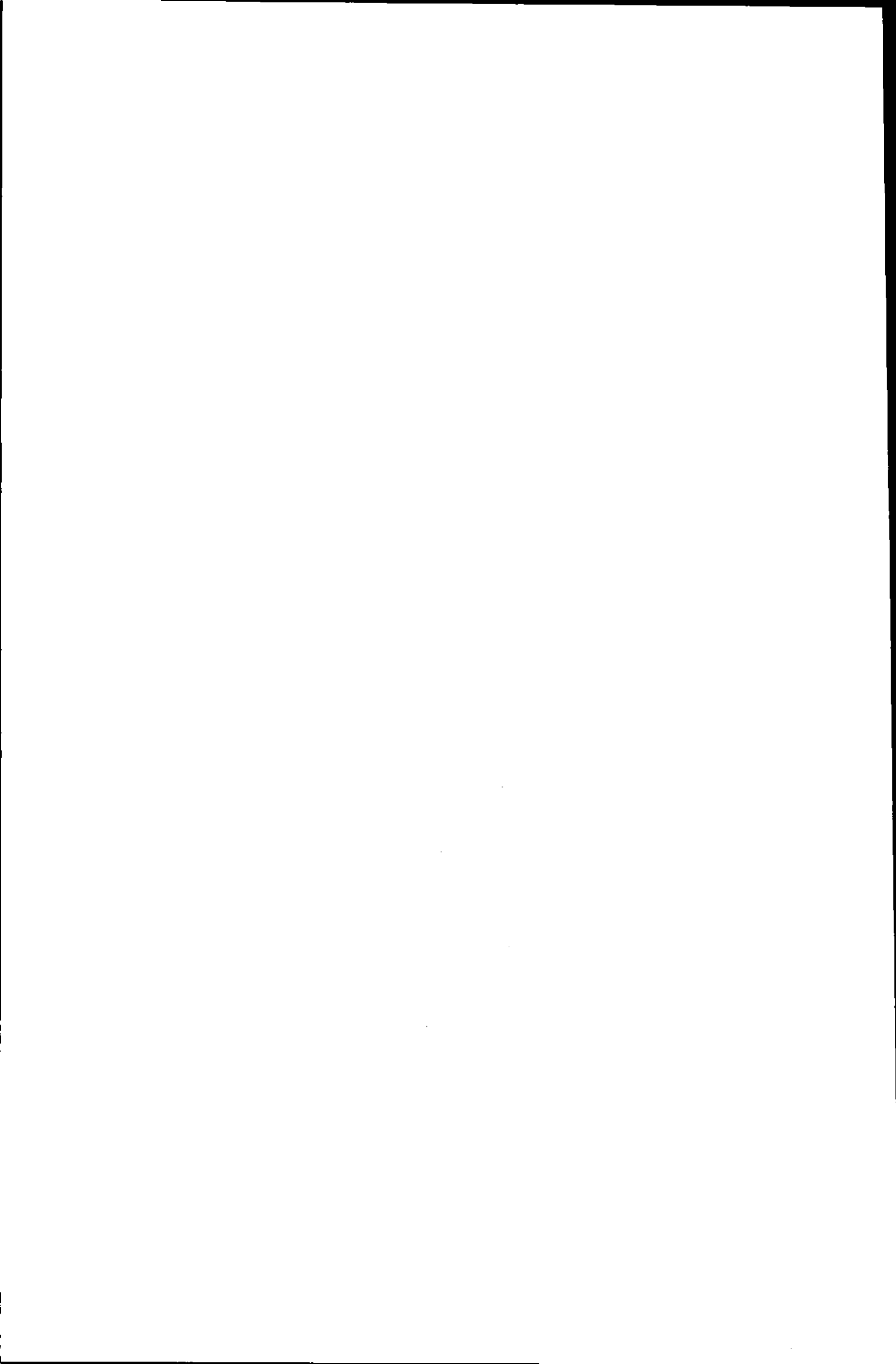
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FEDERAL AND AUSTRALIAN CAPITAL TERRITORY OFFENDERS:

THE FUTURE OF THE CURRENT LAWS AND PRACTICES

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This paper is intended to be an information paper to help dispel some of the myths surrounding Federal and Australian Territory offenders sentenced to terms of imprisonment. The paper will include references to the difficult legal and policy issues that can arise relating to the sentencing of these offenders, their conditional release, the remission laws which apply and to comment generally upon the operation of the existing legislation.

BACKGROUND

By way of background from 1 March 1982 until late May 1985 I was in charge of the Section in the Attorney-General's Department responsible for the legal and policy matters relating to Federal and Australian Capital Territory Offenders, (referred to below as Territory offenders) as well as processing submissions to the Attorney-General on individual prisoners. These submissions related to such matters as the release of Federal Offenders on completion of their non-parole periods and applications for release on licence of Federal and Territory Offenders prior to completion of a non-parole period or sentence with remission, where no non-parole period was set. In May 1985 the processing of the submissions on individual cases, with certain exceptions relating to difficult cases, has been transferred to the Parole and Remissions Section of the Department. My Section is still responsible for providing advice on the legal and policy issues that arise in this area. For these reasons I feel that I am in a unique position to comment upon the operation of the existing system.

PRISONERS FOR WHOM THE FEDERAL GOVERNMENT HAS RESPONSIBILITY AND THE LEGISLATION THAT APPLIES

By virtue of section 120 of the Constitution, States are required to make provision for the detention in their prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences. In the case of Territory Offenders, the Commonwealth and New South Wales Governments have entered into an arrangement whereby Territory Offenders transferred to New South Wales are accommodated in New South Wales Prisons, and the State reimbursed for the cost.

There is no Commonwealth Parole Board and the power of conditional release from prison of Federal Offenders on parole under section 5 of the Commonwealth Prisoners Act 1967 or on licence under section 19A of the Crimes Act 1914 is vested in His Excellency the Governor-General acting on the advice of the Attorney-General. When considering a submission the Attorney-General is provided with all relevant background material, which is annexed to the submission. This may include, depending on nature of the submission, details of the offence and sentence, a short summary of the facts of the offence, the quantity and value of the narcotic drug or the money obtained, the judge's or magistrate's remarks on sentence, the plea in mitigation of sentence, prison and parole reports, psychological, psychiatric or welfare reports and reports from the Australian Federal Police or State Police. Any applications for release made either by the prisoner or on his behalf are also annexed.

In addition to Federal Offenders the Attorney-General has responsibility for:

- . persons convicted of offences against the law of the Australian Capital Territory;
- . life prisoners (there are only Territory Offenders to date);
- . Governor-General Pleasure detainees (there are only Territory offenders at present);
- . prisoners transferred from the Northern Territory to South Australia under the Removal of Prisoners (Territories) Act 1923. Only 4 persons come within this category 2 life prisoners and a Governor-General pleasure detainee (2 life prisoners escaped from prison and are serving terms in other jurisdictions).

These categories give rise to 3 main areas of responsibility namely:

- . The release of Federal Offenders on completion of their non-parole periods;
- . applications for early release on licence from Federal or Territory Offenders, either before the completion of a non-parole period or before completion of the sentence with remission, where no non-parole period is specified; and
- . the review of life and Governor-General Pleasure detainees at appropriate intervals.

The legislation which I will be examining is set out below: -

- . the Commonwealth Prisoners Act 1967 ("the 1967 Act")
- . the Removal of Prisoners (Territories) Act 1923 (the 1923 Act")
- . the Removal of Prisoners (Australian Capital Territory) Act 1968 (" the 1968 Act").
- . section 19A, Crimes Act 1914
- . Parole Ordinance 1976 ("the 1976 Ordinance").

WHO ARE FEDERAL, TERRITORY AND JOINT OFFENDERS

The expressions, Commonwealth Offenders, Federal Offenders, Territory and Joint Offenders are sometimes used interchangeably, or there is confusion about their meaning. For the purposes of this paper, the expressions are defined to accord with the meanings used by the Department. The definitions are based on the legislation. "Commonwealth Offender" is a generic term used to cover all offenders for whom the Commonwealth has a responsibility. "Federal Offender" is defined in the 1967 Act and means a person convicted of an offence against the law of the Commonwealth e.g offences relating to the importation of narcotic drugs contrary to 233B of the Customs Act 1901. It should be noted that there are usually a small number of persons convicted and sentenced to terms of imprisonment in the Territory, who are Federal, rather than Territory offenders. In the case of a person convicted and sentenced to a term of imprisonment in the Territory an "offence" under the 1976 Ordinance means an offence against a law (other than an Act or regulation under an Act) in force in the Territory e.g, murder, armed robbery. A Joint Offender is a person convicted of offences against, for example, Commonwealth and State legislation, or Territory and New South Wales legislation. Some examples of Joint Offenders are set out below:

- . prisoner convicted and sentenced to terms of imprisonment for Commonwealth Offences and either by the same court or a later court convicted and sentenced for supplying heroin contrary to a State law. Such a prisoner is classified as a Federal/State Offender. Non-parole periods were set by the court in relation to both offences. If such prisoner is to be conditionally released he will have to obtain a release document both from the Governor-General and the relevant State Parole Board, provided he is serving both terms on completion of his non-parole period. If in the example the prisoner receives a 10 year sentence with a non-parole period of 6 years, on the Commonwealth offence and by the same court is sentenced to 2 years, for State

offences, once the 2 year sentence expires with remission he will only be a federal offender. He will only be eligible for conditional release in respect of his federal terms.

- . prisoner convicted and sentenced to a term of imprisonment for a Commonwealth offence. This conviction is a breach of a State or Territory parole order. In such cases his State or Territory parole order is either revoked or deemed to be revoked and he thus becomes a Federal/State offender. Likewise, if a federal parolee/licensee is convicted and sentenced to a term of imprisonment for State or Territory offences, the State sentence is a breach of his federal parole or licence and he becomes a Federal/State offender.
- . person convicted and serving terms of imprisonment for a Commonwealth offence, New South Wales offence and a Territory offence. (This may occur because after his conviction and sentence in the Territory, he is transferred to New South Wales, under the 1968 Act to serve his Territory Offence. He may then be dealt with for outstanding State and Commonwealth offences committed in New South Wales).

NOTIFICATION OF PRISONERS AND STATISTICS

The Department is notified by the Commonwealth Director of Public Prosecutions in each State, the Northern Territory and the Australian Capital Territory of all persons sentenced to terms of imprisonment. The information is normally provided on a Prison Register. In the case of Territory Offenders the Register is forwarded to the Secretary of the Parole Board of the Australian Capital Territory. If the prisoner is a Federal Offender and the court has specified a minimum term (non-parole period) the approximate date of completion of the non-parole period is calculated. The prisoner's name and release date is entered on a computer list which tabulates prisoners in date order having regard to the completion of their non-parole periods, or review dates in the case of life prisoners or Governor-General Pleasure detainees.

A file is then made up for the prisoner and parole and prison reports are requested to be provided by the appropriate State authority 2 months before the completion of the non-parole period. In jurisdictions such as Victoria, there can be difficulty about the commencement date of the sentence or, in the New South Wales, the calculation of the remission rate (1/3 or 1/4). The State authorities are requested to confirm that the calculation of the expiration of the non-parole period is correct. Any adjustments are then entered into the computer list.

Occasionally, the Department is not notified of an offender - this would normally occur because he is a joint Federal/State offender and the State Police have prosecuted him. However, it is the practice of the State offices to contact the Department, if we have not written to them about a prisoner for whom the Department has a responsibility.

Many Federal Offenders are sentenced to terms of imprisonment for narcotic drug offences contrary to section 233B of the Customs Act 1901. Table 1 shows the number of Federal and Territory prisoners as at 1 February 1986. There were 327 prisoners. The Table also shows the number serving terms for narcotic drug offences - 184. On 1 February 1986 there were 244 prisoners (other than Territory prisoners with non-parole periods) with either non-parole periods or review dates and of this number, 161 were serving federal terms for narcotic drug offences. The number of such offenders on a State by State basis are, New South Wales - 92, Victoria - 31, Queensland - 11, South Australia - 11, Western Australia - 28, Northern Territory - 2, and Tasmania - nil. I should add that there are 3 federal offenders serving long terms of imprisonment in Western Australia for narcotic drug offences, where the Court has declined to specify a non-parole period. Two prisoners have sentences of 20 years, which will not expire with remission until December 1997 and one has been sentenced to 13 years 10 months which will expire with remission about January 1995. The last person on the computer list at present is serving 25 years for the importation of narcotic drugs and his non-parole period will not expire until 25 May 1997.

The penalties that are provided under section 233B of the Customs Act 1901, range, depending on the circumstances of the offence and the quantity of the narcotic drug, from \$2,000 or imprisonment for 2 years or both, to a fine not exceeding \$100,000 or imprisonment for a period not exceeding 25 years, or both, and imprisonment for life or such other period as the court thinks appropriate. The 92 federal offenders serving terms in New South Wales for narcotic drug offences have terms ranging from 3 years to 20 years. In Victoria there are 3 such prisoners with sentences ranging from 3 years 9 months to 25 years. On the other hand, the non narcotic drug offenders sentences range from 6 months to 12 years in New South Wales and from 6 months to 7 years in Victoria.

There are no federal life offenders at present. In the case of Territory life prisoners the first automatic review is after serving 10 years (this does not exclude an earlier review if the prisoner applies for release). As life imprisonment is a possible sentence under section 233B of the Customs Act 1901, the first review of such offenders may be longer than 10 years, on the grounds that there are already such offenders serving minimum terms or sentences in excess of 10 years. It will be necessary for the Attorney-General to approve a review date for

such offenders, as it is a long standing policy that persons serving indefinite terms are reviewed at appropriate and regular intervals.

FEDERAL OFFENDERS - CONSIDERATION FOR CONDITIONAL RELEASE

(i) General

The conditional release of Federal Offenders is a matter for His Excellency the Governor-General acting on the advice of the Attorney-General. The Governor-General signs a parole order or licence authorising either the immediate release of the prisoner or his release on a specified date. Relevant provisions are section 5 of the 1967 Act (release on parole) and section 19A Crimes Act, (release on licence).

(ii) Sentencing and fixing lesser terms of imprisonment

It should be stated at this point that the Commonwealth Prisoners Act is just on 20 years old. It is a highly legalistic, rigid and complex Act that often gives rise to sentencing difficulties in practice and which has been difficult to adapt to changes in State law in this area.

The policy clearly enunciated in the legislation is that Federal Offenders be treated in a similar manner to their State counter parts. In order to give effect to this policy, prisoners are regularly released on licence under section 19A. The release on licence procedures are less rigid, as a federal offender may be released on licence at anytime while he is serving a federal term. The provision also enables the licence to contain such conditions, if any, as are specified. With few exceptions, the conditions specified in parole orders and licences are the same.

The sentencing difficulties arise, where the prisoners are serving cumulative federal terms or cumulative State and federal terms, particularly where a non-parole period is specified.

Section 4 of the 1967 Act deals with the setting of lesser terms of imprisonment, where a court is sentencing a federal offender to a term of imprisonment. In essence the provision picks up State law. Where a court is sentencing a federal offender and the law of the State or Territory in which the federal offender is being sentenced requires that in the case of a State offender the court specify that a lesser term of imprisonment be set, the court is required to specify a lesser term in the case of a Federal Offender. However, the relevant State law that is applied is restricted by virtue of sub-section 4(4) of the 1967 Act. The State law is restricted under the subsection "to the provisions of the law of that State or Territory with respect to the fixing of minimum terms of imprisonment that are applicable in respect of a State offender or a Territory offender who is before a court for a sentence for only one offence and is not already serving a term of imprisonment for another offence."

I will illustrate sub-section 4(4) of the 1967 Act by giving an example. A Federal Offender is sentenced to a term of 4 years, comprising 1 term of 2 years and 1 cumulative term of 2 years with a non-parole period of 2 years. This non-parole period is invalid. For a valid non-parole period to be set, the court should have set a non-parole period of 1 year and then a further cumulative non-parole period of 1 year.

This provision can give rise to sentencing difficulties for a court, wishing to impose a number of concurrent and cumulative sentences for Commonwealth offences e.g. imposing on the Commonwealth. The reason for this is that the State parole legislation specifies a period before which a non-parole period may be set eg. if the State law precludes the court from setting a non-parole period of less than 6 months. The difficulties that can arise between sub-section 4(4) of the Act and the State legislation are illustrated by the decision of the Court of Criminal Appeal in Victoria in R v Mc Gowan.

In Queensland and Tasmania Federal Offenders are not covered by subsection 4(1) of the 1967 Act, as the non-parole periods are set by statute rather than by the court. As the requirements of section 4 are not present, section 5 of the Act cannot operate and release on parole is not possible. It is the usual practice to consider prisoners in those States for release on licence at the time at which a similar State Offender would be considered. In Queensland, a State prisoner (with certain exceptions) serving a term greater than 6 months is eligible to be considered for release on parole at his half term without remission. A court may, under sub-section 53(3) of the Offenders Probation and Parole Act 1980 (QLD) make a recommendation as to the period to be served before a prisoner is considered for release on parole. Where such a recommendation is made in relation to a Federal Offender, it is the practice for the prisoner to be considered for release on licence at the time recommended by the court. In Tasmania a State offender is eligible for parole after he has served 6 months or 1/3 of his sentence, whichever is the longest.

(iii) Conditional release of Federal deportees

Where a prisoner is, or is likely, to be deported upon release from prison, he is released on licence not parole with special conditions which operate, if he is deported, to exempt him from supervision requirements. It would not be appropriate to release such a prisoner on parole as subsection 5(4) of the 1967 Act requires that a person be under supervision while on parole and sub-section 5(5) of the Act precludes the Governor-General from releasing the parolee from supervision. A person who is to be deported on release cannot be supervised out of Australia. It is therefore necessary for such prisoners to be released on licence, as section 19A of the Crimes Act does not require a licensee to be under supervision.

(iv) Practice regarding release on expiration of non-parole period

The practice of successive Attorneys-General has been to recommend the conditional release of a Federal Offender on completion of the non-parole period where he has favourable prison and parole reports and where his post release plans are adequate. If the Attorney-General approves that a federal offender should be released, either on parole or licence, he signs a submission to the Governor-General and approves the form of the parole order or licence. The papers are then returned to the Parole and Remission Section, which arranges for the papers to be delivered by hand to Government House. Once the parole order or licence is signed, the papers are returned to the Department for despatch to the State or Northern Territory Authorities. The parole order or licence is sent by certified priority paid mail, overnight courier or by Fax - which ever is appropriate.

(v) Practice regarding applications for early release on licence

Where a person is serving a term of imprisonment for offences against the law the Commonwealth, the Governor-General may, if he thinks it proper so to do in the circumstances, grant to that person, a licence to be at large under section 19A of the Crimes Act 1914.

The effect of this provision is that federal offenders may apply for early release during any period of their imprisonment.

It has been the practice of successive Attorneys-General to only recommend release prior to the completion of a non-parole period or sentence with remission, where no non-parole period is specified, where the prisoner establishes exceptional circumstances. Only on rare occasions are prisoners released in these circumstances, particularly by any significant period. Normally the exceptional circumstances are matters, which, if they had been brought to the attention of the sentencing court, would have changed the sentence and or non-parole period. Claims for exceptional circumstances are verified by reports from bodies such as Law Enforcement Authorities, Prison Medical Officers, Welfare Reports and/or Parole Reports, depending on the nature of the application. Many applications are received for early release. Mostly the grounds relied upon have already been put to the sentencing court in plea of mitigation of sentence, or are based on good conduct.

AUSTRALIAN CAPITAL TERRITORY OFFENDERS(i) release on parole on completion of non-parole period.

Where a Territory court specifies a non-parole period in relation to a Territory Offender, his conditional release on

completion of the non-parole period is for the Parole Board of the Australian Capital Territory under the Parole Ordinance 1976. It should be noted that the Board has no power to release a Territory Offender on parole where a court has not specified a non-parole period e.g. a life sentence prisoner or a Governor-General pleasure detainee.

Since the enactment of the Probation and Parole Act, 1983(NSW) a number of problems have arisen in relation to the powers of the Board. I will deal with these under the paragraph below relating to the Probation and Parole Act, 1983(NSW).

(ii) Release on licence

A Territory offender may apply for early release on licence in a similar way to his Federal counterpart under section 8A of the 1923 Act as applied by sub-section 7(2), of the 1968 Act. Such prisoners have to likewise establish exceptional circumstances. The licence is granted by the Governor-General acting with the Attorney-General's advice.

Where a Territory prisoner is sentenced to life imprisonment, paragraph 7(2)(d) of the Parole Ordinance provides, in effect, that a non-parole period may not be set. If such a person is to be released, he is released on licence. In 1977, the Parole Board suggested that the following principles should govern the consideration of life sentence prisoners:

- . that a life sentence prisoner's case should be considered -
 - (a) no longer than 10 years after the commencement of the sentence: and
 - (b) (ii) annually thereafter.
- . that the Board consider on its merits any application made before the expiration of 10 years from the commencement of the sentence.

It has been the practice of successive Attorneys-General to obtain an advisory recommendation from the Board on these cases.

GOVERNOR-GENERAL PLEASURE DETAINEES.

(i) definition of such detainees

Where a person has been charged with an offence against the law of the Commonwealth and -

- . the person is unfit to be tried by reason of unsoundness of mind; or
- . the person is acquitted by reason of unsoundness of mind;

the court may direct pursuant to section 20B of the Crimes Act 1914 that the person be kept in strict custody until the Governor-General's pleasure be known. Australian Capital Territory offenders may also be Governor-General's pleasure detainees on similar grounds under Part 5 of the Lunacy Act 1898 (NSW) as applied in the Territory.

(ii) Practice regarding review

A former Attorney-General approved the following course of action in these cases: -

- . that a Governor-General's pleasure detainee be reviewed by the Attorney-General 12 months after being sent to an institution;
- . that where appropriate an advisory recommendation be obtained from either the Parole Board of the Northern Territory or the Parole Board of the Australian Capital Territory to assist the Attorney-General in the consideration of the detainee's position;
- . that if release is not recommended the Attorney-General's approval will be sought for a deferral for a further period, at the conclusion of which the detainee is to be reviewed again;
- . that an application for release by the detainee or on his behalf before the period expires is to be considered by the Attorney-General in the normal course.

OFFENDERS IN THE NORTHERN TERRITORY TRANSFERRED TO SOUTH AUSTRALIA

There are at present four offenders who have been transferred from the Northern Territory to South Australia under the 1923 Act. A Governor-General's pleasure detainee and three life sentence prisoners (2 of the life sentence prisoners escaped from prison in South Australia and are at present serving terms in other jurisdictions).

REMISSIONS

(i) Federal Offenders

Under section 19 of the 1967 Act, a Federal Offender serving a term of imprisonment in a State or Territory is entitled to receive the same remissions granted by law to his State or Territory counterpart whether on the sentence or minimum term (non-parole period). All States and the Northern Territory provide for sentences to be reduced by remissions. Victoria,

South Australia, Western Australia and New South Wales provide by law for non-parole periods to be reduced by remissions. Four out of the seven jurisdictions now have remissions applying to non-parole periods, so that such remissions cannot be described as novel. Federal prisoners in those States have their non-parole periods reduced by the remissions which are prescribed. Without commenting on the merits of whether non-parole periods should be reduced by remission, it should be noted that New South Wales was the fourth jurisdiction to provide for non-parole periods to be reduced by remission. Newspaper reports and other comments in the media have implied that these remissions are unique.

(ii) Contempt of the Family Court and remissions

The Full Court of the Family Court in G v G (1981) FLC 91-042 held that a person in prison for contempt of a Family Court "is not imprisoned for an "offence" as defined in sub-section 3(1) of the 1967 Act and, accordingly is not a "federal offender" within the meaning of sub-section 3(1) of the 1967 Act". The effect of this decision is that such offenders are not entitled to have their sentences reduced by remission.

(iii) Territory Offenders

The legislation governing remissions applying to persons convicted of offences against Territory law is sub-section 5(3) of the Removal of Prisoners (Australian Capital Territory) Act 1968. That provision provides, in effect, that a Territory offender transferred to a New South Wales institution under the Act may, "while so in custody be dealt with in the like manner, and is subject to like laws, including laws relating to the reduction or remission of sentence, as if the order or sentence had been a like order or sentence made under a law in force in New South Wales". Territory offenders thus receive the remissions granted by law to State offenders on their sentences.

On 27 February 1984 the Probation and Parole Act, 1983 (NSW) came into force. One of the effects of this legislation was to reduce non-parole periods by remission. Sub-section 5(3) of the 1968 Act was interpreted by the Department to extend these remissions to non-parole periods imposed on Territory offenders. However, the High Court R v Paivinen 59 ALJR 543 held, in effect, that sub-section 5(3) of the 1968 Act only applied to the reduction or remissions of head sentences, not the reduction or remission of non-parole periods. While at present it is clear Government policy that Federal and Territory Offenders held in State prisons should receive the same remissions granted by law, as their State counterparts, Territory offenders, do not get the benefit of such remissions as a matter of law. However, Federal and State offenders held in New South Wales prisons, including Territory Federal offenders are entitled to the remissions. I will deal further with this problem under the heading "Impact of New South Wales Laws" below.

(iv) Calculations of remissions

While it is relatively easy to state that State remissions apply to Federal offenders, the calculation and application of the remissions can cause difficulties in practice. New South Wales, for example, has extremely complex laws for calculating remissions on sentences and non-parole periods. Even in the case of State offenders, the calculation of the remissions has given rise to appeals to the Court of Criminal Appeal and the High Court and these decisions have, in some cases, had a significant impact on the calculation of remissions eg. Smith v Corrective Services Commission (NSW) (1980) 55 ALJR 68 and Green v Corrective Services Commission (NSW) (1982) I.N.S.W.L.R. 327. In addition, the Prison Regulations provide complex calculations of remissions, where a person is convicted of escaping from lawful custody.

These difficulties of calculation are compounded where a person is serving both Federal and State terms eg. a person sentenced to a 6 months State term and a cumulative 6 months federal term. The practice has been to calculate the State term less remissions to determine the commencement date of the federal term. It is not beyond doubt, whether, in some jurisdictions, such a calculation is permitted strictly by law eg. in New South Wales, where in the example given above, the prisoner will be released from prison with remission on completion of his combined sentence with remission i.e. his release date is calculated on his total sentence of 12 months rather than on 2 separate sentences of 6 months.

While in the example given, the calculation of the expiration of the combined sentence with remission would not normally give rise to difficulties, problems can arise where non-parole periods are specified. The case of R v Steven John Walsh 55 ALR 496, a decision of the Court of Criminal Appeal is an example of the complexities that may arise. The case involves a number of State terms and non-parole periods imposed by different courts, federal terms and the calculation of the commencement of the various terms because of changes to remission laws and the order in which the terms should be served. This matter has been before a number of superior courts, including the High Court which remitted the matter back to the Court of Criminal Appeal in 1984. A recent calculation provided by the Corrective Services Commission (NSW) seems to indicate that the sentences imposed on the 14 September 1984 did not include the remissions lost by the prisoner for escaping from lawful custody on the second occasion. At present this Department and the State authorities are trying to resolve these further difficulties.

COMMENCEMENT OF SENTENCES AND NON-PAROLE PERIODS

The State and Territory jurisdictions have different laws applying to the commencement dates of sentences. These commencement dates apply to Federal Offenders. They range from

the commencement of pre-sentence detention, if any, the first sitting day of the session of the court, and the date sentence was imposed.

Where a person is being sentenced to both Federal and State terms either by the same court or by different courts care has to be taken that there is not a hiatus between the sentences. This usually arises where a non-parole period is specified, so that a person is eligible to be released in respect of his State term but has not yet commenced his Federal term. For example, a person is sentenced to 6 years' imprisonment for a State offence and is sentenced to a cumulative Federal term of 4 years to commence at the expiration of his 6 year term. The court then purports to set a non-parole period of 3 years in respect of the effective sentence of 10 years. At the time he is eligible to be considered for State parole, he has not yet commenced to serve his Federal term. He could thus be released on State parole then returned to prison, to serve his Federal term. This situation has been judicially criticised in R v Kidd 1972 V.R. 728.

Sub-section 4(5) of the 1967 Act enables a court, when sentencing a Federal/State offender, where a minimum term is to be set in respect of the State term, to direct that the Federal term is to commence at the expiration of the State minimum term. In the previous example, the court could have sentenced the person to 6 years' imprisonment, for the State sentence, imposed a 2 year non-parole period in respect of that sentence and directed the Federal term of 4 years to commence at the expiration of the 2 year minimum term and then imposed a minimum term of 1 year in respect of the Federal term. At the time the prisoner is eligible for parole he is serving both the State and Federal terms and can be considered by both the State Parole Board and the Attorney-General for conditional release.

Even where a court uses sub-section 4(5) of the 1967 Act problems can arise, particularly where changes to legislation are made. This is best illustrated by an example based on an actual case. A prisoner was sentenced to 6 years' imprisonment on a State charge on 8 March 1982 with a non-parole period expressed to expire on 8 August 1984, and then sentenced to a 10 year Federal term, with a non-parole period expressed to expire on 8 August 1988. The Federal term was directed to commence on 8 August 1984. In the ordinary course, such an order would not have caused difficulty. However, the prisoner was sentenced in New South Wales and the Probation and Parole Act came into force on the 27 February 1984. While in respect of the State non-parole period he was not entitled to remissions as a matter of law, the Parole Board of New South Wales was required to consider whether persons sentenced before the commencement of the Act should have their non-parole periods reduced by remissions. The prisoner was reviewed by the Board and granted State parole on 8 May 1984, that is, before his Federal term commenced. His State parole order required that he surrender

himself to the Australian Federal Police on 8 August 1984. I was concerned that if he arrived at an Australian Federal Police Station, particularly as the surrender date was a Saturday, the Australian Federal Police would not be sure what to do with him, as they would not have any background papers available. I arranged with the Australian Federal Police and his parole officer that he surrender to a particular station and that he was to be taken to the Metropolitan Reception Centre. I also arranged for the Reception Centre to have his file available on the Saturday, with the court orders relating to his Federal sentence. After taking all these precautions the parolee was arrested by State police on the 5 August 1984 and charged with State offences and refused bail! Where a court utilizes sub-section 4(5) of the 1967 Act it is preferable that the court does not specify any dates of expiry, but specify months or years.

THE PROBATION AND PAROLE ACT, 1983 (N.S.W.) - EFFECT ON FEDERAL AND TERRITORY PRISONERS

(1) General Background

On 27 February 1984 the Probation and Parole Act, 1983 (NSW) ("the 1983 Act") came into force. That Act had a number of provisions which affected both Federal and Territory offenders.

- . in the case of State offenders sentenced before the commencement of the Act, Schedule 3 of the Act gives the Parole Board of New South Wales the power to extend remissions to non-parole period set by a court prior to the commencement of the Act, i.e. there is a discretion vested in the Board whether a State prisoner sentenced before the 27 February 1984 should have his non-parole period reduced by remissions and if so, by how much.
- . Non-parole periods imposed by a court after the 27 February 1984 are reduced by remissions;
- . in the case of State offenders sentenced after the commencement of the Act a non-parole period may only be specified where the sentence exceeds 3 years. In the case of sentences of 3 years or less imposed after the commencement of the Act, a court may only impose a non-probation period. A non-probation period order entitles the prisoner to be released from prison after he has served the period specified less the remissions granted by law, subject to the conditions specified in the probation order.

(11) Federal Offenders

In the case of Federal Offenders sentenced before the commencement of the Act, the then Attorney-General approved that Federal prisoners would likewise be considered for possible

release on licence at the time their non-parole periods were reduced by remissions. In early 1984, some 80 to 90 prisoners were due for review under this decision, many with review dates of 1982 and 1983. A Circular was sent to Federal offenders advising of the then Attorney-General's decision. They were also advised of the approximate number of prisoners involved and that the Attorney-General had approved, as far as possible, that prisoners would be reviewed in date order, as quickly as possible, subject to the availability of prison and parole reports. Notwithstanding the Circular many prisoners and their families continually rang to enquire about their cases. This was particularly so with some women prisoners, whose review dates, it just so happened, were much later than a number of male prisoners.

Federal prisoners sentenced after the commencement of the Act and who have sentences of greater than 3 years have non-parole periods imposed and these non-parole periods are reduced by remission. The setting of non-probation periods, where the sentence is 3 years or less, has caused a number of legal and policy difficulties. As referred to above "the minimum term of imprisonment" under the 1967 Act means "that part of the term of imprisonment to which a person has been sentenced by a court that is fixed by the court as the period during which the person is not eligible to be released on parole". The Department took the view that a non-probation period was not a minimum term within the meaning of the 1967 Act. Also, a former New South Wales Attorney-General wrote to the then Attorney-General advising that the Committee of Judges of the District Court of New South Wales considered that the setting of a non-probation period was inconsistent with the setting of a minimum term of imprisonment under the 1967 Act. Accordingly, Federal Offenders sentenced to 3 years or less with a non-probation period have been considered for release on licence on completion of the non-probation period less remissions.

However, the Court of Criminal Appeal in R v Gavin held (unreported decision - 30 October 1985) that the setting of a non-probation period was a setting of a lesser term of imprisonment within sub-section 4(1) of the 1967 Act. There was no comment in the judgment whether the State or Commonwealth release mechanisms were to apply. There is judicial authority that state release procedures do not extend to federal offenders. In the decision of R v Tio the Supreme Court of South Australia held on 12 January 1984 "that the expiration of a non-parole period, whether reduced by remissions or not, has a different effect under Federal law, being that of merely conferring on the Governor-General a discretion to release on parole". Also, it can be argued that the Commonwealth intended to cover the field for conditional release of Federal Offenders by providing in sub-section 5 of the 1967 Act for release on parole, section 19A of the Crimes Act for release on licence and section 20 Crimes Act 1914 for the release on recognizance. As

it is not beyond doubt that a prisoner in these circumstances can be released on parole, such federal offenders are continued to be released on licence.

While it was proposed that amendments be made to the 1967 Act to deem State non-probation periods to be minimum terms for purposes of the Act, these have not been proceeded with because of the announcement late last year by the Premier of New South Wales that the Probation and Parole Act, 1983 (N.S.W.) is being further reviewed. While the current procedures are cumbersome, effect is nevertheless being given to the court's intention about the time at which the prisoner is to be considered for release.

(iii) Australian Capital Territory Offenders

As mentioned earlier, the Parole Board of the Australian Capital Territory is empowered to release Territory Offenders on parole on completion of their non-parole periods.

The Parole Ordinance makes it clear that only in the special and limited circumstances set out in sub-section 20(3) of the Ordinance may the Board release a Territory offender on parole before completion of the non-parole period. If the Parole Board considers it appropriate that a prisoner be released in a situation where sub-section 20(3) of the Ordinance is not satisfied, the Board makes an advisory recommendation to the Attorney-General that the prisoner be released on licence under section 8A of the Removal of Prisoners (Territories) Act 1923 as applied by sub-section 7(2) of the Removal of Prisoners (Australian Capital Territory) Act 1968.

As mentioned earlier, before the decision in R v Paivinen 55 ALJR 543 the Department had interpreted sub-section 5(3) of the Removal of Prisoners (Australian Capital Territory) Act 1968, as entitling Territory prisoners sentenced after the commencement of the 1983 Act to have their non-parole periods reduced by remission. As the Board does not have power to release persons with their non-parole periods reduced by remissions, in appropriate cases the Board makes advisory recommendations to the Attorney-General that the prisoners be released on licence.

Likewise, the then Attorney-General approved that offenders sentenced before the commencement of the Act would be reviewed for possible release on licence in a similar manner to federal offenders. Again in these cases the Attorney-General acts on advisory recommendations from the Board.

Since the decision in R v Paivinen it is clear that Territory Offenders are not entitled to have their non-parole periods reduced by remission. However, the day the decision in R v Paivinen was handed down, the Attorney-General announced that amendments would be made to the relevant legislation, so that

Territory Offenders held in New South Wales gaols would receive the same remissions off their non-parole periods as are granted by law to their State counterparts. He also announced that as an interim measure, Territory Offenders would continue to be considered for release on licence at the time prisoners would have been considered for release had the remissions applied.

The High Court considered in R v Paivinen that it would be desirable for such a policy to be set out in the law and that the present law should be amended. To not have adopted the administrative scheme would have meant that one group of prisoners would have been treated differently from all other prisoners in New South Wales. This is contrary to the present policy that Commonwealth Offenders be treated in the same way to their State counterparts. A Circular was sent to Territory Offenders advising of the High Court's decision and the administrative measures being taken.

To date the legislation has not been amended because of the announcement late last year by the Premier that the Probation and Parole Act is to be further amended.

The Victorian Pre-release Scheme

The Community Welfare Services (Pre-release Programme) Act 1983 (Victoria) enables the Adult Parole Board, in appropriate cases, to grant a pre-release permit to a State prisoner. It enables select State Offenders to live in the community under strict conditions, including a requirement to attend an Attendance Centre. The State legislation also lays down when a State Offender is eligible to be considered for release on a pre-release permit. This Act does not apply to Federal Offenders.

The former Attorney agreed to an interim measure, pending final review following receipt of the Sentencing Report from the Australian Law Reform Commission. The former Attorney-General agreed that in appropriate cases, he would recommend to His Excellency the Governor-General that a federal offender be released on licence, so that he may take part in the pre-release programme. The licence when granted operates to allow the pre-release of a Federal Offender at the same time that a State prisoner could be released. The licence contains similar conditions to those in a pre-release permit. At the end of the pre-release period, the special conditions cease to operate and the normal parole conditions apply. Again a Circular was sent to Federal Offenders serving terms in Victoria advising of the Attorney-General's decision.

The Future of Existing Laws

I have gone into some detail into the operation of the existing laws and practices. The examples I have given by no means exhaust the problems that arise. There is a complex interaction

between Federal and State laws and at times grey areas as to how far the State laws apply. The current legislation regularly gives rise to complex sentencing problems, if the requirements of the 1967 Act are not satisfied or sub-section 4(5) of the 1967 Act is not utilised to accumulate federal terms, where there is an earlier State term. These complex sentencing problems have given rise to administrative practices, using the release on licence mechanism, so that prisoners are not disadvantaged because of the complexities of the law. The alternative would have been to adopt a highly legalistic approach to these problems and not to use the release on licence procedure to give effect to the sentencing court's intention. However, as the liberty of the subject is involved, I do not consider that it would have been proper to adopt such a course.

The co-operation and goodwill that the Department receives from the States and the Northern Territory Corrective Services contact officers plays a significant part in the present system of conditional release working. Needless to say, the system also requires the co-operation of His Excellency's staff and the staff of the Attorney-General of the day. The policy adopted by successive Attorneys-General and the Department is that a decision should be made by the Attorney-General whether a prisoner is to be released on completion of his non-parole period in sufficient time, that if he is to be released, he may be released on the due date. On occasions this deadline can only be met by the co-operation and common sense of all involved in the conditional release of Federal Offenders.

Another matter I should mention is that in my experience prisoners, their families and friends become very anxious when changes are mooted or made to State legislation, particularly changes to remission laws or schemes to advance their possible release into the community. Correspondence from prisoners or on their behalf rises noticeably, as do the phone calls from prisoners and from other interested parties. Their concern usually is expressed along the lines that as they are serving Federal terms in State prisons, they should be entitled to the same benefits as State prisoners, who they are living alongside while in prison. To not get the same benefits would mean they are being treated differently. Only rarely is correspondence received from a Federal Offender stating he should get the same benefits as Federal Offenders in another jurisdiction.

When resources permit a detailed pamphlet is to be prepared for use by probation and parole officers, and a less detailed pamphlet for use by Federal and Territory Offenders. The pamphlet should ideally explain who are Federal and Territory offenders, the remission laws which apply, how they are considered for conditional release and the consequences of breaching a parole order or licence and procedures for applying to the Attorney-General for permission to travel overseas

(Federal Offenders cannot travel overseas without permission of the Attorney-General except in the case of persons liable to deportation).

Another area of concern is that Federal parolees and licensees are required to be under supervision for the full balance of their Federal terms. In a significant number of cases this period is in excess of 10 years. I consider that this is a matter that needs to be addressed, as it is doubtful whether parolees or licensees benefit from such long term supervision. It may be that consideration should be given to say 5 years as a suitable maximum period for supervision and that for the balance of the period the person be required to be of good behaviour and not violate any law. Where a parole order or licence is revoked by the Governor-General acting on the Attorney-General's advice how do you determine what is the appropriate balance of his revoked term that he be required to serve? There are no statutory guidelines and each case is treated on an individual basis having regard to such matters as the balance of the Federal term required to be served, his response under supervision and the nature of the breach and whether there have been other breaches of the parole order or licence. In this regard I note that at least one jurisdiction has enacted three months as the maximum period of the balance of the former term that the person may be required to serve where a parole order is cancelled other than where the parole order is automatically cancelled because a further term of imprisonment is imposed.

In summary, for my own part, I would prefer simplified sentencing procedures with pamphlets or other such documents explaining the sentencing of Federal and Territory Offenders to be made widely available for the use of courts, the prosecutors, and the accused's solicitors and for the conditional release procedures to be made less cumbersome. At the same time principles of law enforcement need to be balanced against the personal needs of the prisoners. While it may be trite to say, it is often overlooked in media coverage of convicted prisoners that imprisonment not only affects prisoners but has a significant impact on their families and friends. It is also my view that whatever replaces the existing system the legislation should be certain, particularly any transitional provisions relating to remissions and procedures for conditional release. If some recent changes to State laws in the area of entitlement to remissions are any guideline, one jurisdiction applied the remissions as a matter of law to those prisoners in gaol from the day the legislation came into force, another jurisdiction vested a discretion in a statutory authority. My experience is that the first course is preferable. Where a prisoner is given a date for possible conditional release, even if a note or circular explains it is a review date because of changes to the law and not necessarily the date they will be released, prisoners, quite naturally, adopt it as their release date. No

amount of correspondence or explaining by telephone will change this attitude. Consequently certainty should be the reformer's guiding principle in this most difficult and most complex area of the law.

In the paper I have deliberately concentrated on some of the practical and legal problems that arise under the existing legislation. Whatever legislation the Commonwealth or States adopt relating to sentencing, remissions and conditional release and whatever the philosophical base for the policy enunciated in the legislation, it is the officers in the Commonwealth and State Departments responsible for the administration of the legislation who are faced with the personal problems that arise from the incarceration of offenders, together with the legal and policy problems that arise from the effect of the legislation.

The views expressed in this paper are my own and do not necessarily represent those of the Attorney-General or the Department.

TABLE 1

Commonwealth Offenders as at 1 February 1986

State or Territory	Total No.	Males	Females	Narcotic Drug Offenders		
				Total No.	Male	Female
NSW	118	107	11	92	82	10
VIC	48	42	6	31	27	4
QLD	27	24	3	11	9	2
SA*	22	21	1	11	10	1
WA	35	31	4	28	24	4
TAS	2	2	0	0	0	0
NT	3	3	0	2	2	0
ACT (Territory Offenders)	71	70	1	9	9	0
(Federal Offenders)	2	1	1	0	0	0
TOTAL	327	302	26	184	163	21

* Includes one Territory life prisoner and one Governor-General's Pleasure detainee transferred from NT to SA under the Removal of Prisoners (Territory) Act 1923

A MATTER OF COMPARATIVE INJUSTICE

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This paper probably should have had a sub title in the form of a question: Which type of uniformity should be pursued in the sentencing of Federal offenders in Australia? As that is a little wordy, and as at the bottom line the issue really is a matter of comparative injustice, the shorter title is chosen.

The whole question of uniformity in the sentencing of Federal offenders might sound a little esoteric as the number of Federal offenders who are sentenced to terms of imprisonment is very small, and it cannot be claimed that this is a subject that excites vigorous public debate. Nevertheless, it is a subject of some significance as, in my view, the Australian Law Reform Commission in the 1980 interim report Sentencing of Federal Offenders made a fundamental mistake on the issue of uniformity and that mistake seriously damaged the credibility of the report as a whole. Also, in my view, that mistake tarnished the otherwise bright image of the Australian Law Reform Commission. That report provoked furious condemnation from the states, especially from ministers responsible for correctional services. Fortunately it was only an interim report, even though it was 636 pages in length, and I express the hope that the Commission will not repeat the same mistake in its final report which is now in preparation. I would like to make it clear at the outset that my criticism of the 1980 report of the Australian Law Reform Commission is not to be seen as a criticism of the current President and Commissioners as they cannot be held responsible for the views of their predecessors.

Before presenting the detail of my argument I would like to say a few words about the numbers of Federal prisoners. I have said that the numbers are very small, but the truth is that no-one can be absolutely sure of the actual numbers. It all depends upon how a Federal prisoner is defined and on the reliability of the recorded procedures. In our monthly publication, Australian Prison Trends, we include the numbers of Federal prisoners in each state and territory, as indicated to us by the Commonwealth Attorney-General's Department where a register of Federal prisoners is maintained. From this source it would seem Australia's total ranges between 250 and 280 at any one time.

Another Institute publication, the report of the annual census of

census of prisoners, compiled by John Walker and me, in 1984 yielded a larger figure, 343. This was in response to the question 'Is any offence or charge a Federal offence?'. The number is larger here, probably because there are always some people serving time for both Federal and State offences. They are 'hybrid' as opposed to 'pure' Federal prisoners. Conversely, there are probably others who are not counted as Federal prisoners because they are convicted by a State law applicable by virtue of the Commonwealth Places (Application of Laws) Act 1970, for example, armed robbery of a Commonwealth bank. These people may not themselves realise that technically they could be regarded as Federal offenders. Even though we cannot be absolutely certain about the actual number of Federal prisoners, it is clear that they constitute a very small minority of all persons in custody.

Returning to my central theme, I would like to quote from the 1980 report of the Commission. On the question of uniformity, which it described as 'a critical threshold issue', the Commission was quick to take a hint from the wording of its terms of reference. It said:

The Commission has reached the conclusion that it is desirable 'to ensure that offenders against a law of the Commonwealth are treated as uniformly as possible throughout the Commonwealth.' In the Commission's view this means uniformity, as far as possible, between the different State and Territory jurisdictions of Australia. Commonwealth laws and procedures which diminish such uniformity should be changed to bring them into accord with this principle even if it results, for a time, in differences in the way in which, within a State or Territory jurisdiction, Commonwealth and local offenders are treated. A Commonwealth law is a national law. A breach of this law by a person anywhere in Australia should be attended by generally similar consequences, ranging from decisions to charge and prosecute to the punishment imposed following a conviction.

These grand words, with their ring of reforming zeal, make the notion of national uniformity sound like a universal good that is beyond dispute. Uniformity, like motherhood, is not something that can be easily dismissed, but there is an alternative view, that of uniformity within jurisdictions. This alternative view of uniformity has been the central philosophy of the Commonwealth Prisoners Act which has been in force since 1967. It is also implicit in section 120 of the Constitution which requires the States to accept Commonwealth prisoners in State prisons, an arrangement which has been described in that ugly term the 'autochthonous expedient'.

The issue of sentencing uniformity can be analysed in terms of two different sets of consequences. In the first place, there is the question of the length of sentence imposed, and secondly there is the question of the actual conditions that are imposed upon prisoners. It was the second consequence of uniform treatment of Federal prisoners that provoked alarm among Ministers responsible for correctional services. In May 1980 they expressed, in a joint press statement, 'very great concern at the potentially damaging and destructive impact that some of the recommendations [of the report] would have on State and Territory prison and parole systems throughout the nation'. The Ministers were obviously appalled at the possibility that some outside authority from the Commonwealth was going to impose its own standards for the treatment of Federal prisoners, who comprise only about 2.5 per cent of all Australian prisoners at any time. I personally share the view of the State and Territory Ministers that it would be quite inappropriate for the Commonwealth, which pays nothing for this service, to impose its own standards in relation to health care, visiting, education and training, exercise, etc. on this small group of prisoners. Even if the Commonwealth did pay the States and the Northern Territory for looking after its prisoners (as New South Wales is paid for Australian Capital Territory prisoners) it would still be wrong in principle for different standards to be applied to this group.

But the first issue is that of the length of sentences imposed. It may be regrettable but it is nevertheless a fact of life that some Australian jurisdictions are more punitive than others. This is most vividly illustrated by reference to the differences in Australian imprisonment rates, the number of prisoners per 100,000 of the relevant populations. In January of this year these rates varied between 29.6 for the Australian Capital Territory and 248.3 for the Northern Territory. Even among the States the rates varied between 45.8 for Victoria and 107.1 for Western Australia, and it is important to note that these differences have little or nothing to do with the incidence of crime. (The one exception here is the Northern Territory where both the crime rate and the imprisonment rate are extraordinarily high.) It is quite clear from the annual censuses of prisoners which have been conducted by this Institute for the past four years that the actual sentences imposed vary from State to State. It seems to be the case, for example, that one is very much more likely to be imprisoned for traffic offences in Queensland and Tasmania than in any other jurisdiction. Similarly, the evidence seems to suggest that the average sentence imposed for burglary is somewhat higher in Western Australia than elsewhere in the country. If and when we ever have national comprehensive data on sentencing practices it will be possible to illustrate this point much more graphically.

The underlying question as far as the sentencing of Federal offenders is concerned is whether or not it is morally correct for these regional differences in the severity of sentencing to be reflected in the narrow case of offenders against the laws of the Commonwealth. A couple of hypothetical examples will serve to illustrate the practical consequences of national uniformity and uniformity within jurisdictions:

Example 1. Two offenders, one in Melbourne and the other in Perth, both defraud the Commonwealth Bank of \$50,000 and the Perth offender is sentenced to seven years and the Melbourne offender to four years. This would seem prima facie to be a matter of considerable injustice as both are Federal offenders who have committed the same offence, albeit in different regions.

Example 2. This time two offenders are both located in Melbourne and both have committed bank frauds, each to the value of \$50,000. In one case the offence is against the Commonwealth Bank and in the other case it is against the State Bank. If the offender against the Commonwealth Bank is sentenced to seven years and the offender against the State Bank is sentenced to four years we have again a prima facie case of injustice as both have indulged in almost identical forms of criminal behaviour.

The question is: If both forms of apparent injustice cannot be avoided, which should have priority? It is, plainly and simply, a matter of comparative injustice. If the Law Reform Commission position of 1980 were pursued, then the Perth and Melbourne defaulters of the Commonwealth Bank should be sentenced uniformly and it is simply bad luck or good luck that the defaulter of the State Bank in Melbourne received different treatment. In contrast, if we pursued the notion of uniformity within jurisdictions the two Melbourne offenders should receive the same sentence and it is simply bad luck or good luck that the Melbourne and Perth defaulters of the Commonwealth Bank are treated differently.

I have absolutely no doubt that the form of injustice that I would most want to avoid is that which is most apparent, that is, the injustice that would be seen within the same jurisdiction. It would even be more apparent if the two offenders, in the Melbourne case, were sentenced by the same court (in one case in its exercise of Federal jurisdiction) and they were both sent to the same prison, perhaps occupying cells next to each other. Any difference in their sentence in that case would be totally inexplicable as a matter of ordinary notions of justice. Unfortunately the Australian Law Reform Commission took an opposite view and, as a consequence, would be actively creating injustices of that sort if its proposals were accepted.

It might be argued that I have over-stated my case as there are many offences against the Commonwealth which have no direct parallel in the laws of the States and therefore the differences or injustices that would result from a policy of national uniformity would not be readily apparent. It is true that persons convicted and sentenced for aircraft hijacking, income tax evasion and some forms of smuggling do not have exact parallels in State and Territory laws, and therefore in these cases the issue of intra-State uniformity is less significant. But it must be remembered that there are hardly any convictions resulting in imprisonment in these areas and in the high volume area of fraud there are many parallels in State and Territory laws.

The major Federal offence category, however, that results in imprisonment is that related to drugs, particularly the importation of drugs. A small but very important study of the sentencing of Federal drug offenders by my colleagues, Ivan Potas and John Walker, was published by the Institute in February 1983. This study produced the somewhat unexpected result that there seemed to be a high degree of consistency in the sentences imposed if one took into account a fairly small number of factors such as the value of the drugs, the prior record of the offender, evidence of remorse, etc. This study certainly cast doubt on the belief that there is considerable unjustified disparity in the sentencing of this group of Federal offenders.

From the point of view of the States and the Northern Territory it may be a matter of little consequence that individual offenders feel an acute sense of injustice brought about by the pursuit of a misguided philosophy of national uniformity. Those individual prisoners might be more difficult to manage because of their sense of grievance, but their numbers would inevitably be very small and they would therefore be unlikely to foment major disturbances such as riots or the destruction of buildings. Much more offensive from the prison administrators' view is the proposal in the 1980 report that separate standards should apply to the treatment of Federal prisoners. This proposal raises the spectre of all Australian prison systems having two separate classes of prisoners, each with its own set of rules and regulations applying to privileges, grievance mechanisms and release procedures. It would not be difficult to imagine that Federal prisoners would have specified minimum cell sizes, hours of exercise, the right to work, etc. which would not apply to local prisoners. A management nightmare would be created. It is hardly a recipe for co-operative federalism.

A minority view in the 1980 report of the Law Reform Commission suggested that the Federal Government should establish its own complete criminal justice system which would include its own custodial facilities. This view was rejected by the majority on the grounds of practicality, and I have previously described that minority view as logical but naive. I now take a slightly

different view. As I indicated earlier, Federal prisoners comprise approximately 2.5 per cent of all Australian prisoners. In fact, in January this year there were 275 Federal prisoners in a total of 10,554, and the Federal prisoners are located in all States and the Northern Territory. It would certainly be impractical to establish separate Federal facilities in all Australian jurisdictions, but there are two possibilities that might be worth exploring if the Commonwealth Government really wanted to develop an interest in this field and demonstrate to the States how modern and progressive prison regimes should be conducted.

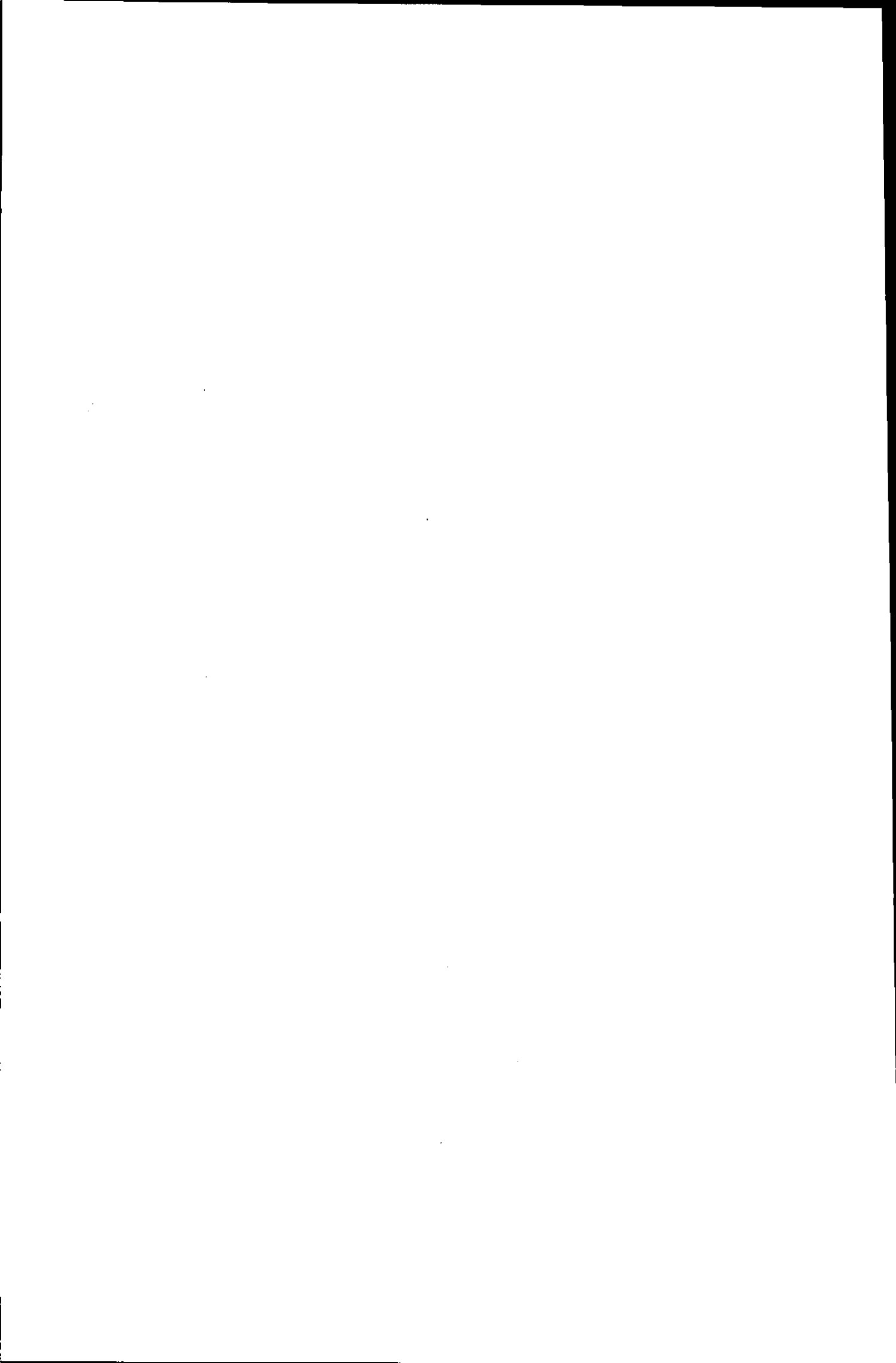
The first possibility is in New South Wales where in January this year there were 116 Federal prisoners. That is surely a large enough number in one jurisdiction to warrant a separate institution. Also, there is the endless debate about whether or not the Australian Capital Territory should have its own prison. Notwithstanding the complications of Australian Capital Territory self-government and recognising the difference between territorial offenders and Federal offenders, it might still be possible for an Australian Capital Territory prison of the future to house both types of offenders from the local region. This would eliminate the undesirable aspects of transportation of prisoners to New South Wales (but would introduce a small degree of transportation from New South Wales to the Australian Capital Territory) and again could provide an opportunity for the Federal Government to be seen to be taking the matter of prison reform seriously. Quite frankly, I very much doubt whether either of these options would be pursued by any Federal Government as it is obviously much simpler to let the States and the Northern Territory handle its problems, but those two opportunities are there and they could be pursued if the Federal Government were so inclined.

Returning to the matter of uniformity, it would of course be desirable if the regional differences in sentencing and the treatment of offenders could be minimised. This is after all one country, albeit comprised of aggressively independent jurisdictions, and it is offensive to our notion of fairness if the same behaviours result in significantly different penalties in different parts of the country. I believe that these differences can be overcome by a comprehensive program of education and information dissemination. To this end one of the proposals of the 1980 report of the Commission that I would strongly support is the proposal to establish a National Sentencing Commission. If such a Commission were able to gather detailed statistical information on sentences imposed for different offences in the different Australian jurisdictions and this information were widely disseminated in a readily understandable form, I believe that a self-correcting mechanism would start to come into play. A Sentencing Commission could, I believe, establish appropriate guidelines for sentencing but it

should not have any real authority over the decision-making of individual judges and magistrates. It is a matter of considerable regret to me that the States and the Northern Territory did not see their way clear to support this proposal when it was made.

I would like to make a final comment on the general focus of the Law Reform Commission in undertaking its reference on sentencing. In my view, far too much attention has been directed to the matter of Federal prisoners and far too little attention has been directed to the much larger numbers of Federal offenders who are dealt with by the imposition of penalties other than imprisonment. It is the effectiveness of the total system of sentencing Federal offenders that needs to be examined rather than concentrating on the very small group of Federal prisoners who, in my judgment, will always be the responsibility of the States and the Northern Territory.

Needless to say, I look forward to reading the final report of the Australian Law Reform Commission on this reference with a great deal of interest, particularly in relation to the issue of sentencing uniformity, or, as I have described it, the matter of comparative injustice.



SENTENCING OPTIONS IN
THE AUSTRALIAN CAPITAL TERRITORY

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This paper may have been more appropriately entitled 'The lack of sentencing options in the Australian Capital Territory', as there is no doubt that the Australian Capital Territory is poorly served by the existing law governing sentencing options. There exists the traditional options of imprisonment, suspended sentence (which may be fulfilled partially or in full with appropriate recognizance), various recognizance powers, the 'old fashioned' power of fining, and various combinations thereof. From 12 August 1985, there also has existed a Community Service Order scheme. The first material released on such a scheme was circulated by the Australian Institute of Criminology in 1974. At that time William Clifford commented that discussion of Community Service Orders in the Australian Capital Territory had been carried on for a considerable time. Yet it was not for another eleven years that those discussions finally came to fruition. The actual operation of the scheme will be discussed later in this paper.

On the question of custodial options, the Australian Capital Territory really only has one - that of imprisonment. The Australian Capital Territory is still involved with what has been emotively termed 'transportation'; in other words, every prisoner sentenced to a term of imprisonment in the Australian Capital Territory is transported to the New South Wales system. Custodial options that might ideally be appropriate for the Australian Capital Territory, such as minimum security farms and forestry camps, work-release hostels and periodic detention centres or hospital orders, are not likely to be successful whilst the practice of transferring prisoners to New South Wales continues. In June 1979, the Australian Law Reform Commission in their discussion paper No. 10, Sentencing Reform Options, advanced the view (somewhat diluted in the final report published in 1980) that there was a need for the construction of correctional institutions for adult offenders in the Australian Capital Territory. The Commission stated that this view was shared by judges and magistrates, police and welfare authorities. That situation has not changed.

An Australian Capital Territory Prison?

In December 1984, Professor Vinson reported and recommended that there should be a prison system in the Australian Capital

Territory catering for all but maximum security adult prisoners. It was emphasised that such provision should be made forthwith. Professor Vinson acknowledged the financial constraints and suggested that use of existing facilities, thereby minimising the need for construction of new facilities. He recommended that initially medium to low security prisons could be housed within the Territory. He also recommended that the courts should have the initial power to classify prisoners: all maximum security prisoners to be given an 'A' classification and then proceed to the New South Wales system - with the ability to earn their way back to a lesser security classification allowing return to the Australian Capital Territory system. Medium to low security prisoners could be contained with the Territory through the implementation of work-release programs, periodic detention, detention centres, and all those other semi-custodial options. Particular emphasis would be placed upon rural type afforestation camps.

Against this proposition, is the age-old argument based on economies of scale and need. The Australian Capital Territory has a relatively small prison population and yet requires a large number of options and consequently the cost would be high. A future argument posed is based on the fear that once a prison was established in the Australian Capital Territory, the courts would fill all the places. The argument may quickly be dismissed - with a prison population of six per cent in the Magistrates Court, it is highly unlikely that such a situation could arise.

It was refreshing to hear the Victorian Attorney-General, Mr James Kennan, at this conference describe the real problem regarding incarceration of prisoners as a basic question of politics. Prisons cost money, and the harsh reality of the matter is that taxpayers are not content to support the expenditure of scarce financial resources of government on the construction of prisons. Mr Kennan's figures indicate that in creating a high-security institution in Victoria, the cost would be approximately \$200,000 per bed whilst for medium to low security, the cost would approximate \$100,000 per bed. It is submitted that these figures equally apply in the Australian Capital Territory. In response to the cost argument however it must be realised that the Australian Capital Territory presently pays for prisoners' places in New South Wales. On a very simplistic argument, had the money spent on prisoners transported to New South Wales over the past thirty years been saved, the Australian Capital Territory could now adequately fund its own prison. Naturally, there is the normal community opposition generated by the mere presence of prisoners in the area. Comments such as 'I do not mind having a prison in the Australian Capital Territory so long as it is on the other side of the lake' are to be expected, but present no logical argument against the creation of a prison within the Territory. The other human factor recently investigated by David Biles and Geoff Cuddihy in

their report A Survey of A.C.T. Prisoners in N.S.W. Prisons is the effect of removing people from their local community. The vexed question of whether the Australian Capital Territory should have its own prison is simply raised to highlight the dilemma: whilst the need is great, the financial difficulties are appreciated. As a result, there is a need to concentrate on the non-custodial options which assist in relieving the problem.

One of the most important points for the public to appreciate is that there are dispositions of sentence other than imprisonment which should be perceived as punishment. That has been the overwhelming problem in promoting the 'decarceration' argument discussed by Dr Ken Polk, earlier at this conference.

Community Service Orders

The Australian Capital Territory presents an example of the need for public acceptance in non-custodial sentences. Between August 1985 and 1 March 1986 the Australian Capital Territory has had forty-six persons placed in the Community Service Order scheme. A total of eighty-four people had been assessed for suitability in the program during that period, and only two people had breached, or were likely to breach, orders. That figure is significantly lower than the number of people breaching parole or probation orders. The average period awarded is relatively high at 175 hours. The scheme, whilst still in its 'honeymoon period', has operated with a great deal of community acceptance. Built into the scheme is a requirement of a preliminary assessment for suitability conducted by the Community Service Order Unit. It is upon receipt of the assessment report that the court will choose whether or not to impose the Community Service Order. There has been an incredible use of voluntary community groups supervising the Orders, and whilst the possible dangers in having unqualified volunteer supervisors is obvious, it is refreshing to report that no problems have yet arisen. In view of the unavailability of employment in the Australian Capital Territory - particularly in regard to high youth unemployment, it is important that the scheme not be seen to be taking from those people who need work. To the present time, that has not been a complaint whilst many charitable and volunteer organisations have benefitted enormously from the work provided by those performing Community Service Orders.

It is in this area therefore that there is a need for public acceptance of this type of non-custodial disposition as a viable and constructive form of punishment. It has a rehabilitative character and importantly it is served within the community as a repayment to society. Hence, it must be promoted as a genuine alternative to imprisonment. The approach which has been taken under the governing Ordinance is that the Community Service Order should be a genuine alternative to imprisonment, and not simply another non-custodial option.

On this topic it is important to discuss the role of the media. It is often said that the media is to blame for all evils, but in this particular area the media reaction has been excellent. The local Australian Capital Territory newspaper, The Canberra Times, has featured special articles on the matter - publicising the scheme and explaining the operation, spirit and background of the scheme. This is one area where the value of media participation in shaping public perception can be importantly demonstrated. The future may hold some problems, but in its period of commencement, the media has played a very useful and instructive role in the successful operation of the scheme.

New Sentencing Options

There are other non-custodial options that should be considered although not yet in force. They include forfeiture of rights, privileges and property, hospital and treatment orders (particularly having regard to the drug addicted and mentally ill), criminal bankruptcy, and the new and popular option which has been termed 'in house arrest'. The last of these options is the subject of some controversy as it stretches the conditions of bonds to the extreme. Although there are certainly risks involved in this type of option and in a small community like the Australian Capital Territory, where policing of such orders might be difficult, some experimentation in the area is required.

Another issue with respect to sentencing options in the Australian Capital Territory is the change of policy directing greater importance to the concept of community-based corrections. However, if there is to be involvement with more constructive non-custodial options, there needs to be a correlative change in the type of monitoring required. Orders will be required to be closely checked and enforced if the system is to escape the possibility of falling into disrepute. Mr Daryl Kidd and Mr Kevin Gasgoine of the Corrective Services Unit have stated that there is to be carried out an active review of all cases of probation in the Territory, and a classification of the various needs of supervision, to enable a more adequate spread of scarce resources of the Unit. That type of action is indicative of the type of constructive re-organisational policy required to ensure the success of non-custodial options of any type.

It is pleasing to report that since the implementation of the Community Service Order scheme a consultative committee on community-based corrections has been formed by the Minister for Territories. The aim of the committee is to attract a large representation of various people to advise the Minister of the effect of community-based corrections. This sort of community check, or public accountability, is vital and long overdue in this area. It remains to be seen how successful this initiative will be.

Before leaving the question of Community Service Orders there is the related topic of the use of the Order in default of payment of a fine. Whilst the power to do so exists in the relevant legislation, it is an option yet to be exercised. There are some problems in the area, not the least being the lack of prescribed procedure to be followed where the option is requested. Nor is there a formula for converting amounts of fine into number of hours of community service to be performed. There are also concerns that if the system is too generously applied, huge administrative costs would ensue. As a result, there must be a generous exchange rate between the amount of time and community service order to be worked out. It can only be properly applied to fines of a considerable level.

Other Relevant Issues

A number of further topics need to be addressed. Firstly, it is instructive to consider the role of the media when discussing sentencing options. In a small community such as the Australian Capital Territory, there is no doubt that the role of reporting cases is important. It is submitted that amongst the people of Canberra, the Canberra Times practice of reporting all prescribed concentration of alcohol (PCA) offences has been the best deterrent of all - possibly more successful than random breath testing. The Canberra Times has also given excellent coverage to views challenging the present sentencing system. Recently, it featured an article by Mr Ivan Potas discussing what he perceived as 'dishonest sentencing'. It is the publication and circulation of this sort of discussion which gives the public greater awareness regarding sentencing practices. The more the public are aware of, and understand the process, the easier the process will be to implement.

There needs to be mentioned the problems that flow from the Paivonen decision, relating to the question of determinate sentencing. The High Court of Australia held that remissions to which New South Wales prisoners were entitled were not applicable to Australian Capital Territory prisoners. In response, the Attorney-General, Mr Bowen, immediately directed that in any event such remissions were still to be applied to Territory prisoners. That action does not however solve the problem, and it is hoped that indications of legislative change on the matter will eventuate.

Pre-trial diversion for adult offenders is certainly a possible sentencing option, and one which has effect in the widest sense. As a result of a conference at the Institute of Criminology held in August 1985, the Director of Public Prosecutions is working with members of the Institute and many other interested parties on a scheme for diversion of adult offenders. If it is given effect, it will be the first scheme of its type in Australia. Its application to offenders and offences of drug possession and use is being actively considered.

The problem of drug addiction has been tackled in a unique manner in the Australian Capital Territory. With an estimated 60-80 per cent drug orientated property offences, the practice has grown, particularly in the Magistrates' Court, and to some extent in the Supreme Court, of delaying sentence after the plea, giving the person the chance of rehabilitative effort. Naturally that offends 'due process', but in many cases it is successful. If the attempt fails, it causes problems for the sentencer: What happens if the rehabilitation fails? Is the offender sentenced for failure of rehabilitation or for the original offence? Further problems arise as the process inevitably lends itself to bogus claims of drug addiction. Consequently there needs to be a very close and reliable assessment by people who can be trusted to ascertain whether someone genuinely has a drug addiction problem. It also raises the philosophical question: Are drug addicts to be given preferential treatment? Perhaps the only solution is hospital orders whereby people are given the sentencing option of being sent to a place where rehabilitation can actually be achieved. Whilst that seems feasible in theory, there are no institutions in the Australian Capital Territory available for that use in practice.

It is obvious that all the preceding options discussed are useless if the resources and facilities are not available. In particular, the Australian Capital Territory has a problem with regard to the treatment of the mentally ill, and their fitness to plead. There have been recent instances highlighting this grave problem. When a person comes before the Magistrates' Court and is found unfit to plead, the matter is referred to the Supreme Court whereby the person is detained at the Governor-General's pleasure until he or she is fit to plead. The area requires urgent attention.

In summary, it remains to be stated that a sentencer requires the widest options (custodial or non-custodial) and maximum flexibility in their application. The more information a sentencer has - not only regarding the offender, but also about sentencing trends and practices - the better equipped he or she is to make an accurate and appropriate decision. Again, the importance of public opinion cannot be underestimated, as whatever sentencing system is employed, there must be corresponding public faith.

Finally, in the Australian Capital Territory there has been some experimentation in the statutory prescription of sentencing principles with s. 17A of the Crimes Act 1914 (New South Wales). That section prescribes that imprisonment should be an option of the last resort.

Attached to this paper are some basic statistics concerning the sentences imposed by Australian Capital Territory courts. The figures are derived directly from Australian Bureau of Statistics publications.

TABLE 1

AUSTRALIAN CAPITAL TERRITORY SUPREME COURT
CRIMINAL MATTERS FINALISED - MATTERS PROVEN AND NUMBER OF DETENTION PENALTIES IMPOSED
(TWELVE MONTHS ENDING 31 December)

Type of Matter	1983		1984		1985	
	Matters Proven	Detention Imposed	Matters Proven	Detention Imposed	Matters Proven	Detention Imposed
Homicide	2	1	6	6	7	7
Assaults (excluding sexual assault)	11	10	14	14	71	52
Sexual Assaults	5	3	10	7	16	16
Other Offences Against the Person	2	2	7	6	28	25
Robbery	31	29	14	13	40	25
Breaking and Entering	36	34	58	28	56	40
Fraud and Misappropriation	45	43	6	3	49	13
Receiving/Possession of Stolen Goods	4	4	6	1	2	-
Other Theft	8	8	6	4	6	3
Property Damage	6	5	7	5	9	8
Offences Against Judicial Procedures	3	3	1	-	3	3
Possession/Use of Drugs	6	6	5	-	6	-
Dealing and Trafficking in Drugs	18	18	12	2	55	36
Totals	178	170	152	89	348	228

TABLE 2

MAGISTRATES COURT - DETENTION ORDERS
(TWELVE MONTHS ENDING 31 DECEMBER)

	1983		1984		1985	
	No.	% of Total	No.	% of Total	No.	% of Total
TOTAL MATTERS FINALISED	334		452		403	
<u>Length of Order</u>						
Less than 3 months	137	41.02	143	31.64	54	13.40
3 months to 12 months	127	38.02	99	21.09	188	46.65
1 year to 2 years	70	20.96	210	46.46	161	39.95
<u>Total Orders by Offence</u>						
Drug Offences	1	0.30	1	0.22	9	2.23
Robbery and Extortion	2	0.60	-	-	-	-
Other Offences (Taxation etc.)	3	0.90	1	1	3	0.74
Offences Against the Person	20	5.99	17	3.76	18	4.47
Property Damage and Environmental Offences	21	6.29	12	2.65	12	2.98
Motor Vehicle (Traffic Offences)	28	8.38	27	5.96	43	10.67
Offences Against Good Order	35	10.48	38	8.41	39	9.68
Break/Enter, Fraud, Other Theft	224	67.06	357	78.98	279	69.23

TABLE 3
MAGISTRATES COURT - RECOGNIZANCE/BOND/PROBATION
(TWELVE MONTHS ENDING 31 DECEMBER)

	1983		1984		1985	
	No.	% of Total	No.	% of Total	No.	% of Total
TOTAL MATTERS FINALISED	334		1126		1768	
<u>Length of Order</u>						
Less than 3 months	137	41.02	-	-	-	-
Less than 6 months	-	-	13	1.15	17	0.96
3 months to 12 months	127	38.02	-	-	-	-
6 months to 12 months	-	-	318	28.24	233	13.18
1 year to 2 years	70	20.96	626	55.59	926	52.38
More than 2 years	-	-	169	15.01	592	33.48
<u>Total Orders by Offence</u>						
Drug Offences	1	0.30	31	2.75	50	2.83
Robbery and Extortion	2	0.60	2	0.18	3	0.17
Other Offences (Taxation etc.)	3	0.90	3	0.27	20	1.13
Offences Against the Person	20	5.99	107	9.05	109	6.16
Property Damage and Environmental Offences	21	6.29	46	4.08	68	3.85
Motor Vehicle (Traffic Offences	28	8.38	269	23.89	263	14.87
Offences Against Good Order	35	10.48	37	3.28	28	1.58
Break/Enter, Fraud, Other Theft	224	67.06	631	56.04	1227	69.4

TABLE 4
CHILDREN'S COURT
DETENTION/COMMITTAL TO CARE OF WELFARE
(TWELVE MONTHS ENDING 31 DECEMBER)

	1983	1984	1985
Assaults (excluding sexual assaults)	3	10	9
Sexual Assaults and Offences	2	-	-
Robbery	2	2	3
Break and Enter	110	91	76
Fraud and Misappropriation	5	76	2
Receiving/Possession of Stolen Goods	10	23	9
Other Theft	62	107	101
Property Damage	13	3	9
Offences Against Judicial Procedures	9	2	11
Offensive Behaviour Offence	-	-	2
Other Offences Against Good Order	1	3	-
Possession/Use of Drugs	2	-	-
Offences involving Driving of a Vehicle	-	-	2
Other Offences	1	-	1
Totals	220	317	225

THE LIMITS OF SENTENCING REFORM

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THE REFORM CLIMATE

Reforms directed at the philosophy, mode and quantum of punishment are not recent phenomena. Concerns about the use of prisons have been raised as early as two centuries ago (see, for example, Ignatieff, 1978). Criticisms of unregulated judicial discretion were voiced in England 150 years ago (see Thomas, 1978). Nevertheless, a new round of attempts to reform sentencing appears to have gathered momentum in the last twenty years. The reform 'movement' has been primarily directed at (a) reducing the use of imprisonment and (b) structuring the exercise of sentencing discretion¹.

The 'decarceration movement', concerned with reducing the use of imprisonment and increasing the use of non-custodial sentencing options, became popular in the sixties in the United States; it has now spread to most western industrialised nations (Scull, 1984; Cohen, 1985; Garland, and Young, 1983). The 'determinate sentencing movement', concerned with procedural justice and uniformity of punishment, also began in the United States in the 1970s (Bottomley, 1980; Zimring, 1983), and has stimulated reappraisals of sentencing in Canada (The Canadian Sentencing Commission, 1985), Australia (Australian Law Reform Commission, 1980; Victoria, Attorney General, 1985) and other countries (Christie, 1981; von Hirsch, 1985).

In the United States, dramatic changes in sentencing practices and institutions have been made since the early 1970s. These changes were related to general dissatisfaction with indeterminate sentences. Blumstein et al. (1983, 2-3) have

Author's Note: The views expressed in this paper do not represent the views of the Australian Law Reform Commission. I wish to thank Gil Boehringer, Ian Cunliffe, David Neal and George Zdenkowski for their comments on the first draft of this paper. I am especially indebted to Kathe Boehringer and Russell Hogg for many hours of valuable discussion throughout the preparation of this paper. I also wish to thank Mark Richardson for sharing his thoughts on law reform.

listed six major precipitating factors for sentencing reforms in the US context:

- . prison uprisings
- . concern about individual rights and control of discretion
- . demand for accountability of official decisions
- . disillusionment with the 'rehabilitative ideal'
- . disparity and discrimination in sentencing
- . perception of 'lenient' sentences as aggravating the crime problem

The loss of faith in the 'rehabilitative ideal' was perhaps one of the most important factors in the new move to 'return to justice' (see Bottomley, 1980; Cullen and Gilbert, 1982). This loss of faith partially arose from a critical review of the empirical evidence concerning the effectiveness of rehabilitative programs, beginning with Martinson (1974). Zimring (1983, 105) argues that prison unrests contribute directly to the demise of the 'rehabilitation' rhetoric:

I would argue that the prison-based origin of the early 1970s review of the purposes of punishment blew the cover on the 'rehabilitative ideal' more convincingly than a thousand empirical studies: How can anybody get cured in Attica, or Stateville, or San Quentin? How can anyone in justice be sent to any one of these dungeons 'for his own good'?

The need to reform penal policies and sentencing practices in the United States, according to Zimring, was dramatically demonstrated by prisoners, intellectually strengthened by liberal academics, and opportunistically exploited by law-and-order politicians.

In Australia, although prison reform has had a relatively long history (see, for example, Garton, 1982, for early reform efforts in New South Wales), two developments seem to have contributed to the recent interest in sentencing reform: (a) the prison riots in the 1970s commanded public attention to the serious problems of using imprisonment as a punitive sanction, and (b) the emergence of a prisoners' rights movement which calls for improved prison conditions and due process protection in disciplinary and parole hearings (see Zdenkowski and Brown, 1982). Over the years, various commissions and committees have looked into the problems of prison conditions, probation and parole, and rate of imprisonment (e.g. Nagle Report, 1978; Mitchell Report, 1973; Neilson Associates Report, 1983; Dixon Report, 1981), but no major re-examination of sentencing

philosophies and practices occurred until the Australian Law Reform Commission (ALRC)'s inquiry into sentencing in 1978 (ALRC, 1980).²

This paper is a preliminary analysis of the experience of the recent sentencing reform movement. It is preliminary in the sense that the long-term effects of sentencing reform have yet to be observed. In the next two sections, I will place the problems of sentencing and sentencing reform in a conceptual framework which identifies the contradictory nature of the problems. This is followed by a survey of the literature on the results of sentencing reforms. These results are explained in relation to the politics of power, interests and ideologies. The final section looks at the limits of sentencing reform.

THE PROBLEMS OF SENTENCING

The problems of sentencing have long been couched in the traditional rhetoric of justice, humanity, cost and effectiveness. With respect to sentencing decisions, criticisms have been directed at the injustices arising from unfettered discretion at the judicial or executive level, sentencing disparity, and the inadequacy or absence of review mechanisms. In relation to the use of imprisonment, concerns have been raised with regard to the cost and ineffectiveness of such a sanction, given the inhumanity of incarceration. At a more general level, the problems of sentencing can be conceptualised along two dimensions, representing the competing demands placed on the criminal justice system: the need to maintain legitimacy and efficiency³ in the performance of its functions (see Offe, 1975b, 245-259).

Legitimacy. The stability of the government depends on a certain level of 'mass loyalty'. That is, there must be widespread belief that the system adheres to the principles of equality, justice and freedom and hence a general compliance with the laws and regulations established by the ruling authorities (Held, 1982, 184). It has been argued that formal legal rationality (Weber) has become the dominant basis of political authority in Western democracies.

The great advantage of this mode of legitimation ... consists in the fact that authority becomes legitimate independently of who is the incumbent in political office or what the intentions of the incumbents are. The only thing that decides about the legitimacy of political authority is whether or not it has been achieved in accordance with general formal principles.... (Offe, 1975b, 248).

Formal legal rationality (or the 'rule of law'), however, is not the only legitimating device available to the state.

Management of political symbols can also be a powerful tool for mobilising support, although it is a double-edged tool which is capable of producing conflict as well. It may also be argued that political stability depends on 'mass apathy' more than 'mass loyalty' and hence legitimacy is not a real concern. Nevertheless, it is instructive to explore the conditions under which the state sees the need to resort to formal legal rules to secure popular support.

In sentencing, or the imposition of punishment, legitimacy is derived from a perception of justice: both in terms of the substance of a sentence (a 'fair' penalty from the offender's or the victim's perspective), and in terms of the procedure of sentencing (an 'impartial' decision based on legal principles interpreted by a disinterested decision-maker). Criticisms of sentencing in the public arena have therefore taken the following forms: (a) in relation to substance, charges of leniency, inequity or disparity and (b) in relation to procedure, demands for control of discretion, accountability or rationality. The locus of responsibility, however, does not merely rest with the judiciary, although the notion of 'judicial independence' has played an important symbolic role in sustaining the legitimacy of sentencing. The legislature, which has the function of prescribing penalty structures in law, is especially sensitive to public sentiment in relation to punishment. Parole and other release authorities are most vulnerable to criticisms, because of the relatively invisible decisions (but highly visible mistakes) such bodies make to modify the sentences announced by the courts.

Efficiency. As Offe (1975b, 249-250) points out, it is difficult to assign meaning to 'efficiency' or 'effectiveness' as far as governmental activities are concerned. In the private sector, efficiency and effectiveness can be measured in terms of profitability in the market, but such a criterion is notably absent in the public sector.

In sentencing and its related activities, efficiency can be stated in terms of various indicators of performance: (a) the ability to control crime through the deterrent, incapacitative, or rehabilitative impact of sentencing; (b) the capacity to manage court caseload and prison population without problems such as excessive delay and prison unrest; and (c) the ability to function without escalating costs. However, even self-defined goals such as reducing prison overcrowding and self-imposed constraints such as budgetary limits are misleading yardsticks for measuring government efficiency. For example, a policy of decarceration may be seen as 'efficient' in terms of managing the overcrowding problem and cutting (or at least controlling) correctional expenditures. However, such 'efficiency' must be weighed against the 'side-effects' of any real or imaginary increase in crime as a result of this policy.

These side-effects, including the possibility of a media-generated moral panic, are often not amenable to financial calculations. Similarly, if there is widespread concern among the public in relation to the prevalence and apparent increase of crime, it may be perceived as a consequence of the ineffectiveness of the crime control apparatus. Yet, if such concerns are translated into more aggressive ('efficient') enforcement policies, this may have the effect of overloading the courts and overcrowding the prisons. Thus, efficiency in one part of the government bureaucracy may lead to inefficiency in other parts of the bureaucracy. Nevertheless, the bulk of governmental activity in the area of sentencing reform is aimed at improving crime control, cutting the cost of imprisonment and preventing prison unrest.

It may be argued that much of the 'efficiency' required of sentencing and its related activities is merely another facet of the need to legitimate, since sentencing is a highly symbolic exercise. Through sentencing and punishment, the state differentiates criminals from the general population and deviant activities from 'normal' activities, denounces such deviant activities, as well as punishes, and sometimes segregates, those convicted of crimes. The successful achievement of differentiation, denunciation, punishment and segregation inevitably contributes to the legitimacy of this exercise. Nevertheless, it is useful to distinguish between the aspects of sentencing essentially concerned with legitimacy and those primarily aimed at efficiency.

In trying to achieve both legitimacy and efficiency in sentencing, the state runs into a variety of problems. For example, the problem of prison unrest can be partially dealt with by reducing the number of prisoners held in custody. The most efficient method to achieve this would be to release prisoners before the expiration of their sentences through a system of remission, pre-release, early release or parole (see Weatherburn, 1986 for a comparison of the relative effectiveness of 'front-end' and 'rear-end' solutions). Yet such a system is precisely one which has a tendency to provoke public outrage, judicial discontent and political opposition (see Sydney Morning Herald, 20 June 1985a; 30 July 1985c; 18 January 1986a; Age, 17 May 1985), thus threatening the legitimacy of the criminal justice system. On the other hand, it would be quite difficult to control the prison population through more direct measures at the 'front end' (e.g. the provision of alternatives to imprisonment as sentencing options, the reduction of maximum penalties, or the 'tailoring' of penalties according to prison resources as in Minnesota), since judicial officers prefer to see prison overcrowding as a problem of the prison administrator and there is no guarantee that lower penalties or non-custodial options will be used in

the manner intended.

The difficulty of maintaining legitimacy and efficiency in sentencing policy is exacerbated by the overall fiscal problems faced by most capitalist welfare states (Scull, 1984; Chan and Ericson, 1981). The opposing demands and conflicting pressures faced by the state do not merely present policy-makers with a dilemma to be resolved. The problem is deeper than this. The efficiency/legitimacy dichotomy is seen as a contradiction, a tendency inherent in the capitalist state 'to destroy those very preconditions on which its survival depends', so that 'the necessary becomes impossible and the impossible becomes necessary' (Offe 1975b, 246).

Such contradictions, however, may or may not result in a situation of crisis (see Habermas, 1973; O'Connor, 1973; also see Bottoms and Preston, 1980 for the possibility of a coming 'penal crisis'), depending on the success of numerous corrective or adaptive mechanisms in society. The state's role is increasingly seen as that of overcoming contradictions. Yet, as we shall explore later, there is considerable doubt that it has been successful in performing this difficult function. Institutionalised law reform, for example, which is one of the most important neutralising and legitimating corrective mechanisms in liberal democracies, is rarely successful in neutralising political and emotional opposition, and as we shall see later, it is equally unsuccessful in legitimating the existing order. The reason for this failure appears to lie in the 'systematic contradictions on the level of state activity itself' (Offe, 1975, 248). In other words, reform activities are just as fraught with contradictions as the rest of the state bureaucratic activities.

REFORM SOLUTIONS

Solutions to the dual problem of legitimacy and efficiency in the sentencing area have taken two contradictory reform approaches: (a) rule-creation which aims at escalating state control over sentencing decisions, and (b) diversion which seeks to de-escalate state control over the management of deviants.

Rule Creation.

The present wave of sentencing reforms gives centrality to the search for uniformity, equity and accountability in sentencing decisions. It can be seen a means of dealing with the problem of legitimation by creating rules, guidelines, or procedural safeguards to force accountability on the part of the decision-maker. Blumstein et al. (1983, 1-2) provide a 'shopping list' of such reform initiatives:

- . Abolition of plea bargaining
- . Plea-bargaining rules and guidelines
- . Mandatory minimum sentences
- . Statutory determinate sentencing
- . Voluntary/descriptive sentencing guidelines
- . Presumptive/prescriptive sentencing guidelines
- . Sentencing councils
- . Requiring judges to provide reasons for sentences
- . Parole guidelines
- . Abolition of parole
- . Adoption or modification of good time procedures
- . Appellate review of sentences

There is no need to elaborate on the details and variations of these innovations, since a substantial literature already exists on the subject (see Blumstein et al., 1983, volumes I and II; Cullen and Gilbert, 1982; Zimring, 1976) It suffices to report that in many jurisdictions of the United States, mandatory or voluntary guidelines have been introduced as a means to structure, limit or eliminate prosecutorial, judicial or parole discretion. One innovation not covered in the above list is the proposal in Sweden and other jurisdictions to guide judicial discretion 'by words' rather than 'by numbers', i.e., through codification of sentencing principles and verbal articulation of broad penalty ranges in relation to the 'penal value of the offence, rather than through the adoption of a 'grid' approach to sentencing guidelines (see von Hirsch, 1985).

In general, these rules are to be enforced by providing venues for appeals or appointing a 'watchdog' committee such as a sentencing council to monitor the degree of compliance. Although the creation of rules and procedures is primarily a means of making sentencing decisions appear more fair and consistent, and hence more legitimate, it can also be a means to effect more efficient use of prison resources, if prison capacity is accepted as a valid constraint on penal policy (as in Minnesota).

Diversion.

The other major thrust of reform stems from a re-consideration of the state's role in the processing of deviants. Cohen (1985, 31) places this in the context of general 'destructuring' tendencies in modern societies:

- (1) Away from the state: 'decentralization', 'deformalization', 'decriminalization', 'diversion', 'non-intervention': a call toward

divesting the state of certain control functions or at least by-passing them and creating instead innovative agencies which are community based, less bureaucratic and not directly state-sponsored.

(2) Away from the expert: 'deprofessionalization', 'demedicalization', 'delegalization', 'anti-psychiatry': a distrust of professionals and experts and a demystification of their monopolistic claims of competence in classifying and treating various forms of deviance.

(3) Away from the institution: 'deinstitutionalization', 'decarceration', 'community control': a lack of faith in traditional closed institutions and a call for their replacement by non-segregative, 'open' measures, termed variously 'community control', 'community treatment', 'community corrections' or 'community care'.

(4) Away from the mind: 'back to justice', 'neo-classicism', 'behaviourism': an impatience with ideologies of individual treatment or rehabilitation based on psychological inner-states models and a call to reverse the positivist victory and to focus instead on body rather than mind, on act, rather than actor.

Reform efforts have been directed at 'screening' out low-risk offenders at various stages of the criminal process. Diversion (decarceration, or deinstitutionalisation) represents a conscious policy to reduce state involvement and interference with certain categories of offenders (e.g. juvenile, non-violent offenders). It involves using a range of non-custodial and semi-custodial sentencing options such as community service orders, attendance centre orders and periodic detention instead of imprisonment. The most significant aspect of this policy is the actual release of prisoners before the expiry of their sentences. These releases may be permanent or temporary, unconditional or conditional, and the decision to release may or may not be subject to independent scrutiny.

Although these reforms may have arisen chiefly from a bureaucratic-utilitarian consideration of reducing costs and improving efficiency (see Scull, 1984), decarceration is generally seen as a humane policy: prisons are such brutalising and oppressive institutions that they should only be used as a 'last resort'. In this sense,

decarceration also serves a legitimation function by placing the state in a benevolent position.

The intention of these sentencing reforms, then, is to escalate control over the decision-makers in the criminal justice system through the creation of rules and procedures, but minimise control over the 'clients' of the system. In effect, sentencing reforms seek to reallocate the state's power to punish. Ironically, as we shall see later, rules and procedures have not succeeded in exerting real control over decision-makers, and far from being a withdrawal of state intervention, decarceration has led to an expansion of state power. This is because 'allocation' (as opposed to 'production') is itself an interventionist state activity (see Offe 1975a, 127-29). Offe observes that in performing its allocative function, the state responds to demands and laws ('politics'):

From the point of view of the particular actor in such a state activity, there is no criterion for the goodness of such activity other than his own interests, the interests of his respective constituency and the legal norms that support or prohibit the pursuit of such norms and interests. A 'good' decision, from the point of view of the decision maker, is a decision that coincides with his legal or political power. There is no alternative or additional criterion for decision making. What characterizes allocative policies, then, is that politics and policies are not differentiated: Policies are congruent with politics. (Offe 1975a, 128)

In effect, much of sentencing reform activities is concerned with the struggle over state resources, including the power to punish.

Criteria of Success

In a later section, we will look at the results of sentencing reform initiatives where they have been implemented, but first, it is important to define what we mean by success or failure.

It has been suggested (Chan and Zdenkowski, 1985) that success and failure of reform can be measured along different dimensions depending on the original goals of reform (e.g. justice, humanity, efficiency, cost reduction, etc), and what is considered as success in one direction may be seen as failure in another. As we suggested earlier, it is difficult to define unambiguously the meaning of

'effectiveness' in any state function, including state-sponsored reform activities.

Even in the so-called 'scientific' world of policy analysis, 'concepts such as policy success or failure are in fact highly problematic, not only because effects may be difficult to isolate and measure but also because the intent of the policy itself is difficult to ascertain' (Casper and Brereton, 1984, 121). Evaluators are warned against equating 'manifest goals' with 'latent goals', ignoring changes in goals over time and overlooking competing goals among parties in a coalition (Ibid, 129).

In addition, the degree or quality of success should be taken into account. Was it a small or a big gain? an incremental or a radical improvement? an ideal solution or a least worst solution? a real or symbolic advance? Finally, there is the suggestion that it may be too soon to draw any permanent conclusions about the experience of sentencing reform, since we should not 'ignore the possibility that small observed changes may be the first stage of what is likely to become over time a significant change in behavior' (Ibid, 132).

RESULTS OF REFORM

Most reform initiatives undertaken in Australia to date have been directed at the introduction of community-based sentencing options and early release measures (see Chan and Zdenkowski 1985). There has not been any attempt to structure sentencing discretion through mandatory laws or voluntary guidelines. One small exception is the requirement, under the 1982 Crimes (Amendment) Act by the federal government, that the sentencer must provide reasons when sentencing a federal or ACT offender to imprisonment. In fact, the ALRC appears to be the only voice suggesting that there is a need to reform the structure and basis of sentencing decision in Australia. In its Interim Report on sentencing, the ALRC has recommended measures such as the creation of an Australian sentencing council, the formulation of voluntary sentencing guidelines, the abolition or reform of parole for federal offenders, and the uniformity of treatment for federal offenders throughout Australia (ALRC, 1980). The sentencing inquiry was resumed in 1984; final recommendations are due in 1987.

Victoria and New South Wales are also conducting inquiries into aspects of sentencing, but if recent events are any guide, (Sydney Morning Herald, 26 February 1986b; Age, 17 May 1985) it seems unlikely that legislatures in Australia would openly limit judicial discretion in the way many United States legislatures have in the past ten to

fifteen years. Politicians have shown a tendency to support ad hoc reform initiatives to deal with immediate problems and to engage in symbolic politics⁴, rather than attempt the difficult task of formulating long-term and systematic sentencing policies which may involve fundamental changes to sentencing principles and practices.

We shall look at the obstacles to reform in Australia in greater detail later. For the moment, it is important to summarise the experience of sentencing reform in other countries, especially the United States, where most of these reform ideas originate and many have been implemented.

With the popularity of program analysis and evaluation techniques, reform programs are evaluated and modified almost as promptly and frequently as are commercial television programs. Although the 'rating game' does not apply to law reform the way it operates in the electronic media, there is already evidence that the next 'wave' of reform - 'reaffirming rehabilitation' or 'doing good' - may be upon us soon (see Cullen and Gilbert, 1982). Before we come back to the 'pendulum syndrome' of sentencing reform, let us examine more closely the 'rating chart' to see if such a swing is warranted.

Cohen's (1985) review of the empirical literature on decarceration covers numerous research studies and over several countries. It is undoubtedly the most comprehensive work to date on the subject of penal reform. Similarly, Blumstein et al. (1983, Volumes I and II) have brought together an impressive collection of evaluation studies on reforms aimed at structuring sentencing discretion. For the purpose of this discussion, therefore, it would be sufficient to highlight the general findings of these reviews, without going into the minute details of every program.

A note of caution is in order. The results of these studies should be interpreted in the following context: (a) the innovations are relatively recent - it may be too early to judge their ultimate success or failure; (b) most of the evaluations are based on statistical analyses, sometimes based on less than adequate data or methodologies - more qualitative information is required; (c) empirical studies do not in fact 'prove' or 'disprove' the success of a program - they merely demonstrate its performance under certain culturally and historically specific conditions; and (d) empirical evidence may assist decisions about reform strategies, but ultimately cannot replace moral and ethical choices.

Results of Structuring Discretion

Adaptive Behaviours. Cohen and Tonry (1983) have conducted a survey of the evaluation literature on the impact of sentencing reforms in the United States. They conclude that, in general, there was formal, but not substantive, compliance with the procedural requirements of reform.

Participants routinely attempted to circumvent changes by filtering cases out earlier. One result thus dominates the studies of sentencing reform impact: Regardless of the type or locus of the procedural change, no appreciable changes were found in the use of prison; whatever system changes occurred were limited largely to modifications of case-processing procedures (Ibid, 438).

For example, the adoption of a determinate sentencing law in California was followed by increases in the rate of early guilty pleas and in the proportion of cases disposed of in the lower courts. In a number of jurisdictions, determinate sentencing has shifted discretion from the judges to the prosecutors (see Austin and Krisberg, 1981, 182), although practices vary with local conditions (see Casper et al., 1981).

Non-compliance. In general, Blumstein et al. (1983, 29-30) conclude that 'the extent of compliance with reforms has varied with: (a) the level of organisational or political support for the reform; (b) the existence of statutory or administrative authority supporting the procedural requirement; and (c) the existence of credible monitoring and enforcement mechanisms'.

They found, for example, that judges are seldom subject to effective organisational controls. When voluntary sentencing guidelines were used, there was no evidence of systematic judicial compliance:

Lawyers and judges interviewed in Philadelphia and Denver indicated that few judges made significant efforts to comply with the guidelines. This indifference to the guidelines was evident in the widespread failure to comply with their procedural requirements. ...An important feature of descriptive guidelines is the expected role of departures from guideline sentences in a continuing process of guideline evaluation and modification. In Denver, however, the requisite written reasons were provided in only 12 percent of cases involving departures. (Cohen and Tonry, 1983, 417)

As a rule, 'voluntary sentencing guidelines have had no discernible impact on judicial behavior or court processing; they have simply been ignored' (Blumstein et al., 1983, 220). Mandatory guidelines have led to formal (but not necessarily substantive) judicial compliance. Minnesota's presumptive sentencing guidelines appeared to be effective because of the presence of effective external enforcement mechanisms (appellate review and close monitoring by the Guidelines Commission).

Increased severity for marginal cases. Cohen and Tonry (1983) cite evidence to suggest that, following sentencing reforms aimed at limiting discretion, the patterns of disposition did not change significantly for offenders involved in minor crimes and those involved in serious crimes. Marginal offenders (those with minor records or those accused of offences of intermediate seriousness), however, were subject to harsher sentences unless they had been screened out earlier. The reasons are obvious:

By definition these are ambiguous cases. New sentencing standards may resolve the ambiguity of the cases by directing that marginal offenders fitting a particular profile be imprisoned. Yet these are cases in which judges may often be loathe to impose prison sentences. It is hypothesized that at least two arguably undesirable outcomes may result. Judges and lawyers may circumvent applicable new standards when they appear to be too harsh in a particular marginal case, or they may apply them inappropriately, punishing marginal offenders more severely - with prison terms - than they want to (Blumstein et al., 1983, 204).

The introduction of determinate sentencing in the United States, therefore, has had the overall effect of increasing sentence lengths (see also Greenberg and Humphries, 1980; Austin and Krisberg, 1981).

Effect on prison population. There have been suggestions that determinate sentencing leads to an increase in prison populations. Blumstein et al. (1983, 32) discount these suggestions and explain the increase as merely a continuation of pre-existing trends, not caused by sentencing reforms. They note that prison population increases have occurred in states which have not undergone sentencing reform as well. Austin and Krisberg (1981, 182) agree that since all fifty state correctional systems are overcrowded, 'determinate sentencing may not be the sole contributor to prison overcrowding', but 'it has encouraged

the state's reliance on imprisonment'. Greenberg and Humphries (1980, 225) also warn that if executive discretion to release prisoners is removed, the overcrowding problem would be exacerbated because there is no obvious institutional mechanism for coping with this problem.

Results of Decarceration

Effect on prison population. There is now a large body of literature which supports the finding that decarceration, including the introduction of non-custodial sentencing options, has not been successful in reducing the use of imprisonment (see, for example, Cohen, 1985; Chan and Zdenkowski, 1985; Austin and Krisberg, 1982; Scull, 1984). The statistical evidence suggests that in Britain, Canada and the United States the rates of imprisonment⁵ are not decreasing and in some cases even increasing. Australian imprisonment rate data from 1961 to 1985, the period during which community-based corrections measures were introduced, show some slight decline in some states and substantial fluctuations in others (Chan and Zdenkowski, 1985, 17-19). Weatherburn (1986) has documented the failure of repeated attempts to reduce the New South Wales prison population in recent history.

Expansion of the system. There is substantial evidence that 'prison alternatives' are frequently used for offenders who would not have been incarcerated in the first place, so that they are not used genuinely as alternatives to imprisonment. Indications are that a substantial proportion (between one-third to two-thirds) of the offenders given 'alternative' sentences such as community service orders and attendance centre orders would not have gone into prison in the first place (Cohen, 1985, 50-6; for Australian research see Rook, 1978; Fox and Challinger, 1985). These options are often seen as intermediate between imprisonment and good-behaviour bonds and are used as such. Community service orders are also considered as a good alternative to fines, especially for the impecunious.

Correctional expenditure. The cost-saving objectives of decarceration have also not been realised, since prison populations and the employment of criminal justice personnel continue to rise in most jurisdictions. Correctional expenditures in most countries have actually shown a steep increase in recent years, far exceeding the effect of inflation (see Chan and Ericson, 1981; Chan and Zdenkowski, 1985).

This brief documentation of the results of sentencing reform serves to highlight some of the more consistent findings in the literature. It is obvious that individual programs do vary in terms of degree and quality of impact, but the overall message of evaluation research to date has been largely negative.

Sentencing reforms have secured a limited degree of compliance among the participants, but most have found ways to circumvent the intentions of the reform. Structuring discretion has the tendency of increasing sentence severity, while shifting powers from the more visible exercise of judicial discretion to the less visible exercise of prosecutorial discretion. The problem of disparity remains. Determinate sentencing also has the potential of exacerbating prison overcrowding when executive discretion is removed. 'Doing justice' is easily translated into 'getting tough' (Cullen and Gilbert, 1982) when put into practice.

Decarceration, on the other hand, has not proved to be the cure of prison overcrowding. As a fiscal measure to reduce expenditure, it has not lived up to its promise. The criminal justice system has in fact taken in more clients under various sentencing options which are meant to be alternatives to imprisonment, while the prospects of controlling the use of prisons seem more remote than ever. 'Doing less' has somehow resulted in 'doing more': deprofessionalisation only leads to the rise of more professionals, charged with the new task of classification and assessment of clients on the 'outside' (see Cohen, 1975, Chapter 5).

This is a disappointing picture indeed for reformers. Yet it is too easy to let empirical experience halt further discussion. Social scientists are sometimes too quick to draw sweeping conclusions about complex social changes occurring in particular historical periods. To say that reform has 'failed' is to ignore the cultural and historical specificity of the reform experience described above. This 'failure' may be seen as symptomatic of the contradictions of liberal ideology and/or the capitalist state, but it would be a mistake to assume too close a link between ideology and practice, and between class and state. In the following analysis, reform is placed in the context of the administrative state - a complex bureaucracy concerned with legitimacy and efficiency in a more independent and restricted sense than in traditional Marxist analysis. The state is seen to be more concerned with politics as competing bureaucratic interests than politics in the sense of class relationships (see Young, 1983).

reforms is bureaucratic or professional resistance to changes in work procedures or philosophies. Court studies have consistently shown that prosecutors, lawyers, and judges have established practices, shared norms and routinised procedures which are not easily re-oriented (e.g., Nimmer, 1978; Feeley, 1983; Heumann and Loftin, 1979; Blumstein et al., 1983). For example, Heumann and Loftin's assessment of sentencing reforms in Michigan suggests that judges and lawyers found a way to circumvent both a ban on plea-bargaining and a mandatory prison term for firearm felony charges. 'Waiver' trials were openly used to avoid the mandatory two-year sentence. Judges either gave explicit prior indications that they would dismiss the gun charges at trial, or indicated that they would consider every possible defence and require evidence of every element of the charge. There was also evidence that judges had in fact adjusted their prior 'going rate' to take into account the two years added by the new law. The reasons behind these adaptive responses are complex, and are likely to vary with each type of sentencing reform. One of the most important motivations may be the assertion of professionalism: the notion that they are the people who 'know' what sentencing is about, they are capable of making reasonable judgments in the individual case, and they resent new rules and procedures which may be seen as crude, rigid and unfair.

To summarise the analysis in this section: sentencing reform is seen as an attempt to rearrange the power to punish among the legislative, judicial and executive subsystems. The target of control depends on the perceived legitimacy and efficiency of the subsystem, as well as the relationship between the subsystem and its environment. Governments are more likely to tighten executive powers than judicial powers because of the political nature of reform. Reform initiatives in the form of structuring discretion are resisted by the subsystems wherever their interests and ideologies differ from the reform interests and ideologies. Politics dominate the formulation and implementation of reform proposals.

LIMITS OF REFORM

We have attempted to document some of the problems with sentencing reform - political and bureaucratic resistance, deflection of goals, evasion of control, and so on. The obvious question is: Can these obstacles be overcome? We shall take some advice from the experts. Bardach (1977, Chapter 10) details a series of strategies to deal with the problems of implementation:

1. Start with a good theory. 'Any policy or program implies an economic, and probably also a

DIALECTICS OF REFORM

A host of theories has emerged in the academic literature recently seeking to explain the apparent discrepancies between the intentions and the consequences of penal reform (see, for example, Rothman, 1980; Scott and Scull, 1978; Ignatieff, 1978; Chan and Ericson, 1981; and more generally Cohen, 1985, Chapter 3). In this section, the consequences of sentencing reform are explained in terms of the bureaucratic nature of the modern state. This approximates the approach advocated by Young (1983, 99):

It conceives of the penal system as an internally differentiated system, working upon principles of administration and bounded by a bureaucracy. Class relations and economic interests may work through these forms, but rarely, if ever, are they the cause of some change in them. Because of its bureaucratic nature, the penal system is surprisingly resistant to change; both ideologically and administratively, it can neutralise and diffuse demands for changes in it. The stratification of ideology and the various forms of representation expressed are crucial to this process of diffusion.

From this perspective, outcomes of reform neither hinge on the technical achievement of 'getting it right', nor are they totally determined by the existing political economic arrangements. They reflect the result of continual struggles among interest groups inside and outside of the penal system. If penal reform is an attempt to reorganise the economy of power, the state is engaged, as pointed out before, in an allocative function where decisions are reached by politics, i.e. the method of power struggle.

Distribution of Power

In most of the jurisdictions where sentencing reform has been introduced, the state's power to punish is distributed among three bodies: the legislature, which has the power to specify by means of law (a) the types of behaviour to be regulated, (b) the structure of penalties to be applied, and (c) the procedures to be followed in the imposition of punishment; the judiciary, which has the power to determine (a) the guilt or innocence of an accused in relation to the charges, (b) the type and degree of penalty to be imposed upon the convicted person within the limits of the law, and (c) any conditions attached to the penalty; and the executive, which has the power to (a) enforce the law through investigation, arrest, and prosecution, (b) make

decisions regarding the processing or non-processing of cases as well as the method and nature of enforcement, (c) assist the courts in relation to the finding of guilt and (in some jurisdictions) the determination of sentence, (d) execute the imposed sentence, and (e) modify the length and nature of the sentence as permitted by law.

The nature and scope of this power distribution are, of course, different in each of the sites of power. The legislature is visible and intensely political in its application of power. The judiciary is also visible, but is considered less affected by politics. Judicial decisions are also reviewable by appellate courts. The executive, however, is relatively invisible (except for the parole board which has a quasi-judicial function) in its exercise of power. It is subject to political and bureaucratic pressures, and its decisions are often not subject to independent scrutiny.

Sentencing reforms have sought either to take away power from the judiciary (through legislating a less flexible penalty structure, or a system of remission of sentence or early releases) or from the executive (through instituting prosecution or parole guidelines, appeal of parole decisions, abolition of parole, or giving veto powers to the judiciary over release decisions). Where sentencing councils or commissions are established, the commission may take over some of the power from each of the existing bodies, depending whether its functions are advisory or prescriptive. In decarceration reforms, often the shift of power is merely from one branch of the executive to the other (e.g. from prisons to probation and parole departments).

Stratification of Interests and Ideologies

If we visualise the sentencing system as consisting of a series of subsystems differentiated according to legislative, judicial and executive functions, the complexity of reactions to reforms becomes clear⁶. This functional differentiation implies that each subsystem represents a special way of conceiving of sentencing. The organisational interest of the subsystem largely determines the priority given to a particular justification of sentencing against another. The primary interests of the subsystems can be gauged by a close examination of the reward structures and organisational imperatives. Similarly, the dominant ideologies of the subsystems can be gleaned from their 'social control talk' (Cohen, 1983).

For example, it can be argued that the legislative subsystem is primarily concerned with political legitimacy and is dominated by the ideology of law and order, i.e. crime

control through the deterrent effect of punishment. The law-enforcement and prosecutorial subsystems are similarly dominated by law-and-order ideologies, but their organisational interests do not lie in getting votes, but in securing convictions and coping with caseload (Nimmer, 1978, 40-1). The judicial subsystem, however, is more difficult to characterise: while judges are concerned with the efficient movement of caseload, the formal expectation of judicial independence retains considerable weight (Ibid, 45-6). In relation to sentencing ideologies, judges also tend to be eclectic, embracing a mixture of crime-control, retributive and rehabilitative justifications (ALRC, 1980). Similar reasoning suggests that parole authorities are concerned with avoiding mistakes in release decisions, and thus a 'public protection' ideology. Probation and parole workers are concerned with the management of caseload as well as the maintenance of a professional status; they are wedded to the ideology of rehabilitation. Finally, prison administrators and workers are interested in the smooth running of institutions. Ideologically they are committed to prison discipline (crime control on the 'inside'), public protection, and some form of rehabilitation.

Further differentiation of interests and ideologies can, of course, be envisaged within each subsystem. It suffices to note that this diversity of ideologies ensures that any attempt to impose a consistent sentencing rationale throughout the system will meet with resistance, subversion or avoidance. The diversity of organisational interests also predict that any move to redistribute power among the subsystems will lead to a power struggle. Austin and Krisberg (1981, 166) describe this as an interactive feature of the system:

The system is interactive in the sense that changes in one segment trigger reactions among others - reactions that may take the form of resistance, attempts to transform the reform strategies, or efforts to destroy the intended reform. Crime control ideology, agency values, power, and authority are sources of conflict among police, prosecutors, the courts, and correctional officials. Agencies compete with one another, and reactions to a given reform depend upon the perceived value of that reform to the agency's survival.

The Reform Target

The precise target of reallocation of power depends on the perceived degree of legitimacy or efficiency in the subsystem's performance, although mere perceptions of

illegitimacy or inefficiency do not necessarily lead to reforms. The stability of a subsystem depends on its relations with its environment, which includes other systems and subsystems (e.g. political, economic, cultural). Zimring (1983, 105-6), for example, argues that although the liberal reform literature in the United States had proposed cutting back judicial as well as parole power, it is the latter which is more vulnerable to assault:

Parole, more than judicial discretion, was linked to theories of rehabilitation and the capacity of administrative bodies to predict when offenders were no longer dangerous. After all, the argument went, the only thing a judge doesn't know when he passes sentence is how an offender will fare in prison. If prison conduct does not predict later behavior, there is no reason to second-guess the sentencing judge - no reason unless you do not trust the sentencing judges.

Parole and release are also vulnerable to attacks from prisoners and prison activists, since there is considerable resentment in relation to the sense of uncertainty, dependency and powerlessness created by release decisions.

Sentencing reforms in New South Wales in recent history have also demonstrated that most reform initiatives have been directed at the correctional subsystem because judges are extremely resistant to perceived attempts at eroding their powers.

For example, an innovative use of executive powers under section 463 of the New South Wales Crimes Act 1900 created a release on licence scheme which proved 'spectacularly successful' in reducing the prison population (Weatherburn, 1986, 10). The scheme was bitterly criticised by the judiciary as "'usurping" the function of the courts to fix non-parole periods' (Ibid, 11).

After the release on licence scheme was terminated in 1982 following allegations of corruption, the government sought to shorten sentence lengths through the introduction of remissions to the minimum (non-parole) periods in the New South Wales Probation and Parole Act (1983). The new Act, 'one of the most determined efforts to reduce the prison population' (ibid, 1), ran into problems immediately with the courts. Apart from open criticism and condemnation from the judges, there is convincing evidence that some judges were subverting the intentions of the legislation by increasing the minimum periods to offset the effects of remission. This took place in spite of an appellate ruling that such an exercise is not permissible.

Weatherburn (1985, 280-1) concludes that the scope of judicial discretion must be the target of reform:

Both the history of court interpretation of minimum periods and the willingness of courts to violate sentencing principles in order to preserve control over such periods suggest that a real reduction in court discretion over sentence length is a prerequisite to any lasting control over sentence lengths. ... The history of events surrounding parole and remission in New South Wales is eloquent testimony to the fact that any executive or legislative attempt to shorten sentences predicated on a continuation of existing judicial discretion is doomed to failure.

Recent moves announced by the government, however, appear to follow the opposite direction - towards giving judges additional control (see Sydney Morning Herald, 26 February 1986b).

Some reform initiatives are, of course, purely symbolic and do not involve any major rearrangement of power. Politicians are known to engage in this kind of 'symbolic politics' to reassure the public that something is being done about crime. Casper and Brereton (1984, 124-5) give the example of the 'bark' and 'bite' sentencing policy:

The 'bark' is the long nominal terms that legislators impose for illegal behavior, knowing full well that the actual 'bite' will be substantially reduced by the activities of judges, parole authorities, and others. Legislators have thus been able to appear very tough on crime without having to face up either to the costs that the actual imposition of nominal sentences would entail in terms of prison construction or to the issue of whether the Draconian penalty structures that characterize our criminal law are just.

Non-mandatory sentencing guidelines may also have the same effect.

Reform Politics

The eventual targets of reform are, as discussed above, rarely determined by rational decisions based on goals and objectives. The most rational target in terms of reform

objectives may turn out to be the least likely target in practice, since other political considerations tend to dominate. Similar considerations shape the formulation of reform proposals and the subsequent implementation of these proposals.

Policy formulation. The formulation of reform proposals is a well-known battleground for competing interests and ideologies.

Martin's (1983) account of the development of sentencing guidelines in Pennsylvania documents how conflicting goals of interest groups, regional jealousies, law-and-order politics, and legislative ambivalence led to successive compromises and finally a guideline which 'made no pretense of trying to resolve the disparity, discretion, and severity dilemma' and 'are designed to increase sentence severity across the state', while 'judicial discretion is hardly affected' (Ibid, 293).

The arrival at a policy consensus is no cause for celebration either. The presence of a 'collection of strange political bedfellows', according to Zimring (1983, 114-5), signals the danger of negative coalitions:

When prisoners and police chiefs unite in proposing the abolition of parole, it should be clear that each group has a different vision of life without parole. Civil liberties groups in particular seem susceptible to participation in attacks against institutions before the likely consequences have been considered. If the only principle behind a proposal is negative, almost anything can be urged as a plausible substitute.

Negative coalitions are dangerous when the coalition 'partners' have unequal strengths. Penal reform and prisoner groups are relatively weak lobbies compared with the established interests such as prosecutors, correctional administrators, prison guard unions, judges, politicians and other law-and-order lobby groups. They are likely to lose out in any contested issues. Any trade-offs or compromises are likely to be one-sided. Once a particular reform is instituted, the weaker groups have even less control over its future direction. For example, when a more rigid sentencing structure is introduced to limit discretion in the individual case, the obvious danger is that wholesale increase in severity will result when the new structure is subject to political pressures. In California, for example, determinate sentencing reforms started with relatively short sentences, but each session of legislature saw new proposals for longer sentences and upgrading of mandatory prison

terms. (Ibid, 1983; Messinger and Johnson, 1977).

In general, the appearance of consensus may hide the presence of hidden agendas which are contradictory to the progressive aims of reforms. Casper and Brereton (1984, 123-4) note that law-enforcement supporters of the Californian Determinate Sentencing Law, knowing that mandatory-minimum sentence law would be strongly opposed by liberal elements in the Assembly as well as by judges who sought to retain discretion, actually adopted a 'gaming' strategy:

Judges, they reasoned, were reluctant to sentence 'marginal' defendants to prison terms because of the apparently very long terms required by the Indeterminate Sentence Law ...[but] if sentences were made shorter and more certain, judges would respond to the change by sending more people to prison. Thus, a statute that on its face may appear to be designed to promote equality in sentencing and ensure that criminals don't serve excessive sentences may, in the minds of those who were most instrumental in its enactment, be designed to get judges to sentence more criminals more severely....

Implementation. Reform proposals, unless they are politically pressing or 'long overdue' in the sense that they merely reflect present practices, often remain as proposals or draft legislation for years awaiting government implementation. The process of implementation, according to Bardach (1977, 9), is a process of 'strategic interaction among numerous special interests all pursuing their own goals, which might or might not be compatible with the goals of the policy mandate'. In other words, the problem is that of 'control' over the life-chances of the reform proposals. This control is brought about through a complex series of bargaining, persuasion and manoeuvring under uncertain conditions, i.e. through politics or 'games' played out within government bureaucracies, between levels of government, and between government and outside interest groups.

In Australia, one of the main obstacles to implementation of reform proposals is government priority. At least for reform proposals generated by law reform agencies, there is no formal machinery to ensure the speedy consideration or ultimate implementation of reform proposals. Not surprising, the implementation record has been poor (Missen Report, 1979). Kirby (1983, 15) has noted that:

Australia, like Britain, does not have a

particularly proud record in the implementation of official reports. Many lie unattended and unread in Ministerial and bureaucratic pigeon-holes. Excuses are offered. Parliament, it is said, does not have adequate time to consider all of the demands for legislation. Reform proposals, particularly controversial proposals, must find a place in the queue. If there are no votes, indeed if there are votes to be lost, there may be no priority. Administrators are hard pressed with the daily political and bureaucratic grind.

Sentencing reforms, especially if they involve a more long-term vision and some fundamental or radical changes, are likely to be controversial and unpopular, and hence are not accorded high priorities unless a crisis has developed.

Even where draft legislation is appended to law reform proposals to expedite implementation, extensive delay occurs when these proposals are submitted for departmental comments. One explanation of this delay was given by a former Chairman of the NSW Law Reform Commission:

The [law reform] report was fed into the bureaucratic system like any other report and one or more officers were required to report upon it to the Minister. This is a task which in the nature of things, no matter how learned, experienced or diligent the officer might be, could only be performed superficially. It is beyond the capacity of anyone in the necessarily limited time adequately to review a work that has sometimes and, in my experience, often taken a number of man-years to carry out.

There is a natural tendency for officers required to make such a report to justify their work by raising queries, suggesting amendments or qualifications and to report upon a report so framed places a Minister in a dilemma if he is called upon to choose between what is raised on the outside front page of a file and the contents of a lengthy report according to his own notions, when the very question is one which has earlier been committed to what is theoretically and, it is hoped, in fact a highly qualified body.

So the hesitation and the delay commences, often leading to matter being put aside. (Missen Report, 1979, 25-6).

This duplication of effort not only delays implementation; it trivialises the work and consultation that have taken place in the original inquiry. One method of overcoming this problem is to step up communications between the relevant departmental officials and the law reform agencies throughout the inquiry, including the implementation stage.

Another crippling problem in Australia and, to a lesser extent in the United States, is the structure of federation. Sentencing reforms emanating from the federal government are virtually impossible to implement since the federal government has very limited powers⁷ to change sentencing practices, which are carried out by State courts. The Australian Law Reform Commission's proposal to create an Australian sentencing council (ALRC, 1980), as modified by the then Attorney-General Senator Evans, was rejected by every State except Tasmania. Similarly, a 1982 amendment to the Crimes Act 1914 to give federal offenders parity of sentencing options with State offenders ran into State opposition over the financing of such an arrangement (Sydney Morning Herald, 29 June 1985b). The role of the federal law reform agency is reduced to one of providing 'model' legislation, which may or may not be picked up by the States (Kirby, 1983, 12-3). Implementation problems of this sort are usually dealt with by mutual 'manipulation of incentives' (Bardach, 1977, 49), notably in terms of financial arrangements.

Some implementation problems are a continuation of the earlier struggle over the formulation of proposals. The true nature of negative coalitions also reveals itself at this stage.

Die-hard opponents of the policy who lost out in the adoption stage seek, and find, means to continue their opposition when, say, administrative regulations and guidelines are being written. Many who supported the original policy proposal did so only because they expected to be able to twist it in the implementation phase to suit purposes never contemplated or desired by others who formed part of the original coalition (Ibid, 38)

This kind of manoeuvring often results in deflecting the original goal or mandate of reform. We have already alluded to the Californian experience which indicates that public or law-enforcement pressure can push determinate sentencing towards increased severity.

By far the most dysfunctional impediment to sentencing

reforms is bureaucratic or professional resistance to changes in work procedures or philosophies. Court studies have consistently shown that prosecutors, lawyers, and judges have established practices, shared norms and routinised procedures which are not easily re-oriented (e.g., Nimmer, 1978; Feeley, 1983; Heumann and Loftin, 1979; Blumstein et al., 1983). For example, Heumann and Loftin's assessment of sentencing reforms in Michigan suggests that judges and lawyers found a way to circumvent both a ban on plea-bargaining and a mandatory prison term for firearm felony charges. 'Waiver' trials were openly used to avoid the mandatory two-year sentence. Judges either gave explicit prior indications that they would dismiss the gun charges at trial, or indicated that they would consider every possible defence and require evidence of every element of the charge. There was also evidence that judges had in fact adjusted their prior 'going rate' to take into account the two years added by the new law. The reasons behind these adaptive responses are complex, and are likely to vary with each type of sentencing reform. One of the most important motivations may be the assertion of professionalism: the notion that they are the people who 'know' what sentencing is about, they are capable of making reasonable judgments in the individual case, and they resent new rules and procedures which may be seen as crude, rigid and unfair.

To summarise the analysis in this section: sentencing reform is seen as an attempt to rearrange the power to punish among the legislative, judicial and executive subsystems. The target of control depends on the perceived legitimacy and efficiency of the subsystem, as well as the relationship between the subsystem and its environment. Governments are more likely to tighten executive powers than judicial powers because of the political nature of reform. Reform initiatives in the form of structuring discretion are resisted by the subsystems wherever their interests and ideologies differ from the reform interests and ideologies. Politics dominate the formulation and implementation of reform proposals.

LIMITS OF REFORM

We have attempted to document some of the problems with sentencing reform - political and bureaucratic resistance, deflection of goals, evasion of control, and so on. The obvious question is: Can these obstacles be overcome? We shall take some advice from the experts. Bardach (1977, Chapter 10) details a series of strategies to deal with the problems of implementation:

1. Start with a good theory. 'Any policy or program implies an economic, and probably also a

sociological, theory about the way the world works. If this theory is fundamentally incorrect, the policy will probably fail no matter how well it is implemented.' (Ibid, 251-2). Bardach notes that governments are likely to get the serious and complicated problems, not the easy ones, and soon discover that no one knows quite what to do, but political pressures dictate that 'something' must be tried. For governments, it is simply unacceptable to say that 'nothing works'.

In sentencing reforms, the initial push has come from the recognition that rehabilitation has not worked, and that the state could do better if it does less. This theory of 'minimal statism' (Cohen, 1983) is responsible for both the policy of decarceration and the policy of determinate sentencing. More specifically, decarceration comes from a sentimental version of anarchism (Berk, 1979), and determinate sentencing goes back to a form of neo-classicism (Christie, 1981). While one can debate the merit of anarchism as a legitimate vision of society, there is little doubt that when applied to state functions (sentencing) and invoked on behalf of the official targets of state activity (offenders), 'third-party anarchism' (Berk, 1979, 5) has serious problems as a theoretical basis for reform. Similarly, neo-classicism upholds the traditionally valued notion of 'justice' and 'equality before the law', but its strict application in an unjust society is a contradiction not missed by one of its original proponents (von Hirsch, 1976).

Perhaps we have been attacking the wrong theories after all: these are theories about how reformers think the world 'should' work, not how it actually does work. Without being cynical about the process of reform, we should come to realise that if it is indeed reform that we want (i.e. improvement without revolution) then the only 'theory' that 'works' is one which takes into account the power differentials, competing interests and unco-ordinated nature of the criminal justice bureaucracy. Any theory which requires a radical transformation of the bureaucracy and its actors is by definition not 'reform', but revolution. There is nothing wrong with looking to some higher ideals, of course, but there is no reason to expect reforms to get us there.

2. Pick a strategy for coping with social entropy. By 'social entropy', Bardach (1977, 124-5) refers to the social forces which have a tendency to confound systems, such as incompetence, variability in the objects of control and the problem of coordination. This problem, however, has no permanent solution, and, according to Bardach, the best strategy is to avoid having to deal with it, i.e. 'design simple, straightforward programs that require as little management as possible' (Ibid, 253). In sentencing reform, the main 'social entropy' problem is precisely the variability among the decision-makers. Yet, there is no way to design simple, straightforward methods of structuring sentencing discretion without ignoring the complexity of the sentencing decision and creating injustices along the way.

3. Scenario-writing. This involves 'an imaginative construction of future sequences of actions-->-consequent conditions-->actions--> consequent conditions. It is inventing a plausible story about "what will happen if..." or, more precisely, inventing several such stories' (Ibid, 254). The object of the exercise is to anticipate and deal with the likely stresses and strains which could become salient when the policy goes through the implementation process. The exercise is, as Bardach himself notes, 'potentially quite useful', but 'nevertheless severely limited' because of the multiplicity of unknowns and uncertainties about the 'implementation game' - 'Who will play? How will they play? With what effect will they play? How long will they play?' (Ibid, 273). There is also the danger that too much scenario-writing may make things worse:

...the maneuvers of the several parties both express conflict and create it - and with every maneuver aimed at reducing it there is an associated risk of actually making matters worse. In an important sense, therefore, much of the implementation process moves along 'out of control,' driven by complex forces not of any party's making. (Ibid, 53).

In the end, the game may have to be 'fixed' by modifications and adjustments at the implementation stage.

In relation to sentencing reforms aimed at structuring discretion, Blumstein et al. (1983, 25-7) have suggested various 'tactical solutions to counterbalance' the circumvention and manipulation of decision-makers. These solutions include:

- . real offense sentence standards that offset charge bargains by basing sentences on actual offense behavior rather than on the conviction offense;
- . charge reduction guidelines and guilty plea discounts that structure adaptive responses by providing approved means to satisfy institutional pressures for circumvention;
- . parole guidelines in which release decisions are based on actual offense behavior and that effectively constitute an administrative review of sentences resulting from the exercise of prosecutorial and judicial discretion; and
- . various forms of appellate review that provide incentives to appeal sentences that are inconsistent with stated policy. (Ibid, 26).

Other suggestions include involving interest groups in the development of policies so that they 'perceive themselves as having a stake in the implementation of the new policy', and the institution of 'credible enforcement mechanisms' such as various types of appellate review, administrative review, or monitoring by a sentencing commission (Ibid, 26-7).

While one may wonder about the legal implications and practical consequences of 'real offence' decision-making, as well as whether the 'cure' is looking worse than the problem itself, Blumstein et al believe that 'the obstacles to credible enforcement of sentencing criteria are formidable, but not insurmountable' (Ibid, 28). Bardach (1977, 280), however, seems to be less hopeful about winning the implementation game in spite of his many strategies: 'First, let us be clear that pessimism is in order'. In the end, Bardach concedes that 'the most important problems that affect public policy are almost surely not those of implementation but those of basic political, economic, and social theory'. Governments, he concluded, ought not to do many of the things liberal reform has traditionally asked of it; it is also not very well suited to achieving them

(Ibid, 283).

The analysis of sentencing reform in this paper suggests that state-initiated or state-sponsored reforms have not been particularly successful in transcending the contradictions of the legitimacy/efficiency problem. Although the establishment of a commission or inquiry on sentencing reform may serve to deflect political pressures temporarily, the formulation and implementation of reform policies will inevitably bring up a variety of contradictory demands and competing interests. These demands and interests can only be resolved by bargaining, manoeuvring and power struggle. Symbolic politics aside, the prospects of introducing coherent, progressive reform seem extremely limited.

Rothman (1980, 4) has described reform as 'the designation that each generation gives to its favorite programs'. The recent history of penal reform has demonstrated how the pendulum of ideas swings from one pole to another: First, social and behavioural science took away individual responsibility and substituted punishment with treatment. This state-sponsored benevolence was then demystified: the abuse of rehabilitation has demonstrated the limits of 'doing good' (Gaylin et al., 1978). The concern of reformers then turned to a 'struggle for justice' (American Friends Service Committee, 1971), or simply 'doing justice' (von Hirsch, 1976). Now there is mounting evidence that 'doing justice' is vulnerable to the forces of 'getting tough'. Reformers are urged once again to 'reaffirm rehabilitation', because there lies the only chance that the state can be obligated to be humane and caring towards its criminals (Cullen and Gilbert, 1982).

This oscillation is characteristic of the 'repetitive quality of reform' (Rothman 1980, 4). It does not imply that reformers are necessarily opportunistic followers of the 'flavour of the month' in punishment philosophy. It does say that reform ideologies are adopted and exploited when they satisfy the needs of the relevant state bureaucracies. The repetitive quality merely indicates the stabilising function of reform: reform is always in need of reform. It is precisely this 'reflexive' (Luhmann, 1982) quality of reform that makes it possible for the state to survive, at least temporarily, its contradiction.

For those concerned with injustices and human sufferings, who see reform as the only path to a better world, a difficult task lies ahead. Reformers can only adopt a strategy of 'moral pragmatism' (Cohen, 1985, 252-3), insisting on the goodness of the values being pursued but recognising the dangers and obstacles which are capable of

corrupting those values.

Choices were made, decisions reached; and to appreciate the dynamic is to be able to recognize the opportunity to affect it. (Rothman, 1980, 11).

Or, to borrow from revolutionary praxis, reformers can hope to chart a course through a stormy sea:

The state and the laws shall be seen as having no more than an empirical validity. In the same way a yachtsman must take exact note of the direction of the wind without letting the wind determine his course; on the contrary, he defies and exploits it in order to hold fast to his original course. (Lukacs, quoted in Spitzer, 1982, 201).

To reformers, reform is a continual political struggle: what is gained is not gained forever; what is not gained can still be fought for. There lie the limits and prospects of reform.

NOTES

1. One aspect of the reform movement which recognises the role of victims in sentencing is becoming increasingly important. It is still too early, however, to assess the impact of this aspect of sentencing reform.
2. The ALRC exercise, however, resulted from an historical accident (i.e. the initial motivation for the inquiry appears to have been the production of a report representing Australia's position at the United Nations Congress on the Prevention of Crime and Treatment of Offenders, originally scheduled to be held in Sydney in 1980), rather than a deeply felt need to reform sentencing.
3. Legitimacy and efficiency are not seen as mutually exclusive concepts. Indeed, efficiency can enhance legitimacy, and the securing of legitimacy is a measure of efficiency in some state functions. In this discussion, legitimacy and efficiency are best visualised as two (non-orthogonal) axes along which state activities can be assessed.
4. See criticism of the NSW Premier's announcement of sentencing changes following public outrage in relation to a murder case (Sydney Morning Herald, 1 March 1986c).
5. Bottoms (1983) notes that it would be more appropriate to look at the proportion of convicted offenders sentenced to imprisonment to gauge the success of decarceration. Such data, however, are not available in Canada (Chan and Ericson, 1981). In Australia, time series data on court dispositions are not available until recent years. The lack of uniformity in criminal law and the definition of offences makes comparison among States misleading. Preliminary analyses of NSW court statistics suggest that the use of community-based options may have increased proportionately and the use of imprisonment declined accordingly (Chan and Zdenkowski, 1985, Tables 16 and 17).
6. See Luhmann (1982) for a detailed treatment of 'differentiation'. Note that Luhmann's notion of 'system' represents a group of activities or acts of communications, not actors. Subsystems, therefore, cannot be reduced to the compact unity of an organisation.

7. The federal government has the power to make changes in relation to the sentencing of federal and ACT offenders, but runs into difficulties if it relies on State authorities to implement federal sentencing policies.

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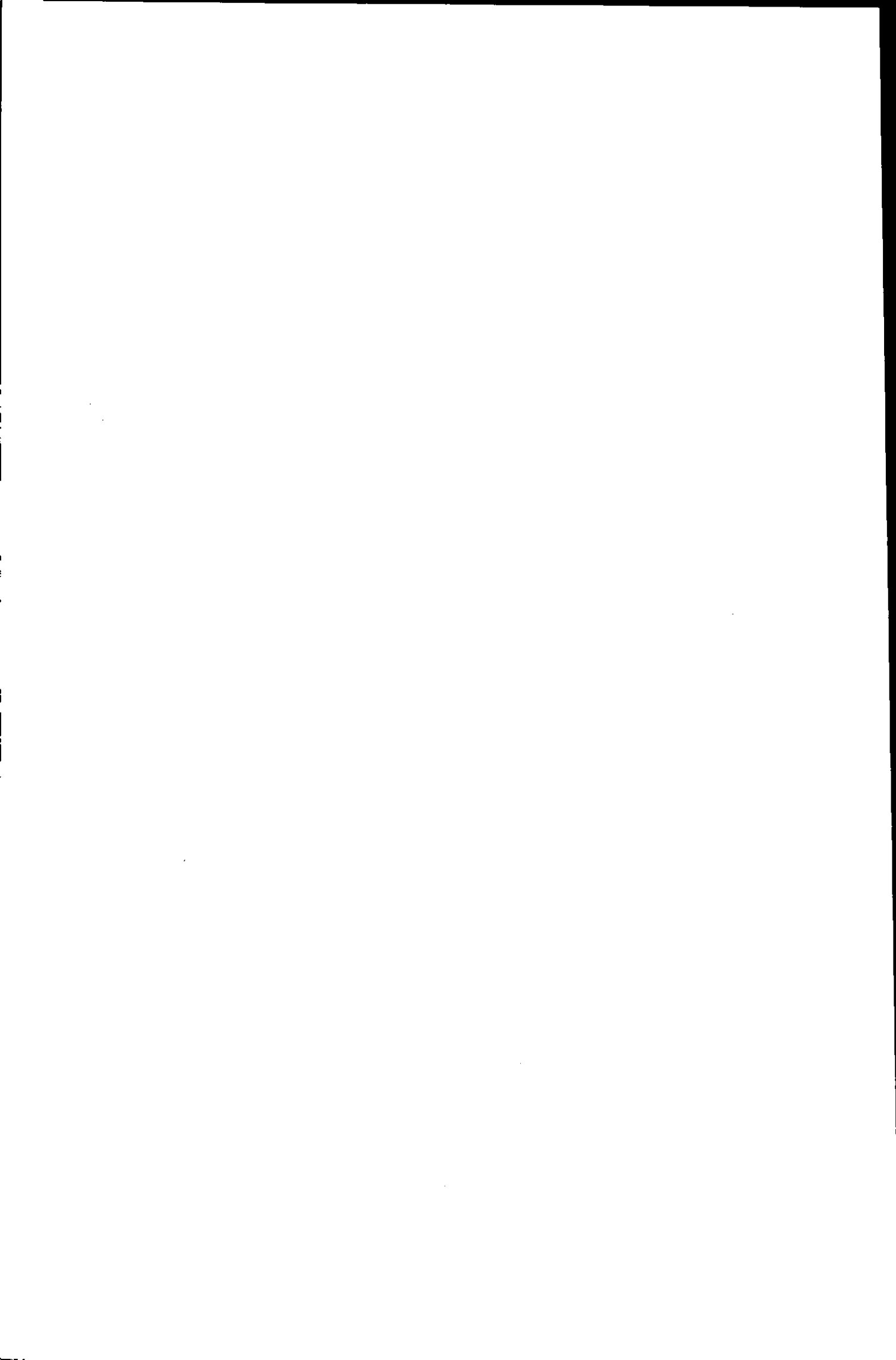
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SENTENCING OF FEDERAL AND ACT OFFENDERS:
SOME REFORM PROPOSALS*

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INTRODUCTION

The Reference

The reference by the federal Attorney-General in relation to punishment of offenders refers to two discrete groups for whom the federal government has responsibility: federal offenders and A.C.T. offenders. As will be seen below, each group has its own distinctive problems which require special treatment. However, there are many important general issues which transcend those specific concerns. The approach of the Law Reform Commission has been to deal with those general issues and then to consider the specific problems of each group. The reference was given to the Law Reform Commission in 1978 with extensive terms of reference. In 1980, following a substantial amount of work under considerable pressure including a number of surveys (the most detailed of which was the pioneering survey in relation to the attitudes of Australian judicial officers as to punishment) an Interim Report Sentencing of Federal Offenders (A.L.R.C. 15, 1980) was published. Unfortunately, resources were not available at the Commission to pursue the normal process of extensive consultation and the completion of the research program at that stage. In late 1984 the project was resumed. The remaining tasks included: undertaking an extensive consultation process; completing the considerable number of research tasks which remained and, if thought desirable, drafting sentencing legislation for federal and A.C.T. offenders. This seminar which was held by the Australian Institute of Criminology at the request of the Law Reform Commission is a further important stage in the consultation process. The proposals advanced here have not been adopted by the Law Reform Commission and feedback is actively encouraged. A final report is to be published in 1987.

* Note and acknowledgment: I gratefully acknowledge the contribution of Kathe Boehringer and Janet Chan in research carried out by them on which this paper is based. Sections of K. Boehringer and J. Chan, 'Toward Rational Sentencing', draft working paper, Australian Law Reform Commission, December 1985 (hereafter Boehringer and Chan) have been reproduced in the following pages in this paper: pp3, 8 to 15, 17 to 21, 24 to 28, 33 to 35 and 44 to 54.

The views expressed in this paper do not necessarily reflect the views of the Australian Law Reform Commission. Comments would be welcome.

Criminal Justice Policy in Australia

The context in which proposals for sentencing reform relating to federal and ACT offenders are made cannot be ignored. The formulation and execution of criminal justice policy in Australia are largely state/territory domains. Criminal justice policy in Australia is substantially formulated, executed and debated at regional levels. This is at least in part due to the existence of considerable variation in the substantive criminal law as well as the punishment systems adopted in the various states and territories. There is a strong argument that such important issues of public policy should at least be debated at the national level. This is not to suggest that regional variation is undesirable. The matter has not been prominent on the national agenda. This is in large part due to the absence of a uniform criminal code. The lack of such uniformity in the substantive criminal law should not preclude an attempt to discuss at a national level important issues of punishment policy. The prospects of such a debate may be enhanced by the formation of the Australian Criminal Law Association as a result of the congress in Adelaide in October last year.

Until fairly recently, the administration of criminal justice in relation to federal offenders has relied heavily on state criminal justice systems. This has largely been for reasons of expediency. The matter had never been systematically reviewed for almost eighty years when the Australian Law Reform Commission was asked to examine the issue. Nevertheless significant ad hoc changes to certain components of the criminal justice process at the federal level have been made through the establishment of the Australian Federal Police and the Office of the Director of Public Prosecutions. However, even in these arenas, there is parallel activity by state police and prosecutors in relation to the investigation and prosecution of federal offences. As far as trial at first instance of federal offences (leaving aside the appellate role of the Federal Court) and the administration of custodial and non-custodial penalties are concerned, these are currently handled exclusively by the states. Indeed, the only exclusive function of the federal government in relation to federal offenders is the definition of federal crime. (This area is currently under review by the inquiry being conducted by Mr Justice Watson.) The federal government exclusively determines the stipulation of maximum penalties and the available sentencing options. In practice, the actual policy is now substantially influenced by state administration of it. Accordingly, important issues which require to be addressed include (i) how best to formulate a suitable punishment policy for federal offenders (ii) whether implementation of such a policy should rely on federal or state agencies or a combination of both. The implications of these matters for sentencing reform proposals in relation to federal offenders are discussed below.

As far as A.C.T. offenders are concerned, the system has been heavily dependent upon the N.S.W. system both in terms of the substantive criminal law and the administration of punishment. Gradual changes are being made in relation to the substantive criminal law. The A.C.T. has now assumed formal responsibility for police and prosecution functions and has its own court system. Although it has a remand prison and a parole board, the A.C.T. is dependent upon N.S.W. for the imprisonment of A.C.T. offenders

who receive a prison sentence. These issues are discussed in greater detail below in the section specifically concerned with the A.C.T. .

Climate for Reform

Until fairly recently the decisions in the criminal justice system which significantly bear upon the offender and the general public, that of 'sentencing' received minimal legal, academic and professional consideration. However, there has for some time been a large literature devoted to analysis of the theoretical justifications which underpin punishment and a large reform-oriented literature, recommending particular punishment regimes as effecting one or other of the justifications. Despite these endeavours, no single theory of punishment or treatment of offenders has achieved predominance, either in theory or in practice. In recent years the process of sentencing has increasingly become the focus of much political and academic debate. The context for that debate is the growing concern in many western societies with rising levels of reported crime, court systems plagued by chronic 'overload', and gross overcrowding in penal institutions. At the same time, the efficacy of penal strategies which promise crime control, or individual offender rehabilitation have come under increasing scrutiny. That questioning is reinforced by the development, in many jurisdictions, of demands for government accountability with regard to state action generally, and particularly with respect to large public expenditures. It is recognised that the sentencing decision is a spending decision 'with major implications for the allocation of public resources'.¹ Further, public disquiet has also been expressed in relation to the inconsistent administration of punishment to offenders and as to perceived injustices flowing from early release through executive action of offenders nominally given significantly greater punishments by the courts. Judicial officers have also expressed strong views on 'executive interference' with court sentencing decisions. In short, there is both public concern and public confusion about fundamental aspects of the punishment process.

There has been a virtual explosion in the literature on sentencing over the last decade or so in common law countries. In the United States in particular many proposals for reform of sentencing laws have been made and a considerable number have been implemented.² The Law Reform Commission of Canada published a major report on sentencing in 1977.³ More recently, the Canadian government has established a Sentencing Commission.⁴ In the United Kingdom the Advisory Council on the Penal System released a major report in 1978 containing proposals for radical reductions in the maximum statutory penalties available for serious offences.⁵ In the same year, a working party published a series of recommendations concerning the training of judges and other sentencers.⁶ In 1979, the Report of the Committee of Inquiry into United Kingdom Prison Services (the May Committee) was completed. In New Zealand the Report of the Penal Policy Review Committee⁷ led to the introduction in October 1985 of the Criminal Justice Act 1985. In Australia reports concerned with sentencing reform have included the Mitchell Report⁸, the Nagle Report⁹, the Muir Report¹⁰, the Parker Report¹¹, the Dixon Report¹², the Nelson Report¹³, the Neilson Report¹⁴, the Apsey Report¹⁵ and, of course, the extensive inquiry into the sentencing of

federal offenders produced by the Australian Law Reform Commission in its Interim Report, Sentencing of Federal Offenders.¹⁶

It should also be observed that until recently the courts and the legal profession were poorly served in relation to the area of criminal law (and in particular sentencing) as far as reports of judgments were concerned and because there were no learned journals in which critical comment could be made on sentencing policy. Judicial officers and legal practitioners tended to reach for English text books and reported cases. Over the last decade the situation has improved considerably with the availability of the Criminal Law Journal and the Australian Criminal Reports which first appeared in February 1977 and August 1980 respectively. Although the Australian literature in the area of sentencing is still thin on the ground, this situation is improving.¹⁷ The Australian Institute of Criminology is actively supporting work in the area. The most recent and comprehensive addition has been a review of Victorian and federal sentencing laws by Fox and Freiberg.

The Commission's extensive consultations to date in the course of the Sentencing Reference have indicated that the terms of reference given to it accurately reflect the concerns expressed by many and the possible directions for reform. In particular, I draw attention to the following themes:

- . The need for coherent, consistent, fair and understandable sentencing policy and procedures.
- . The movement towards deinstitutionalisation, a reduced emphasis on the prison as a sanction and the development of effective non-custodial sentencing options.
- . Restructuring penalty levels.
- . Providing guidances in relation to the exercise of discretion in the sentencing process.
- . The need for better information about and understanding of the sentencing process.
- . The interests of the victim.

The Need for Reform

The efficacy and meaning of the punishment system has been directly called into question over the last decade in relation to its pivotal point: the prison. Although numerically speaking offenders sentenced to prison constitute a minority the prison is still the most powerful symbol of punishment in our society. It should also be recalled that a considerably greater number of people processed by the criminal justice system pass through the prison than actually receive prison as a penalty. People remanded in custody who do not receive custodial sentences and people who are imprisoned as a result of enforcement procedures invoked in relation to non-custodial penalties constitute a significant additional number.¹⁸ The increasing extent to which rehabilitation has been called into

question as a justification for punishment, the escalating cost of imprisonment, humanitarian concerns and serious questions about the efficacy of imprisonment or, at least, long-term imprisonment have all contributed to the movement towards deinstitutionalisation.¹⁹ As a result, it has become commonplace to assert that prison should be used as a punishment measure of last resort. Statements to this effect have been made by the Nagle Report,²⁰ the Australian Law Reform Commission,²¹ the first meeting of Commonwealth Correctional Administrators²² and the Court of Criminal Appeal in Western Australia.²³ Statutory recognition of the principle is now to be found in relation to federal and A.C.T. offenders,²⁴ Victorian offenders²⁵ and in New Zealand.²⁶ Although it is an aspiration easily stated, there are great difficulties in achieving absolute reductions in prison population without the adoption of measures extending beyond the statutory affirmation of that principle. The Law Reform Commission is concerned to investigate what additional measures might achieve this objective and would welcome comment.

The widespread uncertainty, confusion and consequent resentment or cynicism in the community about the punishment process is a serious matter for concern. A substantial factor contributing to such confusion is the lack of any predominant rationale for punishment which finds widespread acceptance in the community. The contrary and often competing objectives invoked as justifications for punishment inevitably lead to disparate approaches by judicial officers.²⁷ Nevertheless in some quarters, there appears to be an insistence on subjectivity. The oft-cited statement in Williscroft²⁸ to the effect that 'every sentence imposed reflects the sentencing judge's intuitive synthesis of all the various aspects in the punitive process' illustrates the point.²⁹ It is not surprising that an observer would be confused. Further, it is unfair to different individual offenders who will have different aspects of their lives emphasised by the sentencer in reaching a decision: their responsibility for the degree of harm inflicted (just desert); the risk the offender poses of reoffending, derived by recourse only to prior record and social and employment history (specific deterrence). Why, an observer may ask, should different factors or a different mix of factors be relevant in (possibly) every case?

Unfortunately, punishment disparity is very difficult to prove. As long as conflicting aims of punishment are relied upon, unjustified disparity is probable. Even if a rationale for punishment can be satisfactorily found there is an argument that disparity can justifiably exist depending upon the factors which are taken into account in sentencing. I would argue that for a coherent sentencing policy a guiding rationale must first be selected and only then can consideration be given to factors to be taken into account and fair procedures for giving effect to that rationale.

Limits to Sentencing Reform

At a general level, it ought to be said that the sentencing decision is relatively marginal to the crime rate despite the greater expectations which are often made of it. This striking and uncomfortable fact of life should be acknowledged at an early stage in any discussion of sentencing reform so that the suggested impact of any reform proposals not be given an inflated value.³⁰

Having recognised the limited impact of the sentencing decision and any reforms proposed in relation to it, it should also be noted that there are a number of important considerations thrown up by the research literature as to the limited impact of law reform in general and sentencing reform in particular.³¹ As well as the general problems mentioned above, there are a number of particular limits to what can be achieved in relation to federal and A.C.T. offenders. (See below.)

The General Approach

I would argue for a sentencing policy that is coherent, consistent, fair and widely accessible.

In broad outline the policy advocated is:

- . Aims of Punishment. The primary aims should be just desert for the offender and reparation for the victim. These aims should be spelt out in statutory form.
- . Deinstitutionalisation. The reduction of the absolute prison population and the expanded use of non-custodial sentencing options. To be achieved through statutory limitations on the use of imprisonment, restructuring of penalty levels and the introduction of a wider range of non-custodial sentencing options.
- . Achieving Consistency. Through the structuring of discretionary decisions by the prosecution, the courts and correctional authorities; the introduction of fair procedures and the establishment of a sentencing commission.
- . Fair and Humane Conditions for Prisoners. The provision of statutory and/or guideline standards for prison conditions.
- . The Removal of Certain Civil Disabilities Flowing from Conviction.
- . Improving Sentencing Information. Providing for the systematic collection, analysis and dissemination of information for participants in the sentencing process and for the community. To be achieved by the establishment of information collection systems and a Sentencing Commission.
- . A Sentencing Statute. Codification where possible of relevant law and procedure for federal and A.C.T. offenders.

Aims of Punishment: The Selection of a Guiding Rationale

In the past, emphasis on the rationales of deterrence and rehabilitation has led to unrealistic expectations about the capacity of the sentencing process in general, or the courts in particular, to effect crime control. A continued primary emphasis on these utilitarian rationales is difficult to justify by reference to practical reality or the weight of past research.

(a) Scientific Objections

(i) Deterrence. In a recent consideration of research, Harris and Gottfredson summarise the findings of the U.S. National Research Council panel on deterrence:

We cannot prove it (yet, the Panel said), but deterrence may work to some degree. With whom, under what circumstances, with what degree of effect, we cannot tell. Certainly, there is in the scientific literature no strong policy guidance for an escalation of punishments in order to reduce crime.³²

(ii) Incapacitation. Research with regard to the claims of selective and collective incapacitation is summarised by Cohen:

This review of research on incapacitation has highlighted a number of problems in pursuing incapacitative strategies. Most important is the recognition that the crime reduction benefits of any incapacitative strategy are inherently limited by the large number of offenders who have no prior convictions. The crimes of these offenders could not have been prevented by an incapacitation policy that requires a conviction before imposing prison terms. Collective incapacitation policies that involve uniform increases in the use of prison for a wide range of offence types were found to have only modest impacts on crime while requiring enormous increases in prison populations. By targeting incapacitation more narrowly on career criminals or habitual offenders with their higher rates of offending, selective incapacitation strategies offer the possibility of achieving greater reductions in crime at considerably smaller costs in terms of prison resources. The success of a selective incapacitation strategy, however, depends critically on our ability to identify the career criminals reasonably early in their careers.³³

One should add that this objective has yet to be accomplished and that, even if it could be, there are ethical concerns relating to the punishment of offenders on the basis of assumed propensities.

(iii) Rehabilitation. Evidence from evaluation research does not support a policy of abandoning rehabilitation as a goal. However, the difficulties of implementing effective rehabilitation programs have proved daunting.

If the rehabilitative ideal has failed, it is in a failure to implement interventions with realistic prospects of preventing further delinquent or criminal behaviour. Feeble, ineffectual interventions would not be expected to work; and there is little evidence that potent interventions have been tested.³⁴

Harris and Gottfredson's conclusion is that no clear guidance, helpful to policy formulation, can be derived from the scientific evidence as to the effectiveness of the three utilitarian purposes of sentencing and corrections - deterrence, incapacitation, and treatment.

I consider that the reintegration into the community of offenders is a desirable and important objective. Those with similar concerns have argued

that rehabilitation be given either primacy or a significant role in the punishment process. However I do not believe the aspiration towards reintegration is a justification for punishment nor that it can be achieved by the incorporation of such an aspiration in statutory form. I would argue that there must be a re-evaluation of the post-punishment approach to offenders. The key needs (particularly in the case of prisoners who have been removed from jobs, family etc often for a considerable period) are for food, shelter, financial support, assistance to obtain employment. This is a question of the provision of adequate resources at a key risk point rather than a matter of social control. Further attention is required as to how this might best be done but it should not be linked with the punishment process.

(b) Ethical Considerations

In addition to scientific objections to utilitarian rationales, there are ethical objections as well. The first is that in 'tailoring' or 'individualising' sentences in pursuit of rehabilitative/incapacitative/deterrent crime control goals, predictions must necessarily be made as to future criminal activity. But predictive errors are endemic, giving rise to the dilemma associated with the notions of 'false positives' and 'false negatives': some offenders will suffer wrongful confinement because they are erroneously classified as 'likely to commit crime' while harms will be suffered by the community from the actions of other offenders released by virtue of having been erroneously classified as 'unlikely to commit a crime'. Further, criminal justice predictions are made 'subjectively, with notorious unreliability and extremely questionable validity',³⁵ virtually inviting the charge of disparity and lack of equity. Additionally, individualisation and prediction in the pursuit of utilitarian aims rely on information whose predictive value is uncertain: prevalence of offence type, attitude and personality characteristics, social, educational and employment histories.

The second ethical objection is that utilitarian-oriented punishment treats offenders as the means to achieve the end, rather than as individuals who, according to the concept of mens rea fundamental to the criminal law, are autonomous beings possessed of free will and responsibility. Lewis argues that:

The concept of Desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a sentence can be just or unjust. I do not here contend that the question 'Is it deserved?' is the only one we can reasonably ask about a punishment. We may very properly ask whether it is likely to deter others and to reform the criminal. But neither of these two last questions is a question about justice. There is no sense in talking about a 'just deterrent' or a 'just cure'. We demand of a deterrent not whether it is just but whether it will deter. We demand of a cure not whether it is just but whether it succeeds. Thus when we cease to consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, a 'case'.³⁶

It is in this context of grave doubts about the crime control claims of

utilitarian rationales as well as of reservations about their ethical status, that interest in the rationale of just desert has grown.

PREFERRED SENTENCING RATIONALE: JUST DESERT AND REPARATION

Definition of Just Desert

What an offender justly deserves as a sanction for wrongful conduct should be proportionate to the gravity of the offence and the culpability of the offender. Just desert involves consideration both of the extent of the 'harm' done to the victim or victims, and the offender's guilt, as qualified by aggravating and/or mitigating factors.

Justification

The widely recognised lack of public confidence in the sentencing process is largely the product of unrealistic expectations with regard to crime control created by directing punishment toward the goals of deterrence, incapacitation and/or rehabilitation. Emphasis on just desert as the predominating rationale of sentencing will focus public attention on the claim of the criminal justice system to achieve justice and will thus conduce toward re-establishing confidence in the sentencing process and, in the exercise of judicial authority. It will also produce greater certainty.

Reparation as a Supplementary Rationale

If the formal genesis of the state's capacity to punish lies in its development of a regime of formal safeguards within which the guilt or innocence of the offender is ascertained, it must not be forgotten that the substantive genesis of that capacity lies in the harm done to victims. 'Justice' for victims requires, minimally, that; (1) the nature of the harm done to them as citizens (infringements relating to life, liberty and property) be publicly recognised; and, (2) where possible, the harm should be redressed.

Therefore, to the degree that, where possible, the offender 'makes good' the harm done to the victim, the offender's desert by way of formal punishment must be qualified by the substantive reparation made to the victim.

If it is desirable that 'punishment' brings about a recognition in the wrongdoer that he or she has perpetrated a wrong, then reparation by an offender which demonstrates that realisation should be fostered. Although serious offences against the physical integrity and personal dignity of the individual are perhaps not readily amenable to reparation, property offences and some trivial offences against the person are. Appropriate

court orders can be devised to achieve reparation, as well as procedures to accommodate the victim interest. Further consideration of these issues is required. Suggestions about how these objectives might best be attained would be welcome.

Advantages

Just desert avoids many of the problems associated with utilitarian rationales. Issues of subjectivity, arbitrariness and inequity associated with predictive rationales do not arise. The rationale of just desert emphasises that punishment

- . flows from proven past conduct, not from predictions as to future conduct
- . is certain, if not subject to later variation during the term
- . is equitable: 'like punishment for like cases'
- . is proportional to the harm of the crime and the offender's culpability
- . cannot satisfy expectations relating to crime control

It is often overlooked by those who favour the desert rationale on ethical grounds that desert can be supported on practical grounds as well. An emphasis on desert allows the development of realistic expectations of the sentencing process. As von Hirsch points out

A rationale emphasising desert makes no promises of significant reductions in crime rates. The mission is a different one: of developing a rational and consistent scheme of punishments that are fairly commensurate with the gravity of the criminal conduct.³⁷

Of course, it is possible that a desert system might operate in any concrete circumstance in such a way that collateral crime control results were achieved, even if crime prevention were not primarily intended. It is neither intended nor expected that the selection of a desert rationale will completely oust utilitarian aim of crime control, and mechanisms of treatment, deterrence and incapacitation may continue to be used as long as these do not conflict with the desert requirements of proportionality and equity. It is emphasised, however, that it would not be regarded as legitimate to increase the punishment determined as appropriate by reference to considerations of just desert on the basis that such an increase might achieve some utilitarian aim. As pointed out earlier, however, sentencing policy can have only a marginal impact on the problem of crime control, remedies for which must be sought in wider social processes not readily influenced by criminal justice policy. But desert-based sentencing can give effect to important principles of the legal order: equal protection, fundamental fairness, and respect for human dignity.³⁸

Disadvantages

Criticisms have been levelled at just desert on the basis that it is ambiguous, vague, circular and so on.³⁹ Various commentators have remarked on the difficulty of securing just desert in an unjust society.⁴⁰ Others object to the interference with discretion that results from such an approach. Rothman has argued that administrative convenience may thwart serious attempts to introduce a justice model.⁴¹ Although it is clear that sentencing reform will not change society from an unjust to a just society, it is important that any approach based on just desert be sufficiently precise to overcome the other criticisms.

It should also be recognised that a just desert approach gives no detailed guidance as to severity of punishment. Nils Christie argues that if attempts to change the offender (through the 'therapeutic' intervention of the state) create problems of justice, attempts to inflict a just measure of punishment can create problems of punitiveness.⁴² While it is recognised that a just desert regime does not assist in defining severity levels it should be realised that none of the existing punishment rationales can provide clear guidance as to the severity of sanctions to be employed. If parsimony in punishment is advocated, its justification must come from elsewhere. The rationale of just desert does not demand harsh punishment. On the contrary, a harsh system may make a casualty of equity by inviting avoidance.⁴³

Practical and humanitarian concerns militate against the existing levels of severity in punishment.

- . Severe penalties (particularly long prison sentences) are not only costly but they generate administrative problems with regard to the management of offenders (See Nagle Report 1978).
- . There is little reliable evidence that severe punishment is actually demanded by public opinion. Research in Canada suggests that punitive attitudes may be a function of information about the offence and offender. When people are given more complete or less selected accounts of sentences, they are more likely to agree with the courts' decisions.⁴⁴ It is possible that a reduction of existing severity levels would not be resisted if the community is adequately informed as to the sentencing policies behind such changes. Research in the United States suggests that public opposition to crime does not necessarily indicate support for harsher sentences; indeed, there is public support for increased use of alternatives to imprisonment.⁴⁵
- . Lower levels of punishment do not appear to be less effective in maintaining social control. The most startling comparison of severity levels is that of Holland: sentences less than 1 month comprise 57 per cent of the total; 'long' sentences -- that is, 12 months and over, comprise a little more than 4 per cent of the total.⁴⁶ By contrast, Australian sentences less than 1 month represent 2.6 per cent of the total and sentences more than 12 months comprise 72.2 per cent of the total.⁴⁷

- . High levels of penalties have proven unsuccessful in achieving utilitarian aims. There is no argument that severe sanctions are called for under a just desert regime. All that is required is that relativities be established to accord with different levels of desert.
- . Humanitarian concerns militate in favour of a low absolute ceiling in respect of any type of sanction.

Accordingly, possibilities along the following lines should be explored:

- . the reduction of maxima for all offences. Research demonstrates that the maximum penalties are rarely used by sentencers. The actual 'tariff' is, generally, much lower than the maximum, indicating that judicial practice, at least, recognises that existing maxima are disproportionate to contemporary assessments of 'gravity' with regard to many offences. Contemporary maxima should not anachronistically reflect understandings of penalties which were enacted over a century ago or reenacted without adequate consideration
- . abolition of the use of minima. This accords with the operation of the supplementary rationale of reparation. On this rationale, it may be that charges would be withdrawn, or a conviction only recorded, where reparation to the victim occurs. Also this allows for reduction of penalties to accommodate mitigating circumstances.
- . imprisonment, where an appropriate penalty, should be used as a last resort
- . prima facie, non-violent property offences such as break, enter and steal or fraud should not attract imprisonment as a penalty
- . prima facie, offences which involve serious violence should attract imprisonment as a penalty
- . ranking offence seriousness and establishing a sanction hierarchy (see below)

(N.B. These are illustrations of possibilities. Further consideration is required.)

These positions involve value judgments which would have to be tested in the political world. However, at this stage, I consider that they are compatible with modern views about punishment. Given the views expressed even in official reports of correctional agencies⁴⁸ as to the negative and destructive experience of imprisonment, and given evidence that jurisdictions operating 'light' punishment systems do not suffer from increased rates of criminal activity, there is little to be said against progressively reducing severity levels. Those who seek to justify the present (or increased) levels of severity should be required to present evidence in its support.

This is the opposite of the current situation in which calls for

'getting tougher' are accepted almost without question, while those seeking to reduce the severity of punishments are challenged to provide hard evidence of the value of their proposals.⁴⁹

ACHIEVING THE POLICIES

A Sentencing Statute

A fundamental aspect of the Law Reform Commission's sentencing reform proposals will be that sentencing law and procedure for federal and A.C.T. offenders should be reduced to statutory form and should be codified as far as is practicable. A notable exception is the area of prosecutorial discretion. This area (including plea-bargaining) is not, in our view, susceptible to statutory regulation. This is not to say that a good deal of improvement through the introduction of other measures could not be made.

Opposition to codification (as distinct from statutory enactment) of sentencing law and procedure is usually expressed on the basis that: it introduces rigidity with the result that there is no capacity to deal with the eccentric case or to develop the law; sentencing is sui generis and discretion in the sentencing tribunal is paramount; it is an attempt to interfere with sentencing discretion, and it is redundant. Further it is said that courts are still required to interpret a code and will, in doing so, place restrictions and qualifications on it, so why bother.

The arguments in favour include: increased accessibility of the law to the judiciary, the legal profession and the community; greater accountability as a result through legal mechanisms such as the appeal system and through public debate and scrutiny; increased potential to detect interconnections between various parts of the sentencing process and, if necessary, to modify any part; and potentially greater certainty.

The redundancy argument ('we do it this way anyway so what's the point of statutory expression') is at best a neutral not a countervailing position and does not offset any positive attributes which can otherwise be made out. The discipline of attempting to articulate underlying principles may reveal and force consideration of contradictory impulses.

The necessity for judicial interpretation (and hence modification) is acknowledged and desirable in order to accommodate change. The rigidity/lack of flexibility argument depends on whether the principles in issue are (i) prescriptive/mandatory or (ii) guidelines/discretionary. Finally, codification of the substantive criminal law is familiar to a substantial number of Australian lawyers. Statutory regulation of various aspects of the sentencing process already occurs in a piecemeal fashion in relation to both federal and state offenders. Victoria has recently gone a step further with its consolidation of sentencing provisions in its Sentencing and Penalties Act 1985. Note also the New Zealand Criminal Justice Act 1985.

Why a Statutory Approach?

If it is conceded that a sentencing rationale is required, consideration must be given to the most desirable means of giving effect to such a rationale. Allied questions are who should formulate the rationale and who should implement it? The list of relevant candidates is not very long: the legislature, the courts, the executive, a specialist agency such as a sentencing commission or a combination of these.

It is doubtful whether the legislature, without recourse to a specialist body, could both settle on a rationale and embark on the tasks necessary to give proper effect to the rationale. The argument here is that the legislature has neither the time nor resources to pursue these complex tasks and to develop and establish considered principles.⁵⁰

There are also problems in asking the appellate courts, by themselves, to develop either a predominating rationale or principled resolution of sentencing policy issues. Von Hirsch is particularly critical of Thomas' claim that the English Court of Appeal has evolved a 'tariff' for various offences (based on deterrence and denunciation) which permits deviations on defined grounds.

Perhaps the English cases do reveal this pattern. My doubts concern whether the pattern was the result of any sustained critical analysis of what the direction of sentencing policy ought to be; or whether, however evolved, the pattern and its purported array of purposes are ones which thoughtful policymakers would be unlikely to find reason for adopting de novo.⁵¹

There are obstacles to development by appellate courts of a systematically formulated rationale. The major impediment is that appellate courts are primarily concerned to decide the instant case rather than to consider policy ramifications. Even the guideline judgment approach advocated by Ashworth⁵² would be hindered by the necessity to develop principles opportunistically, i.e. when a case presented itself which would be amenable to appropriate development. The systematic nature of the task of setting policy requires the adoption of a comprehensive view. Such a view arguably will elude busy appellate courts.

The difficulties faced by the executive arm of government (here broadly intended to refer to the police, the prosecution authorities, probation and parole authorities and the government departments backing those agencies as well as the courts and the legislature) are similar to those which obtain in relation to the legislature. There is no structure which is currently geared to examining, developing and systematically monitoring the area of sentencing policy. Our consultations indicate that most of these agencies and government departments simply do not have the time and resources to devote to such a task even on a limited let alone on a sustained basis.

In my view there is a need for a specialist agency such as a sentencing commission to undertake the task of assisting in the development of relevant information about sentencing and sentencing policy. Such an

agency would not usurp the paramount functions in this area which must remain those of the legislature as the accountable public body and the judiciary as the organ most experienced in administering punishment policy in a finely tuned fashion. The suggested role of such a sentencing commission is referred to in more detail below. Suffice it to say at this stage that my proposal involves an interaction between a sentencing commission, the legislature and the judiciary.

Implementing the Statutory Approach

The argument in favour of establishing a statutory regime, as developed by a sentencing commission, is put by von Hirsch. For him, the claim that the case-by-case common law approach is the tried and tested way begs the question:

No developed legal system, not even that of England, relies entirely on the common law. Some questions, such as the income tax, are dealt with by comprehensive legislation. Others, such as the law of tort, remain primarily matters of the common law. Still others begin as common-law dominated, and then become an area of more systematic regulation - as has become true of commercial law in most US states since the Uniform Commercial Code. Such a mixture makes it appropriate to ask whether, for a particular field, policy can best be made by appellate courts alone, or by appellate courts interpreting more systematically-devised rules or standards. What I am suggesting is that sentencing is the latter kind of area.⁵³

But to advocate a statutory approach directs attention to a number of other issues:

- . Need to Avoid Contradictory Statements of Purpose. Care must be taken to ensure that statutory statements of purpose do not conflict. As a result the aims should be clearly spelt out, their priority should be indicated and the manner in which any conflict is to be resolved should be specified.
- . Level of Specificity. Another issue which arises is the extent of detail which should be provided in the statutory directions. If the adopted formulation is in extremely vague terms it may provide little or no guidance to the courts and hence be redundant (except perhaps as a symbol) because the courts will not be assisted in any manner. An example of this type of direction would be to request the courts to have regard to the 'protection of the public'.

According to von Hirsch, (1985) an example of a general but clear and coherent direction for sentencing policy is provided by the Finnish Criminal Code: the sentence is to be proportionate to the gravity of the crime, by having regard to the harmfulness of the conduct and the culpability of the actor.

However more specific and elaborate guidance has been provided by the draft proposals of the Swedish Committee on Prison Sanctions. The final

report was published in April 1986 but the English translation will not be available for some time. The Swedish proposals give more direction to appellate courts than their Finnish counterpart because the steps in determining sentence are clearly laid out: the statute declares the penal aims to be achieved, and provides a broad framework (based on integrating the 'penal value' of the crime category and the 'penal value' of the offender's particular act, considered in light of detailed definitions of aggravating and mitigating factors) for determining whether the sanction will be imprisonment, conditional sentence or fine. Since the statute provides both aim (imposition of deserved, proportionate punishment) and the criterion to be used in determining quantum of punishment (penal value of the offence), the task of the court is to assess that penal value.

An alternative approach has found favour in a number of North American jurisdictions, namely the numerical guidelines approach. Minnesota, Washington and Pennsylvania are among the state jurisdictions using such guidelines and a Federal Sentencing Commission was appointed in 1985. The usual procedure in the United States has been to appoint a sentencing commission which, following consultations, develops a sentencing grid which is then either enacted or endorsed by the legislature. Generally speaking, such guidelines are presumptive with the result that they must be adhered to by the courts unless a reason for departure arises. Reasons for derogation from the prescribed quantum range must be given and the role of the appellate court is to review sentences to determine their compliance with the guidelines and concomitantly to develop a correlative jurisprudence, for example, with regard to aggravating or mitigating considerations. Alternatively, some smaller jurisdictions (for example the City of Denver) prefer advisory guidelines (similarly constructed by an expert body). Research indicates that where guidelines are purely advisory, they are significantly derogated from in practice.⁵⁴

In my view numerical guidelines are unsatisfactory for Australian conditions because they would prove to be too rigid in practice. The advantage of the Swedish scheme of non-numerical guidelines is that courts retain their traditional discretion for deciding sentence severity, but are assisted by the statutory framework and elaboration of principles in reasoning through their decisions. This approach also has advantages in relation to appellate review, since the appeal court has recourse to the principles and standards provided in the statute rather than numerical inaccuracies which perhaps inadvertently get incorporated during the construction of the tariff grid but which are determinative for the appeal court. It also avoids the limitations of the present appellate court method of sentence review in Australia. Even though appeals are now generally available to both the accused and the Crown in all jurisdictions, a principled resolution of sentencing policy issues is unlikely since appellate courts simply do not possess the requisite knowledge upon which a tariff based on a systematic perspective might be developed. Neither appellate court judges nor litigants will have either the time or the resources to become familiar with the intricacies of sentencing policy. However the Swedish model has the advantage of involving the courts in the responsibility of tariff-construction, of determining the seriousness of particular crimes and their punishments.

The Role of a Sentencing Commission

The adoption of legislative non-numerical guidelines requires a skilled agency with time and expertise to draft standards for eventual legislative enactment. In Sweden, a study commission was established for the specific purpose of drafting standards, assisted by a working group of penologists, fully acquainted with sentencing issues and with sentencing reform in other jurisdictions. Another approach being considered overseas is that of establishing gradations of 'penal values' attached to offences. In addition, paradigm cases could be constructed (by a sentencing commission) to detail what would constitute 'high', 'medium' and 'low' penal values, but detailed ranking of penal values would be left to the trial and appellate courts. On this scheme the role of the courts would be to flesh out the rationale and standards which comprise a sentencing policy.

The role of a sentencing commission would possibly consist of:

- . initially outlining the penal value approach;
- . constructing paradigm cases;
- . monitoring appeal court decisions and feeding them back to the lower courts;
- . acting as an advisory body to the appeal courts by providing sentencing information and statistics;
- . monitoring the implementation of sentencing principles.

It should be noted that none of the suggested tasks to be undertaken by a sentencing commission seeks to undermine the role of the parliament or the courts but is rather intended as a servicing function. This is not to diminish the important contribution to public policy which such a commission could make but to place in perspective what its role might be.

Moreover, careful consideration would need to be given to the composition of any such body. It is suggested that its membership might include the following:

- . representatives of judicial officers drawn from the superior courts, the district/county courts and the magistracy;
- . police;
- . prosecution authorities;
- . professional associations (law society/bar associations);
- . correctional administrators;
- . the Australian Institute of Criminology;

- . academics qualified in penology/criminology;
- . community representatives.

The above list is by no means definitive and would require a good deal of further discussion including the extent to which federal/state representatives are to be included. This will be influenced by considerations such as whether the proposed body should have a brief to consider sentencing issues on an Australia-wide basis or whether it is exclusively concerned with matters relevant to federal and A.C.T. offenders.

To date the debate on a sentencing commission in Australia is, to say the least, embryonic. The concerns which have been expressed in relation to the suggestion since it was floated in the Interim Report (A.L.R.C. 15, 1980) have tended not to focus upon the merits of the proposal. As a result, there has not really been a debate about what functions such a body might usefully perform and how it might be composed. The arguments in opposition to such a body have been couched in terms of duplication of functions, cost, interference with judicial independence and the like. However, even during this phase of the discussion the concept had its supporters. The federal Attorney-General, Senator Evans, embraced the notion although the model he referred to the states for consideration differed in its composition from that proposed by the Australian Law Reform Commission. Tasmania unequivocally endorsed the proposal. Victoria's opposition was really based on altruistic concerns rather than an opposition to the concept. The Victorian Attorney-General, Mr Kennan, expressed reservations about the notion of a sentencing council but only because he was not certain whether it would achieve its stated objectives and because he 'would not like to see any proposal . . . which dragged Victoria's imprisonment rate up to the national average'.⁵⁵

However, more recent developments indicate growing support. In October 1985 following delivery of the key note address on the role of the High Court in relation to sentencing appeals at the International Criminal Law Congress in Adelaide, the Chief Justice of the High Court of Australia, Sir Harry Gibbs, declared that he thought a sentencing council was 'prima facie a good idea'. His Honour's remarks have not received a great deal of publicity. Nevertheless, it is a significant endorsement of the concept and requires that it be taken seriously in the Australian context. In what may be an unrelated development, I understand that N.S.W. authorities are considering a sentencing council as one of a series of options relating to proposed sentencing reforms in NSW. Accordingly I would suggest that attention be focused on what sort of body could best serve the needs of the Australian community and what functions should be entrusted to such a body so that it could most efficiently aid those in whom actual decision-making power in the sentencing process is vested.

Restructuring Penalties

A major implication of the introduction of a sentencing rationale, attempts to improve consistency and to move towards a reduction in

severity of punishment is a substantial restructuring of penalties. Although there is no comprehensive systematic information about penalty levels and the relationship to actual practice (or lack of it) in Australia there appears to be little doubt amongst judges and practitioners that the maximum penalty imposed for most offences is rarely invoked and that the penalty range most regularly used occupies the bottom half of the available spectrum.

Exceptions may perhaps be found in a couple of dramatic examples such as laws relating to drug trafficking or the hijacking of aircraft. In these cases there have been dramatic increases in the maximum penalty in recent years. Again, it is not clear that there has been a dramatic systematic escalation in the actual penalty imposed which corresponds with those increases in maxima.

Another area to which the above generalisation may not apply is that of monetary penalties. The trend in this area has been in the opposite direction and complaints are regularly made about the inadequacy of pecuniary penalties having regard to the effects of inflation and increasing affluence in the community. In some jurisdictions the response has been to switch to penalty units instead of stipulated amounts. This approach has been taken in Victoria in the Sentencing and Penalties Act 1985 and the Tasmanian Law Reform Commission has also recently recommended that the Victorian model be adopted.⁵⁶

There is little doubt that there are many anomalies in the stipulation of maximum penalties for particular offences. In his analysis of penalties for federal and A.C.T. offenders⁵⁷ Gilchrist found an enormous range of penalties for similar conduct. Mr Justice Watson has also remarked on this phenomenon during the course of his review on federal criminal offences.⁵⁸ Warner, in reviewing financial penalties in Tasmania, discovered a similar situation.⁵⁹ In England, the Advisory Council on the Penal System discovered a similar range.

Given that there is no systematic machinery for reviewing penalty structures it would be surprising if the situation were other than chaotic.

The actual task of restructuring penalties, if it is to be pursued seriously and in a sustained way, is necessarily a long term objective. In suggesting a complete review and restructuring of penalties I am acutely aware of the enormity and the difficulty of such a task. It is potentially the most politically controversial, value-laden task that one could undertake in the area of sentencing. It is also clear that there are dangers in adopting a system which would not allow some flexibility and not allow some scope for change over time with changing values.

Nevertheless it is a task which we would argue can be undertaken and ought to be undertaken because it is necessary to the overall coherence of our penal policy.

In the brief time available, I shall only attempt to sketch out how one might go about this task and to give a few examples.

Ideally, a sentencing policy emphasising justice and deservedness of

punishment should begin with identifying and ranking (a) the seriousness of offence and (b) the severity of penalties, so that, at the very least, there is some basis for 'making the punishment fit the crime'. The key general issues are: (a) what restructuring of penalties consists of; (b) how it can be done; (c) who should be doing it.

It is important to recognise that the existing penalty structures already contain some basic assumptions about the seriousness of offences and the severity of penalties. For example, maximum penalties are meant to reflect the seriousness of offences, although they are often found to be inconsistent. If punishment is to be just, proportional, and non-arbitrary, it is doubtful that such an ideal could be achieved within the existing structures.

One attempt to restructure penalties is that undertaken by the Advisory Council on the Penal System in England.⁶⁰

The main thesis of their recommendations was that existing maximum penalties do not represent a valid guide to sentencing practice and bear little or no relationship to the great majority of cases dealt with by the courts. They therefore recommended that new maximum penalties should be derived from existing sentencing practice so that they are fixed at a level which would cover 90 per cent of Crown Court trials resulting in the imposition of a sentence (on the admittedly arbitrary basis that the remaining 10 per cent can be considered exceptional cases). In exceptional cases the courts would have power to exceed the maximum.

The anticipated consequences were threefold: (a) the new maximum penalties would provide a relevant guide to sentencing in all cases; (b) a reduction in sentence lengths with considerable advantages for the prison system as a whole; (c) a wider discretion in the courts for 'unexceptional' cases.⁶¹

The Advisory Council was reluctant to suggest immediate legislative implementation of its proposals, preferring to invite an experimental phase in which the Court of Appeal (Criminal Division) tested the proposal.⁶² The Council also stressed the importance of research to monitor the implementation of its proposals. As far as I am aware there was considerable criticism of the Report⁶³ and its recommendations have not been acted on.

Another approach to restructuring penalties has been suggested by von Hirsch.⁶⁴ Three major issues have to be resolved: (1) the rating of seriousness of offence, (2) the significance of the offender's prior criminal history, and (3) the choice of penalties.

Seriousness of Offence

Von Hirsch sees harm and culpability as two major components of seriousness:

Harm refers to the injury done or risked by the criminal act.

Culpability refers to the factors of intent, motive, and circumstance that determine how much the offender should be held accountable for his act. Culpability, in turn, affects the assessment of harm. The consequences that should be considered in gauging the harmfulness of an act should be those that can fairly be attributed to the actor's choice.⁶⁵

In order to rate the harmfulness of conduct, von Hirsch suggested an approach based on the 'ranking of interests', a concept he attributed to Feinberg.⁶⁶ According to this conception, the degree of harm can be roughly divided into three categories:

- (1) Serious harms which invade the 'welfare interests' of a person. Welfare interests are 'the interests that persons need satisfied in order to have any significant capacity to choose and order their way of living . . . When these interests are destroyed or threatened, the person is foreclosed from almost any tolerable mode of life he might wish to pursue'.⁶⁷ Von Hirsch included here major violent offences such as murder, aggravated assault and armed robbery, as well as some economic crimes which stripped a person of his or her means of livelihood. [Note that the inclusion of property offences in this category can be open to further debate.]
- (2) Intermediate harms which invade the 'security interests' of a person. These are interests beyond the bare essentials of life, and they refer to 'a certain additional safety margin', without which the person would have to live in 'acute anxiety and discomfort'.⁶⁸ Included in this category are serious assaults and certain types of residential burglaries.
- (3) Lesser harms which invade the 'accumulative interests' of a person. These are interests people pursue 'to accumulate the various good things of life'.⁶⁹ Included in this category are offences such as common thefts.

Such a scheme is useful as a first step towards rating the harmful consequences of offences. It is not a perfect scheme which will take into account special cases, and more work needs to be done to refine it.

Von Hirsch cited four kinds of situations in which the issue of culpability arises in sentencing:

- (1) the principle of criminal intent, that is, the gravity of the offence depends on whether the actor's behaviour was purposeful, knowing, reckless or negligent;
- (2) the doctrine of excuse, that is, the seriousness of the offence is mitigated by circumstances of necessity, duress, provocation or other valid excuses;
- (3) the situation of mental impairment, that is, the actor is less blameworthy because, while not insane, he or she lacks the capacity to comprehend his or her own action while committing the offence; and

- (4) the consideration of motives, that is, the offence may be seen as less serious if the actor violated the law as a matter of conscience or to benefit others (as in civil disobedience situations).

In attempting to come up with some grading of seriousness, the body charged with this responsibility may want to follow von Hirsch's advice that (a) the seriousness of crimes be explicitly graded, (b) judgment of gravity be made conscientiously rather than borrowed from somewhere else, (c) reasons be given for ranking, and (d) the reasons be based on a systematic rationale. It is worth noting that:

Rating crimes is ultimately a matter of making value judgments, on which persons reasonably may differ. Those judgments can, however, be supported and guided through the giving of reasons and thorough debates.⁷⁰

Prior Criminal History

If one accepts that prior convictions of an offender should be taken into account in sentencing, then some decisions will have to be made with regard to the amount of adjustment in penalty appropriate to the offender's criminal history. One way of viewing this adjustment is to consider lower penalties for first offenders as a system of 'discount', which is progressively lost as the offenders recidivate. This approach avoids a limitless escalation of penalties for recidivists. Two other issues need to be considered very carefully in devising a scheme of discount on the basis of criminal record: (a) the quality of the criminal record (that is, the seriousness and frequency of prior convictions, and their relatedness to the current offence), and (b) the decay of the record (that is, the length of time which has passed since the last conviction). Another important issue which relates to prior criminal history (if this history is sought to be used as a predictive measure) is whether categories such as 'habitual' or 'dangerous' offenders should continue to exist.

The Choice of Penalties

The assigning of penalties to various levels of seriousness of offence is another difficult task. If there is a way of ordering the severity of penalties according to a deprivation (financial deprivation or loss of liberty) scale, it may be possible to assign maximum penalties for each level of seriousness (which takes into account harm, culpability, and prior record as discussed above). I favour the assigning of maxima rather than ranges of penalties because it gives more flexibility to reduce penalties in relation to mitigating circumstances. However as von Hirsch points out, when it comes to establishing 'the levels of severity appropriate for given degrees of blameworthiness', just desert can only provide guidance as to the upper and lower limits. The upper category refers to serious crimes for which 'the severe penalty of imprisonment is

manifestly deserved, and any lesser penalty would be disproportionately lenient', whereas the lower category refers to lesser crimes for which the use of imprisonment is 'plainly excessive'.⁷¹ In other words, we can visualise the following broad categories:

SERIOUSNESS MAXIMUM PENALTY

Most serious
Imprisonment

Intermediate
Semi-Custodial/Non-Custodial

Less serious
Non-custodial

where 'seriousness' is determined by harm, culpability and prior criminal history in combination. Clearly, this scheme would need to be substantially refined and expanded for the purpose of reviewing the penalties in legislation. However, as a general guide to sentencing this may be a useful start to a broadly-based debate as to what constitutes deserved punishment.

A Rough Outline

What would a scheme for grading offence severity look like in practical terms? A very rough outline of one possibility is set out below. Inevitably it makes certain arbitrary value judgments and is included for illustrative purposes. Any proposal would need to be subjected to a good deal of further work. Ultimately, the task of recommending changes in the allocation of offences from one severity level to another should be undertaken by a sentencing commission as should the evaluation of initial recommended severity levels for new offences. It will be apparent that the proposal below suggests a general downgrading of maxima and a removal, generally speaking, of indeterminate penalties. As a result, no powers are available to the court to impose a life sentence (except for murder) or to impose additional open-ended penalties in respect of so-called habitual offenders. Although the matter is discussed in general terms below, separate schedules would need to be prepared in relation to federal and A.C.T. offenders.

Schedule A. Murder: life imprisonment (non-mandatory).

Schedule B Offences. It is contemplated that this will be a very small category of offences regarded as extremely serious by the community such as attempted murder and extreme forms of drug trafficking. It is suggested that the maximum penalty for this category be 15 years imprisonment. However the court should retain the power to impose any lesser penalty prescribed in the range of sentencing options. This will allow the courts considerable latitude in the exercise of their discretion.

Schedule C Offences. It is suggested that this also be a fairly small category of offences and should include such offences as armed robbery, hijacking aircraft and aggravated forms of sexual assault. The suggested maximum penalty is 10 years imprisonment. However, for the reasons suggested above, the court should retain all its other sentencing powers.

Schedule D Offences. The suggested maximum penalty is 5 years imprisonment. Possible candidates include break, enter and steal and serious assault. Again the court should retain all its other sentencing powers.

Schedule E Offences. This would cover the majority of offences. Imprisonment would not be available as a penalty. The court would retain the power to impose any non-custodial penalty prescribed in the range of sentencing options. It is suggested that provision be made that any new offence will be governed by schedule E unless otherwise expressly provided. It may have the salutary affect of insisting on some consideration being given to any offence for which the penalty of imprisonment is contemplated.

Schedule F Offences. A category of offences for which there are fixed monetary penalties only and which will be dealt with on an infringement notice basis with a right to be let in to defend. In the federal sphere this category might include airport parking violations, and minor tax and customs matters.

The Role of Judicial Officers

The role of judicial officers under the proposed scheme will be pivotal. Judges and magistrates will be substantially involved in any proposed sentencing council or commission and in formulating any proposals and initiating any research, monitoring activities or information service undertaken by such a body. Judicial officers will be intimately involved in interpreting any statutory guidelines approved by Parliament on a day to day basis. Judicial officers will be involved in appellate review as they always have been but with a better flow of information, statutory guidelines as to the exercise of their discretion and the availability of better training in the sentencing area.

It would be misleading to suggest that this involved any erosion of judicial independence. The long standing tradition of a robust and independent judiciary will be maintained.

The Role of Parliament

Nor would the proposed scheme seek to usurp the paramount role of the legislative and publicly accountable arm of government. Nothing in the proposal derogates from the paramountcy of the parliament in establishing the parameters within which judicial officers make their decisions. Unlike the organs established in certain North American jurisdictions the

policies or guidelines formulated by the sentencing commission/council are not presumptive or self-executing. Any change must receive the imprimatur of the parliament. There is no question of a non-accountable body determining punishment policies. On the contrary, the existence of a sentencing commission/council will provide a forum in which public debate can take place about punishment policy in relation to any new offence unlike the existing situation in which such determination are more likely to be the result of an ad hoc decision without the opportunity for deliberation.

The Role of the Executive

As before, the Executive (as broadly construed) will continue to play a substantial role in punishment policy. However, with the consolidation of guidelines for the exercise of prosecutorial discretion and the establishment of statutory procedures relating to the factual basis of sentence and the prosecution address on sentence, the role of the prosecution will be transformed into one which will lead to more consistent, fair and publicly accountable decision-making. At the other end of the sentencing process, our proposals may entail a reduced involvement by the Executive in prison release decisions. Moreover, where such rights continue to exist their exercise is constrained by the requirement of adherence to due process. As far as correctional agencies are concerned, it is clear from the thrust of our proposals that prison is to play a less significant role in overall punishment policy. However, where imprisonment continues to be used as a sanction, our proposals also envisage an enhanced and more active and positive role for prison administrators and staff than has hitherto been the case.

The Importance of Information

Throughout the consultations conducted by the Law Reform Commission, emphasis has been placed by respondents on the importance of information relating to the sentencing process. On this general issue there has been unanimity. Judicial officers have regularly lamented the lack of information available to them. The complaint takes many forms and there is disagreement about priorities and the relevance of various types of information. However comments have included reference to:

- . lack of judicial training for sentencing
- . lack of systematic information about particular offence categories
- . lack of adequate information about offenders from pre-sentence reports etc
- . lack of adequate feedback about the effect of penalties actually imposed

- . lack of information about the sentencing practice of themselves, judicial colleagues, appellate courts and other jurisdictions
- . inadequacy of information relating to sentencing decisions reported by the media with the result of misinformation/distortion etc.

A crucial part of any serious sentencing reform program must tackle the question of information in all its forms. As a result, the systematic collection of sentencing information, the importance of the sentencing commission/council in this area and the need to implement evaluation programs in relation to introduced sentencing reforms must all be emphasised.

Public Opinion and the Media

Intimately related to the issue of sentencing information is the role of public opinion. The lack of adequate information inevitably influences the manner in which public opinion about punishment policy is formed. The primary vehicle for transmitting information to the public is of course the media. Accordingly, even if substantial improvements can be achieved in the area of the collection, recording and analysis of sentencing information, serious obstacles still lie in the path of adequate dissemination of such information unless the media co-operates in the exercise.

IMPORTANT ISSUES REQUIRING FURTHER RESEARCH

Victims

In the Commission's Interim Report, Sentencing of Federal Offenders, the importance of the need of victims was emphasised. A victim compensation scheme was outlined. While this is a major step in the consideration of the issues relating to victims, recent developments in both England and North America point to the need for a consideration of other matters. There has been a considerable growth in the so-called victim rights movement which, I think it is fair to say, is in an embryonic stage in Australia. In certain jurisdictions victims have achieved greater recognition both formally and informally in decision-making at various stages of the sentencing process. Perhaps the extreme example of this is the Californian situation in which the victim has statutory rights to give evidence in relation to penalty. There is a growing recognition that the victim has been neglected in the criminal justice process and largely relegated to the role of principal witness for the Crown and then, usually, only in contested matters. The complaints by victims range from the relatively mundane - not being notified of dates, times, venues, etc - to the more serious claim of feeling helpless and irrelevant to the whole system which is theoretically seeking redress on his or her behalf. Complex issues are raised by the suggestion that victims should be afforded formal legal rights to have an input into decision-making

processes at any or all stages of the sentencing process. Obvious dangers would seem to arise. Nevertheless, it is a serious matter which has hitherto not received adequate attention in Australia. The Law Reform Commission would welcome comments and suggestions in relation to these matters.

Special Offender Groups

Important issues arise as to whether special rules should be devised as to the sentencing of special groups of either (a) offenders, (b) categories of offence, or whether such special features as present themselves should be taken into account as part of the general circumstances of the case. Corporate offenders and for example, arguably deserve special attention by the Commonwealth because of the increasing likelihood of the use of the extensive Commonwealth legislative power to regulate corporate affairs. In my view, special sanctions should be devised in relation to corporate offenders for whom the existing range of penalties is not adequate. To some extent this has already been recognised as far as financial penalties are concerned in existing legislation in which maximum penalties prescribed for corporate offenders are often considerably more than for individual offenders. The issue arises as to which additional sanctions ought to be available (not necessarily in substitution for) the range of penalties available for individual offenders. For example, the suggestion has been advanced that equity fines and formal adverse publicity orders be used as sanctions for corporate offenders.⁷² Further research is needed in this area and the Law Reform Commission would welcome comments and suggestions.

Other offender categories which may require special rules include Aboriginal, migrant and female offenders. A special offence category which deserves special attention in the federal sphere at least is that of drug offences. Comments in relation to these matters are also encouraged.

Fair Procedures

It was suggested earlier that, where practicable, procedures for sentencing should be codified. A number of possible items for inclusion are referred to in Appendix B. I have not sought to justify their inclusion in this paper. Some merely reflect existing practice. Obviously others are likely to be controversial and require further detailed debate. I invite such comment particularly from those who have the day to day burden of making procedural rules work. With that substantial qualification, I make brief comments below on a few selected aspects.

Relevance of Prior Record

The problem of whether or not to take prior offences into account in the sentencing of the instant offence bedevils just desert theory.

Fletcher⁷³ and Singer⁷⁴ maintain that prior record is irrelevant to the offender's desert since the punishment undergone as a result of previous convictions extinguishes them. The quantum of punishment deserved for the current crime should not be affected by prior record.

It is important to avoid confusion here. There is no denying that prior record should be irrelevant at the trial stage, where the question is one of guilt or innocence of the accused.⁷⁵ The question of whether the offender did or did not commit the particular offence cannot generally be helped by knowledge that the person committed offences in the past. A person's pattern of offences, if any, is irrelevant (subject to the rules relating to similar fact evidence) because, in general, the likelihood that he or she would commit such an act is qualitatively different from the evidentiary determination that the person actually did commit the act beyond a reasonable doubt.

But this is not to say that the existence of an offence pattern is equally irrelevant to the assessment of desert. A first offender may be treated less severely because it may be argued that he or she was uncharacteristically or temporarily unwise or selfish on the occasion of the first offence, but this argument loses force with each repetition of the offence. At work here is von Hirsch's notion of 'sympathy for the all-too-human frailty' that can lead someone to an initial lapse.

. . . tolerance is granted on the grounds that some sympathy is due human beings for their fallibility and their exposure to pressures and temptations - and some respect is owed their capacity, as moral agents, to reflect on the censure of others. The temporary nature of the tolerance - the fact that it diminishes (and is eventually wholly withdrawn) with repetitions - is critical. This assures that, ultimately, people are held fully accountable for their misdeeds, as any conception of desert requires.⁷⁶

I emphasise here that the notion that the first offender is entitled to some scaling down (a 'discount', if you like) of disapprobation does not express either a predictive judgment (that it is unlikely that the offender will re-offend) or a rehabilitative judgment (that a reduced penalty will be the 'slap on the wrist' that will cause the offender to return to a law-abiding course). The 'sympathy' that is extended to the first offender is, rather, grounded in a recognition of the far-reaching consequences of criminal punishment, that it is 'so public, has such lasting stigma, and can be accompanied by so much material deprivation' and that tolerance is particularly appropriate where the mode of censure is so onerous.⁷⁷

I think that in determining the culpability of the offender for the purposes of sentencing, the offender's prior criminal record, if any, should be taken into account. If the offender has had a bad criminal record this may serve to disentitle him or her to the kind and/or quantum of leniency that is normally accorded to first offenders, or to offenders whose criminal records cannot fairly be regarded as relevant or whose criminal records may otherwise be discounted owing to the effluxion of time.

Factual Basis for Sentence

It follows from the earlier discussion about restructuring penalties that in order to assess the appropriate penalty to be given to an offender, a sentencer would need to have adequate information about the seriousness of the offence -- the extent of harm done and the degree of culpability -- as well as the prior criminal history of the offender. A policy of just desert implies that sentencing decisions should be based on information relating to the circumstances of the offence and the circumstances of the offender, provided that this information gives the sentencer an accurate description of the harm done, the aggravating and mitigating factors involved, as well as the practicality and suitability of certain types of penalties for this particular offender. [This raises concerns regarding prosecutorial discretion and the practice of 'fact bargaining' in some jurisdictions. More research into prosecutorial practices is needed to address these concerns.] Information not relating to the above is considered irrelevant. For example, predictions about future behaviour of the offender (eg possible dangerousness) should not be allowed because just desert is based on past conduct. Similarly, information about the prevalence of a particular type of crime in a community should not be taken into account if deterrence is not the primary sentencing rationale. On the other hand, information such as medical condition, employment situation, family circumstances and financial situation is useful for assessing an offender's suitability for certain types of penalties.

Reasons for Sentence

It is crucial to the development of rational and coherent sentencing practices that a detailed account of the sentencing decision be given. This includes:

- . a resume of the factual basis of the sentence
- . an articulation of the factors taken into account in determining sentence and the relative weights given to these factors
- . reasons for selecting these factors with reference to the sentencing rationale
- . (if applicable) references to similar or contrasting previous decisions to illustrate the reasoning behind the current decision.

On the question of what should count as a reason for sentence, Ashworth has some useful comments:

Statements that this is 'one of the worst cases of its kind', that there is 'no alternative' to passing a particular sentence and that 'full account has been taken of mitigating circumstances' should not be acceptable as reasons, for they do not disclose why the court chose three years rather than two, or a suspended sentence rather than a fine and so on. What is required, surely, is the

articulation of a process of reasoning whereby the gravity of the offence is assessed, the mitigation is assessed, the alternative measures discounted and a sentence arrived at. This requires reference to a starting-point, such as a convention on levels of sentence ('I take the view that these cases call for a custodial sentence of one to two years, depending on the circumstances') or a Court of Appeal decision.⁷⁸

The giving of reasons may be inappropriate for all cases because of court delay and possible redundancy. It may be that for relatively 'routine' matters, the penalty range determined advance according to a clearly articulated set of principles should be publicised. Where mitigating or aggravating factors are allowed, appropriate likely adjustments in sentence can be indicated. Some consideration should be given to establishing a short list of reasons for use by magistrates in dealing with minor offences. The danger of lapsing into pro forma compliance would be avoided if adequate consideration were to be given to the criteria in the first place.

SENTENCING OF FEDERAL OFFENDERS: SOME SPECIFIC ISSUES

[Note: Important issues concerning the sentencing of federal offenders are not considered here. These include conditional release (and the review of the Commonwealth Prisoners Act 1967) and the availability of non-custodial sentencing options. Aspects of both issues are canvassed in the comments relating to A.C.T. offenders below.]

Apart from the general issues as to sentencing reform referred to earlier, special problems arise in relation to federal offenders. Who are federal offenders? What should the relevant punishment policy be? Who should administer that policy? These matters are briefly canvassed below although the complex issues associated with these questions are not explored in detail.

Federal Offenders

The profile of federal offenders is difficult to delineate with accuracy. Information is available in relation to federal prisoners. However, accurate information is currently not available in relation to federal offenders who receive non-custodial penalties. This situation may improve when the results of the census in relation to community corrections by the Australian Institute of Criminology become available. But a general picture can be built up as a result of: trends in state jurisdictions (which demonstrate the vast majority of offenders are the subject of non-custodial penalties); court observation; piecemeal information as to specific offences as a result of our consultations; an examination of federal statutory offences (as distinct from the pattern of actual use of those offences).

Once a rough profile is built up from this mosaic it appears that the federal government has responsibility for the following:

- (a) 'Pure' federal offenders, namely those who commit offences which are exclusively the subject of federal legislation (e.g. tax offences, customs offences and hijacking etc.);
- (b) Federal offences which have rough 'state equivalents'. These might be termed 'jurisdictional' offences. However, an analysis of federal offenders does not necessarily yield an easy distinction between 'pure' federal offences and 'jurisdictional' offences. The extent to which equations can be drawn between federal and state offenders depends on the weight accorded to the different aspects of the offence in issue. Those seeking to emphasise similarities tend to focus on the similarity of the conduct (e.g. fraud, robbery, etc.) as distinct from the quality of the victim. On the other hand, the view is put that the status of the victim should not be ignored. In other words, it is argued that the Commonwealth has a legitimate interest in regulating fraud on its revenue (eg re social security matters) and in devising an appropriate response as to punishment policy rather than delegating this function. Further, attention needs to be given to likely trends. The prospects appear to be for an increasing involvement by the Commonwealth in the criminal justice area and the creation of specific federal offences.⁷⁹
- (c) Common law offences. Note that (i) s.80 Judiciary Act 1903 as amended provides:

Common Law to Govern. So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the statute law in force in the State or Territory in which the court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

- (ii) s.4 Crimes Act 1914 (Cth) as amended provides:

Application of Common Law. The principles of common law shall, subject to this Act, apply in relation to this Act.

- (d) International Transfer of Prisoners. If current moves in this area proceed it is likely that offenders transferred to Australia will be a Commonwealth responsibility. This may represent a substantial and increasing number of offenders for whom the Commonwealth has to accept responsibility.

The Existing Situation

Federal offenders are currently dealt with in the following way:

Definition of Crime and Penalty. Federal function (subject to common law)

Policing. Federal function (Australian Federal Police) but concurrent state powers.

Prosecution. Federal function (Director of Public Prosecutions) but concurrent state powers (tendency towards federal control).

Courts. Apart from the High Court of Australia and the Federal Courts, substantially dependent upon state courts vested with federal jurisdiction.

Probation and Parole. Completely carried out by the states.

Prisons. Likewise entirely dependent upon state institutions (see section 120 of the Federal Constitution).

Discussion

The existing situation does not bear the hallmarks of a coherently worked out policy but appears to be rather the result of a series of expedient decisions (see generally the discussion of the 'autochthonous expedient' in A.L.R.C. 15).

Different Possible Approaches

- (1) The Commonwealth could determine punishment policy for all federal offences, whatever their origin.
- (2) The Commonwealth could determine punishment policy for 'pure' federal offences, leaving the 'jurisdictional' category to state regulation.
- (3) The Commonwealth could completely delegate to the states responsibility for punishment policy for federal offenders.

The approaches suggested above do not include another theoretical option namely complete Commonwealth responsibility for all criminal justice matters within Australia. This is not regarded as a viable option because this would involve a complete upheaval of existing arrangements (including significant constitutional change) and is, in any event, beyond our terms of reference.

The suggested approaches one and two above could be varied so that the Commonwealth and the states could be involved separately or together at different stages of the process: definition of crime and penalty; policing; prosecution; sentencing by the courts; conditional release and determination of prison conditions.

Distinguishing Policy and Implementation. The determination of punishment policy by federal authorities is a separate issue from the means adopted to implement it. For example it would be possible to devise a policy (thereby discharging Commonwealth responsibility in this respect) and then

to rely on state agencies to implement such policies. The argument that state agencies cannot handle different approaches is not persuasive. In other words separate federal structures do not have to be developed even if it is desired to establish distinctly federal policies.

Practical Limitations. There are a number of practical limitations which need to be taken into account. In the case of the federal police and the federal prosecution service, resources have already been devoted to putting these agencies into place. However, financially it would be extremely burdensome to erect separate federal structures for courts, probation and parole and prisons particularly having regard to the relatively small number of federal offenders. In some jurisdictions the distribution is so sparse that it would be absurd to inject considerable resources in order to establish a separate federal presence.

Federal Financial Responsibility. If the federal government proposes to pursue a distinct federal policy in various areas it must assume financial responsibility for such developments either by adequately funding the relevant federal structures or by providing adequate funding to state agencies to whom the task has been delegated. It is an unsatisfactory approach to delegate responsibility for a federal task to a state agency as a sensible and expedient way of dealing with a task in the hope that the state agency would absorb this function without separate financial support. Such an approach entails the prospect of the relevant federal policy being ignored or gravely distorted. In short, if the federal government is serious about pursuing a coherent federal punishment policy it must pay the piper.

Punishment Policy for Federal Offenders: A Federal Responsibility. In my view it is not possible to make a satisfactory distinction between 'pure' and 'jurisdictional' federal offenders. The Australian government has constitutional, legal, political and moral responsibility for all federal offenders.⁸⁰ However, the assumption of responsibility for punishment policy still leaves unanswered the manner of its exercise which has hitherto been characterised by the 'autochthonous expedient'. Given the opportunity presented by the first review of the existing arrangements for some 80 years, the federal government should seriously review the options and not simply reaffirm what may originally have been a convenient arrangement.

A key question which remains is the extent to which a punishment policy for federal offenders can be uniformly administered. What are the different possible approaches?

Federal Offenders and Uniformity: Possible Approaches

(i) National Uniformity. According to this principle, national (or interstate) uniformity is desirable despite the acknowledged regional variation because federal offenders in any part of Australia should have the expectation of equal treatment. The corollary is that, intrastate uniformity amounts to an abandonment of federal responsibility for this area and acknowledges that the fate of individual federal offenders as to punishment will depend on the legislative caprice and administrative system of the particular state/territory in which he/she is convicted and punished.

Logically, the most desirable way of achieving national uniformity would be via a separate federal criminal justice system. In practice, it is acknowledged, particularly having regard to the lack of a separate criminal justice infrastructure (apart from the Australian Federal Police and the federal Director of Public Prosecutions) there would be substantial financial and other problems in achieving complete interstate uniformity.

Because of the existing and potential number of federal offenders and their dispersal across the nation, the establishment of a separate court system, prison system and probation and parole service could not be justified. It would be completely unrealistic in financial and practical terms to provide a network of federal courts and correctional facilities throughout Australia. Attempts to overcome these problems by minimising and centralising separate federal facilities bring with them another set of problems which make this approach unacceptable (eg building a prison for federal offenders in the most populous state would cause extreme hardship to prisoners from other jurisdictions and their families as well as creating a considerable ongoing financial burden as to travel etc.).

(ii) Intrastate/territory uniformity. According to this approach, greater injustice would result from disparate treatment of offenders within the same state/territory by virtue of their federal/state status than would result from the inevitable disparities in treatment of federal offenders if they were treated like their state counterparts. The divergences between state/territorial laws and practices are acknowledged, however it is maintained that these represent a lesser evil. As the status quo reflects a mixture of state and federal responsibilities it would seem that advocates of across-the-board intrastate uniformity are arguing for the federal government to vacate the field. This would be a significant departure from current policy and would involve political and legal decisions which should not be taken lightly.

(iii) A Practical Compromise. A hybrid scheme which maintains the integrity of interstate uniformity where possible but concedes that (i) it cannot be universal, and (ii) use of state courts vested with federal jurisdiction and state correctional facilities is necessary, could take the following form:

- (a) National uniformity as to prosecution policy in relation to federal offenders
- (b) National uniformity as to sentencing options
- (c) National uniformity as to conditional release procedures for offenders in custody
- (d) Intrastate uniformity as to prison conditions.

In essence a national prosecution policy for federal offenders is in place. Prosecution guidelines for federal offenders were developed as a result of the Law Reform Commission's recommendations in A.L.R.C. 15. Since then the Director of Public Prosecutions Act 1983 has put the federal prosecution service on a statutory footing. The guidelines were

revised to accommodate this change and the revised version was published in January 1986.

Courts are experienced in the administration of differential regimes. Regional variation may still take place in terms of choice of penalty and extent of penalty. However, these divergences occur in any system and depend on considerations other than those related to the uniformity principle adopted. I do not think that courts, properly equipped with a federal sentencing code which consolidates and renders accessible the relevant principles and procedures would experience any particular difficulties.

The attraction of the national uniformity principle vis-a-vis release decisions will be influenced by the release scheme proposed. If it is proposed to abolish conditional release the problem does not arise. If conditional release is retained and it is court controlled (and participation of parole authorities is eliminated) interstate uniformity is desirable and feasible for the reasons suggested above in relation to sentencing options. If a post-court releasing authority is proposed, consideration needs to be given to the desirability of: (i) state parole boards with delegated authority administering differential regimes; (ii) field officers administering different schemes.

It is accepted that, at the practical level, it would be most difficult to implement a separate scheme for federal offenders within state/territorial institutions. Accordingly it is suggested that no binding prescriptive regime be enacted in respect of prison conditions for federal offenders. Nonetheless, consistently with federal responsibility, it is suggested that guidelines for minimum standards be incorporated in the final report with possible legislative changes in areas which do not have a material impact on correctional administration. [Distinguish the position of A.C.T. offenders for whom it is suggested such conditions be prescribed.]

The issues relating to federal prisoners are considered further below.

Uniform Conditions for Federal Prisoners

The position adopted by the Law Reform Commission in its Interim Report Sentencing of Federal Offenders (A.L.R.C. 15, 1980) was that federal prisoners should be treated uniformly wherever they may happen to be detained. It was argued that it would be unfair to treat federal prisoners differently because they happen to be detained in institutions in Sydney and Adelaide and that the federal government has a responsibility to ensure that federal prisoners are kept in humane prison conditions. The federal government has constitutional power and legal and political responsibility for federal prisoners. Moreover, it could be argued, that the federal government has an overall responsibility for prison conditions in Australia because of its superintendence of foreign affairs and international responsibilities and that in this respect, the federal government ought to show leadership in seeking implementation of the United Nations Standard Minimum Rules (even though they are international guidelines rather than a binding treaty). State prisons in most

jurisdictions do not completely satisfy the relatively conservative standards of the U.N. Standard Minimum Rules.⁸¹

The Australian Law Reform Commission should, generally speaking, make recommendations as to guidelines for minimum standards for the treatment of federal prisoners and only recommend the introduction of suitable legislation governing such treatment where this is desirable and practicable. For the reasons referred to below I think that this will be a limited arena. The terms of reference do not extend to state prisoners. However it may be that any guidelines proposed for federal prisoners will be adopted by relevant state jurisdictions as they see fit.

Since the publication of A.L.R.C. 15, opposition has been expressed to the approach of uniformity of treatment of federal prisoners on the basis that the development of special standards for federal prisoners would lead to unfairness as between federal and state prisoners detained in the same state institution.⁸² As a corollary, it has been argued that there should be intrastate uniformity rather than national uniformity as between federal prisoners.

Federal prisoners constitute a minority within state institutions. The development of separate and enforceable standards for federal offenders could in certain areas produce management difficulties as far as state correctional authorities are concerned.

Nevertheless the federal government should have regard to the most enlightened traditions in the field and seek to implement them to the extent practicable. For the reasons canvassed earlier, a separate federal prison system (which would best enable a federal government to introduce its own standards) is not a practical option.

In the circumstances, the federal government cannot, realistically, expect state institutions to manage entirely separate regimes for federal and state prisoners. This would be particularly the case as far as physical accommodation and day to day administration are concerned.⁸³ This is not to say that certain matters which would not cause management problems (eg the removal of certain disabilities such as restrictions on the right to vote or to sue) could not be separately implemented for the benefit of federal prisoners.

As a result of extensive consultations I think that changes in this area should be fully negotiated with state authorities and should proceed with great sensitivity to the difficulties of all concerned. Minimum standards for federal offenders should not be given legislative force until (a) there has been agreement by the states and (b) the federal government is prepared to make suitable financial arrangements. Ideally, state governments should introduce uniform minimum standards for correctional institutions. The Australian Institute of Criminology has published guidelines as to minimum standards for Australian prisoners which seek to adapt the U.N. Minimum Standard Rules to Australian conditions.⁸⁴ Some steps in this direction have been taken as a result of the formation of a Council on Correctional Standards but progress has been very slow. The Human Rights Commission has recently received a Report on the Human Rights of Federal Offenders which has not yet been published. The availability of

that Report may encourage consideration of these issues at state level. Perhaps guidelines developed by the Law Reform Commission for federal offenders will provide a further benchmark for this enterprise.

SENTENCING OF ACT OFFENDERS: SOME SPECIFIC ISSUES

Major issues which arise specifically in the A.C.T. include: imprisonment in the A.C.T.; semi-custodial and non-custodial sentencing options; and distribution of sentencing authority: conditional release and remission.

Imprisonment in the A.C.T.

The absence of prison facilities in the A.C.T. for adult convicted offenders has led to the present practice of transporting A.C.T. prisoners to NSW gaols. Arguments for and against the construction of custodial facilities in the A.C.T. have been canvassed extensively.⁸⁵ Only a summary of these arguments will be presented here.

Arguments Against the Construction of Prisons in the A.C.T. include:

Convenience and Economics. Although the cost of maintaining A.C.T. prisoners in N.S.W. is by no means negligible (according to A.L.R.C. DP 10, the Commonwealth paid a total of over \$400,000 for such facilities in 1977-78), the cost of new correctional institutions would be in the order of \$150,000 to \$180,000 per prison space.⁸⁶

Keeping the Rate of Imprisonment Low. Imprisonment rates in the A.C.T. have consistently been the lowest among Australian states and territories.⁸⁷ It has been claimed by some⁸⁸ that the deficiencies of the NSW prisons as well as the hardships imposed by the present transportation arrangements have deterred judges and magistrates from using imprisonment more widely as a sanction. The fear has been expressed that the availability of the A.C.T. facilities may result in an increased tendency to use such facilities.

Community Opposition. Concerns have been raised about the location of correctional facilities in the nation's capital city and the extent to which the presence of these facilities would be opposed by the community.

Arguments for Keeping ACT Prisoners in the Territory include:

Conditions in NSW Prisons. Conditions in N.S.W. prisons have been condemned by the Nagle Report (1978) and there has been little evidence that these conditions have changed substantially. In fact, overcrowding is now a pronounced problem in N.S.W. For humanitarian reasons alone, it has been argued that A.C.T. prisoners should not be subjected to such additional punishment.

Personal Hardship to Offenders and their Families. Prisoners and their family members have expressed almost unanimous support for the idea of a

prison in the A.C.T. ⁸⁹ because the present arrangement makes it difficult and costly for prisoners to maintain contact with their families.

Loss of Control over Offenders. By transporting convicted A.C.T. prisoners to be held in N.S.W. prisons, the Commonwealth and A.C.T. authorities have virtually lost control over classification, prison conditions, and some aspects of conditional release of A.C.T. prisoners.

If we assume that imprisonment will remain as a sanction acceptable to the community, it will continue to be viewed as the most severe of all the available penalties. It follows that only the most serious offenders should receive the most serious sanction -- imprisonment -- as a sentence. In addition, I believe that for the small number of cases in which imprisonment is appropriate, the punishment should only consist of deprivation of liberty. This approach is now well recognised and has been endorsed by, for example, the Nagle Report. Accordingly, any additional oppressive features (except those which flow inevitably from security concerns) which currently accompany imprisonment in some jurisdictions in Australia are inappropriate. Since it is not within the power of A.C.T. or federal authorities to compel NSW correctional authorities to conform to such standards, it follows that it will be necessary to build a prison in the A.C.T. and that such a prison should be limited in size and conform to the above requirements. It is arguable that classification of A.C.T. prisoners will not be necessary because imprisonment would only be used for a very limited class of offenders but this requires further consideration. I do not see the necessity for a separate institution for female prisoners. One of the features of the Belconnen Remand Centre which has worked well, despite the many other criticisms which have been made of that institution, is the adoption of integrated staff and a complex with integrated facilities for men and women in separate sections. Similar arrangements could be made for a prison. At present about 50 to 70 A.C.T. prisoners are detained in NSW institutions, and it has been estimated that about 20 per cent of the prisoners are kept in maximum security prisons.⁹⁰ It is envisaged that, with the introduction of other non-custodial options, only a small proportion of the current prisoners would remain in custody. One possible model is the Barlinnie Special Unit in Scotland. (The Unit was set up in 1973 for prisoners who posed exceptional management problems. The basic concept involves a flexible and relaxed regime within a secure perimeter, involving a substantial degree of trust between staff and offenders.)

Such a recommendation may be seen as unacceptable from a variety of viewpoints. For example, the cost of building a new prison is enormous, and a humane but secure institution may be seen as even more expensive. The establishment of a just and humane regime should not be undermined by cost considerations. The conditions in most NSW institutions are unsatisfactory. The A.C.T. is in the unusual position of having the opportunity to establish a new and more humane institution without having to demolish inadequate ancient buildings. Moreover, it is arguable that excessively harsh prison regimes are counterproductive for prisoners, the correctional authorities and ultimately for the community at large.

The other major concern may be that the construction of any prison is a regressive step: that it can only lead to an increased use of imprisonment

in the A.C.T. . There may also be scepticism about the likelihood of any prison being different from its forebears either in design or in practices. These are serious concerns which need to be addressed. I envisage that the physical capacity of the new prison would itself impose some limits on the use of imprisonment as a penalty. Although it is true that the judiciary is not bound by such administrative considerations as prison capacity, the prospects of co-operation among various agencies in the criminal justice system seem more promising in the A.C.T. than in other larger jurisdictions. Indeed, some members of the judiciary have expressed great annoyance at the suggestion that the mere presence of an institution would alter their sentencing practice towards increased use of imprisonment.⁹¹ The availability of more semi-custodial and non-custodial options (see below) can provide viable alternatives to the use of imprisonment. Much depends, of course, on whether these options are used as genuine alternatives to imprisonment. If they are used instead of prison sentences, then there should not be an increase in imprisonment. The rate of imprisonment in the A.C.T. has remained relatively stable from 1977 to 1984⁹² Although it may be argued that crime rates in the A.C.T. are likely to increase as a result of economic growth and changing demography, and hence there will be demand for more prison facilities, Australian research⁹³ has suggested that there is no necessary correlation between crime rates and imprisonment rates. The actual number of prisoners, however, may show a significant increase and that is an important consideration for planning prison capacity. Biles and Cuddihy's⁹⁴ figures show that the maximum number of prisoners has gone up from 57 in 1978 to 68 in 1984. If however a totally different prison regime is adopted, accompanied by an explicit policy of reserving the use of imprisonment to a small class of offenders, it is reasonable to expect that there will not be a dramatic increase in prisoners. In any event, I think that the issue is important enough that a permanent body should be assigned the task of monitoring the use of imprisonment in the A.C.T. .

The management of prisoners in a humane institution may be seen as a serious problem. Prison administrators have generally been able to use classification and segregation as methods of maintaining peace and security inside the prisons. I will deal with the issues of discipline and protective segregation separately. The establishment of a humanitarian regime is not inconsistent with the existence of disciplinary mechanisms within the prison. However, for minor conflict situations, mechanisms for resolution would need to be developed within the institution. This may involve removal of trivial matters from the calendar of offences. However, where a matter is sufficiently serious to warrant remaining as an offence, it should be dealt with in accordance with the processes which obtain in the normal courts of law. From time to time, the need may arise for prisoners to be segregated from other prisoners for their own protection. Such arrangements are not inconsistent with the suggestion for a single custodial institution without a classification system. The need for protective segregation is recognised and appropriate facilities need to be developed. In some NSW institutions the segregation facilities for prisoners on protection are little better than cages and indistinguishable from facilities used for discipline purposes.

It may be argued that the establishment of a more humane regime would lead to industrial problems among prison officers. This has certainly happened

in NSW in the wake of the Nagle Report. However, I would argue that the situation in the A.C.T. is demonstrably different. Here an attempt is not being made to persuade staff with long standing traditions and practices to change these practices as a result of a judicial inquiry which has severely criticised them either directly or indirectly. In the A.C.T. there will be a 'fresh start' which may be directly linked to a different approach. Recruitment should be carried out on the basis that the staff will be interested in and will be involved in such a different regime from the outset.

The possibility of community opposition to the location of a prison in the A.C.T. because of safety and other considerations cannot be minimised. However, there is a growing feeling among those involved in criminal justice in the A.C.T. that the Territory ought to take care of its own problems. The prospects of political autonomy in the A.C.T. point to the inevitability of an A.C.T. prison.

Remand in Custody. Belconnen Remand Centre which opened in 1976 is the only facility in the A.C.T. for holding unsentenced adult prisoners. It has a capacity of 18 which appeared to have been adequate until the last couple of years. Six additional cells are being built in 1985 and six more will be built in 1986. The Vinson Report⁹⁵ noted a 75 per cent increase in the number of prisoners from 1980-81 to 1983-84. The daily average number of prisoners in custody has more than doubled from 6.6 to 15.2 in those four years. In 1983-84 there were 110 occasions on which the number to be detained exceeded the capacity, necessitating the use of police cells to ease overcrowding. Although the average number of days in custody has remained constant in the four-year period (at just under three weeks), some prisoners were remanded in custody for unreasonably lengthy periods. The Vinson Report cited a few extreme cases where offenders were remanded from 265 to 646 days. It also criticised the internal environment, the recreation and work program, as well as the standard of security in Belconnen. It recommended that Belconnen should not be used as a remand centre in future.

The purpose of remanding prisoners in custody is to ensure attendance at trial; it is not intended as punishment. In that sense remand policy should be distinguished from punishment policy. However, to the extent that the criminal justice process is concerned with justice, it seems appropriate to minimise (a) the number of people detained in custody and (b) the remand period. Bail decisions should be carefully scrutinised and the relevant criteria clearly defined. Ways of reducing court delays should be explored, [Note: The introduction of the DPP in the A.C.T. and efforts by the Supreme Court have contributed to a reduction of remand periods.] and the use of less secure facilities, such as bail hostels should be considered. In addition, time served in custody ought to be taken into account in relation to any custodial sentence imposed following conviction. Although it is preferable to minimise the number of prisoners remanded in custody it is possible that a small number will, from time to time, suffer injustice as a result of such incarceration. Accordingly, consideration should be given to granting A.C.T. courts the power to make orders for costs or compensation in relation to prisoners who have been remanded in custody for a minimum period and are subsequently acquitted.

Consideration needs to be given to the precise scope of such powers (if any) and the issue of jurisdiction.

Semi-Custodial and Non-Custodial Sentencing Options

Judges and magistrates in the A.C.T. have expressed frustration at the inadequate range of sentencing options available to them. The principal concern appears to be the lack of 'intermediate' sanctions between imprisonment and good behaviour bonds where fines are inappropriate. The introduction of community service orders (C.S.O.) as a sentencing option in 1985 was a long-awaited and welcome development. The sentencer may impose a maximum of 208 hours of community service over a twelve month period. The C.S.O. was intended primarily as a punitive sanction and an alternative to imprisonment. However, soon after the scheme was implemented in August 1985, it became obvious that some of the judges and magistrates did not see C.S.O. as an alternative to imprisonment but as a penalty which could be used in its own right, intermediate in severity between imprisonment and bond. Doubts were expressed as to the C.S.O.'s usefulness since under the terms of the legislation it could not be combined with other penalties. It is not clear whether judicial officers objected to the initial formulation of the C.S.O. -- i.e. as not capable of being combined with other penalties -- because they felt it 'too light' on its own to impose instead of prison or because they felt it too light, on its own, to fill the gap between imprisonment and bond. At present, the legislation is undergoing further amendments to allow the combination of C.S.O. with other options. In general, A.C.T. sentencers would like to have the full range of options available in other Australian jurisdictions.

In analysing the need for new non-custodial options in the A.C.T. , the Law Reform Commission has issued some general caveats about extending the range of options.⁹⁶ These warnings are worth repeating:

- . Existing research evidence has failed to identify any one non-custodial sentencing option which is more effective than another in preventing recidivism by offenders. Thus, if two offenders with similar backgrounds commit similar offences but receive different sentences, such as a fine or probation, current evidence suggests that the chances of them both offending again are about the same.
- . The cost of administering various non-custodial sentencing options differs quite substantially. Thus, fines produce revenue while a probation order can be quite expensive to administer as a sentence because it is [labour] intensive.
- . There is little point providing new non-custodial sentencing options requiring additional administrative staff and allied resources if such resources are not going to be made available.
- . There is a tendency, to be rigorously avoided, to regard each new sentencing option as a panacea for all ills. New options, like community service orders, can become faddish when they are first introduced. Such orders are, however, only suitable for certain situations and certain types of offender.

- . The failure of an offender to fulfil what may often be an unreasonable obligation specified under one type of non-custodial sentencing option may result in a much more severe sanction being applied. For example, in many jurisdictions the non-payment of a fine frequently leads to a sentence of imprisonment. Similarly, in some jurisdictions, failure to comply with the conditions of a probation order or the terms of a licence or parole may lead to automatic imprisonment.
- . The creation of too many non-custodial sentencing options can lead to ambiguity and uncertainty amongst both sentencers and offenders. The aim should be to provide adequate flexibility to sentencers within a framework of options which is clearly defined and understood by all concerned with their imposition and service.

One of the underlying principles of just desert is that of proportionality of punishment. In order to allocate punishment in proportion to the crime, there must be a corresponding range of penalties which can be calibrated in terms of severity. It may be argued that any single non-custodial penalty can be calibrated in terms of amount of time or money and that therefore there is no need to introduce other forms of punishment. For example, the fine could be used in this manner. It is the most commonly used option in most jurisdictions, especially in the lower courts. However, it is a well known problem that fines have differential impact on offenders with different resources, and a likely result is that some offenders will default and thereby run the risk of imprisonment. The routine use of imprisonment for fine defaulters is not a fair solution.⁹⁷ To avoid the potential injustice which may result from the exclusive use of fines, other forms of penalties need to be considered.

Non-monetary penalties involve not only some form of stigmatisation (e.g. conviction), but usually some degree of deprivation of freedom (e.g. C.S.O., probation, periodic detention, or attendance centre), or some form of work (e.g. C.S.O.). If it is possible to arrange these penalties in terms of relative severity (while simultaneously taking into account quantum of penalty), then the principle of proportionality can be applied. The following is an example of how the semi-custodial/non-custodial, non-monetary sanctions can be arranged in an ascending order of severity:

- . absolute discharge without conviction
- . conviction and discharge
- . deferment of sentence
- . unsupervised probation order
- . supervised probation order
- . attendance order
- . periodic detention

The use of an order for restitution or compensation either separately or

in combination with the above penalties (or with a fine) may be considered appropriate in some situations. The making of restitution or payment of compensation may also be considered a mitigating factor in the assessment of penalty. Difficulties arise in seeking to rank monetary and non-custodial non-monetary penalties in order of severity particularly when we consider the potential range within each penalty type.

In general I support an extension of the range of non-custodial options available to the A.C.T. courts. Additional work in this area is required to formulate more precise recommendations on the use of these options. However, the following preliminary qualifications are in order:

- (1) Each option must be scrutinised on its merits. A decision to introduce an option should take into account any evaluative research that has been conducted in other jurisdictions.⁹⁸ The focus of any such evaluation should be to assess whether implementation of these options would bring about hardship or injustice to the offender. Considerations of practicality are of course also important. However, the effectiveness of these options in terms of crime prevention should not be central to the decision to adopt the option. For example, if the imposition of a C.S.O. has a deterrent effect because it is a punishment undergone in public then this is a collateral benefit. However, no option should be adopted purely on the basis that it will, or is primarily intended to, effect crime control purposes.
- (2) Options designed to be used as genuine alternatives to imprisonment should only be invoked after a threshold decision has been made to imprison an offender. Problems of escalating prison sentences to match a certain quantum of non-custodial or semi-custodial penalty should be seriously dealt with.⁹⁹
- (3) In general, sentences which combine penalties should be avoided on grounds of clarity and accessibility. One object of the Law Reform Commission's reform strategy is to enable the public to understand the sentencing process, and it is our view that combining penalties unnecessarily complicates sentences. In the case of restitution or compensation orders, we feel that the purposes of such orders are sufficiently clear in the public mind that no confusion could result from their combination with another penalty.
- (4) Close consideration should be given to the policy and practice of enforcement of options. The use of imprisonment as a universal backup sanction is problematic.

Distribution of Sentencing Authority: Conditional Release and Remission

The problem of loss of control over A.C.T. offenders has become a serious one in relation to parole of prisoners. Section 5(3) of the Removal of Prisoners (ACT) Act 1978 provides that where a prisoner has been removed to NSW, that prisoner shall be dealt with in relation to 'reduction or remission of sentences' as if he or she were a N.S.W. prisoner. Since the Probation and Parole Act 1983 (N.S.W.) came into force in February 1984, N.S.W. prisoners are entitled to remission off the non-parole period. This

created a situation in which A.C.T. prisoners appeared to be entitled to be released at a time earlier than the A.C.T. Parole Board could exercise its powers under the A.C.T. Parole Ordinance 1976. [The Parole Board also apparently lost control of prisoners serving sentences of less than three years, since the N.S.W. legislation refers to a 'probation period' rather than a 'parole period'.] These problems were dealt with by releasing the prisoners on licence under s.8A of the Removal of Prisoners (Territories) Act 1923 as amended. Such a practice virtually took away the statutory function of the A.C.T. Parole Board except as an advisory body regarding licence decisions.

The situation was complicated by the recent High Court decision in R. v. Paivinen which ruled that the provisions of the Probation and Parole Act 1983 (N.S.W.) did not apply to A.C.T. offenders. Unfortunately the decision left unanswered the more general question of whether the court is entitled to take into account remission deductible from the non-parole period when specifying the non-parole period in sentencing. A number of judges in N.S.W., Victoria and the A.C.T. have expressed concern about the effect of appellate decisions which enjoin the trial judge from considering such remission entitlements and have voiced their concern in the public arena. They see this limitation as an erosion of the authority of the courts, making sentencing a 'charade'. On the other hand, members of the judiciary have been criticised for undermining the effects of legislation providing for the deduction of remission from minimum periods by allegedly extending non-parole periods to compensate for the deduction of remission notwithstanding the directions of the Courts of Appeal.¹⁰⁰

The current policy of the federal Attorney-General is that A.C.T. prisoners should receive the same remission as N.S.W. prisoners and they will continue to be released on licence instead of on parole. Uncertainties about possible imminent changes in remission provisions in N.S.W. also create further difficulties for the A.C.T. Parole Board.

One fundamental difference between a desert-based punishment philosophy and a utilitarian one is that of basic orientation: desert concentrates on past conduct and the punishment it deserves; utilitarianism takes into account future conduct and the probability of prevention through sanctions. The introduction of conditional release and remission of sentence in most jurisdictions took place during a period of optimism about rehabilitation and individualisation of punishment. The science of predicting criminality promised much but delivered little. Nevertheless, the institution of parole lives on, and has become accepted by all parts of the criminal justice system, including the judiciary, as a necessary step towards the reintegration of prisoners into society. However, parole and remission can also be seen as a reward system to encourage good behaviour and facilitate prison management.¹⁰¹ The reverse argument is that refusal or revocation of parole is an additional punishment to the prisoner. The acceptance of a conditional release system also gives rise to the adoption of a double standard as to severity of sentences. Politicians and the media invoke 'head sentences' on some occasions and 'minimum periods' on others.

If one accepts the assumption that a deserved and just quantum of punishment can be completely determined at the time of sentencing, there

is no reason to institute a system of conditional release which amounts to a re-sentencing of the offender based on post-offence behaviour. A strict application of this approach would lead to an abolition of the current system of parole or release on licence as well as remission entitlements.

The A.L.R.C. Interim Report, Sentencing of Federal Offenders, recommended the abolition of parole. That recommendation has met with considerable criticism. Any suggestion to abolish conditional release and remission must be approached with caution. Experience in the United States has warned us of the danger of unintended consequences, such as lengthening of sentence and overcrowding of prisons. The abolition of conditional release would have to be accompanied by a proportional reduction in the length of sentence to a level which reflects at most the actual time served under the current regime. This would involve a downward adjustment of maximum penalties as provided in current legislation. The sentencing practice subsequent to abolition would have to take into account the fact that the courts are no longer working with the 'head sentence', but the equivalent of the 'minimum period'. Alternatively it may be possible to modify existing conditional release mechanisms to take account of the substantial criticisms that have been directed at them.

One alternative approach has been suggested by Ivan Potas.¹⁰² In this proposal, the existing system of remissions involving deduction of a proportion of the prison sentence would be abandoned. In substitution, a hybrid form a parole would operate so that parole would be calculated as a proportion of the overall sentence. The proposal is that prima facie an offender would be entitled to parole at the expiration of two-thirds of the head sentence. The role of the Parole Board would be restricted to consideration of release conditions.

The arguments advanced in support include simplicity, clarity and honesty of such a system. Sentences should mean what they say. It assumes that consistency and fairness would be promoted by reducing Parole Board discretion.

This area requires serious and careful reconsideration. The Commission has not reached any conclusion on it and would particularly welcome comments and submissions in relation to it.

NOTES

1. D.A. Thomas, 'Have the Courts Failed? The Problems of Sentencing in the Figures 1980s', paper presented at the Canadian Institute for the Administration of Justice National Seminar on Sentencing, October 1985, Toronto, 1, as cited in Boehringer and Chan, 1.
2. For example, Minnesota and Pennsylvania. The recently established Federal U.S. Sentencing Commission will be considering the desirability of this approach at the federal level.
3. Law Reform Commission of Canada, A Report on Dispositions and Sentences in the Criminal Process: Guidelines, 1977.
4. Appointed by Order-in-Council 10 May 1984 for a period of two years.
5. Home Office, Report of the Advisory Council on the Penal System on Sentences of Imprisonment: A Review of Maximum Penalties, 1978. The proposals were severely criticised in the press, see e.g. Times, 28 June 1978, 13. See also the Report of The Committee of Inquiry into the United Kingdom Prison Service (The May Committee), Cmnd 7673 (1979) reviewed and criticised (1979) 129 New LJ 1035.
6. Home Office, Lord Chancellor's Office, Report on the Working Party on Judicial Studies and Information (1978). The proposals have been criticised, see Devlin, The Judge (1979), 36.
7. Mr Justice Casey, Chairman, Report of the Penal Policy Review Committee, Government Printer, Wellington, New Zealand, 1982.
8. Criminal Law and Penal Methods Reform Committee of South Australia, First Report: Sentencing and Corrections, 1973.
9. Report of the Royal Commission into N.S.W. Prisons, N.S.W. Government Printer, 1978.
10. Report of the Committee Appointed to Review the Parole of Prisoners Act 1966 (N.S.W.), 1979.
11. A Report on Parole, Prison Accommodation and Leave from Prison in Western Australia, 1979.
12. The Report of the Committee of Inquiry into the Rate of Imprisonment, 1981, chaired by Oliver Dixon, Q.C.
13. Report of the Sentencing Alternatives Committee (F.R. Nelson, Q.C., Chairman), Sentencing Alternatives Involving Community Service, Victoria, 1978.
14. Neilson Associates, Office of Corrections, Victoria, Master Plan, 1983-2003, 1983.

15. Report of the Review into Northern Territory Correctional Services, Darwin, 1984.
16. A.L.R.C., Sentencing of Federal Offenders, Interim Report No. 15, 1980.
17. See, for example, A.P. Bates, TL Buddin and D.J. Meure, The System of Criminal Law: Cases and Materials, Butterworths, Sydney, 1979; D. Biles (ed.), Crime and Justice in Australia, Australian Institute of Criminology, Canberra, 1977, The Size of the Crime Problem in Australia, Australian Institute of Criminology, Canberra, 1979; D. Chappell and P. Wilson (eds), The Australian Criminal Justice System (1st ed.), Butterworths, Sydney, 1972, The Australian Criminal Justice System (2nd ed.), Butterworths, Sydney, 1977; M.W. Daunton-Fear, Sentencing in South Australia, Law Book Co., Sydney, 1980, Sentencing in Western Australia, University of Queensland Press, Brisbane, 1977; I. Potas, Sentencing Violent Offenders in N.S.W., Law Book Co., Sydney, 1980; F. Rinaldi, Crown Appeals Against Sentence, Law School, Australian National University, Canberra, 1976 (Penology Monographs; No. 1, 2nd ed.); F. Rinaldi, Essays in Australian Penology, Law School, Australian National University, Canberra, 1976 (Penology Monographs, No.7); F. Rinaldi, Imprisonment for Non-Payment of Fines, Law School, Australian National University, Canberra, 1976 (Penology Monographs, No.2 2nd ed); P. Sallmann and J. Willis, Criminal Justice in Australia, Oxford University Press, Melbourne, 1984; R. Fox and A. Freiberg, Sentencing: State and Federal Law in Victoria, Oxford University Press, Melbourne, 1985. There are also a number of official government reports which have considered matters relevant to sentencing: Australian Law Reform Commission, Report No. 15, Sentencing of Federal Offenders, AGPS, 1980; Nagle, Justice J.F. Report of the Royal Commission into New South Wales Prisons, Govt. Printer, Sydney, 1978; Report of the Committee Appointed to Review the Parole of Prisoners Act 1966 (N.S.W.), (Chairman: His Hon Judge A.G. Muir), Govt Printer, Sydney, 1979; Sentencing Alternatives Involving Community Service. Report of the Sentencing Alternatives Committee (Chairman: The Hon F.R. Nelson) mimeo, March 1978; Criminal Law and Penal Methods Reform Committee of South Australia, First Report: Sentencing and Corrections, Adelaide, 1973; Law Reform of Western Australia, Report on Alternatives to Cautions, Perth, 1975; K.H. Parker (QC), Report on Parole, Prison Accommodation and Leave from Prison in Western Australia, mimeo, Perth, 1979.
18. See J Walker, The Outcomes of Remand in Custody, Australian Institute of Criminology, 1985; D Biles, Unconvicted Prisoners in Australia: A Study of the Structure of Remand Populations in Eight Jurisdictions, Australian Institute of Criminology, 1984; J.M. Houghton, Fine Default: A Survey of Persons Imprisoned for Fine Default in NSW for the Non-Payment of Fines, N.S.W. Bureau of Crime Statistics and Research, 1985; C.A. Warner, Research Paper on Fines, Law Reform Commission of Tasmania, 1984.
19. See J. Chan and R. Ericson Decarceration and the Economy of Penal Reform, Centre of Criminology, University of Toronto, 1981, J. Chan

- and G. Zdenkowski, Just Alternatives: Trends and Issues in the Deinstitutionalisation of Punishment, Working Paper for the A.L.R.C., July 1985.
20. J. Nagle, (Chairman), Report of the Royal Commission into NSW Prisons, N.S.W. Govt Printer, 1978.
 21. A.L.R.C., Sentencing of Federal Offenders, Interim Report, No. 15, 1980.
 22. Management of Corrections in the Commonwealth, Proceedings of the First Meeting of Commonwealth Correctional Administrators, Hong Kong, March 1985.
 23. James v. The Queen, unreported decision of the Western Australian Court of Criminal Appeal, 20 February 1985.
 24. Crimes Act 1914 (cth) as amended.
 25. s.12 Sentencing and Penalties Act, 1985.
 26. s.7 Criminal Justice Act, 1985.
 27. See P. Sallmann and J. Willis, Criminal Justice in Australia, Oxford University Press, 1984, p. 9. Note also the criticism of Sentencing of Federal Offenders, A.L.R.C. 15, 1980 for failure to specify a guiding rationale by D. O'Connor, Editorial, Sentencing of Federal Offenders, Crim. L.J. 325.
 28. Williscroft (1975) V R 292.
 29. Criticisms have been made of this approach. F Rinaldi, Commentaries on Shrubsole v. Rodrigez (1978) 2 Crim L J 348 and O'Keefe 1979 3 Crim L J 246 but Mr Justice Starke has rejected these criticisms in Wiltshire (10/6/81) and Murnane (15/7/80).
 30. A. Ashworth, 'Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems', paper delivered to Seminar 'Sentencing: Problems and Prospects', Australian Institute of Criminology, Canberra, March 1986.
 31. See J. Chan, 'The Limits of Sentencing Reform', paper delivered to Seminar 'Sentencing: Problems and Prospects', Australian Institute of Criminology, 1986.
 32. M.K. Harris and D.M. Gottfredson, 'Ethical Foundations of Sentencing Policy Principles for Assessment of Reforms', paper to the meeting of the American Society of Criminology, November, 1984, Cincinnati, as cited in Boehringer and Chan, p. 5.
 33. J. Cohen, 'Incapacitation as a Strategy for Crime Control: Possibilities and Pitfalls', in M. Tonry and N. Morris, Crime and Justice: An Annual Review of Research, vol. 5, 2-84.

34. National Academy of Science's National Research Council on Research on Rehabilitative Techniques, 1979, cited in Harris and Gottfredson, 1984, op. cit., as cited in Boehringer and Chan, p. 6.
35. Harris and Gottfredson, 1984, op cit 30, as cited in Boehringer and Chan, 7.
36. C.S. Lewis, 'The Humanitarian Theory of Punishment', Res Judicatae (vi) 2, 224-30, 1953, as cited in Boehringer and Chan, p. 7.
37. A. Von Hirsch, 'Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Sentencing Guidelines Commission', Hamline Law Review, (1982) at 188-9, as cited in Boehringer and Chan, 9.
38. Harris and Gottfredson, 1984, op cit, as cited in Boehringer and Chan, 10.
39. See for example J.C. Mackie, Criminal Justice Ethics, 1982; J. Feinberg, Doing and Deserving, 1970 and A. Kenny, Freewill and Responsibility, 1978.
40. Such criticisms have been aired not only by the left but by one of the principal advocates of the just desert approach: A. von Hirsch, Doing Justice: The Choice of Punishment, Hill and Wang, 1976.
41. D. Rothman, Conscious and Convenience: The Asylum and its Alternatives in Progressive America. Boston, Little Brown, 1980.
42. N. Christie, Limits to Pain, Martin Robertson, Oxford, 1981, as cited in Boehringer and Chan, 10.
43. Gaylin and D. Rothman in von Hirsch, 1976 op. cit., as cited in Boehringer and Chan, 10.
44. A.N. Doob and J.V. Roberts, 'Sentencing: An Analysis of the Public's View of Sentencing', A Report to the Department of Justice, Canada, 1984, as cited in Boehringer and Chan, 11.
45. The Ohio Statistical Analysis Centre, Ohio Citizen Attitudes Concerning Crime and Criminal Justice, Fourth Edition, Governor's Office of Criminal Justice Statistics, Ohio, 1984, as cited in Boehringer and Chan, p.11.
46. D. Downes, 'The Origins and Consequences of Dutch Penal Policy Since 1945', British Journal of Criminology, 22 4, 1982, as cited in Boehringer and Chan, 11.
47. J. Walker and D. Biles, Australian Prisoners 1984: Results of the National Prison Census - June 1984, Australian Institute of Criminology, Canberra, 1985.
48. See N.S.W. Department of Corrective Services, Annual Report 1983, N.S.W. Government Printer, as cited in Boehringer and Chan, 12.

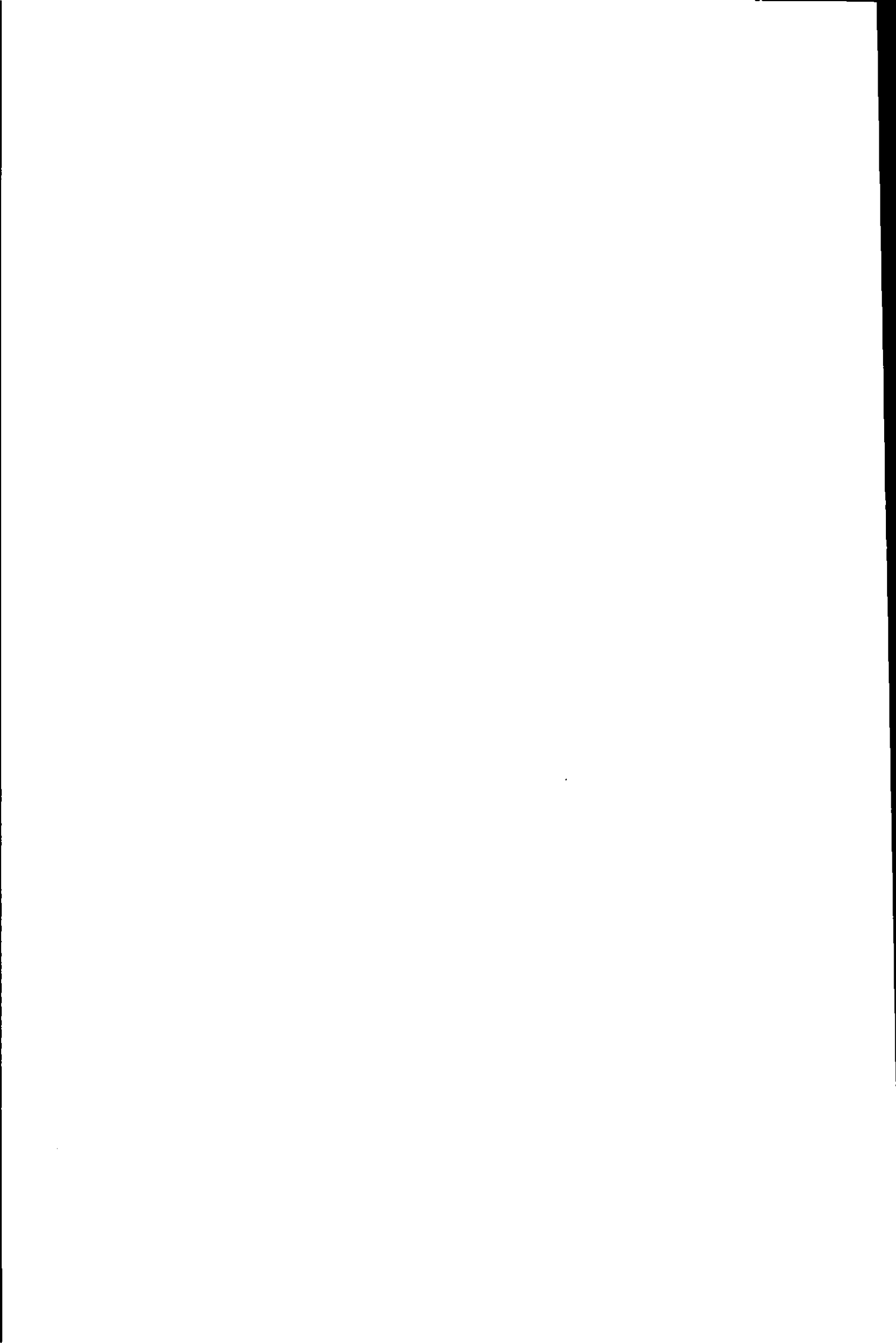
49. Harris and Gottfredson, 1984, op. cit. 51, as cited in Boehringer and Chan, 12.
50. See D.A. Thomas, 'Have the Courts Failed? The Problems of Sentencing in the 1980s', op cit, as cited in Boehringer and Chan, 36.
51. A. von Hirsch, 'Guidance by Numbers or Words? Numerical Guidelines and Statutory Principles in Sentencing Policy'. Forthcoming. Manchester University Press, 1985, as cited in Boehringer and Chan, 36.
52. A. Ashworth, 'Techniques of Guidance on Sentencing', Criminal Law Review (1984) 519-30, as cited in Boehringer and Chan, 36.
53. A. von Hirsch 1985, op. cit., 24, as cited in Boehringer and Chan, 36-7.
54. Blumstein et al, (ed) Research on Sentencing: The Search for Reform, National Academy Press, Washington D.C., 1983, as cited in Boehringer and Chan, 35.
55. J.H. Kennan, 'Sentencing and the Role of Alternatives to Imprisonment', paper presented at 'The Problems of Punishment' seminar, 10 November 1983, Lincoln Institute School of Nursing, 87.
56. Tasmanian Law Reform Commission, Report on Fines, Report No. 41, Government Printer, Tasmania, May 1985.
57. J. Gilchrist, 'An Analysis of Penalties Provided in Commonwealth and Australian Capital Territory Legislation', A.L.R.C. Research Paper No. 1, 1979.
58. Personal communication to the author by Mr Justice Watson.
59. C.A. Warner, Research Paper on Fines, Tasmanian Law Reform Commission, July 1984.
60. Report of the Advisory Council on the Penal System, Sentences of Imprisonment a Review of Maximum Penalties, H.M.S.O., 1978.
61. *ibid*, 141.
62. *ibid*, 142.
63. D.A. Thomas, 'Sentences of Imprisonment - A Review of Maximum Penalties', (1979) 42 Modern Law Review 309.
64. A. von Hirsch, Past or Future Crimes, 1985, op. cit., Part III, as cited in Boehringer and Chan, 28.
65. *id.* 64-5, as cited in Boehringer and Chan, 29.
66. J. Feinberg, Harm to Others, Oxford University Press, New York, (1984), as cited in Boehringer and Chan, 29.

67. A. von Hirsch, Past or Future Crimes, 1985, op. cit., 67-68, as cited in Boehringer and Chan, 29.
68. id. 69, as cited in Boehringer and Chan, 29.
69. id. 70, as cited in Boehringer and Chan, 29.
70. id. 76, as cited in Boehringer and Chan, 30.
71. A. von Hirsch, Past or Future Crimes, 1985, op. cit., 93, as cited in Boehringer and Chan, 31.
72. B. Fisse and J. Braithwaite, The Impact of Publicity on Corporate Offenders, S.U.N.Y. Press, Albany, 1983; B. Fisse and J. Braithwaite, 'Sanctions Against Corporations: Dissolving the Monopoly of Fines', in R. Tomasic (ed) Business Regulation in Australia, C.C.H., 1984. Other sanctions which have been canvassed include: corporate probation; specialised community service orders; probation (punitive injunction); management intervention. In all cases the danger of 'overspill', ie potential harm to workers within corporations needs to be assessed carefully.
73. G. Fletcher, 'The Recidivist Premium', Criminal Justice Ethics, 1, 2 (1982), 54-9, as cited in Boehringer and Chan, 13.
74. R.G. Singer, Just Deserts: Sentencing Based on Equality and Desert. Ballinger Publishing, Cambridge, Mass., 1979, as cited in Boehringer and Chan, 13.
75. Note, however, that in certain jurisdictions an accused may be cross-examined if he or she puts character in issue.
76. A. von Hirsch, Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals, Rutgers University Press, New Brunswick, N.J., 1985, as cited in Boehringer and Chan, 13.
77. A. von Hirsch, Past or Future Crimes 1985, op. cit., 85, as cited in Boehringer and Chan, 14.
78. A. Ashworth, 1984, op. cit., 528-9, as cited in Boehringer and Chan, 33.
79. It is noted that on 22 June 1984 the Commonwealth government appointed a review of the criminal laws of the Commonwealth to be conducted by Mr Justice Watson.
80. With the exception of persons who commit an offence which is a federal offence solely because of the Commonwealth Places (Application of Laws) Act 1970 which is a purely formal category.
81. According to responses by state correctional administrators to the questionnaire on conformity with the UN Standard Minimum Rules

circulated to them by the Department of Foreign Affairs on behalf of the U.N.

82. Meeting of Correctional Ministers; D. Biles, letter to A.L.R.C., 5 December 1985.
83. I agree with the remarks of David Biles 'It would obviously be intolerable to prison administrators if they were required or cajoled into providing different cell sizes, different recreation regimes, different diets etc., for the very small number of federal prisoners in their care'. Letter to A.L.R.C., 5 December 1985.
84. C. Bevan (ed.), Minimum Standard Guidelines for Australian Prisoners, Australian Institute of Criminology, Canberra, 1978.
85. A.L.R.C. D.P. 10, 1979; Vinson Report, Beyond the Image, Report on Review of Welfare Services and Policies in the A.C.T. , AGPS, Canberra, 1985; D. Biles and G. Cuddihy, A Survey of A.C.T Prisoners in N.S.W. Prisons: A Research Report, Australian Institute of Criminology, Canberra, 1984 as cited in Boehringer and Chan, 15; R. Harding (ed.), Administration of Criminal Justice in the A.C.T., Seminar Proceedings No. 2, Australian Institute of Criminology, Canberra, 1984.
86. Vinson Report, 1985, op. cit., 201-2, as cited in Boehringer and Chan, 15.
87. Australian Prison Trends, monthly statistics issued by the Australian Institute of Criminology, as cited in Boehringer and Chan, 15.
88. A.L.R.C. D.P., 10:22, as cited in Boehringer and Chan, 15.
89. Biles and Cuddihy, 1984, op. cit., as cited in Boehringer and Chan, 15.
90. A.L.R.C. D.P. 10, 22, as cited in Boehringer and Chan, 17.
91. See, for example, Mr Xavier Connor's comments, in R. Harding op. cit., 21, as cited in Boehringer and Chan, 18.
92. Biles and Cuddihy op. cit., Table 3, as cited in Boehringer and Chan, 18.
93. D. Biles, 'Crime and Imprisonment: An Australian Time Series Analysis', A.N.Z.J. Crim (1982) 15, 133-53, as cited in Boehringer and Chan, 18.
94. Biles & Cuddihy op. cit., Table 3, as cited in Boehringer and Chan, 18.
95. op. cit., 208-9, as cited in Boehringer and Chan, 19.
96. A.L.R.C., D.P., 10: 35, as cited in Boehringer and Chan, 24.

97. A more comprehensive review of the use of fines will be conducted. Some work has already been done by the Commission. See J Scutt A.L.R.C. Research Paper (1979) and A.L.R.C., D.P. 10. Our recent consultations in the A.C.T. confirmed the finding in DP10 that imprisonment for non-payment of fine is not a problem in the A.C.T. to the extent that it is a problem in other jurisdictions.
98. See Chan and Zdenkowski, *op. cit.*, 1985, for a review of some of these studies, as cited in Boehringer and Chan, 26.
99. See R. Fox and D. Challinger, 'Victorian Attendance Centre Orders: An Alternative to Prison?' Criminal Law Journal, (1985) 9, 1, 3-9, as cited in Boehringer and Chan, 27.
100. Sydney Morning Herald, 10 and 17 August, 1985; D. Weatherburn, 'Appellate Review, Judicial Discretion and the Determination of Minimum Periods', A.N.Z.J. Crim (1985) 18, 272-83, as cited in Boehringer and Chan, 21.
101. See, for example, A. Freiberg, 'Reward, Law and Power: Toward a Jurisprudence of the Carrot, paper to Third Law and Society Conference, Canberra, 1985, as cited in Boehringer and Chan, 22.
102. I. Potas, Submission to the Muir Inquiry, 1979.



CLOSING SUMMARY

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Well, the first thing that I ought to say is that I have enjoyed my experience here. I have not just profited from it and learnt more facts, but have also changed some of my views. I have also been made very welcome and, as often happens in weeks like this, the discussions informally are just as valuable sometimes as the discussions formally. I have certainly found during the conference that there has always been something going on in the papers, the standard has been uniformly high and I think that is a great tribute to those who put together the program and those who delivered the goods. I also find it is a very exciting time to be in Australia by comparison with England. There is so much going on, or about to happen, with at least three major sentencing references in the air. I shall be really interested to see what happens when the various reports start to come through.

In putting together these final remarks my mind was taken back to a judgment in a case in 1981 in England by the name of Ball which Lord Lane dealt with, a case of an eighteen year old unmarried mother who had been convicted of taking about \$100 worth of goods from a shop. She was in breach of a conditional discharge at the time, and therefore the court thought that it could not give a conditional discharge and the magistrates got rid of a difficult sentencing problem by committing her for sentence to the Crown Court. The Crown Court then had to grapple with it. The court went through all the alternatives - she could not be fined, the judge thought, because she was on social security/social welfare payments. She could not be given a conditional discharge because she was already in breach. The probation service said that she did not need probation and therefore the judge felt in the end that he had to give her a suspended sentence of imprisonment. The case went up to Lord Lane in the Court of Appeal and he said quite clearly that this suspended sentence of imprisonment was wrong and went through all the options again. The reason why I am drawing this case to your attention now is that at the very end of his judgment he said that, having considered everything, he had formed the view that the least wrong course was a fine of \$50 payable over six months - in other words about a few dollars a week. I think it is important in looking at the alternatives that are before us to appreciate the different paths which can be pursued. None of them are ideal, I do not think anyone can think of a particular sequence of possibilities which has no drawbacks to it at all, and therefore we have got to look for the least unprofitable course rather than for some set of ideals which will solve all problems in this notoriously difficult area.

Rather than attempting to review each contribution, I am just going to pick out some of the issues that have come up and to highlight one or two of them. First of all, what goals ought we to be thinking of in terms of sentencing reform? Well the things that have come through have been rather varied. The first thing which does seem to have commanded a fairly widespread acceptance is the idea of reducing variation among sentences according to the individual sentencer. Now we have been reminded just a few moments ago about the concept of disparity and that it should not be used in the loose way. So the sort of disparity which it is desirable to eliminate is that among individual sentencers, individual judges or magistrates, not one that precludes variations according to the individual offender.

Then another theme which I tried to put forward in my earlier address and which I think has had some sympathy, but not universally, is this idea of promoting respect for individual rights and the rule of law, through something like a just deserts framework. I would gladly adopt what George Zdenkowski said this morning about having clear twin aims at the top of any new structure; aims of just deserts for offenders and reparation or compensation for victims, and putting it that way subject perhaps to qualifications in places. I think it is desirable to have some clear aims such as these. One can see objections for each of these and it is a question here of the least objectionable alternative. In this field, just deserts and reparation/compensation have a claim to be placed at the head.

A third goal is one which might be regarded as perhaps impertinent for me to raise as a foreigner. I hope I will be heard sympathetically, perhaps as a foreigner who has misunderstood, but I think one goal should be to reduce interstate variation on certain issues at least. I say this with diffidence coming from a country which is not federally organised but I think there are certain things which can be called rights and which should not vary even if there are other issues more closely involved with party politics or particular localities and preferences, other issues on which variation may be regarded as much more justifiable. So, I would adopt, for example, what George Zdenkowski said about minimum standards for prisons. That is a matter which can be related to rights. I would have thought there was a fairly strong argument for regarding that as something to which one ought to pursue in terms of uniformity. Also I think certain victim rights could be placed in the same category. So I think there are certain types of things which one can place in a category where one can say, these are rights which deserve respect and recognition wherever the individual happens to be, matters on which the variation which derives from a federal and state structure is not in itself desirable.

The Division of Sentencing Authority

Then there are various constitutional issues that have been raised. I will deal with these very briefly. One of these is,

who should have the authority over different matters concerned with sentencing? We have looked at the legislative authority, and have seen how legislatures tend to leave to the judiciary a large amount of discretion and authority which they could claim for themselves. I think there has been a fairly general acceptance that the judiciary should continue to have a major role. As for the executive we have not perhaps debated that as much but we have had discussions about parole and executive release, and that is one area where clearly that issue arises.

Who should be given the discretion then, once we have divided up the question of where the authority should lie? We have looked, I think, at several different stages of the process. One of the really good things about the week's conference is that it has not been limited to sentencing as an isolated topic. We have heard from prosecutors, we have heard from people working in parole agencies, we have heard from police, we have heard from sentencers. There are at least four major stages then at which discretion can be exercised and part of what we have been discussing is the allocation, or reallocation of discretion. Police, the beginning, prosecutors at the second stage, sentencers, the third stage and parole and prison agencies at the fourth stage. What emerged was considerable support for increasing the role of public prosecutors in regard to sentence, but much less enthusiasm for the way in which parole and early release have expanded in some states.

When one has decided on the allocation of discretion, the structuring of that discretion is no less important. I hope that although we have talked a lot about the structuring of sentencing discretion, we haven't overlooked the fact that prosecutorial discretion has such a potentially wide area of application that really, because of the way in which it impinges on individuals it ought to be structured no less than, and in a way similar to, the sentencing discretion.

Deception of the Public

Another issue which has surfaced once or twice is a little hobby horse of mine. It is whether it is politically or morally acceptable to engage in deliberate deception of the public. Now this is something which rose fairly clearly for me when Mr Justice Vincent, at a fairly early stage in the week's proceedings, called the systems of parole and early release systems farcical and even used the phrase 'the appearance of dishonesty'. Courts pronounce high head sentences and then, when it comes down to the question of how much time that person is really going to serve, it is a fraction of what has been announced in open court. The problem is not a new one, you can find it in Bentham's writings back in 1789. The idea for him, in the utilitarian way of thinking, is that it might be of great utility to announce in court that a man should have a hundred lashes and then quietly go away give him six lashes and make him

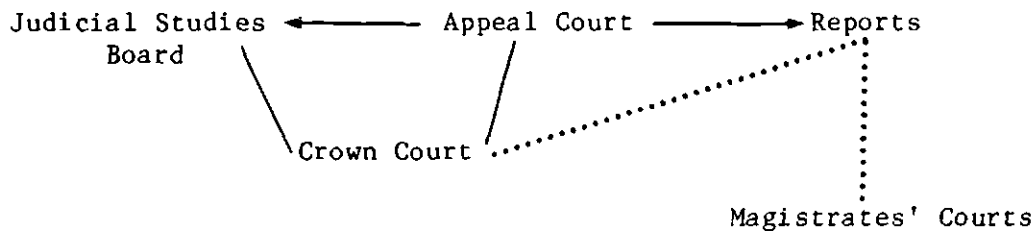
promise not to tell anyone that he has not had the full hundred. In that way you minimise the detrimental effect on him, and maximise the general deterrent effect. So it is not a new problem, but on the other hand it is a very real problem and it is one with which I still have difficulties. I see no clear answer at all because the real difficulty with parole, I think, is that if you abolish it, which looks to be quite an attractive option, then the consequences could be very awkward, as Janet Chan argued in her paper. You have got to look at the consequences of abolishing it. It is very easy to say perhaps that it ought to be abolished in theory but once one does think of abolition then it seems very difficult to resist the idea that the next thing will be a massive rise in the real amount of time spent in prison by offenders - for no good reason, because that is unlikely to have much beneficial effect on anyone or to improve 'just deserts'.

Another constitutional issue raised during the conference by Paul Wilson and others was, what should be done about the media? A number of the early speakers pointed out the power of the media to shape what is then taken as 'public opinion', and mentioned also the selective nature of most reporting - selecting which cases to give prominence to, and what facts to publish about the cases. David Brown expressed the view that the media exert such disproportionate power over public perceptions of criminal justice that some control should be placed upon them. Some would find this unacceptable in a 'democratic' society, but then there is the argument that the media are abusing their freedom in an anti-democratic way. Others have stressed the beneficial effects of the media, as Ron Cahill did when speaking of the development of community service orders in the Australian Capital Territory, and there may be profit in cultivating and lobbying the media, even by appointing press liaison officers for courts and for criminal justice agencies.

Three Models for Reform

In terms of the approach to sentencing reform itself, I suggest we should look at the week's proceedings in terms of three possible models for reform. The first model I have called the pregnant common law. Support for such a model has already been given at this conference, particularly at the beginning from Mr Justice Nicholson and Mr Glissan. The argument is that the common law has not failed us to the extent that would justify removing it completely from the sphere of sentencing. It still has within it the potential for giving birth to the sort of system that we want and it would be wrong to throw it all away just because in certain respects it's defective. So this is the argument that the common law has within it the potentiality for growth. I have tried to illustrate it in diagrammatic form by just showing how the English system, which is a common law system and in some respects developed a little further than some of the Australian systems, has come together.

MODEL 1: THE PREGNANT COMMON LAW

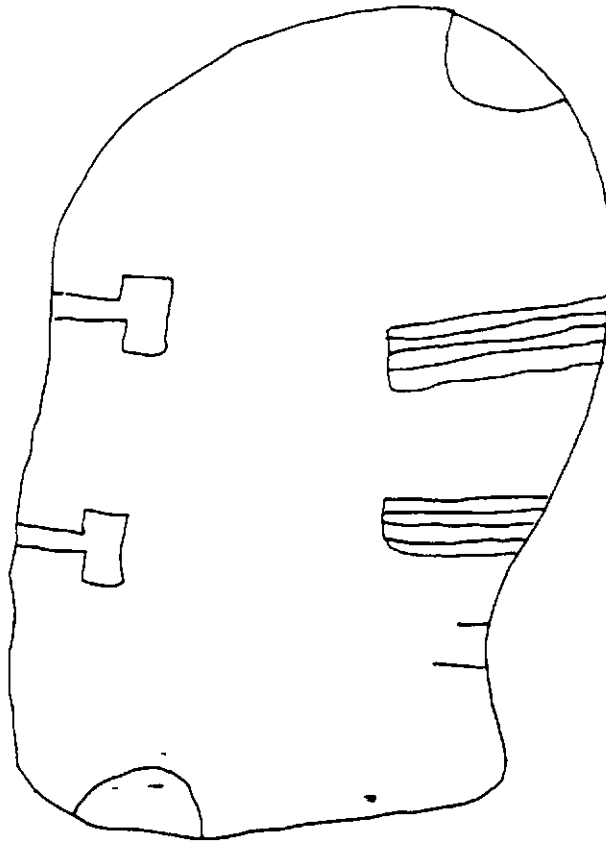


The elements that you see in the English system are the use of the appeal court to give judgments which afford some kind of guidance. These judgments are then reported and the reports are generally available to those sitting in the Crown Court, for the judges dealing with the more serious cases. Also to reinforce the flow of reported cases is some kind of National Judicial College. In England we have a body called the Judicial Studies Board, which every judge is required to attend once in five years, to go along for a week's study course and to be informed of the latest decisions, to be harangued by criminologists and just generally to get a picture of what is going on in sentencing and criminal justice. The Judicial Studies Board also publishes regular bulletins, about three or four times a year, to bring to the judges' attention summaries in a glossy form (without them having to wade through law reports) of leading sentencing decisions that have recently come forth, and occasionally summaries of relevant research. But that of course does not solve the problem of the lower courts. The magistrates' courts are very poorly served by guidance from the reports. The line of communication and guidance between the magistrates' courts and the Court of Appeal is a broken one with many gaps in it.

Some magistrates' courts, let it be said, have actually taken their own measures to develop their own guidance and this is what I think is one of the more exciting features of the English system. Because the Court of Appeal does not often lower its sights to deal with the sorts of cases that come before the magistrates' courts, some local benches have started to devise their own guidelines and there are some really interesting sets of propositions. One bench has 250 offences put into a guidelines package with starting points and guidance on how to move upwards and downwards. They have done it for themselves through the magistrates' clerk (the qualified lawyer who is meant to advise the lay magistrates and is responsible for their training). This kind of 'do-it-yourself' enterprise is done by sentencers for sentencers, and thus has a strong chance of practical acceptance.

What you get if you use that kind of model is a kind of reservoir of discretion. If you imagine the large area illustrated in the following diagram as a piece of water then what the Court of Appeal in England is doing is pushing out little jetties and promontories hither and thither. If you get guidelines on drugs let us say, that deals with one particular area, but there is still a great deal of discretion round it for other offences; perhaps the court then adds guidelines on rape cases, but that again only covers a small area. You get the occasional legislative intervention for a particular age group perhaps, but there is still a sea of discretion with just a few pieces of guidance, and I suppose the idea is that the common law expands over a period of time and eventually these promontories close in. More and more guidance accumulates over the years, but discretion is preserved to give the flexibility which is the most prized element in this model.

RESERVOIR OF DISCRETION

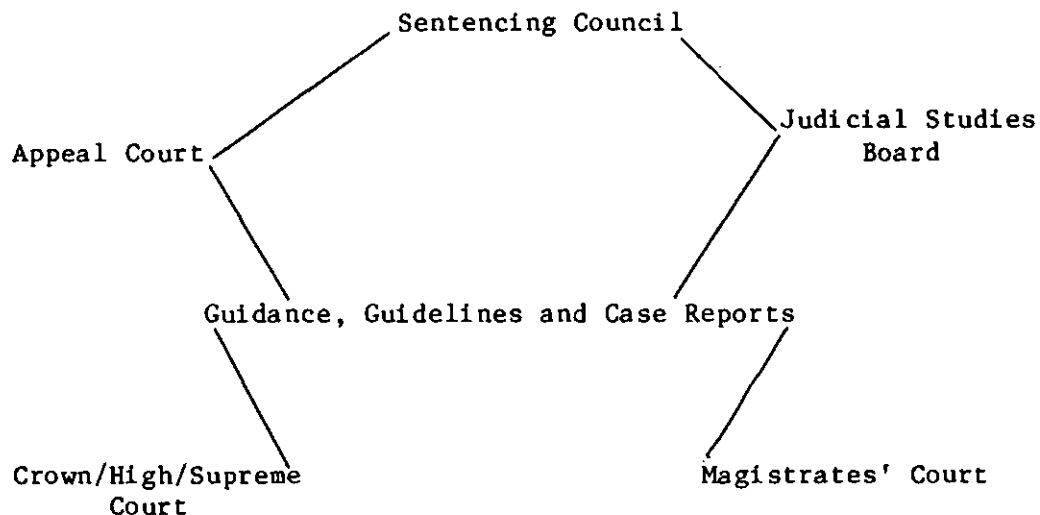


This is what has been happening in England and many other common law jurisdictions since the 1960's, but it is happening very slowly. This is why my preference is for another form of gradualism which moves rather more quickly.

Model 2: Structured Gradualism

The second model, then, is a kind of structures gradualism. It has at its head a Sentencing Council which actually makes itself responsible for looking at whole areas and devising guidance for them, not just waiting for cases to come on appeal to the Court of Appeal - one great disadvantage of the common law method. The Council would choose the areas to be reviewed, relating the sentencing scales to one another, publishing guidelines which are then disseminated and which are relevant both to courts dealing with the more serious cases and to courts dealing with the least serious cases. In this sort of model the Sentencing Council plays a key role. I think one other failing of the common law approach is that it depends entirely on the energy and imagination of a very small coterie of Appeal Court judges, and there is a desperate need to broaden out the basis if we are to have realistic guidance on the full range of practical sentencing problems. One approach would be simply to furnish the Chief Justice with research and support staff. A further step would be to include some trial judges and magistrates in the process of policy formation, as members of the Sentencing Council. Another step would be to bring into the Council others in the criminal justice system who see the results of sentencing - probation, police and prison officials. And finally there are the claims of academic lawyers or criminologists to play their part in this process.

MODEL 2: STRUCTURED GRADUALISM



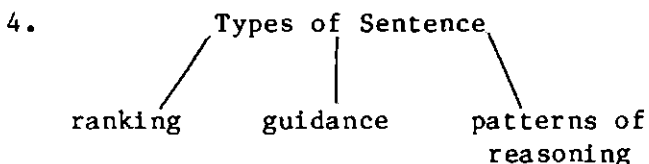
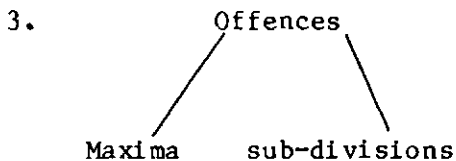
In terms of explaining and propounding the Council's guidance, and obtaining comments on it, there is also a function for a body like the Judicial Studies Board. I would not defend the particular model we have in England, but I do think there is a need for some kind of judicial college in a way which I will try to explain later.

The next question is, what exactly would a Sentencing Council do? The figure below gives a possible answer to the question of what does one codify. Now with reference to the four general areas listed under the heading 'codification', I think there is clear difference between 1 and 2, and 3 and 4. 1 and 2 could be accomplished relatively simply. By codification of general principles of sentencing I mean, for example, codification of principles relating to the sentencing of persistent offenders, multiple cases, mitigating factors, aggravating factors. As for 2, it is a question of settling the procedures to establish the factual basis of sentencing, what happens if there is a dispute and so forth. Those are two general areas where I believe that a code could be produced and it would have a good guiding effect. It would also possibly have some attraction to other states in a federal jurisdiction, even if their particular maxima or ranges of sentences were rather different. I set some store by codifying these two areas as a minimum. Then one comes down to the more tricky categories, 3 and 4.

CODIFICATION

1. General Principles

2. Procedures



I can quite clearly see that one of the problems in a country like Australia is that different states have different maxima for offences. We have heard the Victorian problem over maxima clearly explained by at least two sets of speakers. Then, of course, there is this task of subdividing offences according to their seriousness which I discussed at considerable length in my paper. Others have referred to this task as undoubtedly difficult, but since it is being done by judges all the time, implicitly, I do not see why it should be impossible to try and reduce it to paper. Austin Lovegrove's paper showed a fruitful direction for developments here.

There are at least three major issues relating to 'type of sentence'. There is the issue of ranking them in order of severity which was discussed by Fox and Freiberg; then there is the question of guidance on how a particular sentence ought to be used. This is another hobby horse of mine. Too frequently a legislature creates a new option like, let us say, community service, and tosses it to the courts saying, 'Oh, see what you make of that'. I think there is a case for saying quite clearly how each option fits in, what group of offenders it is for, how courts should reason towards it or away from it. These patterns of reasoning also have their part to play. There could be forbidden patterns of reasoning, for example.

The other issue, and one which we have not actually discussed in this conference, but which certainly struck me when I was thinking about possible codification for England, is the suggestion of two separate frameworks for young offenders and adult offenders. In England there is one range of measures available for those aged twenty-one, a different range for those aged seventeen to twenty, and another different set for those under seventeen. It may be that although the general principles could be the same, when you come down to the lower levels there is a case for setting out different levels of seriousness in concordance with different levels of sentence.

Well those two possible approaches are, firstly, what I call the pregnant common law, the idea that common law can itself give birth to the necessary rules and principles, and secondly, the structured gradualist approach of the kind which, over the years, I have often associated with standing in the middle of the road and being hit by the traffic coming in both directions. A third possible model then would be the guidelines approach of Minnesota which Kay Knapp has explained to us so clearly and elegantly that it would not be really worth my going through it again. There is a role there for a Sentencing Commission with a broad basis not limited to the higher judiciary. There is also a role for the courts in developing and refining the principles, a fact which is often I think overlooked and which certainly struck me this week more than it has struck me in reading the literature. Kay Knapp also mentioned that if community perceptions of the seriousness

of a crime change over time then it is possible to change the guidelines. On the other hand there are those who think that the Minnesota guidelines are too crude, that ten levels of seriousness are too few and that the flexibility to which our courts have been accustomed makes it unacceptable to propose only ten categories of seriousness, even if courts do retain some discretion to depart from the guidelines.

Dynamics of Change

The last subject which I would like to discuss is the dynamics of change and this is where I think one really has to know very closely the particular system. I feel much more confident in talking about this in England, also much less enthusiastic and optimistic, than in Australia, but it is clear from what Kay Knapp has said about what has happened in the United States that, however precisely one tries to regiment sentencers or any other group in a particular direction, if they do not want to go in the direction then adaptive behaviour will set in and somehow the elaborate framework that has been set up will not quite work out. One almost comes to the paradox that reform will not succeed unless it is accepted by the judiciary, but if it is acceptable to the judiciary, it will not amount to real reform and so one locks into a very difficult circle. The key word however, is 'almost'. There are ways out of the circle.

One is to bring sentencers into greater contact with other professionals in the criminal justice system and with those in the universities and institutes who specialise in sentencing and criminology. I would say that judges and magistrates should be more prepared to look at problems from other points of view - such as those of the probation or correctional authorities. I would also suggest the desirability of more openness among judges and magistrates towards the ideas and research findings of academics. Judges have been known to be critical and dismissive towards academics, and I would be the first to concede that the academic house has not been put in order. If academics expect their work to have any impact on policy and practice, we must take greater care to ensure that it is soundly based in a proper appreciation of the practical problems, and that our work is communicated in a clear, non-technical and fairly brief fashion. For all these reasons, a judicial college or Judicial Studies Board is worth consideration, both as a forum for exchanging ideas as well as a means towards greater consistency in sentencing policy and practice.

One of the most heartening features of this week's conference has been the number of judges who have attended and participated. Perhaps here we have the seeds from which greater and further co-operation might grow. If sentencing reform in Australia is to be successful, its roots must be firmly established within the legal profession which supplies the judges and magistrates who pass sentence. Let us hope that those who go forth from this week's discussions are able to nurture the seeds and to set down those roots.

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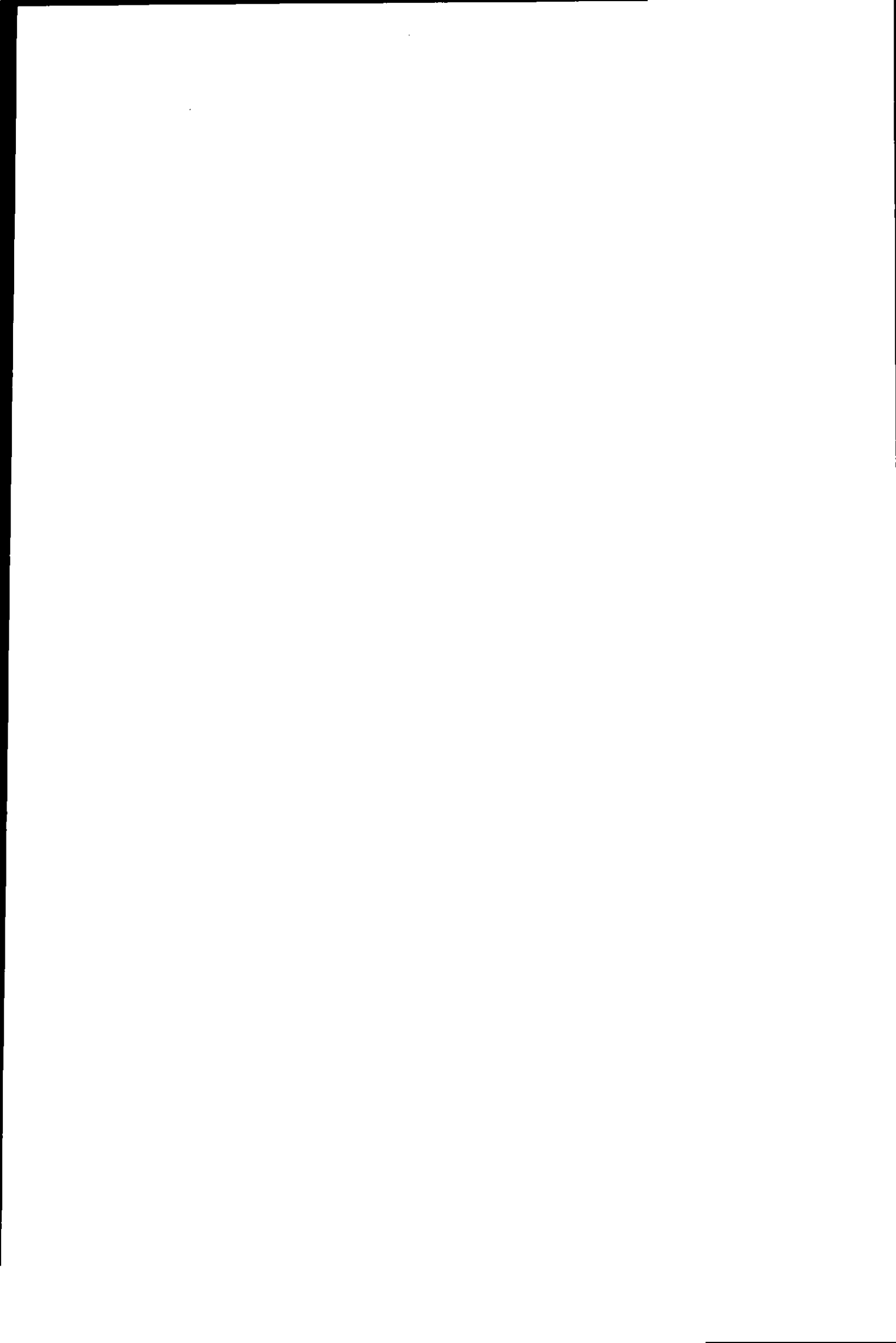
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