SENTENCING – GOOD BAD AND INDIFFERENT

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1. From a judicial perspective a good sentence is one providing a just outcome – that is a just sentencing disposition as measured against the offending conduct. Crucially, a just outcome also seeks to underpin the Rule of Law by fulfilling a role allocated to sentencing within those legal structures promoting the Rule of Law. The particular promotion of the Rule of Law given overwhelming prominence in sentencing is best future protection of persons and property in society.

2. A bad sentence not only fails to provide a just outcome as described above, but contributes to undermining the Rule of Law by facilitating or contributing to delinquency contrary to the Rule of Law, and in particular, the best future protection of persons and property in society. My concern is that much of the sentencing undertaken in our courts, by conscientious judicial officers who would consider themselves men and women of good will, does in fact, fuel continued criminal disobedience to the Rule of Law.

3. An indifferent sentence is one that falls somewhere between these two markers.

4. The approach to a good sentence from the litigants' perspective, both prosecution and defence, should not seek to differ all that much from the judicial perspective just outlined. There may be room for a difference of opinion in individual cases as to what may constitute a just outcome, and the mechanisms by which a just outcome may be achieved. For this reason there is not only room for advocacy but also a necessity for it.

5. In so saying one can hope those advocating the prosecution case will recognise that not all criminal offending requires, punishment, incarceration, general deterrence, or consistency in sentencing. Indeed, research is showing in many cases emphasis on these matters may produce unintended counter productive consequences.

6. Likewise, one would also hope that all defence advocates will recognise that not all criminal offending can be justly deal with by the granting of a s.10[2] discharge or bond; or by refusing to incarcerate persons guilty of very serious criminal conduct.

7. What needs to be recognised by both sides is that accountability for criminal offending may take many forms. The skill of the advocate must be focused on identifying an appropriate form or manner for an offender to account for the criminal conduct that is the subject of sentencing. Too many advocates on either side approach their task unprepared (may I have a few minutes your Honour) – without any clear aim (a matter entirely for your Honour) – and without evidence to support their aim (your Honour can draw an inference).

8. Until the last decade, or perhaps two decades, little had changed in general sentencing assumptions that had stood for centuries. The punitive paradigm of

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[1] The views expressed in this paper are my own views. They do not purport to reflect the view of the District Court of NSW or any other judge of that court.
[2] Crimes (Sentencing Procedure) Act 1999

sentencing and the assumptions underpinning it are a legacy from our common law heritage. An advocate for a good sentencing outcome may do well to consider whether some of those assumptions have any validity in the particular sentencing exercise in which he or she is engaged.

9. There are numerous assumptions in sentencing, which although they have stood the test of time, are now increasingly under challenge. In any sentencing determination the appropriate prominence of these assumptions in the sentencing exercise may determine whether the sentencing is good, bad or indifferent.

10. Four assumptions I wish to focus on are:

- In all criminal offending the perpetrator has a mental element, mens rea, constituting a greater or lesser reflection of evil and malice.
- Punishment is always an effective measure in reforming criminal offenders.
- Incarceration in prison is always an effective mechanism for reforming criminal offenders.
- General deterrence, as a factor in sentencing, is such an effective method of deterring others from offending, that a component of sentencing should nearly always include a weighting for general deterrence.

11. Judicial officers, and consequently society have cherished these assumptions for centuries. A moment's thought would reveal that each assumption has rarely, if ever, been supported by direct or expert opinion evidence in court. The irony of that proposition should not be lost on lawyers who understand how the proof of their case depends upon the tender of relevant and compelling evidence.

12. Other professions have recognised false assumptions in their workplace; inherited from times long gone bye. Engineers have discovered alternative methods of transport from the horse and buggy or the five-mast schooner. Travel across water and land and in the last century air and rail travel, have seen incredible transformations. Communication has changed from horseback post to wireless transmissions into a variety of media forums. Entertainment has moved from the Shakespearian stage to the mobile phone screen.

13. Doctors have moved on from applying leeches and portents to sophisticated micro-surgery and gene manipulation. Architects have moved from punts and wooden bridges, to using cement, steel and glass in constructing multi-lane highway bridges and skyscrapers. The mindset changes that occurring in other professions comes from the Stephensons, the Wrights, the Marconies and other inventors rejecting accepted assumptions in the name of progress.

14. The legal profession should cringe as it considers that the brilliant legal minds of the past have accomplished so little by comparison with other professions, in their approach to the criminal law and in particular to sentencing. The doctrine of precedent has much to answer for – it demands hindsight, and being bound by the past, when other professions are looking to make changes for and adapting to the future. The legal profession has survived on constancy and consistency. An offender from the Eighteenth Century England would have little difficult recognising a criminal courtroom, the judge, the robes and unpreparedness of the advocate, the flow

of proceedings, the rhetoric, the results associated with sentencing including the harshness of gaol architecture and gaol life.

15. In a Twenty-First Century sentencing hearing there surely is room to challenge old assumptions. Indeed, they should be challenged if continued reliance upon them produces sentencing outcomes that in reality do not promote the Rule of Law.

16. There is a growing body of evidence and research compelling a view that strict adherence to these assumptions is, or may be counter productive insofar as the future protection of person and property from the offender are concerned. Indeed, in areas having concentrated incarceration rates these assumptions are producing criminogenic factors inviting other community members (usually males) to imitate their predecessors' journeys to the gaol door as opening for them a way to a rite of passage.

Challenging the universality of assumptions.

- **In all criminal offending the perpetrator has a mental element, mens rea, constituting a greater or lesser reflection of evil and malice.**

17. Mens rea (or guilty mind) is a doctrine based upon the notion of man's sanity and capacity to exercise free will. The principle of mens rea depends upon a proposition that an offender can reason with a moderate degree of calmness so as to know the nature and quality of his criminal act and recognise that his criminal action is wrong. Putting to one side those who have a mental illness defence, three propositions apply, namely: an offender can reason with a moderate degree of calmness so as to know the nature and quality of his act; an offender can recognise the wrongness of the criminal act; and then with deliberate intent or aware recklessness undertake the criminal behaviour. That is, the offender undertakes his criminal conduct with a mind knowing guilt. Thus an offender had a knowing deliberateness, or aware recklessness that carried some degree of moral reprehensiveness.

18. The Twenty-First Century is a time when social and behavioural scientists have much to contribute to sentencing. Judges are also being assisted or perhaps challenged in sentencing by the work of psychologists, psychiatrists, neurologists and other brain specialists who are calling into question assumptions upon which the principles and doctrine of mens rea and criminal malice are based[3]. As more is learnt about the anatomy of the brain and how it functions; about genetic predisposition; about addiction; about the impact of environmental factors upon emotion and mental health well-being, about the impact of chemical imbalances in the brain, consequences of a shrinking of the brain, a greater understanding of compulsion factors in behaviour, including criminal behaviour is emerging.

19. In many sentencing presentations it becomes important for the advocate to analyse for the court, and to support such analysis by evidence, the quality of the mens rea and/or malice involved in the offence. Even where there is planning – such as fraud cases, that planning may be capable of some mitigation if it is compelled by, say, a gambling addiction – and there is relevant evidence as to the addict

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[3] Experts in brain functioning are coming to understand mental drivers arising from addiction, and chemical imbalances within the brain that may be impacting upon behaviour in so many ways – sometimes predictable, sometimes not.

gene/behaviour and its impact upon the cognitive and other functioning mechanisms in the brain.

Punishment changes behaviour – but is it for the better?

- **Punishment is always an effective measurement in reforming criminal offenders.**

20. Prosecutors, almost invariably, and defence counsel too commonly, accept that punishment is a most effective, and too frequently, the only mechanism for reform of the offender.

21. This all seems a hangover from times past. It was once fashionable to teach the parishioners and children punishment is the choice of God for evil conduct to be found in hell and purgatory. For that reason in times past, those who sat in sentence for crime[4] saw themselves as doing God's work. This is not the venue to discuss the theological correctness of a proposition that punishment of hellfire and brimstone is the choice of God for evildoers – save and except to say the evidence for it is scant and mostly hearsay. Those raised Catholics and I daresay others were told in youth that wrong-doing would result in everlasting punishment. So ingrained in the collective psyche is this notion that the consequence of discovered wrong-doing is punishment, that it has always been acceptable, nay expected, that criminal wrong doing should also be met by punishment. In this day and age it is the shock-jock, the professional spruiker of law and order, who feigning righteousness indignation, gives voice to an insatiable appetite for the punishment of others; residual ethics suspended in a callous pursuit of audience share and advertising revenue.

22. Surely, in the Twenty-First Century we should be asking whether punishment is always the right sentencing purpose response to bring about a just outcome for criminal offending by a particular offender. The answer to that question would be informed by:

1) What precisely it is the overall objective the criminal justice system is trying to achieve when a wrong doer is sentenced? Is each sentence to be seen as a one-off, or part of a broader mosaic?
2) How is the overall objective best achieved?
3) Is the punitive sentencing paradigm achieving that:
    a) Completely;
    b) in part;
    c) not at all.
4) If each sentence is part of a broader mosaic, where does this offender before this Court fit into this mosaic?
5) To what extent are the personal rights of the offender to be sacrificed for the distal vision of the overall objective?

[4] In the early days of common law where clergy including abbots, bishops and archbishops presided in Courts.

23. There is a well-known High Court purple passage on the purposes of "criminal punishment".

> The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."[5]

24. One of the difficulties with a punishment outcome – particularly one involving full time imprisonment is that it comes at a cost of foregoing or accepting serious compromise on other recognised aims of sentencing such as rehabilitation and long term protection of the community. This may be the tension the High Court refers to when it says "*sometimes they point in different directions"*.

25. Of course, there can be no doubt many crimes – particularly in the District and Supreme Courts jurisdictions merit punishment, and sometimes condign punishment.

26. The Crimes (Sentencing Procedure) Act 1999 sets out, the purposes of sentencing[6] in N.S.W.

> The purposes for which a court may impose a sentence on an offender are as follows:
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> (a) to ensure that the offender is adequately punished for the offence,
> (b) to prevent crime by deterring the offender and other persons from committing similar offences,
> (c) to protect the community from the offender,
> (d) to promote the rehabilitation of the offender,
> (e) to make the offender accountable for his or her actions,
> (f) to denounce the conduct of the offender,
> (g) to recognise the harm done to the victim of the crime and the community.

27. Arguably there are other purposes of sentencing – such as healing, restoring or achieving physical[7] and emotional well-being and closure, which do not appear in the legislation. A more punitive purpose of sentencing not itemised in the section is incapacitation.

28. It will be seen that the NSW statute has picked up all of the purposes of "criminal punishment" set out in *Veen No. 2* except "retribution" as purposes of sentencing. It has recognised "adequate punishment", accountability, denunciation, and the recognition of harm done to a victim as other purposes of sentencing. There appears

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[5] Veen v The Queen [No.2] (1987- 1988) 164 C.L.R. 465 at 476. One cannot help but wonder whether the High Court's view of the purposes of criminal punishment may have altered had it had received evidence of current social and behavioural research into the effects of punishment, and in particular incarceration?
[6] S.3A
[7] For example Drug Courts, and the Compulsory Drug Treatment Program.

to be a difference in approach from the common law purposes of punishment as set by the High Court, and purposes for which a court may impose a sentence.

29. The point to be made is there are six purposes of sentencing nominated in the NSW statute, which are not included in the High Court's concept of "criminal punishment".

30. Strictly read, the passage from High Court places reform as a by-product of punishment – and achieved through punishment, competing with the other four nominated potential by-products of punishment. Such a result may well depend upon the form the punishment takes, but for those 18,000 offenders annually for whom full-time custody is chosen, reform and, its sequela – the long term protection of the community from the offender are less likely to be consequences of those 18,000 sentencing exercises.

31. A serious, but rarely ventilated issue in sentencing, is an understanding that sentencing is more akin to a mid-point than an end point in the administration of criminal justice. This may be important if one accepts that a just sentence seeks to promote the Rule of Law. The end point of the criminal justice system for an offender is the day he finishes his imprisonment, suspended sentence, community service, bond, fine payment or other sentencing disposition imposed upon him[8]. Surely, it is at the end point that the efficacy of the sentence should be measured and compared with others.

32. As earlier observed, lawyers by virtue of their knowledge, skill and training look backwards at past practice, past precedent and the like. All of that is good. But the condition of an offender at the final point of his/her accounting for offending conduct is not without significance. After all – it is at that point that one can really determine whether the sentence imposed was a just sentence as described in the opening paragraphs. An advocate, who imparts such an overview when targeting the need or otherwise of punishment, is more likely to contribute to a good sentencing outcome.

"Lock 'em up and throw away the key" – is no answer

- **Incarceration in prison is always an effective mechanism for reforming criminal offenders**.

33. Seventy two year old Marcus Einfeld, recently released from prison told Jo Casamento[9]

> "Look whatever I have learned from the [custodial] experience, it has taught me a lot that I would like to impart … to the legal community and other people because the people of NSW have to know we have a 74% recidivism rate and in Victoria it's 25%.

[8] I use the male form of the third person when referring to offenders in this paper. Males form a large majority of offenders. No offence is intended to the female gender by their exclusion.

[9] Journalist for The Sun-Herald; September 4, 2011 at p6.

There are 10,000 people in the system but only 1,000 should be there. They are not dangerous to the public. They are young people who get into drugs or they have driving offences.

34. While I have some reservation as to the precision and source of his recidivism rates in both States[10], I do accept that it is approach two out of every three prisoners qualifying as a recidivist offender in NSW. Einfeld may be right that it is closer to three out of every four.

35. On either basis, incarceration is demonstrably counter-productive as a reforming[11] or rehabilitation[12] instrument. Assuming a nexus between "rehabilitation" and "protection of the community from this offender"[13], an advocate seeking a just sentence should seek to make aware those passing sentence that imprisonment, if called for, should be imposed on an understanding that the offender standing for sentence has a greater than 50% chance of revisiting the prison sometime after completing the sentence being currently imposed. Again, rhetoric from an advocate unsupported by evidence or learned articles, is likely to be shut down very quickly. Historic and entrenched assumptions are unlikely to be moved only by rhetoric.[14]

36. A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate[15]. A moment's thought should make plain two reasons why imprisonment must be imposed only after the court is satisfied no other penalty is appropriate.

37. Firstly, because Courts should only restrict the liberty of the person – an inherent right of all persons – when there can be no justification in law for that liberty continuing. Secondly, there is a greater than 50% chance the incarcerated person will be worse off at the time of release than he was upon the day of imprisonment. A government has no right to impose upon a citizen physical, mental and emotional detriment, even if he be a convicted criminal unless the government's cause is of greater value than the cost to the incarcerated citizen[16].

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[10] The Victorian Sentencing Advisory Council referred to a 2007 study on recidivism showing that of those released from prison in 2002-2003 over 34.7% were convicted of further offences and returned to prison within two years. The highest proportion of returning offenders was in the 17 – 20 years age group with 55.7% of them returning. If the 2 year period is set aside the figure becomes 49% "had known a prior sentence of adult imprisonment. The Sentencing Council's source for the first was Holland, Pointon and Ross, 2007 p.15; and for the latter Australian Bureau of Statistics 2010b, p.37.

[11] *Veen No 2; ibid*

[12] S. 3A Crimes (Sentencing Procedure) Act 1999.

[13] S. 3A (c) Crimes (Sentencing Procedure) Act 1999.

[14] Relevant information may be available from BOSCAR, annual reports of the Corrective Services, and bodies such as the Parole Board, and Serious Offenders Review Council. No doubt there are several research projects being funded by Law faculties at various universities.

[15] S.5 Crimes (Sentencing Procedure) Act 1999.

[16] While not binding in Australia, Plata v Brown 563 US 2011 (23rd May 2011) is instructive. In that case the United States Supreme Court confirmed an ordered made by an intermediate three-judge court requiring the release of 46,000 Californian prisoners (30% of the then California prison population). The basis of the order was that the impact of overcrowding was the primary cause of a denial of basic sustenance including adequate medical care resulting in a Bill of Rights violation. The Courts noted an absence of adequate medical and other services and the incapacity of the State to remediate the problem constituted cruel and unusual punishment. The relief sought was narrowly drawn, extended

38. It is no surprise the chances of the offender emerging worse of are high. Possibly as many as one in three prisoners has a mental health problem, a condition which makes him less likely to be able to focus on, or achieve, rehabilitation than those not suffering from a mental health disability. Substantial numbers of prisoners have impaired or compromised intelligence. Within a gaol setting rehabilitation will likewise be difficult for them.

39. Access to adequate medical and psychiatric care is compromised by enormous demand and limited supply. Access to programs for serious problems e.g. drug addiction, is tokenistic, totally inadequate and conducted in an environment so different from life outside as to be hopeless – with nil or insignificant post release follow up. Indeed, it is now recognised that programs conducted in prison for prisoners are far more effective when conducted with the same persons in the community[17].

40. Full-time incarceration may itself become a cause of depression and other mental health problems. It can leave life long scars on prisoners. In the last twenty years there is greater understanding of post-traumatic stress disorder, and conditions likely to cause it. There is every reason to accept that gaol conditions could be included as one such likely cause[18].

41. Prison places offenders in a brutally harsh environment. Ugly buildings lacking in any architectural merit, fittings such a heavily barred doors that clang with every opening and closing, the presence of para-military personnel, single sex inmate population, and a mixture of violent, paranoid, emotionally troubled and difficult to manage prisoners are all constant daily features of most custodial settings.

42. Decision making in respect of coming or going, major purchases, employment choices, relationship choices and interaction with family and children choices is severely compromised – notwithstanding the inherent positive value associated with many of them. Replacing choices is a peer pressure rooted in gaol culture, reflecting various anti social values reinforced by an ethos of gaol brutality from other prisoners, and on occasions prison staff.

43. Research in more recent years has looked at the effect of imprisonment on the 'million dollar communities' in the United States. These communities (usually seriously impoverished and dysfunctional) gain their title from the more than million dollar cost of incarcerating substantial numbers of members of that community. The Federal Attorney General, Robert McClellan referred in a recent speech[19] to an

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no further than necessary and sought release of prisoners through parole or sentence reform. The Courts found that the various available methods of reducing overcrowding – good time credits, diverting prisoners to community based programs would have little or no impact upon public safety. Release of prisoners was set to be completed with a two year deadline. Release would target particularly those prisoners not receiving adequate medical and psychiatric care – but other prisoners were also available for selection.

[17] Assistant Commissioner Offender Services and Programs, Department of Corrective Services; Exchanging Ideas II; conference paper 11th September 2011.

[18] Plata v Brown *ante.*

[19] McClelland R. Attorney-General (Cwlth); *Vigilance against Injustice in the Justice System;* Speech, 25th Lionel Murphy Lecture; 7 September 2011.

analogous reaction noted by Professor Dave Brown in respect of the Australian scene. He said:

> In an excellent article published in July last year, Emeritus Professor Dave Brown from the University of New South Wales (also the Chairperson of the Lionel Murphy Foundation) argues that incarceration has "at best, a modest effect in reducing crime"- but that effect is short term.
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> He argues that in fact, excessive imprisonment rates may actually cause more crime in the long term. Professor Brown's point is that prisons can, in effect, become 'schools of crime' which result in the fracturing of family and community ties, hardening and brutalization, and poor mental health outcomes for those who have been incarcerated.
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> And after an offender is released they are likely to have lost essential life skills; have an increased reliance on criminal networks built up in prison; and experience reduced employment opportunities and access to social programs.
>
> He also points to a study that shows there may be a 'tipping point' for certain communities where once incarceration reaches a certain level, crime in that community will only increase. How is this 'tipping point' reached? Professor Brown argues that
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> > *"High rates of imprisonment break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce further income potential, and engender a deep resentment toward the legal system. As a result, as communities become less capable of managing social order through family or social groups, and crime rates go up*."
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> We know that this is currently what is happening in our Indigenous communities. And we must turn this around. If we are to address crime and victimization, we need to commit to a longer term approach and address the causes of offending and – very importantly - reoffending. (Paragraphing and some punctuation supplied)

44. There is a little relied upon section in the Crimes Act 1914, which, at least in Commonwealth Offences gives scope to a advocate to deal with the impact of custody as relevant to sentencing. It provides that the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to the offender under the sentencing order the court intends to make[20]. Unfortunately, it does not require judges to refer to this in their reasons for sentence. Arguably it is important that judges do this in all sentencing proceedings. To do so would have the effect of keeping in judges' minds the consequences of each imprisonment set by them.

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[20] S.16A (3) Crimes Act 1914 (Cwlth).

45. It is surely arguable that s.5 (1) C(SP)A[21] is not only about circumstances of crossing a threshold by determining to impose a sentence of imprisonment. Arguably there is still work for the subsection to do once a decision to imprison is made – in terms of the quantum of imprisonment to be set; the making of a parole order, use of a finding of "special circumstances"[22] and the availability of other sentencing options to mitigate the sentence of imprisonment.

46. Of course, most sentences of imprisonment result in full time custody. There are, however, other options where a sentence of imprisonment is imposed, but the manner of serving the sentence (e.g. home detention), or indeed the very serving of the sentence may be mitigated. Intensive Corrections Orders are founded upon an order of imprisonment. Suspended sentences are likewise founded upon the existence of a sentence of imprisonment.

47. Even in circumstances where an offender is to be incarcerated, there are still options to be considered that will not only mitigate the imprisonment, but also focus upon rehabilitation – the Compulsory Drug Treatment Program, the Specialised Young Male Adult Offender's Program[23], immediate classification to a minimum security prison. Consistent with the purpose of s. 5(1) is an aim that any term of imprisonment requiring fulltime custody should set the custodial portion of the sentence at a point that is the least the law requires, subject only to Ss.44 – 46 Crimes (Sentencing Procedure) Act 1999.

General Deterrence – real? or hoped for?

- **General deterrence as a factor in sentencing is such an effective method of deterring others from offending, that a component of sentencing should nearly always include a weighting for general deterrence**.

48. For the purposes of this paper I am happy to accept the concept of deterrence relied upon by the Sentencing Advisory Council[24] of Victoria.

> Deterrence can be described as the prevention of crime through the fear of a threatened – or the experience of an actual criminal sanction. General deterrence is aimed at reducing crime by directing the threat of that sanction at all potential offenders. Specific deterrence is aimed at reducing crime by applying a criminal sanction to a specific offender [standing for sentence], in order to dissuade him or her from reoffending.[25]

49. These two sentencing mantras appear to have been incorporated into sentencing dogma without a skerrick of evidence or research to support either notion of deterrence as being effective in so far as imprisonment is concerned.

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[21] Crimes (Sentencing Procedure) Act 1999

[22] See s.44 (2) Crimes (Sentencing Procedure) Act 1999.

[23] There is available a Department of Corrective Services Correctional Centre Program Guide listing the various Custodial Centres and programs available in that centre. Googling Department of Corrective Services Programs is another source of obtaining some information on what is available.

[24] Sentencing Matters – Does Imprisonment Deter, a Review of the Evidence; Sentencing Advisory Council (Vic); April 2011, p.1

[25] *ibid* at p.22.

50. In April 2011, the Victorian Sentencing Advisory Council, in respect of specific deterrence, relying upon available research, advised that the research suggests imprisonment has either no effect upon reoffending or a criminogenic effect. There were, it said, a number of reasons for the failure of the imprisonment experience to deter inmates from reoffending. Among them were acknowledgements that imprisonment may create a criminal learning environment; may label and stigmatise offenders and may be an inappropriate way to address the underlying causes of crime.

51. In respect of general deterrence, the Victorian Sentencing Advisory Council said:

> The evidence from empirical studies suggests that the threat of imprisonment generates a small general deterrent effect. However the research also indicates that increases in the severity of penalties, such as increasing the length of imprisonment do not produce a corresponding increase in the general deterrent effect…
>
> The research shows that imprisonment has, at best, no effect on the rate of offending and is often criminogenic, resulting in a greater rate of recidivism by an imprisoned offender compared with offenders who have received a different sentencing outcome.[26]

52. The Victorian Sentencing Advisory Council is not alone in being critical of the widespread application of general deterrence in adult sentencing. As early as 1987 the Canadian Sentencing Commission seemed to have two complainants – firstly, a scepticism as to the legitimacy of an argument that general deterrence worked. Its second complaint was that it drove sentences upwards thereby calling into question the proportionality of the sentence to the harm generated by the offence. [27]

53. The Victorian Sentencing Advisory Council argues there is a conflict of purposes arising from a tension between the sentencing principle of proportionality, and purpose of general deterrence. Proportionality requires that the overall punishment must be proportionate to the gravity of the offending behaviour[28]. General deterrence, on the other hand is focused upon delivery of a threat to other would-be offenders sufficient to discourage them from offending. If general deterrence is requiring a "loading" of the sentence this can conflict with proportionality by raising the total tariff so that it becomes disproportionate to the harm generated by the offence.

54. General deterrence competes with the notion that justice is individual[29]. General deterrence is a threatening message aimed at unidentified would-be offenders somewhere out in the vast community who otherwise play no part in the proceedings. Yet, sentencing litigation is conducted upon a basis that

a) sentencing proceedings are instituted to resolve, between an offender and the executive branch of the State, the nature and extent of offender-specific criminality, aggravating and mitigating features so that an appropriate sentence can be given to the offender;

[26] *ibid* at p.23
[27] *ibid* at p. 10.
[28] Veen No.2 v The Queen *ante.*
[29] Kable v DPP (1995) 36 NSWLR 374 at 395F.

b) only the parties to the sentencing litigation have right of appearance and right to be heard; and
c) the views of other persons (including the victims) as to the criminality, aggravating or mitigatory features of the crime are inadmissible in evidence because their views are not relevant.

55. While sentencing proceedings are heard in public – that is about accountability of the Court through the administration of open justice. Most court hearings have few spectators, if any. Judges do not write their judgment for or to the public – but rather for the litigants, understanding the most likely readership includes the victim, corrective services, and the appeal courts, and perhaps practitioners interested in consistency in sentencing so that all can understand the reasons relied upon by the tribunal for imposing the sentence. This is consistent with litigation being confined to the individual.

56. True, many judgments of the Supreme and District Courts are published, more so these days than was the case 5 years ago. Even so, the level of circulation of judgments is miserably modest by comparison with other forms of media publications.

57. For general deterrence to be effective two essential steps must need to be in place. Firstly, the sentence quantum constituting the deterrent message must reach the would-be offender. He must know about it. Secondly, the would-be offender must understand, not only that the sentence imposed is meant to inform him of a penalty appropriate for the specific kind of offending conduct and offender – but also that, even though his personal circumstances are likely different, he too will be liable to a penalty of that order if he commits a like offence. That is that the message applies to him.

58. Yet the language of the judgment is invariably expressed in the passive voice, or sometimes addressed personally to the offender. Most frequently the judgment makes no mention of any would-be offender. Sentencing remarks such as "*I have taken general deterrence into account*" are not addressed to any third person – but to the parties and appeal courts.

59. Past cases establish that the criminal appeal courts throughout Australia regard the provision of general deterrence in sentencing as one of the more purposes of sentencing. Assuming it is a valid function of the Court to promote as vigorously as it does a policy of "Do not commit a crime or you will be punished" to general public, or a class of members of the public[30] – the current manner of its doing so, by weighting a sentence because of general deterrence is not only the ultimate media disaster, but also unfair because of that very fact.

60. There are far more efficient ways of delivering what the "Do not commit a crime …" message than a lowly judicial officer designing a general deterrent sentence for an offender who has no public profile, announcing in the remarks on the sentence that

[30] Legislative authorisation for the policy lagged long behind its pursuit by the courts. Indeed, it appears the legislators blindly followed the court practice when drafting and adopting s.3A (b). I query whether the imposition of such further penalty as is required by general deterrence is a truly "judicial" function.

the sentence carries an unidentified quantum weighting for general deterrence, in a courtroom deserted by all but the participants and witnesses, when the remarks made are unlikely to be published in printed form immediately if at all, and if subsequently published, are likely to be read by a miniscule portion of the public.

61. It bears repeating, the judicial officer making the remarks has, in reality, addressed his/her remarks to a narrow audience, consisting of the offender, the prosecutor (who knows it all anyway), possibly to the victim and the appeal court judges. There is no direct communication from the judicial officer to the public the general deterrence is intended to reach – nor is the message/threat addressed specifically as a "Do not offend or you will be punished" specifically spelt out. The message is to be inferred from the nature and quantum of the sentence, although a moment's consideration requires that proposition to be qualified.

62. Quite frequently the nature of the punishment selected by the sentencing tribunal will have been reached without any consideration of general deterrence. Even so, the cases are replete with sentences of imprisonment being increased only on the basis of an absence of general deterrence weighting. In such cases general deterrence plays no part in the selection of the sentencing option, but rather in the quantum of the option selected. As earlier noted, increasing the quantum of sentence is the very area where general deterrence is least effective.

63. Given that the method of communicating the Court's message to the public is so inefficient, the Court's persistence with it is unfair. That must be so because of the considerable human cost to offenders for no proportionate gain to the reduction or containment of crime.

64. If the "Do not commit a crime …" message to the public at large is a legitimate judicial function for Courts to be pursuing, then, in this day and age there are available media consultants capable of advising the Judiciary of the best way of delivering such a message to the general public. Such a message might be through a media advertising, a school based educational program, an awareness campaign that the general public is well familiar with; or perhaps an address by or interview with the Chief Justice or one of the more senior judges, during Law Week or on other occasions throughout the year. Such a methodology has the advantage of addressing directly a far larger number of the public, of informing them in clear terms of the message content – and doing so in a form readily used by and acceptable to the recipient. Of this one can be sure – no media consultant would suggest the message would best communicated by the current method.

65. As recently as a week ago, Luke Grant[31] noted worldwide research that almost uniformly reflects upon the inadequacy of imprisonment as a deterrent or rehabilitation tool. The most effective purpose of imprisonment was "incapacitation". No one doubts there are sociopathic and hardcore criminals who must be incapacitated for protection of society. Many studies across the world, having transparent integrity, conclude that imprisonment acts to increase the risk of re-offending by young offenders who entered prison neither sociopathic nor hardcore, rather than, as a form of deterrence, decreasing re-offending[32].

[31] Assistant Commissioner Offender Services and Programs, Department of Corrective Services.
[32] Exchanging Ideas II, conference paper; 11th September 2011.

Conclusion

66. We live in an age were there is a growing realization among researchers, professionals involved in post-release social behaviour, custodial officers and more recently some politicians that the time has come to dismantle to a considerable extent the punitive paradigm of sentencing, reserving it for hardcore and pathological offenders.

67. There is also a growing awareness that the individual nature of sentencing may require different outcomes for different persons. Where an offence is not so serious as to require long-term incapacitation as well as condign punishment, the better outcome will focus upon a result that is just and advances rather than impedes the Rule of Law.

68. Once it the research becomes known, recognised and accepted sentencing purposes must be reviewed. Both common law and legislation place importance on general deterrence as an important purpose of sentencing. If the research is correct, such a proposition is a fiction having no place in real law. Commonwealth and the State Legislators should seek to remove general deterrence as a purpose of sentencing.

69. All Advocates should familiarise themselves with the current research – at very least research relevant to imprisonment and general deterrence, to satisfy themselves of the integrity of the research. If satisfied the research reveals reality those advancing prosecution cases before sentencing judges, and appeals before the appellate courts should consider that reality before asking for general deterrence to be weighted into the sentence, or for imprisonment in circumstances where some other sentence is justifiable.

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