G Ellenger

ISSN 085-7033

THE UNIVERSITY OF SYDNEY
FACULTY OF LAW

PROCEEDINGS of the INSTITUTE OF CRIMINOLOGY

No. 35

SENTENCING (1978)

REGISTERED IN AUSTRALIA FOR TRANSMISSION BY POST AS A BOOK

INSTITUTE OF CRIMINOLOGY
SYDNEY UNIVERSITY LAW SCHOOL

Address: 173 - 175 Phillip Street, Sydney, N.S.W. 2000

The Institute of Criminology is an organization within the Department of Law of the Sydney University Law School for teaching and research in criminology and penology.

STAFF

Director
Associate Professor R. P. Roulston, LL.B. (Sydney), LL.M. (Tasmania).

Assistant Director
Associated Professor G. J. Hawkins, B. A. (Wales) *(Criminology).*

Senior Lecturers
W. F. Lucas, M.B., B.S., D.P.M. (Sydney), Dip.Crim., (Cambridge). M.R.A.N.Z.C.P. *(Forensic Psychiatry).*
J. Oxley-Oxland, B.A., LL.B. (Rhodes).
P. G. Ward, M.A., B.E. (Sydney) *(Statistics).*
G. D. Woods, LL.M. Dip.Ed. (Sydney).

Research Assistant
Mary Elliott, M.A. (Cambridge), M.A. (Sydney).

Publications Officer
D. M. Langley, M.B.E., B.Sc., Dip.Diet. (Melbourne). Dip.Crim. (Sydney).

N.S.W. ADVISORY COMMITTEE

Chairman
The Honourable Sir Laurence Street, Chief Justice of New South Wales.

Deputy Chairman
The Honourable Mr Justice J. A. Lee, a Justice of the Supreme Court of New South Wales.

Members
Dr J. S. Blow, M.B., B.S., D.P.M., M.R.A.N.Z.C.P., Consultant Psychiatrist, N.S.W. Department of Youth and Community Services.

Professor T. Brennan, M.A. (Cambridge) Professor of Social Administration in the University of Sydney.

W. Clifford, Director, Australian Institute of Criminology.

Dr J. H. T. Ellard, M.B., B.S., D.P.M., M.R.A.C.P., Consultant Psychiatrist.

M. F. Farquhar, O.B.E., E.D., Dip.Crim. (Sydney), C.S.M., Chairman of the Bench of Stipendiary Magistrates.

The Honourable Mr Justice R. W. Fox, Chief Judge of the Supreme Court of the A.C.T.

F. D. Hayes, Dip.Soc. (N.S.W.), M.A., Dip.Soc.Stud., Dip.Crim. (Sydney), Director, Social Work Programme, Milperra College of Advanced Education.

Dr W. Hemphill, M.B., B.S., D.C.H., Assistant Director, Bureau of Maternal and Child Health, Health Commission of N.S.W.

The Honourable Mr Justice R. M. Hope, C.M.G. a Justice of the Supreme Court of N.S.W.

The Honourable Mr Justice M. D. Kirby, Chairman of the Law Reform Commission, Deputy President of the Australian Conciliation and Arbitration Commission.

W. C. Langshaw, B.A., Dip.Soc.Stud. (Sydney), Director, N.S.W. Department of Youth and Community Services.

W. J. Lewer, LL.M. (Sydney) S.M., Deputy Chairman of the Bench of Stipendiary Magistrates.

R. H. Lucas, formerly Chief Police Prosecutor and a Vice-President of the Australian Crime Prevention Council.

K. Lukes, Dip.Soc. (N.S.W.), Dip.Soc.Stud. (Sydney) A.I.H.A., Director, Probation and Parole Services for N.S.W.

W. R. McGeechan, A.A.S.A., A.C.I.S.

The Honourable J. C. Maddison, B.A., LL.B. (Sydney) M.L.A.

F. J. Mahoney, O.B.E., LL.B. (Sydney) Deputy Secretary, Australian Attorney-General's Department.

J. A. Morony, F.R.I.P.A., a member of the Parole Board of N.S.W.

The Honourable R. J. Mulock. LL.B. (Sydney), M.L.A., Minister for Justice and Services.

H. F. Purnell, Q.C., LL.B. (Sydney), Senior Public Defender for N.S.W.

R. N. Purvis, Dip.Crim. (Sydney), F.C.A., Barrister-at-Law.

Emeritus Professor K. O. Shatwell, M.A., B.C.L. (Oxford).

Mrs B. Shatwell, B.Com. (Tasmania).

The Honourable Mr Justice J. P. Slattery, a Justice of the Supreme Court of New South Wales.

His Honour, Judge J. H. Staunton, C.B.E., A.C., LL.B. (Sydney), Chief Judge of the District Court of N.S.W.

Professor T. Vinson, Ph.D. (Sydney), Professor of Behavioural Science in Medicine, University of Newcastle.

The Honourable F. J. Walker, LL.M. (Sydney), M.L.A., Attorney-General.

Dr F. W. Wright-Short, M.B., B.S., D.P.M., M.R.A.N.Z.C.P., Consultant Psychiatrist to the University of Sydney.

Special Adviser on Alcohol and Drug Addiction

Dr M. S. Dalton, M.A. (Edinburgh), M.D. (Lausanne), M.R.C.Psych. (London), M.R.A.N.Z.C.P., D.P.M. (R.C.P. & S.).

Overseas Correspondents

Professor Sir Leon Radzinowicz.

Professor Norval Morris, Dean, The Law School, University of Chicago.

O. V. Briscoe, Consultant Physician, Bethlem Royal and Maudsley Hospitals, London, Vice Dean of the Institute of Psychiatry, University of London.

J. J. Panakal, Head Department of Criminology and Correctional Administration, Tata Institute of Social Sciences, Deonar, Chembur, Bombay.

THE INSTITUTE OF CRIMINOLOGY

SYDNEY UNIVERSITY LAW SCHOOL

Proceedings of a Seminar on

SENTENCING

CHAIRMAN:

The Honourable Mr Justice J. A. Lee
Supreme Court of New South Wales

10th May, 1978
State Office Block, Sydney.

TABLE OF CONTENTS

Discussion Papers Page

"SENTENCING": A FOREWORD

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

The Dilemma of Sentencing

A proverb is ascribed to the Chinese which captures something of the dilemma of sentencing which emerges from these pages:

"Beat your child once a day. If you don't know why, he does".

It is because we cannot secure entire agreement about the *rationale* for sentencing that disparities appear to arise in the maximum (and sometimes minimum) sentences allowed by Parliament and the individual sentences imposed by judicial officers for apparently like offences. Theories, of course, abound. They range from the Removal from Society, Denunciation, Retribution and Deterrence theories, at the one end of the spectrum to the Restoration, Compensation, Behaviour Modification and Rehabilitation theories at the other. Unfortunately, the theorists' language is sometimes used loosely by practitioners. Judge Roden points out that all too frequently "deterrent" sentences are synonymous with "heavy" sentences; "rehabilitation" becomes synonymous with "light". The aim of deterrence is to modify conduct, for fear of the consequences. Yet if the consequences are perceived to be remote, or are not known or appear to be applied unequally and irrationally by the courts, a "deterrent" sentence is not likely to have the desired result. Judge Roden illustrates this point by reference to the comparative severity typically visited upon those convicted of culpable driving causing death by the same judges who deal lightly with appeals against sentence on conviction of driving under the influence. The *conduct* may be precisely the same in each case. Only the consequences may distinguish the two crimes.

Beside disagreement on the fundamental aim of sentencing, many other factors are identified in this seminar as the cause of apparent disparity in sentences. They include the incomplete perceptions often conveyed by inadequate reporting of the full facts of a case, the inconsistent legislative policy which arises from the piecemeal amendment of the Statute Book and the erosion of fine values by the passage of time, the separate trial of co-criminals and the individuality of judges and magistrates, who have the function of imposing the sentence. The speed with which many sentences have to be passed, particularly in the Magistrates' Courts and uneven fact presentation, inherent in the adversary trial, all contribute to some degree of inequality in the sentences imposed for like offences in Australian courts. Should we be concerned about this? Is it anything more than a feature of human justice? Are the inequalities at an acceptable level? What should we do about them?

Equality is Justice

There is no doubt that perceptions of unequal sentences or apparently excessive or (more usually) inadequate sentences agitate our community from time to time. Examples are mentioned in the seminar and many will spring to the mind of the average reader. It seems to be assumed that equal "guilt" will be equally punished. Dr. Francis and Dr. Coyle have set about testing scientifically the degree of variance in penalties imposed by different magistrates for like offences. In order to reduce the experiment to the greatest degree of objectivity possible, a videotape procedure has been adopted, by which component parts can be varied, in order to test the relative importance of multiple factors including age, appearance, sex, racial origin, the offence and so on. The results so far emerging from their work are recounted in this report. They suggest that the more extravagant claims of variance in sentencing are simply not borne out, if the videotape experiment is reliable.

Judge Roden, in his paper and oral comments, questions the fundamental assumption that sentences *should* be equal in every case. So long as individuals impose a sentence with discretionary powers conferred, within limits, by Parliament, it is inevitable that disparities will arise. This is a feature of human justice. What some condemn as disparity and inequality, others applaud as flexibility and individualised decision-making.

One reflection of the concern in some quarters about inequality in sentencing and the alleged inadequacy of some sentences is the current moves, especially in the United States, towards mandatory minimum sentences which reduce the judicial officer's options, once a defendant has been convicted of a particular offence. A like reform reflected in the *Criminal Code Reform Act* of 1977 (S.1437) now before the United States Congress seeks to define crimes with precision and to assign specified sentences to particular offences, listing aggravating and mitigating circumstances that can modify the penalty. Various suggestions are contained in these papers, designed to reduce inequalities in sentencing, short of passing the problem from the judicial arm of government to the legislature, by the adoption of fixed penalties. The suggestions include the special training of judges and magistrates (including by the use of videotape techniques), regular meetings amongst them to discuss sentencing practices, the provision of greater legislative guidance concerning the hierarchy of crimes and the introduction of improved reporting of appeals against magistrates' sentences, for the guidance of the lower courts where the great bulk of sentencing is done.

Alternatives to Imprisonment

A major theme to emerge is the need to consider alternatives to imprisonment. The range of alternatives available will inevitably raise the objections of those who seek complete equality in penalties imposed for apparently like conduct. If there is but one penalty, for example, death or a fixed term of imprisonment, equality may, superficially, be achieved. However, in any system of individualised justice, this approach is bound to leave many

dissatisfied. For example, a money fine falls unequally upon the middle class and affluent, on the one hand, and the unemployed on the other. Imprisonment has well identified social inefficiences as a correctional measure. Furthermore, it is extremely labour-intensive and costly and achieves little discernable positive good either for society as a whole or for the victims of crime. A recent announcement by the Minister for Welfare in Queensland, Mr. Herbert, estimated that the average cost of keeping a prisoner in a Queensland gaol was $23,000 per year, allowing for $9,000 loss of wages by the prisoner and payments of social security to the prisoner's dependants. By comparison, the cost of supervising a person on probation or parole was about $300 per year.

Considerations of this kind have taken criminologists and lawyers to the scrutiny of alternatives to imprisonment. The recommendations of the Australian Delegation to the Fifth United Nations Congress on the Prevention of Crime and Treatment of Offenders in Geneva in September 1975 included a recommendation that consideration should be given by the Commonwealth and State Governments to:

> "the revision of the laws with respect to sentencing to promote the greater use of alternatives to imprisonment, having regard to the costs and other unsatisfactory features of the punishment of imprisonment. Such a revision should take into account the need to rationalise existing provisions, fill in gaps that exist in their operation, develop new alternatives, introduce sentencing principles and criteria, and establish a legislative intent that imprisonment is to be used only as a last resort".

The Parliaments of the United Kingdom and New Zealand have already enacted restrictions on imprisonment. Section 20 of the *Powers of Criminal Courts Act* 1973 (U.K.) provides that a court shall not pass sentence of imprisonment on a person who has attained the age of 21 and has not previously been sentenced to imprisonment unless the court is of the opinion that no other method of dealing with him is appropriate. Section 43A of the *Criminal Justice Act* 1954 (N.Z.) likewise provides that no court shall sentence any person to imprisonment for a term of less than six months unless "having regard to all the circumstances of the case, including the nature of the person's offence and his character and personal history, the court has formed the opinion that no way of dealing with him other than imprisonment is appropriate".

These statements of legislative recognition of the potentially harmful effects of incarceration, so that it is relegated to the position of a measure of last resort, obviously require the closest possible attention to the provision of sentences, alternative to imprisonment. Attention was given to this subject in the seminar.

Among the alternatives, some of which were indentified and discussed are the following:

* Recognizance
* Fines, including "day fines" i.e. a fine expressed in terms of average earnings not money
* Compensation and restitution orders
* Probation
* Periodic detention
* Suspended sentences
* Attendance centre orders
* Community work orders
* Work release orders.

The alternative of community service orders attracted the keenest attention of the seminar, the experiments in Tasmania and Western Australia being described. The most hopeful statistic of all was provided by Mr. J. P. McAvoy of the Probation and Parole Service who suggested that experience in England has shown in one scheme that 40% of offenders, after finishing their compulsory community service order, actually continued to work with the community group in a voluntary capacity. Amidst all the pessimistic statistics on the effect of institutional rehabilitation, this figure may bear a message of hope.

Sixth United Nations Congress

The Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders will take place in Sydney in August 1980. The assembly of this major Congress in Australia will bring to this country nearly 2,000 Ministers, Judges, Academics and other leaders in the fields of law, criminology, police corrections, social welfare and allied disciplines. The spotlight of attention will be placed upon Australia's criminal justice system generally and the treatment of offenders, in particular. The agenda for the Congress will most likely include the self-same subjects as are debated in these pages. Australia, which began its colonial history as a penal colony, has special reasons to give urgent attention to the punishment and treatment of offenders and the principles and policies which should guide those who sentence them. The debate recorded here has value in identifying some of the major themes that will have to be addressed. Identifying the problems may be the beginning of wisdom.

THE SENTENCING PROCESS: A NEW EMPIRICAL APPROACH

Ronald D. Francis, M.A., Ph.D., Dip.Crim., F.A.P.S.
Senior Lecturer, Department of Applied Psychology,
Caulfield Institute of Technology;
Honorary Senior Research Fellow, Department
of Psychology, La Trobe University
and
Ian R. Coyle, B.A., Ph.D.,
Consultant, Hays Associates (Australasia) Ltd.,
Honorary Research Fellow, Department of
Psychology, La Trobe University.

Writing in 1971 Hogarth opens his book with the quotation:

> "There is no decision in the criminal process that is so complicated and so difficult to make as that of the sentencing judge."[1]

It is to this brief that the article is addressed; the court processes have for centuries been concerned with the adjudicatory and dispositional aspects. The adjudicatory process is circumscribed and guided by rules and precepts that exercise strict control to ensure that the finding part of the proceedings retain the rights of the accused. The dispositional part of the process, the application of the penalty, is not circumscribed by strict safeguards and is very much a fallible human process.

It is difficult to see exactly what safeguards one should introduce into the dispositional stage but some suggestions will be presented at the end of the paper.

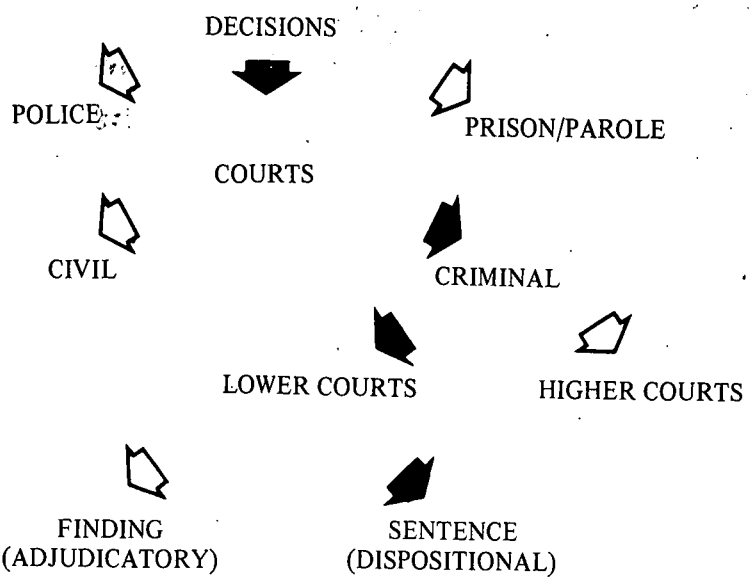
Among the reasons for selecting the lower courts sentencing for study is the fact that over 95% of all cases heard by courts are heard in the lower court system and the sentences in the overwhelming majority of cases are given without extended consideration. This should not be construed as a criticism for if the system is to function at all it must do so with reasonable dispatch.

This paper deals with decision making in the court process. As indicated in **Figure 1**, the emphasis is with criminal rather than civil jurisdiction in the lower courts. Further, the focus is on dispositional factors (both legal and non-legal) rather than adjudicatory factors.

Interest in the application of penalties is not of recent origin. However, research and public debate in this area has been mediated by a number of factors. These include such factors as the apparent denial of natural justice in the dispositional aspect of criminal proceedings and the possibility of empirical

Figure 1

DECISION MAKING AND THE SENTENCING PROCESS



investigations of decision making and how they may be modified. Fox and O'Brien[2] refer to Sir James Stephens, writing in 1863 on the capriciousness of sentencing in the criminal law:

> ".....without consultation, advice or guidance of any description whatever yet the sentence is the gist of the proceeding, it is to the trial what the bullet is to the powder."

The extent of the jurisdiction of the courts is, of course, extensive but there are particular problems with this wide ranging authority. For instance, how does one deal with aliens and on what occasions are deportations appropriately ordered? Devlin[3] also points out the distinction between recommendations for deportation of aliens and of Commonwealth citizens and thus illustrates how complicated the issue may become. How should one deal with the offences committed outside the jurisdiction and what should one reasonably do with the mentally disordered offender?

---

1. Hogarth, J., *Sentencing as a Human Process.* University of Toronto Press: Toronto, 1971.
2. Fox, R. G. and O'Brien, B. M., Fact-finding for Sentencers. *Melbourne University Law Review,* 1975 10 pp 163-206.
3. Devlin, K., Sentencing Offenders in Magistrates Courts. Sweet and Maxwell: London, 1970. p187.

The application of sentences in terms of their appropriateness and also the issue of disparity have been the concern of the majority of empirical studies. There is, however, a case to be made for disparity in sentencing. Bartholomew[4] has pointed out that certain pathological conditions may be regarded as cases deserving of special and/or different treatment. Further, he goes on to discuss whether the object of punishment is to inflict hurt without consideration of other matters.[5] It will be appreciated that the distinction, in the aims of sentencing, between punishment and reform may be yet further complicated by a third category that we might call "treatment". A hard and fast distinction is, of course, a difficult one to draw. Stealing may be seen as a straightforward criminal matter but if it becomes known that the objects stolen were always frilly underwear, this may be construed to mean that there is some kind of fetish or perhaps a mental disorder and that may shade into yet more serious types of pathology. In these cases involving psychiatry and the law there is the added difficulty of confidentiality. In ordering a psychiatric report the court obliges the accused to be examined by a psychiatrist, thereby placing the forensic psychiatrist in a position of appearing to be a quasi-judicial person for it will be clear to the accused that what he tells the psychiatrist will have a powerful bearing upon the sentence handed down. Thus, instead of the conventional confidential relationship that normally obtains between a medical practitioner and patient, in the legal context the object of the consultation can be to make the information public rather than keep it private. Further, the aim of the conventional medical consultation is the primary interest of the patient. In this forensic context its aim may be quite the contrary.

The conventionally stated aims of punishment are deterrence, both specific and general. There may be other aims such as rehabilitation. The conflict between the deterrence and reform is frequently not made clear and, even if it were, would still present difficult problems in sentencing. For this Bartholomew[6] coins the neologism "punitherapy". Walker[7] in discussing the aims of a penal system, outlines what he believes to be a mistaken assumption, that penal philosophy is just a sector of moral philosophy under a more fashionable name. The points Walker raises in that chapter again show that there are a variety of issues which are interlocked and about which many sentencing magistrates must be unaware.

Among the many issues in sentencing is the one concerned with personal responsibility. On the one hand Wootton[8] has argued that the problem of responsibility need not be an issue in the courts. She holds that the courts should be concerned only with the question of "did this person commit this offence?" and, secondly, "what should the court do about it?" The contrary view is discussed by Johnston[9] where he presents the notion that offenders

---

4. Bartholomew, A. A., Psychiatry and Sentencing. In Section 5 of Chappell and Wilson. *The Australian Criminal Justice System*, Butterworths: Sydney (1977) p317.
5. *ibid.* p321.
6. *ibid.* p333.
7. Walker, N., *Sentencing in a Rational Society.* Pelican: Harmondworth, 1969, p15.
8. Wootton, B., Social Science and Social Pathology. George Allen and Unwin: London, 1959.
9. Johnston, S. W., The Utilitarian Does Something Useful. In section 5 of Chappell and Wilson, *op.cit.* p274.

should still keep their rights as human beings and be treated as morally responsible. In this context Johnston discusses the indeterminant sentence and goes on to conclude that the test of logic is not the primary but the test of community mores is.

In sentencing, the presiding judge or magistrate hands down a penalty that in some way reflects the commission of an offence and, also, the prevalence of that offence in recent times. The penalty may be a sort of social advertisement of society's standards and the imposition of penalties, such as extended prison terms, may take cognizance of the probable future behaviour of the offender. Walker[10] in speaking of the assumptions of the sentencing system, states that the most venerable and fundamental of them all is that the sentencer should deal only with the offender. It is clear to the present writers that that assumption is a questionable one. Devlin[11] discusses the available dispensations that the court may use and he uses the alliterative terms Reformation, Rehabilitation, Retribution, Reprobation, Reparation and Reductivism, pointing out that with this vast array of available sentences, some are bound to be foolish.

In recent times one of the sources of information available to the courts is the pre-sentence report. This is an example of the principle that the bench should have access to expert professional advice, but it is unrealistic to expect a judge to acquire proficiency in a wide range of social sciences. In this context one of the most significant precedents established in recent times is that of the Portolesi case[12] in which it was successfully argued by Counsel that the formulation of sentencing policy can be properly informed by the presentation to the court of criminological arguments and data. This principle is no longer accepted having been upset by a decision of the High Court in the case of Lyon and Ors.

Among the problems of the principle of pre-sentence reports is that of disclosure. The anonymity of informants should afford a measure of protection to them but when viewed from a civil liberties perspective it will be seen that if the defendant does not have the right of access to the report he is not in a position to rebut those allegations which may be prejudicial to him, and which may also be false. Fox and O'Brien[13] state:

> ".....a case may be made for legal representation and disclosure only to Counsel, but total non-disclosure is unacceptable."

On the matter of natural justice, Fox and O'Brien[14] also say:

> ".....failure to allow a defendant or his Counsel an opportunity to be heard on sentence clearly constitutes a reviewable denial of natural justice and failure by a court to obtain sufficient facts upon which to found a sentence may entirely vitiate the sentencing discretion."

10. Walker, *op. cit.*, p139.
11. Devlin, *op. cit.*
12. *R v Portolesi*, 1973 1 NSWLR 105
13. Fox and O'Brien, *op. cit.*, p200.
14. *ibid* p169

There are two basic approaches to sentencing, one of them the legal and the other human decision-making process, although of course this distinction is only made for analytic purposes since in the courts themselves they are factors that operate jointly. Of the first, legal issues, the authors cited in the preceding sections are representative. (See also: Thomas[15] for a definitive analysis.) Of the second, perhaps the best known studies are those of Hood[16] and Hogarth[17]. In the latter studies, Hogarth, for instance, did an analysis of the decisions of 71 magistrates in over 2000 real cases and he examines a variety of issues in that context, including the background characteristics of magistrates and the penal philosophies that they hold.

From the decision-making point of view the present authors regard the sentencing process as having a number of problems. Firstly, there are no properly constituted guide lines for sentencing as there are for trials (while recognising that it may not be possible to frame such guide lines). Secondly, the sentencing decision is not as publicly seen as the finding decision (again recognising that this, too, is a difficult problem). Thirdly, the sentencing appears to be done in less time and with smaller consideration than is accorded the adjudicatory part of the process, although it may be argued that consideration is being given to the sentence while the adjudication takes place.

Studies of sentencing such as those of Hood and Hogarth are concerned with magistrates as agents of the law and it is very difficult to find studies which evaluate the process rather than the agents. One example of a study which has evaluated the sentencing process is Morris'[18] article in which he points out that in the United States the powers of the bench have been reduced in recent times by three factors: plea-bargaining; legislatively fixed terms; and parole. Perhaps we should add another to these and that is development of the appellate system. Some of the issues are that the appeals may pertain to the finding or to the sentencing. If pertaining to the sentence, the appeal may be against leniency and severity and on the type of penalty imposed. There has also been a great increase in the range of options available to the bench in sentencing. In addition to the conventional options such as prison and fines in the Australian context new options have recently become available, such as work release programmes and community service orders. Brooke-Taylor and Booth[19] in a British context, list 21 options available to the bench. In this respect, then, the decision-making process in sentencing is very much more difficult than it is in determining innocence or guilt, where there are only two alternatives.

Of the various ways of solving the problems in sentencing, empirical research is but one. It is argued here that it is a very powerful method of investigation but we would not wish to argue that it is the only form.

15. Thomas, D. A., *Principles of Sentencing.* Heinemann: London, 1970.
16. Hood, R. G., *Sentencing in Magistrates Courts.* Stevens and Sons: London, 1962.
17. Hogarth, *op. cit.*
18. Morris, N., Sentencing and Parole. *A.L.J.* 51 (1977) pp 523-531
19. Brooke-Taylor, J. C., and Booth, D. H., *A Magistrate Court Handbook.* Barry Rose: London, 1974.

Cross[20] suggests that it is necessary to put a curb on undue optimism that research will solve all the problems associated with sentencing. As he point out, there are two major difficulties: the difficulty of performing the necessary experiments without perpetrating an injustice; and the fact that some of the most interesting questions are not capable of resolution by empirical research. While recognising that empirical research will not solve all the problems associated with sentencing, this paper presents an innovative approach to impirical investigation of the sentencing process that is economical, realistic and which does not perpetrate injustice.

In using an empirical approach to sentencing there are two basic methodologies. One is to use a vast array of information, as was the case with the Hogarth[21] study referred to earlier. In this approach minor variations between cases is accommodated by the analysis of a great number of cases. The alternative approach is to use a few cases and simulate realism while keeping the points under investigation in strict and precise control. Sentencing exercises commonly do this and in such cases either transcripts or enactment are used.

Some time ago the writers tried the technique of sending teams of senior students out to observe in courts and to choose cases that were comparable. This approach did not work as it was not possible to find cases that were exactly comparable. It was also very uneconomical of time.

The simulation approach was tried but it is unreasonable to expect experienced magistrates to give their time to produce only one item of information for each case.

Transcript reading was also tried and that lacked the necessary element of realism. Sentences are decided after seeing and hearing a defendant as well as gaining the facts of the case.

The procedure ultimately adopted was to videotape cases and present those to magistrates for sentencing.

The first instance of making the videotapes had actors simulating the court roles. These tapes (B/W) were made in the media centre at La Trobe University. When shown to the magistrates they offered the advice that the addition of colour would be a help, and that professionals should play their own roles.

A second series was made, in colour videotape, and with a professional director. In this second instance the videotaping was done at the National Film and T.V. School in Sydney. Here the parts of S.M., police prosecutor, clerk, policeman, detective, etc., were all played by the appropriate professionals in their own roles. The only exception was that the parts of the defendants were played by students from the N.S.W. College of Law. (For a fuller description of the technique, see pages 30-31).

20. Cross, R., *The English Sentencing System.* Butterworths: London (1975) p178.
21. Hogarth, *op. cit.*

In this professionally produced series there are several important points to note. Firstly, the production was professional. Secondly, the addition of colour made the presentation more realistic. Thirdly, the courtroom roles were played by people who did that as an occupation. (This, as it turned out, had the dual merit of using people who needed no tutoring and, when shown to magistrates, the cases were accepted as realistic since the magisterial viewers knew that the enactment was by professionals who thoroughly understood what they were doing.) Fourthly, the videotaped cases were available for re-use and being a recorded medium were presented as invariable from one occasion to the next.

To these substantial advantages the writers added one important ingredient. When the cases were filmed each part of the judicial process was videotaped separately. The identification (Are you Robin Wallace, born Melbourne 27 April, 1950, technician of 18 Holmes Grove, Burwood) was shot as a unit. Similarly, the charge (You are charged with offensive behaviour on 14 May this year in that you did .....). Each section of the trial thus became a module.

Some of the modules were reshot as, for example, the identification which on one occasion would have the same facts except that one was changed. For instance, the birth date was changed from, say, 1950 to 1940 or the birthplace from Melbourne to Zagreb, Yugoslavia.

This is particularly advantageous in that the modules may be combined in different ways. For example, a case could be produced that involved an older or a younger defendant, a migrant or a native defendant, appearing on any one of a series of charges. The editing simply consists of selecting the particular modules of interest and recording from them in order to construct a case. Edited factors of this kind have been referred to as "tape" factors.

Figure 2

THE VIDEOTAPE MODULAR TECHNIQUE FOR SENTENCING

Module 1 (Identification)	*Module 2* (Charge)	*Module 3* (Plea)	*Module 4* (Evidence)	*Sentence*
Male/female (2)	Assault	Guilty		No record
Migrant/native (2)	Stealing	Not guilty		No record for these offences
Younger/older (2)	Drugs			
	Motoring			Record for these offences
Eight possible combinations	Four possibles			Three possibles
8 X	4 X			3 = 96 cases

96 cases X 2 types of psychiatric report = 192 cases
192 cases X 2 types of character reference = 384 cases

From **Figure 2** it is apparent that in the construction presented ther· are eight possible combinations at the identification level. With four different types of charge, those four may be combined in various ways with any of the eight possible identifications, thereby producing 32 possible cases. Each of these could be combined in various ways with any of the three combinations of prior convictions, thereby making 96 possible cases.

In addition to these "tape" factors of modular combination, "ex tape" factors have been incorporated. An example of an "ex tape" factor is the presentation of a pre-sentence report. At the sentencing exercise, in addition to the case to be viewed, the magistrate would receive a copy of a pre-sentence report. For the exercise the group could be divided into two. One group could receive a favourable report and the other an unfavourable one. By this means our 96 possible cases would become 192. If this were to be extended by the addition of two types of written character references, that would extend the possibilities to 384 cases. Of course, it would not be meaningful to show all of these cases to the same group. However, the cases are available for comparative purposes.

It will be appreciated that this technique of modular visual units and "ex tape" modular changes is both economical and versatile.

Perhaps the most significant feature of the method outlined here is its dual function. The first feature is its use as a training device whereby hundreds of precisely and reliably presented cases are available. The second feature is its research function. By the use of this tightly controlled and easy to manipulate series of cases it is possible for a researcher to indicate fairly precisely what changes in the case produce what kind of effects.

Among the studies that have so far been conducted using the videotape modular technique is an evaluation of the effects of group discussion on the sentence prescribed (see page 31-37). In a document produced by the British Magistrates Association[22] the value of group discussion is outlined:

> "Anyone, however qualified, who acts as a judge sitting on his own, will carefully guard against his prejudices in so far as he recognises them. But we all have other prejudices that we do not recognise. The best way of guarding against them is for a small group of people to act jointly as judges. If the group is drawn from different sections of society with different backgrounds their unrecognised prejudices will tend to even themselves out, so that the group judgement represents the greatest common measure of agreement and avoids individual quirks. Magistrates' courts rarely have difficulty in deciding between guilty and not quilty but often have difficulty over sentence. This must be a question of opinion where several heads (and usually both sexes) are better than one. A bench of magistrates must contain 2 - 7 people, 3 being best. In domestic cases they must sit 3 including magistrates of both sexes."

22. The Magistrates Association, Speakers Notes 2. Fitzroy Square, London. Revised October, 1975. Document 75/30A, Section 7.

It is interesting to note that the videotape modular technique may be used not only to evaluate agents of the law but also to process. Its investigative use thus may be both procedural and substantive.

The current concern with crime in general and sentencing in particular stems, no doubt, from its importance in the social fabric but we should keep our sense of perspective.

Johnston[23] puts this most aptly when he says:

> "The courts glorify crime as being somehow more grave than industrial or other intergroup conflict. We have institutionalised reasonableness in industrial conciliation; and since the threat to social order is less from a criminal (indeed many serious crimes actually cement the sense of community), we should be even more reasonable there. I suspect that one reason that people indulge a retributive philosophy with the individual criminal is that he can not hit back: with serious industrial, political or other inter-group conflict, we may be offended no less by the enemy than we are by a criminal, but we respect the strength of his political following and therefore do not bully but put our passions in their place, under the rule of conciliatory reason. So it should be with the individual criminal."

The writers would like to conclude by saying that there is much that needs to be done in modifying the sentencing process.

Numerous suggestions on sentencing have been proffered. They include such ideas as: remove the sentencing process from the courts; rationalise and formalise the sentencing process though leaving it within the court's province; let the sentence be the result of a group decision; do not sentence immediately but have time to reflect.

The authors believe that before any such modifications are affected, the community should keep its sense of perspective and obtain a great deal of empirical information on the consequences of substantive and procedural modifications.

The videotape modular technique is one method by which that understanding may be fostered.

---

23. Johnston, *op. cit.* p267

PRESENTATION OF PAPER

Dr. R. D. Francis

My colleague Dr. Coyle and I are gratified at the invitation to present papers at this seminar. We have been working for two or three years on the process of sentencing, particularly in the lower courts, and have reached a position where we have something to say from the standpoint of behavioural science. I should make it plain that we are not here to tell the experts what to do. Although I am qualified in Criminology I am in blissful ignorance of the law and can speak with great confidence because I am not hampered by information of any kind.

I would like to emphasise the following points:

1. (a) We believe that sentencing studies are important because there are fewer safeguards in the trial process.

(b) There are more alternatives available in the trial process, of course, but there are only the two alternatives in our jurisdiction: guilty or not guilty. Whereas in the sentencing process there are a number of alternatives available and they are increasing.

(c) There is a confusion about the purposes of sentencing; whether we are reformatory, reprobation or reparation, or as Dr. Bartholomew calls it punitive or therapy - "punitherapy". As he says the therapy part is so small that "puny" is perhaps an apt way to put it.

(d) The sentencing process deals not only with the offender but also it can, of course, deal with the way that the crimes become prevalent in the community, and we are therefore remarking on not only what the offender did but what the community thinks of as a warning to others.

(e) There is less time devoted to sentencing but, of course, consideration may be given while the trial proceeds so that it looks to an outsider as though the sentencing process takes relevantly little time. Perhaps it should take more, and at the end of my presentation I shall have some suggestions to offer, and finally in

(f) that we have an ignorance of the outcomes of various programs: when sentencing does take place we do not really know quite enough about the outcomes of different kinds of sentence on different kinds of people. We know for instance that the recidivism rate is fairly high and does not change much no matter what you do. But we really need to know a great deal more. Perhaps knowing something about the personality of the offenders would be important.

2. Sentencing in lower courts we believe is important because it deals with the majority of cases heard and the estimates range from somewhere between 80 and 98 per cent. Some of them, of course, are heard in both jurisdictions, in the lower courts and higher. Nonetheless it is plain that the majority of cases do go through the lower courts.

3. The means of investigation are legal and this is the kind of work that David Thomas of Cambridge has been addressing for some time and that is outside our area of competence. We tried the collection of statistics. In the lower courts the statistics are not kept in such a manner as to answer the kinds of questions that we wish to pose. The third technique of court observation: we have sent teams of students out observing in courts but the cases were never comparable, so we decided on simulation.

Perhaps I should say that this project arose originally out of an entirely distinct project. For some years we have been interested in the problem of migrant crime and what happens to the sentencing of migrants in courts. We made a first series in which we made a case in which the defendant was an Australian and we changed only the segment that identified him and made him a migrant. With the co-operation of the magistrates in the State we showed it to two distinct groups of magistrates to see if they would sentence the migrant differently, and the answer was that they did not. There was no discernible difference between the sentences. We were so taken with the idea, we thought that we would generalise it as a technique and we have come to call it the "video-modular technique". Instead of changing only the birthplace you can also change other variables as well. So, basically we are interested in the simulation process.

4. The video-modular technique is used as a training device and as a research tool. Originally it was a research tool for the above project in migrant crime. But plainly it can be used as a training device and most recently it has some to be used as that for Justices of the Peace in Victoria.

5. We had to make a number of decisions about the processes that were taking place (see **Figure 1** page 14). I have described on page 18 the details of the various series we produced, and why the changes were introduced. Perhaps just to emphasize three points:

(a) The merits of using professionals in their own roles - they needed no tutoring. They know what to do, and they tell us what to do when we are wrong.

(b) We discovered, quite by accident, that if you use professional actors you have an Actors Equity problem, involving copyright and payment of royalties for each showing.

(c) Perhaps the most important of all is the acceptance of the product by the professionals. When we showed the original amateur productions to the magistrates, who are senior and experienced, they could detect immediately that the amateurs did not know what they were doing. By actually using senior, experienced magistrates it makes those things most acceptable to the practitioners themselves. They know that they are realistic because they are done by people with decades of experience between them and we found that was a very important feature.

6. The merit of the video-module system is the way in which we can construct cases. In **Figure 2** page 19 we have divided the court process up into several segments. Identification: Are you John Smith? Were you born in ....? and so forth. Then the reading of the charge, the taking of the plea and so on down to prior record and we have made each of these as separate segments. We have made three series altogether. The first series were the amateur ones, the second series were made in The National Film School in a court which was constructed for the purpose within the studio and the third which we completed about three weeks ago were done in the Central Court of Petty Sessions in Sydney by The National Film School.

In the new series the defendants can be male or female, they can be older or younger, they can be native or migrant, they can be well dressed or ill dressed. So we have sixteen possible combinations of defendant. There are four different charges, assault, theft, forgery and refusing a breath test. We can combine them with the other identifications. We have three kinds of prior record: none, three of a similar kind, or three of a dissimilar kind. We have so made these modulars on the tape with spaces between that you can pick up an older or younger, male or female, defendant, or migrant-native, ill dressed - well dressed. Combine with any of the charges, with any of the prior records, and we can end up with a 192 possible cases which are simply done by editing in the studio. We call those "on-tape factors". i.e. they are on the tape by editing the modules to make them fit. If you want to extend the series you can have the addition of, say, two kinds of pre-sentence report so that twice 192 will give 384 cases. or perhaps a legal directive, two kinds of those combined with these will give us 768 and so on. What we aim to do is have a set of cases so that you can "dial a case", and you can use them for training (which we are now starting to do in Victoria for Justices) or you can use them to investigate "Does the informal matters in the court, such as how they appear in their dress, does it make a difference to the sentence?"

7. It has been apparent from the papers that one of the difficulties in research in court processes is that sometimes it intrudes into ethical considerations and civil liberties matters. One of the singular merits of our video-module system is that it does not bring in those kinds of difficulties in research. It is ethically neutral and that seems to us to be another merit of the case.

8. The empirical data to date is going to be presented by my colleague, Dr. Coyle. Concerning the prospect of international comparisons, I spent several months overseas during the long vacation and showed tapes in various countries. At the moment we have a reasonable prospect of having a set of cases that have been viewed by magistrates not only in this State and in Western Australia, but have also been viewed by magistrates in Britain and in Canada and in New Zealand. If this happens it is the nearest comparison we can get with four jurisdictions, four different countries within the British Commonwealth, and it is the only international one that we know of.

I referred earlier to its use in the training of Justices of the Peace in Victoria. When we made the last set of modular cases three weeks ago we also took the opportunity of making a documentary, the opening and closing address which was given by Mr. Justice Kirby. We also made another case which we have come to call the "right and wrong way" case, in which the magistrate permitted three deliberate errors to take place in the trial. We hope to use it as a training device to see if practitioners can pick up deliberate mistakes. They are matters like leading witnesses, admitting to prior convictions before the finding, and admission of hearsay evidence.

9 **Conclusions.**

(a) Sentencing is a difficult area for the reasons that we mentioned at the beginning, and is one in need of very close examination.

(b) That research will not solve all of the problems but it is a necessary adjunct to other approaches. There is a need to know what is the actual basis of magisterial decisions. That is until we actually know what really takes place in court we are not in a position to make judgements in terms of legal or moral issues.

(c) There is a case for guided discretion but that will encompass both substantive and procedural issues and this technique will allow us at least to approach that problem.

10. **The options available.** If we are concerned about sentencing, and plainly we are, one option available is to reduce the discretion available by having some kind of fixed tariff. Another option is that of plea bargaining. This is done rather more widely in the United States. Another method of amending it might be by having group decisions with sentencing, perhaps with a form of lay assessors. There is a difficulty with that, of course, because in summary jurisdiction it is necessary to move at a fair speed. Another option that one might consider is remand for sentencing so that the magistrate has time to stop and consider instead of making the decision under some pressure.

I would like to conclude by stating that there is something amiss with sentencing. It is not circumscribed by the same procedural safeguards as the trial process and we ought to quite rightly be concerned about that. I am somewhat heartened however by two things. One is that seminars of this kind can take place and the kind of concern expressed here is obviously something that is

wholly commendable, and secondly, that when we entered this enterprise of doing this "video-module technique" the amount of co-operation that we received from the magistrates and justices absolutely astonished us.

The enterprise was funded originally by a grant from The Victorian Law Foundation. We were helped by the N.S.W. Law Foundation, by the magistrates of all States, by the justices of Victoria, by the N.S.W. College of Law, by the Institute of Criminology in Sydney. It is difficult to express how grateful we are for the enthusiasm we have met. We have something that we think can be developed into a very useful tool. It is not to supplant anything, it is an adjunct to other approaches and the kind of reception that it has received, the enthusiasm of the professionals, gives us heart to continue.

SENTENCING IN MAGISTRATES COURTS:

A VIEW FROM THE OUTSIDE

Ian R. Coyle, B.A., Ph.D.

and

Ronald D. Francis, M.A., Ph.D.
Dip.Crim., F.A.Ps.S.

Sentencing and the Videotape Modular Technique

It is generally considered that the determination of guilt or innocence is the most crucial aspect of Court proceedings. Yet, guilt as to the crime charged, is one of the most predictable of issues in the entire legal process. Only in those relatively few cases in which the defendant pleads not guilty is the determination of guilt or innocence of prime importance. In the Australian legal system, and in similar jurisdictions, the overwhelming majority of defendants appear before a magistrate and plead guilty.[1] The real concern of the defendant then is usually not "Will I be found guilty" but "How much will I get".[2]

In contrast to the earlier stages in the legal process, the discretion which is exercised by magistrates in sentencing offenders is much more visible and open to public scrutiny. Indeed, public scrutiny has given rise to a considerable folklore amongst legal practitioners on the factors influencing magisterial decisions. In addition to the anecdotal research concerned with evaluating the factors involved in the sentencing process.

Such research has typically focussed on legal and sociological factors which influence the decision making process (See pages 13-18) and has contributed relatively little in a pragmatic manner to the magistrate who must continue to prescribe sentences notwithstanding, or despite, the exhortations and reasoned logic of academics.

There have been notable exceptions to this trend. For example, *The Sentence of the Court*[3] adopts an informative approach to the problem of sentencing disparity aimed at the practitioner rather than the academic. In a related field, the development of practically oriented decision models in the parole area has proved extremely usual,[4] as has the use of multi-judge panels.[5]

---

1. It is not always appreciated that in any one year almost half those sentenced to terms of imprisonment are sentenced by magistrates. See Baldwin, J. The Compulsory Training of the Magistracy. *The Criminal Law Review*, 1975, pp634-643.
2. See: Zumwalt, W. J., The Anarchy of Sentencing in the Federal Courts, *Judicature*, 1973, 57, pp97-104.
3. H.M.S.O. Home Office, *The Sentence of the Court*. H.M.S.O. London, 1969.
4. Carter, R. M. and Wilkins, L. T. *Probation, Parole and Community Corrections*. Wiley, N.Y., 1976.
5. Martin, W. L. The collective sentencing decision in judicial and administrating contexts: a comparative analysis of two approaches to correctional disparity. *American Criminal Law Review*, 1972-73, 11 p700.

Another approach that has been commonly utilised is the sentencing exercise or seminar in which participants discuss the appropriate sentences with respect to a number of "model" cases. A variety of approaches have been used in sentencing seminars: reading from transcripts, tape recordings, simulated trials and so on. The major problem associated with these techniques have been dealt with in a previous article[6] and it is clear that sentencing seminars based on videotaped cases exhibit the greatest cost/benefit effectiveness from an analytical and participants point of view.

In the following pages the theoretical and practical utility of the videotape modular technique in the development of legal guidelines is discussed.

Simulated trials in which the defendants pleaded guilty were videotaped in a professional television studio set up as a court. The shooting scripts for the films were arrived at after consultation with senior stipendiary magistrates of New South Wales and Victoria and the film director. These scripts were based on cases already dealt with in the Central Court of Petty Sessions in New South Wales. Only the names of those involved and the date of the offence were changed. The defendants in the films were actors: all the other persons involved were real practitioners portraying their actual occupations. Thus, a magistrate portrayed a magistrate, a police prosecutor portrayed a police prosecutor and so on. Care was taken to ensure that the maximum amount of verisimilitude was obtained in the filming and the preparation of the scripts.

Specific sections, or modules, of the tapes were re-shot to incorporate different legal and non-legal factors. For example, the appearance of an older and younger defendant; the presence of a psychiatric report; the type and number of prior convictions; and extenuating circumstances relevant to the defendant's actions. This approach was economical in that only portions of the tape required shooting; for a fuller report see Coyle and Francis.[7] The master tapes were then edited on to "Sony U-matic" colour videocassettes to produce a number of cases.

In the study reported here the defendant portrayed in the simulated trial was a young female charged with "shoplifting" (i.e. theft) of goods to the value of $99.28 from a large department store. The defendant was presented as having prior convictions for similar offences.

This videotaped case was shown to stipendary magistrates in Victoria and Western Australia, where the authors had been invited to conduct sentencing seminars as part of magistrates' conferences in the respective States. In addition, a group of senior management personnel, attending a course at the Australian Administrative Staff College, Victorian police cadets, and Victorian justices of

---

6. Francis, R. D., and Coyle, I. R.,Consider your verdict: Applications of the videotape modular technique in Sentencing *A.N.Z.J. Crim.*, 1976, 9, pp181-186.
7. Coyle, I. R. and Francis, R. D. Sentencing: Applications of videotape in analysis and training. *J. Behaviourial Science.* June, 1976, pp172-174.

the peace participated in the study. A total of 72 magistrates (59 Victorian, 13 Western Australian), 31 justices of the peace, 20 police cadets and 59 management personnel viewed the simulated trials.

After the participants had arrived at a decision and filled in the standard response forms, they were divided into small groups of between five and ten people to discuss the case, the sentences they considered appropriate and the factors that influenced them in their decision.* Fifteen to twenty minutes was allowed for discussion.

Following the group discussion, the participants were again instructed to re-sentence the defendant and indicate the factors considered relevant. Provision was made on the response form to indicate whether further information was required, either of the case or of the defendant's background, as a result of the group discussion of the case.

Table 1

COMPARISON OF SENTENCES PRIOR TO GROUP DISCUSSION**

	Magistrates			*Police*		
	Vic.	*W.A.*	*Total*	*J.P's*	*Cadets*	*M'ment*
Proportion sending to Prison	60%	8%	50%	6%	45%	19%
Median Prison Sentence	4 weeks	N/A	4 weeks	8 weeks	12 weeks	8 weeks
Proportion Imposing Bond	24%	31%	25%	23%	10%	65%
Median Bond	104 weeks	104 weeks	104 weeks	N/A	N/A	104 weeks
Proportion Imposing	17%	70%	25%	71%	65%	46%
Median Fine	$300	$400	$300	$250	$200	$300

*For the purpose of the study the sentencing options of the relevant N.S.W. State legislation were utilised. All participants were informed of the available range of penalties prescribed by the appropriate law. The possible sentencing options under this leglislation range from dismissal of the case to 12 months imprisonment and/or a $1,000 fine. Provision is also made for the imposition of a recognizance or "bond".

***Explanatory notes.*

In a number of cases, participants elected to impose some combination of sentences such as a prison sentence and a fine. For the purpose of illustration, these responses have been double scored: thus the percentages indicated will not necessarily equal 100% in all columns. For the purpose of statistical analysis, the more severe option was evaluated, in the rank order: prison > fine > bond.

In some cases not enough participants imposing a sentence indicated the length of the recognizance or period of imprisonment: these have been indicated as N/A.

This explanatory note also applied to the other tables.

The Empirical Findings

A comparison of the sentences prescribed by the different groups of participants taking part in the study prior to discussion of the case are shown in **Table 1**. For the purpose of illustration the Victorian and West Australian magistrates are shown by individual States and as a common group. Because of the relatively small number of Western Australian magistrates viewing the case, it was not considered meaningful to analyse their responses separately to the Victorian magistrates; accordingly, these two groups were collapsed and analysed as one entity.

From an inspection of **Table 1** it is apparent that the various groups of participants gave different patterns of sentences prior to discussion of the case. Analysis of the respective proportions of participants sentencing to imprisonment, fine or bond revealed a highly significant effect due to occupational status (X^2 = 47.42, d.f. = 6, $p < 0.001$).[8] In general terms, magistrates and police cadets tended to impose a prison sentence more frequently than did the other groups. Conversely, justices of the peace and management personnel were more disposed to fine the defendant.

Comparison of the sentences imposed by the various groups of participants in the study after discussion of the case revealed the same general pattern.

Participants from differing occupational backgrounds applied significantly different sentences to the defendant (X^2 = 81.36, d.f. = 6, $p < 0.01$).[8]

Table 2

COMPARISON OF SENTENCES AFTER GROUP DISCUSSION

	Magistrates				*Police*	
	Vic.	*W.A.*	*Total*	*J.P.'s*	*Cadets*	*M.ment*
Proportion sending to Prison	64%	8%	53%	13%	40%	8%
Median Prison Sentence	4 weeks	1 week	4 weeks	4 weeks	12 weeks	4 weeks
Proportion Imposing Bond	24%	46%	28%	6%	10%	65%
Median Bond	104 weeks	104 weeks	104 weeks	104 weeks	N/A	N/A
Proportion Imposing Fine	12%	46%	18%	74%	60%	27%
Median Fine	$400	$300	$400	$250	$500	$300

8. X^2 test for k independant samples.

Again, police cadets and magistrates were more inclined to impose a gaol sentence than justices of the peace and management personnel who tended to opt for a fine.

When the proportion of participants changing their sentence as a result of the group discussions of the case were analysed, it was found that there was no significant difference prior to and after the group discussion with the exception of the management personnel. This group was more prone to apply a fine rather than a bond after discussion of the case ($X^2 = 32.03$,d.f.=1,$p<0.01$).[9]

In an attempt to further elucidate the nature of the sentences applied by various groups, the relative proportions of individuals requiring further information about the background of the defendant and/or the nature of the case prior to and after group discussions were analysed. The proportion of magistrates wanting more information about the nature of the offence and the background of the defendant decreased significantly after the group discussion. ($X^2 = 4.08$ and 10.24 respectively, d.f. = 1, $p < 0.05$ and 0.01 respectively).

Table 3

THEFT CASE: PARTICIPANTS REQUIRING FURTHER INFORMATION ON OFFENCE AND/OR OFFENDER.

Prior to Group Discussion	*Magistrates*			*Vic.*	*Police*	
	Vic.	*W.A.*	*Total*	*J.P.'s*	*Cadets*	*M'ment*
Proportion enquiring re Offence	24%	38%	31%	61%	30%	39%
Proportion enquiring re Background	56%	92%	63%	13%	25%	90%
After Group Discussion						
Proportion enquiring re Offence	14%	23%	15%	55%	20%	36%
Proportion enquiring re Background	36%	38%	36%	58%	25%	61%

The other participants did not significantly change the amount of additional information they required as a result of the group discussion.

9. McNemar test for the significance of changes.

Although a significant proportion of participants required further information on either the nature of the offence or the defendant's background (see **Table 3**) it did not prove possible to further quantify the nature of the information required. Indeed it proved extremely difficult to quantify the factors considered by participants in imposing sentence.

In evaluating the factors considered by participants in imposing a sentence, nine categories were chosen on the basis of a preliminary analysis of the data. These were: the nature of the offence; the previous criminal record of the defendant; future prospects of the defendant rehabilitation; expressed contrition; general deterrence; financial and employment factors pertinent to the defendant's commission of the crime; probation consideration relevant to the defendant; miscellaneous factors.

The authors assigned the reasons stated on individual response sheets to one or more of these categories independently. A check on interobserver agreement on a sample of 20 response sheets indicated an interobserver concordance of 80%. Since this was considered unacceptable for the purpose of analysis, the authors evaluated each response sheet independently, then, using these individual assessments as a basis, arrived at a consensual judgement.

The relative occurence of factors that influenced participants in the determination of the sentence are summarised in **Tables 4** and **5**.

Table 4

RELATIVE PROPORTIONS OF FACTORS INFLUENCING DECISION-MAKING IN SENTENCING: PRIOR TO DISCUSSION

	Magistrates			*Vic.*	*Police*	
	Vic.	*W.A.*	*Total*	*J.P.'s*	*Cadets*	*M'ment*
Nature of Offence	11.8%	15.6%	17.9%	19.4%	36.8%	19%
Prior Record	36.3%	26.3%	34.2%	30.6%	34.2%	30.6%
Rehabilitation	4%	10.5%	5.4%	11.3%	13.2%	14.8%
Contrition	1%	7.9%	3%	9.7%	2.6%	4%
Deterrence	9%	—	7%	—	—	1%
Financial/ Employment	4%	7.9%	5%	—	—	2.5%
Personal	9%	13.2%	9.8%	11.3%	13.2%	16.5%
Probation prospects	17.8%	18.4%	18%	17.7%	—	5%
Miscellaneous	—	—	—	—	—	2%

Explanatory note:

The percentage figures expressed in this table are approximations: rounding errors are in the first decimal place.

Table 5

RELATIVE PROPORTIONS OF FACTORS INFLUENCING DECISION-MAKING IN SENTENCING: AFTER DISCUSSION

	Magistrates			*Vic.*	*Police*	
	Vic.	*W.A.*	*Total*	*J.P.'s*	*Cadets*	*M'ment*
Nature of Offence	16.9%	16.6%	16.8%	10.9%	21.2%	6%
Prior Record	30.3%	23.3%	29.3%	23.6%	39.4%	18%
Rehabilitation	5.6%	13.3%	6.7%	10.9%	21.2%	16%
Contrition	1%	3.3%	1.4%	5.5%	—	3%
Deterrence	7.8%	3.3%	7.2%	1.8%	—	1%
Financial/ Employment	5.0%	3.3%	4.8%	5.5%	3%	7%
Personal	7.8%	13.3%	10%	20%	18.2%	35%
Probation prospects	16.3%	16.6%	16.3%	20%	—	14%
Miscellaneous	8.9%	6.6%	8.7%	—	—	—

Cross-tabulation of these factors with each other and the sentence imposed failed to reveal any consistent pattern in a predictive sense although it was apparent that certain factors were highly correlated with each other (but not the sentence). For example, although the factors "Prior Record" and "Nature of the Offence" occurred together 83% of the time, no significant correlation could be established between this pair of factors, or any combination of factors involving this pair, and sentencing options.

Conclusions

The significance of the findings reported here logically fall into two separate, though related, domains. In the first place, the general issues raised in the preceding pages are relevant to the development of legal guidelines in the dispositional aspect of the legal process.

Secondly, there is the question of the practical utility of videotape/ sentencing seminars in legal education.

Taking the first of these issues, the empirical findings reported here reinforce the anecdotal observations of variability in sentencing. Further, they suggest that the factors underlying sentencing are variously interpreted by magistrates. The failure to find a consistent sentence, or any consistent pattern of factors related to specific sentences indicates that the informative approach

adopted by *The Sentence of the Court,*[10] for example, is unlikely to be successful in reducing sentencing disparity. Even if such an analysis could extract all the pertinent factors (both legal and non-legal) in a particular case, it does not follow that individual magistrates would apply the same sentence when presented with an identical case; even if they agreed on the factors that should be considered in sentencing.

To illustrate this point, it seems appropriate to refer to an example of the range of sentences applied by magistrates in the present study who cited the same factors as having influenced their decision. Thus, four different magistrates citing the factors "Prior Record" and "Probation prospects" imposed sentences of 24 weeks in gaol, a $300 fine, a recognizance extending over 2 years, and 4 weeks in gaol. The same words either mean different things to different magistrates, or individual factors are weighted differentially in determining the sentence. (Lest it be interpreted that this is undue criticism of magistrates, it should be emphasised that the variability among non-magistrates in sentencing was at least of the same order).

To the behavioural scientist, such variability is not surprising. indeed it would be surprising if there was less variability. There is an abundance of literature which demonstrates that human decision making in complex, relatively unstructured situations, is notoriously unreliable. (For example: Freedman *et al.*, pp 31 - 61).[11]

Even in highly structured situations, variability remains, but it is markedly reduced.. The implications are obvious: development of legal guidelines which will reduce the uncertainty associated with sentencing by structuring the situation.

This approach is likely to be unpalatable to many legal practitioners who want to see magistrates retain their discretionary powers. Nonetheless, legal history is replete with examples of judges and magistrates being divested of discretionary powers and having them circumscribed by legislation. From the behavioural science point of view, this historical process can profitably be regarded as an increasingly structured approach to the legal process.

Of course, it would be neither feasible nor appropriate to remove all discretion in sentencing and replace it with precisely specified penalties. Idiosyncratic factors do occur in legal cases and no legislation on sentencing could hope to allow for all the diversity of human transgressions of the law. The approach adopted by Carter and Wilkins[12] in parole board decisions seems to overcome this objection by leaving a reduced amount of discretionary power in the hands of the administrators of the legal system subject to the highly specific guidelines laid down by the sentencing model.

---

10. H.M.S.O. Home Office, *op. cit.*
11. Freedman, J. L., Carlsmith, J. M., and Sears, D. O. *Social Psychology.* Prentice Hall, New Jersey, 1970.
12. Carter and Wilkins, *op. cit.*

Having regard to the practical utility of the videotape sentencing seminars, two issues are particularly pertinent. to what extent are these types of seminars a useful adjunct to legal education; and to what extent can they reduce sentencing disparity? Considering the efficacy of the sentencing seminar approach in legal education, the relative proportions of magistrates and non-magistrates requiring further information about the nature of the case and the background of the defendant prior to and after the group discussion should be noted. The significant decrease in the proportion of magistrates requiring further information following the group discussion indicates that the seminar is a useful information-exchange medium. This notion is consistent with the literature on information-rich communication systems and previous studies of sentencing seminars[13],[14]. The failure to find a significant effect in this regard among the other participants reflects their relative ignorance of the legal system and may represent a base line effect (i.e. no change is observable owing to high initial level of uncertainty about sentencing). The fact that the Victorian justices of the peace fell between the magistrates and other groups with respect to information requirements supports this contention, since they had a significantly greater knowledge of the legal system than the police cadets or management personnel.

The failure to find any significant change in the sentences applied before and after the discussion of the case with the exception of management personnel, is noteworthy. To put it bluntly, those groups which had exposure to the legal system were more reluctant to change their sentences. (This was not due to a general uncertainty about the case since the proportion of magistrates requiring further information declined after the group discussion). One possible explanation for this lies in the notion of cognitive dissonance.[15] That is, it was less significant, in personal terms, for the management group to admit that their initial decision was in error than it was for the agents of the legal system. Indeed, it is encouraging that there was any movement at all! The pragmatic outcome of this finding is to suggest that sentencing seminars adopt an approach whereby a group decision has to be reached after discussion of the case. The process of reaching a consensual decision is more likely to facilitate a shift in individual attitudes than individual reconsideration of the case.

The development of behavioural science techniques that can aid in the equitable and effective enforcing of the law holds great promise[16],[17]. Hopefully, this development will continue and, without overlooking the elements of judgement and personal assessment that are involved, there seems little doubt that the Australian legal system will move increasingly towards a more scientific approach to sentencing.

---

13. Chapanis, A. Interactive Human Communication, *Scientific American,* 1975,232, pp36-42.
14. Francis and Coyle, *op. cit.*
15. Festinger, L. Conflict decision and dissonance. *Stanford,* Stanford, California, 1964
16. Tapp, J. Psychology and the Law, *Annual Review of Psychology,* 1975, 26, pp 481-507.
17. Russell, R. W. Environmental Stress and quality of life. *Australian Psychologist,* in press.

PRESENTATION OF PAPER

Dr. I. R. Coyle

I will be concerned here to put Dr Francis' paper into a broader context as well as presenting some of the empirical findings that we have obtained.

It is probably fair to say that criminology has three main inputs into it: legal, sociological and psychological. It is also probably fair comment to say that the psychological input into the study of criminology has been rather poor. It has been lacking both in quantity and in quality. In Particular there has been little real attempt to apply the findings of the vast amount of psychological research to the study of criminology.

In 1977 there was an article in *The Annual Review of Psychology* by June Tapp on psychology and the law entitled "An Overview". To my knowledge it is the first time that an article on psychology and the law dealing with the relationship between the two disciplines has appeared in an international journal of any substance in psychology. I think it is significant that it has happened fairly recently. I also think it is significant that there has been considerable research particularly in the United States of an applied nature concerned with applying psychological principles to criminological investigation.

In looking at applying behavioural science to the study of the law there are a number of approaches that one can utilise. The one that Dr Francis has presented is one of many. I should re-emphasize the point and make it very clear that I am not a lawyer. I am completely ignorant of most legal maxims and most legal processes. Equally strongly I do not believe that prohibits me as a psychologist from the study of criminology and the study of legal processes. The emphasis is one on direction and one on attitude. In terms of the approaches that have been utilised in studying criminology from a psychological point of view video tape is a fairly recent one. It is a publishable sort of medium, it is a marketable medium and there is a tendency to treat it in some cases as a technological toy. I do not believe that that need necessarily be the case.

Let us look at some of the other approaches. In an article entitled "The Nose Knows Best" dealing with environmental pollution recently published in Japan there is mention given to the use of psychological scaling procedures in the legal determination of pollutants. Trained "sniffers", for want of a better word, who work within a framework of odour detection developed by psychologists with a very precise set of rules, determine whether or not there is a cause for legislative complaint. The procedures that are laid down for those "odour detectors", who are humans, is based on psychological research that is anything up to fifteen to twenty years old. The basis behind the research that Dr Francis and I have been concerned with is something of the order of ten to twelve years old. There is always, of course, a gap in applying research findings to applied situations. However the gap appears to be markedly exaggerated when there is a cross discipline situation such as we have here.

Looking at the video tape situation in psychological approaches to criminology there have been a number of studies overseas. Some of you may be aware of them. Let me reiterate a few:

Videotape has been used to provide feedback to judges as to the effect of their behaviour on the defendant. In other words a judge in a mock trial situation has been taped and he has then had to observe himself. How does he come across? Is he overbearing? Is he displaying the sort of behaviour that is appropriate for the position? The evidence on that study indicates that the majority of judges who took part in that found it a significantly useful exercise. Videotape has also been used in recording evidence and playing it back to the court.

In terms of applying video tape to the study of legal processes we are not doing anything new. What I think we are doing, that is somewhat new, is to look at it in a very applied situation. As was indicated in the previous talk there are two ways of looking at this technique. One from a research point of view and one from a practical orientation.

Table 1

ASSAULT CASE: COMPARISON OF FOUR PRESENTATION CONDITIONS

	Video and transcript	*Transcript only*	*Video/ audio*	*Audio only*
No. magistrates	24	25	18	17
No. sending to prison	4	3	3	2
No. giving bond	4	6	3	3
No. ordering compensation	3	0	0	1
No. fining	14	17	13	10
Modal fine ($)	100	100	100	100

This table shows how the use of video tape and other modes of presentation was perceived by the magistrates who took part in the study which you have seen. On a five point rating scale it was found that showing video tapes plus a transcript of the case was by far the most useful as perceived by the magistrates approach.

Table 2

POSSESSION OF INDIAN HEMP: PREVIOUS USE

No. magistrates	*Module difference*	*No. sending to prison*	*No. giving bond*	*No. fining*	*Mean fine $*	*s.d. fine $*
37	First offender	1	7	22	133.64	69.98
49	Habitual user	11	6	31	353.23	135.36
		$X^2=6.84$ $p<.01$	$X^2=0.40$ (n.s.)	$X^2=0.02$ (n.s.)	$t=7.73$ $p<.001$	

Comparison of the presentation conditions in terms of the sentences given revealed no major significant difference. That surprised me at first but on reflection it should not appear too strange. What that indicates simply is that

regardless of the mode of presentation the magistrates who took part in our study tended to go on the facts presented to them.

Table 3

COMPARATIVE EVALUATION OF THE USE OF VIDEO AND TRANSCRIPTS

	Video plus transcripts	*Transcript only*	*Video only*	*All groups*
How useful are transcripts?	4	4		
How useful is video?	4		4	4
How useful is video with transcript?	5			
How realistic is video?				4

A five-point scale was used: 1 = no use/realism; 2 = little; 3 = some; 4 = considerable; 5 = greatest use/realism. The values quoted in table are the median scale values.

This is dealing with the case of possession of Indian hemp (one of our Mark 11 series of films) and shows one of the possible comparisons that can be obtained from data of this sort. I must emphasize that this in the research context: first offender - mean fine of $133 or thereabouts: habitual user - mean fine of $353. Those differences are of course highly significant in a statistical sense.

A lot of research data can be generated from studies of this kind and unless it is backed up in my opinion with some applied findings it is just research data with no practical utility. What are the practical applications of this approach? Dr Francis has mentioned some. I raise a few others as referred to in my paper - they may appear as being somewhat presumptive of me to put them forward.

I think the evidence that we have to date indicates very clearly that magistrates and other people taking part in sentencing are less prone to change their attitudes, change their reasons for giving sentences and the sentences they give, if they do not take part in some sort of group discussion of the reasons they applied to a sentence and the sentence they have applied. I think that is one very practical note. So group discussion with some attempt at reaching a common consensus would seem to be something that could be incorporated without too much in the way of hardship in the currently existing sentencing seminars run by magistrates.

It is also highly likely having regard to research evidence from other fields that there is some optimum time for discussion. There is some optimum number of sentencing seminars for each magistrate. It is possible that the technique that we have used, this video tape modular technique, can be utilised in such a fashion. There are other implications flowing from it. It is very difficult without actually going out and using this technique as a tool, as an aid in training or as an aid in reducing disparity in sentencing, to show exactly how effective it will be. But I am quite convinced that the evidence to date indicates that something of this nature is certainly worth trying.

SENTENCING: ONE JUDGE'S VIEWPOINT

Adrian Roden, Q.C., LL.B., DipCrim. (Syd).,

Judge, District Court, New South Wales.

In all forms of organised society there are rules with which those living within the society are expected to comply. And there are consequences of non-compliance. Whether it be a matter of tribal custom or of a sophisticated criminal code, whether they be founded upon religious belief, humanist morals or mere pragmatism, such rules exist; and whether it be payback in Papua or penal servitude in Parramatta, whether they be as formalised as ex-communication in Rome or as spontaneous as ostracism in Broken Hill, such consequences also exist. Whatever their source, and whatever their method of imposition, the existence of such rules and such consequences is an essential part of life within an organised society.

There may be considerable debate, and emotions may run high, in the course of disputes as to what the rules should be, and there may be similar debate and emotional involvement in questions as to what the consequences of non-compliance should be. But there is a demand and requirement that there be such a Rule/Consequence system in operation.

Within our society, sentencing under the criminal law is the means whereby such consequences, provided by the Legislature, are imposed.

I begin by stating those rather obvious and thus often overlooked facts, because I believe that no consideration of the sentencing process or sentencing policy can take place in a realistic context if regard is not had to the fact, as I believe it to be, that the prime function of sentencing in our society is simply to provide the appropriate flow of consequences for breaches of its rules.

It is a matter of putting fact before theory. For theories of sentencing and its objects there certainly are. With the classical theories of retribution, deterrence and rehabilitation we are all familiar; with theorising that seeks to combine the three or allocate relative degrees of importance to them we are also familiar. That deterrence and rehabilitation are desirable goals is unquestionable. But to my mind it would be unproductive to approach the question of sentencing in terms of any such theory without appreciating that the sentence is primarily society's reaction to unacceptable, and thus proscribed, conduct within it. The sentence must be seen to be an appropriate reaction; it must suitably proclaim our disapproval of that conduct.

That I believe is "what the community demands" of its sentencers.

The judge or magistrate who performs this task does so on behalf of the society by which he was appointed and in whose name he acts. Such judge or magistrate, in my view, no less than the representative leaders of that society

in the legislative field, ought to see himself as bound to have regard to the attitudes of that society, and at the same time to act as a responsible leader in the development of those attitudes. No mere delegate, nor yet autocrat.

If then I were asked to describe the prime object of sentencing in terms of one of the conventional labels, I would unhesitatingly opt for "denunciatory". The sentence is certainly the means by which society says what it thinks of the particular breach of its rules, and it does so, I believe, as much for its own comfort as for any purpose related to the particular offender, or other potential offenders, or offenders in general.

This is not to rule out all consideration of deterrence and rehabilitation. Rather to put them in what I see as their proper perspective. Frequently, and I believe more frequently than is generally conceded, references to the objectives of deterrence and rehabilitation with regard to legislative provisions and court decisions on sentencing are rationalisations. Frequently the chance to deter or reform arises as a side-effect which occurs incidentally, or which is created when the opportunity presents itself, at the time of fulfilment of the basic function of the sentencer.

Pursuit of the denunciatory objective does not mean that over-riding regard is necessarily to be had to the nature of the offence rather than the circumstances of the offender. For despite massive evidence to the contrary, I believe we have some claims to be regarded as a humane society. And I believe it does no violence to "what the community demands" if:

(a) on all occasions in determining the denunciation appropriate to a particular offence, we have regard to subjective factors touching the offender;

(b) on some occasions when assessing that appropriate denunciatory sentence, we give special consideration, within an allowable scale, to a desired deterrent or rehabilitative effect; and

(c) on rarer occasions, which we must always be careful to label "exceptional", we allow the subjective factors to exempt the particular offender from a denunciatory sentence, either in the interests of rehabilitation, or on purely compassionate grounds.

The sentencing process then, as I see it, involves a series of steps.

1. Become informed of the objective facts of the offence, and the relevant subjective factors affecting the offender.

2. Assess the appropriate sentence, probably to be expressed in the terms of a range, applying the denunciatory principle and having regard to conventional modes of expressing disapproval by sentence.

3. Determine whether in all the circumstances there ought to be a departure from such sentence or range, in particular to enable the particular offender to receive individualised treatment.

4. Fix the penalty within the range, or design the individualised treatment, as the case may be.

The aim I believe is to denounce the particular illustration of the particular offence on behalf of the community and in terms which the community will understand. In the course of so doing advantage should be taken in all cases of any opportunity to deter or to rehabilitate; and in appropriate cases, which will necessarily be in the minority, either of these objectives, especially the rehabilitative, may be allowed to displace the demand for a denunciatory penalty by individualised treatment. The process involves a conscious or instinctive adoption of the "Tariff/Individualised" approach so ably expounded and espoused by Thomas.

It is in the light of that appreciation of the objects and process of sentencing that I turn to some particular areas of concern.

The Factual Basis

I have described the first step in the sentencing process as becoming informed of the relevant facts, both objective relating to the offence and subjective *qua* the offender. This is a step the importance of which is often under-estimated, and on which the sentencer often receives far less assistance than might be expected. The rules of evidence are often forgotten at this stage, principles of fairness scrupulously adhered to in the process of determining guilt are departed from, and there is no consistently applied rule as to onus and standard of proof with regard to the aggravating and mitigating circumstances which can have an enormous effect on sentence. The problems occur with the ambiguous verdict, and with the plea of guilty which admits the offence "but not the facts alleged".

Every verdict and plea of guilty establishes or admits the minimum facts necessary to constitute the offence and negatives all facts which if present would constitute a defence. But within the limits so established there may be a variety of versions available the choice among which will have a significant bearing on the sentence decision. To establish the appropriate factual basis after a plea the sentencer will require further material; to do so after a trial he may.

The courts in England and in South Australia in particular, have gone a long way towards establishing a code for the purpose. Drawing heavily upon *Law* v *Deed* (1970) SASR 374 and later decisions of the South Australian Supreme Court, and a series of English decisions from *R* v *Van Pelz* (1943) KB 157 to *R* v *Denniston* (1977) Crim. LR 46, I regard a reasonable and proper basis for establishing the facts for sentencing purposes as requiring adoption of the following principles:

1. All facts must be taken to be established which are necessary to constitute the offence, and all facts negatived which would provide a defence.

2. No further fact by way of aggravating circumstance ought to be taken into consideration unless admitted or proved beyond reasonable doubt.

3. Except with the consent of the offender no fact may be taken into consideration which (alone or in conjunction with other facts proved) would constitute a further or more serious offence; and such facts are absolutely debarred from consideration where the offender has been acquitted upon such charge, or a lesser plea has been accepted.

4. The starting point to a determination of facts following a plea should be the depositions or the "Sec. 51A Brief" statements, provided that insofar as any matter therein is disputed it becomes a matter for evidence and subject to the same onus and requiring the same standard of proof as aggravating circumstances referred to in 2 above.

5. The starting point to a determination of facts following a verdict should be the evidence in the trial, upon which the judge may make his own finding not inconsistent with the verdict, subject to the same onus and standard of proof, and subject to the right of the parties to call evidence on any matter not in issue at the trial, e.g. a mitigating factor not constituting a defence.

6. In the case of mitigating subjective factors and mitigating circumstances surrounding the offence, established practice allows some relaxation of the strict rules of evidence. This practice, in my view, ought not to be encouraged, and certainly the more substantial the potential effect upon sentence the greater the need for evidence and the opportunity of testing it. In respect of such matters the onus of proof should be upon the Crown to negative the matters contended for beyond reasonable doubt, subject to an evidential burden on the prisoner, the material necessary to discharge such burden being "credible evidence".

Mutual exchange of material prior to the sentence hearing seems to me to be highly desirable so that the parties may know what is conceded and may prepare to meet what is contested. In this regard it is unfortunate that Pre-Sentence Reports are generally withheld from the defence until the last moment and that in consequence the court is often informed through hearsay of matters which are disputed and which accordingly ought not to be before the court except by way of admissible evidence.

Practices which have developed in New South Wales and which I believe should be firmly discouraged are:

1. On the part of the Crown, the presentation of "P.16" Antecedent Reports which list acquittals and even "No Bills" along with convictions, and which, even when prepared by officers to whom the prisoner was not previously known, contain adverse general observations as to his character.

2. On the part of the Defence, replacement of the oath and evidence by the formula "I am instructed that" and a statement from the Bar Table on matters of which the Crown can have no knowledge and which are only capable of challenge by cross-examination.

R v *Robinson* (1969) 53 CAR 314 and *R* v *Bibby* (1972) Crim.LR 513 specify limitations on the reception of adverse material as to facts and as to general character which might well be more closely followed here.

Although much of what follows verdict or plea and precedes sentence calls for adherence to the strict rules of evidence and involves questions of onus and standard of proof between the parties, the proceedings should to a large extent be regarded as no longer strictly adversary in nature. This applies particularly to circumstances extraneous to the facts of the offence. The court is enquiring and may properly require material which neither party volunteers. In *R* v *Butterwasser* (1947) 2 A11 ER 415 at 417 Lord Goddard referred to the different forms of oath administered to witnesses during trial and after verdict as indicating that in the enquiry relevant to sentence evidence is not limited to matters in issue between Crown and prisoner, and "the Court can then demand any information it thinks fit".

Tasmania's *Criminal Code Act* (No 4) of 1973 imported into the Code of that State guidelines to the reception of such information. The then (December 1973) newly enacted sub-sections of Section 386, which deals with sentencing powers, provide:

> "(7) Before exercising any of the powers conferred on the court by sub-section (1) of this section the judge may receive such information, in oral or documentary form, as he thinks fit; and, in so doing, he is not bound by any rules of evidence.
>
> (8) It is the duty of the judge to ensure that the convicted person has knowledge of, and the opportunity to challenge, any information received by the judge under sub-section (7) of this section.
>
> (9) ...(exceptions to sub-section (8) re certain medical reports).
>
> (10) If the person convicted challenges the truth of any information received by the judge under sub-section (7) of this section, the judge may require that information to be proved in like manner as if it were to be received at a trial."

It is submitted that it is in rare circumstances if at all that the "may" in sub-section (10) ought not to be read as mandatory.

Punishment Fit The Crime?

To this point I have considered what the sentencer is seeking to do and how he goes about it. Assuming that he sees his prime purpose as to denounce, and assuming that he has established the relevant facts and circumstances, what is to determine how loudly he denounces? What makes one illustration of a particular offence more or less serious than another?

Generally there is a conglomerate of mitigating and aggravating circumstances to be considered; and to say that the sentencer has to weigh and assess them, apply his sense of judgment and come up with a conclusion that gives the particular offence a place in the range from the least to the most serious, is to say everything and to say nothing. I have no observation to offer here on any particular factor among the limitless array that can and do arise, beyond drawing attention to one matter which causes me some concern.

I believe that in prescribing and assessing sentence both the Legislature and the courts give too much weight to the chance outcome of criminal conduct, and insufficient to the blameworthiness of the conduct itself. One outstanding example relates to drink-driving.

The offences of "P.C.A." or "D.U.I." under the *Motor Traffic Act*, and "D.U.I. Culpable Driving" under the *Crimes Act*, are not infrequently distinguishable only by their chance outcome. The fact that grievous bodily harm or death ensues may bear no relationship to the extent to which the offender is under the influence, or to the quality or intrinsic dangerousness of his driving. It is very difficult to see how the chance presence on the road of a pedestrian or another vehicle, and an ensuing accident, can change the character of the offence to the extent reflected both in the maximum penalties provided by the Legislature and in the actual penalties generally imposed by the courts.

That is but one of many available illustrations. Assault can become manslaughter, and attempted murder the completed offence, both with considerable bearing on the available sentence, without any change in the conduct of the offender. And on the other side of the coin, what in fact is an attempt to commit an offence may, it seems, be no offence in law at all, if though the *mens* is present, an unsuspected fact (? the empty pocket) may make the *actus* impossible.

"The community", on whose behalf we do our denouncing, not unnaturally tends to measure criminality by its visible result. This is an area, I believe, in which the sentencer has a duty to attempt to lead public attitudes.

Reverting to the drink-drive offences, it could be argued that excessive leniency in the *Motor Traffic Act* cases enables the conduct to retain a degree of social acceptability and may in turn increase the number of offences with tragic consequences; whilst undue severity in the *Crimes Act* cases can divert attention from the conduct to which both pieces of legislation are directed, and involves an over-weighting of penalty in favour of the worst aspect of the retributive approach, primitive revenge.

And it seems that insofar as we may be seeking to deter or to reform, our assessment of sentence, to be relevant, must be related to the conduct we are seeking to discourage, rather than to its chance outcome over which neither sentencer nor offender has any control once the conduct has been indulged in.

Appeals and Anomalies

Sentence appeals provide a basis for the establishment of a body of principles which hopefully will result in a flexible uniformity of approach. Some degree of perceived uniformity is necessary to avoid that "burning sense of grievance" referred to in the disparity cases (see, e.g. *R* v *Dickinson* (1977) Crim.LR 303); flexibility is both inevitable and desirable so long as we are concerned with passing human judgment on human conduct.

The appeal process in this State does not allow for the establishment of such body of principles so far as matters dealt with summarily are concerned, by reason of the nature of the appeal provided. Why there should be an as-of-right *de novo* hearing on either or both of conviction and sentence after proceedings before a magistrate, whilst there is no such provision with regard to matters dealt with on indictment, I find difficult to understand. This is but one of three apparent anomalies in our appeal system as it affects sentencing which I believe are worthy of examination.

The three situations I perceive as anomalous are:

1. A Crown "appeal" against acquittal does not affect the position of the "respondent". A Crown appeal against sentence does.

2. The Crown may appeal against sentence in indictable matters. In summary matters it may not.

3. A person sentenced to penal servitude for five, ten, twenty years or life may not have a second bite at the sentencing cherry unless he can show an error of principle etc. A person sentenced by a magistrate to a few months in prison or even to pay a small fine has only to ask for it to be entitled to a second assessment.

As to Anomaly No 1: Whether it has grown out of the double jeopardy rule or simply from a sense of fair play, the principle acknowledged by Section 5A(2)(d) of the *Criminal Appeal Act* seems firmly entrenched and I for one would not seek to have it removed. So long as we adhere to that principle it is hard to see the justification for allowing a Crown appeal against sentence to affect the position of the respondent to that appeal. The observation of Murphy J in *Griffiths* v *The Queen* (1977) 15 ALR 1 at 33,

> "It is inhuman to send a man to gaol for six years when he had been released a few months earlier for the purpose of reforming him and was observing the conditions of release and trying to reform. This drastic reversal offends ordinary standards of fairness ..." .

is equally applicable, it is submitted, to the respondent who has paid his fine or served his short term of imprisonment, or who is serving a term of periodic detention and complying with all conditions as he goes about a law-abiding life.

Whether or not that view is taken, it is submitted that if a trial judge errs in law in favour of an accused, and if the Crown has the error rectified by an appellate court, the same rule should apply as to whether the appeal decision affects the person concerned, irrespective of whether the error had resulted in an inappropriate acquittal or inappropriate leniency.

As to Anomaly No 2: I see no logic in the distinction. The right should, it seems, exist either at both levels or neither. Consistently with the views expressed elsewhere, I would of course propose that any Crown "appeal" against sentence allowed at summary level be subject to the stipulation that it have no effect upon the particular "respondent".

As to Anomaly No 3: The as-of-right rehearing of summary matters on "severity appeals" to the District Court may owe its origin to the days of the unqualified magistracy, or to a belief that a "summary hearing" involves a sacrifice of traditional safeguards and wholesale departure from the rules of evidence; but whatever its origin it seems to me to have little justification in present circumstances, and none at all when compared with the position with regard to indictable matters. This observation applies equally, though with less relevance for present purposes, to the as-of-right *de novo* re-hearing (misnamed "appeal") from summary conviction.

One would be entitled to think it would go without saying that the greater right of appeal, if there were to be a distinction, would be available for the more serious charges and the heavier sentences, but of course the reverse is the case.

Sentencing is an area for the exercise of the court's discretion. And generally sentence appeals are approached in the same way as appeals in respect of other matters involving the exercise of discretion. The classical statement, frequently made and repeated, is to be found, among other places, in the joint judgment of Dixon, Evatt and McTiernan JJ in *Cranssen* v *The King* (1936) 55 CLR 509 at 519, cited by Dixon CJ, Fullagar, Kitto and Taylor JJ in *Harris* v *The Queen* (1954) 90 CLR 652 at 655:

> "...the appeal if from a discretionary act of the Court responsible for the sentence. The jurisdiction to revise such a discretion must be exercised in accordance with recognised principles. It is not enough that the members

> of the Court would themselves have imposed a less or different sentence, or that they think the sentence over-severe. There must be some reason for regarding the discretion confided to the Court of first instance as improperly exercised ..."

and the application of this principle is ensured in the case of appeals to the Court of Criminal Appeal by the requirement of leave *(Criminal Appeal Act,* Section 5 (1) (c)). For what reason does this not also apply to the generally lower level of sentence imposed by magistrates?

Two advantages, I believe, would flow from putting all appeals from magistrates' courts onto a proper appellate basis. One is a reduction in the workload of the appellate court. The other, and more important for present purposes, is that through the appellate process there would hopefully be developed a body of principles which would effect some movement towards standardization of approach and a removal of the feeling of injustice that arises through different treatment being received at different hands. If we cannot all be treated by the same hands, at least we can endeavour to see that the hands are all clothed in similar gloves. At present an appeal from a magistrate's sentence will be heard by any one of the 30-odd District Court judges, who sits alone and is called upon to do no more than substitute his own discretion for that of the magistrate. Such a process by its very nature, it is submitted, cannot give rise to the development of a body of principles. It could even work in the opposite direction by tending to undermine anything achieved towards standardization through magistrates' conferences.

In South Australia appeals from magistrates are true appeals (see S.A. *Justices Act,* Sections 163 *et seq*). The provision that those appeals are to be "heard and determined in a summary way" has resulted in decisions on questions of fact being accorded something falling between the "untouchable" status of a jury's verdict and the contemptuous ignoring of the magistrate's decision with which we are familiar in New South Wales. The South Australian provision relevant to sentence appeals is contained in Section 177 (2),

> "Upon hearing the appeal the Supreme Court may ... (b) mitigate any penalty ..."

It seems that the principle there applied is that the appellate court will not enquire whether the sentence is one which it itself would have passed, and provided there was no error of principle it will not interfere unless the sentence was "manifestly excessive".

A move in the same direction in New South Wales would in my view do away with a lot of pointless and frequently minimal interference with what has been a proper exercise of a magistrate's discretion, and could create a useful body of true appellate decisions.

In passing I note that the South Australian *Justices Act* provides in Section 168 for discretionary release of an appellant who is in custody pursuant to the

conviction or order appealed from. This seems eminently reasonable compared with the as-of-right release that can be achieved by entering a recognizance under our Section 123. I have always found it strange that a defendant awaiting summary trial may be refused bail and held in custody while presumed innocent, whilst he has a right to be at liberty after that presumption has been displaced by his conviction, by the simple means of giving notice of appeal and entering a recognizance.

One Law For The Poor?

I believe that imprisonment in default of payment of fines, or at least as a direct result of non-payment, ought to be abolished.

The present position is governed by Section 82 of the *Justices Act* which (except in the case of corporations) requires magistrates, when imposing fines or ordering moneys to be paid by way of penalty or costs, that they,

> '...adjudge that, in default of payment ... the person against whom the ... order is made ... shall be imprisoned and so kept for a period calculated ... (with reference to the amount to be paid) ..."

It is interesting to contemplate who the people may be who may lose their liberty in consequence of that provision. I see them as falling into four categories:

1. Those who cannot afford to pay.

2. The "martyrs".

3. Those already in custody who can "cut out" their fines.

4. In theory at least, persons who have the means to pay but value those means more highly than their liberty.

An appreciation that those are the people likely to be affected is enough, I believe, to justify abolition of the provision.

As to the first class, it is repugnant and ought to be unthinkable in our society that in given circumstances a person, if poor, will go to gaol, but if with means, will not. To suggest that the fine and the imprisonment are reasonable (and thus comparable) alternative forms of punishment for the same offence in similar circumstances is to value human liberty very poorly indeed. At present the "going rate" for liberty in New South Wales is $5 a day. As I write, the news is breaking that it will shortly be increased to $25 a day. Nothing it seems is immune to the ravages of inflation! If on the other hand the sanction of imprisonment is intended not as an alternative form of punishment but as a means of enforcing payment, it is meaningless when applied to the poor.

As to the second class, the "martyrs", it seems absurd that the offender is allowed to choose his own "penalty", or, more accurately, to use facilities created by the State for one purpose for an entirely different purpose of his own; and at our expense. It is even more absurd when the disposition of the offender is determined, as it sometimes is, by the action of a third party who pays the fine.

The third class defeat the object of the imposition of the fine, and avoid the penalty altogether.

The fourth class, if they exist, ought not to be given their own choice of penalty any more than the second.

It is sometimes said that the default provision is merely a threat which ensures payment in the case of those who can afford to pay, whilst those genuinely without the means are not pursued. Any who believe that to be the case may be interested in some statistics. The 1975-76 Prison Statistics of New South Wales, the most recent available (to me), show total receptions into custody under sentence from Lower Courts during the year as 6,456. Of those, 3 231, or just over 50%, were fine defaulters. Indeed of receptions under sentence from all courts during that year those fine defaulters represented 38.5%. The corresponding percentage during each of the four preceding years was 1971-72 43.6%; 1972-73 38.6%; 1973-74 34.8% 1974-75 34.7%. Is this fourth quarter of the 20th century too early to suggest that we abandon this form of Debtors' Prison?

A magistrate may impose a fine, (a) where that is the only penalty provided, or (b) where the Legislature has provided for punishment by fine or imprisonment or both. In the first class of case imprisonment in default brings about a situation of a penalty ultimately being imposed which the Legislature itself deemed inappropriate. In the second class of case it must be assumed that the magistrate has directed his attention to the question whether deprivation of property (fine) or deprivation of liberty (gaol) is appropriate to the particular circumstances and has opted for the former; yet operation of the default provision would reverse that decision. I believe that it cannot be seriously argued that with relation to any of the four categories of defaulter referred to above, such reversal of the decision of the Legislature or the court is justified, whether the cause of the reversal be the poverty or the choice of the offender.

If there is any place for imprisonment as the ultimate sanction after imposition of a fine, it can only be, I believe, after the intervention of some other offence in the nature of contempt or resistance to the process of the court. Where deprivation of property is the penalty imposed, deprivation of property ought to be the penalty we seek to exact. It should not be beyond our legislative skill and administrative ability to create and apply a method for the enforcement of fines as civil judgments or in some similar manner.

Among Australian jurisdictions, New South Wales and the A.C.T. alone, I believe, have abolished distress. We preserve it, or its equivalent, in the case

of corporations only, and we exempt the officers of corporations from liability to imprisonment in default. It is interesting to compare this position with that provided in the Model Penal Code of the American Law Institute which deals with fine default at Section 302.2. The American proposal requires a summons to show cause, and allows of committal (on the contempt principle) only if the refusal to pay is "contumacious". In the case of corporations and unincorporated associations it provides for similar treatment of officers shown to have authority to pay and to be "contumacious" in the non-payment.

Schemes have been devised for testing means, both before the imposition of fines and before the imposition of sanctions for default. English legislation from the *Criminal Justice Administration Act* 1914 through to the *Powers of Criminal Courts Act* 1973 has striven to reduce committals to prison and to abolish them in cases of non-payment through lack of means, and a similar philosophy is to be seen in the Tasmanian *Justices Act* Sections 78, *et seq.* Such schemes all present their problems, but I believe that we ought to be able to do better than the reproduction and retention of legislation which was up-to-date in England in 1879 and is still to be found in Section 83 of our *Justices Act* 99 years later. The ineptitude of that provision is highlighted by sub-section (1) (c) relating to sureties for the payment of fines. When was it last invoked? And if it were, upon whom would the penalty be imposed?

It is argued that many with the means to pay would not if the sanction of imprisonment were removed. The validity of that proposition is open to question and may well depend upon the effectiveness of enforcement measures. But basically the imposition of a fine creates a debt. And in our society the threat of imprisonment is not the accepted means of securing payment of a debt.

It is argued that without the alternative of imprisonment, the poor would be immune from punishment for minor offences. I would think that with social services as they are today, there are very few indeed in respect of whom a fine cannot be assessed within their means. Fines as low as one dollar have been imposed. Additionally there are other forms of treatment to which I believe New South Wales should give serious consideration. Community service orders suggest themselves as possible alternatives to fines in certain cases. In other cases the indigent defaulter is likely to be a person for whom we would hope for the same mature treatment as is now given to "drunks" and "vagrants".

Whatever the arguments against abandonment of the sanction of imprisonment for fine defaulters, there is none that I have heard, or read, which justifies the imprisonment of thousands of persons in this State each year in circumstances that would gladden the pen of a latter day Dickens. Many of those whose liberty is so carelessly equated to a few dollars belong, I suspect, to the same section of the community as those who spend their remand in custody for want of a $50 or $100 surety. We should have better means of dealing with the disadvantaged, and better things to do with our gaols.

I believe that our priorities should be such that even if we are left with some offenders we don't know how to punish appropriately, that should concern us less than the prospect of continuing to imprison defaulters as we now do.

Measures and Effectiveness

Prison, it is generally agreed, is the least unacceptable form of response to serious crime yet devised. And it seems likely to be with us for some time to come in its role as a "last resort" sanction for less serious offences. It is the task of the legislators, their penologist advisers and the administrators of our corrective services, rather than of the sentencers, to seek to minimise its dehumanising effects and to seek new alternatives. The sentencer can play his part by minimising its incidence and making maximum use of available alternatives.

I offer the following observations on some measures which are available and some which are not.

Words are not without significance, and "penal servitude" are two that I would like to see disappear from their present place at the head of our catalogue of penalties. With them would go the anachronistic distinction between "felonies" and "misdemeanors" (two further words we could well do without). A modern penal code should have no difficulty in overcoming any consequential problems with ancient common law offences, which badly need re-appraisal in any event.

I would like to see provision for suspended sentences restored. I believe that there is room for both, (a) the suspended sentence, which subject to compliance with conditions represents a final disposal of the matter and thus is "a sentence", and (b) a deferring of sentence, which delays the final decision and is not "a sentence". The present Section 558 of the *Crimes Act*, introduced in 1974 when suspended sentences were done away with, appears to me to involve a confusion of the two concepts. The recent decision in *Griffiths* (supra) 1977 15 ALR 1 highlights the necessity to distinguish between orders which do and orders which do not amount to sentences. The language of Sections 1 and 22 of the English *Powers of Criminal Courts Act* 1973 makes clear the respective places in the sentencing process of a deferral of sentence and a suspended sentence. Each has its place and serves its own valuable purpose. The Mitchell Report recommends the availability of both for South Australia, with a recommended six months limit on the *Griffiths*-type deferral. I believe we should have both available in this State. Legislation is necessary to provide for a clear statement of the two processes in place of the present confusion and overlap within Section 558 and between that section and *Griffiths*.

More use, I believe, could well be made of the conditional discharge. The unconditional Section 556A dismissal has long been popular in Petty Sessions; far less of course is seen of that section at District or Supreme Court level. I see the conditional Section 556A discharge as having some advantages over the Section 558 "deferral". The promise of no conviction, coupled with

the threat of punishment, must be an added incentive to compliance with the conditions imposed. I accept that the nature of the offence dealt with on indictment will frequently make it inappropriate not to proceed to conviction. I believe nonetheless that that course could properly be followed more often than it is.

Periodic detention is another useful means of keeping down the prison population and saving some offenders (and their families) from some of the worst consequences of prison sentences. It seems a pity that its application is so strictly limited to shorter terms and that it carries no parole or other supervision process when the term ends. Sometimes a multiplicity of counts enables a term of periodic detention to be combined with a bond for a substantially longer period. This seems such an attractive sentencing procedure that thought might usefully be given to making it available in the case of single offences.

Probation, parole and work release are other prison de-populating measures with much to commend them on both humane and practical grounds, and I have referred elsewhere to community service which may yet find its way into our system.

All the above alternatives to sentences of continuous imprisonment ought, I believe, to be employed wherever the application of the principles referred to earlier in this paper allows. As I make these observations on the type of sentence or sentencing procedure that "ought" to be employed, I seem to hear voices calling for facts and figures to prove their "effectiveness"; and I seem to recall those studies which tend to show that carefully designed sentencing achieves very little, as one form of treatment is no more effective than another. I have no such facts and figures. And I dispute those findings which take recidivism rates as the measure of effectiveness. Effectiveness can only be measured with reference to the purpose one is seeking to serve. Recidivism rates may well provide a measure of effectiveness of attempts at deterrence or reform. But as I have indicated earlier, important though those objectives are, they are not in my view the sole or the prime objects of sentencing. Human conduct will always be influenced by many factors, of which the decisions of criminal courts form but a small part.

"Heavy" sentences, I believe, have their place in appropriate cases as fulfilling the denunciatory function required of the Legislature and the courts. Such sentences are in that respect both appropriate and effective in such cases, however the offenders may behave on their release and however they may have behaved if dealt with differently. "Humane" sentences have their place too. The way in which we treat our fellow human beings is important in itself. Whether by our treatment of them in the sentencing process we discourage further criminal activity is significant, but it is not the only consideration. If it is desirable to minimise suffering, even among those whose conduct offends, then sentencing decisions that have that effect are in respect both appropriate and effective. The sentencer's task is and always will be to strike a balance. It is important that as he strives to do so he be not confined by a narrow view of what constitutes effectiveness in sentencing.

Post Script

As I look back over this paper a few comments upon it suggest themselves to me.

I may appear to have over-stated the part played by the denunciatory aspect in the sentencing process. If I have, it is because I believe that that is what sentencing is primarily all about. The other objectives, which we all seek to serve whenever we can, are bonuses we seek to achieve on the way. It may well be that "what the community demands" is satisfied by what are seen as general sentencing levels, with more scope than the earlier pages may suggest for individualised treatment and compassionate departure from those levels.

The "rules" I have suggested for the pre-sentence fact finding exercise may make sentencing a more time-consuming process than it presently often is. If that is so, that is as I believe it should be.

My observations on default imprisonment and appeals from magistrates are directed to areas in respect of which I believe serious and urgent consideration should be given to legislative reform. Indeed many of the fines which are presently subject to the mandatory provisions of Section 82 of the *Justices Act* ought not in my view to be part of the criminal process at all. I believe that there is a whole array of minor offences, particularly relating to regulatory matters, be they parking or poultry farming, cockroaches in restaurants or bread in sausages, television licences (if we had to have them), shop hours, dogs without collars or companies without returns, which may attract penalties by all means as part of the regulatory process, but should not be the basis of criminal proceedings. I see them as some sort of "civil wrong" against the State. Recovery of the penalties should be, and generally is, for some authority other than the police. And if recourse to the courts proves necessary, a civil style procedure similar to that employed by the Commonwealth under the *Customs Act* seems suitable. It need not even involve the same magistrates as are concerned with summary criminal matters. The assessment of penalties (often fixed) for such transgressions ought not to be part of the criminal sentencing process.

Matters that do belong within the criminal sentencing field will always be the subject of concern and controversy. There will also from time to time be "goals" that we pursue, at times so absorbed in the pursuit that we too readily accept the goals as worthy. Two of today's goals are Effectiveness and Standardization. In the paper I have referred to the narrow view of effectiveness sometimes held. The search for standardization also has its hazards. I would not have sentencers seek it as though it were an attainable goal, although working towards it is a valuable means of minimising the injustice sometimes done by disparity. No more is there a single sentence that is "right" in given circumstances than there is a single "community attitude" by which the sentencing decision should be coloured.

Offenders are infinitely varied, as are sentencers. The ultimate in standardization will be achieved only by removing the human qualities possessed by the sentencer and ignoring those possessed by the offender. I have always regarded the criminal law, and sentencing in particular, as being concerned essentially with humanness. May the sentencing process long be preserved from Komputer control.

Epilogue

"....

For with what judgment ye judge,
Ye shall be judged; and with what
measure ye mete, it shall be
measured to you again."

St. Matthew, vii, 1, 2.

PRESENTATION OF PAPER

His Honour Judge A. Roden, Q.C.

It has been suggested to me that in the approach that I have adopted in the paper I have given insufficient prominence to deterrence, in particular, and to rehabilitation, to some extent, in the matters that I say are of importance in the assessment of sentence.

My own view is that both the concepts of deterrence and rehabilitation, and the words themselves, are very much misused and abused in many a judicial utterance when sentences are passed. A reading of a number of judgments on sentence would justify one in believing that in judicial parlance the words "deterrent" and "rehabilitative" are synonymous respectively with "heavy" and "light". That is not the position, but we must be very careful or we will find ourselves using the words in that way. That is what I meant when on page 44 I said that as often as not they are no more than a rationalization of what is in fact an otherwise unexplained heavy or light sentence.

Let me give a few illustrations of how the principle of deterrence is referred to in at least questionable, if not completely inappropriate, circumstances as the basis of a heavy sentence.

Take the very familiar scene of a judge handing down a heavy sentence, describing it as a "deterrent" sentence, and referring to the need for deterrence in respect of that particular class of crime. The only comment I make is by way of rhetorical question. "How often in those circumstances does the sentencing judge have any real knowledge capable of supporting the proposition, implicit in his remarks, that his chosen level of sentence will have a deterrent effect with regard to that particular class of offence?"

I refer to another matter that was in the paper by way of illustration of misuse or abuse of this notion of the principle of deterrence. You will find that one of the illustrations that I used is the drink-drive type of offence. I have said on page 48 that if sentences are to be effective as deterrents they must be directed towards the conduct that we are seeking to deter, and not to the chance outcome of that conduct, over which people have no control. If you look at the drink-driving offences you will see that in New South Wales over a number of years, for the standard "D.U.I. Culpable Driving" causing death a gaol sentence of some years is the norm. That is a sentencing principle by which we are now bound. When sentences like that are passed in cases like that, it is customary to hear a reference to the principle of deterrence; yet these sentences are imposed by the same judges from the same bench as those who frequently look sympathetically on appeals from the "severity" of magistrates who have imposed a fine of a couple of hundred dollars and a disqualification of a few months for a P.C.A. in which the *conduct* constituting the offence is indistinguishable from the conduct constituting the *Crimes Act* offence.

To me the simple fact appears to be this: you cannot by sentence or in any other way deter drink-driving from causing death, but you can meaningfully try to deter people from drink-driving. Yet a distinction is made in the sentence. I am not saying that that distinction is wrong, but when it is made, I say it is absurd to seek to justify it on the basis of the principle of deterrence. And just as I think that the discrimination or differentiation in sentence level in such cases is attributed to the principle of deterrence quite inappropriately, so there are other occasions when I think that violence is done to what the principle of deterrence demands through a failure to discriminate in sentencing levels.

If you think in terms of the ordinary robber, you can distinguish him from the armed robber. If you think in terms of the escapee, so called, from a minimum security or open institution, you can distinguish the one who delivers himself up after a very short period of liberty from the one who does not. If you think of persons determined to make money out of trafficking in drugs, you can distinguish between the one who contents himself with trafficking in cannabis and the one who turns to heroin. In each of those three situations you have one type of conduct which most of us would agree is very much worse than the other; and one thing that you can do by sentences, (if we are capable of deterring people from conducting themselves in a certain way by the sentence we impose) is to seek to divert the energies of, for example, those who are determined to rob, to unarmed robbery, by a meaningful and significant distinction in the level of sentence for robbery and for armed robbery. You can do the same by a significant distinction in sentence between the absconder from an open institution who gives himself up within a few hours and the one who does not, and the same with the trafficker depending on the type of substance in which he trafficks.

If you do not make a significant distinction, if you concertina the penalty range either by being too severe at the bottom end or too soft at the top end, then you are limiting the opportunity that your sentencing policy has of deterring people from the more undesirable type of conduct, or of encouraging them, if they are determined to offend, to the less undesirable type of conduct. Where I think we go wrong in talking of deterrence, is when we make the mistake of being too severe at the bottom end of the scale,and seek to justify it by a reference to the "need to deter". If that need is there, then I think it is a need to distinguish and differentiate in the sentences we pass.

Turning to the factual basis for sentencing, the comment has been made that what I regard as appropriate is really asking too much of the courts once a person's guilt has been established. It is suggested that one does not have to be as careful in scrutinising facts, applying rules of evidence, or having an onus and standard of proof, when it is only a matter of deciding whereabouts in the scale the particular offender is to be put. It is a very easy thing to say that the facts constituting the offence will be found by the jury, and it is only facts that are relevant purely to sentence which need concern the sentencing judge. What is overlooked is that the legislature has a completely free hand in determining where it is going to draw the line between facts necessary to constitute the

offence and facts which are only relevant to sentence; and our legislatures, both State and Federal, have been extraordinarily erratic in their line drawing. The line has been drawn in such a position in some cases as to deny in effect the right to trial by jury. It may sound an astonishing statement to make but, at this moment, for what is probably the most serious offence under Commonwealth law, treason apart, it is impossible to get a trial by jury.

Let me explain very briefly what I mean. There are two different ways that the legislature goes about separating facts that are for the jury and facts that are for the sentencing judge.

First think in terms of the offences of "malicious wound" and "malicious wound with intent to do grievous bodily harm". Under our *Crimes Act* they are two separate offences. "Malicious wound" carries a maximum penalty of seven years, "malicious wound with intent to do grievous bodily harm" carries a maximum of life, and there is a provision that if you are charged with the more serious you can be convicted of the lesser offence. By that method of legislating, the aggravating circumstance, namely the "intent to do grievous bodily harm", becomes a jury question because it is an ingredient in the offence.

If you look, on the other hand, at the statutory provision relating to kidnapping you will see that the position is different. The person who is guilty of the offence of kidnapping is liable to a maximum of twenty years, unless the judge is satisfied that no undue violence was used, or whatever the proviso may be, in which case the maximum is fourteen years. The effect of that is that although the ingredients of kidnapping are matters for the jury, it is a matter for the judge to determine whether the aggravating circumstance increasing the maximum from fourteen years to twenty years is present.

Let us turn our attention now to the *Customs Act* and the provisions relating to the importation of narcotic goods Section 233B, and the penalty provision Section 235. If a person imports heroin into Australia, or is knowingly concerned in the importation or possesses it after it has been imported, he is liable to a penalty, and the maximum penalty will be two years or twenty five years according to whether the court is satisfied that the purpose of the offence was not sale or other commercial dealing in the commodity. In other words, and in simpler terms, there is a two year maximum for the drug user who imports his own, and there is a twenty five year maximum for the drug trafficker. You may think the penalties are too high or too low, but I think everyone would agree that it is reasonable to have such a distinction.

Now, imagine the position of the person who flies back from Penang to Sydney, with 20, 30, 50 grams of heroin strapped to his body. He says, "I am a user - it is for my own use". He is caught by the customs at the airport. No pretence that he did not bring it in. He might even say, "I'm glad I've been caught. The time I will have to spend in custody might involve some compulsory 'cold turkey' and it might get me off the stuff". There he is admitting that he is a drug user in possession of the substance or having imported the substance, but

saying, "It is for my own use". He is charged with importation or some other offence under Section 233B. He is up for a twenty five year maximum penalty as a drug trafficker unless he satisfies the court that in effect he is not a drug trafficker. Leave aside the complaints you may have about the "onus of proof" situation, there is no way in which, before he becomes liable to be sentenced as a drug trafficker, he can have a jury determine whether he was guilty of drug trafficking or not.

In the circumstances that I have given, where he makes no bones about the fact that he brought the substance in, he presumably pleads "guilty", and it is for the sentencing judge to decide whether he is satisfied that the purpose was other than for a commercial dealing. If he chooses to plead "not guilty" the jury will determine either that he imported it or that he did not, and assuming that he is convicted it will still be a question for the judge to determine whether he is a trafficker or not for the purpose of penalty. If you compare that with the position under our *Poisons Act* for the so called "deeming" provision you will see that it is exactly the opposite. A person who is found in possession of more than the prescribed quantity and says, "It is only for personal use" has the matter go before a jury.

This is but one illustration of the extremes to which, quite unwittingly, the legislature can go in putting into the judge's court, as distinct from the jury's, the determination of critically important facts. It is for that reason that, to my mind, the idea of solicitor or counsel standing up at the Bar table and saying, "I am instructed that" followed by all the obvious things that would be wonderful if only they were true, should be quite unacceptable; and it is equally for that reason that I think presentation of the "P.16" Antecedent Reports with the defects to which I have referred in the paper should be regarded as unacceptable.

SENTENCING: A MAGISTRATE'S VIEWPOINT

K. R. Webb, Dip.Crim. (Sydney)

Stipendiary Magistrate,
Central Court of Petty Sessions, Sydney, N.S.W.

I have been unable to locate any articles by recognized authors - or pronouncements or findings by eminent judicial persons - in which it has been asserted that the passing of sentence upon a convicted offender presents as an easy or rewarding task.

The President's Crime Commission had this to say:-

> "There is no decision in the criminal process that is as complicated and as difficult as the one made by the sentencing Judge. A sentence prescribes punishment, but is should also be the foundation of an attempt to rehabilitate the offender, to ensure that he does not endanger the community, and to deter others from similar crimes in the future. Often these objectives are mutually exclusive and the sentencing Judge must choose one at the expense of others."[1]

Undoubtedly one would aspire to achieve all of the recognized objectives when passing sentence, however, it appears to be a task which requires the sentencer to wend his way warily between what, in many instances, seem to be conflicting and even competing goals of punishment.

Sentencing in Magistrates' Courts differs in some respects from the Supreme and District Courts. Magistrates are required to deal with a huge volume of offences for which the penalty provided is a fine and where the defendant seldom, if ever, appears before the court. In these circumstances it is difficult to imagine that the sentence imposed will have any lasting deterrent effect upon either the defendant or members of the community at large, the prospect of the offender's imprisonment only arising if there is a default in payment of the fine.

Magistrates are, from time to time, criticised for the sentences they impose - on occasions for alleged misconceived leniency, on others for resorting to harsh penalties. Any person aggrieved by a decision of a magistrate is given the right to appeal to a judge in the District Court where the matter is heard *de novo,* this should provide a safeguard against magistrates imposing harsh penalties. If reference is made to the last report of the New South Wales Bureau of Crime Statistics (covering the year 1976) it will be seen that appeals were in the order of 1.5% which, I would suggest, gives an indication that the majority of offenders accept magistrates' penalties in New South Wales as at least being within the bounds of reasonableness.

---

1. U.S. President's Commission on Law Enforcement and Administration of Justice Task Force Report, *The Challenge of Crime in a Free Society* (1967) p141.

There is another aspect of sentencing in magistrates' courts which could be open to criticism and arises out of the large number of cases listed at each sitting and also from the fact that most offenders either appear and plead guilty or allow the case to be disposed of in their absence. This aspect is referred to, in a slightly different context, by Professor R. M. Jackson in his book *The Machinery of Justice in England*:-

> "An English criminal trial, properly conducted, is one of the best products of our Law, provided you walk out of Court before the sentence is given; if you stay to the end you may find that it takes less time and inquiry to settle a man's prospects in life than it has taken to find out whether he stole a suitcase out of a parked motor vehicle." [2]

Persons attending at a magistrate's court while cases are being dealt with under the provisions of Section 75B of the *Justices Act* must ponder how the magistrate's learning and experience could possibly equip him to pronounce the penalty on the material presented within the brief period of time that the entire proceeding occupies.

It has been said that as late as the turn of this century the problems of sentencers were few - that they were guided largely by a theory of retribution. I am unable to accept that this is a supportable proposition in relation to present day sentencers in the various jurisdictions operating within the State of New South Wales. It is clear from the reported decisions of the Court of Criminal Appeal in this State that regard is had to each of the objectives of punishment when important matters of sentence are considered.

The absence of proper information relating to a particular offence or insufficient material as to the background of an offender increases the difficulties faced by the sentencer. Lord Kilbrandon has said.-

> "The assessment of sentence, punishment, treatment - call it what you will - on inadequate information, without professional assistance and without proper time to think, is one of the most painful and unrewarding of the functions of the Judge."

It is only upon rare occasions that inadequate information as to an offence is available in magistrates' courts in New South Wales and on these occasions a short adjournment usually suffices to enable all details to be provided. There are many occasions when the position is different so far as adequate information about the offender's background is concerned. This is particularly evidenced when an offender presents at court, unrepresented, on the day when the matter is first listed and indicates that he desires to enter a plea of "guilty" and have the matter finalised there and then. The increase in the availability of the services of officers from the Parole and Probation Service in magistrates' courts has made available professional assistance in many needy cases, and the continual

---

2. Jackson, R. M. *The Machinery of Justice in England* 7th Edn., Cambridge. C.U.P. 1977.

expansion of the various legal aid schemes will certainly ensure that magistrates are provided with valuable information as to the offender's background and any special circumstances which require to be drawn to the attention of the court before sentence is pronounced.

Work Load of Magistrates

Being in the position to afford sufficient time for the consideration of the proper sentence looms as a real problem in many magistrates' courts. In New South Wales in the order of 98% of criminal cases are concluded in magistrates' courts and one of the results is that the case load for each magistrate is particularly high. The figures available from the 1976 report of the New South Wales Bureau of Crime Statistics show the total number of charge and summons cases dealt with during 1976 as in excess of 600,000. On these figures the case load for each individual magistrate would be in the vicinity of 7,000. Not every magistrate would be required to deal with that number of cases in a year - some of the matters take but a very short time to finalise. It must also be borne in mind that magistrates are required to preside over cases which are not included in the charge and summons case figures.

In his book *Sentencing as a Human Process* John Hogarth published a study of the magistrates of Ontario and had these comments to make:-

> "The work load of a magistrate has a direct influence on the way in which he makes decisions. It affects not only the time he has to consider each case, but also the degree to which he is able to devote time and thought to general considerations in sentencing, to attend lectures and seminars, and to read.
>
> The work load of a magistrate is reflected in his sentencing behaviour. Busy magistrates tend to use fines in criminal code cases more frequently. They not only use fines frequently in lieu of probation and suspended sentence, but also in lieu of short-term institutional sentences. This is understandable, as for a busy magistrate fines have the advantage of requiring less thought or consideration than either probation or institutional sentences. Fines fit more easily into a tariff system in which the penalty imposed is automatically determined by the nature of the offence. Fines may be justified either as deterrent, or as a punishment, and they avoid the damaging effects of imprisonment on the offender. This means that, regardless of penal philosophy, magistrates can find adequate justification for heavy reliance on this form of sentence." [3]

3. Hogarth, J., *Sentencing as a Human Process.* University of Toronto Press: Toronto, 1971.

I am unaware of any other studies which indicate that the findings of John Hogarth are of universal application - there does however sound a ring of reality about his comments.

No matter how astute an individual magistrate may be he can have no final control over the number of cases which will be before him at a particular sitting nor over the type of offences which will be charged. Every care is taken by the administration to see that magisterial time is used to the fullest, however, it is difficult, especially where a magistrate sits at a suburban or country court on his own, to assess in advance the number of persons who will be arrested and brought before a court on a given day. Every person arrested and charged, who is not released to bail by the police, has to be taken before a justice at the earliest convenient time. The number of these persons varies from day to day and from court to court. The Supreme and District Courts exercising criminal jurisdiction do not face this problem - they are usually aware, well in advance, of all persons committed to appear before the court.

It would appear essential that the work load of magistrates be kept at a level which will not deprive them of sufficient time to contemplate sentences with the utmost care. There is a wide range of alternatives now available between discharge and imprisonment and selecting the one which meets the requirements of a particular offender for a given offence is no mean feat and certainly not one that should be hurried.

Typical Cases Heard in Magistrates' Courts.

There are certain types of cases which occupy a great deal of magisterial time and are responsible for the actual bulk of cases listed before magistrates' courts and I refer to such offences as "parking", "non-lodgment of company returns", and similar classes of offences. The offender seldom appears at the court and the cases are disposed of *ex parte* or under the provisions of Section 75B of the *Justices Act.* It is impossible to contend that a magistrate follows the principles of sentencing when dealing with these type of cases, it would be more true to say he adopts a tariff system. The question that needs answering is whether these cases should be dealt with in some other way. I understand that in one American state unpaid traffic fines are recorded and when the driver's license is due for renewal, if the fines remain unpaid, the license is not renewed. The system appeals as being more economical than the present method in New South Wales where a warrant is issued for the recovery of any unpaid fines, it has the added built in advantage of conserving valuable magisterial time. The system could only be appropriate to those classes of offences for which a fixed penalty is provided, for example, offences against the *Motor Traffic Act* where "on the spot" infringement notices are issued.

A problem area for magistrates, not experienced by judges, is the sentencing of persons charged with offences such as drunkenness and vagrancy. In a majority of these cases the offenders are unlikely to do harm to anyone but themselves, certainly their appearance in public places may be objectionable,

but experience indicates that no matter the number of times they are "punished" (if it can be considered punishment to confine them in a prison for a short period and provide them with good food, a bed, adequate medical care and a fresh outfit of clothes for their return to the community) or indeed how severe the punishment imposed (within the allowable limits) they keep returning before the courts on a regular basis. Perhaps this problem could be resolved by selecting a suitable alternative system of "providing for" these persons. Would such an alternative necessarily be any more expensive to the community than the present usage of magisterial time, the time of law enforcement agencies and custodial facilities?

Role of Legislation

The legislature continues to create new offences and cast jurisdiction upon magistrates to hear and determine them in a summary way. It does appear there is a belief on the part of the legislature, accepted by the public, that if some activity is unacceptable all that it is necessary to do is pass a law declaring it to be an offence, and the heavier the penalty provided the less it is anticipated the unacceptable activity will continue. To those engaged in law enforcement of course it would be obvious that such is not the case. The number of offence-creating statutes continues to grow with each sitting of Parliament, both Federal and State, with no corresponding reduction in those offences already in existence. As a consequence the wider the range of subjects a magistrate has to make himself conversant with, and of course the less time he has available for the purpose, if he is to give proper consideration to all aspects when imposing sentence.

To date it has not been the practice of the legislature of New South Wales to subject the penalty sections of offence-creating statutes to regular periodic review, hence it can be found that some statutes contain provisions for fines, for example the *Motor Traffic Act,* 1909, which although providing an adequate range of penalties in 1909 (the general penalty section providing for a maximum fine of $200 for offences ranging from "parking" to "negligent driving") is totally inadequate in 1978. Of course, when considering appropriate monetary penalties for statutes passed in 1978, for example the various "pollution" Acts, the legislature is thinking in present day monetary values and authorises fines, at magisterial level, in the order $2000. The anomalies which occur as a result of this type of legislative behaviour only serve to make the task of the magistrate more difficult when striving to keep a balance in the imposition of proper sentences.

Looking at the general penalty section of the *Motor Traffic Act,* as it presently stands, from another angle; a maximum fine of $200 to meet the least significant breach of the parking regulations through to the worst conceivable act of negligent driving (not amounting to dangerous or culpable driving) leaves little margin available for the consideration of a proper penalty if one is endeavouring to deter a persistent offender in 1978 when the average weekly wage is in the order of $200.

Of course, resort can always be made to the provisions of the Act for suspension or cancellation of the driver's license but there are numerous cases when an appropriate monetary penalty, appropriate that is to 1978 conditions not 1909, is called for.

Increased Demands on Magistrates

The jurisdiction of magistrates in New South Wales has been increased considerably in recent years, more particularly by the amendments to the Crimes Act in 1974. Magistrates are now called upon to deal with classes of offences calling for the imposition of sentences which were previously the province of District Court judges. These cases have brought with them greater demands upon magisterial time, resort must be made to pre-sentence reports and in many instances medical and psychiatric information about the offender, and further it has been necessary for the magistrates to familiarize themselves with the work being done in psychiatric research to enable better comprehension of the information provided. Research into criminal behaviour is ongoing and it is now essential for magistrates to keep abreast of present day knowledge in this area as well as all other relevant fields if they are to be competent sentencers.

In recent times "diversionary schemes" have been introduced to the majority of Metropolitan Courts and the larger country centres for persons charged with the offences of "drink driving" and "use of hard drugs". In these cases persons charged, after entering a plea of guilty - and providing they meet certain other criteria - are afforded an opportunity to attend, on a voluntary basis, centres where assessment is made of the degree of the problem, the most effective known way of treating it and to minimise the likelihood of subsequent offences. Upon agreeing to enter the programme the charge is adjourned for eight weeks and the defendant required to enter a recognizance conditioned, in addition to the usual conditions, that he attend at the assessment centre, undertake any treatment or counselling prescribed and accept supervision from officers of the Parole and Probation Service. These schemes are not specifically provided for by any statute and therefore do not relieve the magistrate from his responsibility to impose an appropriate sentence in due course and in fact in many instances they tend to complicate the already difficult task. They do serve as an additional means of providing the court with further information about the offender, his background, any particular problems he might be experiencing and the likelihood of any worthwhile response if a deferred sentence is considered appropriate. In an area as complex and changing as sentencing practise there must necessarily be experimentation and resort to schemes which, even though they do not finally prove to be successful, at least provide further insight to the problems of offenders.

Magistrates generally take advantage of all of the methods of sentencing provided by the various statutes including good behaviour recognizances, deferred sentences and week-end detention in appropriate cases. However, they are always searching for new alternatives to imprisonment. By the provisions of the *Powers of Criminal Courts Act,* 1973, a recommendation contained in the 1970 Wootton Committee's Report that courts be given power

to order offenders to carry out a specified number of hours work for the community in their spare time, supervised and administered by the probation and after-care service, was translated into law.

Alternatives to Imprisonment: The Community Service Order

Briefly the community service order scheme, as it came into being in 1973, required a court contemplating a community service order to be satisfied the following conditions are met:-

1. the offender is aged 17 or over;

2. the offender has been convicted of an offence for which a sentence of imprisonment can be given;

3. the offender consents;

4. the offender's home is in an area where arrangements exist for people to work under community service orders and the court has been notified of the arrangements by the Home Secretary;

5. the court has considered a report by a probation officer on the offender and his circumstances and is satisfied that he is suitable to carry out work under an order;

6. provision can be made under the arrangements which exist in the offender's home area for him to carry out work.

If these conditions are met the court can make an order that the offender work for from 40 to 240 hours within a maximum period of twelve months. There are provisions for breach, review, transfer of orders and numerous other aspects for the effective operation of the scheme. The Home Office Research Unit closely monitored six pilot schemes which came into operation in 1973 and concluded on the evidence of the first years working that the arrangements were viable. It would be fair to say that some of the reports coming back indicate that there have been a number of successes achieved.

It would seem that the community service order is another form of non-custodial sentence which, although it deprives the offender of his leisure time, does not have the traumatic effect of a term of imprisonment either on the offender or his family. Perhaps the legislature of this State would be prepared to give consideration to the introduction of enabling legislation with a view to introducing a pilot scheme to study the prospects of success in New South Wales.

Sentencers require a great deal of information and professional assistance to enable them to perform their functions as successfully as can reasonably be hoped. The provision of pre-sentence reports and adequate legal representation

for offenders are two services which have assisted magistrates greatly in more recent times. Without these aids the process of determining a proper sentence becomes cumbersome. If the court itself is cast with the responsibility of extracting information from the offender it can be asserted that the court only seeks information which supports the course of action determined to be taken and completely overlooks important aspects about the offender's background which ought properly be taken into account before passing sentence.

Changes in Community Attitudes

Society is constantly undergoing change in all areas and this is reflected in sentencing in magistrates' courts as well as the fashion houses of London and Paris. In 1966 persons appearing before the court charged with the use or possession of marihuana were likely to be imprisoned upon their first conviction and almost certainly would be for the second conviction. Today it would be highly improbable that a person charged and convicted of use or possession of marihuana, providing the possession was of a quantity for personal use, would be imprisoned on the first or second conviction. Many matters have bearing on the reasoning of magistrates before changes of sentencing policies occur. Magistrates are influenced by community reaction, they gain knowledge from their own research and the published results of professional studies and, of course, they have an opportunity to see at first hand the effectiveness of the sentences which have been imposed. New South Wales usually follows criminal behaviour patterns that have been experienced in other Western countries and resort can be had to the methods used in those countries to combat the problems, especially if they have proved effective. To enable change to take place on a reasoned basis, and not simply for the sake of change, it is essential magistrates keep abreast of developments, not only as to new laws introduced by the legislature and decisions handed down by the superior courts, but also the progress being made in the fields of penology, sociology, psychiatry and technology. If computers can be programmed to assist in any way which could lead to the more efficient handling of cases resulting in more time being available for magistrates to devote to considering sentences before they impose them, then magistrates should be prepared to make use of them immediately they are available.

Magistrates in New South Wales are creatures of statute being appointed under the provisions of the *Justices Act* and relying upon various statutes for jurisdiction. When dealing with matters for sentence there exists in nearly all cases a maximum sentence that can be imposed. There is a present tendency for the legislature to provide maximum fines in the order of $2000, under the *Crimes Act* the maximum term of imprisonment is a total of three years. The more common terms of imprisonment authorised range between three and six months. Although on occasions publicity is given to cases where magistrates have imposed sentences which are referred to as "inadequate" the sentence, to be lawful, has to be within the limit prescribed by the statute.

There has been an argument raging for many years as to the relative merits of "short" sentences. In view of the limitations imposed in most statutes in New South Wales if a magistrate considers the appropriate sentence to be of a custodial nature then by reason of the statute it will, in a majority of instances, be of short duration. There is an article published in the 6th August, 1977, *Justice of the Peace,* Vol. 141 No. 32 titled "Short Sentences" which highlights the controversy which exists about the principles of sentencing:

> "We have long suspected that criminology is more a matter of fashion than a science and this suspicion is reflected in the latest (interim) report of the Advisory Council of the Penal System which recommends shorter sentences of imprisonment. The debate about long or short sentences has been going on for some time. In 1957, for example, the Advisory Committee on the Treatment of Offenders in its report, *Alternatives to Short terms of Imprisonment* observed that:-
>
> 'The short sentence has a definite and necessary place in our criminal law. There are many cases in which a sentence of imprisonment is inevitable, but the nature and circumstances of the offender do not require a long sentence. There is thus nothing inherently wrong in a short sentence being the only sentence of imprisonment open to magistrates' courts, the courts which deal with over 98% of criminal charges. Nor is there any reason why a short sentence should not be socially and penally useful in certain circumstances.'
>
> There then followed an about-turn with publication of the Home Office's guide to sentencing entitled *The Sentence of the Court* which took the view that:-
>
> 'The disadvantage of short sentences of imprisonment are especially marked, as it is impractical in the space of a few months to give a prisoner any effective remedial treatment and such sentences are subject to special statutory provisions.....' "

The article proceeds to comment on aspects of "short" sentences and refers to other material relevant to the topic.

Current and Future Developments for "Training" of Magistrates

In New South Wales for many years magistrates have gathered once a year at three day conferences to which have been invited prominent figures from the various professions as well as officers of the Parole and Probation Service, the Health Commission, the Australian and New South Wales Institutes of Criminology, the Department of Corrective Services, the Police Department and so the list could continue. At these conferences magistrates are given the opportunity of hearing first hand the current thinking and movement in many fields relating directly and indirectly to sentencing. Each second year a live-in seminar has been conducted attended by magistrates on a rotational basis.

Here again papers are presented and lectures delivered on a wide range of topics, a great number of which serve to provide magistrates with further information to strengthen their individual expertise in the sentencing field. It is not only hoped that these conferences and seminars will continue but perhaps, optimistically in the present economic climate, that they will be held more frequently. It is my personal view that one of the greatest aids to uniform, consistent and proper sentencing is the opportunity of sentencers to discuss problems and experiences with persons engaged in the same or similar fields of interest.

At the Central Court of Petty Sessions there is provided an excellent Law Library serviced by a competent librarian to which all magistrates in the State have access. With the increasing volume of statutory offences, the extended use of summary jurisdiction under the *Crimes Act* and the continual growth of work loads, magistrates have less time to devote to reading the huge volume of material which is currently available on a wide range of relevant subjects. It would no doubt be of material assistance if the library staff were increased and given time to prune out those matters which would be of particular interest to magistrates and circulate them throughout the State.

I am aware of the work being done by Ronald Francis and Ian Coyle on variation in sentencing having participated in the making of the video tape exercises in sentencing. This is an area which could be developed to provide worthwhile assistance in preparing magistrates for their duties in court and also to assist in minimising disparity in sentencing. Sentencing exercises have been carried out by magistrates in New South Wales over a number of years and the indications have been that there is no great disparity between the sentences of various courts. Exercises of this nature are interesting but must be looked at with some reservations. Mr. W. J. Lewer, Deputy Chairman of the Bench of Stipendiary Magistrates, said in a paper delivered in 1969:-

> "Sentencing discussions at all levels are useful but one might be cautious before concluding that the view point expressed with most felicity or force is necessarily correct. The whole area is devoid of blacks and whites, there are different shades of grey." [4]

A real problem in discussing variation or disparity if sentence is the need to consider the existence of a "right" sentence for an offence committed by a particular individual. Dr. Glanville Williams (1963 Crim. L.R. 733) says:-

> "Briefly, the attitude of the Courts has always been that there is *in gremio judicis* a moral scale which enables the Judge to pronounce what quantum of punishment is justly appropriate to what offence. This is the punishment that fits the crime."

---

4. Lewer, W. J., *Modern Development in Sentencing* Australian Institute Criminology, Canberra, 1974. p211.

One final matter which occurs to me might be worthy of discussion is the right of appeal given to a person aggrieved by the decision of a magistrate to a judge in the District Court. The relevant provisions are contained in the *Justices Act* and provide that the appeal is to be by way of a *de novo* hearing. Sentences imposed by Supreme and District Court judges are subject to appeal to the Court of Criminal Appeal and that Court in decisions handed down from time to time, lays down principles in relation to the imposition of appropriate sentences which provide a standard for judges in the first instances to follow. These decisions are valuable as guides to magistrates in certain areas of their sentencing responsibilities, however, they do not deal directly with the major problems of sentencing experienced by magistrates in their daily duties.

Because of the nature of the appeal provided for under the *Justices Act* the decision of the District Court Judge is not binding upon the magistrate in future cases and, indeed, it would be unusual for a magistrate to be aware of the result of an appeal - much less the reasons for any alteration to the decision, or sentence, appealed against. Perhaps it would be of assistance to magistrates if the system of appeal was altered to provide that, when the appellate court concluded it was proper to interfere with a decision or sentence of a magistrate, the reasons for such conclusions to be stated on the record. Even if it could not be said that a magistrate would be bound to follow such reasons they would be very persuasive.

PRESENTATION OF PAPER

K. R. Webb, S.M.

The principles and problems of sentencing in criminal matters, I refer mainly in New South Wales to those provided for under the *Crimes Act,* are the same in magistrates' courts as they are in the Supreme and District courts. I feel the area of sentencing which should come under discussion and be examined in magistrates' courts is that of the statutory offences, especially those for which only a fine is fixed as a penalty. Perhaps at least some part of those offences should not be classified as criminal offences.

Is it possible to find satisfactory alternative methods of imposing and collecting penalties for such offences as parking, failing to lodge company returns, and similar offences? Judge Roden in his paper mentioned a number of offences for which a fine is the only penalty provided. While bearing in mind the necessity to provide for the individual's right to contest the breach and to have his particular case considered judicially, is there an acceptable and practical system available to deal with people found drunk in public places, or people who are apparently without sufficient legal means of support, without bringing them before a court in the first instance? It must be remembered that these people may wish to deny guilt as to any allegation made against them, and, of course, it must also be borne in mind that it would not be the wishes of the community to leave these people to their own devices in the state they are in in public streets and public places. There must be some protection provided for welfare officers or social workers who may, in the interests of the individual, take the particular person into some type of care or custody situation. It is not difficult to imagine the hue and cry of the wrongful arrest if these people are not given proper safeguards.

Should the legislature adopt a different approach when examining what amounts to unacceptable behaviour in the community and provide some viable alternatives to discourage that behaviour rather than to simply continue the long accepted procedure of fixing a fine recoverable in a summary way before a justice? I think we may have had one example in more recent times under the *Jury Act* of an attempt to provide some different form of penalty, but most statutes, if you examine them, make the same means of recovery of the penalty prescribed available, i.e. before a magistrate or justices in a summary way.

On examining figures that have been produced from time to time as to workloads in magistrates courts, most of these figures relate to sentence matters, it will very shortly become necessary to appoint additional magistrates, which, of course, in turn will require additional accommodation, expensive equipment and more support staff.

The legislature should be moving more positively to provide forms of punishment in substitution for imprisonment. Work release orders, are, as I see

it at the moment, a fine example but there must be other forms available. Perhaps in cases of vandalism, it would not be unreasonable to expect, so far as the person was capable, of making an order for him upon conviction to restore the wrong that he had done, if that were possible. In a number of cases, such as we have seen recently at the cenotaph and on the walls of the Central Court of Petty Sessions, it would not be too hard for a defendant to get a bucket and the necessary ingredients and scrub off the words he wrote, and it may well deter a lot of people if they were required to take this step in the full view of the public. Perhaps these type of orders should be considered by the legislature.

Magistrates, of course, have been experimenting with behaviour modification programmes for some time. The current drink driver and hard drug users schemes are instances. I feel here again the legislature should assume some responsibility by introducing programmes of this type in order that they are available throughout the State. At the present time of course they are confined to certain areas.

A system for the periodic review of all penalties, and I think more especially those authorising the imposition of a fine should be introduced. Monetary penalties appropriate to 1909 are not suitable in 1978, more particularly when you consider them alongside the monetary penalties authorised by the 1978 statutes. I think the *Motor Traffic Act* is probably the most glaring example, although there are certainly others. The regulations under the Government *Railways Act* where the maximum penalty that can be imposed in one of $40.00. This might apply to some person who has satisfactorily travelled from Gosford to Sydney for three months on an expired ticket - hardly discouraging if you can pay a fine of $40.00 every three months for free travel.

In conclusion, I would like to refer to a matter that Judge Roden has dealt with in his paper far more competently than I could, and that is the question of appeals from magistrates' courts dealt with by judges in the District Court. I believe that there is some need to change the present system. Whether Judge Roden's ideas in this respect are acceptable or not I do not know but it seems to me that there is a wastage of essential material in the present appeal system. Magistrates are operating in the dark, as it were, as to the way in which judges are imposing penalties or upholding appeals against magistrates' decisions. And, of course, the same thing occurs in the District Court. Each judge is virtually unaware as to what his brother judge is doing in the appeals that he is dealing with.

There must be a wealth of information available somewhere in this system that should be accessible to magistrates and judges for one very good reason, and this gets back to the theme of Dr Francis and Dr Coyle, that is to try and find some way that like offences are being dealt with uniformly and in a constant way. And, of course, that is only to a certain practical level: it can never be perfect by any means. In particular, (in this State at any rate) there is a need so far as offences under the *Motor Traffic Act* are concerned, where

we are dealing with not only fines and terms of imprisonment but also the suspension or cancellation of drivers' licenses. No feedback is provided, no information is provided, no publication under the present system of appeals. It is a hearing *de novo*. The judge simply substitutes his view at that time for that of the magistrate, and I think it is a waste if something cannot be done to use the results and provide us all with more knowledge when we are dealing with like cases.

DISCUSSION PAPER

Probation and Parole
Officers' Association of
New South Wales.*

Towards an Alternative Approach to Sentencing

Over the last few years in North America and elsewhere, there has been controversy over indeterminate sentencing whereby such bodies as Parole Boards determine the release of a prisoner after part of a gaol sentence has been served.

Just recently the Royal Commission Report into New South Wales prisons (page 608 and page 615)[1] recommended *inter alia* that release to parole should be automatic on sentences of less than four years and it also made recommendations aimed at reducing the uncertaintities surrounding Life Sentence prisoners and Governor's Pleasure detainees. This paper discusses the issue of indeterminancy as it affects prisoners and parolees at the present time in New South Wales. The conclusion reached is that the existing system of parole hinders the efforts of probation and parole officers because it leads to unfairness and uncertaintities which confuse and demoralise prisoners.

The solution proposed is that the *Parole of Prisoners Act* 1966 should not be amended, but abolished, and replaced by a system involving determinate sentences and after-care recognizances to be attached at the discretion of the court.

In February, 1978, a conference of senior probation and parole staff involved in institutional work was surprised by a late agenda item which recommended "automatic parole" and the return to full judicial control of sentences. This item stimulated such widespread criticism of the present parole system that a wider conference of probation and parole staff was held in March at which a majority opinion expressed the view that New South Wales should move towards a system of determinate sentencing.

Here then, was a Service charged with, and experienced in, carrying out the parole function saying that the parole release system was not working effectively and that the time for change was at hand. What has happened to the aspirations and efforts of the initiators of the 1966 *Parole of Prisoners Act?* Has the whole exercise been a failure?

---

* Prepared by a Committee of the Association in the light of the resolution of a staff conference on 2nd May, 1978:

"There appear to be good reasons for considering the introduction of legislation to provide fixed sentences with automatic release to parole supervision if such supervision is considered necessary by the original sentencing authority".

This paper does not necessarily reflect a unamimous viewpoint.

1. Report of the Royal Commission into New South Wales Prisons. The Honourable Mr Justice J. F. Nagle. Government Printer, Sydney, 1978. (The Nagle Report).

Not a bit! Rapid change has caught up (with the parole system) in an age which probably holds many more "future shocks". If the system itself has been the subject of some controversy the basic idea has not. It is considered by probation and parole officers to be, in essence, a resounding success. The Royal Commission, echoing the recommendations of the Swedish Commission into prisons in 1972 best sums up the essence of parole by stating that,

> "Imprisonment should be a last resort and those imprisoned should be kept in the lowest appropriate security."[2]

If the community can achieve its aims by minimum levels of imprisonment of certain categories of offenders, then it should do so, not only for positive and humane reasons, but also because of the economics involved. The balance of research indicates that conditional liberty assessments are at least as effective as imprisonment in preventing recidivism.[3], [4]. Moreover, New South Wales with an imprisonment ratio of 69 per 100,000 of population[5] has a long way to go in exploring alternatives to imprisonment compared to Holland and Sweden with respective imprisonment ratios of 12 per 100,000 and 32 per 100,000.

Before examining the reasons for discontent with the current parole system let us look at probation in New South Wales, the concept of probation as a conditional liberty system being little removed from that of parole. Few people in the community, even those working in the criminal justice system, realise that there are approximately three times as many probationers as there are prisoners in this State. Very few indeed would be able to recall headlines or incidents involving a probationer. Yet many people in the community, when discussing criminal justice can recall incidents when parolees have committed serious crimes while on parole. Is it only the concept of the "prisoner in the community" which arouses the press and alarms the public and politicians? If those prisoners we now parole were placed under the mantle of a general conditional liberty system such as probation, the punishment and deterrent sentence of imprisonment already having been served according to a determinate sentence practice, would the community distrust of conditional liberty such as we have seen recently in regard to parole and work release, abate? Or would the opprobrium then attach itself to probation? It is questions such as these which admittedly, must be considered when evaluating the proposals for change outlined in this paper. What, then, are the major issues which have led to discontent with the working of the parole system?

---

2. *ibid.* Chapter 38, Recommendations, p701.

3. Hood, Roger and Sparks, Richard. *Key Issues in Criminology.* World University Library, London, reprinted 1974, p186.

4. Morris, Norval and Hawkins, Gordon. *The Honest Politician's Guide to Crime Control.* Sun Books, Melbourne, 1971, p121.

5. Rinaldi, Fiori. *Australian Prisons.* F.M. Publisher, 1977, p37.

A. The first major issue is the uncertainty caused by the non-parole period and assessment for release. When the prisoner commences his sentence he sees before him the goal of an early release to parole. Usually the prisoner with a non-parole period will not be concerned about remission calculations because these are deducted from his "head" sentence. He is much more concerned with the attitude of the parole officer or of anybody else who may assess his fitness for parole. The effects of this are multiple:

1. Prisoners become increasingly anxious as their time of assessment draws near and news of parole refusals, few though they are, aggravates the situation.

2. There is a tendency for prisoners "to play safe" and avoid discussing crucial problems lest these militate against parole. Prisoners sometimes tell their parole officer only what they think he wants to hear.[6]

3. Under these circumstances counselling of prisoners on the one hand and their assessment for release on the other are rendered incompatible.

4. The effect of remissions aimed at encouraging good behaviour in prisons is negated by the existence of a non-parole period whereby release to parole may be effected well ahead of a remission release. Prisoners and prison officers alike have remarked on this factor which involves internal discipline and security.

5. Release planning by prisoners and parole officers is handicapped in the more difficult cases because release to parole is not certain.

B. The second major issue relates to the validity of parole assessments. There can be a great deal of variation amongst assessing officers in regard to whether a prisoner is ready for release or not, even though the known facts of the case remain constant. The Parole Board has acknowledged prediction difficulties in the 1976 Annual Report where S. H. Simon's quoted opinion is that, (p. 1975):

> "for a large 'middle range' of offenders it is unlikely that future criminal behaviour can be predicted to a useful extent from a knowledge of past history."

Also in the 1976 Parole Board Report in regard to unstable and dangerous behaviour, the following is recorded: [7]

> "The Board has found itself increasingly involved in the question of assessing potential 'dangerousness' for parole candidates, Life Sentence Prisoners and Governor's Pleasure detainees. In the case of the latter,

---

6. Manson, J. R. "Determinate Sentencing". *Journal of Crime and Delinquency*. April, 1977, p205.

7. Annual Report of the Parole Board of N.S.W. 1976

the experience has been that to be certified 'not mentally ill' no more guarantees lack of 'dangerousness', than to be certified 'mentally ill' indicates its presence."

Strong support was found for such observations in the 1977 Institute of Criminology Seminar entitled, "The Dangerous Offender - Prediction and Assessment" - where Roman Tomasic's paper [8] quoted the results of studies where two out of three (Kozol) and nineteen out of twenty (Wenk) predictions of dangerousness were wrong.

It would seem obvious from recent figures of parole breakdowns (approximately one-third) that there is a wide margin for possible error in assessing, prisoners for parole, whether favourably or infavourably.

C. The third major issue is the confusion over the rationale for releasing prisoners to parole and the perceived fairness of the system in regard to commonly held views of justice.

1. The difficulty of reconciling requirement of punishment and deterrence with reasonable expectations for rehabilitation should not be underestimated. Presumably a sentencer would have at least as much difficulty looking ahead to the expiry of a non-parole period as a Parole Board would have in looking back to see what had happened.

2. Because of the need to maintain present discipline it has become necessary to insist upon acceptable prison behaviour reports before granting parole. The system of remissions reflects this need but remissions do not work on the non-parole period. The subjective elements such as age, upbringing, character and intelligence as outlined by John A. Morony in *A Handbook of Parole* (page 16) are not reconciled to objective limits, such as prison regulations, but are subordinate to them. This can result in the paradox that experienced prisoners, habitual criminal types who are most likely to offend again, often manage satisfactory institutional reports but receive parole reports with poor prognoses. Could not the opposite occur?

3. There must be a question mark against any system which releases to parole approximately 90% of eligible prisoners because they are assessed as acceptable risks while it allows the remainder to be released on remission, sometimes only months later, without the safeguard of supervision. Should not the unacceptable risks be supervised as well as the acceptable?

4. Many prisoners have seen the assessment procedures and Parole Board determinations as a rather frightening "second trial" undertaken by a "Star Chamber" system at which they have no rights of representation

8. Syd. Inst. Crim. Proc. No. 32. Government Printer, 1977, p17.

and where knowledge of evidence being put to the Board is not available to them. A return to full judicial control of sentencing would solve this problem.

D. The fourth major issue of dissatisfaction with the present parole system to which this paper addresses itself, is the adverse effect indeterminate sentences have on the running of a correctional system.

1. The Parole Board has released in recent years the great majority of eligible prisoners, for which their courage and persistence in times of criticism needed to be commended. The following figues are taken from the Report of the Parole Board in 1976 (printed 13th October, 1977).

Year	Parole Granted	Parole Refused	Parole Revoked
1974	1,283	163	464
1975	1.198	241	419
1976	1,236	315	373

The Royal Commission into New South Wales prisons has commented on the heavy workload of both the Parole Board and the Probation and Parole Service. From the above statistics it can be argued that much effort has been spent on investigation, report preparation and assessment of prisoners prior to release in order to identify a small minority of prisoners who may be a risk to the community. A determinate sentencing system with an appropriate provision for after care recognizances would eliminate much needless effort and would direct attention to the problem of deciding whether a person should be returned to gaol rather than whether he should be released.

2. Non-parole periods add several variables to an already complicated prison programme system. A prisoner can be released to parole, to deferred parole, on licence, by remission, from work release, or transferred within the prison system for a variety of reasons. The result is that prison staff can seldom be sure of exactly how long a prisoner will be in their system. This makes it difficult to plan educational and industrial courses. One hesitates to criticise any point in such a thorough and well balanced report as is the Royal Commission especially as automatic parole has some advantages over the present system. However, the Royal Commission's recommendation of automatic parole for prisoners with sentences of under four years would add yet another variable to a system that has been criticised for its uncertainty. Planning arrangements for employment and accommodation of a parole release could be thrown into chaos with a last minute loss of remission. On 1974 prison census figures only 28.4% of prisoners would be eligible for automatic parole as recommended, leaving 39.1% of prisoners including Life Sentence and Governor's Pleasure detainees under the old system.

3. The focus of the present parole system on early release encourages in prisoners insincere efforts aimed at impressing their parole officers. It would be preferable if prisoner treatment were of a voluntary nature where motivation was assured and the quality of rehabilitation programmes higher in consequence.

The above criticisms of the parole system are in no way intended to belittle the extent of its valuable contribution to correctional thinking. It is considered that such a contribution is beyond dispute.

It is beyond the scope of this paper to fully detail the system of determinate sentencing in New South Wales but a broad proposition could run as follows,

The judiciary would decide on a determinate sentence in the knowledge that the offender's stay in prison would only be varied by remission earned or lost for behaviour whilst in custody. The humane principle of the individualisation of sentences would be preserved by the enactment of legislation to ensure that the judiciary would have discretion to attach recognizances to the determinate prison sentence where this was considered appropriate.

The advantages of such a proposition would be that:

1. The uncertainty of time of release caused by indeterminate sentences would be removed, giving the public, the prisoner and criminal justice system staff a clear understanding of the nature and length of sentence.

2. Doubtful assessment for release procedures would not be required, removing a major source of prisoner grievance and contributing to prison harmony and discipline. A vast assessment machine could be redirected to a more effective role.

3. Counselling and treatment of prisoners would not be constrained by the need to assess for release, making the recognition of prisoners who want to help themselves an easier task.

4. The main thrust of counselling and treatment of offenders against the criminal code would be in the community in realistic settings rather than in artificial prison conditions.

5. The criticism of the present parole system that justice is done in camera would be removed and accountability for evidence given in regard to release of prisoners would be a natural result of normal court proceedings.

In the April, 1977 edition of the *Journal of Crime and Delinquency*, there was an excellent series of commentaries both for and against determinate

sentencing in America. This paper supports a statement made by John R. Manson [9], a proponent of determinate sentencing:

> "Proponents of fixed sentencing are too often inclined to attribute the ineffectiveness of the existing system at least, in part, to the unfitness, ineptitude and weaknesses of Parole Board members. My own experience with Parole Board members, past and present, has almost without exception, been positive and rewarding. The problem is not with the qualifications and character of the Parole Board members, but with the state of the art of a criminal justice system that will not allow itself to function effectively in its present form"

In approaching reform and seeking ways to implement the Royal Commission findings, we should not allow the existence of institutions such as Parole Boards and Parole Services, and current acts of Parliament, to obscure the direction in which sound concepts such as conditional liberty have taken us. It may be that we need to form new institutions around the concepts rather than modify old institutions to attempt to fit the concepts. Some institutions are just not that flexible. It is suggested that the 1966 *Parole of Prisoners Act* is one such institution and that it should be replaced by a system of determinate sentencing with provision for after-care recognizances with supervision.

---

9. Manson, *op. cit.* p206

Other References used in preparing paper:

i Census of Prisoners 1974. New South Wales Department of Corrective Services.

ii Current Sweden No. 87, August, 1975. *"The 1973 Correctional Court Reform"* published by the Swedish Institute.

iii Directory of Corrective Service, 1977. Statistics complied by the Research Division of the New South Wales Department of Corrective Services.

PRESENTATION OF DISCUSSION PAPER

Peter Coleman, M.A., Probation and Parole Officer

This is a collective effort of the Association, and the point that I would like to make in connection with this paper is that so far there has been useful discussion on the problems associated with sentencing, or leading up to, the sentencing process, but we should be aware that there are many serious problems consequent to the sentencing process and these involve the Probation and Parole Officers.

The second point that I wish to make is that this paper, and the proposal in it, represents a widespread and deeply felt conviction that the parole system in New South Wales is in need of urgent review and the reasons for that are set out quite clearly in the paper. This conviction is the result of some thousands of hours of first hand experience in custodial institutions and in face to face contact with prisoners, the people who have been sentenced. It also represents the point of view that theory or principle, ideal or philosophy should be shaped by, and tested against, practical experience especially practical experience within custodial institutions. Rightly or wrongly, within our institutions, there are tremendously high levels of anxiety associated with the parole system and those levels of high anxiety make it very difficult to do any effective work with the people involved.

And the third point I wish to make is to link the proposals outlined with this paper to the statement of His Honour Judge Roden when discussing the sanction of imprisonment and I quote: "It is the task of legislators rather than sentencers to seek to minimise prisons dehumanizing effects of prisons and to seek new alternatives".

DISCUSSION PAPER No. 2

C. R. Briese, B.A., Dip.Crim. (Cantab.),
Stipendiary Magistrate, Central Court of Petty Sessions, Sydney.

The question of community service orders being introduced into New South Wales as a court sanction was raised by Judge Roden and Mr Webb in their papers. Last year I spent some time in the United Kingdom looking at the operation of community service order schemes there and, convinced of their value, I would like to summarise the case for their introduction to New South Wales.

Over the years a considerable number of evaluative studies have been made of most of the sentencing sanctions available to western courts. A number of people (e.g. Martinson[1] (U.S.A.), Brody[2] (U.K.)) have reviewed these studies, and one of the conclusions flowing from their work is that no one sanction is better than any other in terms of recidivism. True it is that two or three studies suggest otherwise but with those very few exceptions the remainder support that general statement. It follows that in the employment of sanctions now available to courts and when considering the introduction of others, we should look to matters other than recidivism as the over-riding criteria for their selection.

The ultimate penalty for offenders continues to be a prison sentence and it is widely used. In terms of correctional efficacy and recidivism, prison of course gives no better results than other sanctions but there are a number of valid reasons which need not be noticed here why, for the forseeable future, prison sentences will necessarily be required and used by the courts. Having said that, it must also be emphasised that it is now generally recognized there is a need to develop sanctions of a non-custodial and semi-custodial nature to take out of the prison populations those offenders who can be safely and satisfactorily penalised in other ways, ways which are acceptable to society as a whole and to individual members of society.

The position in N.S.W. is that offenders are being sent to prison for some relatively minor offences and also for some relatively serious offences because there are no satisfactory alternative sanctions the courts might use. Speaking as a stipendiary magistrate with some 12 years experience it is my view that the range of non-custodial sanctions available to N.S.W. courts is not large enough. The recent Royal Commission Report into N.S.W. prisons[3] makes it plain that prison should be used as a last resort but recognises that the problem is to devise alternatives which will attract political and public support.

---

1. Robert Martinson, "What Works? Questions and Answers about Prison Reform." *The Public Interest*, Spring 1974, pp22-54.

2. Brody, *The Effectiveness of Sentencing*, Home Office Research Unit, 1975.

3. The Royal Commission into New South Wales Prisons: The Honourable Mr Justice J. F. Nagle, (The Nagle Report) Government Printer, Sydney, 1978.

Other States and countries have devised some alternative sanctions which have that support and it is important in the present climate in N.S.W. that the best of these be introduced into N.S.W. In my opinion the one alternative measure to prison which demands urgent introduction in N.S.W. is the Community Service Order Scheme presently operating in Tasmania, Western Australia and the United Kingdom. The way in which it operates was summarised in Mr Webb's paper, but for convenience sake I will provide a further summary.

N.S.W. does have the semi-custodial sanction of week-end imprisonment, generally called periodic detention. It seems to be proving a viable way of dealing with some offenders who, but for the existence of this sanction, would have been given a full-time prison sentence. Unfortunately no proper evaluative study of periodic detention has yet been made anywhere to my knowledge; it is to be hoped this deficiency might soon be remedied. One criticism which can be made is that periodic detention is underused by some courts, either because of lack of facilities or insufficient knowledge of its existence and value on the part of some sentencers. It seems to me, however, that periodic detention suffers from one inherent defect and that is the necessity for accommodation to house offenders for the periods they are undergoing detention - usually week-ends. This means:

1. The scheme is expensive to administer and so it is not available to many courts in N.S.W. because it is not economic to provide facilities.

2. Offenders undergoing periodic detention establish considerable contact with each other in that residential environment, and from what we know of prisons we can assume that the influences of fellow prisoners in periodic detention schemes will be seldom wholesome or beneficial.

I suspect that for this reason Tasmania, Western Australia and the United Kingdom bypassed periodic detention and opted for community service order schemes instead. Under the latter schemes offenders continue to reside in their own homes.

In British Commonwealth countries Tasmania was the first pioneer of the community service order idea. It introduced its "Work Order Scheme" in 1972 as an optional alternative to short terms of imprisonment. It allows an offender to be sentenced to a maximum of 25 Work Order days which he must work one day per week on community projects without pay. An evaluation of the scheme was made by Mackay and Rook[4] (funded by the Research Council, Australian Institute of Criminology) which concluded that "the scheme is considered a successful, unique and viable alternative to imprisonment, with numerous benefits to both the offender and the community." Similar schemes have since been set up in the United Kingdom and in Western Australia.

4. Mackay and Rook, "Evaluation of the Work Order Programme in Tasmania", *Aust. Inst. Crim. Info. Bull. 2 (1) 1975.*

In England and Wales a community service order scheme came to be enacted as the result of a recommendation in 1970 by the Wootton Committee,[5] a subcommittee of the Advisory Council on the Penal System. The Wootton Report was written against a background of a rising prison population and a limited range of alternatives to custody. The recommendations of that Report, with some amendments, were finally incorporated in Sections 15-19 of the *Criminal Justice Act* of 1972, and later in the *Powers of Criminal Courts Act* of 1973. The main provisions are as follows:

1. A person aged 17 years or over, convicted of an imprisonable offence, may be ordered with his consent to undertake unpaid work for any total number of hours between 40 and 240, within a period of one year.
2. A court cannot make an order unless (a) arrangements for community service have been made in the petty sessions area where the offender will reside; (b) the court is satisfied, after considering a probation officer's report about the offender and his circumstances, that he is a suitable person to perform work under such an order; and (c) the court is also satisfied that arrangements can be made for him to do so.
3. So far as is possible, community service arrangements should not conflict with the offender's work, educational or religious commitments.
4. Failure to comply with the order makes the offender liable to a fine up to £50 without prejudice to the continuance of the order, or the court may revoke the order and deal with the original offence.
5. Provisions is made in the Act for the appointment of a Community Service Sub-Committee of a Probation and After-care Committee. The Sub-Committee acts as a policy controller for the organisation of community service in a probation area. The committee is made up of lay magistrates and certain ex-officio members whose experience in community affairs is thought relevant to the administration of the scheme.

During the period of my stay in the United Kingdom 1976-77 on a Winston Churchill Fellowship I spoke to many persons and officials from the probation services and courts about community service orders, and I made a study of the growing literature on the subject. The impression I gradually formed was that the community service order scheme was proving itself to be a valuable weapon in the sentencing armoury of the magistrates' courts and also of the Crown courts. Fortunately provision was made at the outset to evaluate the working of the scheme in England and Wales, the monitoring being done from the start by the Home Office Research Unit. Two evaluative studies have been made by this body and the results published, the first in 1975 and the second a year later. Already in 1975[6] the Research Unit was able to say:

---

5 *Non-custodial and Semi-custodial Penalties.* Report of the Advisory Council in the Penal Section, London, H.M.S.O. 1970.

6. Home Office Research Study No. 29. *Community Service Orders* London, H.M.S.O. 1975.

> "The community service experience shows that the scheme is viable; orders are being made and completed, sometimes evidently to the benefit of the offenders concerned...At best, community service is an exciting departure from traditional penal treatment."

And in 1976:[7]

> "In this second report, an analysis of the aims of the community service scheme has been attempted. An estimate was made of the proportion of those given community service orders who were diverted from custody. This estimate is within the range 45%-50% of those given orders. A study of one-year reconviction rates of those given community service orders during the scheme's first year of operation in each of the six experimental areas was reported. It was found that 44.2% of all those sentenced to community service in six experimental areas during the first year of the scheme were reconvicted within a year of the sentence. The reconviction rate of the community service group is within the same range as that of a group recommended for, but not given, a community service order. There is no evidence of systematic change in the level of seriousness of offences committed after a sentence of community service, nor in the time at risk before reconviction amongst those reconvicted."

Whilst the people that I spoke to in the United Kingdom had varying views as to the best way to operate the scheme, rarely did I hear a voice which was opposed to the idea altogether. Indeed there are very few opponents of the scheme and those that there are make their criticism from the extreme left of the political spectrum. Opinion as to the desirability of community service orders being made available to courts throughout the United Kingdom was unanimous. According to latest information, the sum of £0.8 million has been made available by the Government to provide for the extension of the scheme to those few areas left in England and Wales where it is not yet operating. Scotland is introducing its own version of the community service order scheme, the orders there to be made as conditions of probation orders.

In 1977 Western Australia introduced its community service order scheme modelling it on the English experience but with some important modifications. It is too early for any evaluative work to have been done in Western Australia.

What is now known of the operation of community service order schemes elsewhere makes it inevitable, in my judgment, that they will eventually appear in all Australian States, the only question being when and in what form. With the appearance of the Royal Commission Report into N.S.W. prisons[8] the climate in N.S.W. is such that the scheme should be introduced forthwith. The fact that Tasmania, Western Australia and the United Kingdom do not have the sanction of periodic detention and N.S.W. does, is not in my view

---

7. Home Office Research Study No. 39 *Community Service Assessment in 1976.* London H.M.S.O. 1977.
8. "Nagle Report" *op. cit.*

a sufficient reason to refrain from introducing community service orders in N.S.W. Indeed there is every reason to believe that an enlightened criminal justice system should as part of its range of sanctions include both periodic detention *and* community service orders, the former being administered by prison officers and the latter by selected officers of the probation service. The fact that community service order schemes are relatively cheap to introduce and administer may mean in practice that the existing facilities for periodic detention in N.S.W. are sufficient, those facilities being confined to large population areas. The provision of further expensive accommodation to extend the periodic detention scheme to other parts of N.S.W. may be obviated by setting up community service order schemes for the whole of the State. In those parts of the State where periodic detention facilities are available as well as community service order arrangements, the courts may prefer periodic detention for some offenders and offences rather than community service orders. It would be a matter for these courts to develop proper criteria for the use of periodic detention as opposed to community service orders. However if community service orders are made available to N.S.W. courts and they are used to the point where the operation of the periodic detention scheme remains static or withers away, I suggest that development would pose no administrative problems of any weight.

The value of community service orders can be better understood when the following matters are appreciated:

1. The scheme appeals to all kinds of people on a wide spectrum, including those who administer it, for different reasons. The Wootton Report[9] foreshadowed this feature of the scheme in these words:

> "But in general the proposition that some offenders should be required to undertake community service should appeal to adherents of different varieties of penal philosophy. To some, it would be simply a more constructive and cheaper alternative to short sentences of imprisonment; by others it would be seen as introducing into the penal system a new dimension with an emphasis on reparation to the community; others again would regard it as a means of giving effect to the old adage that the punishment should fit the crime; while still others would stress the value of bringing offenders into close touch with those members of the community who are most in need of help and support.....These different approaches are by no means incompatible."

This factor can be used to great advantage in obtaining the support of all sections of the community for the implementation and subsequent operation of the scheme. As it is a sanction involving the community, much effort should go into explaining the scheme and its operation to the public via the media and other channels, as well as into obtaining the support of the voluntary agencies,

---

9. *Non-custodial and Semi-custodial Penalties, op. cit.*

the labour movement, the courts and the probation service, Preparatory work of this kind is vital to its success. It should be pointed out that any administration introducing the scheme can ultimately expect to reap considerable support from the community as the community comes to understand the problems associated with penalising its offenders and joins in the efforts to deal with those problems in an enlightened fashion.

2. The cost of setting up and administering the scheme is relatively cheap. For example, the investigation by Mackay and Rook[10] into Tasmania's Work Order Scheme found:

> "The cost of operating the Work Order Scheme, $4.50 per man per week, is considerably less than the cost of imprisonment, $117.11 per man per week, an estimated saving to the State of $1,175,000 for 1975."

3. Flowing from the operation of the scheme is the value of the work performed for the community, work which generally speaking would not otherwise by done. In Tasmania, the Mackay and Rook study found that:

> "Currently 25 years of work is provided annually for charitable institutions and needy individuals."

In England and Wales it is anticipated that when the scheme is in full operation approximately 15,000 orders a year will be made. Generalising the English experience to N.S.W. one can expect something in the vicinity of 1,500 orders to be made annually, giving up to 200,000 hours of unpaid work to the community. Whether or not these figures are reasonably accurate predictions matters little; introduction of the community service order scheme to N.S.W. will certainly mean that a large reservoir of untapped manpower is made available to charitable bodies and needy individuals in N.S.W.

4. Recidivism of offenders placed on community service orders is no worse than if they had been sent to prison. (See the above passage taken from the Home Office Research Unit Study of 1976.) In Tasmania the Mackay and Rook study found:

> "A comparison of recidivism rates between the 1974 Work Order and short-term imprisonment groups showed that 47% of the Work Order group committee further offences and 19% subsequently went to prison, compared to 62% and 40% respectively for the short-term imprisonment group. However, as the prison group had a more extensive criminal record, it could not properly be compared with the Work Order group."

---

10. Mackay and Rook. *op. cit.*

5. Community service avoids some of the negative effects of imprisonment. These are so well known (e.g. the loss of responsibility and decision making) there is no need to dwell on this matter.

6. Community service orders involve the public in the penalising of offenders in a way which is entirely constructive. They offer to offenders the opportunity to contribute in various ways to the community, thereby gaining for themselves some status and approval for their activities from individual members of the community. Whilst I believe the proper approach to community service orders means administering the orders primarily and essentially as penalties, there is no doubt that many offenders respond positively to the opportunities offered them to help other persons. For these offenders the scheme provides a "treatment" effect as a side benefit; some of them become so involved with the work they are required to do they continue with it on a voluntary basis after completion of their orders. One former offender I spoke to at Nottingham is now employed as a supervisor in the Nottingham community service order scheme. I was informed there are others similarly employed elsewhere.

7. Finally a word of caution. It should not be thought that community service orders are a panacea for the problem of crime. The most that can be claimed for them at this stage of our knowledge about them is that they provide a better way of penalising some offenders than using other sanctions. I would not expect the availability of the community service order sanction to take out of the present prison population of N.S.W. any more than 5-10% of the prisoners now there. But that is a considerable number of men and women - some 300 to 600 people - the population of one to two large gaols.

I propose to deal now with some important questions which may give rise to queries or concern.

(1) *Who should administer the community service order scheme?*

Not all offenders are suitable to perform community service. The six experimental schemes set up in England in 1973 as pilot projects in different areas did not use the same criteria of suitability although there was considerable overlapping. The important point, however, is that it was agreed there are offenders who cannot be employed in community service. Included in those regarded not suitable are:

(a) violent offenders; (b) the heavily addicted - to drugs or alcohol;
(c) mentally ill or highly disturbed offenders; (d) sexual offenders.

The people who are presently entrusted with the task of making inquiries about offenders and supplying the courts with information about them are the probation officers. In furnishing a presentence report to the court attention is given to the offender's background, his family and social environment, his strengths, weaknesses, problems, the type of person he is. Officers of the

probation service through their training and experience ought to be, and usually are, more qualified than others to judge whether a particular offender is suitable to perform community service. In England the probation officers are encouraged to consult with the local community service organiser, himself a former probation officer, when offenders are being considered for community service. After such consultation the probation officer is in a position to inform the court:

(a) whether the offender is thought suitable, giving reasons;
(b) whether suitable work is available for the offender to perform.

On the basis of this information the court is in a position to make a rational judgment as to whether a community service order should be made.

It is sensible, therefore, to entrust the task of administering the community service order scheme to selected personnel from the probation service. By appointing as the community service organiser for each area a qualified probation officer and making him responsible for the running of the scheme, is to ensure as far as this can humanly be done, that only suitable offenders are permitted to perform community service.

(2) *Will the scheme clash with the interests of the trade unions?*

The schemes now operating in the United Kingdom, Tasmania and Western Australia are doing so with the full support and co-operation of the trade union movement. In these places the work performed is for charitable bodies and needy individuals e.g. pensioners. Generally speaking it is work which would not otherwise be done were it not for the existence of community service orders. To obtain the support of the trade union movement it is essential that representatives from that movement be included in the committee which must be set up to implement and oversee the scheme. In day to day activities the community service organiser must consult with the trade union representative in those cases where the work under consideration might offend the legitimate interests of a trade union or its members. In England the organisers I spoke to about this matter indicated they had no problems with the unions, and claimed that this was because they rigorously pursued a policy of close contact with the committee representative from the unions and refused to consider any work which was normally performed by union labour, or which could be.

I should indicate that I have already discussed the question of the possible introduction of community service orders into N.S.W. with Mr Barry Unsworth, the Assistant Secretary of the Labour Council of N.S.W. Providing adequate representation and participation is permitted to the Trade Unions he sees no objection to the scheme from the point of view of the labour movement. Indeed, properly administered, he believes the scheme will receive the full support of the trade union movement.

(3) *Should the community service order be used only as a genuine alternative to imprisonment, or might it be also used in those cases where imprisonment is not being considered?*

In England this question continues to be debated, with some theorists maintaining that to the extent that community service orders are not used as an alternative to imprisonment, so their position in the scale of tariffs is weakened. Continued misuse of the sanction in this way, so the argument goes, will eventually mean the sanction is not seen by the community and the courts as a sufficiently credible alternative to imprisonment. I do not agree with this view. Fines are today used for both minor and serious offences and in the case of serious offences the use of a fine is often employed as an alternative to prison. I think that community service orders should be made available to courts on the same basis as fines, to be used for suitable offenders as the court sees fit. The experience in England indicates that the community service order sanction is being used as an alternative to imprisonment in only 50% of the cases where it is used. That does not surprise me. As a magistrate one can point, for example, to those cases where a fine is not suitable because of the financial circumstances of the offender, those circumstances being often aggravated by his requirement to support a family. In some of these cases the availability of the community service order sanction would be the best answer to the problem of how to penalise the offender effectively. It should be remembered in this connection that the imposition of a fine upon an offender who is not able to afford it, may mean that the offender eventually goes to prison for non-payment of that fine. Prison statistics suggest that this happens only too frequently. For example, in the 1975-1976 figures, total receptions into custody under sentence from the lower courts during the year are given as 6,456. Of that number, 3,231, or just over 50% were fine defaulters.

(4) *Should the scheme be introduced as part of a probation order or as a sanction in its own right, not part of a probation order?*

Scotland is introducing the scheme in such a way that when a community service order is made it will be as one of the conditions of a probation order. It is my view that the English approach, followed by Western Australia, is better, and there the scheme was enacted by special legislation making the community service order a sanction in its own right. I believe, however, that N.S.W. should follow the Western Australian example of permitting the court to put an offender on a probation order in addition to ordering community service.

(5) *In the event of a decision being made to introduce the scheme, what practical first steps must be taken?*

The first step to be taken is to set up a committee with responsibility for making policy decisions how the scheme is to be operated in N.S.W. That committee should be impowered to set up the scheme and supervise its operations. Representation on this committee should come from all sections of the community which will be connected with, or affected by, the scheme.

This means that the committee must have representatives from the voluntary agencies, the service organisations, the trade unions, the courts, probation officers and the corrective services. Upon establishment, the committee must familiarise itself with the literature which is available on the subject and examine the various ways in which the scheme could be operated. It will then be in a position to make an informed judgment as to the best method of operating the scheme in N.S.W. with due regard for N.S.W. conditions.

It is my view that the scheme should be introduced in three or four different areas of N.S.W. as a pilot project, so that the experience of administering the scheme in those areas can be used to determine how the schemes should finally be operated and administered throughout N.S.W. The proposed committee should be asked, therefore, to consider and recommend three or four areas in N.S.W. and the committee empowered to set up the scheme in those areas.

In conclusion I should indicate that at a seminar held in Canberra at the Australian Institute of Criminology in March, 1978, I was present when the subject of community service order was discussed. Judges and magistrates from every State and Territory in Australia were in attendance. No one spoke against the use of community service orders as a court sanction and the impression I gained was that judges and magistrates are not opposed to the idea and will use the sanction if it is available to them.

PRESENTATION OF DISCUSSION PAPER

C. R. Briese, S.M.

Judge Roden has referred in his paper to the need for a sufficient range of alternatives to imprisonment so that prison might, in fact, be used as a last resort for the less serious offences. Mr Webb also outlined the community service order scheme and how it operates in the United Kingdom. My paper provides a summary of what I believe to be the main arguments for the introduction of the further alternative to prison, namely: community service orders.

Versions of the community service orders scheme are in fact operating in the United Kingdom as I have indicated, also in Western Australia and Tasmania. They are also available to some States of the United States. Indeed, I understand in California they have been operating as early as 1966, but in the British Commonwealth countries it is Tasmania that first pioneered the idea.

Generally speaking community service orders are working well and providing the courts with a valuable sentencing tool. I believe there are many reasons why New South Wales should introduce community service orders and the main ones are set out in my paper.

I want to refer again to the question of unemployment or unemployed offenders before summary courts. In the present economic climate, with many people out of work, a considerable number of offenders before the courts are unemployed. Often they have a family to support, and other financial commitments. It is really not appropriate in many of these cases to use the sanction of the fine. The availability of the community service order scheme would be an ideal penalty in some of these cases.

A recent publication from America entitled *Sentencing to Community Service* (October 1977) sponsored by the National Institute of Law Enforcement and Criminal Justice sums up what I believe to be the case for the use of community service orders as opposed to a fine in many cases:

> "Plainly many offences and many offenders neither deserve nor will benefit from a gaol or a prison sentence of any sort. Yet a suspended sentence, perhaps with probation, may not be sufficient to impress either the offender, the victim, or the public, that the offence involved is not trivial and that the offender has been held to account for his behaviour. In such circumstances statutes often permit the assessment of a fine. In fact, where the offence is a violation rather than a misdemeanor, the fine may be the only sanction available. For the middle class or affluent offender, a fine may have little significance. And for the indigent offender, found disproportionately in the lower criminal courts payment of a fine may be an undue burden....or an impossibility. Often the real effect of

a fine is to penalise the family and friends of the offender. The legislatures' omission of a range of flexible sentencing tools has been described 'as a failure of the highest order'."

I believe from the discussions that I have had with interested persons in New South Wales (e.g. Mr John McAvoy from the Probation Service who is on a committee investigating the feasibility of community service orders for New South Wales, also with representatives of the trade union movement) that there is practically no opposition to the introduction of community service orders as a court sanction for New South Wales. I understand that the Nagle Report has recommended its introduction and I believe that it will not be long before New South Wales will have the sanction of community service orders. I would be interested to know if anyone, after reading my paper, would like to oppose, as a matter of principle, the idea of community service orders as a court sanction being introduced into New South Wales. Mr Unsworth has informed me that personally he is very much in favour of the scheme and endorses the whole paper. He is confident that the scheme would receive the wholehearted support of the trade union movement which is, of course, vital to its success.

I would also like to refer to the question of appeals from magistrates' courts being placed on a proper appellate basis. I support that suggestion wholeheartedly. From time to time we hear of disparities which appear in magistrates' courts as a result of their sentencing decisions, and there is a great deal of criticism about why one defendant got one penalty and an identical offender got another penalty even though one would have expected them to receive similar penalties. One method, of course, of improving the sentencing performance of sentencers is to provide adequate training. We have heard how the video tape might be effectively used in the training of sentencers, and magistrates might be able to use this technique in their training programmes but, even more important than proper training for sentencers in summary courts, is the need to establish a Court of Appeal which will supervise magistrates' sentencing decisions by the gradual establishment of principles and criteria in reported decisions over the years. If no principles and criteria for summary court sentencing is developed by a superior court (which would have to be considered by the summary court as a matter of law) then the training of magistrates will not reduce disparities in sentencing to acceptable limits. To allow matters to continue as they are means that the present sentencing structure guarantees inacceptable disparities in sentencing to take place regularly. While the sentencing decisions of the District Court are supervised by the Court of Appeal in accordance with principles established over the years through case law and precedent, and judges of the District Court are able to turn to those principles for guidance in sentencing considerations, very little guidance is available to magistrates.

David Thomas[1] suggests this solution which is similar to the solution suggested by His Honour Judge Roden. He puts it this way:

---

1. D. A. Thomas, "The Control of Discretion in the Administration of Criminal Justice", in Roger Hood (ed.), *Crime, Criminology and Public Policy; Essays in Honour of Sir Leon Radzinowicz*, Heinemann, London, 1974, p151.

> "The major weakness in the use of case law techniques of structuring sentencing discretion in the English system is that the jurisdiction of the Court of Appeal does not extend downwards to the Magistrates' Courts where the overwhelming majority of cases are tried. It may be that the solution to structuring sentencing decisions by magistrates is to be found in the thoughtful development of legislative techniques supported by a more centralised appeal system."

The late Sir John Barry[2] from Victoria has said:

> "The existence of the Court of Criminal Appeal may not have resulted in achieving the impossible a science of sentencing, but unquestionably it has put an end to illogical and fortuitous variation between sentences where the variation errs in the direction of excessive severity."

It seems to me that there is no reason why appellant review of the same kind for summary courts could not do the same for "illogical and fortuitous variation between sentences" imposed by magistrates, be that for reasons of excessive severity or excessive leniency.

---

2. Sir John Barry. *The Courts and Criminal Punishments,* Government Printer, Wellington, New Zealand, 1969, p39

DISCUSSION PAPER No. 3

John P. McAvoy, Probation and Parole Officer.

1. References have been made by several of the seminar participants to the possibility of introducing a Community Service Order Scheme which would add to the range of sentences available to the courts in New South Wales. This brief contribution outlines the involvement of the Department of Corrective Services in the preparation of a recommendation for such a scheme.

2. A departmental Working Party of Community Service Orders was set up about eighteen months ago and submitted an interim report in October, 1977. The final report, however, was to await the outcome of a study tour by myself under the auspices of a Public Service Board Fellowship, granted for the purpose of investigating Community Service as used in Tasmania and New Zealand. I was also able to visit and observe programmes in Devon (U.K.), California, and Oregon. Written material was obtained on successful schemes in operation elsewhere.

3. My report on my findings was recently submitted to the Departmental Working Party and it is anticipated that its final report will be completed within a few weeks. The scheme recommended does not substantially differ from that outlined by Mr Webb and Mr Briese, and it is hoped that it will be operated by the Probation and Parole Service before the end of the year.

DISCUSSION PAPER

Paul Byrne, B.A., LL.B., Dip.Crim.,
Research and Advising Division, Public Solicitor's Office.

The Impact of *Griffiths* v *The Queen* (1977)
15 A.L.R. 1.

In a recent matter heard in the Court of Criminal Appeal of New South Wales the court considered the influence of the judgment of the High Court of Australia in *Griffiths* v *The Queen.* In the course of argument the Chief Justice expressed the view that the Court of Criminal Appeal may not, by virtue of the decision in Griffiths, have jurisdiction to grant to an appellant to the Court of Criminal Appeal the benefit of a recognizance to be of good behaviour in substitution for a determinate sentence of imprisonment.

The opinion expressed by the Chief Justice would appear to be an inevitable conclusion from a consideration of the various judgments in Griffiths case and the terms of the *Criminal Appeal Act*, 1912, as amended. Perhaps the most emphatic statement and the one which most concisely summarises the view of the High Court is the following, taken from the judgment of Mr Justice Jacobs, at p29:

> "... I am of the opinion that neither a so called 'common law bond' nor the order made by Judge Goran in this case is a sentence properly so called nor one within the meaning of that word in the Criminal Appeal Act, 1912."

In *Griffiths* case the determination of the appeal involved an exhaustive analysis of the meaning of the word "sentence" as it was defined by s.2 of the Act, namely -

> " 'Sentence' includes any order made by the Court of trial on conviction with reference to the person convicted, or his property, and any recommendation or order for deportation in the case of a person convicted; and the power of the Court of Criminal Appeal to pass any sentence includes a power to make any such order or recommendation."

Although in *Griffiths* case the High Court's decision related to an appeal brought by the Crown pursuant to s.5D of the *Criminal Appeal Act*, it would seem that it is equally relevant in considering the Court of Criminal Appeal's powers under s.6(3) of the Act, which deals with appeals brought by convicted persons, and which reads as follows:

> "On an appeal against a sentence, the court, if it is of the opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."

The short point which seems to have been accepted by the Chief Justice is thus if the deferment of sentence on the condition that the convicted person enter into a recognizance is not a sentence against which the Attorney General can appeal under s.5D then it is not a sentence for the purpose of s.6(3) and hence the power to defer sentence and order the convicted person to enter into a recognizance is not among those possessed by the Court of Criminal Appeal.

In an appeal where a sentenced prisoner seeks the intervention of the Court of Criminal Appeal on the basis that at the court of sentence he might reasonably have expected to have been given the benefit of a recognizance, and that the failure to do so was manifestly unjust, what means can the Court of Criminal Appeal now employ to give the effect of such an order? It is submitted that the court could sentence an appellant to a period of time which the appellant has already served in custody so that his or her immediate release might be effected. There is one significant and obviously disturbing omission from such an order and that is that the specification of a parole period is eliminated. An order for a determinate term of imprisonment cannot, it would seem, be conditioned upon the prisoner subjecting himself to certain conditions which might prevail at the end of his sentence. The desirability of maintaining supervision over people who have already served part of their sentence in custody has been emphasised many times over in various courts. Since a court cannot specify a non parole period of less than 6 months, consequently it may be with reluctance that the Court of Criminal Appeal will interfere with any sentence which carries a non parole period of 6 months as to do so would automatically withdraw that appellant from being subject to the provisions of the *Parole of Prisoners Act*.

The situation which apparently exists since *Griffiths* case is thus it is submitted unsatisfactory. The restriction in the number of appeals by the Crown may have been the desirable object of the decision in that case but it seems that a laudable aim has in the ultimate produced a lamentable situation. To restrict the Crown's right of appeal to cases in which the sentencing judge has imposed a gaol sentence or fine, and to deny them the right to appeal in cases where the sentencing judge has deferred passing sentence is illogical and of little assistance to those charged with the responsibility of administering justice in the higher courts of this State. Moreover the decision in *Griffiths* case has withdrawn from the Court of Criminal Appeal the power to grant a recognizance in substitution for a gaol sentence in a case where the court considers such a course appropriate. This unfortunate corollary of the decision was not adverted to in any of the judgments in the High Court. By itself it threatens to cause more hardship to prospective appellants to the Court of Criminal Appeal than has been caused by the proliferation of appeals brought by the Crown in recent years.

It would appear that the most effective remedy available to the legislature is to amend the *Criminal Appeal Act* by adding to the definition of "sentence" in s.2 of the Act the following:

> "For the purposes of the Act 'sentence' includes any order deferring or postponing sentence."

Such an amendment would of course render the judgment of the High Court in *Griffiths* case a matter of historical interest on this point, but it would also return an element of rationality to the administration of justice in the Court of Criminal Appeal.

DISCUSSION

Greg Smith, Commonwealth Crown Solicitor's Office, Prosecution Section.

Unfortunately due to the pressure of Commonwealth crime (and we are winning that race at the moment) we have not had a chance to prepare a paper but we thought of speaking about the problem of dealing with aliens in Australia. I think it has been set out fairly clearly recently in the case of the two "grannies" that there is a problem of dealing with people who commit serious offences against Australian legislation as to how you treat them once they are due for discharge. This matter is probably *sub judice* at the moment because the reasons for not granting non-parole are still not available. The problem is illustrated in a recent decision of the New South Wales Court of Criminal Appeal of *Regina* v *Pierre Alaine Riche* reported at 17 ALR 227. Riche was a french citizen who spent a lot of time in South East Asia and who brought into Australia a large quantity of opium. At first instance he pleaded guilty before a magistrate and was subsequently sentenced by a District Court Judge to five years imprisonment, without a minimum term being fixed. He appealed and I think the Court of Criminal Appeal fixed a 2½ year non-parole period but kept the head sentence as it was. The problem which the court did not solve is how do you use the services of the Probation and Parole Service for aliens once they are released?

I have not done any research on this but I understand that there is no international convention that covers dealing with these people once they return to their own countries. If that is the case I would suggest that the Australian and the New South Wales governments and the other governments should be urging the setting up of a convention similar to the Singles Convention relating to drugs insofar as we can persuade governments of other countries to sign and comply. We also have conventions for extradition, but we have gaps there too.

There is another problem that has been foreshadowed in Mr Byrne's paper on *Griffiths* case of a situation where a Section 20 *Commonwealth Crimes Act* recognizance is used in lieu of non-parole period. I think the case he was adverting to was *The Queen* v *Carngham* reported 16 ALR [1977-78], which is a Commonwealth case where a man brought in $¾ million worth of heroin and was sentenced to 2½ years imprisonment, but was ordered to be released after 6 months pursuant to entering into a *Commonwealth Crimes Act* Section 20 recognizance. The Commonwealth's Attorney-General appealed on the ground that the sentence was inadequate. A problem arose when the matter came before the Court of Criminal Appeal for hearing. On that occasion a preliminary point was taken by Counsel for Carngham that in view of the High Court's decision in *Griffiths* case it was not available to the Crown to appeal against inadequacy of sentence, because the Section 20 recognizance order was not part of the sentence under the *N.S.W. Criminal Appeal Act.* A majority of the Court accepted this point and so the appeal was dismissed.

Mr Carngham had already been released at the time, but the Commonwealth Crown made application for special leave to appeal in the High Court, which application was heard several weeks ago and the Court reserved its decision after two days argument.

The question remains whether *Griffiths* or *Carngham's* case is right.

Those working in the field of presecution under Commonwealth Law have this problem in that they are using a pot-pourri of legislation to cover the prosecution, punishment and treatment of Commonwealth offenders. There appear to be contradictions between the various Commonwealth Acts, the Judiciary Act, and the various Crimes Acts and Criminal Codes as to how you deal with these people (i.e. Commonwealth offenders); whether weekend detention is available; whether Section 20 is the same as a common law bond or a Section 558 bond (I submit that it is not because it is a separate offence to breach Section 20). I believe there is a need, not only for an international convention, but for a call from high sources in the judiciary in this State that the Commonwealth set its own penal provisions and its own methods of punishment so as to make it easier for the judges, the magistrates, the prosecutors and last but, certainly not least, the counsel and solicitors advising those accused of these crimes, to know the real answer. You cannot do it by legislation, but perhaps a better effort could be made than has been done so far.

J. Parnell, S.M.

I do not wish to seem to be detracting from Judge Roden's paper, which I think was the most significant paper presented at this Institute and ought to be universally adopted by sentencers, but on page 47 he raised the contents of antecedent reports. My recollection is that adverse hearsay comments were dealt with and outlawed by the Court of Criminal Appeal about 1959 in *Hitchock* v *The Crown* (an unreported decision) although they seem to be still accepted when given without objection as set out in *Mottrick* in 1976, another decision of our Court of Criminal Appeal.

As to these matters of acquittals and no bills, this is accredited information and I suggest should be received on the basis that it represents information within the knowledge of the offender and at the very least denies an offender the opportunity of playing down the seriousness of his actions. Furthermore dealing with both those aspects within the admissable parameters of repute the sentencer ought to be aware of matters within the peculiar scope of those who prepare antecedent reports. This has been instanced before this Institute in the invaluable papers prepared in the past by Detectives King, Morrison and Craig and I think it is expertise which ought not to be lost at the sentencing stage. There is ample material in the use of normally admissible factual matter by the use which is made of Markham/Osborne type similar fact evidence and Section 420 evidence which is evidence of previous convictions even to show propensity. This material is used to secure a conviction so that I do not feel that the use of the material now questioned to assist in sentencing after conviction ought to be forbidden.

I would like to take up a matter which appears never to be touched upon in these judicial seminars, and that is whether a slavish adherence to the advocacy system throughout the entire criminal process is the ideal. Whilst I do not advocate any modification to the conviction process I do not see any justification for denying innovations in the sentencing process. Some years ago in the *Criminal Law Review* the Swedish Criminal Court proceedings were discussed. In relation to pleas of "guilty" these follow a process of confrontation between their bench and the offender with the advocate adopting a passive role until called upon. Such a procedure is only available now in childrens' courts and with unrepresented offenders. It has in my view a valid and a valuable use in all courts and ought to be tried.

His Honour Judge A. Roden, Q.C.

It seems to me that confrontation between bench and accused is nothing strange to the courts of New South Wales, but I might be using the term in a different sense from John Parnell. I acknowledge in the paper with a reference to something that Lord Goddard said some years ago that the process of fact finding for sentencing purposes is not limited to a continuation of the adversary procedure. The adversary procedure must be continued I believe for matters which are circumstances surrounding the offence. You can have with an ambiguous verdict, or with a plea of the type that I mentioned "I admit the offence but I do not admit all the facts alleged", a dispute between a prosecution witness and the accused as to what happened. On both versions the accused is guilty. I think you need apply the adversary procedure in order to determine that fact. When you want to find out things about the person that you are about to sentence, then you give effect to that formal oath to which I referred (and to which Lord Goddard referred): "You shall true answer make to all such questions as the Court shall demand of you". That is the form we use at sentencing time, and that is because it is not a matter of giving evidence in the adversary proceedings between the Crown and the accused. The court does, in fact, demand all sorts of things of these people who give information. In simple terms in answer to what was put to me: Yes it is a good idea, but a great deal of that already goes on.

As far as the other matter that Mr Parnell mentioned is concerned I am afraid I do not agree. I think that "No Bills" and acquittals are not a relevant piece of information at all. I think that hearsay is something that should be out of the window if it does not refer to an agreed fact. There was a rumour some time ago that there was a gentleman sitting upon one of the benches in New South Wales who had an arrangement with the police officer who sat in the back of the court, and as he came to deal with each matter for sentence there was a surreptitious "thumbs up" or "thumbs down", and that obviated the necessity for any "P. 16" report at all.

Rodney N. Purvis, Barrister, Member Advisory Committee, Institute of Criminology.

The paper presented by Mr Briese was of particular interest especially in the context of his having seen in operation in the United Kingdom, Community Service Orders.

There are two aspects of it that leave me with some reservations. Firstly, is the sentencing of a person into the community and his being there compelled to render some service a matter of selection on the part of a magistrate, or is it a matter of work of a particular kind only being available?

Secondly, if there is a choice, is any thought given to rehabilitation in the nature of the work that he might do?

C. R. Briese, S.M.

The procedure that is followed in England is as follows: when a person is remanded for a pre-sentence report the Probation Officer who is preparing the report will have in mind the question of a community service order for appropriate offenders. If, in the enquiries that the Probation Officer makes, he or she believes that the offender is a suitable person to perform community service (not all people are eligible to perform community service, see page 91), the Probation Officer will normally consult with the community service organiser who runs the scheme, and in England this person is usually a former Probation Officer. If he agrees with that assessment and is able to indicate that suitable work is available a recommendation is then made to the Court that the Court consider a community service order in that particular case.

In the process of determining whether or not a person is a suitable offender for community service it is proper for the Probation Officer to discuss with the offender the question of him performing community service and ascertain if he is agreeable. In all community service order schemes the consent of the offender is essential. If the offender agrees to performing community service the various types of work which are to be done and which are available in the community will be indicated to him. Whether it be for an old age pensioner, whether for a crippled children's hospital and so on, and the offender himself will be given an opportunity to indicate the particular job that he considers that he would be better able to do, and which would be more useful to him and the community. If he is given this opportunity, I believe that there is the real possibility of the treatment element coming into this sanction for some offenders, because these offenders go to work in a job which they have had some opportunity to choose for themselves. It will not always be agreed that the work that they choose will be allowed to them, but if they have had some opportunity to consider the work that they are doing and consent to doing it, it is amazing how they can get involved in the work and in helping other people even though they are not paid for it. To some extent they become rehabilitated.

Rodney N. Purvis

I would like to put forward two suggestions.

The first relates to what was said by Mr Briese in his paper, and especially at pages 96 and 97, where he outlines steps that might well be taken in New South Wales if a scheme of community service orders is introduced. The structure of the Committee there proposed would seem to be deficient in that no representative of legal practitioners is included. I would have thought that practitioners might well have a contribution to make in this field.

The matter of appeal from magistrates is the other aspect upon which I would like to make a suggestion. For some time the current position in the United Kingdom consequent upon the introduction of new provisions of the Criminal Law and the manner of its administration, especially whereby an appeal lies to a magistrate's court of appeal, has commended itself to me. Such a court is constituted by a Judge and two magistrates; the magistrates can over-rule the Judge. This form of appeal is one that may provide an answer to some of the criticisms that have been raised referable to the current form of appeal in New South Wales.

Finally, might I make some comment upon the matters raised by Mr Smith, especially as they relate to aliens who commit crimes in Australia and are thence subject to the jurisdiction of our Courts and penal institutions.

The Australian Branch of The Internation Law Association has recently promoted the setting up of an International Criminal Law Committee of the Association. One of the matters on the Committee's Agenda is consideration of questions of international parole and probation, and the devising of a convention dealing,inter alia, with a convicted person serving his sentence, or a portion of his sentence, in the country from which he came. The matter is presently very much the subject of consideration by the Committee of the Association.

Chairman

One of the matters that has not been seriously discussed in regard to these alternatives, such as community service orders, is the question of to what extent should they be generally available in the sentencing field. As I understand it they only have a limited availability. You can only give a community service order where you would give a sentence of no more than twelve months or two years, and one wonders why when there is to be an alternative to imprisonment there should be a barrier such as that; in other words, should not the type of alternative be related to the individual more specifically than to the crime that he commits? We all know that there are many situations where you feel that certain persons committing serious crimes would respond and would be effectively punished by this type of order but at the moment it is not possible to do it. The thinking seems to be that once you get beyond twelve months or two years gaol sentence, you forget about alternatives to imprisonment, and you are faced with either imposing a sentence or granting a bond.

John P. McAvoy

I was very interested to hear Mr Purvis question Mr Briese on the possible rehabilitative content in a Community Service Order Scheme.

I was in England at the time that the English programme was started and I remember that one of the most telling criticisms of the infant scheme was from a left wing group known as Radical Alternatives to Prison, which claimed that the Scheme was likely to become a "chain-gang" operation emphasising the punitive element. During the first two years of the scheme the

criticism was silenced because, in most instances, work of a "rehabilitative" nature was chosen for the offender, perhaps in response to R.A.P.'s criticism. An example suggested by R.A.P. and taken up by at least one of the schemes was work for a housing association providing accommodation for families in straitened circumstances. The offender would be ordered to assist in the conversion of a house into flats. On a number of occasions a further positive factor was introduced when an offender with long standing accommodation difficulties was offered a flat on which he had been working. Efforts are generally made in existing schemes to introduce tasks of a similarly rehabilitative nature.

A problem likely to be encountered in New South Wales is the small number of voluntary agencies in the State compared with other States and countries with Community Service Order Schemes. The programmes in California, for example, usually have at least 600 voluntary agencies on their books, and act simply as referral agents, directing the offender to report to one of these agencies for work and informing the court in the event of his non-compliance. Some English schemes report that a number of offenders continue to work with the voluntary agency after their sentence has expired. One scheme claims that, in one year, as many as 40% of Community Service offenders continued to work beyond expectations. I find this number hard to believe, but know personally that some offenders do this and have their lives changed as a consequence.

Finally, I should like to comment on the Chairman's reference to the need for an alternative to longer periods of imprisonment. In California, the measure is used mostly at the lower end of the range of possible sentences; very often as an alternative to a fine, even a very small fine. Judges impose orders in this way according to the current hourly wage; instead of imposing a fine of, say $30.00, an order would be made for ten hours service where the wage is $3.00 per hour. At the other end of the range, a sentence of 3,000/4,000 hours might be imposed for serious offences such as involuntary manslaughter, where the court feels that imprisonment is inappropriate. In England 240 hours is the maximum, and this is imposed only for serious offences. In both California and England, the effectiveness of long periods of community service is being questioned.

J. Parnell, S.M.

One aspect of sentencing in the lower courts which is highlighted by the figures in Mr Webb's paper is that lower courts deal extensively with recidivists in minor issues. These are people who never appear in the superior courts where in view of the serious nature of the offences large scale recidivism is just not possible. It is these minor matters which cause the problems. Sentencers ought to go about their task within the framework provided by parliament, is cases of unacceptable harm the parliament of New South Wales has sought to ensure that criminal actions do not occur by prohibition with appropriate sanctions in the case of unacceptable harm. A system of licencing is not involved with unacceptable harm.

Criticism is often made of lower courts for introducing a licensing system to unacceptable areas by the use of tariffs in non-tariff areas. One area recently referred to in the press was prostitution, others concerned were various lists in lower courts, motor traffic, corporate affairs which has been referred to, taxation, main road, etc. Dealing with the first there have been queries as to

why more severe sentences including imprisonment are not used in the case of recidivists in an attempt to ensure that some offences at least do not recur and thereby further the primary object of the government.

K. R. Webb, S.M.

The only comment I could make would be that there are a number of instances where a maximum penalty is fixed by the legislature, and, of course, on the principles that we are not expected to impose maximum penalties except in the worst possible case of the worst possible nature that one could envisage, the maximum penalty would seldom be availed of in practice. I think in answer to the prostitution question, it is unlikely to be discouraged by the maximum penalty provided by the legislature. In any case one would have to wait a long time to get a prostitute whom one felt was committing the most serious offence of soliciting that could possibly be imagined, and that is why we probably fall short of imposing maximum sentences. The legislature allows a sentence of three months for soliciting or a fine of $400.00 and I wonder if it would assist in any way to deter the prostitutes convicted by sentencing them to three months or whether it would act as a deterrent to prospective prostitutes.

His Honour Judge J. S. Cripps, Q.C.

I am a newcomer to the District Court Bench, and before I went there I did not have a great experience in the Criminal Law. It has been very apparent to me that in the sentencing process, that is that portion of the court activity that starts after the accused has been convicted and up until he is sentenced, almost no attention is paid to hearing the views of the victim. By that I am not referring to hearing the views of victims who may insist upon very heavy penalties being imposed, although I understand in the United States that it is not uncommon to be a factor to be taken into account. I can perhaps illustrate what I think is a difficulty by a case I was presiding over this week. Two young men were charged with and pleaded guilty to assault in a public lavatory, they were both represented, and the Crown presented the indictment. They accepted the plea. They both claimed that the person who was the victim of the assault had, in fact, made homosexual advances to them and as a result of that they were so outraged that they struck him and kicked him when he was down. I expressed the view that it seemed to be a little outrageous that this man whose name could appear in the newspaper, that is the victim, had nobody looking after his interests. Ultimately, as a result perhaps of non-judicial persuasion, I said I was going to take no notice of that being said unless the two accused were prepared to say so on oath and the man who was alleged to have done this was given the opportunity to be heard. After some adjournment that occurred, and I had no doubt in my mind that these allegations were wholly unfounded and were mere excuses to justify what could not otherwise be explained.

This merely illustrates that when the sentencing process is under way nobody in this system so far as I have noticed, pays a great deal of attention to the victim. The system seems to be that legal aid gives a certain amount of help to the accused. The Crown seems to adopt the view that there is something

not distasteful but a little improper in making any submissions or buying into this argument, taking the view that they should represent an aloofly impartial State. Somebody should be looking after the interest of the victims when there are allegations of this sort made which could be published in the newspapers and could be wholly damaging and yet were quite unfounded.

His Honour Judge A. Roden, Q.C.

I happened to be in the other court at Penrith when my young brother Cripps had this problem. It is the sort of thing that I had in mind when I referred in the paper to the desirability of having evidence on these matters. I would not take any notice whatsoever of any barrister or solicitor who from the Bar table told me that he was instructed that his client had been the object of homosexual advances made by a prosecution witness. I might have said "I find that very interesting", but it is not a matter that one can take into consideration. If a Judge has to exercise his discretion in the matter of sentence, or in any other matter, I maintain he must do it on either a true and correct version of the facts, or an incorrect version of the facts to which he has been misled by evidence which was untrue because someone committed perjury. There is no offence involved so far as I know in an accused person giving his solicitor or counsel false instructions, and there is nothing unethical in that solicitor or counsel conveying them to the Judge provided he tells the truth when he says: "I am instructed that..." So there is absolutely no sanction.

I do not know that I would go so far as agreeing that there should be some protection for the victims of the crime in the sense that Judge Cripps has suggested. With witnesses in any trial, or even with persons who may not be called as witnesses, things may be said about them that are not very pleasant, and you cannot have all such people represented. It is one of the hazards of being a citizen and having the courts of the type that we have that are open and where what is said is privileged. But, certainly, so far as ascertaining facts is concerned I think that this practice of instructions from the Bar table ought to be completely done away with and treated as being of no value whatsoever. So far as facts as close to the offence itself as the facts to which Judge Cripps referred are concerned, it is the duty of the prosecution to be ready to call evidence to meet any allegation which is not admitted. I would have no doubt had his trial gone on on a plea of "not guilty" that the victim would have been the first Crown witness, and under cross examination would have denied the allegations that were later put. I see no reason why if those allegations are to be put by the defence on sentence the Crown should not be there to meet them.

This also ties in with something else that I have suggested - and that is that where you know there is going to be a plea, or where there is an adjourned hearing after conviction for the purpose of sentence, there should be an exchange of information between the Crown and defence so that they will know what matters they wish to raise and are admitted so that they will not need evidence, and they will also know which are contested so that they know they do need evidence. I would certainly include among the matters that should be made available any pre-sentence report even if it is obtained on the direction

of the judge or magistrate, as it usually is. It always seems to be quite absurd that counsel, if he has a nice Probation Officer, is given the report five minutes before the court sits, otherwise only when the officer is already in the witness box. He should be in a position to say that he does not want the judge to see it; because it will invariably contain hearsay material, and if it is disputed then again it should be a matter for evidence by the people who are able to give direct evidence.

Les Calvitto, Solicitor

I look to the bulk of crimes, those payable by fines, and I would like to link two facts and come to a conclusion.

The first fact is that over 50% of receptions into custody are fine defaulters, and secondly it has been announced, but not yet proclaimed, that people can work off the rate per day (if that were increased to $25.00 per day). I therefore come to this conclusion. If it is the Bench's intent that it should be difficult for people to buy their way out and impose what I consider as a heavy fine, say $300.00, are we therefore going to see fines in excess of $1,000.00?

Joscelyne Scutt, Lawyer

If one can believe anything that one reads in the newspapers particularly in "Letters to the Editor" it appears that the public is currently concerned with disparities in sentencing in our courts. Therefore, I would like to address my remarks and questions to Judge Roden and to Mr Webb.

I would be very interested to know do magistrates and judges get together and discuss the sorts of cases that have come before them, and the sorts of sentences that they have given and go through the rationale for this decision.

The particular disparities that have been noted just to cite a couple of specific cases, one of a drug offence where persons it would have seemed would have got the lighter sentence receive the heavier sentence, another was a case of infanticide, and the third case was instances of murder where one person received a bond and the other person received life imprisonment in apparently seemingly similar circumstances.

K. R. Webb, S.M.

Magistrates have been conducting sentencing seminars for a number of years now, and they do discuss these problems of disparity in sentence. Sentences have also been made the subject of an outside study in this State through the system that we saw on the video tape. Dr Francis and Dr Coyle in their study came to the conclusion that there may be isolated matters but basically there is no real disparity shown in sentences in the magistrates' courts, and at our own sentencing seminars we have reached the same conclusion.

Obviously there will be disparity when you are talking about fining different people for the same offence. There is no way of avoiding it. Magistrates work within the limit of the statute under which the offence occurs, and in most cases it provides a very short term of imprisonment or a very nominal

sort of fine in this day and age. We are getting some different situations with the new pollution laws, but basically the top fines have been in the order of $400.00. When you consider the type of offences that people can be found to be guilty of such as negligent driving, it is not surprising that in some courts a class of negligent driving is penalized by a fine of $400.00 and in other courts a different class of negligent driving by a fine of $50.00 or perhaps even less. The facts are usually not sufficiently reported. I think that a reference to my paper probably answers the whole aspect so far as the magistrates courts are concerned.

His Honour Judge A. Roden, Q.C.

Let us assume for a moment that all judges who have jurisdiction with regard to murderers, drug importers or whoever they may be that you are concerned with, had a meeting or a series of meetings at which they put forward their obviously, from what you referred to, "different opinions". Do you want a vote to be taken and all judges to be bound by the majority decision? Do you expect some magic to be worked like the old mango tree justice - in consequence of talking we will all come to the same point of view? If you want the first of those things you will not get it so long as our judges as individuals are as independent as they presently are, and if you want the second then you will need some magic to bring it about.

The only way you are going to get rigidly standardised sentencing is by having fixed penalties for every offence. I do not think that is a very good idea, and I do not think other people would think so either. Inevitably, if you were now to ask this group of people: "Which do you think was the more sensible sentence, the one the "grannies" got in New South Wales or the one the airman got in the Northern Territory?" You are going to find that some will say one and others will say the other. If you have that difference of opinion amongst this group of people you are going to have the same difference of opinion among judges. There is no way you will remove that unless you have an enforced standardization by a rigid scheme from which you remove the area of discretion. Once you have that, then you have a situation in which no regard is given to the peculiar circumstances of each case, although almost every case has its peculiar circumstances. As I say in the paper, if you are passing human judgment on human conduct you are going to get vastly differing opinions, and if you want something that represents "the society" then you are going to get something that will reflect that variety of opinion that exists within that society. Judges do discuss sentences, usually judges of like mind get together to discuss the sentences of those with whom they do not agree. There are occasions, there has been one in the time that I have been on the District Court Bench, when there has been a meeting of judges of that level from all States, and sentencing was one of the matters that was discussed. We probably all benefited from hearing other points of view, but I do not know that any of us changed our points of view very much. You start with a piece of legislation that prescribes a maximum and, in the odd case, a minimum penalty, you have discretion within that area, you have an appellate tribunal that lays down principles that you feel obliged to follow when you cannot find a way of distinguishing the

particular case, but within those limitations you exercise your discretion. If you get bad decisions, as you inevitably will, it is because you have bad judges, as you inevitably will, but unless you take it out of the hands of human beings it is going to continue to be like that I am afraid.

Joscelyne Scutt

I think that one does first of all sympathise with the judge who does have to make his or her decisions in a vacuum. Secondly, I think that one does not have to go quite so far as saying there must be rigid sentences set, or that we must go beyond human beings to find the answers to setting penalties in criminal cases. I think a productive idea might be to try to formulate some sort of guidelines which, I shall admit, are general but that may give judges an indication as to the kind of penalties that might be appropriate in particular cases. If we do have bad judges then by requiring them to meet together and to think specifically about what they are doing in a communal situation, it might lead to them becoming less bad judges.

Greg Smith, Commonwealth Crown Solicitor's Office

Parliament decided that cannabis is like a pop gun compared to hashish being like a sub-machine gun, and allotted a ten year maximum sentence for cannabis and twenty five years for cannabis resin. He was facing ten years and got six and a half. The "grannies" had hashish, they were facing twenty five years, but were sentenced to fourteen years, and so comparatively they received about the same sentence.

L. Taylor, Lawyer

In relation to what has been said about disparity of sentences, perhaps I should outline the history of the case referred to earlier, Carngham's case, and point out that in that case, in fact, there was no disparity, but the reasons for the result might be questioned. The situation was that two Carnghams, father and son, were party to the importation of 900 grammes of heroin into Australia. The father pleaded "guilty" and came up for sentence before one judge who took the view that the father was not the principal offender, and sentenced him to what, in effect, turned out to be six months imprisonment. The son later came before a different judge who took the opposite view, namely that the son was not the principal offender but the father was, so he sentenced the son to what was, in effect, six months term of imprisonment making particular reference to the sentence imposed on the father. The result was that 900 grammes of heroin entered this country, each of the persons involved (and no other person was involved) received six months imprisonment, so a total of one years imprisonment was served. It would suggest there is no disparity of sentence but the result was arrived at because of one of the problems alluded to earlier, namely that on the evidence put before him each judge took a different view. I make two suggestions: firstly each offender should have come before the one judge and secondly, there should have been a closer examination of the evidence following the guilty pleas.

One other problem that I would like to refer to is something which concerns those of us who practise at the Court of Petty Sessions (119 Phillip Street). We do a great deal of social services prosecutions in which people

are prosecuted for making false statements on forms submitted to the department, and I think most people would agree that, in such circumstances, a term of imprisonment is not the appropriate penalty. A term of imprisonment may be imposed up to a period of six months but this is quite rare. The other alternative is the fine and this is the alternative that is used most often. The problem with this, of course, is that a great number of these offenders are receiving social services benefits. Their only source of finance are benefits from the Department of Social Security, so in fact the money goes around in circles at a great cost to the taxpayer and to the country generally. It seems obvious that some alternative sanction should be found in this situation.

John Dobes, Solicitor

It appears to me it is inefficient (if not putting the cart before the horse) to make submissions in relation to sentencing because I can walk into a magistrate's court and I do not know what information he is looking to see, I do not know whether he would prefer it in the form of a written reference or would want me to actually call a witness in support of my instructions. I do not know whether it makes a difference to him if the offender is wearing a tie, or has had a haircut recently. There are no guidelines put out to the profession about the sort of information that is relevant, you learn it by experience.

K. R. Webb, S.M.

I do not think our friend should be too upset. Fortunately he is appearing for people apparently in a non-custody situation. Magistrates are required to deal with people in custody situations in a great number of cases. We have them appearing in nothing more than a G-string on occasions as far as the males are concerned, and we have females who appear in dresses that are apparently very easily removed and they will, if they think it is going to attract attention, remove them. I do not feel that there would be magistrates who would take exception to the way an individual decided he was going to follow the current fashions. People are not dealt with on their appearance, except perhaps those poor unfortunate individuals who come before the court that the Salvation Army and others try to assist where magistrates definitely do look at them and know that the only answer is to provide them with some help.

We are dealing with people and we deal with people as we find them. It is not going to mesmerize a magistrate for long to have a young man before him, as we saw on the video tape, who was capable of changing his physical appearance overnight. Most of us have had enough experience with people to be able to see through that sort of veneer fairly quickly. If you present your client the way he appears in the community, he will receive as much consideration for his appearance so far as the penalty for the offence that he is appearing for is concerned as he would if represented completely out of character.

Unless the case hinges greatly around the character of your client I would suggest that a written reference would be accepted. Character is peculiar to certain types of pleas when it may be well worthwhile to bring someone along to give evidence on oath.

The following Proceedings have been published and are available for sale at The Government Printer, 55 Market Street, Sydney.

All enquiries to The Government Printer
P.O. Box 75,
Pyrmont, N.S.W. 2009 Australia.

1967	1.	Sentencing: Part 1, Fitness to Plead.
1968(1)	2.	The Adolescent and the Law: Treat or Punish?
1968(2)	3.	Computers and the Lawyer.
1968(3)	4.	Drug Abuse in New South Wales.
1969(1)	5.	Judicial Seminar on Sentencing.
1969(2)	6.	Sexual Offences against Females.
1969(3)	7.	Bail.
1970(1)	8.	Abortion.
1970(2)	9.	Male Sex Offences in Public Places.
1970(3)	10.	Sentencing Project: Part 11, Probation.
1971(1)	11.	Sentencing Project: Part 111, Parole of Prisoners Act, 1966.
1971(2)	12.	Social Defence.
1971(3)	13.	Road Safety.
1972(1)	14.	Psyshiatric Service for the Penal System.
1972(2)	15.	Armed Robbery.
1973	16.	Sentencing to Imprisonment - Primary Deterrent or Last Resort?
1973	17.	The Right to Silence.
1974	18.	Police Questioning and Confessional Statements.
1974	19.	Corporate Crime.
1974	20.	The Protection of Children.
1974	21.	An Examination of the Parole of Prisoners in N.S.W.
1975	22.	Proposed Amendments to the N.S.W. Mental Health Act (1958).
1975	23.	White Collar Crime - Can the Courts Handle It?
1975	24.	Motoring Offences.
1975	25.	Compensation and Restitution for Victims of Crime.
1976	26.	Parole in Practice in N.S.W.
1976	27.	Treatment of Children Associated with Crime.
1976	28.	Corporate Crime (No. 2).
1976	29.	Complaints Against Police.
1977	30.	Probation.
1977	31.	Bail (No. 2).
1977	32.	The Dangerous Offender - Prediction and Assessment.
1977	33.	A Diversion Programme for Drinking Drivers.
1978	34.	Rights of the Mentally Ill.

11.77 D. West, Government Printer

[illegible] a.