SENTENCING AND THE PROSECUTION

Richard Refshauge,
Department of Public Prosecutions, ACT

*Paper presented at the*
4th National Outlook Symposium on Crime in Australia,
New Crimes or New Responses
*convened by the Australian Institute of Criminology*
*and held in Canberra 21-22 June 2001*
Sentencing and the Prosecution

The interrelation of sentencing and prosecutions is multi-faceted, but I wish to deal with two highly current and, in my view, problematic areas. Thus, I wish to consider the questions of sentencing as a sanction, or sentencing discounts, within the context of criminal justice reform and also sentencing diversion. They raise difficult issues of principle and practice which impinge on the prosecutor’s task.

Not so long ago, the prosecutor understood that his or her (though most then were male) task concluded when the jury returned its verdict, whether of guilty or not guilty. \(^1\) There was considered no role for the prosecutor in the sentencing process which followed a guilty verdict.

Not only have those days well passed\(^2\), but a prosecutor’s involvement in the sentencing process can be important. Courts now expect specific assistance from the prosecutor on a range of matters. \(^3\) Appellate courts can tailor their response according to the stance taken or submissions made at the first instance level. \(^4\)

The duties of a prosecutor on sentence have been comprehensively set out elsewhere\(^5\) and, I believe, are relatively well-known. I do not propose, therefore, to rehearse them here. Rather, I propose to consider two important current issues that are now impinging on the sentencing process and how they impinge on prosecutions.

Sentencing and Criminal Procedure Reform

In the last few years, a concern with the efficiency and effectiveness of the administration of justice has grown substantially. \(^6\) While some attempts were earlier made to reform the criminal justice system\(^7\), most of the efforts in the last decade have focussed on the civil justice system. \(^8\)

More recently, however, there has been a revival of interest in reform of the criminal justice system and, in particular, the criminal trial. \(^9\) Many of the same issues confront both civil and criminal justice reform. Unfortunately, the same responses are not always available.

---


\(^2\) For an early Australian encouragement, see R v McIntosh [1923] St R Qd 278 at 282. See also an appeal upheld because a magistrate refused to permit a prosecution address on sentence: Kerr v Mathews (1976) 15 SASR 216. This was early linked to the availability of crown appeals against sentence: R v McKeown (1940) St R Qd 202 at 214. In Canada, the position has also applied for many years: Switlishoff (1950) 9 CR 428; McKinney (1963) 40 CR 137.

\(^3\) For example, R v Travis and Davies (1983) 34 SASR 112 at 116; R v Tait and Bartley (1979) 46 FLR 386 at 389.


\(^7\) See, for example, Royal Commission on Criminal Procedure, Report (HMSO, Lond, 1981) Cmdnd 8092; Criminal Law and Penal Methods Reform Committee of South Australia, Court Procedure and Evidence (Adelaide, 1975); New South Wales Law Reform Commission, Criminal Procedure, Procedure from Charge to Trial: A general Proposal for Reform (Syd, 1986); D Breerton and J Willis, Commitments in Australia (AIJA, Melb, 1990); M Aronson, Managing Complex Criminal Trial: Reform of the Rules of Evidence and Procedure (AIJA, Melb, 1992).

\(^8\) See note 6 above. See also Senate Standing Committee on Legal and Constitutional Affairs, The cost of justice: First report – foundations for reform (AGPS, Canberra, 1993); Access to Justice Advisory Committee, Access to Justice, An Action Plan (Canberra, 1994); Family Law Council, Family law appeals and reviews (AGPS, Canberra, 1996); R Cranston, Delays and efficiency in civil litigation (AIJA, Melb, 1985).
Much of the reform discussion has recognised that the differing interests of the parties to both civil and criminal litigation are likely to inhibit reform or make reformed processes difficult to implement effectively. It has been said, for example, that both civil and criminal defendants are not keen to progress their cases expeditiously and both see a benefit to themselves in delay. In civil proceedings, that case may have been overstated; insurance companies, usually defendants, are now keener to quantify their liabilities and to discharge them as soon as possible. Criminal defendants, however, seem to remain as keen to procrastinate as ever.

In civil justice administration, there are devices to overcome any predilection for delay. Pre-trial conferences set within tight time-tables can require participation of reluctant parties with sanctions as effective as costs orders or summary dismissal of defences and entry of judgment if all else fails.

For criminal defendants, however, there are insuperable problems, both practical and philosophical, in the way of directly importing such strategies into the system.

Most criminal defendants are granted legal aid or are self-represented and legal-aid budgets are increasingly tightening. Thus costly court appearances (even in pre-trial conferences) and costs orders are quite ineffective as an inhibitor for delay because they impinge little on the defendant who has no means and is not paying his or her lawyers. Additionally, for self-represented litigants (whether impecunious or not) the ability to participate appropriately in the pre-trial process is often quite unattainable.

It must only be in the most exceptional of circumstances that a defendant would be convicted (without hearing evidence) for not co-operating in a pre-trial process.

The search for alternate sanctions has led to the sentencing process as the answer to a criminal justice reformer maiden’s prayer. After all, altering a sentence has already been used to encourage helpful participation: a guilty plea has entitled the accused to a reduction in sentence for a long time.

Originally, this was justified on the basis that remorse mitigated punishment and that a plea of guilty could be evidence of remorse. Of course, on this theory, where it was not evidence of remorse, the plea would not necessarily result in sentence reduction.

---


11. Discussion by writer with lawyers acting for insurers.

12. See, for example, ACT Supreme Court Practice Direction No 1 of 1990.


More recently, however, other reasons for reducing sentences because of a plea of guilty have been successfully advanced and the criminal trial reformers are now positing that one such legitimate reason should be the accused’s co-operation in the trial process, that is, the utilitarian value of the plea. Formal admission of uncontested facts, “fast-track” committals, pre-trial disclosure of one’s defence are all steps that are seen as entitling a co-operative accused to a sentence reduction.

While strongly committed to criminal trial reform, I have grave doubts about whether discounting or increasing the sentence is the panacea for the sanctions dilemma in the reform of the criminal process. Those doubts are both pragmatic and philosophical. At the pragmatic level, there are a number of issues to be considered. At the most fundamental level, most of those who plead not guilty and thus activate the criminal trial process believe they are not guilty and expect to be acquitted. Many also believe that their arrest or summoning has been unfair if not illegal and that the forces arrayed against them will not “play fair”. It seems hard to believe that these people will willingly give up their rights or alleged protections within the criminal trial process for what to them will be a meaningless benefit.

At another level, a discount implies a tariff. If there is no “set price”, then the notion of a discount is not meaningful. Despite the general use of a notion of tariff that currently does apply to sentencing, it must be clear to everyone who deals with the sentencing of courts that this is a very slippery concept. There is no clarity of tariff and, indeed, it is usually formulated as an acceptable “range of sentencing” which could well mean that a discount on a tariff sentence “at the upper end” might well fall still well within the ordinary sentencing range, thus being no discount on the tariff.

Accordingly, there are real questions about the psychological value of the trade-off sought. While the difference between a custodial and non-custodial penalty is very significant and likely to encourage a plea of guilty or co-operation, there is no certainty that a relatively small amount of jail time reduced, especially where the likely actual length is so uncertain, will similarly encourage co-operation, especially when what is being sacrificed is so significant – namely the possibility of an acquittal. For serious offences where the discount might amount to years (although 10% of 20 years imprisonment – a rare sentence – is only 2 years) the stakes are so much higher; for minor offences the amount at risk is so much less (10% of 2 years imprisonment is about 6 weeks).

24 The classic discussion of the “tariff” is in D Thomas Principles of Sentencing (Heinemann, London, 1970) pp29-73. There, Thomas suggests it is at least a century old and rejects the suggestion that it refers to “an inflexible scale”. See, for example, Clair v Brough (1985) 37 NTR 11 at 14 (“a ‘tariff’, that is a normal range of sentences for a particular offence”). Based on Yardley v Belsh (1979) 1 A Crim R 329, it has been said that South Australia has accepted tariff sentencing: C Ruby Sentencing (Butterworths, Toronto, 1987) p389. Such a tariff, however, was gleaned from “a schedule of penalties imposed in other cases of a similar nature” (following R v Barber (1976) 14 SASR 388 at 390) and were, in any event, described at 331 as providing “a general appreciation of the range of penalties customarily imposed by sentencing courts for a particular type of offence”. Indeed, many courts have expressed the view that “there is little to be gained by looking for other cases with similar facts in order to try to establish what other differently constituted courts have done by way of sentencing”: Tran v The Queen (Fed Court, ACTG 70 of 1996, 17 June 1997, unreported) p6; R v Boudelah (1991) 28 FCR 176 at 187.
25 For example, in Joyce v The Queen (1988) 33 A Crim R 288 at 294, Dowsett J rejects the notion of “the range of sentences inferred from past decisions as itself comprising a binding decision”. Similarly Wright J in R v Dowie [1989] Tas R 167 at 185-6 rejected such a rigid system. Then in Devine v The Queen (1993) 2 Tas R 458 at 470, the Court held that the “so called tariff, or range of sentences imposed in the past is but one factor to be taken into account”, a view, one would have thought, that is quite antithetical to the whole notion of a tariff. Cf Tarry v Pryce (1987) 45 NTR1.
26 Clair v Brough (1985) 37 NTR 11 at 14; Joyce v The Queen (1988) 33 A Crim R 288 at 294. Perhaps, however, guideline judgments set a kind of tariff: R v Henry (1999) 46 NSWLR 346. They are not, however, “a requirement or anything in the nature of a rule” at 357, 387.
This is not to deny that defendants – especially once sentenced – seek to minimise their time incarcerated, even by a relatively short period. The sanctions, however, are intended to operate not post-sentencing but, for the most part, pre-conviction.

Perhaps the high point of this sentencing process has been in *R v Thomson*, the guideline judgment of the Court of Criminal Appeal in NSW, where the court laid down as a guideline that, for an early plea of guilty, the utilitarian value was worth a 10% to 25% reduction in sentence. Utilitarian value was defined to have two components:

```
(i) The time at which a plea is entered. A plea entered at committal has a more significant utilitarian benefit than a plea entered at first listing, which in turn has the greater benefit than a plea entered at the beginning of trial.

(ii) The complexity of the issues about which evidence will have to be gathered and adduced affects the value of the plea. The greater the difficulty of assembling the relevant evidence and the greater the length and complexity of the trial, the greater the utilitarian value of a plea.```

After the “utilitarian discount”, there has then still to be deducted in mitigation of the penalty additional matters such as remorse and other subjective factors.

Whilst the amount of sentencing discount for various factors has in the past sometimes been quantified using a percentage, there is a real risk that doing so will imply a mathematical accuracy that is far from yet being achieved (even were it to be desirable) in sentencing.

As an example of these difficulties, one can consider a sentence for, say, a series of armed robberies. A total head sentence of 8-9 years’ imprisonment would clearly be within range. Prima facie, then, either period could, without appellable error, be imposed. Yet 8 years’ imprisonment would be 9 years’ imprisonment with an 11% discount.

To take another example, depending on the utilitarian value of an early plea, a judge could discount a sentence by 10% up to 20% probably without appellable error (though that may be less certain). On a starting point of 9 years’ imprisonment, a 20% discount leaves the final sentence at 7.2 years; on a starting point of 8 years’ imprisonment, a 10% discount leaves the final sentence at 7.2 years. What message do these figures produce? At the very least, they produce the comment that the apparent mathematical clarity from this process is still a long way from giving any clear result by which an offender (or his or her legal advisors) can order his or her affairs. Without that certainty, the psychological approach by an offender to ordering his affairs becomes quite problematic. His or her co-operation may result in no different sentence than his or her non-co-operation. A severe judge is likely to sentence in the upper range and give a lesser discount, so the opportunity for an acquittal becomes more attractive, and so on.

There are, however, a number of examples where the discount does not, in practice, seem to work at all. Relatively similar offenders can still suffer similar penalties imposed for the same offence regardless of whether they plead guilty or not. Indeed, it has been known for co-operative offenders to get severer sentences than their non co-operating co-offenders, especially if, as is sometimes inevitable, sentenced by different judicial officers. Also, for minor offences, as noted above, the margin for the discount is very small.

---

29 At 418.
30 ibid.
31 For example, in *R v Golding* (1980) 24 SASR 161 at 176 the “informer’s discount” in that case was set at 50%.
32 A recent example of this in the ACT Supreme Court were two co-accused involved in the death of the same victim. The accused has relevantly similar subjective circumstances. The accused who pleaded guilty (Culshaw, SCC 70 of 2000) was sentenced to 7 years’ imprisonment with a non-parole period of 5 years; the accused who pleaded not guilty and
The difficulty in this for the prosecution is two-fold: how to participate appropriately in the pre-trial process and how to formulate submissions on sentence. I return to these later.

There is, too, an ethical issue at stake. Lawyers must always guard against convenience pleas; a defence counsel cannot ethically promote one, a prosecutor may not accept one. The criminal justice system does accept the real possibility of them (perhaps even promotes them) through the system of expiation notices (“on the spot fines”). These are, however, restricted to relatively minor offences where, for the most part, there are easily observable external indicia of guilt or innocence: a speed camera photograph, records showing who are licence holders and the like. Offences where extensive investigation, evidence taking and the exercise of judgment are required to establish that the offence has been committed are not suitable for such notices. Part of the reason is the likelihood of convenience pleas which have the real capacity to bring the system of criminal justice into disrepute.

A high discount, especially one which changes the character of the penalty – imprisonment to conditional freedom; a fine to a bond – has the very real capacity to induce convenience pleas. If such pleas are induced, especially commonly, they increase the chances that the system will potentially be corrupted. On the one hand, a plea of guilty avoids the cleansing spotlight of a public trial focussed on the prosecution evidence, reducing the chance of inadequate, or more importantly, fabricated evidence being used to support a charge. It is a critical form of accountability.

On the other hand, the possibility of a discount inducing a convenience plea places another difficulty into the proper relationship that a lawyer should have with his or her client. For the defence, the problem of defending a client who confesses to his counsel is well known; now the client will have neither to confess nor to provide a defence until the likely sentence is known so that the tactics can be determined.

For the prosecutors, it runs a real risk that the independence of their work can be compromised. An expectation of a convenience plea can be a significant inducement for an investigator to create strongly inculpatory evidence, perhaps even to fabricate charges. It is very difficult to resist the acceptance of a guilty plea when offered just because of some vague and perhaps unsubstantiated concerns about the nature or sufficiency of evidence. In times of budgetary restraint (even reasonable budgetary restraint) a prosecutor cannot be expected to demand or examine a full brief of evidence for every early plea of guilty offered.

Thus, there are some serious pragmatic and ethical problems with the current approach. Nevertheless, if it works, then there may still be some value in it, provided there is no principled objection and the problems, especially ethical ones, can be managed and minimised. My view, however, is that a change in the culture of the profession is a greater contributor to criminal justice.
reform. It is when good defence lawyers who know that one must focus on the real issues are confident enough to disclose those issues to the prosecution and the court before the trial that real reform will occur. This must then be backed by professional, competent prosecutors and expertly investigating police so that genuine issues are the ones on which the trial is fought, not on the hope that the prosecution – or prosecutor – will stumble and leave an irredeemable gap that can be exploited in the trial, though unknown before it.

Sentencing discounts may nevertheless have a place if they, in fact, give defence counsel an argument to assist in encouraging their otherwise recalcitrant clients to participate by pleading guilty when they are guilty or otherwise co-operating, but only for so long as there is a perception that such discounts can in fact be delivered.

These pragmatic considerations aside, there are philosophical considerations that must give pause to the move to apply sentencing discounts for co-operation in the criminal trial process. An important one is that it does have the capacity to erode the foundation of our system, an accusatorial system in which the prosecution bears the onus of proof and the accused, for the most part, bears no onus at all.

Whilst it has been said that the right to silence is not in a strict historical sense merely an entitlement for an accused to stand mute during the whole of the investigation and trial, that is probably its current meaning in law. It is an important right which underpins the accusatorial nature of our criminal justice system and justifies it. I do not wish to enter that debate.

If I am right in, at the very least, how it is currently generally regarded, then pre-trial defence disclosure and perhaps even participation amounts to an infringement of that right. Thus, compulsory or coerced pre-trial disclosure would be an infringement of this right and a serious one at that. Voluntary participation, including disclosure, would be no breach, of course, since people are free to give up their rights.

To offer a discount on sentence for disclosure, however, is very close to making disclosure compulsory, or, at least coerced. What judge would permit a confession induced by hope or promise of a sentence discount ordinarily to be inadmissible?

In fact, this may be the very kind of induced confession that the historical purists would say the original doctrine of a right to silence was actually designed to prevent.

38 M Rozenes, “The right to silence in the pre-trial and trial stages” Paper presented to the Criminal Trial Reform Conference, AIJA/SCAG, Melbourne, March 2000.
That is not to say that I am opposed to criminal trial reform which requires pre-trial disclosure by the accused. On the contrary, I think there are good reasons why this should be required. They are not just reasons of administrative efficiency, but include more fundamental ones of fairness in the system.44

Nevertheless, the question of sanctions is very problematic in this context and I am concerned about the use of sentencing discounts to encourage co-operation and pre-trial disclosure. It seems to me that, as a matter of principle and practice, other sanctions are more appropriate, such as permitting comment on the failure to disclose and thereby permitting the jury (or judge in judge-alone trials) more easily to draw inferences adverse to the accused. In this, the sanction is proportionate and appropriate to the failure to co-operate.

The second issue of principle relates to the concept of punishment which, I believe, underpins our theory of sentencing. The question I ask is how the sentencing discount fits into our concept of punishment. I see at least two important issues in this.

While it is clear that there is a difference between mitigating a sentence and not aggravating it, the difference is often a metaphysical one. It first requires a tariff or “neutral sentence” from which one can start adding or subtracting the various mitigatory or aggravating circumstances.45 In the absence of a clear tariff, and in a landscape where the majority of criminal dispositions are from pleas of guilty, it is not difficult to see how the exercise of an accused’s right to put the prosecution to proof can easily become in fact an aggravating feature and thus a positive disincentive to the exercise of such a fundamental entitlement. That is to say, as a matter of principle rather than practice (i.e. it is difficult to identify a tariff precisely), there will be no such “neutral sentence”. An accused will either co-operate or not; there is no halfway house (though there may be degrees of co-operation). Thus there will be no “benchmark” from which it can be said that the court is adding or subtracting punishment. Perhaps more importantly, there is no “right” sentence which in principle is the starting point for the arithmetical process. Thus, in principle, a court could in fact be adding to the penalty for non-co-operation rather than subtracting for co-operation.46 It is not possible to tell which is occurring.

This point is not insignificant. It is not merely appearance, though it is that as well. It is more benign to discount for “good behaviour” than to aggravate for non-co-operation. Even in civil proceedings we do not incarcerate for failure to co-operate unless there has been such non-co-operation as would amount to a contempt of court.47 Why should we impose a much harsher penalty as a first sanction for non-co-operation in the criminal justice system?

As a second point, it must be said that the relevance of co-operation (absent it being evidence of remorse) to the proper sentence is rather strained. It says nothing about the offence itself – its nature or seriousness or the effect on victims.48 It says nothing about the personal situation of the offender in the way that is usually said to be relevant to sentencing: age, explanations for committing the offence, personal circumstances, remorse, prospects of rehabilitation and the like.49

44 As was pointed out by Dawson J in McKinney v The Queen (1991) 171 CLR 468 at 488 a fair trial is one that is fair to both sides.
45 See notes 24 and 25 above.
46 J Baldwin and M McConville, Negotiated Justice – Pressures to Plead Guilty (Martin Robertson, Lond, 1977) p107; J Bishop, Prosecution Without Trial (Butterworths, Syd, 1989) at 208. At least one can say that this is how the offender will often view it and that may leave the offender with a sense of grievance – a matter of no small importance: Everett and Phillips (1994) 74 A Crim R 241, 249. See also Lowe v The Queen (1984) 154 CLR 606 at 610-611, 612.
47 Knight v Clifton [1971] Ch 700. See, for example, ACT Supreme Court Rules Order 34 Rule 23.
49 A Ashworth, Sentencing and Criminal Justice (Weidenfeld and Nicholson, Lond, 1994) at 130; R v Shannon (1979) 21 SASR 442 at 457.
Generally, the post-offence actions of the offender are only relevant to sentencing as evidence of remorse or of the prospects of rehabilitation.\(^{50}\) Co-operation, pre-trial and at trial, however, is not, by itself, evidence of either of those characteristics. It is purely a matter of self-interest unless more is shown. For example, with other evidence, it may show a newfound respect for authority and thus provide evidence of the prospects of rehabilitation. In this way, it may also, with other evidence, show remorse. By itself, especially in the context of a sentence discount (or potential sentence increase), it only shows self-interest.

It hardly fits at all into the traditional purposes of punishment (retribution, denunciation, deterrence and rehabilitation).\(^{51}\) Indeed, it may be contrary to one or more of them.\(^{52}\) Such self-interest may disclose a hardened attitude antithetical to rehabilitation. A reduction in sentence may render the sentence so low as to fail adequately to denounce the offence. By its very nature, a sentence thus discounted fails to be proportionately retributive to the offence committed.\(^{53}\)

For the prosecution (perhaps more especially on appeals) this creates some difficulties in making coherent, principled submissions about the appropriate penalty. It creates difficulties in managing the trial process when the prosecutor’s part in that potentially becomes a factor in the actual determination of the sentence. It makes the process even more difficult for victims to understand by devaluing their right to have imposed on the offender a sentence proportionate to the invasion of their rights, and sometimes their bodies, by factors quite external to the commission of the particular offence by the particular offender.\(^{54}\) It creates a potential unfairness to offenders by allowing those for whom disclosure is relevant (because, for example, of the availability of certain defences) a discount whereas those for whom no such disclosure is relevant no access to such a discount though they may have the identical co-operation attitude to the process.\(^{55}\) These issues may rely on quite incidental factors like the quality of the police investigation which would seem by itself hardly relevant to the sentence to be imposed.

As can be seen, I have serious reservations about using sentencing as an incentive by way of discount or a sanction by way of increase to regulate pre-trial co-operation and disclosure. Such an approach to pleas of guilty is now too well entrenched to admit of successful opposition,\(^{56}\) but I believe it is necessary to be aware of these issues in that context as well so as to ensure that even in the case of the guilty plea discount we do not allow the process to be misused and so that we can minimise the encroachments on rights and principles. So far as other pre-trial co-operation and disclosure is concerned, I am in favour of re-consideration of the sentencing discount as a sanction and the use of other, more appropriate, sanctions and, therefore, the continued search for them.


\(^{51}\) These are set out in the oft-cited words of Lawton LJ in *R v Sargeant* (1974) 60 Cr App R 74 at 77 and have been repeated many times since. There has also been a move to synthesise these purposes into a single one, “the protection of the public”: *R v Radich* [1954] NZLR 86; *R v Cooke* (1955) 72 WN(NSW) 132; *Channon v The Queen* (1978) 33 FLR 433 at 437. See also *R v Casey* [1977] Qd R 132; *Veen v The Queen* (1979) 143 CLR 458.


\(^{55}\) The cynicism of offenders to the system of sentencing was reported as evident in Australian Law Reform Commission, *Sentencing of Federal Offenders* (ALRC, Syd, 1980) p80.

Sentencing By Diversion

The other issue I wish to raise is the use of diversion programs as sentencing within the criminal justice system. By diversion programs, I do not mean all diversions from gaol. There are a number of alternatives to gaol, such as probation and other forms of conditional release, which raise serious issues but are not the focus of my remarks. There are now also a number of programs that divert offenders from the criminal justice system, such as diversionary conferencing, police drug diversion programs and the like. They, too, raise similar issues as well as the very significant additional issue of accountability and transparency of operation which need to be addressed. Within the confines of “the topic of my paper”, however, I wish to confine the focus of my remarks to diversionary sentencing.

Most such programmes are used for drug addicted offenders and provide an opportunity for rehabilitation through various therapies including medication, counselling and residential courses. They can, however, be and are used in other areas. For example, anger management courses are now sometimes the diverted destination for offenders convicted of family violence offences. Drink driving education courses are used for certain offenders of that offence. Such sentencing options can range from the informal - such as by including some therapeutic undertaking as a condition of a recognizance - through to the quite formal programmes of the drug court.

A number of issues surround such processes, varying, of course, according to the precise nature of the arrangement. I do not wish to deal with any particular process but raise some issues that, in my view, arise in relation to most of them and which affect the prosecution.

The rise of such programmes has been in part a recognition that rehabilitation is, at the end of the day, the best protection for society from recidivism. It is now clear that while the other purposes of punishment, together with (temporary) incapacitation, are probably still effectively met by imprisonment, there is little rehabilitation that occurs in prison; indeed, it is more likely to aggravate criminal tendencies or the criminality of its graduates.

59 For a conspectus of such programmes, see D Weatherburn et al Drug Crime Prevention and Mitigation: A Literature Review and Research Agenda (NSWBCSR, Syd, 2000) pp38-40.
60 The following examples are only illustrative and there are many other programmes available or utilised. For example, Gamblers Anonymous has provided assistance to those with a gambling problem. One unusual example is in the St Louis Missouri Circuit Courts where offenders are sentenced to participate in programmes of Transcendental Meditation. Judges there report some successes with the programmes: conversations with Judge Anna Forder and Judge Mason.
62 The Alcohol and Drug Foundation of the ACT has run a drink-driving education program for some years; R Tomasaki, “Diversionary Alternatives for the Drinking Driver” (1977) Aust J of Alcoholism and Drug Dependence 4:38.
64 R v Sweeney (1992) 7 CCC (3d) 82 at 101.
65 Again, there is a huge amount of material on this. See, for example, J Dawes, “The Future of Prison: an Australian view” in D Biles (ed) Current International trends in corrections (Federation Press, Syd, 1988); R Tomasaki and I Dobinson, The Failure of Imprisonment (Allen U Unwin, Syd, 1980).
Those, however, who offend because of remediable tendencies are better dealt with, at least in part, by the remedying of those tendencies than by mere retribution or deterrence. It is clear for example that addiction is usually stronger than any prospect of punishment and often psychological traits will cause criminal behaviour quite irrespective of the threat of penalty.  Thus, without some rehabilitation, the prison gates do not merely “clang”, they become a revolving door – often to a place of education or networking for more and more serious, if not sometimes sophisticated, crime.

Nevertheless, we cannot use rehabilitation as a mantra or catch-cry unless we give it some real content and it is in that content in which lies I think the first problem with which I propose to deal.

Causation is a difficult concept which the law has had to deal with in a relatively arbitrary way. Scientifically, including in the social sciences, causation poses significant problems, especially in relation to behaviour.

Unfortunately, when we come to sentencing in a rehabilitation way, the law must be careful before proceeding to identify the cause of offending which needs to be remedially addressed. Courts should not address causes which are not the real or effective cause since the inevitable failure will both render the sentencing disposition ineffective and bring the system into disrepute.

Many offenders commit their offences for a multitude of reasons. Some of those reasons are beyond eradication in the individual offender at the time of conviction: childhood abuse, for example. Remedies or amelioration can be provided by counselling, perhaps, and clearly the criminal justice system recognises this. Some are beyond the scope of the courts to eradicate: unemployment, for example. It is a very rare situation where a court can order employment for an offender. It is to be noted, however, that not infrequently the imposition or a community service order (or work order) can lead to either the gaining of skills or even a relationship with an employer that results in subsequent employment.

Most offenders have, however, multiple problems and the inaddiction is only one. That there are addicts in employment who do not come to the notice of the criminal law is an example of how the addiction alone is not the effective cause, at least alone, of the criminal behaviour.

67 See C Ruby, Sentencing (Butterworths, Toronto, 1987) p275, though the cases cited do not seem to be authority for their proposition. The earliest case using the phrase seems to be Smedley (1981) 3 Cr App R(S) 117, but it has its origins in the less colourful “the sounds of the prison gates closing behind him” used in Gregson (1980) 2 Cr App R(S) 253 at 255. This, in turn, seems based on R v Bibi [1980] 1 WLR 1193 where at 1195 the Court referred to “the obvious case of a first offender for whom any prison sentence however short may be adequate punishment and deterrent”. For this principle, see also Ollerenshaw [1999] 1 Cr App R(S) 65 at 67. For the “clang of prison gates” see Ward (1981) 3 Cr App R(S) 350; R v Satterthwaite [1981] Crim LR 657; R v Smith [1982] Crim LR 469; r V Tonks [1982] Crim LR 193; Kelly (1983) 5 Cr App R(S)1. Formica (Vic CCA, 618169, unreported) appears to be based on the principle. The term has been used more recently in Australia: Kiss (1993) 69 A Crim R 436 at 439.
68 H Hart and A Hoanoré, Causation in the Law (OUP, Oxford, 1985). The courts somewhat circumscribe the cause of events because of the necessity of finding a particular responsibility from amongst the chain or network of causes. Thus, courts draw an “uncertain and wavering line” cutting off causative liability for reasons of “practical politics”: Palsgraf v Long Island Railroad Company (1928) 248 NY 339.
70 For example under Part 15A of the Crimes Act 1900 (ACT) and similar legislation in other States.
Undoubtedly, the addiction of a drug user is a very relevant cause of crime, but any rehabilitative intervention must look beyond that cause into the cause of the addiction itself in order to make an effective intervention.\textsuperscript{73} I do not suggest that these other issues are not addressed in drug rehabilitation programmes, particularly in many of the residential rehabilitation and other counselling programmes, but this is not usually considered by either the court or the parties before such an option is mandated by sentence.

Indeed, the proposals to establish a safe injecting facility\textsuperscript{74} and a trial of medically prescribed heroin distribution\textsuperscript{75} proceed on the assumption that it is not only the addiction itself but importantly ancillary matters (such as the need to obtain funds to pay the high cost of the drug) which cause the crime.

Unemployment is but one of a myriad of problems that includes illiteracy, mental illness, and physical illness to name a few.\textsuperscript{76}

Thus, the first issue that needs to be considered is the nature and content of the rehabilitative programme. It must be appropriately targeted and this may mean both a detailed assessment of the offender and his or her needs as well as a comprehensive treatment provision beyond a simplistic categorisation of the “problem” which needs treatment.

The second issue then is the effectiveness of the treatment. There are now studies that show that “treatment works.”\textsuperscript{77} “Works”, however, is a relative term and not all treatment works equally well. Research can now make some differentiation between treatments.\textsuperscript{78} The question then arises as to what treatment is acceptable. Until now, my experience is that, especially at the lower end of the criminal calendar, courts rarely reject any agency as a suitable destination for an offender seeking drug rehabilitation and rarely seek anything more than the most cursory assessment of the agency or its programme. There are, so far as I am aware, few formal benchmarks for acceptability of such agencies or programmes as providers for the criminal justice system other than so far as the NSW Drug Court is concerned.\textsuperscript{79}

Perhaps this is partly because, to date, most such treatment has been accepted by the court on the application of the offender. The logic of the position, however, is that such a sentencing disposition need not be voluntary. Those who are imprisoned are expected to take part in certain activities regarded as rehabilitative. We do know that some coercive treatment works.\textsuperscript{80} Why, then, should an offender not on occasion be sentenced to a treatment programme even if he or she does not consent – or even objects.\textsuperscript{81}

---


\textsuperscript{74} Supervised Injecting Place Trial Act 1999 (ACT). See also, ACT Hansard, 25 Nov 1999 pp3677-81.

\textsuperscript{75} G Bammer, Report and Recommendations of Stage 2 Feasibility Research into the Controlled Availability of Opioids (NCEPH and AIC, Canberra, 1995) p2.


\textsuperscript{79} Even with the Drug Court, the statutory requirements are minimal: s7(2)(a) Drug Court Act 1998 (NSW); reg 7, Drug Court Regulations (NSW).

\textsuperscript{80} See references at note 80.

Certainly, despite the lamentable history in respect of incarceration, some standards or accreditation might perhaps be required before accepting the coercive sentencing of an offender to a rehabilitative regime. That position, however, may be desirable now for voluntary rehabilitative dispositions as well. This, of course, raises all kinds of questions about the required standard and the accreditation agency, questions that have hardly so far been addressed.

At present, the prosecution has no clear duty in this area. Not infrequently, the prosecutor will not know what rehabilitative option the accused will choose until the sentencing proceedings are half-way through and may have no or no up-to-date information on the agency or the programme chosen. Thus, any opportunity to do so will either be lost or necessitate an adjournment of the sentencing proceedings whilst appropriate inquiries are made.

To date, I am not aware that this is regularly done or, indeed, has been done at all. This may well be because of the uncertainty about the basis on which an objection could be based. The information available about the efficacy of specific agencies is quite limited; in respect of most agencies it is often non-existent. Even if it is available, it is quite unclear about what it will actually tell us. A success rate even if low, will not necessarily imply that the particular offender should not enter the programme. In any event, the meaning of success is not in itself, clear.

These problems need to be addressed and, in my view, a proper regime established to ensure that any treatment diversion is just that and effectively meets the criteria that the criminal justice system would legitimately demand.

The options referred to above tend to involve the court by bond or order directing an offender to an agency or practitioner who then arranges, effects and supervises the treatment regime. This may or may not involve that entity in ensuring compliance. The most traditional supervisors of compliance, corrections officers, may be added as an additional layer for that purpose.

The issues that arise in respect of this process relate to the actual administration of the treatment. Under the processes described above, the treatment provider has usually recommended the treatment and provides it. Unlike most sentencing options, however, which specify one modality which is expected to last through to the completion of the sentence, treatment (if genuinely so) can be required by the treatment provider to change, and to change quite substantially. For example, residential rehabilitation (which is an attractive sentencing option because it involves a degree of liberty deprivation and incapacitation) may be completed satisfactorily in less than the sentencing period or may be terminated by the provider because it is not working and replaced by outpatient counselling which the provider believes is adequate or equally effective.

---


83 Prosecutors have a duty to identify mitigating circumstances, not otherwise identified: Boulton, Conduct and Etiquette at the Bar (Butterworths, Lond, 1975) p75. The courts seem to reject a notion that prosecutors should make specific submissions on quantum: R v Tait and Bartley (1979) 24 ALR 473 at 477; Shrubsole v Rodriguez (1978) 18 SASR 233 at 236; R v Burchelli (SC(Vic) Ct of Appeal, 10 June 1977, unreported). This would imply that prosecutors should not urge a specific disposition, including of a rehabilitative kind, although it has been suggested that this prohibition is only against “emotive, personally opinionated prejudicial” submissions: I Campbell, “The Role of the Crown Prosecutor on Sentence” (1985) 9 Crim LJ 202 at 227. The Federal Court has rejected a suggestion that a sentencing judge must consider all conceivable sentencing options: Nurzynski v The Queen [2000] FCA 1860. This would imply that the duty of a prosecutor is somewhat circumscribed as well.

84 Such as in Griffiths v The Queen (1977) 137 CLR 293 (the “Griffiths bond”) or under section 123 of the Drugs of Dependence Act 1989 (ACT).


87 Such as under section 142 of the Drugs of Dependence Act 1989 (ACT).
If this is done by the provider without reference to the court, as is possible in some regimes, the change in modality may be so significant that the court will feel its sentence has been undermined. This leads to loss of confidence in the provider or in the sentencing option. The problem is that there are two different approaches at work here: treatment or therapy is aimed at mitigating, curing or preventing the problem and thus is recommended only where it can likely achieve that but also where it might achieve one of those aims. That is to say, therapists will mostly recommend treatment if it will ameliorate the condition even if it will not cure it. The focus is squarely and usually only – on the patient.\(^8\) On the other hand, a legal corrections approach is required to balance quite other issues as well: fairness, certainty and proportionality. As well as the offender, the law must bear in mind the victim and the public interest.

One approach to avoiding these problems has been to involve the court more closely in the treatment process. An example of this is the drug court.\(^8\) This does introduce a new role for a court, which has not traditionally been involved in the supervision of its orders. The jurisprudence of this has not really been clearly articulated, especially in the context of an adversarial system. For example, it is not clear what interests are at stake that need to be considered by the court. The weight, if any, to be placed on the public interest, administrative convenience, cost and the offender’s personal interests have not been decided.

This is what I have elsewhere called “therapeutic jurisprudence”\(^9\) and has not been clearly addressed by courts or the academic community much less the profession as a whole. This theoretical underpinning does need to be addressed, however, because there are many practical issues which depend upon a clear articulated jurisprudence.

Among such issues is the role of the judge in supervising the treatment. It is not clear whether a judge has a role in deciding which treatment should be provided, or whether the judge should be bound by the decisions or recommendations of the treatment provider. Then again, a question arises as to whether the court should be able to order a treatment provider to administer treatment which he or she does not consider appropriate or, perhaps, to have a therapeutic value. By tradition, these are not decisions that judges make and they are not trained – insofar as they are trained at all – to make. There then may be an implication for judicial training in this approach.

The apparently positive results from the monitoring of the NSW Drug Court\(^9\) need to be recognised and their value to the community addressed in this critical problem in the community, but that does not negate a need for a careful and rigorous consideration of “therapeutic jurisprudence”.

It is also important to recognise that many offenders who may benefit from or, indeed, be entitled to a rehabilitative sentencing option will not appear in or have access to specialised tribunals such as the Drug Court. Indeed, these days one could almost suggest without fear of contradiction, that most courts are Drug Courts – without, regrettably, the expensive (but warranted) infrastructure that goes with that.\(^9\)

---

\(^8\) See, for example, The Declaration of Geneva of the World Medical Association (1948), reproduced in A Burton, *Medical Ethics and the Law* (Aust Med Publ Co, Syd, 1974) p12. At that time, applicants for membership of the Australian Medical Association were required to undertake to abide by its terms. The principle may also be deduced from cases such as *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428; *Corder v Banks*, *The Times*, 9 April 1960.\(^8\)

\(^9\) See note 63 above.


\(^9\) J Popovic and S McLachlan, “Court Referral Evaluation and Drug Intervention as Treatment Program” Paper presented at the Australian Conference on Drugs Strategy, Adelaide, April 1999. Estimates vary, but a significant number of offenders before
This leads me to the next issue that arises in this context and that is the question of the implications for sentencing of the limits on the availability of rehabilitative resources. There will always be finite resources but good rehabilitative therapy is especially limited. A sentencing system, however, must be fair. Thus, if one offender is entitled to a rehabilitative sentence, then it is hard to see why another relevantly similar offender should be denied that because it is unavailable.\textsuperscript{93} Indeed, without that comparative element, it is hard to see the fairness of a sentence which ought to be rehabilitative not being imposed because of the unavailability of resources. This then means that either the sentence will be too harsh (because it is unable to give full effect to the rehabilitative elements and thus emphasises another, such as retribution or deterrence) or will be too lenient (such as a non-custodial option without the rehabilitation that ought to accompany it).

One does not err against an offender and his or her interests if the court takes the too lenient option, but there are then consequences for other offenders and for the system as a whole.

These issues do impinge on the prosecution as it must now – and should – participate in the sentencing process. Prosecutors are expected to make relevant and helpful submissions on the options available to a sentencing court and to assist the court to avoid appellable error in its sentence.

These submissions should be based on law and assume a jurisprudence being a context within which they are to be made. This is particularly a requirement for the prosecution because prosecutors have a duty to be scrupulously fair.\textsuperscript{94} Fairness is, in part, a reflection of the objectives and philosophy of the system and until these are clear, the standards by which fairness is then to be judged becomes unclear if not elusive.

Further, a prosecutor has a duty to draw to a court’s attention mitigating circumstances of which he or she is aware, notwithstanding that this is the usual role of defence counsel.\textsuperscript{95} That role is particularly important with but not limited to unrepresented litigants.

Whilst perhaps not in strict terms mitigatory, the existence of some reasonable rehabilitative option may fall into the same category. What obligation, then, a prosecutor has to seek out or identify such options needs to be addressed. Indeed, it has been argued, though not yet accepted, that the common provision in Australian sentencing statutes that imprisonment is a last resort,\textsuperscript{96} means that a court must specifically advert to and investigate rehabilitative options which must then be held to be inappropriate before imprisonment can be imposed.

**Conclusion**

I regret that in this paper I have raised questions rather than answered them for the most part. This is because the answers will not be simple and, indeed, there may be none of the kind one usually seeks. The answers may come from a better awareness of the issues so that the bounds or the balance can be better kept in mind and the errors or injustices that potentially arise avoided or at least ameliorated.

\textsuperscript{93} Such an approach is unlikely to be taken to imprisonment! Even when the English courts were reducing sentences because of overcrowding (such as in \textit{R v Bibi} [1980] 1 WLR 1193) there was no suggestion that one offender would not get a fair sample of imprisonment if that was warranted for parity.

\textsuperscript{94} Lord Denning, \textit{The Road to Justice} (Lond, 1955) at 036; \textit{R v Tait and Bartley} (1979) 24 ALR 473 at 477.

\textsuperscript{95} I Temby, “The Role of the Prosecutor in the Sentencing Process” in I Potas (ed), \textit{Sentencing in Australia} (AIC, Canberra, 1986) at p119.

\textsuperscript{96} See, for example, section 429C of the \textit{Crimes Act 1900} (ACT).