

HUMAN RIGHTS ASPECTS OF SENTENCING

***A paper for the National Judicial College of Australia
and Australian National University Conference***

Canberra, 11 February 2006

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Justice Connolly was appointed a Judge in January 2003. He was Master of the Supreme Court of the Australian Capital Territory from 1996-2003, and had been a Member of the ACT Legislative Assembly from 1990-1996. He was Attorney-General from 1991-1995. He was educated at Adelaide University (BA, LLB (Hons) and the Australian National University (LLM). In 2001 he undertook mediation training at Harvard Law School.

I would like to acknowledge the research and drafting help provided to me by Ms Zrinka Lemezina, Associate to the Hon Chief Justice Higgins of the ACT Supreme Court.

In one sense, sentencing has always been about human rights, as sentencing judicial officers struggle to craft a disposition for an offence that balances the various interests of the offender, the victim and the community. The entry into force on 1 July 2004 of the *Human Rights Act 2004 (ACT)* (the Human Rights Act) marked a significant point in the development of Australian law as it is the first statutory Bill of Rights to be enacted by an Australian Parliament. The Act is a statute which declares the existence of rights. It is not constitutionally entrenched. It requires all courts, when considering how to properly interpret a law of the Australian Capital Territory, to adopt an interpretation that is consistent with human rights protection. The Supreme Court cannot strike down an inconsistent Act of Parliament, but it can issue a declaration of incompatibility. Delegated legislation inconsistent with enumerated human rights may be struck down as being ultra vires. This is the model that has been in place for some years now in both the United Kingdom¹ and New Zealand.² A proposal for an equivalent law is now under active consideration in Victoria.

How will a statutory Bill of Rights impact upon the sentencing exercise?

As a signatory to the International Convention on Civil and Political Rights (ICCPR), the International Convention on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CROC), Australia has made a declaration to the international community that there are certain rights we will uphold in our dealings with our citizens. Among other obligations, Australia has undertaken to ensure that all people

¹ *Human Rights Act 1998 (UK)*.

² *New Zealand Bill of Rights Act 1990 (NZ)*.

will be treated equally before the law. In light of the national tendency to “get tough on crime” and calls by newspapers, politicians and talk-back radio to impose increasingly lengthy sentences upon offenders, proportionality becomes even more relevant to protecting the human rights of disadvantaged offenders.

As we know, in the ACT, the Legislative Assembly has enacted the Human Rights Act, which expressly restates these convention rights as rights under Territory law.

In any sentencing exercise under territory law, the Act expressly requires a sentencing judge or magistrate to be mindful of human rights, both in considering the proper construction of sentencing provisions and in exercising such discretions as are conferred under that legislation. It seems to me that it is in the area of statutory discretions that much of the impact of the Human Rights Act will emerge.

The rights set out in Part 3 of the Human Rights Act – Civil and Political Rights - are based on those set out in the ICCPR. The concept that one may look to those covenant rights is not a new one. Indeed it is, or should be, familiar to those practitioners who work under the Uniform Evidence law. Section 138 of the *Evidence Act 1995* of both the Commonwealth and New South Wales codifies the discretion to exclude improperly or illegally obtained evidence. Section 138(3) sets out a non-exhaustive list of factors that may be taken into account by a court in the exercise of this discretion, such as the probative value of the evidence, the nature of the offence, whether the impropriety was deliberate or reckless and, in s. 138(3)(f):

Whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognized by the International Covenant on Civil and Political Rights.

Interestingly, this provision seems to have been rarely examined by the courts other than in Canberra. Odgers does not refer to any judicial consideration of the provisions,³ but Cross⁴ takes readers to the remarks of Miles CJ in *Truong*⁵ where his Honour said that:

Behaviour contrary to the International Covenant on Civil and Political Rights would appear to favour non-admission.

That the provision has not been specifically analysed is not, of itself, unusual. Historically, judges have looked at the highly complex task of sentencing convicted offenders as an intuitive process that cannot be broken down to individual concerns, a process that can appear to not be open to scrutiny by actors outside the court system. This shroud of impenetrability is often explained by stating that “sentencing is an art not a science”.⁶

It is true that judges cannot mechanically apply sentencing principles to any given fact scenario to achieve the “right outcome”. Unfortunately there is no sentencing machine that processes all the considerations that judges must take into consideration. If there was, judges and magistrates could be replaced by the calculating machine. This would, no doubt, be a pleasing prospect to treasury officials around Australia, if not for lawyers. The High Court has itself commented on the idiosyncratic and difficult nature of the task⁷, remarking that:

... sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment ... the

³ S Odgers, *Uniform Evidence Law*, (6th ed), 588.

⁴ Cross on Evidence [27315].

⁵ (1996) 86 A Crim R 188 at 195.

⁶ *Wise* [1965] Tas SR 196, 197.

⁷ *Veen (No 2)* (1988) 164 CLR 465, 476.

purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence, but sometimes they point in different directions

Indeed, sentencing as an artform could suggest that the matter is one that cannot be taught; rather, it is an instinctive, intuitive skill that comes from years of practice. Unlike so much of the law, which has its genesis in the much-abused “common sense”, sentencing is driven by a sense of the *uncommon* variety. The difficulty with common sense is that the public would say that, as a matter of common sense, law breakers as a class deserve stern punishments unless the offender is a partner, sibling, child or relative, when common sense says the sentence should have regard to subjective factors, and justice should be tempered by mercy.

Indeed, despite the great evolution of the ever-expanding common law,

*There is no decision in the criminal process that is so complicated and so difficult to make as that of the sentencing judge.*⁸

This statement almost seems trite when one considers the various players who have an interest in sentencing outcomes and the conflict between their needs. The sentencing judge must try to find a balance between delivering retribution for the community; deterring other would-be criminals from breaking the law; rehabilitating the offender to prevent re-offending and protecting the community from the harms of anti-social, criminal behaviour.

But at the heart of this process is a foundational principle, the bedrock of the modern justice system. This is the principle that sentencing decisions should treat offenders equally, irrespective of their wealth, race, colour, sex or employment/family status. The ACT legislature has enshrined this principle in s 8 of the Human Rights Act so that:

- (1) Everyone has the right to recognition as a person before the law.

⁸ *The Challenge of Crime in a Free Society* – A Report by the President’s Commission on the Law Enforcement and Administration of Justice (Washington 1967), 141.

- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

Yet how does the principle of equality, a fundamental human right, fit in with the principle of parsimony, that is, that punishment should be imposed sparingly? As Lord Woolfe once noted, it is important to resist the misconception that “prison works”⁹ or that the solution to all social ills is to “get tough on crime”. Indeed, his Lordship observed that:

*... it needs to be reiterated repeatedly that if prison is used when it is not necessary, then it is frustrating, not furthering, the objectives of the criminal justice system.*¹⁰

As Parliaments respond to headlines by increasing maximum penalties for a range of offences, care must be taken when exercising the sentencing discretion in respect of past conduct. An offender should only face the penalty in place at the time of the offence, not any increased penalty that has been imposed since the act occurred.

This principle is enshrined in s 25(2) of the Human Rights Act, which states that:

A penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed. If the penalty for an offence is reduced after anyone commits the offence, he or she benefits from the reduced penalty.

To date we have no guiding ACT case law on this point, but we can take our cue from New Zealand, where similar provisions are in place.¹¹ In *R v Fissenden*,¹² the New Zealand Court of Appeal cited s 25(g) of the Bill of Rights, stating that, where sentencing tariffs have increased significantly since an offence was committed, judges should approach sentencing according to the tariff guidelines that were applicable when the

⁹ As stated by Home Secretary in response to the proposed treatment of the two young boys who murdered 2 year old Jamie Bulger.

¹⁰ HL Deb 2 February 1994.

¹¹ *Bill of Rights 1990* (NZ), s 25(g).

crime took place. Unfortunately, the Court did not specify what was meant by “significant” change. This case suggests that, while s 25(g) may affect the scale of punishment applicable to any given offence, precedents that were relevant when the crime was committed must still determine the appropriate measure of punishment that the courts can impose. Given the media’s enthusiasm for tough new penalties, and the tendency for State and Federal Governments to impose harsher penalties on convicted persons, this right is one to which sentencing judges must be particularly sensitive.

It is worth remembering the words of Lord Justice Lawton¹³ some 30 years ago in *Clarke*:

Her Majesty’s courts are not dustbins to which the social services can sweep difficult members of the public. Still less should Her Majesty’s judges use their sentencing powers to dispose of those who are socially inconvenient. If the courts became disposers of those who are socially inconvenient the road ahead would lead to the destruction of liberty.

Sadly, I would suggest that his Lordship’s comments are in 2006 more normative than descriptive. Indeed, as we all know, particularly colleagues in Magistrates Courts, so many of the defendants who come before us daily are people with long-standing mental illnesses or drug addictions. They are often poor, unemployed and with limited formal education. Given the ever-present constraints on the public purse, critics may point out that the criminal justice system functions as a somewhat convenient alternative to meaningful improvements to education, employment, housing and leisure facilities for the disadvantaged. To some degree the criminal justice system is a coercive mechanism that supplants expensive institutional and social change. It seems that when the carrot is too expensive, we make do with the stick. Unfortunately, coming in at the end point severely restricts the options available to a sentencing judge; at that point, proportionality of sentence is all that we are able to address.

¹² CA 364/95, 21 February 1996 at 3. See also *R v Carruthers* CA 401/94, 10 April 1995; *R v Elswin* CA 290/93, 10 August 94.

¹³ *Clarke* (1975) 61 Cr App R 320.

However, leaving aside all practical difficulties, Australia has undertaken to ensure that all people will be treated equally before the law. While the High Court recognises the right to a fair trial,¹⁴ it is not clear whether *Dietrich* includes the right to be sentenced fairly.¹⁵ Arguably this would follow under the Human Rights Act. Chief Justice Spigelman, in a recent paper, has argued that the common law principle of a fair trial is consistent with the right set out in the UK Human Rights Act, and discussed a range of English authority.¹⁶

For example, let us imagine the court is faced with two people who have been convicted of theft with the same amount stolen. One is a person from a “criminal” family or neighbourhood; the other is from a privileged background and the court believes she is unlikely to re-offend. Giving the second person a lighter punishment would be consistent with the principle of parsimony, that is, that punishment should be meted out frugally. But would a lighter sentence honour the principle of equality before the law?

Morris and Tonry argue “to insist that criminal A goes to jail ... because resources are lacking to deal sensibly with criminal B, is to pay excessive tribute to an illusory ideal of equality”.¹⁷ They argue that:

*Imprisonment is expensive and unnecessary for some convicted felons who present no serious threat to the community and whose imprisonment is not necessary for deterrent purposes, and yet whose crime and criminal record could properly attract a prison sentence. Are we to allow an excessive regard for equality of suffering to preclude rational allocation of scarce prison space and staff?*¹⁸

Morris and Tonry make it clear that one result of their approach would be that a white, middle-class offender should properly receive a more lenient sentence than a black offender living on government welfare. They characterise the principle of equality before the law as a principle of equality of *suffering*, since it refuses to allow more lenient

¹⁴ *Dietrich* (1992) 177 CLR 292.

¹⁵ Also, it is not clear whether fairness in a criminal trial is an implied guarantee arising from Chapter III of the Australian Constitution. See *Frugmiet v State of Victoria* (1997) 71 ALJR 810 per Kirby J.

¹⁶ JJ Spigelman, *The Truth Can Cost Too Much: The Principle of a Fair Trial*, (2004) 78 ALJ 29.

¹⁷ N Morris and M Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System*, Oxford University Press, 1990, 33.

sentences for certain offenders if the result would be to discriminate on improper grounds against others. They oppose equality of suffering because their utilitarian concern is the reduction of suffering in as many cases as possible.

Disturbing though it may be, this attitude is often reflected in the outcome of sentencing process. Whether consciously or unconsciously, the reality is that all offenders are *not* treated equally before the law; discrimination in sentencing is widespread.

For example, it is often argued in white-collar cases, that punishment by way of a full-time custodial sentence is not needed because the offender “has suffered enough” through the process of apprehension, public trial and sentencing, plus any collateral disabilities from loss of employment, revocation of licence, and diminution of social status in the community. Thus in a 1994 fraud case, in a Federal Court appeal from our Court, Burchett and Higgins JJ observed:¹⁹

... the most serious consequences of the conviction of a “white-collar” offender, as indeed of many other persons ... must be loss of his own self-respect and the suffering of disgrace and humiliation, as well as the complete loss of his previous standing in the community, his professional position, and the means of livelihood he has chosen and in which he has acquired expertise. The conviction is a personal calamity. So far as gaol is concerned, to be sent there is also a disaster of the greatest magnitude. These are the considerations that must loom large if a professional person is confronted by a situation inducing thought about the personal cost of committing comparable offences, and a significant period in gaol, attended by such consequences, must constitute a weighty deterrent. Indeed, an equivalent gaol term is plainly a severer punishment for a man like the appellant than it would be for many violent criminals, who could take up much the same life upon leaving gaol as they had led before.

A more recent example comes from former NSW Premier, Mr Bob Carr. In 2003 Mr Carr told Sydney radio station 2GB that the courts were wrong to impose a prison sentence upon Pauline Hanson as punishment for electoral fraud. This is because:

¹⁸ N 17.

¹⁹ *McDonald*, (1994) 48 FCR 555, 564-5.

*[P]rison exists for people who are a danger to society, a danger to you and me and our families, when we're walking down the street. Prison is basically there to get violent people away from us.*²⁰

Thus it is more “humane” to require white-collar criminals to do “community service ... work in a nursing home, have them work for a prescribed number of hours per week in a good cause”.²¹

These approaches imply that the family, social and work ties of blue-collar criminals mean less than for those with white collars; that those offenders who appear to have little or nothing to lose by way of collateral penalty are more deserving of being punished by incarceration. Such attitudes do little to further the principle of equality before the law. They certainly fly in the face of Brennan J’s emphasis that:²²

The same sentencing principles are to be applied ... in every case, irrespective of the identity of the particular offender or his membership of [any] group.

Andrew Ashworth points out²³ that to characterise equality before the law as “equality of suffering” is “blinkered and fails to give due recognition to the principle as a fundamental value that cannot be cast aside”. As a maxim, it honours human dignity; it is central to preserving impartiality in the administration of criminal justice. So, while “it should not be regarded as absolute and inviolable”,²⁴ it should not simply be disregarded where it produces inconvenient or inefficient results.

Moreover, it is important to be aware that practice does not always live up to theory; we must take steps to redress that shortfall of the criminal justice system. Regarding the general legislative level, we must remember the dangers of getting “tough on crime” and bringing in “tough new measures” because these moves often exacerbate the problems that underlie criminal behaviour. In that sense, parsimony should be encouraged. But

²⁰ *Sydney Morning Herald*, 21 August 2003.

²¹ N 20.

²² *Neal* (1982) 149 CLR 305, 326.

²³ A Ashworth, *Sentencing and Criminal Justice* (2nd ed), Butterworths, 1995, 198.

when we get to sentencing an *individual*, equality before the law should be the prevailing principle.²⁵ This is important not just from a human rights perspective; it is also essential in maintaining public confidence in the judicial system as a legitimate social institution.

Of course, given the prevailing attitude that “ultimately every sentence imposed represents the sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process”,²⁶ and that each sentence “rests upon what is essentially a subjective judgment largely intuitively reached by an appellate judge as to what punishment is appropriate”,²⁷ we cannot underestimate the difficulty of this task.

It is too early to say whether the enactment of the Human Rights Act will impact significantly on sentencing in the ACT. Certainly the enactment of the Human Rights Act was not free of controversy, and many of the arguments that have surrounded this debate at the national level and in other states were again heard in the ACT. In particular, concerns were expressed that a Human Rights Act could become something of a “rogue’s charter”, and that it would lead to both a significant increase in litigation and to innumerable criminals escaping the consequences of their actions due to technical defences founded on human rights norms.

As we approach the second anniversary of the Act, it seems fair to observe that this has not come to pass. In a paper to a conference to mark the first anniversary of the Act, the ACT Director of Public Prosecutions, Mr Refshauge SC, observed that in the eight cases where Judges of the ACT Supreme Court had made reference to the Act in criminal proceedings:

²⁴ N 23, 198.

²⁵ N 23, chapter 7.

*The decisions were all decisions which were made on the basis of principles of law or the exercise of a discretion that were unexceptional applications of the common law and which were unaffected by and independent of, the Human Rights Act though consistent with it.*²⁸

The UK experience seems to support the view that the enactment of a statutory and interpretive Human Rights Act is unlikely to lead to a massive increase in litigation.²⁹

Certainly, challenges to statutory “protective sentencing regimes”³⁰ and mandatory head sentence limits³¹ have been unsuccessful. However, sitting as the Privy Council, England’s highest court has used reasoning analogous to the Human Rights Act to strike down the mandatory imposition of the death penalty in the West Indies.³² It should be noted that the UK Parliament has carefully crafted its protective sentencing regime to protect procedural fairness, and so ensure compliance with the Act.

So far, the Human Rights Act has not had a revolutionary impact on the practice of criminal law or sentencing practice in the ACT. There have been no floodgates of litigation opened, and judges and magistrates have not been overwhelmed by masses of exotic jurisprudence on equivalent human rights statutes. Indeed, it is ironic that:

*The critics who before the Act became law were predicting that the Act would become a lawyer’s picnic and that courts would be overwhelmed with unmeritorious claims, now seem to have changed track, and have begun to deride the Act as ineffective.*³³

Only time will tell.

²⁶ *Wisecroft* [1975] VR 292.

²⁷ *Wisecroft* [1975] VR 292.

²⁸ R Refshauge, *The Human Rights Act and Criminal Law*, paper for ANU/UNSW joint conference, *Assessing the First Year of the ACT Human Rights Act*, Canberra, 29 June 2005.

²⁹ Rt Hon Lord Carwell, *Rights or Wrongs? The Human Rights Act in the Courts* (2005) 79 ALJ 36, 39.

³⁰ *R (Giles) v Parole Board* [2004] 1 AC 1.

³¹ *R v Lichniah, R v Pyrah* [2003] 1AC 903.

³² *Roodal v State of Trinidad and Tobago* [2005] 1 AC 328.

³³ G McKinnon, *The ACT Human Rights Act: The First Year*, a paper delivered at conference in N 28.