Sentencing - One View

Following is a letter from former magistrate Bruce McCormack to the Attorney-General expressing his view on the *Sentencing Amendment Act (No 2) 1996* and the *Juvenile Justice Amendment Act (No 2) 1996.*

Dear Attorney

RE: SENTENCING AMENDMENT (NO 2) 1996
JUVENILE JUSTICE AMENDMENT (NO 2) 1996

I write to express my serious concerns about the Government's legislative proposals for mandatory jail terms and punitive work orders for offenders who are found guilty of property offences.

Police statistics show that less than one in ten reported unlawful entry and stealing offences in the Darwin area are "cleared up". If allowance is made for statistical inaccuracies, a clear up rate in Darwin of about 15% and about 20% in Katherine, Tennant Creek and Alice Springs means that the proportion of offenders actually found guilty in court to the proportion of reported offences is less than fifteen in one hundred in Darwin and about twenty in one hundred in the other major towns. The most recent annual police report also confirms the continuing trend of low clearance rates throughout the Territory for offences of criminal damage (17.35%), stealing (15.31%) and unlawful entry (13.68%). While care must be taken before reaching conclusions based solely on statistics, they raise questions about the effectiveness of policing rather than the need for increased penalties.

The criminal justice system is a complex and multi-faceted one. The court is only required to sentence an offender after an often lengthy process of investigation, apprehension and prosecution involving police investigators, police prosecutors, the legal profession, legal aid organisations, correctional services (probation and parole services) as well as the offender and family. Imposing rigidity upon one part of this complex system i.e. requiring courts to impose mandatory jail terms - is not likely to enhance its effectiveness. Stringent limits placed on sentencing discretions by legislatures have always met with non-enforcement or nullification. As Professor Norval Morris observed (*Sentencing and Parole* 1997 51 ALJ 529):

"This is neither surprising nor deplorable. It is not surprising because of the pervasive influence of plea bargaining inevitable ensures the reduction of charges for offences carrying the severe mandatory penalties. It is not deplorable because persistent confusion about the goals of criminal law enforcement and indefiniteness regarding the purposes of punishment make sentencing discretion essential. The enforcement of arbitrary penal equations is both irrational and inequitable."

Mandatory minimum sentencing cannot encompass the factual and moral distinction between crimes and offenders which are essential to a just and rational sentencing policy. When the likelihood of detection is low the deterrent effect of mandatory prison terms must be seriously doubted. As King CJ says (Yardley v Betts [1979 (1A Crim L 329 at 333]) *"The courts must assume, although evidence is wanting that sentences which they impose have the effect of deterring at least some people from committing crimes"*. This will only be so if those minded to commit crime believe that there is a high probability that they will be caught. On available information this is clearly not the case in Darwin, Katherine, Tennant Creek and Alice Springs where a majority of the population resides.

"It is apparent that there is little or no information about the effectiveness of the criminal justice system in the Northern Territory."

Your Ministerial Statement of 20 August makes no reference to increase in reported property offences and nor do you suggest any deficiencies with the present sentencing practices in the courts that explain the need for harsher penalties. It is apparent that there is little or no information about the effectiveness of the criminal justice system in the Northern Territory. The present proposals only reinforce the need for a Crime Research Centre or a Bureau of Crime Statistics in the Northern Territory. In its policy for the 1990 election, the government of the day indicated its commitment to the establishment of such a centre. The community would be well served by such a centre in assessing the needs for the changes proposed under the *Sentencing* and *Juvenile Justice Amendment Acts*. I envisage information on such matters as:

- the size, cost and nature of the crime;
- the efficiency, effectiveness, and appropriateness of police, law and correctional services initiatives aimed at redressing crime, fear of crime, recidivism and rates of imprisonment;
- the effectiveness of criminal justice issues and satisfaction with criminal justice agencies;
- more activities involving the community and crime reduction and non-custodial sentencing options;
- the development of meaningful court statistics;
- the identification of the needs of victims of crime.

I urge the Government therefore to look towards establishing such a centre as a matter of urgency, rather than legislate proposals which do not appear to be justified on the information available at present. Moreover there are likely to be many adverse effects flow from the proposed changes.

In many Aboriginal communities and towns where there is a permanent police presence the "clear up" rate of reported offences is almost 100%. Many of these offences involve several offenders stealing small amounts of alcohol, cigarettes and food from premises other than retail outlets. Invariably these offenders make admissions to police and plead guilty in court, thereby ensuring swift justice and manageable court lists. If this cooperation continues there is likely to be a great increase in Aboriginal prisoner numbers. With mandatory prison terms however, I have no doubt Legal Aid lawyers are very likely to advise clients to plead not guilty and require police to prove the charges. Either scenario is unacceptable, both financially and socially.

In the major towns, particularly Darwin, access to legal representation is much easier. There is therefore likely to be an increase in defended matters as the incentive to cooperate or plead guilty at the earliest opportunity as provided under Section 5 (2)(j) of the *Sentencing Act* is negated by the proposed amendments. I note that Mr Manzie, your predecessor, in introducing the *Sentencing Act* in Parliament for the first time on 3 March 1994 observed:

"It is also a well-established principle of sentencing that those who provide assistance to the authorities should be given a discount of the sentence the court would otherwise impose. Such assistance is often vital to the conviction of other offenders. The Australian Law Reform Commission Report No. 44 recommended that the sentencing court should be able to take into account the fact that the offender provided relevant information to the authorities. After finding widespread support for this proposition, the commission noted that, without the incentive of a 'discount' off the sentence, offenders might be less likely to provide information that could result in the prosecution of other offenders. One example given

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was where information provided by one member of a large drug ring could lead to prosecution of the entire ring. The Sentencing Bill introduces a statutory discount for cooperation with investigating authorities and for a plea of guilty. The aims of these provisions is to encourage offenders to assist the investigating authority and for those offenders who are guilty of an offence to plead guilty to that offence."

Proposed changes to the sentencing legislation are in dire conflict with the then Government's clearly expressed policy.

We can expect even further delays in the court list (there is presently an eleven month delay in obtaining a trial date in the Supreme Court and a four month delay in the Magistrates' Court). Furthermore every offence involving theft of more than $400.00 must, at the defendant's option, be tried by judge and jury in the Supreme Court. Not only are there serious resource implications for the court, the legal profession, the legal aid institutions and Correctional Services but also more and more police officers will spend their time preparing trial briefs and waiting around at court to give evidence. Your intention that "justice be done quickly" simply will not be achieved.

In March 1993 the Northern Territory Department of Correctional Services released its "five year plan". I draw your attention to the then Minister for Correctional Services, Mr Poole's statement to Parliament on 3 March 1993 which referred to a Government philosophy which included:

1. the diversion of offenders from the criminal justice system and in particular the custodial sanction;
2. the reduction of the cost of the system by community service orders aimed at community restitution and enhancement of community property;
3. planning to provide a flexible response to "local community demands and the overall requirements of a rapidly changing multicultural society";
4. on-going consultation with employees of the Department to tap the "deep reservoirs of the knowledge and experience [which] exist throughout the Correctional Services workforce.

Mr Pole also observed that part of the government's law, order and safety plan consisted in "enshrining in legislation the principle of imprisonment as a sanction of last resort" and that a primary objective was to reduce the over representation of Aboriginals in the criminal justice system.

In your statement of 20 August 1996 there is nothing to explain why the need for a policy change and as there was no suggestion that sentences have been ineffective I am at a loss to understand why you see the need for the proposed changes. "The protection of the community is also contributed to by the successful rehabilitation of offenders. If a sentences induces or assists an offender to avoid offending in the future the protection of the community is to that extent enhanced. But public concern about crime, however understandable and soundly based must never be allowed to bring about departure by the Courts from those fundamental concepts of justice and mercy which should animate the criminal tribunals of civilised nations". (Per King J in Yardley v Betts.)

Finally, I do not understand the need for punitive work orders, other than the wearing of a uniform as the proposed amendments are substantially the same as the presently existing provisions for the Community Service Orders. In your statement you say that punitive work orders would be for the benefit of the community and most importantly it will be public. Present provisions adequately cover these goals. The problem in my view is one of resources. During my nine years as a magistrate I have never been satisfied that the community service program has been adequately or swiftly enforced. To my knowledge there has never been and there are not now any paid supervisors for community service programs on the Northern Territory other than in several Aboriginal communities - Correctional Services Officers - where the Department contributes about one third of the salary of Aboriginal community Corrections Officers. In the major population centres the Department relies substantially on community organisations i.e. Salvation Army, Red Cross, sporting organisations and local councils for the supervision of these orders. The already unsatisfactory resource position will only be compounded by punitive work orders which are unlikely to be properly supervised and will, I predict, quickly lose credibility in the community.

'Sentencing cannot have a mathematical precision. It is an art, not a science."

In Western Australia supervision of community service order can, at the discretion of the area manager, be contracted out or supervisors directly employed. The area manager also has the right to approve suitable community service programs. We can learn much from these initiatives. For the cost of maintaining one prisoner in jail for twelve months (about $40,000) two part time supervisors could be employed who are likely to supervise scores of defendants during a similar twelve month period.

Sentencing cannot have a mathematical precision. It is an art, not a science. As the High Court observed in Veen v The Queen (2) [1987 - 1988] 164 CLR 465 at 476:

"However sentencing is not a purely logical exercise and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of 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 other 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."

Mr Attorney, I write as someone who accepts the fundamental principle that each person must accept responsibility for his or her action and I write as someone who has sentenced many juveniles and young adults to detention or prison for property offences during my nine years as a magistrate in the Northern Territory. I say to you very plainly that nothing in your Ministerial Statement of 20 August 1996 and nothing in the information currently available justifies the amendments that are proposed to the *Sentencing Act* and the *Juvenile Justice Act*. Not only will the changes be counterproductive, there is a strong probability that they will add significantly to the work load of police and courts at enormous financial and social cost.

The community will be better served by the government establishing a Crime Research Bureau as a matter of urgency as well as reviewing police policy, police resources and correctional services resources. We are all familiar with those police operations whereby extra police resources result in higher apprehension and more offenders appearing before the court. Recent publicity given to police operations such as Operation Surf, traffic blitzes in the rural areas and even foot patrols by police along the Mall only underline the very obvious point that certainty of detection, apprehension and prosecution is the most effective deterrent.

I am sending a copy of this letter to the shadow Attorney-General, Mr Neil Bell, the Commissioner of Police, the President of the Law Society, the President of the Criminal Lawyers' Association of the Northern Territory, the Legal Aid Commission of the Northern Territory, the Northern Australian Aboriginal Legal Services and the Director of Public Prosecutions.

Yours faithfully
Bruce McCormack