Contemporary Comment

DANGERS AND OPPORTUNITIES IN THE SENTENCING CRISIS

The 1989 *Sentencing Act* was, in the eyes of its architects, the sentencing reform we had to have. The 1983 *Probation and Parole Act* was simply too problematic, both in its technical applications and in the disparity between the head sentence and the actual time served by the prisoner. The slogan "truth in sentencing" was not only catchy and effective as a selling point, it was in fact a term endorsed by one of the most respected law reform institutions in this country: the Australian Law Reform Commission. Yet, any attempt by elected politicians to bring back the "truth" must be seen as an act of extreme bravery, since the truth is not always what people want to hear or see. The rather large gaps which existed prior to the *Sentencing Act* in many categories of offence between the statutory maximum sentences and the head sentences, between the head sentences and the non-probation or non-parole periods (NPPs), and then between the NPPs and the actual time served were well known to those familiar with the New South Wales criminal justice system, but little known or understood by the general public. The government's wish, implied but not stated explicitly in Parliament, was that the sentencing tariffs would come down approximately to the levels of the former NPPs less remissions, so that there would be no increase in the length of time served by prisoners. The intention that the time served should not increase was clearly stated in the Second Reading Speech and in the Department of Corrective Services booklet on the *Sentencing Act*. It was not, however, explicitly written into the legislation, nor was it widely publicised in the media. What the government had intended, then, was that the "truth" about what prison sentences were really worth would be recognised by the people of New South Wales, perhaps not immediately, but in the long run.

The down side of the *Sentencing Act*, as the initial results of monitoring show, is the rather substantial increase in actual time served by prisoners, and the implications of this increase on the already burgeoning prison population in New South Wales. Yet, even this piece of bad news must not obscure some of the windows of opportunity for turning the tide.

First, the surprising fact is that some degree of success has been achieved by the *Sentencing Act* in terms of the public acceptance of tariff adjustments. Even though sentences have come down substantially from the old head-sentence levels, there has not been an angry public outcry about judicial leniency. Media workers are now quoting minimum terms (or both minimum terms and full sentences) when reporting sentencing outcomes. This is a vast improvement over past reporting practices where the head sentences were regarded as "the sentence", and much was made of prisoners who were released "early", even though they have served their full non-parole periods as adjusted by remissions.

Secondly, the figures presented did not suggest that all sentencers have ignored the effect of the abolition of remissions. If they did, the increased would have been much more substantial. The indications are that some sentencers have adjusted, and others have not, either consciously or subconsciously.

Thirdly, even though the Court of Criminal Appeal in *Maclay* did not tell judges and magistrates to reduce their sentences to correct for the absence of remissions, it did not tell them that they could not do so either. The judgment called for a "fresh approach" to sentencing and has in fact opened the way for the "floating" of the tariffs in a way which sentencers individually and collectively find acceptable. At the initial stage, the tariffs have floated towards the high end, but such a development is neither inevitable nor irreversible.

Fourthly, sentencers have not been happy with the rigidity of the three to one ratio specified by the legislation. Many have expressed a preference for a longer parole period for some prisoners. The *Moffitt* decision has in effect made a longer parole period possible for these cases. It is probable that over time parole periods will become longer as a proportion of the minimum term, but obviously not as long as they were prior to the *Sentencing Act*.

Finally, the continual monitoring of sentencing trends and imprisonment rates and the publication of these results serve to highlight the connection between sentencing policy and the penal system. Such a close relationship is, of course, not surprising, but too often the effects of sentencing policies and practices are either considered irrelevant or simply not available to sentencers. I think that the quality of the debate on the *Sentencing Act* has been exceptionally high, thanks to the valuable contributions from social researchers, practising and academic lawyers, and members of the judiciary.

Once it is recognised that a sweeping change such as the *Sentencing Act* can lead to practical/technical difficulties for sentencers, and operational/fiscal problems for the prison system, every effort must be made to repair any damage that has already occurred ore is likely to occur. Many excellent suggestions have been put forward by the papers in this issue (see papers by Ivan Potas and David Brown). For example, the increase in prisoner population since the *Sentencing Act* should force us to reconsider the purposes of imprisonment and the principles which should govern the use of this sanction. It may be a good time for debating alternatives to the 75 per cent rule, the merit or otherwise of earned remissions, and the possibility of taking prison conditions into account in sentencing. It may even be appropriate for New South Wales to review its statutory maximum penalty structure as the Victorians have already done.

At a time of crisis — and our prison system is indeed at a point of crisis — we must be aware of the dangers as well as the opportunities the *Sentencing Act* offers. If we really want to establish truth in sentencing, we must begin by recognising some of the home-truths about crime and punishment: that a harsher sentencing policy will, for most types of offences, have little or no effect on the crime rate, but it will almost certainly result in further overcrowding and tension in our prisons. Any sentencing policy that ignores the economic and human costs of imprisonment is in fact forgetting that, after all, punishment is carried out for the general good of the community. A harsh sentencing policy does not merely punish the offender, in the long run it also punishes the community.

JANET CHAN*

* Department of Social Science and Policy, University of NSW

ABORIGINAL IMPRISONMENT DURING AND SINCE THE ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY*

The Royal Commission into Aboriginal Deaths in Custody was established in October 1987. The first major national report of the Commission was released in December 1988. The *Interim Report* by Justice Muirhead raised serious concerns about the level of Aboriginal imprisonment and argued that imprisonment should be used only as a last resort. Indeed recommendation 1 of the Muirhead *Interim Report* states that "Governments ... [should] enforce the principle that imprisonment should be utilised only as a sanction of last resort". The *National Report* of the Royal Commission was released in May 1991. Recommendations 92 to 121 deal with imprisonment as a last resort and the methods involved in reducing the levels of Aboriginal imprisonment. Recommendation 92 of the *National Report* specifically repeats Recommendation 1 of the *Interim Report*. Thus one of the basic thrusts of the Royal Commission has been that to reduce or stop Aboriginal deaths in custody there needs to be a reduction in the number Aboriginal people in custody. This proposal has been at the forefront of Royal Commission work since 1988.

Therefore it is important to ask what changes have occurred during the last four years in the level of Aboriginal imprisonment. Table 1 below shows the number of Aboriginal people in Australian prisons in different jurisdictions at the time of the prison census on 30 June 1987 (immediately prior to the establishment of the Royal Commission), and at the prison census on 30 June 1991 (immediately after the release of the Royal Commission's *Final Report*).

TABLE 1: Aboriginal Prisoners (Prison Census, 30 June 1987 – 30 June 1991)

State	30/6/87 No	30/6/91 No	Increase %
NSW	369	664	80
VIC	52	91	75
WA	503	624	24
SA	147	150	2
QLD	354	346	-2
NT	334	328	-2
TAS	7	10	43
AUS	**1766**	**2213**	**25**

* Fiona Wright provided research assistance in gathering data for this project. The sources for data were the relevant Corrective Services Departments.

There have been dramatic increases in the level of imprisonment of Aboriginal people in New South Wales, Western Australia and Victoria. Over the four year period New South Wales had the greatest increase in Australia with an 80 per cent rise in the number of Aboriginal prisoners and also the highest increase in real numbers from 369 to 664 Aboriginal prisoners. Victoria recorded an increase of 75 per cent during the period. While the actual numbers were comparatively small (an increase from 52 to 91 Aboriginal prisoners), the magnitude of the Victorian increase is disturbing. Western Australia recorded an increase of 24 per cent which is particularly alarming given the number of Aboriginal prisoners in that State. Other States and Territories recorded slight increases or decreases, with the exception of Tasmania. However the Tasmanian figures are so small that the 43 per cent increase should be taken in the context of a rise from 7 to 10 Aboriginal prisoners. As indicated below the actual rate of Aboriginal imprisonment in Tasmania is the lowest in Australia.

Nationally there has been a 25 per cent increase in the number of Aboriginal people in prison during the four year period of the Royal Commission into Aboriginal Deaths in Custody. The increase has occurred at a time when it was recognised that over-representation of Aboriginal people in prison custody was a contributing factor to the large number of deaths in custody. New South Wales must bear the major responsibility for the national increase in Aboriginal prisoners. The increase in that jurisdiction alone contributed over 16 per cent to the national increase of 25 per cent. Western Australia contributed over 6 per cent to the national increase.

Rates of imprisonment of Aboriginal people per 100,000 of the total Aboriginal population (as measured by 1986 Census) are shown below in Table 2. Jurisdictions are listed in order of the magnitude of the rate.

TABLE 2: Aboriginal Imprisonment (30 June 1991; rate per 100,000)

State	Rate
WA	1651
NSW	1125
SA	1050
NT	944
VIC	722
QLD	565
TAS	149

Table 2 highlights New South Wales and Western Australian jurisdictions as having high rates of Aboriginal imprisonment. Not only have these jurisdictions significantly increased the level of Aboriginal imprisonment, they also have the highest rates of Aboriginal imprisonment in Australia.

An issue often neglected in analysing figures on Aboriginal imprisonment is the specific position of Aboriginal women in prison. *The number of Aboriginal women in prison in all Australian jurisdictions rose from 78 in the 1987 prison census to 127 in the 1991 census. Such a change represented a 63 per cent increase in the imprisonment of Aboriginal women during the four year period.* New South Wales was the major contributor to the national increase in Aboriginal women in prison. Between 1987 and 1991 the number of Aboriginal women in New South Wales prisons rose by no less than 168 per cent. Western Australia also saw a corresponding rise of 54 per cent in Aboriginal women prisoners during the same period.

It is also worth considering the extent to which the increase in Aboriginal imprisonment over the last four years has occurred alongside a more general movement towards the increased use of incarceration. Table 3 below shows the percentage increase (or decrease) in the number of Aboriginal prisoners and the number of non-Aboriginal prisoners during the four year period.

TABLE 3: Increase in Aboriginal and Non-Aboriginal Prisoners (30 June 87 - 30 June 91)

State	Aboriginal Increase %	Non-Aboriginal Increase %
NSW	80	54
VIC	75	17
WA	24	6
SA	2	22
QLD	-2	-12
NT	-2	3
TAS	43	-6

It is significant that in New South Wales, Western Australia and Victoria, the increase in Aboriginal imprisonment has far outstripped the general increases in imprisonment figures. Thus the percentage of non-Aboriginal people imprisoned increased by 54 per cent in New South Wales, while the imprisonment of Aboriginal people increased by 80 per cent. Similarly in Victoria the increase in non-Aboriginal prisoners over the four year period was 17 per cent, while the increase in Aboriginal prisoners was 75 per cent. In Western Australia the non-Aboriginal prison population increased by 6 per cent, while the Aboriginal prison population increased by 24 per cent.

It is not the purpose of this paper to offer comprehensive reasons for the dramatic national increases in Aboriginal imprisonment. However some issues stand out as being important. Firstly the Royal Commission has noted that proportionately more Aboriginal people are sentenced to imprisonment for less serious offences. "It is to be noted that at

the less serious end of the scale, there are proportionately more Aboriginal than non-Aboriginal prisoners held for traffic, good order offences, property offences and for the group of offences known as 'justice procedures', which includes breaches of orders and fine default".[1] There are a number of issues which flow from this point and primarily centre around the use of imprisonment as a sanction for less serious offences.

In New South Wales there has been the *reintroduction* of penal provisions for minor public order offences since the introduction of the *Summary Offences Act* 1988. While it is not known how many Aboriginal people have been imprisoned under the *Summary Offences Act* 1988, it is known through the work of the Bureau of Crime Statistics and Research that there has been a massive increase in the number of charges for offensive behaviour and offensive language and that in some cases terms of imprisonment have been imposed.[2] There is a substantial body of research covering the last two decades which indicate that it is precisely for these type of public order charges that Aboriginal people are most over-represented. In other words we have seen the reintroduction of the use of imprisonment as a punishment for minor offences exactly at a time when the Royal Commission in its *Interim Report* was advocating the opposite. In Victoria there has been the failure to decriminalise public drunkenness, despite the reports of the Victorian Law Reform Commission and the presentation of a bill to Parliament. Under sections 13–15 of the *Summary Offences Act* 1966 it is possible to receive penalties for public drunkenness ranging from a $100 fine to twelve months imprisonment.

A further point which needs to be considered is the use of imprisonment for less serious offences *instead* of community-based options. The Royal Commission into Deaths in Custody in its *Final Report* specifically referred to New South Wales and Western Australia as two jurisdictions where there was the under-utilization of non-custodial sentencing options. It has been suggested that in New South Wales non-custodial sanctions have been used as an alternative to other sanctions such as fines rather than as an alternative to imprisonment. As a result the adoption of non-custodial options has not led to a reduction in imprisonment. In Western Australia it has been argued that Aboriginal people specifically do not receive the benefits of non-custodial sentencing options. It is non-Aboriginal offenders who are more likely to receive the benefit of a non-custodial sentencing option.[3]

Another reason for the increase in prison numbers has been the more widespread increase in penalties for certain offences under the NSW *Crimes Act*. For example under the *Crimes (Amendment) Act* 1988 the penalty for car theft under particular circumstances was increased to 10 years. One could predict similar outcomes in Western Australia with the introduction of the *Crimes (Serious and Repeat Offenders) Act* 1992.

A further factor which is directly relevant to New South Wales is the impact of the *Sentencing Act* 1989. Research by the Bureau of Crime Statistics and Research and the

1 Commissioner Elliot Johnston, Royal Commission into Aboriginal Deaths in Custody, *Final Report*, Vol 1 (1991) at 208.

2 According to the Bureau of Crime Statistics and Research figures, the number of persons charged with offensive behaviour rose from 2,808 in 1985 to 13,665 in 1990.

3 Above n1, Vol 3 at 95.

research unit of Corrective Services both indicate that the average length of time served by prisoners has increased since the introduction of the legislation. The Corrective Services research puts the increase in time served at 19 per cent.

More difficult to demonstrate empirically, but no less real in its effects on imprisonment, has been the emphasis placed on a punitive law and order approach. Part of that approach has been translated into greater resources for policing, which has itself resulted in an increase in police numbers. Given the history of Aboriginal/police relations, such an emphasis on law and order leads to a more interventionist role in the lives of Aboriginal people.

In conclusion it might be appropriate to offer a word of warning to those who might interpret the increase in Aboriginal imprisonment as a result of increased offences. Certainly the Australian Institute of Criminology has documented the increase in reported offences to police during the 1980s. However they note that "the rate of change in the levels of crime appears to be similar in the six states and two territories".[4] The evidence in this paper demonstrates that changes in Aboriginal imprisonment do not correspond across jurisdictions with increases in reported offences. It is inadequate and misleading to explain the increase in Aboriginal imprisonment by reference to any increase in alleged criminality. It is far more important to analyse and question the effects of government policy which *has promoted the use of imprisonment* and which has adversely impacted upon Aboriginal people. Any government commitment to implementing the recommendations of the Royal Commission into Aboriginal Deaths in Custody will be shallow rhetoric indeed, if the overall thrust of criminal justice policy is based upon locking-up an ever increasing number of Aboriginal people.

CHRIS CUNNEEN†

4 Mukherjee, S and Dagger, D, *The Size of the Crime Problem in Australia* (1990) at 7 and 8.

† Institute of Criminology, Sydney University.