The Sentencing Advisory Commission and the Hope of Smarter Sentencing

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Introduction

Sentencing law practice — confused and incoherent

Sentencing has been described as the 'high point in anti-jurisprudence' (Smith 1997:174). This comment reflects the fact that sentencing law is devoid of an overarching rationale. It is marked by a high degree of discretion and is shaped more by political expedience and intuition than informed inquiry and principle. The fact that sentencing is 'the most controversial and politically sensitive aspect of the criminal law' (Freckleton 1996:ix) has militated heavily against it being developed in a coherent and principled manner.

The rambling and imprecise nature of sentencing law has been perpetuated by the fact that judges have displayed reluctance to accept any fetters being imposed on their sentencing discretion. This has been tacitly supported by legislatures in most jurisdictions, including Australia and the United Kingdom, which, on the whole, have refused to pointedly endorse specific sentencing goals. The failure to endorse a rationale for sentencing has led to what Andrew Ashworth labels a 'cafeteria system' (Ashworth 1995:331) of sentencing, which permits sentencers to pick and choose a rationale which seems appropriate at the time with little constraint.

This state of affairs is unsatisfactory. Sentencing law is arguably the most important area of law. The sanctions available against offenders target the most cherished and coveted individual interests; such as the right to liberty and property. Sentencing law is too important to not get 'right'.

Main flaws of sentencing — no moral dimension, no empirical evidence that it works

The most fundamental failings of sentencing law and practice in Australia (and most other parts of the world) are that: (i) it is based on unproven *assumptions* concerning what can be achieved through a process of state imposed punishment; and (ii) it lacks a justification and focus. As a community we need to be clear about why we punish criminals and develop a clear mission statement for sentencing law and practice. In addition to this, the discharge of the judicial task of sentencing is remarkably at large, and permits the judicial officer great latitude in determining the appropriate sentence (*Olbrich*). This undercuts the pursuit of

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uniformity and transparency. The reason that the reasoning process of the judicial decision-maker remains shrouded in mystery is the dominance of the approach to sentencing known as the 'instinctive synthesis'. This conceptual term for the sentencing process, which is derived from the Victorian Supreme Court decision in *Williscroft,* continues to represent the dominant approach to the sentencing of offenders under Australian criminal law as approved in the recent High Court of Australia decision in *Wong*.

Sentencing council provides law-makers with information on how to get it right

In October 2000 the Victorian Government commissioned a review of the sentencing system in Victoria. Six broad terms of reference were provided, one of which was mechanisms to inform the sentencing process. Professor Arie Freiberg was commissioned to conduct the review. A number of recommendations were made following consultation with a large number of interest groups including judicial officers, the legal community and community organisations. One of the recommendations of the Review was the establishment of a Sentencing Advisory Council. This proposal had strong support from the relevant parties (Freiberg 2002:197). It was recommended that the Council should have a number of functions, most of which aim to better inform sentencing law, policy and practice (Freiberg 2002:198). The new established Sentencing Advisory Council presents an opportunity for sentencing law and practice to become a more sophisticated and defensible institution. Pursuant to section 6(4) of the *Sentencing (Amendment) Act* 2003 (Vic), the Council has a wide ranging brief including:

- to provide statistical information on sentencing, including information on current sentencing practices, to members of the judiciary and other interested persons; and
- to conduct research, and disseminate information to members of the judiciary and other interested persons, on sentencing matters.

The Sentencing Council does not have the mandate to implement any measures that will improve the sentencing system. Its functions are essentially advisory. However, it is in a position where, being at least one step removed from the political process, it can present enlightened and objective information to law-makers and the judiciary regarding the manner in which the sentencing process should be developed to achieve the objectives of a properly constructed sentencing system (which are listed below). Thus, the Sentencing Council is in a position where (properly focused) it can recommend changes that will make sentencing a more socially defensible and scientifically based practice. It is important to capitalise on this opportunity.

The purpose of this paper is to suggest a blueprint for a more coherent and justifiable system of sentencing. The new approach to sentencing should place a premium on the values of rationality, consistency and transparency. Such an approach is predicated on the importance of the coveted interests of an individual that may be interfered with by the criminal justice system and the need for the process to be underpinned, and guided, by clear values and attainable objectives.

The objectives that sentencing should pursue

In our view, the sentencing system should be fundamentally reformed. It should aim to achieve (only) three goals:

(i)To reduce crime;

(ii)To reduce the cost to the community of sentencing orders; and

(iii)To impose sanctions that do not violate important moral prescriptions.

We now set out the process by which the sentencing system can be reformed to achieve these objectives.[1]

Step 1: Pick a Theory of Punishment

The main theories of punishment lead to the same broad principles

The first step in the process is to decide which theory of punishment will underpin sentencing practice.[2] Punishment is the study of the connection between wrongdoing and state imposed sanctions. The main issue raised by the concept of punishment is the basis upon which the evils administered by the state to offenders can be justified. Thus, sentencing and punishment are inextricably linked, with punishment being the logically prior inquiry. In order to properly decide how, and how much, to punish, it must first be established on what basis punishment is justified and why we are punishing.

Two main theories of punishment have been advanced. Utilitarianism is the view that punishment is inherently bad due to the pain it causes the wrongdoer, but is ultimately justified because this is outweighed by the good consequences stemming from this practice. These are traditionally thought to come in the form of incapacitation, deterrence and rehabilitation. The competing theory, and the one which enjoys the most contemporary support, is retributivism. While retributive theories of punishment are not clearly delineated (Honderich 1984:211), they share the common view that the justification for punishment does not turn on the likely achievement of consequentialist goals: it is justified even when 'we are practically certain that attempts [to attain consequentialist goals, such as deterrence and rehabilitation] will fail' (Duff 1985:7). Thus, is it often said that retributive theories are backward looking, merely focusing on past events in order to determine whether punishment is justified in contrast to utilitarianism which is concerned only with the likely future consequences of imposing punishment.

Most commentators have claimed that radically different sentencing goals stem from the particular theory of punishment endorsed. However, one of us has previously argued that on *either* a retributive or utilitarian account of punishment, as is discussed below, general deterrence is the goal which justifies punishing wrongdoers, while the principle of proportionality fixes the amount of punishment (Bagaric 2001). The key at this point is simply to note that *a* (tenable) theory of punishment must be adopted — the corollary being that it is impermissible to pick, choose and swap a theory at whim, which happens to support one's intuitive predisposition.

Advancing this step would, for the Council, entail a literature review to ascertain if there are more recent persuasive writings regarding the implications stemming from the leading theories of punishment.

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1 For our views on how the judiciary can contribute the reforms proposed in this paper see Bagaric, M & Edney, R (2003) 'What's instinct go to do with it? A blueprint for a coherent approach to punishing criminals' *Criminal Law Journal,* vol 27, no 3, pp 119–141. For a summary of some of the recommendations in this paper, see Bagaric, M & Edney, R (2004) 'The evolution of Sentencing', *Law Institute Journal,* vol 78, no 4, pp 38–41.

2 This of course, assumes that as a threshold consideration it is morally defensible to deliberately inflict punishment on wrongdoers. For comments on that, see Bagaric, M & Edney, R (2003) 'What's instinct got to do with it? A blueprint for a coherent approach to punishing criminals', *Criminal Law Journal,* vol 27, no 3, pp 119–141.

The moral dimension cannot be ignored

We are aware that punishment needs to be analysed as a social practice, not simply the manifestation of a philosophy of punishment. It has been noted that philosophical normative inquiry is inapposite to the development of a sentencing system. The 'delivery of punishment in concrete settings condenses a whole series of relations: of power, force, legality, sexuality, economic and so on'.[3] Thus, it has been argued that the 'start from the correct theory of punishment' approach is flawed (Garland 1983:79):

> General arguments pitched at the level of abstract moral philosophies afford no adequate means to evaluate current penal practices, nor can they provide an adequate grounding or foundation upon which to prescribe future practices (Garland 1983:83).

In our view, this criticism is not persuasive. There are two reasons for this. First, punishment by its very nature requires a moral justification. Not all practices or types of behaviour call for a moral justification. We do not need to justify playing sport, visiting friends or dancing. However, punishment requires a moral justification because it involves the intentional infliction of some type of harm and hence infringes upon an important concern or interest. As such, it is not dissimilar to activities such as slavery, abortion and euthanasia. Zimring and Hawkins (1995:5) note that:

> The need to justify punishment is reflected in moral logic as well as history. Since penal practices are by definition unpleasant, the world is a poorer place for their presence unless the positive functions achieved by them outweigh the negative elements inherent in the policies.

If it was established that a state imposed system of punishment was clearly morally repugnant, as a community we would be (morally) obliged to abolish such a system. We may of course decide on pragmatic grounds to ignore this mandate. However, this is no minor matter. Invariably, while there is no end of wrongdoing in the world, individuals and societies do not expressly accept (or at least acknowledge) that are they engaging in immoral behaviour, no matter how repugnant their activities may appear. The reason for this stems from the fact that morality is the ultimate set of principles by which we should live. Moral judgments are capable of trumping all other types of principles. It is a settled social convention that moral prescriptions can be invoked to justify breaches of all other types of standards and rules; whether they relate to norms of business, sport, politics, etiquette or even law. We do not condemn the politician who disregards party policy and casts a conscience vote, and many people are prepared to excuse the murderer who commits the offence out of compassion for another.[4] Thus, the normative dimension is important in setting a framework for a sentencing law and practice.

Moral theory knocks out certain forms of punishment

Secondly, moral theory also plays an important role in setting the amount and type of punishment that is permissible within a properly developed system of sentencing. In particular, it acts as a side constraint to prevent certain forms of treatment, such as exemplary punishment, sacrificing the innocent and vicariously punishing family members of offenders.[5]

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3 We thank the anonymous reviewer of an earlier draft of this paper for this comment.

4 Opinion polls indicate that most people are firmly in favour of euthanasia. The results of a comprehensive range of surveys on euthanasia are detailed in the Report of the Senate Legal and Constitutional Legislation Committee (1997) *Euthanasia Laws Bill*, Australian Parliament, Canberra, 81–92.

5 None of these prohibitions are, however, absolute: see Bagaric, M & Amarasekara, K (2000) 'The Errors of Retributivism', *Melbourne University Law Review*, vol 24, no 1, pp 124–189.

Thus, while moral theory does not exhaust the range of considerations that properly inform the development of a state imposed system of punishment, moral considerations cannot be ignored in this process. It is on other considerations that the remainder of this paper focuses.

Step 2: Ignore Public Opinion

Take the advice from the experts

The next step in developing a coherent system of sentencing is to accept that sentencing is a purposive social endeavour which must be guided by rational inquiry, not raw impulse. It is also important to identify who should be involved in developing a sentencing process. As a matter of principle, it is legal commentators, practitioners and other experts (namely, criminologists, penologists, sociologists, moral philosophers and econometricians) who should be educating the public about how to frame a sentencing system — not the other way around.

The public know little about sentencing

Seeking public views on sentencing is analogous to doctors basing treatment decisions on what the community thinks is appropriate or engineers building cars, not in accordance with the rules of physics, but on the basis of what lay members of the community 'reckon' seems about right. Sentencing is an intellectual social discipline. It should have underlying principles which govern the way it ought to be administered. These are ascertained through a process of inductive and deductive logic and analysing the relevant empirical evidence to determine what objectives are and are not achievable through a system of state imposed punishment. Guidance on sentencing matters should be sought from experts in the field not the uninformed.

This may seem to be asking too much. It has been noted that the public have a strong interest in sentencing. 'Of all of the aspects of the criminal justice system, sentencing is probably most in the public eye and the most sensitive to changes in community opinion' (Freiberg 2002 :185). Some commentators express the view that the viability of our system of criminal law and punishment is dependent upon continued public confidence. 'A criminal justice system which loses touch with its community risks losing its legitimacy' (Freiberg 2002:185). This point is often overstated. The Australian public does not engage in acts of civil disobedience each time a lenient (or for that matter, harsh) sentence is imposed.

Strong feelings do not justify standing

While the public have strong *feelings* about punishing criminals, feelings are just that: raw, unreflective expressions of emotion. As in most areas of life they are better suppressed than being permitted to flourish and guide behaviour. In relation to any sentencing reform proposal the critical question regarding its appropriateness is whether it will promote the objectives of a properly developed sentencing system. Sentencing is (or at least ought to be) a purposive practice — it is done with some ends in mind. Thus, the ultimate criterion against which any proposed sentencing reform should be assessed against is whether it is consistent with the objectives of the practice.

Pragmatically the community can be trained to listen

While many commentators might agree that as a matter of principle, community sentiment should be ignored in developing a system of punishment it could be asserted that at the

pragmatic level this is unrealistic. In a liberal democracy community sentiment, no matter how uniformed will, so the argument runs, play a cardinal role in sentencing practice and policy. In our view the populist nature of Australian politics and the capacity for crime to inflame community passions is not an insurmountable obstacle to the development of an informed and progressive sentencing system. We accept that the retributive impulse seems to be an entrenched part of the many people's disposition; however, there are demonstrably more important considerations. It is unlikely that a community will seek to control the design of an important social institution if it was presented with evidence that this input would lead to a worse system and is in fact likely to be self-defeating.

Part of the community education would no doubt involve informing the community that retribution has a high price. Every dollar spent on jails is a dollar less for education and health. There is nothing new about this equation. What is new is the magnitude of the sums involved — now reaching into the billions of dollars nationally. Ultimately the magnitude of the figures gets so immense that even lay people will start to question the desirability of a policy which leads to sanctions of ever-increasing severity. In a recent Victorian State budget, the government allocated $194 million to build four new prisons and a further $43 million per year for temporary accommodation until those new prisons are built (Mottram 2001). The unwillingness of the Victorian community to continue to punish itself by spending scarce public resources on punishing wrongdoers resulted in the home detention being developed as a sentencing option (Bagaric 2002). In this small way, there is some evidence that the community and politicians are starting to realise that retribution has its limits. Further, evidence that public sentiment is not a fetter to the development of a rational and informed system of sentencing stems from the Finnish experience (which is explored further below) where the community endorses extremely lenient sentencing orders in the knowledge that it leads to enormous savings to the public revenue and a reduced crime rate.

Community should be informed, not heeded

It is important to emphasise that we are not advocating that the community should be totally divorced from the process of developing a more sophisticated sentencing system. The community should be involved in the process, but it cannot be permitted to set the agenda otherwise the process will fail. The community should be informed of the limits of current sentencing system and the benefits of a more sophisticated system. There is no reason to think that the goals of less crime, less taxes devoted to prisons and less punitive orders should be impossible to sell to the community. While crime tends to enliven feelings of hatred and revenge, the prospect of less crime and more spending on health and education (from savings to the corrections budget) may have the capacity to extinguish such feelings.

It is also important for the Council to impress that sentencing is social science, not a formless, discretionary community activity. Several members of the Council must have experience in community issues affecting the Courts. The inclusion of these members should be used to assist in getting the message out to the community that sentencing is a rational goal focused activity which works best if designed by experts in the area.

Step 3: Identify the Objectives of Sentencing — Incapacitation, Deterrence and Rehabilitation?

The next step involves working out what can be achieved through a process of state imposed punishment of wrongdoers. This is essential because it is pointless striving for aims which are not attainable. Sentencing, like all practices, has limits concerning the goals and purposes that it can fulfil. For the system to work effectively these limits must be ascertained. In the same way that the health care system is not used as a means to educate people; the building industry is not used to cure physical ailments and the education system

does not aim to feed the hungry, unattainable goals should not be pursed by the sentencing system. Not only will this necessarily lead to the (on-going) failure of the system, but it will lead to the imposition of inappropriate sentences. For example, going soft on first offenders because it is assumed that they have greater prospects of rehabilitation would be erroneous if it transpired that rehabilitation was ultimately an unachievable sentencing aim.

Curiously, legislatures and courts seem to be unwilling to accept such limitations. In the case of some sentencing goals the courts at times have displayed a remarkable resolve to not allow themselves to be browbeaten by logic into disregarding them in the sentencing calculus. In the context of general deterrence, for example, in *Yardley v Betts* (at 112) the court stated: 'the courts *must assume*, although evidence is wanting, that the sentences which they impose have the effect of deterring at least some people from committing crime (emphasis added)'. This peculiar fondness of deterrence as a rationale for sentencing is not confined to Australian courts. Commenting on the general approach by the Canadian Courts to the issue Ruby (1994:7) states:

> One does not know what secret information trial judges may possess unknown to social scientists and lay men alike, but there is a distinct shortage of statistical analysis upon which to base [the view that individuals may be deterred by severe sentences] ... It seems almost to be the case that there exists a fear on the part of the judges that if they let loose of the straw of general deterrence, the waters will take them and all will be lost.

The source of this imperative to rely on deterrence as a sentencing goal is unclear. It is not as if there is a shortage of other sentencing objectives which are open to the courts to justify punishing wrongdoers: denunciation, rehabilitation, reparation, just to name a few. Even if there were not, it would seem far more appropriate to abandon punishment altogether than to punish criminals on the basis of a flawed rationale. As it transpires, as we discuss shortly, (absolute) deterrence is an appropriate sentencing objective, however, this is something that must be proven — not taken for granted.

The sentencing system should pursue only those objectives that empirical evidence (and in particular econometric research) shows are attainable through a system of punishing wrongdoers.

Broadly, it has been suggested that there are three positive *benefits* that may be secured through a system of State imposed punishment: incapacitation, deterrence (both general and specific) and rehabilitation. The foregoing is a brief summary of the conclusions that one of us have previously reached on this matter (following a consideration of relevant empirical evidence) (Bagaric 2001).

Current empirical evidence provides no basis for confidence that punishment is capable of achieving the goals of incapacitation, specific deterrence and rehabilitation. Incapacitation is flawed, since we are very poor at predicting which offenders are likely to commit serious offences in the future. There is nothing to suggest that offenders who have been subjected to harsh punishment are less likely to re-offend, thus there is no basis for pursuing the goal of specific deterrence. Rehabilitation fares no better. There are no far reaching rehabilitative techniques which have proven to be successful at producing positive internal attitudinal change in offenders. Even more telling is the fact that the goals of punishment and rehabilitation may be inconsistent due to the apparent inherent contradiction between punishing a person while simultaneously attempting to promote his or her internal reform.

Absolute General Deterrence; not Marginal General Deterrence

However, experience shows that absent the threat of punishment for criminal conduct, the social fabric of society would readily dissipate. Crime would escalate and overwhelmingly frustrate the capacity of people to lead happy and fulfilled lives. Thus, general deterrence works in the *absolute* sense — there is *a* connection between criminal sanctions and criminal conduct. However, there is insufficient evidence to support a direct correlation between higher penalties and a reduction in the crime rate. It follows that *marginal* deterrence (which is the theory that there is a direct correlation between the severity of the sanction and the prevalence of an offence) should be disregarded as a sentencing objective — at least unless and until there is proof that it works.

The above conclusions summarise the current state of play concerning what can be achieved through sentencing. An important on-going task of the Council will be to continually monitor the relevant literature.

Step 4: Make the Punishment Fit the Crime

The failure of marginal general deterrence means that (absolute general) deterrence justifies inflicting *some* punishment on offenders, but it is of little relevance in fixing the *amount* of punishment. Likewise with the goals of incapacitation and rehabilitation — sanctions should not be either increased or reduced on the basis of these goals.

Proportionality is trumps

In terms of fixing the amount of punishment, the cardinal determinant is the principle of proportionality, which prescribes that the punishment should fit the crime. That the severity of the punishment should be roughly commensurate with the gravity of the offence is one of the few principles of the debate in punishment and sentencing which enjoys widespread acceptance, by philosophers, legislatures and the courts. Proportionality is one of the main objectives of sentencing and the Australian High Court decisions of *Veen (No 1)* and *Veen (No 2)* even went as far as pronouncing it as the primary aim of sentencing in Australia. Despite this, sentences for similar offences vary widely from jurisdiction to jurisdiction and from court to court. There are two reasons for this. The first is that legislatures and the courts have not developed a workable way to match the two limbs of the principle. The second is that the principle of proportionality is seriously distorted by the notion of aggravating and mitigating factors. The manner in which these should be dealt with is discussed in step 5.

At this point we discuss how legislatures can go about matching the two limbs of the proportionality principle. This, admittedly, is no easy task. How many years of imprisonment correlate to the pain endured by a rape victim? The main difficulty here is that the two currencies are different. The interests typically violated by criminal offences are physical integrity and property rights. At the upper end of criminal sanctions the currency is (deprivation of) freedom. The only conceivable way to give content to the proportionality principle is to adopt a uniform standard for measuring the offence gravity and punishment severity. Previous criteria that have been suggested included public perceptions of offence seriousness and statutory penalties (Anderson 2003). In our view, both of these are inappropriate. They are too transient (public perception can be fickle) and have no relation to actual offence seriousness.

Happiness and pain as the common denominator

We propose that a more appropriate measure is happiness and pain. Thus, the amount of unhappiness caused by the punishment should be commensurate with the seriousness of the offence. The reason that we select pain or suffering as the ultimate criterion is that it is capable of being felt by all; and desired to be avoided *most* by all. Quite simply, the desire to avoid suffering is the sentiment felt most strongly by all people at all points in history and across all cultures. To this end, it is important to note that there is a large amount of empirical data indicating the conditions in which humans flourish best (Myers 1994; Kasser 2002) and social scientists are adept at making assessments of subjective well-being.

It is this aspect of our proposal which requires the allocation of most resources. It requires surveys to be conducted that evaluate the subjective well-being of victims of crime. These should be compared to studies that analyse the degree of pain that actually stems from criminal sanctions. Well-being in relation to both aspects of the study will be measured by the extent to which a person's interests are adversely affected as a result of being either a victim of crime or subjected to a criminal sanction.

Step 5: Aggravating and Mitigating Factors — Scrutinise Each of Them

Hundreds of sentencing variables

The second last step in developing a sophisticated sentencing model involves addressing the issue of so-called aggravating and mitigating sentencing variables. As the law currently stands, there are currently hundreds of them — two separate studies, undertaken about twenty years ago, determined that there were between 200 and 300 factors that were relevant to sentencing (Sharpland 1981; Douglas 1980). The main sentencing variables (apart from the objective seriousness of the offence) include considerations such as the level of harm caused, the offender's prior criminal record, remorse, intoxication, breach of trust, the prospects of rehabilitation, whether the offence was planned or spontaneous, previous good character, age (of the accused and the victim), breach of trust, the prevalence of the offence, the maximum penalty, the use of weapons, degree of participation, profits from the offence, the offender's intention, the attitude of the victim (including victim impact statements), response to previous court orders, the sex of the offender, the effect of the proposed sanction, hardship to others (especially the offender's family), the requirement of parity, parsimony, plea of guilty, voluntary reparation, worthy social contributions and assisting the criminal justice system.

Need to determine which are relevant

The relevance of most, if not all, of these considerations is questionable. The starting point is that all of these considerations should be ignored unless a cogent justification is given for them. To justify the existence of a sentencing practice or rule one must (i) state the sentencing aim(s) that is being invoked; and (ii) show how the consideration will assist in promoting the aim(s). Thus for example, if the objective of sentencing is to impose proportionate sentences, then a consideration like remorse should be excluded from the sentencing calculus. It might feel right to punish the regretful criminal less than the defiant one, but feelings of regret will not mend the victim's broken bones, nor compensate for the stolen property. Contrition after the event also does not affect the accused's level of blameworthiness at the time he or she committed the offence. It might be suggested, for example, that remorse diminishes the relevance of specific deterrence, but if this has been excluded as a relevant variable in step four then it cannot justify its retention as a sentencing consideration.

This analysis makes for a vastly different sentencing system to that at present. While general deterrence determines the type of punishment, legislatures should then look to the principle of proportionality to guide them on how much to punish. The most obvious change to sentencing that would follow from this is that the reliance on imprisonment would be significantly diminished: 'old favourites', such as specific deterrence, incapacitation and prior criminality could no longer be invoked to 'justify' incarceration (Bagaric 2002).

Thus the Sentencing Council needs to identify each of the main sentencing variables (pursuant to the reasons advanced in Court of Appeal judgements) and critically evaluate whether they are justified as being legitimate sentencing objectives.

Finland shows that low crime and lenient sentences are achievable

The main rationales underlying the move towards harsher penalties are incapacitation and (marginal) general deterrence. Given that these objectives are flawed, it follows that what we should be doing is watering down the severity of punishment. At the same time, we should be striving for a lower crime rate. This may seem overly ambitious, but it is certainly not unattainable. Any intuitive unease that lowering imprisonment rates would inevitably lead to increased crime rates is to a large extent allayed by a comparison of sentencing practice in jurisdictions such as Finland where sentencing premiums are not attached to pursue the aims of incapacitation or deterrence and the main determinant in setting criminal sanctions is the principle of proportionality (Lappi-Seppala 1998). The system is founded on a (relatively) forensic approach to sentencing, which has many similarities to the model we have proposed. In relation to the Finnish model, it has been noted that the 'approach is driven by an analysis of what sentencing should aim to achieve, tied in closely with a cost-benefit analysis of the effectiveness of various penalties in achieving the aims of general social policy, such a reduction in crime through prevention, deterrence and rehabilitation' (JUSTICE 2001). The prison rate in Finland is about half of that in Australia (Lappi-Seppala 1998) and when offenders are sent to prison they do not stay very long — prison sentences exceeding 5 years are rare (Von Hirsch 1995:43). Moreover, the crime rate in Finland is about 35 per cent lower than that in Australia (Bagaric 2001).

Finnish system works because it was designed by experts

It is important to emphasise that the Finnish did not achieve success in sentencing by accident. Thirty years ago, Finland had a strict criminal justice regime, inherited from neighboring Russia, and one of the highest rates of imprisonment in Europe. However, academics provoked a fundamental re-thinking of penal policy, urging that it should reflect the region's liberal theories of social organization (Hoge 2003). The Director of the Finnish National Research Institute of Legal Policy, Tapio Lappi-Seppala, stated that criminal policy in Finland is exceptionally expert-oriented (Hoge 2003). 'We believe in the moral-creating and value-shaping effect of punishment instead of punishment as retribution'. Over the past two decades, more than 40,000 Finns had been spared prison, $20 million in costs had been saved, and the crime rate has gone down to relatively low Scandinavian levels. The Finns openly state that 'we don't believe in an eye for an eye, we are a bit more civilized than that, I hope' (Hoge 2003).

The Finnish experience is a victory of principle over expedience and is a model that should be followed by Australian law-makers. It took several decades for the Finns to succeed in establishing a criminal justice model that was effective in reducing crime, is inexpensive to administer and at the same time does not involve the imposition of harsh and unjust sentences. We do not suggest that transporting the Finnish model to Australia will necessarily have the same outcome in Australia. There are many variables that impact on

the workings of criminal justice initiatives, including the social, political and environmental considerations. To this end, it is important to note that Finland is a relatively classless culture with a Scandinavian belief in the benevolence of the state and a trust in its civic institutions (Hoge 2003). However, the Finnish experience does provide a strong foundation for confidence that if the development of sentencing policy and practice is guided by expert analysis, it will become a far more sophisticated and workable system.

Abolishing sentencing variables does not necessarily mean tougher sentences

It could be contended that abolishing sentencing variables could lead to tougher sentences. Calling for the eradication of mitigating and aggravating circumstances is exactly what the Coalition opposition in NSW did before the most recent state election in calling them 'mere excuses' and in promising mandatory minimum terms which were anything from 2 to 5 times the existing tariff. The effect of this is to curtail judicial discretion and reduce sentencing to a much more US style grid system, which had generally lead to harsher sentences.

Tougher sentencing is not, however, the inevitable by-product of abolishing sentencing variables. This is because to the extent that it emerges that certain variables are in fact irrelevant there is no reason to think that they will come mainly from the mitigating, as opposed to the aggravating, side of the calculus. While variables such as remorse might become redundant, so too might variables such as prior criminal record which often serve to greatly increase the sentence. And in fact one of us has previously argued that a grid or fixed sentencing system if adopted will lead to more lenient sentences, if the system is designed in a forensic, rather than populist and expedient, manner (Bagaric 2002).

Step 6: On-Going Reform

The last step is an on-going one. No system, be it health, education or sport is beyond improvement. It is important not to lose sight of the fact that whatever sentencing system is adopted it will not be perfect; rather, it will necessarily be provisional --- subject to new evidence regarding what can be achieved by punishing wrongdoers. The system proposed by the above model relies heavily on what research shows can be achieved through sentencing. We are skeptical, for example, about the efficacy of sentencing to achieve the goals of rehabilitation or incapacitation. However, the evidence is not conclusive in relation to this --- more testing is needed. And even if the evidence was strongly suggestive that such benefits could not be achieved through sentencing, this would only apply in relation to the present sentencing practices. More sophisticated psychiatric techniques may make it possible to distinguish offenders who are likely to re-commit serious offences from those who no longer present a danger to the community, thereby giving renewed impetus to an incapacitative sentencing regime. Likewise, better designed educational programs may make it possible to re-shape the value systems of criminals, which would make rehabilitation an attainable objective. We should not give up readily on the pursuit of such desirable outcomes. Thus, there is an on-going need for experimental controlled sentencing programs to see if they can achieve where other past programs have failed.[6]

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6 A good example are newly developed Therapeutic and Holistic sentencing orders which seem to offer some hope of affecting rehabilitation: see King, M (2002) 'Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush', *Criminal Law Journal*, vol 26 , no 5, 260–271.

Guideline Judgments Not the Answer

Another important innovation accompanying the Sentencing Council is that the Victorian Court of Criminal Appeal will be granted power to issue guideline judgments.[7] One of the functions of the Council is to inform the Court of Appeal of its views in relation to the giving, or review, of a guideline judgment.[8]

It is important to emphasise that guideline judgments while constituting a positive reform are only a very small improvement and should not be used as a basis for not engaging in a total review of sentencing law and practice. Guideline judgments are a positive step forward in terms of achieving greater consistency in sentencing; however, they are ultimately unlikely to significantly improve sentencing practice. There are several reasons for this. First, they are only directory. This point was not missed by the New South Wales Court of Criminal Appeal in *Henry*:

> A guideline judgment on the subject of sentencing should not lay down a requirement or anything in the nature of a rule. The failure to sentence in accordance with a guideline is not itself a ground of appeal. Guidelines are not rules of universal application. They may be departed from when the justice of a particular case requires such departure.

Secondly, guideline judgments do not involve the courts taking a top down approach to sentencing. Rather than focusing on why we should punish offenders in the first place and developing suitable sentencing considerations (and penalties) to meet such objectives, typically, guideline decisions simply adopt (possibly flawed) existing sentencing practices and try to make them as coherent as possible.[9]

Thirdly, there is persuasive empirical evidence contradicting the claim that guideline judgments serve to make sentencing more consistent and predictable. Guideline judgments have been a feature of the sentencing landscape in the United Kingdom for several decades. A relatively recent study has found an enormous disparity in sentencing outcomes among courts which are meant to be applying the same sentencing laws and practices. A report by the Prison Reform Trust (1997) found a fundamental lack of consistency in Magistrates' courts decisions throughout England and Wales. The report showed that the chances of an offender going to prison depend far more upon the court where he or she is sentenced than upon the crime of which he or she is charged.[10]

The report shows that markedly different sentencing cultures have developed in towns which are in close proximity to each other. For example, defendants in Sunderland are twice as likely to be imprisoned for driving while disqualified and theft, and are over five times more likely to be imprisoned for car related thefts than defendants in nearby Newcastle. In Brighton the imprisonment rate (13 per cent) was more than double that in Southampton (six per cent). There are also large discrepancies in relation to the length of sentence passed. The average in Southampton (4.4 months) was nearly 40 per cent higher than in Brighton

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7 *Sentencing (Amendment) Act* 2003 (Vic), s 4.

8 *Sentencing (Amendment) Act* 2003 (Vic), s 6.

9 Spigelman, J (1999) 'Sentencing Guideline Judgments', *Australian Law Journal*, vol 73, no 12, 876 at 881 makes a distinction between top down guideline judgments, where the court establishes a guideline of a prescriptive character, and bottom down guidelines, by which he means where the court attempts to derive a range or tariff for actual sentences imposed by lower courts. In both cases the appellate court is influenced heavily by existing sentencing ranges (for example, this is evident from the reliance on sentencing statistics in *Henry* (1999) 46 NSWLR 346) and sentencing objectives and rationales are rarely considered in depth.

10 The report used figures from the Criminal Statistics England and Wales, Supplementary Tables 1995, Vol.4, Proceedings in magistrates' courts — data for individual Petty Sessional Divisions, HMSO, November 1996.

(3.2 months). Similar discrepancies were found in the four Yorkshire towns of Leeds, Bradford, Huddersfield and Wakefield. The incarceration rate for defendants in Bradford and Huddersfield was nearly twice that in Leeds and Wakefield. The average prison sentence in Bradford was 2.2 months, compared to 3.4 months in Leeds. Magistrates in Wolverhampton were over 70 per cent more likely to imprison offenders convicted of burglary offences, nearly 40 per cent more likely to imprison disqualified drivers and twice as likely to impose prison sentences for actual bodily harm, than magistrates in Coventry. In North Wales, the incarceration rate in Merthyr Tydfil was more than three times that in Llanelli.

Overall, offenders in London were 25 per cent more likely to receive a prison sentence than nationwide. However, this overall figure is very crude and glosses over significant disparities across the 43 courts in London which are as pronounced as in other regions of the country. For example, defendants in Croydon were half as likely to be imprisoned as defendants in Sutton and defendants in Brent were twice as likely to be imprisoned as defendants in Ealing and Haringey.

Guideline judgments at best offer some hope of increasing consistency in sentencing. Even if they do achieve this outcome, this will only be a small improvement to the present system. Absent a wholesale reform of the sentencing system, there would be no reason to believe that if consistency was promoted by guideline judgments that this would not simply mean that the courts were now getting it wrong — consistently.

Conclusion

Given the crude manner in which sentencing has evolved in Australia, there is room for considerable scepticism concerning whether in the foreseeable future it would transform from a confused and fragmented practice into something akin to social institution underpinned by a body of empirical and normative knowledge. The Sentencing Advisory Commission, properly conducted, offers hope that this process can be considerably accelerated. In order for this to occur it is imperative that the Council take a global approach to sentencing and not make any assumptions about the validity of existing sentencing policies and practices.

Law-makers and the courts may, ultimately, not act upon the recommendations made by the Council. The populist nature of the Australian political and social landscape may, despite our hunches to the contrary, prove too much of an obstacle for principle to trump unbridled community passion in this area. If this is so, as a society we will continue to have an uninformed, 'dopey' sentencing system. However, it would be regrettable if the Council did not at least present courts and other interested parties with the roadmap to a more sophisticated sentencing system.

List of Cases

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Olbrich (1999) 199 CLR 270

Veen (No1) (1979) 143 CLR 458

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