SENTENCES AND SENTENCING

Most people have views about sentencing and many people have strong views about individual sentences but unfortunately many of those views are uninformed. Public defenders, more than most people, are well aware of the difficulties and complications involved in the sentencing process. It is all too easy to look at it in relation to known facts but of course it is very important for all the facts to be known. The real complications arise when it is necessary to weigh against the known facts the motivations of the offender for committing the offence and the subjective features of the offender.

It is well established as a legal principle that sentencing is based on an instinctive synthesis applied by a sentencing judge. There is no better analysis of this than that made by Justice McHugh in the case of Markarian V The Queen (2005) 228CLR page 357. The instinct of the judge is guided by experience and an analysis of like cases over a period of years. Of course there is a lack of precision in that approach and that lack of precision encourages a criticism of the sentencing process and that in turn leads to attempts to rationalise sentencing and lay down specific rules to govern the sentencing process. A typical example of the legislature doing this is in the sentencing legislation and in particular section 21A of the Crimes (Sentencing Procedure) Act 1999. That section really does no more than set out principles that have been applied by judges for centuries. Such intervention by the legislature then leads to arguments about whether the sentencing process has miscarried for failure to comply with the statute and it is not surprising that the repeal of section 21A is being considered. But it is not only the legislature that becomes involved in this process. There is also a temptation for appellate judges to seek to set out rules governing sentencing which have the effect of limiting the discretion of the sentencing judge.

The instinct of the judges over the past 50 years when I have been involved in sentencing is not a constant instinct. For example, the introduction of standard non-parole periods undoubtedly caused a significant increase in sentences because the instinct of the judges was guided by the legislation. In a paper I delivered some years ago to the legal aid commission I examine the comparative imprisonment rates in Victoria and New South Wales and demonstrated that even though the respective populations of the state were not too dissimilar, the number of prisoners in New South Wales was about double the number in Victoria and the cost of the prison system in New South Wales had got to more than $1 billion per year. Undoubtedly standard non-parole periods were a significant contributor to this result. The decision of the High Court in Muldrock V The Queen (2011) HCA39, certainly had a significant impact on the accepted interpretation of legislation in New South Wales but by the time that decision was made there had already been a number of years of decisions of courts at first instance and courts of appeal that provided a completely different framework sentencing and different information to inform the instinct of judges.

For example in the period from 1965 to 1984 when I worked as a defence lawyer, sentencing patterns were quite different to the patterns which exist today. Then a life sentence was mandatory in cases of murder but the general practice was for lifers to be released on license after somewhere between nine and 12 years. In rape cases a common sentencing range was between five years and eight years with non-parole periods of between three years and five years and that included pack rape cases where the accused were normally members of motorcycle groups.

One of the key factors informing the instinct of the judge in recent years has been the excellent database kept by the public defenders. That is because the information contained in it includes short summaries of the facts of the cases and that makes it more useful to a sentencing judge than the more extensive statistics available from the judicial commission although those statistics are useful also. My advice to judges seeking advice about sentencing has always been to commence with the public defenders sentencing database and can I take this opportunity to pay tribute to the people who have prepared and maintained that database over the years. Ironically because much of the information relates to appeals and the decisions made in that context the sentences are perhaps more severe than would appear from a database of all sentences imposed at first instance.

The debate about sentencing in the public arena is very often driven by uninformed criticism and unfortunately that can lead to governments passing more punitive legislation. That has to be measured against the cost to the community of incarcerating a significant number of people. An interesting study about this question is action taken in the United States of America in the state of Oregon. There a problem emerged because the prisons were overcrowded and the Federal Court placed capping orders on the number of prisoners who could be kept in each prison. The government of Oregon solved the problem by setting up a sentencing Council with a mandate to establish a sentencing grid similar to the federal grid. The federal grid was set up because there was seen to be a need to provide a degree of uniformity in sentencing. In Oregon the sentencing Council was given a mission statement which was to protect the citizens of Oregon but within the capacity of the citizens of Oregon to pay. The practical effect of the Oregon guidelines was to reduce sentences.

By referring to the system in the United States I do not intend to suggest there are any similarities with the system in Australia. Indeed quite the contrary. In many ways Australian society is very like the United States society and there is a temptation for politicians and the public to be influenced by the American experience, for example, the three strikes legislation. But in reality the area of crime and punishment is one area where the social dynamics in Australia are quite different from those in the United States. There is a much more significant underclass in the United States than in Australia and there is a very significant overrepresentation of Afro-Americans in their prison system which is vastly more significant than the problem we have with the overrepresentation of aborigines in our

system. In addition to that difference the Social Security safety net in the United States is significantly less than in Australia and poverty is certainly a significant cause of crime. If we are to look elsewhere for a comparable Society it would be far more appropriate to be looking at the European systems and unfortunately they are less well-known in Australia.

The Administration of Sentences

This is governed by the Crimes (Administration of Sentences) Act 1999. Where the sentence is three years or less and a non-parole period is fixed the release to parole is automatic. The question I wish to consider is where the sentence is longer than three years and where the release of the prisoner is at the discretion of the State Parole Authority. I have not been able to obtain statistics as to the percentage of prisoners in this category who are released at the expiry of their non-parole period. The system works on the basis that as the release to parole date approaches the matter is considered by the parole authority and that authority "must not make a parole order for an offender unless it is satisfied on the balance of probabilities that the release of the offender is appropriate in the public interest". In the case of serious offenders, the parole authority must not make a parole order unless the Serious Offenders Review Council advises it is appropriate for the offender to be considered for release to parole unless the parole authority can find exceptional circumstances.

It can be seen the legislation takes a negative approach to release to parole. The parole authority makes a decision in closed session and if that decision is questioned by the Commissioner or the prisoner the matter is heard in an open hearing. In making these decisions both the State Parole Authority and the Serious Offenders Review Council are assisted by detailed reports kept within the prison system by prison officers, social workers and psychologists who deal with the prisoners. There are programs provided within the prison system to address common issues such as drug and alcohol addiction, propensity for violence and deviant sexual behaviour. Where prisoners are required to do these programs they do not progress in their classification unless they satisfactorily complete these courses. If parole is refused the next consideration by the parole authority is deferred for 12 months unless the prisoner can demonstrate manifest injustice in the meantime.

The classification system for male prisoners ranges from A2 to C3. As prisoners reach a C2 classification they get to a point where they can be given greater trust and ultimately allowed to work outside the prisons, at first under supervision and then unsupervised. It is generally considered by the parole authority to be highly desirable that prisoners who have been in custody for a significant period should be able to demonstrate they have not abused the trust placed in them and this is a significant factor for consideration when the question of their parole arises. Another key factor considered is offences committed in custody against prison discipline. The most common offences are possession of mobile phones, possession of drugs or assaults.

The Serious Offenders Review Council supervises serious offenders in the prison system. A broad but not exclusive definition of a serious offender is someone who will be in custody for at least 12 years. The court or the Commissioner for Corrective Services can ask for any prisoner to be treated as a serious offender. The function of the Review Council is to provide advice and recommendations to the Commissioner with respect to the security classification of serious offenders, the placement of serious offenders and developmental programs for serious offenders and the Council also provides advice on the classification of high security inmates, the reclassification of escapees, the pre-release leave of public interest inmates and it also constitutes hearings for appeals against segregation orders.

In more recent times legislation in the form of the Crime ((High Risk Offenders) Act of 2006 has made provision for continuing supervision orders so that even if the prisoner serves the full term release can still be made subject to supervision. There is also provision for extending the custodial period for up to 5 years. These applications are made to the Supreme Court and subsequent applications can be made for a further five year term. This legislation has fundamentally changed the meaning of what a sentence is in New South Wales. In the circumstances defined by the Act every sentence has the potential to be an indefinite sentence. The addition of these provisions also may have an impact on the decision to release to parole. A normal consideration when a prisoner is approaching the end of the head sentence is that it is desirable to release on parole so there is at least some period of supervision. Now that period of supervision can be approved by the Supreme Court after the full term has been served.

It can be seen there are many ways in which a prisoner can fail to reach a level of behaviour and rehabilitation such that release to parole can be guaranteed. One anomaly in the system is that prisoners serving federal sentences do not fall under the care of the State Parole Authority. The question of their release is determined by the Attorney General for the Commonwealth. The past history of that indicates it is only rare that these prisoners are refused release to parole at the expiration of their non-parole period.

Another difficulty with requiring prisoners to undertake rehabilitation programs is that the rehabilitation programs are not always available in particular prisons. This year will see a new series of programs referred to as the Equips. It is hoped that the provision of these new programs will lead to greater availability of programs to prisoners who need to demonstrate their rehabilitation in the period coming up to the expiry of the non-parole period.

From a defence lawyer's perspective you may then consider what is in the best interests of your client when it comes to the sentencing of prisoners serving State sentences. It is common for defence submissions to be made on the basis that there should be a reduction in the statutory ratio to allow for a longer period of supervision and a lesser period actually

in prison. One aspect of that you should consider is that no parole order is supervised past three years. The submission is also predicated on the assumption the prisoner will be released at the expiration of the non-parole period. On the other hand if release at the end of the non-parole period does not occur then your submission may very well lead to the prisoner serving a longer term than otherwise.

This is admittedly a very difficult matter for judgement at the time the prisoner is being sentenced but they are factors which you need to consider. There are limited options to avoid the problem. If there is more than one sentence to be passed it is always possible for a sentencing judge to impose a fixed term in relation to the first offence and subsequent offences and then fix a sentence of three years with a short non-parole period at the end. That can work for sentences up to about 12 years where the first sentence or sentences amount to a fixed term of nine years with the last sentence being one of three years with a non-parole period of one month. That does slightly infringe the practice about the statutory ratio for a non-parole period but slightly lesser sentences would not.

Considerations such as these give rise to the question as to how you address the problem if you decide you need to. It appears to me the only way is to raise the specific sentence you are seeking with the judge. There has often been reluctance to do this. It was always my practice as a defence lawyer to address the question of sentence with some degree of specific proposal rather than making general submissions. I found that nearly all offenders had a realistic view of what the sentence might be and indeed most of their expectations were for a higher sentence than I expected to aim for (in saying that I acknowledge that the ground rules have changed because sentences today are more severe). As a judge I believed in saying upfront what I thought the presumptive sentence might be and seek submissions about it. I found a discussion about a particular sentence shortened the sentencing proceedings quite significantly. It does however depend on the personalities involved.

Unfortunately this all means that the task of the defence lawyer is getting ever more complicated.

I wish you well.