THE IMPACT OF CRIMINAL JUSTICE ADMINISTRATION ON THE PENAL SANCTION*

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One of the central philosophies underlying the *Report of the Royal Commission into NSW Prisons* is revealed in the widely quoted aphorism, "A person is sent to prison as punishment, not for punishment".[1] The conditions under which prisoners are contained feature crucially in assessing both the perceptions and reality of prison as a punishment.[2]

Expectations for the experience of imprisonment vary enormously.[3] These expectations in many particular forms have been used to justify the expansion and diversification of the penal sanction. In their most modest representation, however, it is hoped that "by treating all prisoners humanely in a manner befitting their human dignity ... prisoners will at least leave prison no worse than when they entered it".[4]

It is commonly asserted by those who are opposed to prison reform that gaols resemble motels or holiday camps, and prison life is too easy. According to this view prisons should be made as harsh and unpleasant as possible so that their occupants will suffer stiffer punishments, and potential criminals in the community will be deterred. Whether there is substance in such a causal assertion, or in the assumptions on which it is based, has been actively challenged.[5] The reality for most prison systems is that as institutional conditions decline the pressures on occupancy increase, and vice versa. A leader article in the *Guardian* newspaper observed of British prisons that if "the prison system came under the same health regulations governing shops, factories and offices, the Prison Director would have been taken to court years ago on one of the longest indictments our criminal justice system has witnessed".[6]

Writing in the early ninteenth century Jeremy Bentham enunciated for prison management the principle of "less eligibility". This notion argued that if conditions in prison were not harder than those experienced by the lowest of the honest labouring classes then the deterrent effect of the penalty would be lost. This position had significant influence over the development of penal strategies in Australia, and I would suggest that it formulates the thinking of many justice operatives, and politicians in this State, in recent times.[7]

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1 Nagel, J, "Report of the Royal Commission into NSW Prisons" (1978) at 40.

2 See Mathiesen, T, *The Prison on Trial* (1990); Fitzgerald, M, and Sim, J, *British Prisons* (1982).

3 See Morris, N, *The Future of Imprisonment* (1974).

4 Above n1 at 41.

5 Findlay, M, *The State of the Prison; A Critique of Reform* (1982); Zimring, F and Hawkins, G, *Deterrence: The Legal Threat in Crime Control* (1973).

6 *Guardian*, 31 Oct 1978.

7 See Yabsley, M, *Prisons: Firm but Fair*, New South Wales Department of Corrective Services (1990).

The relationship between prison conditions and the existence of the penal sanction as punishment has important ramifications for the administration and management of criminal justice at large. If, for example, it was the express policy of the legislature that the punishment component of imprisonment must be nothing beyond the deprivation of individual liberty, then the factors responsible for poor prison conditions would be appropriate issues of government concern and intervention. Prison overcrowding, with its direct bearing on gaol conditions, and institutional security would be, against different expectations for the prison, a serious worry for justice administrators.

The argument in this paper rests on two assumptions. First, irrespective of whether it merits the designation of a system, there is in this State some identifiable process through which the administration of criminal justice is achieved. Second, the agencies and instrumentalities essential to this process operate in a fashion and within an ideology which is not conducive to co-operation.

If there is a thematic and material connection which binds the component parts of the criminal justice process together it is discretion. This paper suggests that the exercise of discretion at one stage of the process can have a significant influence over the operations of other stages. Logically, then, controls over the exercise of discretion may have consequences beyond the particular decision-making operation against which they are directed. An absence of such controls, or ones which are effective, also will impact on the force of discretion and its "output" for the process as a whole.

By focusing on one output of the criminal justice process (that is, the prison) and the expectations for its operation, I intend to show how earlier stages in the process have an unavoidable effect on this output. Next, those issues which militate against an efficient management of the process in terms of the expectations for this output may be explored. Finally, some possible strategies for improving the links between each major stage of the process and its output will be examined, paying particular attention to the regulation of judicial discretion.

ADMINISTRATIVE PROCESS OF CRIMINAL JUSTICE

A necessary prerequisite to the formulation of strategies for criminal justice management requires one:

> to analyse the negotiated reality of the relationships within the bureaucratic organisation of the administration of justice. Thus the image of a production conscious bureaucracy and of a bargain justice of the market-place came to be favoured by criminologists attempting to comprehend the social reality of the law in action.[8]

Bottomley warns against any conceptualisation of criminal justice which fails to critically address the relationships within the system and the interconnections (or their absence) between decision-stages. Once such an analysis is achieved the following pattern emerges:

1) evidence of disparities between principle and practice at individual decision-stages within the process,

8 Bottomley, K, *Criminology in Focus* (1979) at 101.

2) the importance of discretion,

3) the critical influence of earlier decision-stages on the exercise of discretion at following stages (both in terms of the nature and scope of the discretion exercised),

4) the conflicting perceptions by operatives involved in different decision-stages, when viewing similar issues, from their own perspective,

5) the likelihood that outcomes will take the form of compromise, or a victory for one perception over another,

6) the realisation that the defendant and the victim may be inconsequential observers outside any of the decision-stages,

7) routine, efficiency and predictability assume paramount importance as operational concerns of the process, and

8) the professional values and personal career "stakes" of operatives within the stages effect the expectations and commitments of various agencies in bargaining the process.

Along with its institutional manifestation, if the criminal justice process is to be understood as a series of decisions and decision-stages, each with considerable discretion within its own sphere of activity, then the creation and handling of imput and output also should be conceived of as intricate and problematic. Management objectives must be set to address this process of decision-making in terms of the factors which influence discretion, prior to any assault on the interconnection between decision-stages.

These management objectives have been far more the slaves of politics than logic over recent years. As a result, the process of criminal justice all too often has been driven by a discourse which, while claiming some internal coherence, arises out of an agenda which may insult reality. For example, "law and order" penal policy has been primarily about:

> ... responding to the dictates of favourable political ideologies of social control and the pressure from the interest groups of 'primary definers' as far as available resources allow ... Public images of this kind can only begin to be revised if those responsible for penal policy adopt a stance which can be fully justified on the grounds of existing knowledge.[9]

Apropos of this, Bottomley and Coleman cite the following well-established penological facts:

> Increased resources to the police are most unlikely to reduce the crime rate, and may quite feasibly produce an increase in what is recorded;
>
> harsher sentences upon convicted offenders will have no effect in deterring them (or other potential offenders) from future crime, nor indeed will more rehabilitative sentences achieve greater success in changing their behaviour patterns;
>
> detaining offenders in prison for long periods on the grounds of incapacitation is a policy that will have only marginal effects on the crime rate, even if the prison population were to be increased three or four fold.[10]

9 Bottomley, K and Coleman, C, "Law and Order: Crime Problem, Moral Panic, or Penal Crisis?" in Norton (ed), *Law and Order in British Politics* (1984) at 54.

The reality is that facts such as these are unlikely to influence penal policy if they run contrary to government policy or the ideology of powerful interest groups. Law and order responses for criminal justice policy have even less connection with researched evidence than the law and order portrayal of the crime problem has with the picture painted by official statistics.

To ensure an administration of criminal justice which will effectively translate policy, while producing the information necessary to critically evaluate such policy, it becomes vital to recognise and exploit the interrelatedness of decision-stages. At present the autonomous ideologies and operations of principal criminal justice agencies are a barrier to the realisation of responsible and responsive criminal justice management.

JUDICIAL DISCRETION

An obvious and vital decision-stage when it comes to the construction of the penal sanction is that which occurs on sentence. Not only is it accepted that the judicial function involves more than "the mechanical application of immutable rules imposed by some extraneous power",[11] but also the independent discretion of the judicial officer is regularly lauded as essential for individualised and just punishments.

In the recent past in New South Wales, executive intervention into sentencing and punishment consequences has led to disquiet over the real effect of sentencing decisions, and the potential for corruption which exists where such intervention is significant and random.[12] The reaction of the government has been to fetter both executive and judicial discretion when it comes to setting down and administering sentences.

It would be incorrect to suggest that the moves towards "truth in sentencing" were motivated by concerns about the operation of judicial discretion per se. However it could be argued that one of the motivations behind the expansion of executive involvement in actual sentence length during the life of recent Labor governments was the managerial imperative to counteract sentencing practice which did not recognise its consequences, and capital works expenditure which did not value prison construction.[13]

The factors which should influence the mind of a judge in setting sentences are now seen to extend to executive decision-making as it effects the actual length of sentence. In New South Wales at least:

> All the considerations which are relevant to the sentencing process, including antecedents, criminality, punishment, and deterrence are relevant both at the stage when a sentencing judge is considering whether it is appropriate that the convicted person be elligible for parole at a future time and at the subsequent stage when the parole authority is considering whether the prisoner should actually be released on parole at or after that time.[14]

10 Id at 55.
11 Meagher, R, "Immutable Rules and 'Free Law Finding'" (1991) 3*/ Judicial Officers Bulletin* at 3.
12 See Chan, J, "The Release on Licence Programme 1982-1983: A Case Study of Decarceration in New South Wales" (1990), unpublished PhD thesis, University of Sydney.
13 Ibid.
14 *R v Shrestha*, High Court 20/6/91

To this extent the observations from the bench regarding each and all of these factors may have ongoing influence over the course of a prisoner's incarceration even beyond the expiration of the minimum term of the sentence.

The *Sentencing Act* (NSW) came into force on 25 September 1989. It is an Act which, in the words of the Minister for Corrective Services in his second reading speech,[15] " ... turned the sentencing process on its head ... Instead of working from the top down, the court will, under the new sentencing scheme, build its sentence from the bottom up". In addition all remissions were abolished, so that the whole minimum term fixed by the court would be spent in prison.

The essential connection between this "sentencing" legislation and the penal sanction could not have been more vividly represented when it was sponsored through the House, not by the Minister responsible for the courts, but by the one in charge of prison administration.

Prior to September 1989 in New South Wales, courts nominated a head sentence:

> ... by reference to the gravity of the offence in relation to the maximum penalty fixed for the offence by statute, and very frequently tailored the non-parole period to give full effect to subjective and rehabilitational considerations. In fixing a penalty the court did not take into consideration the fact that the prisoner would almost certainly be released prior to the time fixed by the sentence because of the effect of remissions.[16]

The issue of setting minimum terms of imprisonment is now regulated by the decision of the Court of Criminal Appeal in *R v Maclay*:[17]

> In our view the duty of a sentencing judge fixing a minimum term under the new legislation is clear. Giving appropriate weight to well established principles of sentencing, including those which require him to pay due regard to the maximum penalty provided by statute for the offence in question, the gravity of the effective features of the case, and all relevant subjective considerations relating to the offender, he is to determine what is an appropriate term during which the offender is to remain in custody, before being eligible to be released on parole.

It was at least the intention of the court to avoid the mere replication by sentencers of sentences which would have been passed under the repealed legislation, whether with or without a discounted quotient for remissions as they would have eventuated prior to the new Act. The present sentencing process is seen to develop from the fixing of a minimum term to which there is added an additional term, the relationship between the two being governed by statute. In setting the minimum term the sentencer should address the prescribed maximum penalty, the gravity of the offence, the objective features of the case, and the subjective considerations relative to the offender. The Court of Criminal Appeal did recognise, however, that justice and fairness may, in some "limited circumstances", require an arithmetic translation from the previous non-parole period, discounted by the previous factor of remissions, in order to set the minimum term, for example, where a court might after 25 September 1989 vary a sentence which was imposed prior to that date

15 10 May 1989.

16 See *R v O'Brien* [1984] 2 NSWLR 449, in Harvey Cooper, J, "Bottoms up, Remissions away; Off they go and in they stay, It's all explained in R v Maclay!" (1990) 2/7 *Judicial Officers Bulletin* at 1.

17 *R v Maclay* [1990] 19 NSWLR 112.

or, where a court is fixing sentence after the enactment date on a prisoner who is equally culpable with a co-accused who was sentenced under the old legislation.

In the case of *R v Moffitt*,[18] the Court of Criminal Appeal considered in more detail the expression "special circumstances", referred to in section 5(2) of the *Sentencing Act*. Badgery-Parker J in this case made an interesting observation on a sentencer's discretion under the new Act:

> A judge may not give rein to his own personal philosophy that short periods of incarceration followed by long periods on parole should be the norm. If however it can be seen in an individual case that for reasons which can be identified in the facts of the individual case, a longer period of parole supervision is warranted than would be provided by adherence to the one-third rule, the judge is entitled to regard that as a special circumstance justifying a departure.

The new legislation has influenced the exercise of sentencing discretion by returning responsibility for the determination of minimum periods in prison to the trial judge. Where it has restructured discretion over sentence is through the requirement that sentencers must set out by striking a tariff which will only become the subject of executive decision-making where additional time is to be served before parole is granted. The nature of the sentencer's decision and the issues on which it is based are not controlled, but the consequences of the decision are inextricably governed by the new process through which it is made.

INCREASED USE OF THE PENAL SANCTION

An examination of prison statistics published by the Australian Institute of Criminology[19] reveals that imprisonment rates are on the increase. In December 1989, the daily average of persons held in prison in New South Wales was 4,864. This was an increase of 591 over the previous twelve month period. The imprisonment rate (per 100,000 general population) was 83.4 for December 1989. For December 1990 the rate has moved to 147.8. Except for the Northern Territory and Western Australia which have exceptionally high rates of imprisonment, New South Wales has the highest rate in the Commonwealth. As Angela Gorta observes,[20] the average prison numbers for recent years have been higher than the general upward trend for New South Wales shown this century. The total as at 30 June 1991 was 7,103.

Ivan Potas lays blame for the increase at least in part on the new sentencing legislation:

> While there may be other factors such as increasing crime and police clearance rates, which may be contributing to the burgeoning prison population, there is little doubt that the Sentencing Act, as translated into practice has meant that "real time" served for those sentenced to imprisonment has increased.[21]

18 *R v Moffitt* [1990] 20 NSWLR 114.
19 Australian Institute of Criminology, *Australian Prison Trends* [nd], Nos 163, 164, 165.
20 In this issue.
21 In this issue.

When dealing with average prison population measures one should be on notice that they conceal sometimes huge weekly fluctuations. Even so the increases overall in the New South Wales prison population are considerable. For example, from 1988 to mid 1991,

> ... the daily average prison population has increased by the equivalent of nine times the design capacity of Parklea prison (210 inmates). To have kept up with this increase at this time we would have had to have been building at the rate of more than one Parklea every 4.7 months.[22]

Instead the government has settled for overcrowding prisons such as Parklea to in excess of 70 per cent above optimum capacity!

The increase in prison population since the implementation of the *Sentencing Act* is not explained by the fact that more people are going to gaol. The more significant contributor to this increase is the consequence that the average time periods over which prisoners are held in custody is on the rise. Excluding those prisoners who do not come under the scope of the *Sentencing Act*, or those received into custody to resume the balance of a sentence handed down under the previous legislation, it would appear that the average minimum term served has increased by 19 per cent.

Estimates on projected prison populations, should the present sentencing regime continue, predict that the increase due to the new legislation will be most marked for the period of four to 17 months after the introduction of the Act. Following on from March 1991 the influence of the Act will remain constant.[23]

There have been suggestions that determinate sentencing leads to an increase in prison population.[24] Despite the assurances of Blumstein et al[25] that if such increases occur they are merely continuations of pre-existing trends, there is ample evidence in this State, and in the USA[26] that when there is a move towards determinate sentencing, accompanied by a rejection of executive intervention for early release, pressures towards prison overcrowding will be exacerbated.

Due to the fact that sentencers prefer to see prison overcrowding as a problem of the prison administrator, there is no guarantee that the provision of non-custodial options, or lower maximum penalties may bring about a reduction in the use of the prison. In fact, it is suggested that policy initiatives towards decarceration, which do not require a reinterpretation of judicial discretion are not successful in reducing the use of imprisonment.[27]

> Australian imprisonment rate data from 1961 to 1985, the period during which community based corrections measures were introduced show some slight decline in some states and substantial fluctuation in others.[28]

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22 Ibid.

23 Id.

24 See Chan, J, "The Limits of Sentencing Reform", in Zdenkowski, G et al (eds), *Criminal Injustice System*, Vol 2 (1987); Chan, above n12; Gorta, above n20.

25 Blumstein, A, et al (eds), *Research on Sentencing: The search for reform* (1983) at 32.

26 Greenberg, D, and Humphries, D, "The Co-opation of Fixing Sentencing Reform" (1980) 26/2 *Crime and Delinquency.*

27 See Scull, A, *Decarceration: community treatment and the deviant — a radical view* (1984).

28 Chan (1987), above n24 at 219.

There is evidence that alternatives to imprisonment are frequently used for offenders who would not have been incarcerated in the first place. To this extent these sentencing options are not true alternatives. Furthermore, if the conditions of such options are breached by the offender, then they will amount to another pathway to the prison which might not otherwise have existed.

Effective strategies to counter the over-use of the penal sanction must countenance some re-ordering of judicial discretion towards such an objective. Even so, the implementation of such strategies will face keen opposition.

CONTROLLING THE GROWTH OF PRISON POPULATIONS

How can inflow and length of stay be influenced? A comprehensive assessment of possibilities would include an examination of pre-sentence negotiations, the sentencing process itself, and post-sentence interventions. Independent variables such as court delay may also play a part.[29]

In New South Wales prior to the *Sentencing Act*, the preferred scenario for regulating prison population was that which involved executive interference at designated or discretionary occasions following sentence.[30] This is not to say that the pre-sentence stage was not influential. As Willis[31] has identified, whether it be as a result of prosecutorial discretion, sentence discount for pleading guilty, or the less significant practices of charge or plea bargaining, negotiations before the trial have a potential to constrain judicial discretion.

The *Sentencing Act* is an attempt to regulate judicial discretion without displacing its influence over sentence to bargain conscious lawyers, or budget-conscious administrators. However, despite the protests to the contrary, the legislation has the effect of drawing actual time served relentlessly closer to statutory maxima and hence altering prison populations only unidirectionally.

Beyond the limited articulations of the Court of Criminal Appeal, the development of sentencing guidelines has not been seriously explored in this State as some uniform attempt to rationalise the use of imprisonment at the sentencing stage. In certain state jurisdictions in the USA which have taken a numerical approach to the construction of guidelines, where given constant conviction rates, the aggregate prison population would not exceed the capacity of the state's prisons.[32] A variant of this technique is to set a population target either slightly higher or lower than capacity populations, to allow for policy fluctuations. Interestingly, this was a mechanism for population regulation which did not rely on prison administrators to maintain ceilings while judges continued to sentence beyond capacity levels. Sentencers were made responsible for the consequences

29 See NSW Bureau of Crime Statistics and Research, "Court Delay and Prison Overcrowding" (1989), *Crime & Justice Bulletin.*

30 Above n12.

31 Willis, J, "Pre-trial Decision Making" in Zdenkowski, G, et al (eds), *Criminal Injustice System* Vol 2 (1987).

32 Von Hirsch, A, "Guidance by Numbers or Words? Numerical versus Narrative Guidelines for Sentencing", in Wasik, M and Pease, K (eds), *Sentencing Reform; Guidance or Guidelines* (1987).

of their decisions through the relative neutrality of externally imposed guidelines. One of the difficulties with this approach, however, is that from the point of view of the sentencer it does not challenge seriously what Bottomley identifies as "domain" theory.[33]

MANAGING JUDICIAL DISCRETION

> The dangers of the traditional 'domain' theory could be largely eliminated by a greater openness and accountability in the articulation of policies, and the establishment of comprehensive guidelines and standards for the implementation of those policies at all levels. Such an outcome would be even more likely if similar procedures were adopted at every stage in the (justice) process.[34]

Clearly it is one thing to propose methods for the regulation of sentencing discretion which influence the sentence stage and do not simply restructure or displace discretion to other ungoverned stages. It is another to complement the interrelatedness of decision-stages with a framework of reform.

I have noted earlier that the ideology of independence has strong sway over sentencing discretion in this jurisdiction. Any attempt to "manage" the exercise of such discretion will confront the not insignificant resistance of the judiciary, and even might be portrayed as challenging government through the separation of powers.

Sentencing reforms in New South Wales over recent years have been mostly directed at correctional policy, because judges are resistant to perceived attempts at eroding their powers. In this respect, the negative reaction to the government's initiative in 1983 to reduce prison numbers by automatically deducting remissions from the non-parole period, was given greater impact by the efforts of some sentencers to subvert the effect of the legislation. Assuming however that it is possible to legislate for the regulation of judicial discretion, this proves little more than a representational endeavour towards management intentions. Don Weatherburn identifies the scope of judicial discretion as the vital target for reform in sentencing policy:

> Both the history of court interpretation of minimum periods and the willingness of courts to violate sentencing principles in order to preserve control over such periods suggest that a real reduction in court discretion over sentence length is a pre-requisite to any lasting control over sentence length ... any executive or legislative attempt to shorten sentences predicated on a continuation of existing judicial discretion is doomed to failure.[35]

Such warnings regarding the reactionary potential of judicial discretion beg the question as to what wider environmental pre-conditions might be necessary to facilitate the success of attempts to manage sentencing discretion. David Brown recognises the essential interconnection between sentencing, discretion and the process of criminal justice, when he identifies the following necessary pre-conditions to reform:[36]

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33 Bottomley, K, "Sentencing Reform and the Structuring of Pre-trial discretion", in Wasik, M and Pease, K (eds), *Sentencing Reform: Guidance or Guidelines* (1987).

34 Id at 157.

35 Weatherburn, D, "Sentencing Principles and Sentence Choice", in Findlay, M and Hogg, R (eds), *Understanding Crime and Criminal Justice* (1988).

36 Brown, D, "Some Pre-conditions for Sentencing and Legal Reform", in Wickham, G (ed), *Social Theory*

- the separation of penal discourse and practice;
- a rejection of simple determinist connections between crime and punishment;
- the development of a social rather than individualist analysis of penalty;
- the recognition of the futility of searches for a "blueprint" for reform;
- stimulation towards socially responsible media reporting of sentencing issues;
- socialising the judiciary;
- creating forums for debate and interchange within the criminal justice process;
- developing formal political initiatives.

Notwithstanding such preconditions, several of which require social reorganisation of the widest nature or a fundamental restructuring of the sentencing profession, attempts at sentencing reform in various jurisdictions have not met with resounding success. Janet Chan identifies, amongst other factors, the dialectics which exist between intentions and consequences as a major limitation on reform.[37] Chan also refers to the need for reform strategies to cope with social entropy: the social forces within and around the justice process which tend to confound systems, through incompetence, confusion regarding the objects of control, and problems of co-ordination.

> In sentencing reform, the main social entropy problem is precisely the variability amongst decision-makers. Yet, there is no way to design simple, straightforward methods of structuring sentencing discretion without ignoring the complexity of the sentencing decision and creating injustices along the way.[38]

RELOCATION OF DISCRETIONARY POWER

As part of a more general examination of the displacement of discretion through the use of guidelines, Keith Bottomley argues for a strategy for integrated decision-making in criminal justice.[39] Unfortunately, he projects that any such reform will take place in a piecemeal fashion. The three main elements of his proposed strategy are the primacy of articulated policies, a recognition of the interrelatedness of the different decision-stages, and the introduction of model structures for decision-making with the maximisation of consistency as their principal goal.

The endeavour to articulate policy as the basis for reform "has the virtue of forcing policy choices into the open rather than concealing them under the camouflage of deserts".[40] If an attempt to identify some consensus on sentencing principle was advanced in tandem with an exercise in structuring decision choices in the light of policy aims then a logic of reform might emerge.

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and Legal Politics (1987) at 94-119.

37 Chan (1987), above n24 at 221.

38 Id at 231.

39 Above n33 at 154.

40 Galligan, D J, "Guidelines and Just Deserts: A critique of recent trends in sentencing reform" (1981) *Criminal Law Review* at 306.