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DISCRETION IN SENTENCING

The Honourable Justice Dean Mildren RFD

Historical Introduction

At the time of the establishment of the first penal colony in New South Wales in 1788, capital punishment was still the only sentence which could be imposed for serious felonies which did not have the benefit of clergy. Blackstone[1] categorised the available penalties in the 18th century as including, in addition to execution, being drawn and dragged to the place of execution for treason, embowelling alive, beheading and quartering for high treason; in the case of murder, public dissection; in the case of treason by a female, being burned alive; in other cases exile or banishment; transportation; imprisonment, both perpetual or temporary; mutilation and dismemberment; the imposition of fines, both stated and discretionary; whipping; hard labour in a house of correction; the pillory; the stocks; and the ducking stool. In addition, convicted felons were liable to forfeiture, as well as corruption of the blood, and the inability to hold public office or certain kinds of employment.

Not only were the available sentences at that time barbaric, but they were usually far more severe than the offence warranted: e.g. larceny of a chattel above the value of one shilling was grand larceny, and punishable by death.

Holdsworth[2] observes:

> "This list of punishments comes from all ages in the history of English law. It contains abundant traces of barbarities which came very naturally to a primitive society, but which were a disgrace to a more civilised age. It also contains penalties suited to feudal ideas, but wholly out of harmony with the ideas of the eighteenth century. And the punishments inflicted by the law were not only barbaric and archaic, they were quite unsystematic; for they were often inflicted by many unconnected statutes, which came from all periods in the history of the law. In most cases there was little or no attempt to apportion punishment to the magnitude of the crime, and there was no attempt to think out any theory as to the objects at which punishment ought to aim."

Reformers such as Howard, Fielding, Goldsmith, Beccaria, and Sir Samuel Romilly did much to shock the public conscience during the later stages of the 18th century, but it was left to others to gain any progress. The punishment of burning alive female traitors was abolished in 1790[3], but most of the important reforms did not occur until well into the 19th century. By 1861, the death penalty had become limited to treason, murder, piracy with violence, and setting fire to dockyards and arsenals.[4]

Transportation to the colonies eventually was abolished; the last convicts to be sent to Australia occurred in 1868 when a limited number were sent to Western Australia.[5] Most of the other forms of violent punishment either never found their way to Australia, or were abolished by the third quarter of the 19th century. Nevertheless whipping still remained on the statute books until well into the late 1960s; and the death penalty was not abolished until the second half of the twentieth century.[6]

During the period from about 1875 to 1950 there were significant reforms to sentencing and to punishment which gave courts a wider range of sentencing options and a wider sentencing discretion. Nevertheless mandatory minimum sentences were still common. In the Northern Territory, for example, mandatory minimum terms for a wide range of offences were prescribed by the *Criminal Law Consolidation Act 1876* (SA) which continued in force in the Northern Territory until its repeal by the *Criminal Code* in 1984. For example, the minimum penalty for manslaughter was 3 years (s 15); for attempted murder, 3 years (s 21); for various forms of arson, 7 years (ss 81-85); for rape, 4 years (s 62); and for buggery 10 years (s 71). All of these offences carried a maximum of imprisonment for life. All minimum term provisions were repealed by the *Criminal Law Amendment Ordinance 1939,* which then left the courts in the Territory with a complete discretion as to the sentence to be imposed for all serious offences, except for murder.

During this same period, the courts were given the power to impose bonds and suspended sentences. For example, in South Australia the *Offenders Probation Act 1887*, s 3(2) empowered the courts of summary jurisdiction to impose a suspended sentence on a good behaviour bond in the case of a first offender, where the offence was punishable summarily with less than 2 years imprisonment and where the court decided to impose a sentence of more than 3 months. That Act was replaced in South Australia in 1913 by a more liberal provision, but the 1887 Act still continued in force in the Northern Territory after the handover to the Commonwealth. It was not until 1971 that all Territory courts were given the power to impose fully or partially suspended sentences without any restrictions, or to release upon a bond without passing any sentence.[7] Further amendments made to the legislation included the power to impose a community service order, or a home detention order, a power to dismiss a charge when the offence was trivial, and the establishment of a special juvenile court with powers of punishment more appropriate for juveniles, including detention in a detention centre until the age of 17, and now 18 years of age.

Another aspect of the reform of the criminal justice system concerns itself with the reform of the prison system. An important change in thinking resulted in the concept of earned remissions on sentence. For example, the *Prisons Act 1869-70* (S.A.) by regulation 43 contained in the Schedule to the Act, provided that prisoners could earn by "industry and good conduct" partial remissions equal to 1 day for each 6 marks earned, (depending on how much stone was quarried). A prisoner could earn up to 3 marks in a day, so it was theoretically possible to earn a remission of 50% of the sentence. This Act remained in force in the Northern Territory until 1951 when it was replaced by the *Prisons Ordinance 1950.* Regulations made under the ordinance allowed prisoners to earn marks by good conduct which resulted in payment of a certain amount per mark upon release. The regulations also credited each prisoner with partial remissions equal to 1/3 of the head sentence, but the prisoner was liable to lose a proportion thereof if he failed to earn good conduct marks. A similar system was still in force until the introduction of the *Sentencing Act 1995* (which came into force on 1 July 1996) which abolished the remission system entirely as part of the "truth in sentencing" movement. One of the consequences of the remission system in the Northern Territory was that it was not possible to fix a non-parole period which was too close to 2/3 of the head sentence, as to do so, would discourage prisoners from accepting conditional release on parole: see *Mulholland v The Queen* (1991) 1 NTLR 1 at 9 per Gallop J (with whom Asche CJ and Angel J agreed). At the same time, the idea that prisons were labour prisons gradually disappeared. Prisons focused more on rehabilitation with education and work programmes becoming available to most prisoners. By 1984, penal statutes in the Northern Territory no longer provided for imprisonment with or without hard labour. Some prisoners who were considered a low security risk were offered the opportunity to serve their terms on a prison farm.

Truth In Sentencing

What happened in the 1990s was that changes in government policy were introduced piecemeal in order to toughen up the system. This translated itself inevitably into longer periods of actual gaol time.

The first step was the abolition of remissions, as I have said, which came into effect on 1 July 1996. One consequence of this was that courts were no longer bound to fix minimum terms less than two thirds of the head sentence. Another was that prisoners sentenced to serve a term without a non-parole period being set, would spend longer in actual custody. However the *Sentencing Act*, s 58, provided that in any case where a sentence of less than one year was to be imposed, the court must allow for the abolition of remissions and reduce the sentence it would have imposed accordingly. This meant that a head sentence of between 8 months and just under 12 months was not possible. S 58 is subject to a 5 year sunset clause and will cease to operate on 1 July, 2001.[8]

The new *Sentencing Act* also imposed some new restrictions on the courts' sentencing powers. Minimum non-parole periods fixed at 50% for most offences and 70% for serious sexual offences such as rape[9] were prescribed whilst the courts' power not to fix a non-parole period at all was liberalised.[10] Suspended or partially suspended sentences could not be imposed in respect of a head sentence of 5 years or more.[11] Except in the case of sexual offences, these restrictions had no significant practical effect on judicial discretion.

Mandatory Minimum Terms

Subsequent amendments to the *Sentencing Act* passed in 1996 introduced mandatory minimum sentences for a wide range of property offences. The minimum terms prescribed were 14 days for a first "property" offence, 90 days for a second "property" offence and 12 months for a third or subsequent "property" offence. As "property" offences includes offences such as stealing and malicious damage to property (as well as a wide range of other offences) it is not difficult to foresee that there will be third-strikers liable to be imprisoned for a minimum term of 12 months notwithstanding that the offence committed was relatively minor. Further, there is no provision enabling the courts to ignore prior offences because of the passage of time. A constitutional challenge to the legislation was unsuccessful.[12] In particular, the Full Court held that the requirement that the courts, upon a finding of guilt must proceed to a conviction and impose a minimum term which could not be suspended or otherwise ameliorated did not violate the doctrine of the separation of powers or intrude upon the perception of the independence of the judiciary.

The trend towards longer sentences

Of course the Northern Territory was not alone. The movement for longer prison sentences and restriction of judicial discretion has a long history both in Australia and overseas. As long ago as 1953 Professor Norval Morris warned that there were gross and unjust variations in sentences imposed on criminals, and that unless the judiciary developed a comprehensive theory of sentencing, sentencing discretion would be removed from the courts' hands.[13] There is no doubt that any comprehensive theory of sentencing which was so lacking in 1953, is no longer lacking, yet there has still been a significant trend towards increased penalties and reduced discretion. By the mid 1970s, the trend in the United States had become firmly entrenched "…based on an absurd belief in the sentimental leniency of the judiciary, a belief fostered by some elements of the press in the United States."[14] The most extreme form of limitation of judicial discretion, one we are all too familiar with, which had become popular was the fixed term or fixed minimum term for a defined crime. Norval Morris in 1977 pointed out the weaknesses of this system, which he described as "irrational and inequitable"[15] and which need no further elaboration except to point out that the inevitable consequence is a transfer of power from the courts to the prosecution which exercises what was formerly properly the courts' discretion in the process of charge and plea negotiations.

Just Deserts and Retribution

In the mid 1970s, the position in the United States began to change in some jurisdictions, in favour of legislatively fixed sentences, perhaps more accurately called prescriptive sentencing grids, based upon theories developed by von Hirsch[16] and Professor Dershowitz[17] seeking to control judicial discretion by precise legislative statements of the appropriate or "presumptive" sentence, variation from which could be allowed, but only as provided by rules promulgated by a Sentencing Commission. The jurisprudential basis for this movement was the 'just deserts' theory described thus by the Australian Law Reform Commission Interim Report No. 15:-

> "The philosophy of retribution is enjoying a renaissance under the 'fresh guise' of the concept of 'just deserts'. This is a view that convicted criminals deserve to be punished."[18]
>
> "The notion of just deserts, as envisaged by von Hirsch, includes not only the belief that sentences should be more determinate but also that punishment should be proportional to the gravity of the crime. Fairness in sentencing includes both certainty and proportionality: The sentence should fit the crime. However, those who favour the 'just deserts' approach are not in agreement about the amount of punishment which should be inflicted upon offenders. There is no doubt that a significant number of those urging that offenders "be punished" also believe that they should be punished more severely than at present."[19]

The Australian Law Reform Commission concluded in its interim report[20] (a position it maintained in its final report[21]):

> "66. *The Principles of Desert and Economy.* While recognising the substantial disillusionment in contemporary Australian society about rehabilitation as a chief aim of criminal punishment, and the renaissance of support for 'just deserts' and retribution, we are not persuaded that any single rationale of punishment can or should predominate in guiding reforms of Commonwealth law. Punishment may, in varying degrees, take into account elements such as deterrence, the denunciation of abhorrent behaviour, the reinforcement of community moral and ethical values and, perhaps with less confidence than in the past and within the limits required by 'just deserts', reformation of the offender and his restoration to society. The importance of the concept of 'just deserts' is that it draws attention to the need for fairness in the imposition of punishment. Punishment for persons convicted of Federal offences should, as far as possible, be certain, consistent and proportional to the gravity of the crime for which an offender is being sentenced. The principle of economy in the imposition of punishment limits the amount of punishment that may be imposed to the minimum necessary to achieve community objectives. The community objective of curbing crime is not achieved simply through the imposition of severe penalties. The use of imprisonment is especially ineffective for this purpose. Such evidence as is available does not support the popular assumption that severe penalties diminish crime. Evaluative studies which have been carried out in this century do not provide any support for the idea that a return to the severe penological principles and practice of the past will provide more effective protection for the public."

Sentencing grids mandatory sentencing and sentencing commissions had no place in the Australian Law Reform Commission's recommendations, and did not feature in the amendments to the *Crimes Act 1914*, passed in 1990, when, for the first time, the Commonwealth provided *inter alia* for a list of matters to which the courts must have regard when passing sentence etc.

But in the meantime, as is well-known, New South Wales introduced its *Sentencing Act 1989*, which was described by government spokespesons as:

> …"turning 'the sentencing process on its head' and as 'revolutionary in abolishing all forms of remission; providing fixed minimum terms to be served in custody; and removing a presumption in favour of parole for certain categories of offender.' The spokespersons also stressed that the government had no intention of 'seeking to make sentences longer' and that

the new legislation would not heighten an already pressing problem of overcrowding in the New South Wales prison system."[22]

Other states, as is well known, have introduced their own truth in sentencing regimes and in one case, mandatory minimum sentencing. To some extent it is possible to relate the various Australian State and Territory governments' reactionary flirtation with truth in sentencing and with mandatory sentencing with specific phenomena above and beyond mere party politics at election time. There has been significant public support for victims of sexual offences to come forth - even years after the event - and for heavy sentences, particularly where the victims are or were children at the time of offending. To that end, victim impact statements are now provided for by legislation and courts are urged to take them into account in the sentencing process. In South Australia, not so long ago, there was also much public protest about so called "home invasions" that the government felt obliged to introduce legislation to make this a specific offence, even though the existing law adequately covered the situation. In Western Australia, in the early 1990s, 20,000 demonstrators were said to have marched on the Western Australian Parliament demanding tougher sanctions for young offenders. In the Northern Territory, there was a marked increase in the number of burglaries, robberies and armed robberies in the 1990s, compared with the period 1970 – 1990. And all of this was so much bread and butter for a media which passes its time criticising the judicial role in sentencing mainly by focusing on the courts' alleged leniency and dissociation from public opinion[23] or by making awkward comparisons which suggest inconsistency.

Rising crime and imprisonment rates

The statistical data show some alarming trends. The Northern Territory's imprisonment rate per 100,000 persons has increased from 230 in 1989 to in excess of 450 in 1998, 1999 and 2000. New South Wales increased from 72 in 1988 to 143 in 1999-2000. The average Australian rate has increased from 67.3 in June 1980 to 142.8 in 1999. Comparisons with all jurisdictions show marked increases from the 1970s to the present day (see tables 1 & 2).

TABLE 1

Daily average number of prisoners per 100,000 population aged 10 years and over 1900-1976.

Year	Australia	New South Wales	Victoria	Queensland	South Australia	Western Australia	Tasmania
1900	168.3	197.2	129.0	166.1	150.4	390.6	77.0
1905	143.7	167.0	108.0	131.1	97.3	352.8	75.0
1910	106.0	109.2	85.2	111.4	85.9	235.5	54.7
1915	97.1	122.4	81.0	94.2	87.6	132.0	39.6
1920	67.3	75.0	63.1	56.5	51.8	103.8	39.1
1925	70.1	83.8	68.5	50.8	57.6	93.2	47.0
1930	89.1	101.1	91.0	55.4	87.5	128.1	55.5
1935	67.7	68.2	83.3	43.3	61.4	85.1	62.5
1940	60.5	65.0	75.6	39.8	43.2	88.5	51.1
1945	69.9	80.8	67.2	65.9	44.0	89.9	45.8
1950	65.5	76.6	61.9	48.4	45.1	88.7	54.1
1955	79.1	95.3	66.7	58.3	67.6	105.7	61.4
1960	91.3	101.2	82.6	76.4	85.5	115.9	82.0
1965	90.6	100.3	77.1	79.0	81.9	142.7	83.6
1970	103.0	106.1	85.7	85.0	97.8	170.5	126.2
1975	78.8	91.7	52.9	84.6	69.1	100.9	94.1
1976	77.8	90.3	48.4	88.6	66.2	110.6	79.4

(Source: S.K. Mukherjee, *Crime Trends in Twentieth-Century Australia*, p 981.)

TABLE 2
Persons in prison custody 1997-2000

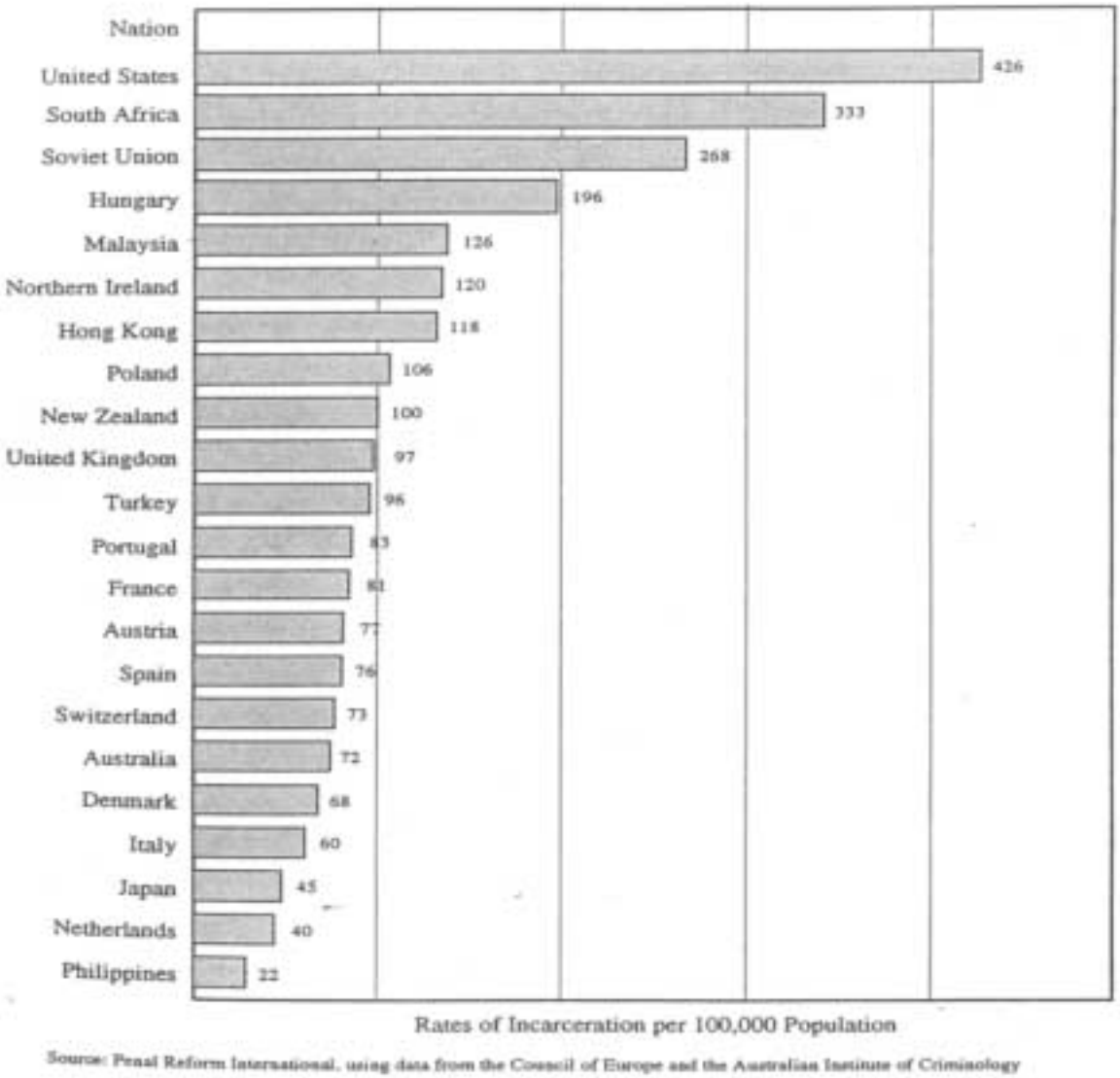
Year	AUST	NSW	VIC	QLD	SA	WA	TAS	NT	ACT in NSW	ACT (Unsen-tenced)
1997	126.1	134.6	72.6	162.6	131.2	168.4	73.0	449.1	50.4	11.8
1998	134.3	137.5	78.5	188.2	124.4	177.9	85.0	455.7	50.4	15.8
1999	142.8	148.1	81.4	193.0	120.0	211.6	96.4	453.9	54.7	15.3
2000										
March Quarter	143.8	149.4	84.1	191.0	114.8	212.8	105.0	467.1	61.3	21.8
June Quarter	143.9	151.0	85.4	182.2	114.9	218.1	120.4	459.3	64.8	20.9
Sept. Quarter	142.9	151.0	86.1	175.5	112.3	224.2	112.8	456.9	64.4	22.4

(**Source:** Australian Bureau of Statistics)

It is of interest to compare these rates with world figures for 1992 (see Table 3). The Northern Territory's present rate exceeds that of the USA in 1992, then the highest figure in the world. Australia's rate has increased from 72 to about 143, i.e. it has nearly doubled in less than 10 years.

TABLE 3[24]

Incarceration rates for the United States, South Africa, and the Soviet Union in comparison to Europe and Asia



Source: Penal Reform International, using data from the Council of Europe and the Australian Institute of Criminology

Whilst I accept the limitations which can be drawn from these statistics, they hardly demonstrate excessive leniency on the part of the Australian judiciary; nor do they support claims that truth in sentencing programmes would not result in longer prison sentences. Indeed, as Professor Duncan Chappell observed in 1992, the New South Wales *Sentencing Act 1989* had resulted even by then, in a massive growth in the New South Wales prison population with more offenders being incarcerated for longer periods.[25] Professor Chappell also referred to the Ottawa Symposium held in June 1991 when the United States was criticised by European nations for its high incarceration rate:

> The true sentencing dichotomy revealed at the Ottawa Symposium among North American and European participants was in reality an ideological split between the two continents regarding the severity of punishment to be imposed upon offenders. Speaking about this issue at the Symposium, the distinguished Norwegian criminologist, Nils Christie, sparked the wrath of many of the United States participants by suggesting that their ideological views had produced a punishment system which was not so dissimilar from that of the Soviet Union's. The USSR had been severely criticised by Western democratic nations for its policy of keeping dissident citizens in Siberian and other labour camps but the United States was incarcerating in its prisons an equivalent underclass of black and other dispossessed minority groups.[26]

Is there not a parallel here as well? In the Northern Territory, for example, indigenous Australians represent on average a figure of about 80% of all sentenced prisoners, and has done so for many years. This represented in 1998/9 an imprisonment rate in excess of 1,500 per 100,000 indigenous adults.[27] Even worse rates were reported for New South Wales, Western Australia, and South Australia in 1993 as can be seen from table 4.

TABLE 4

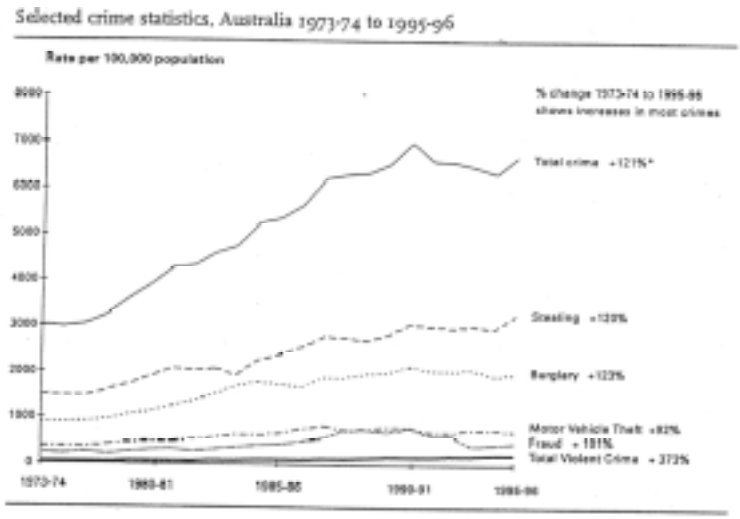
Ratio of Indigenous Australians and others in prison per 100,000 population and over-representation of Indigenous Australians by jurisdiction, 30 June 1993.

	Indigenous Australians	Others	Total Persons	Over representation of Indigenous Australians
New South Wales	1,636.2	153.5	168.0	10.7
Victoria	972.7	64.1	67.0	15.2
Queensland	971.1	72.0	89.0	13.5
Western Australia	2,476.5	114.2	163.0	21.7
South Australia	1,790.0	88.0	103.7	20.3
Tasmania	255.8	72.8	75.7	3.5
Northern Territory	1,226.0	113.1	360.5	10.8
ACT	0.0	6.8	6.8	0.0
Australia	1,438.4	102.3	119.2	14.1

(Source: Mukherjee & Dagger 1995[28])

However, to put the rising imprisonment rate into some sort of perspective, it must be acknowledged that there is also statistical support for rising crime rates in Australia: see tables 5 & 6.

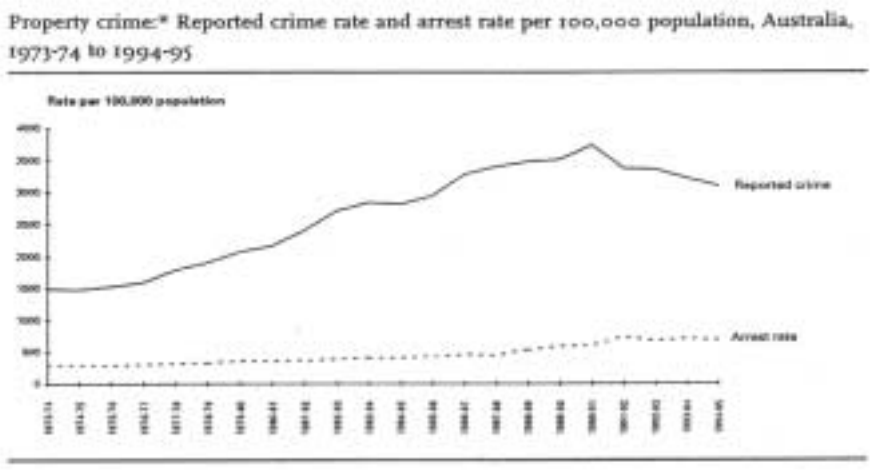
TABLE 5



*Total crime refers to violent crime (homicide, robbery and serious assault) plus stealing, burglary, motor vehicle theft and fraud.
(Source: Police Service Annual Reports, States/Territories[29])

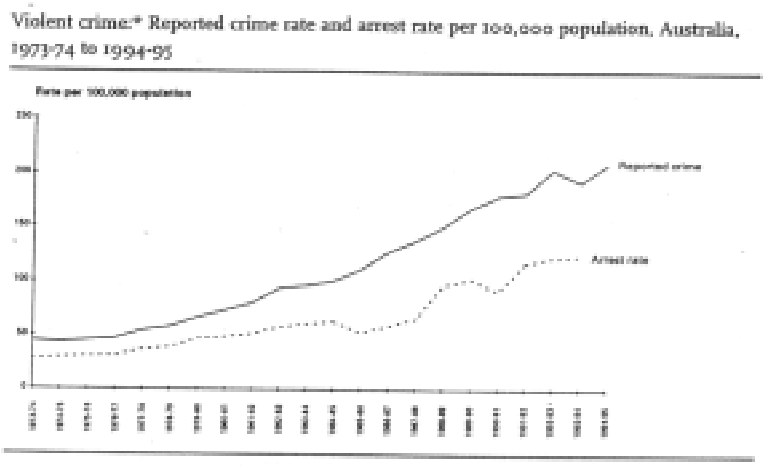
Arrest rates for property crime and violent crime have not kept pace: see tables 6 & 7.

TABLE 6



*Includes, motor vehicle theft, fraud, and break, enter & steal.
(Source: Police Service Annual Reports, States/Territories.[30])

TABLE 7



N.B. Arrest rate for 1994-95 excluded as date not available for all jurisdictions.
*Includes serious assault and robbery.
(Source: Police Service Annual Reports, States/Territories.[31])

Crime rates are clearly rising throughout the western world. Australia's burglary rate has more than doubled between 1972-1995, as has New Zealand's, West Germany's and that of England and Wales. Canada's rate increased by about 50%. The rate in the USA has remained relatively stable, and in 1995 was less than half the rate of Australia and the other countries mentioned.[32] Increased larceny were recorded in each of those countries, the rate of increase being between 50% to 100%.[33] Increases in the rates for robbery were even more dramatic, with Australia and New Zealand increasing about 400%, whilst England and Wales increased seven fold.[34] On the other hand homicide rates have remained fairly stable.[35]

There can be little doubt that one of the major factors involved in these increases is illicit drugs. Drug offences reported to police have grown from a rate of 70.7 per 100,000 population in 1974-1975 to a rate of 437.9 in 1994-1995: see table 8.[36] Although there is no direct statistical evidence there is no doubt that the rises in property crime and increased serious assaults[37] are directly related to rising drug offences and rising drug use. This is so also in the Northern Territory, which does not have as serious a drug problem as it has an alcohol problem, particularly in some of the Aboriginal communities.

TABLE 8

Drug offences reported to police and rate per 100,000 population, Australia, 1974-1975- to 1994-1995.

		NSW	VIC	QLD	WA	SA	TAS	NT	ACT	AUST.
1974-75	N	4,046	1,951	1,671	810	690	321	168	77	9,734
	R	82.8	52.5	80.2	70.6	55.1	79.3	187.9	40.3	70.7
1979-80	N	9,380	3,514	4,504	1,372	3,198	1,103	130	102	23,303
	R	182.3	90.4	200.4	108.5	246.2	260.8	107.2	45.0	159.4
1984-85	N	23,118	11,528	14,119	4,870	8,175	2,267	467	173	64,717
	R	423.1	279.9	549.1	343.3	596.2	511.9	314.4	68.8	409.9
1989-90	N	20,195	14,917	10,622	8,917	3,090	1,940	628	n/a	60,309
	R	346.6	340.6	365.4	545.8	214.7	424.8	399.2	n/a	369.0
1994-95	N	17,512	15,323	25,011	10,823	4,481	3,825	n/a	n/a	76,965
	R	286.4	340.4	763.1	625.0	304.0	808.6	n/a	n/a	437.9

N – Number reported to police. R – Rate per 100,000 total population.
(Source: Police Service Annual Reports, States/Territories)

One of the responses by some governments to these increases is to increase sentences, and as part of that process, to limit judicial discretion. Professor Duncan Chappell noted in 1992 that the choice facing Australian State and Territorial governments was whether to follow the path laid out by the Americans, or whether to go the way of the Europeans.[38] It seems that the Northern Territory, is heading well down the American path, despite the lack of any evidence that longer sentences act as a more effective deterrent than shorter sentences, and the enormous costs involved of keeping prisoners in gaol. Some other states which have embraced truth in sentencing may have taken tentative steps along the same path. The movement towards restricting discretion, whilst reactionary, is thought to be populist, and therefore is explained as one of the many irons in the fire which the state has in the fight against crime.

Options

From the court's perspective, there are three choices. The first is to do nothing, even if the courts are attacked whether by the media, or by interest groups, or by the Attorney-General. Those in favour of this option argue the traditional case that the courts should not get involved in politics, and hope that in time when things return to normal, we might return to a more enlightened age.

The next choice is to provide information to the public on a regular basis with a view to enabling informed public debate. Tasmania took this initiative by publishing all sentencing remarks in full on its web-site. The Northern Territory has done the same. We shall also be publishing a summary of the principles of sentencing, and possibly some statistical information concerning crime rates, imprisonment rates, etc., with links to other web-sites containing further relevant information. Some other courts have employed a public relations officer – ideally someone with a background in law and journalism. South Australia has adopted the initiative of judges speaking at public forums.

The final choice is to become pro-active, and critical of government policies by engaging in political debate through the media, as one Court seems to have done.

Which, if any, of these choices will be effective is problematical. Since the 1950s, sentencing critics have suggested that this problem would go away if courts gave reasons for the sentences imposed, and developed rational sentencing principles; that judges should have a wider range of sentencing options such as community service, weekend detention, home detention etc.; that the legislature should set down the sentencing principles in legislation to ensure more consistency in sentencing; that appeal courts should hand down guideline judgements; that sentencing summaries and statistics should be kept – the list goes on. All of those things have come to pass in some form or another but sentencing discretion is still under threat, and will remain so unless the public are convinced that efforts to restrict the discretion are unworkable, unprincipled and ineffective to reduce crime. Nevertheless I suspect there must be a trade-off – the public will still expect lengthy sentences for serious offences, if for no other reason than to punish and to keep these individuals locked away where they can do no harm. The courts should attempt also to publicise those cases, so that the community can see that its interests are being protected by the courts to the extent that the courts are able in accordance with reasoned and appropriate principles of justice and mercy.

A cautionary tale

Recently I was involved in sentencing an Aboriginal man who had entered a Darwin residence whilst the occupants were asleep in order to steal alcohol. Having entered the house, the man picked up a sleeping female child and took her out into the streets where he sexually interfered with her for a short time, before taking her home and then disappearing into the night. He pleaded guilty. He had a bad prior record including a prior for attempted rape 12 years ago. Most of his priors were for burglary or stealing. I imposed a sentence of 8 years with 6 to serve, saying that I thought it likely that he would offend again when released. The sentence resulted in a few letters of criticism in the local press, which sparked off a debate about the sentence, and sentencing

generally. The letters were often couched in dramatic, and ill-tempered and emotive terms. Among the points raised by some of the critics were the following:

1. The offence was so serious it deserved life imprisonment without parole;
2. The offence was not that serious, but it deserved a much lengthier sentence, such as 25-35 years;
3. Judges are public servants who should listen to public concerns about over-lenient sentences, and if they do not, they should be dismissed;
4. This case is a good illustration as to why we need mandatory sentencing in the Northern Territory;
5. As a long sentence was not imposed, the public could expect that in 6 years' time, the offender would be released and offend again in the same way.
6. Any appeal was a laughable exercise, being in effect an appeal from Caesar to Caesar.

Naturally I did not respond, but watched with keen interest. The following points emerged in response:

1. Neither the DPP nor the prisoner intended to appeal;
2. The Attorney-General did not intend to appeal because he had been advised not to, although he personally thought the sentence was not enough.
3. As a life-sentence without parole is the punishment for murder if the courts are going to hand out that sort of sentence for cases like this, the defendant might as well murder the victim.
4. The Judges have to act within the framework of the law. The fault lies with the legislature/politicians/government.
5. Why is not the Attorney-General explaining properly to the public why this sentence is not appellable/or is not unjust etc.

The following points did *not* emerge:

1. Nothing was said about the principle of parsimony in sentencing.
2. No-one mentioned the principle that maximum penalties are reserved for cases falling into the worst kind category.
3. Only one writer referred to the fact that it was a guilty plea. No-body mentioned that such pleas usually result in a discount and that I had said that I had discounted the sentence because of that fact.
4. It was wrongly assumed (and not corrected) that the sexual offence was rape when it was digital penetration.
5. It was wrongly assumed that I meant that the offender would re-offend in the same way, when in fact I was referring to re-offending by committing property crimes.

All this should have been corrected and was not. The proper person to have made these corrections used to be the Attorney-General, but he had made no effort to do so. Whose job is it now? It cannot be the Judge's. Is it the Chief Justice's or the Bar Association's or the Law Society's or the Shadow Attorney-General's or the President of the A.I.J.A.'s and if not one of those, whose?

We need an answer to that question. Part of the answer is to educate the public beforehand, but the other part is to have someone whose function it is to respond – even if all that is done is to correct factual errors as well as legal misconceptions. Perhaps the answer is to form a committee consisting of appropriately trained individuals headed by the Chief Justice with one of their number to act as spokesperson, but there may be better suggestions, and I leave this for further discussion later in the conference. Whatever the solution, there is a strong need also for proper public debate about the merits and dangers of such populist solutions to crime trends as mandatory sentencing and other quick-fix ideas which usually have the result of limiting sentencing discretion. This I believe has so far not been properly addressed despite the lengthy public discussion that has occurred already in the media, and is also a task which must be undertaken by whomever is chosen to respond to uninformed criticism.

ENDNOTES

[1] *Comm.* iv 376-377
[2] *A History of English Law*, Vol XI, p 556
[3] 3 Geo.III c.48
[4] See *Holdsworth*, op.cit., Vol XV, p 163
[5] Sir Victor Windeyer, *Lectures on Legal History*, Law Book Company, 2nd Edn, (1949), p 329
[6] Abolished in the Northern Territory in 1973: see *Criminal Law Consolidation Ordinance 1973.* The death penalty still exists for treason: see *Crimes Act 1914* (Cth) s 24.
[7] *Criminal Law (Conditional Release of Offenders) Ordinance 1971.*
[8] However, s 58(6) curiously provides that "it is intended that the expiry of this section will not of itself have any effect on sentencing practices current immediately before then as if this section had not expired," which sounds like an each-way bet.
[9] Technically, the section refers only to s 192 (3) of the *Criminal Code*, which makes sexual intercourse without consent an offence carrying life. However 'sexual intercourse' has been defined to include a wide range of prohibited conduct apart from vaginal penetration – e.g. cunnilingus, fellatio and any form of penetration of the vagina or anus.
[10] s 54(3) now provides that the court is not obliged to fix a non-parole period where it considers it to be 'inappropriate'.
[11] s 40 (1)
[12] *Wynbyne v Marshall* (1997) 7 NTLR 97
[13] Norval Morris, *Sentencing Convicted Criminals* (1953) 27 ALJ 186
[14] Norval Morris, *Sentencing and Parole* (1977) 51 ALJ 523 at 529.
[15] *Ibid*
[16] *Doing Justice – The Choice of Punishments* (Hill and Wang, 1976)
[17] *Fair and Certain Punishment*, Task Force on Criminal Sentencing (McGraw-Hill, 1976)
[18] ALRC Interim Report No. 15, para 41.
[19] *Ibid*, para 44.
[20] *Ibid*, para 66
[21] ALRC Report No. 44, paras 27, 28 and 29.
[22] Professor Duncan Chappell, S*entencing of Offenders: A Consideration of the Issues of Severity, Consistency and Cost* (1992) 66 ALJ 423 at 427.
[23] See Fox and Frieberg, Sentencing State and Federal Law in Victoria, 2nd Edn., (Oxford University Press 1999) p 29.
[24] Reproduced from Professor Duncan Chappell, *op.cit*., at p 431.
[25] *Op.cit*., at p 427.
[26] *Op.cit, at p 432.*
[27] See Annual Report 1998-99, Northern Territory Correctional Services, p 78.
[28] Published in *Crime and Justice in Australia*, SW. Mukherjee and A. Graycar, (Hawkins Press 1987), p 84.
[29] *Ibid*, p 19.
[30] *Ibid*, p 64
[31] *Ibid*, p 64.
[32] See S. Mukherjee, C. Carach and K. Higgins, *A Statistical Profile of Crime in Australia.* (Australian Institute of Criminology 1997) Research and Public Policy Series No. 7, p 77.
[33] *Ibid*, p 79.
[34] *Ibid*, p 80.
[35] *Ibid*, p.
[36] *Crime and Justice in Australia*, *op.cit*., p.53.
[37] Serious assaults have risen by 558% in the period 1973-1974 to 1995-1996: see *Crime and Justice in Australia*, *op.cit*., p 19