BATTLES AROUND TRUTH:
A COMMENTARY ON THE *SENTENCING ACT* 1989*

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First, I would like to congratulate the previous speakers on their papers, and the Sydney Institute of Criminology and the Judicial Commission of NSW for putting on this seminar. The information provided in the papers provides the basis for a commentary. This information should be used for reassessment. We might now have the sort of informed debate which should have, but did not, precede the rapid and exceedingly rhetorical enactment of the *Sentencing Act* 1989.

Second, I note that not being as closely involved and informed in the detailed operation of the system as most of the participants at this seminar, I would like to use the time to make some comments of a more general nature. I would like in particular to interrogate the truth claims that have surrounded the Act.

THE BATTLE AROUND TRUTH

The focus of this seminar is the *Sentencing Act* 1989 (NSW).[1] If we are concerned with notions of truth then it bears remarking immediately that the title of the Act is somewhat of a misnomer. For the Act deals almost entirely with the sentence of imprisonment, and the derivative question of parole, despite the fact that in the Local Courts in New South Wales imprisonment is generally the sentencing disposition in approximately 5 per cent of cases and in the Higher Courts between 40 and 50 per cent. One effect of the terminology "Sentencing Act" is to bolster the centrality of imprisonment and to confirm the impression that imprisonment is the only "true" or "real" penalty and that the range of other sentencing options are unimportant. A more "truthful" title to the Act would have been the "Calculation of Terms of Imprisonment Act". This is more than merely a semantic issue for it connects with my second point on the question of "truth" and the "truth in sentencing" slogan which has arguably been very successfully exploited by the New South Wales government and Mr Yabsley[2] in particular, as indicated in the popular and journalistic references to the "Truth in Sentencing Act".

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* Paper presented at a professional seminar entitled "The *Sentencing Act* 1989", convened by the Institute of Criminology at Sydney University Law School, 8 August 1991.

1 For earlier commentaries see: Basten, J, "Legislation Comment: The Sentencing Act 1989 (NSW)" (1989) 42 *Crim LJ*; Brown, D, "Sentencing Changes: What Truth?" (1989) 14 *Legal Service Bulletin* 161; Chan, J, "The New South Wales Sentencing Act 1989: Where does Truth Lie?" (1990) 14 *Crim LJ* 249.

2 FormerlyMinister for Corrective Services, NSW.

Michel Foucault has argued that:

> There is a battle 'for truth', or at least 'around truth' — it being understood once again that by truth I do not mean 'the ensemble of truths which are to be discovered and accepted' but rather 'the ensemble of rules according to which the true and the false are separated and specific effects of power attached to the true', it being understood also that it is not a matter of a battle 'on behalf' of the truth, but a battle about the status of truth and the economic and political role it plays.[3]

Janet Chan[4] has carefully teased out the three levels of relationship around which the claims of "untruthfulness" in sentencing pre *Sentencing Act* were grounded.

(1) Maximum penalties — average sentences

(2) Head sentences — non-parole periods

(3) Non-parole periods — time actually served in prison

Now these are certainly complex relationships, and there are legitimate criticisms of the failure of the Wran Labor government to democratically and openly argue the case for the 1983 Act and in the aftermath of the Jackson affair to adequately explain the benefits of the 1983 reforms applying remissions off the non-parole period.[5]

The new *Sentencing Act* is easier to understand and more certain. But it is not more "truthful" unless we equate truth with certainty or unless we operate on two key assumptions. Those assumptions are :

(1) that "sentence" equals "imprisonment" or more accurately time actually served in prison; as the Chief Justice has said tonight we see a continuation of this assumption in what he referred to as the "dangerous habit" of referring only to the minimum term.

(2) that the judiciary are the sole social agency appropriately vested with the power to make penal determinations.

In my view those assumptions are eminently questionable. As to the first, "sentence" is the total period over which an offender is subject to some form of state sanction. And as to the second, agencies other than the judiciary (subject to proper safeguards and accountability) may well be both better placed and better able to bring more appropriate criteria to bear on the question of the relative proportion of the total sentence period to be spent under custodial conditions and the respective period to be spent under various forms of non-custodial supervisory conditions.

While we are on the theme of "truth" we may well ponder the relationship between judicial ideology and practice. While there has been dispute here tonight as to the effect of

3 Foucault, M, in Gordon, C (ed), *Power/Knowledge: Selected Interviews and Other Writings* (1980) at 132.

4 Chan, bove n1.

5 See Chan, J, "Decarceration and Imprisonment in New South Wales: A Historical Analysis of Early Release" (1991) 13/2 *University of NSW Law Journal* 393; Chan, J, "Decarceration: A Case for Theory Building Through Empirical Research" (1991) 8/1 *Law in Context* 32, for the history of sentencing reform in New South Wales.

the *Sentencing Act*, it is clear from the research done by the NSW Bureau of Crime Statistics and Research[6] that, after the *Parole Act* 1983 applied remissions to the non-parole period in compliance with the recommendations of the Nagle Report[7] and the Muir Committee Report,[8] sections of the New South Wales judiciary substantially increased the non-parole periods in order to negate the legislatively intended reduction in the custodial portion of the sentence, despite the express injunction of the NSW Chief Justice in the Case of *O'Brien*[9] that remissions were not to be taken into account in setting non-parole periods. The research shows quite clearly that there were increases in non-parole periods in eight out of ten specified categories of serious offences, with an increase of 50 per cent or higher in six out of ten offence categories.

There is an allusion to this in the judgment of Justice Hunt in the NSW Court of Criminal Appeal Case of *McClay*[10] but an allusion only and the issue is sidestepped. One of the questions which arises squarely in relation to notions of "truth" is what is the standing of information provided through agencies such as the Judicial Commission's Sentencing Information System as to what judges are actually doing (as distinct from what they say they are doing) and how prepared are they to accept evidence as to what they are actually doing?

Finally, still on the theme of truth, it bears remarking that Mr Yabsley twice in the parliament and again in a government information booklet explaining the new Act claimed that the government did not intend to increase sentence lengths by the new measure. The latest figures reveal that the current New South Wales prison population is now 5,800. When this government came to power in March 1988 it was 3,950, an increase of 45 per cent in just over three years. Clearly that increase is due to a range of factors including an increase in police numbers, the increases in maximum penalties enacted by this government and their preparedness to talk up the law and order climate, and, as Angela Gorta shows clearly in her paper[11], the effects of the *Sentencing Act*. Arguably we are in danger of truth claims being reduced to the currency of rhetorical, advertising type slogans, to be jettisoned and invoked whenever it suits.

TIME FOR RECONSIDERATION

Enough time has now elapsed, the monitoring of the impact sufficiently detailed, to enable us to conclude that the government's stated intention that "this government is not seeking to make sentences longer", has failed. To quote the Gorta paper, "Prisoners are serving longer periods in custody".

In passing — why was this legislation introduced by the Minister for Corrective Services rather than the Attorney General? This was an abrogation by the Premier of the

6 Weatherburn, D, "Appellate Review, Judicial Discretion, and the Determination of Minimum Periods" (1985), 18/4 *ANZ Journal of Criminology* 272.
7 Nagle, J, *Report of the Royal Commission into NSW Prisons* (1978).
8 Muir, A, *Report of the Committee Appointed to Review the Parole of Prisoners Act 1966* (1979).
9 *R v O'Brien* [1984] 2 NSWLR 449.
10 Unreported, NSW Court of Criminal Appeal, 16 February 1990.
11 In this issue..

most basic understandings and conventions concerning the division of responsibility and powers among different portfolios. It is illustrative of the blurring of departmental functions and responsibilities under this government — the way prisons are being assimilated as an arm of the police force, evident in the prison informer issue. Here we have the reverse direction, the Minister for Corrective Services taking control of sentencing matters properly the task of the Attorney General.

It is time for the Premier and the new Attorney General to recognise the failure of the government's proclaimed intentions, and enter into a proper consultation process to consider how that original objective might be achieved. There is no shortage of suggestions as to how this might be done, for example those contained in the Australian Law Reform Commission's Sentencing Discussion Papers and Report[12] or as (retired) Judge Ford said in his paper, it would not hurt us to look to what is happening in other jurisdictions, for example the New Zealand legislation, the recent Victorian Sentencing Report[13] and developments in Queensland.

TAKING PRISON CONDITIONS INTO ACCOUNT IN THE SENTENCING PROCESS

One such suggestion made in one of the other papers in this issue I would like to endorse, and had intended to raise myself. In his paper Ivan Potas has this to say:

> While New South Wales has not had the need to follow the highly structured sentencing systems of the United States it would be possible to legislate for a principle which provides that a sentencing judge or magistrate should be permitted to reduce or discount the otherwise appropriate sentence if he or she is satisfied that the prisons are overcrowded.
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> In my submission such a principle should not be any more controversial than one which provides for a prisoner with a sentencing discount for co-operating with authorities pleading guilty, or turning police informer.

This is an instructive example. Informer sentence discounts are now a well-established feature of the common law sentencing tradition.[14] The rationales for the discount, expressly discussed in the cases include the need to reward the informant for harsher conditions suffered in prison. Indeed the reward has even been quantified. The rule of thumb developed through the cases, for interestingly this is a judicial rather than a legislative creation, is that the standard level of discount is one third of the proposed sentence on the basis that 12 months imprisonment under conditions of greater than normal severity is roughly equivalent to 18 months under normal discipline. This formulation makes a welcome break with the usual legal, political and popular tendency

12 Australian Law Reform Commission, "Discussion Paper No 29, Sentencing: Procedure" (1987), "Discussion Paper No 30, Sentencing: Penalties" (1987), "Report No 44, Sentencing" (1988).

13 Fox, R, and Freiberg, A, "Sentencing Task Force, Review of Statutory Maximum Penalties in Victoria" (1989).

14 As spelt out in cases such as *R v Goldring* [1980] 24 SASR 161; *R v Perez-Vargas* [1986] 8 NSWLR 559; *R Cartwright* [1989] 17 NSWLR 243; *R v Frederick Glen Many* NSW Court of Criminal Appeal 11 December 1990 (unreported).

to evaluate imprisonment only according to the length of time to be served and focuses on the issue of the quality of the conditions under which a prisoner is held. If restricted or protection conditions can be taken into account in order to justify a reduction of a prison sentence by one third for informers (of often dubious veracity), why cannot the following factors be explicitly taken into account in the sentencing decision: the fact that prisoners are consigned to live with two other people in tiny dark, damp, dirty cells built in the last century for one person; or that they are restricted to two books, and that few education and training services are effectively available to them; or that they run the constant risk of assault, sexual attack, HIV infection, illness through inadequate diet, lack of access to the means of maintaining family contact, or proper medical and psychiatric services; or that the experience of imprisonment leads an alarming number of prisoners to mutilate themselves or take their own lives.

My argument then is for the direct introduction of factors such as the availability of civilised prison conditions, states of overcrowding, access to educational and training programs, comparative financial costs of various penal measures and so on into the sentencing process itself. Lest it be said that an acknowledgement of the nature of specific prison regimes and the experience of imprisonment, as distinct from the time to be served, could never realistically be taken into account in sentencing, the informer sentence discount is an example of where under the existing system such considerations are taken into account.

Precisely the advantage of Potas' suggestion is that it turns the judicial spotlight on the current disgraceful prison conditions in many of the prisons of this state. It would involve the judiciary taking cognisance of those conditions. I urge judicial officers to exercise their statutory right of entry to prisons under the *Prisons Act*, a right not provided to other social agents. This is especially needed where, as in New South Wales under the Greiner government, prisons are characterised by:

1) a 45 per cent population increase with resultant severe overcrowding;

2) the removal of many of the mechanisms of accountability and review;

3) the intensification of penal discipline, clearly illustrated in the property confiscations policy; and

4) the slashing of educational, welfare and rehabilitative programs.[15]

Again if we take up Judge Ford's suggestion and bother to look to other jurisdictions we might even learn something. Indeed we are seeing at the moment an interesting case study in change in different directions occurring in New South Wales and Queensland. Over the three year period from March 1988 to March 1991 the number of people imprisoned in New South Wales has increased by 44.48 per cent while in Queensland it has decreased by 4.8 per cent, and over the two year period March 1989 to 1991 the New

15 See generally Brown, D, "Post Election Blues: Law and Order in NSW Inc" (1988) 13/99 *Legal Service Bulletin*; Brown, D, "'Putting the value back in punishment'" (1990) 13/177 *Legal Service Bulletin*; Brown, D, "The State of the Prisons in NSW under the Greiner Government: Definitions of Values" in Carrington, K and Morris, B (ed), "Politics, Prisons, Punishment" (1991) 4/27 *Journal for Social Justice Studies* (Special Issue).

South Wales adult imprisonment rate has increased by 23.5 per cent while the Queensland rate has decreased by 13.9 per cent. Both these states are subject to similar sorts of macro-economic forces and federal government policies while clearly the local political cultures are undergoing significant shifts in the form of NSW Inc on the one hand and a period of reform and renewal after the demise of the long National Party ascendency and the Fitzgerald Report, on the other.

REINTRODUCTION OF AN EARNED REMISSION SYSTEM

Finally, I had better declare my hand as an old fashioned, conservative sort of fellow, and argue for the reintroduction of a remission system. After all, we have had one of sorts since colonisation and the ticket of leave. There were clearly dangers in the semi-automatic system of the sort now abolished in the *Sentencing Act*. And there are also dangers of an expansion of prison officers' power in a genuinely earned system. Nevertheless it should not be beyond our wit to devise a defensible earned remission system along with the other desirable incentives within the prison system. The current promotion of informing as the major incentive within the prison system[16] only encourages manipulative behaviour, brings criminal justice into contempt, and induces bitterness against a system which is seen to have a price for everything, which is prepared to turn even criminality into a commodity. Far from exemplifying and promoting the defensible social and moral values upon which the criminal justice system is supposedly based, it in fact feeds into and consolidates many of the anti-social values present in prison culture which contributed to the prisoners' offences and imprisonment in the first place.

I know it is unfashionable in the political and "moral" climate of NSW Inc to suggest such things, but might it not be better to orient incentives around the promotion of positive values associated with education, participation in programs, work, cultural activities and so on? Such incentives have the potential to encourage and reward behaviour which accords with social values supposedly promoted and defended in the operation of the criminal justice system.

16 See Brown, D and Duffy, B, "Privatising Police Verbal: The Growth Industry in Prison Informers" in Carrington, K, Dever, M, Hogg, R, Bargen, J, and Lohrey, A (eds), *Travesty! Miscarriages of Justice* (1991).