Paper to Public Defenders' Criminal Law Conference

Saturday 7 March 2009

The Honourable Justice Ian G Harrison

Supreme Court of New South Wales

It seems to be assumed by all of those with the power to influence public opinion in this country that folk who are charged with or convicted of crimes necessarily come from a special and separate class or section of society into which it is not possible other than by birth to enter, and from which it is not possible other than by death to leave. Populist pronouncements about sentences and bail and release on parole following completion of the head sentence all seem to me to be monotonously infected with the aroma of inevitable preordination. Nothing that is ever thought to be newsworthy finds expression in terms that are not derogatory or demeaning. This is unsurprising given that the unwritten and unexpressed assumption is that the majority of the population is all safe from inclusion in this awful group. Crimes are committed by others and by inference against the rest of us. The perpetuation of this mentality is apparently politically important.

May I congratulate you on such a well-attended conference. I have not seen this many people gathered in the one room with a real interest in crime since Johnny Cash entertained 300 inmates at Folsom Prison 40 years ago.

What I have to say to you today is in one sense the third in a series of papers I have delivered on related topics. The first was to the National Sentencing Conference in Canberra on 8 February last

year, a paper that appeared to some to be slightly controversial. I said this at that time:

> "*before my appointment I had been at the Bar for 30 years and only in the early years did I conduct many criminal trials. I came to the view early on, and I still hold it, that every aspect of the sentencing process is inevitably, inappropriately and unfortunately shackled to some kind of fear. The end result, in my opinion, is that the sentences we are bound to impose, with some notable but rare exceptions, are unreasonable and excessive. My simple argument is this: we are required in conformity with currently binding principle to sentence those whom we convict to terms of imprisonment that are in very many – although of course by no means all - cases far too long. As a result, they are punished and suffer more than they should and we – the community – acquire no corresponding benefit in economic, social or emotional terms from the excess"*

The second was a paper delivered later last year to the 11th International Criminal Congress in Sydney. This appeared to be less controversial, the result I suspect of my having acquired greater skills in choosing my audience. I am aware that some of you were in attendance at one or both of those events. With some minor – perhaps notable – exceptions I suspect that the degree of controversy that I generate in this audience this afternoon will be even less.

It is important at the outset to stress that anything I say today is said in my capacity as an independent individual and not as a member of the judiciary. I raise that not by way of rider or

disclaimer but for the very important reason that administration of the law and views about the law should remain unconfused. It is dangerous and churlish to comment on matters in a way that can give the impression that they represent an official approach to the administration of the law when litigants and accused persons and the public at large are entitled to expect and to receive justice delivered in accordance with the judicial oath. If law reform is to be effected it must occur wholly independently of the rights of any individuals or groups who come before the courts in anticipation of a certain and final result. A meeting such as today's meeting is therefore the only proper venue for debate.

I should immediately disclaim any particular expertise in the things I wish to address. This has in one sense fuelled what little controversy I have unintentionally managed to generate. How can a common law commercial equity tick have anything worthwhile to say about hairy chested crime! However, I took heart from a comment that I received following one of my papers to the effect that views that are unadorned by traditional thinking are sometimes unexpectedly refreshing. I hope to reinforce that suggestion today.

My most extraordinary experience as defence counsel in a criminal trial was appearing for a man charged with attempted rape. The trial was in Wagga Wagga and I travelled there on the Sunday before the trial to confer with the accused. I was very junior and had the popular impression that criminals looked liked criminals. So I was surprised to meet my client at the solicitor's office when he turned up in bowling creams and those funny brown shoes that bowls players wear. He looked highly unlike an attempted rapist in my view. The corollary of the story is that the prosecutrix turned

up to court the next day with more tattoos than Chopper Read and looking just as menacing. I realised why the charge was only attempt and not the real thing. You will be unsurprised to learn that the jury acquitted my man in the space of an hour's deliberation.

We all know that this country operates under the rule of law, of which the presumption of innocence is a cornerstone. Due process and either a conviction or an acquittal are events in the logical and ordered progress of properly conducted criminal proceedings. Imprisonment is also a natural, or at least not unusual, consequence of conviction. So what intellectual criteria generated the wholesale amendments to the Bail Act that altered or in some cases eradicated the presumption in favour of bail. There is of course an irreconcilable tension between the presumption of innocence on the one hand and the revocation of the presumption in favour of bail on the other hand. It is my view that this awful contradiction of principles passed scrutiny because of this "them and us" mentality that constantly infects the debate. Criminals, or at least no one we know, commit crimes so what does it matter if they languish in gaol pending a committal or a trial. They were arrested so they are probably guilty anyway.

However if you personalise this discussion, a different view always emerges. When your own son or daughter is speaking to you in the reception centre of some gaol somewhere emotionally (and for present purposes let us assume truthfully) explaining that he or she was not even there at the time, and so forth, do you revert to the "well let's just wait and see what the jury has to say about that"

mentality. Of course not. And the position should be no different in any other case.

A refusal of bail should be based upon the simple concepts that alone or in combination arguably and temporarily outweigh the logical indicia of the presumption of innocence. Evidence that establishes threats to witnesses, interference with evidence, a well founded expectation of repeat offences or the likelihood of non-appearance are all that should inform the inquiry. The strength of the Crown case, to the extent that it is ever possible to assess it accurately at an early stage, is also obviously important. Statements that someone is a flight risk should be supported by more than just the assertion that it is so.

Regrettably the loss of the presumption in favour of bail can now follow from a multiplicity of circumstances that range beyond what I have identified as the critical determinants. Section 8A is headed "presumption against bail for certain offences". As you all know, these are predominantly offences under the ***Drug Misuse and Trafficking Act*** **1985** and certain offences under the Commonwealth Criminal Code. A person accused of an offence to which this section applies is not to be granted bail unless the person satisfies the authorised officer or court that bail should not be refused. Nothing that is inherent in these offences is related to the traditional factors that would warrant rebuttal of the presumption in favour of bail. It does not take a genius to realise that the determining factor is the simple fact of arrest.

Section 8B is in cognate terms for serious firearms offences. Section 8C is in my opinion in even more insidious terms. That

section provides that there is a presumption against bail in the case of certain specified property offences if the applicant for bail has been convicted of at least one property offence within the previous two years. Prior criminal history is inadmissible at the actual trial but for the purposes of a bail application it assumes an undeserved relevance and importance upon arrest.

These matters would not be so critical if it were not for at least two very important factors. First, significant numbers of those arrested are socially and intellectually unable to arrange representation in a timely way and languish in custody often unaware of their rights. Secondly, the periods that these people remain in custody are often unacceptably long and create hardships that affect families and financial survival in many cases, quite apart from the injustice inherent in a period of imprisonment that ultimately turns out to have preceded an acquittal.

The other side of the coin is that conditions attaching to grants of bail are so often very onerous. The cases in which the factors, that should excite attention on a bail application, are prominent are usually capable of attention in the formulation of bail conditions that remove or reduce the risks associated with a grant of bail.

You could be forgiven for thinking that the creation of a feeling that the more people that are locked up, the safer we all are, serves the interests of those with the power to make the rules. It is a matter of some shame for those of us with the intellectual power and the continuing opportunity to do something about this that we have so far done so little.

Before I leave bail let me share a delightful true story with you. I was hearing an application for bail by a young aboriginal boy. He was about 12 or so. He was on a video link from a juvenile detention centre in the bush. He was on the screen seated with two juvenile officers standing behind him. I could not see their faces on the screen. My first reaction was to feel that it was unfair to have this boy answer questions under pressure in such an application with these officers standing so close and appearing to be so menacing.

The boy had a face like an angel but was obviously a bit of a tearaway from a troubled background. I asked him some questions, including why it was that I should grant him bail. He was a little bit shy and became lost for words. Then everyone heard one of the officers behind him whisper, "because you learnt your lesson". The boy repeated, "because I learnt me lesson". The court erupted in laughter. It was a wonderful moment. It restores your faith.

The principles that govern sentencing also require some continuing critical scrutiny. I have spoken on a previous occasion about my views on deterrence and the relationship between that concept and the fear of detection. I maintain my view that sentences of others do not operate as a deterrent for the simple and logical reason that those who commit crimes almost without exception either do not anticipate that they will get caught or do not turn their mind to the consequences of their proposed criminal acts or both. Only fear of detection has a direct and significant impact on the incidence of crime. Certainty of detection, if ever possible, would reduce crime.

What then of punishment, retribution, and rehabilitation. The *Sydney Morning Herald* on Wednesday carried an article suggesting that barely more than half of all adults found guilty of sexual offences against children served any time in prison. The article attributed to the Shadow Attorney General a suggestion that the government should request a guideline judgment "to force judges to deliver harsher penalties". The figures compiled by the Bureau of Crime Statistics and Research show that of 259 people found guilty of such offences in 2007, 148 were sentenced to full-time gaol terms. Only 27 of them were sentenced to at least four years and 87 served less than two years. Not a hint of a discussion about the range of offences taken up by these figures.

Why is this news? It is news because it excites the notion of the exclusive criminal group I spoke of earlier. People like to hear about the prospect of others being severely punished because they are not part of the group and naïvely do not think they can ever join it. We seem to extract some vicarious pleasure at the plight of others. In Afghanistan they watch public hangings but we are not far removed. This base sentiment spills over into calls for higher sentences when the proper inquiry should be directed to the individual crime. Touching the buttocks of a 15½ year old girl (or boy) is capable of amounting to a sexual offence against a child. It is not similar to the sexual penetration of an infant. It calls for a different result. It is dangerous and misleading to fail to discriminate. That failure operates to the disadvantage of a large number and proportion of accused persons. We have to address this type of hysterical sentiment.

I was heartened to see a recent report of the views of Bernie Whelan to the effect that if he had a choice between either the conviction of the person who kidnapped and killed his wife or the discovery of her body, he would choose the latter. It is not appropriate to deal with the detail of that crime but it is an instructive example suggesting that the so-called victims of crime are not universally or necessarily only concerned with the imposition of ever more severe punishments. Longer and harsher sentences are thought to attract universal or at least general acclaim but if that wisdom is flawed, as I think it is, then the sentencing equation becomes skewed. This inevitably has human consequences.

Also in the paper this week was a report of the young woman whose appeal to the District Court against a sentence of imprisonment for a graffiti offence was allowed. In what must have been a misquote of the Shadow Attorney General, the *Herald* suggested that he said she should be behind bars and that "we need to put fear into people's lives". If he was not misquoted then what you have is a serious misconception about the legal and social role that our prisons should play. She received a 12-month good behaviour bond, which curiously was itself a topic of rabid and ill-informed debate in the press only recently.

It is also important to realise that a one-size fits all approach to sentencing actually draws attention away from those cases where significant sentences are appropriate. In other words, if the freight goes up for small offences they will merge with and detract from the flexibility of discretions necessary to emphasise or mark out the worst offences.

One controversial product of all of this is the legislation that permits applications to delay the release of some offenders at the expiration of their term of imprisonment. The safety of the community is touted as the rationale for these provisions. I do not have any difficulty with the desire of the community to be protected from awful crime or with the proposition that some offenders are likely to be intractable and will have an untreatable propensity to commit further offences. My concern is that this propensity should have been, and in all probability was, recognised and accommodated at the time of the imposition of the original sentence. It should not be raised twice or at a point where a prisoner is on the verge of imminent release into the community, and in circumstances where it serves to operate as a double punishment.

Imprisonment as a useful concept is also a very blunt instrument. There is little fresh or current debate about its utility. There is a passive acceptance that ultimately no alternative exists. Its role is as much a result of the failure to seek out and create an appropriate substitute as anything else. So the question becomes, are there realistic choices available? Are we hampered in our search for them by the concept that here is a group who will always be criminals and we may as well get used to it or do we look for a result inspired by lateral thinking?

We have all heard of restorative justice. Instead of asking what laws have been broken, who did it, and what do they deserve, we ask who has been hurt, what are their needs and whose obligation is it to satisfy those needs. Although at one level this sounds like

bleeding heart psychobabble, it has the potential to create untapped scope for penal reform and to save large sums of money, quite apart from the human benefits.

Restorative justice is a theory of justice that focuses on crime and wrongdoing as acted against the individual or the community rather than the state. In restorative justice processes, the person who has created the harm takes responsibility for their actions and the person who has been harmed may take a central role in the process, in many instances receiving an apology and reparation directly or indirectly from the person who has caused them harm. Restorative processes that foster dialogue between the offender and the victim show the highest rates of victim satisfaction, true accountability by the offender and reduced recidivism. Restorative justice emphasises repair, reconciliation and the rebuilding of relationships.

This all sounds good in theory, but where does it sit with our traditional notions of punishment and retribution? My response to that question is to ask, "Well who cares?" In other words, why cling to an idea that is so obviously failing the tests that have been set for it – that is, rehabilitation, crime reduction, social contentment and so forth. We have nothing to lose.

There are of course already examples of restorative solutions that have been put in place in this State. The good work performed by the Drug Court requires no elaboration. The Magistrates' Early Referral Into Treatment programme and the circle sentencing initiatives are also well known and working well. What else can be done?

In my opinion the first thing that is required is a total rethink of what is a proper punishment for all crimes. We must not simply *say* that prison will be a last resort. It must *become* a last resort. It is so often the first resort. I had cause to deal with a shoplifting case recently where a woman was sent to gaol for six months for stealing from retail stores. Her criminal history was unremarkable. She had children and mental problems – a not unusual combination in my experience! The sentencing tribunal probably thought that it was without adequate sentencing alternatives, but that is a lame response for a community to be given.

I would like to imagine a day when you as Public Defenders appearing in trials can confidently advise your clients about what they face, and in due course make submissions to a court, based on a range of sentencing options that recognise that all people who are convicted of crimes are not from a single group of hopeless individuals whose futures are irrevocably mapped out for them by birth or circumstance. Imagine the approach you would take to your job if, in an appropriate case, the worst that the offender for whom you appeared might expect to receive was a frightening and shameful confrontation upon coming face to face with the parents of an assaulted child, knowing that an apology and reparation would satisfy the victim and bring home to the offender in a reasonable and reasoned way the enormity of his actions. And tell me why in an appropriate case this is not a just, quick and cheap solution?

As his Honour the Chief Justice said in *R v Whyte* (2002) 55 NSWLR 252 at [147].

"*the maintenance of a broad sentencing discretion is essential to ensure that all of the wide variations of circumstances of the offence and the offender are taken into account. Sentences must be individualised*".

Similarly, his Honour Mahoney JA in *R v Lattouf* (NSWCCA, 12 December 1996, unreported) said:

"*if a sentencing process does not achieve justice, it should be put aside. As I have elsewhere said, if justice is not individual it is nothing*".

No doubt some of you (old folk) remember the line from Bob Dylan's 1975 song "*Hurricane*":

"*how can the life of such a man*
be in the palm of some fool's hand . . .
put in a prison cell, he could a' been
the champion of the world".

I have to confess an overwhelming admiration for the work that the Public Defenders of New South Wales do on a daily basis. You carry on a long and fine tradition. You are constrained by high workloads and low levels of resources. You are time poor and stress rich. You carry the hopes of the members of an outcast group that society so often is happy to leave alone, like people dying in a hospice or old people in a nursing home. You are with these people and for these people everyday. No doubt after a while you take it for granted. But I don't and your clients don't.

You perform the very work that members of the community think of when they imagine a barrister's work. I congratulate you on your dedication. We are all indebted to you.

Finally I should emphasise that my remarks today have not been a call for judicial delinquency. Judges are not legislators. We fall into error if we try to be. Nor are we free agents of change. Our discretions are highly circumscribed. We must observe the constraints of guideline judgments. I make absolutely no complaint about that. I just question whether or not *some* at least of the tools we are required to work with might not have become a little rusty and whether or not some brilliant mind shouldn't turn attention to starting an intellectual revolution in the provision of just sentencing options that don't simply draw upon what happened in the penal colonies of Britain and France in the 19th century or what happens today in the United States in this century.

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