

Should Sentencing Fit the Crime?

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In 1987, he went to the Bar and, later that year, became a New South Wales Crown Prosecutor. In 1998, he became Deputy Senior Crown Prosecutor and, in 2002, Deputy Director of Public Prosecutions. He became Senior Counsel in September 2004. He was elected as the Member for Epping in March 2007 and is currently the Liberal Party's Shadow Attorney-General and Shadow Minister for Justice.

Compassion for victims

A prosecutor's background logically leads to compassion for victims and families. That's the current culture. We are very pro-victim. It wasn't always so. The change occurred about the mid-nineties when we started getting much more interested in victims. Money was poured into it. [Witness assistance officers were appointed in the DPP's office](#). Various other departments, such as Attorney General's and agencies and courts, now have active pro-victim, pro-witness schemes.

The pro-prisoner line

You also regularly hear the pro-prisoner line, pro-defence line about why people have become like this. Generally, you can look at their background, their upbringing and see exactly why they have become criminal and why they have been convicted – because they haven't had as much of a chance as the rest of us. Years ago, if someone had said that to me, I would have said, "you are a bleeding heart", because the push for many years, in the prosecution area and in politics in this State, has been to be hard and, basically, to keep increasing the sentences and to lock these dangerous people away and to throw away the key. That has been the attitude, encouraged by newspapers, particularly the *Daily Telegraph*, and by the 'shock Jocks' on radio stations 2GB, 2UE and elsewhere.

Punishment doesn't protect society

Before I became a politician, and one of the reasons I became a politician, is that I decided that this was rubbish, as many prosecutors have thought as they have gone through their careers – the push for more punishment doesn't protect society in the future. That's why we have a 43% recidivism rate – people back in gaol within two years of being discharged after serving time for their first crime. Something is not working. Over 10,000 people are now in NSW gaols; we probably imprison nearly 20,000 more each year. Many are in on remand or for short-terms.

NSW's high imprisonment rate

I wondered why we have around 10,000 prisoners, compared with Victoria's 4,500 in a population which is about 85% of ours. They have a much lower recidivism rate, which is going down each year. Ours is not coming down, and the NSW Government's five-year plan to reduce recidivism by 10% hasn't come about. In fact, it has gone up since that plan was announced, by only 1% or 2%, but 43% is totally unacceptable. While not as high as in the Northern Territory, it is easily the highest rate of all the other states. Premier Nathan Rees, back in December 2008, when it was claimed that the gaols were likely to be overflowing within months, commented, "we will build more gaols" – despite the fact that it costs \$150 million or \$160 million to build a decent size gaol.

The principles of sentencing

Going through the criminal process and prosecuting people, both at trial court and appellate levels, you hear a lot about the principles of sentencing. You see many criminals and police and you hear many stories. From time to time, you see things go wrong in your own cases, such as where witnesses disappear or are unfavourable. As you mature, I think it tends to point you to towards thinking that there must be a better way. There was a fair bit of media coverage in January this year of a piece in the *Sydney Morning Herald* entitled, "[Truce on hardline sentencing](#)" by Andrew West, based on an interview he'd conducted with me before Christmas. I had made several other press releases along the way, saying exactly the same thing, but they hadn't been picked up as much, but [in December, I contradicted Rees, saying that we should be trying to reduce the number of prisoners and the recidivism rate](#), because if hospitals can't afford bandages, or in some cases food or medication, and they have to go down to the local vet to get the pain-killers, there is something really

going wrong with this State. I don't want to get political, but if we are spending all of this money, unproductively, on gaols and prisoners, perhaps we should be trying something else.

Appropriate sentencing?

We have a system of checks and balances in our system: on the one hand, proof beyond reasonable doubt and the principle that nine guilty men should go free rather than one guilty man be convicted, but, on the other hand, we are exposed to horrific crimes by the media, which have a feeding frenzy over some of these crimes, bringing out a lust for stern punishment.

How often do you see somebody, after a sentencing, coming out and saying, "It's not good enough, my (deceased) Johnny deserves better. That man should have got life imprisonment; and what did he get? Only 25 years with 17 or 18 years non-parole. That's not enough." The shock jocks get hold of it, people ring up and it starts another round and then the government says, "OK, we'll increase the penalty from 25 years to life."

Judicial variation

A recent case didn't really go over well in the media, not for the judge anyhow. The judge, since retired, gave a fellow a two-year suspended sentence for the rape of a girl aged four – he having broken into the her home, where he found her on her own and raped her. [He was ultimately sentenced on appeal](#), as I recall it, to about seven years with a four and a half year non-parole period. That was a pretty lenient sentence for that offence, and there were additional offences involved in the break-in etc. Had another judge dealt with that matter, the sentence might have been 15 years, or 12 years, or something of that sort – which is around about the standard non-parole period fixed in the [Crime \(Sentencing Procedure\) Act](#).

Inadequate sentencing

Once a particular judge calls the shots, he does the sentencing. He gave a two-year suspended sentence, all hell broke loose and, because it was obviously an inadequate sentence, I joined in. My view is that judges, in giving an inadequate sentence, do a disservice to the accused who generally has to front up again to be sentenced.

With all the attendant publicity they have had in the meantime, it's pounds to peanuts that they are going to get a gaol sentence and a longer one. Under the current system, the Court of Criminal Appeal is not a suitable sentencing court because it applies the principles of double jeopardy to sentencing: they say that, if this criminal who has done the wrong thing comes here, he should get the bottom of the proper range. If the Court of Criminal Appeal says that the proper range is seven to 12 years, they will generally give him seven. That's the New South Wales version of it.

Victoria has a different view, which I personally support, which would allow the Court of Criminal Appeal to impose the appropriate sentence which the judge should have imposed in the first place.

Sentencing and recidivism

You might think that, in making the previous comments, I am being hard on the prisoner. I am not philosophically soft on sentencing, particularly violent or serial offenders from whom the community needs to be protected, but I've come to realise that long terms of imprisonment, particularly for property offenders, often don't involve much rehabilitation and lead to higher rates of recidivism.

You owe it to the community to try to help those people. Otherwise, they will do it again when get out: break into your bedroom, break into your car, or rob the local convenience store, because they have no other way to make money, either to feed their drug habit, or just to live. A lot of prisoners, when they leave gaol, are given the pension cheque or whatever it is, it might be \$50, are shown the bus stop, given a phone number for their parole officer and told, "See you later, sunshine," and that's it.

Parole officers

There are not enough [parole officers](#). Under the current regime in Corrective Services, they supervise probation and parole, but when they need to cut staff, probation and parole get cut first. There are too few parole officers and too many clients, which means that they don't do much for each individual at all.

On the other hand, we have groups in society who are doing this work voluntarily or getting government funding. They take hold of prisoners referred to them, sometimes by probation and parole officers – those who are still there – and work with them. They find them somewhere to live. They find them a job if they can. They find them a doctor to look after them and they provide a phone number which they can ring at any hour of the day or night if they are in trouble – and so many of them do get into trouble – and it is great to have someone to ring. It's like being a father or mother to these people, trying to help them.

Rehabilitation and recidivism

When you do that, your recidivism rate comes down to about 9%. That's what these groups are finding in our community. John Taylor, a psychologist who was always on the defence side when I was a prosecutor, is doing

this sort of work voluntarily. There are many others, but it is not enough. The Government spent 150 million last year on rehabilitation. If you look at [Ron Woodham's Commissioner's Report in the latest departmental report](#), the first two pages are on rehabilitation. But then you look for this rehabilitation, it is just so inadequate, as Dr Nielszen has said. It occurs in fits and starts. It is not consistent. People keep getting moved from gaol to gaol for various reasons and can't continue their programs. There are some good programs.

Sex offenders and paedophiles

The [Cubit program for sex offenders](#) is quite intense and is said to be successful. I'm not so sure of that, but it is, at least, a serious attempt. Those who take part are in it for about nine months of intense work, trying to turn them away from sex-offending.

Some of them have this compulsive problem, especially the paedophiles. That means that they never give it up. I have spoken to some paedophiles about this, because I have called them as witnesses, and they just say to you, "You like women. You are married and you have children. Do you like your wife?" "Yes", I reply. "Well, we like kids," is the response. That's it. It's the same thing. They treat them like a wife.

I asked one of the victims of a paedophile, who was a witness in a case in which he gave evidence, "Why did you stay with him?" He said, "Well, Dad died. Mum shackled up with this other bloke. He was a drunkard. He used to belt her up. He used to belt me up. I left and lived on the street. If you live on the street, you either sell drugs, sell your body or you find a sugar-daddy, and I found a sugar-daddy and he was kind to me." That was sad, but it certainly opened my eyes to how many of these things happen.

'Law and order auctions'

The sad thing is that the political parties in this country, particularly in NSW since 1988 – and the others have followed suit – have engaged in 'law and order auctions' in election campaigns. In the 1980s, we had the scandal of the [early release of prisoners – the Rex Jackson matters](#). Much corruption was exposed through the Internal Security Unit in the Police Force. A number of politicians fell by the wayside over the years. By the early 1990s, by the election in 1994, it was on for young and old and both sides were trying to outbid each other.

One of the things that I said to Andrew West is that we have to end this law and order auction because it is not working. Judging by the reaction, you would think that I had scandalised or said something against the Pope or the Queen or somebody like that, in the sense that I am a heretic.

That's what they have done in England and that's where they started a lot of this. Bob Carr always used to follow Tony Blair and say, we should be harsh on crime, harsh on the causes of crime. "Tony Blair believes in being harsh on crime, harsh on the causes of crime, we have to follow these policies." What's not known is that, before Blair left, his government was abandoning those policies and. They are in a mess. Their gaols are over-full. It has cost them a fortune. They can't afford it, so that's probably the main motivation for turning the way they have. They are now much more into the causes of crime.

Funding of Corrective Services

It's happening here. We currently spend \$1 billion on our corrective services¹. That includes building costs. We can't afford that and also look after the hospitals, the schools, the infrastructure, the lack of railways out to the north-west and south-west and things like that. We can't keep spending all this money. I am being pragmatic about all of this, but I also believe that there are good moral reasons to take this line – to try to save people from themselves and to save the rest of the community.

This law and order campaign stuff has led to 'truth in sentencing'. This was probably a much more efficient way of dealing with prisoners, rather than saying that they are going to get 20 years with 15 years non-parole and they then serve three or four – which is what was happening with remissions and all of that, with people then saying that sentencing means nothing. Now when you get 20 years with 15 non-parole, you serve 15. You don't get out earlier unless you escape, and then they will probably get you back. That has been efficient in a sense, but it has also brought up the average sentences, so people are spending longer in gaol.

Exposure to other criminals

There they are being exposed more to other criminals. They have been learning more about how to commit crimes. They are dealing with some warders who are pretty tough characters, who themselves might have gone close to being criminals in their past as well.

[How do mobile phones get in to the Skaf brothers?](#) I don't know, but it could well have been *via* Corrective Services officers. Obviously, that is one way for people to get drugs, drink, telephones and other things they need. How do people practise crime in gaol, organise major importations from gaol, as they sometimes do?

¹ Department of Corrective Services: Annual Report, 2007-2008, p.63

With people like [Basham Hamzy](#), they terrorise the Corrective Services Department and organise for other criminals to help them from outside, because there are bank accounts for them to get benefits if they need them. Some of these criminals aren't really stopped by being in gaol or even in maximum security prisons.

New offences

Over the years, NSW Labor has created a stack of new offences and many aggravated offences which previously didn't exist, resulting in higher sentences. Guideline judgments were aimed at increasing sentences, making them more consistent. I have actually argued several of those guideline applications: higher maximum sentences, and standard non-parole periods. So they set these things. They say that the standard non-parole period for murder should be 20 years. The fact that the average life sentence used to be about 10 to 11 years doesn't really affect the figure they put there. Murder of a policeman or another person in authority has a standard non-parole period of 25 years.

Horrendous crimes

All of us are horrified by some of the murders and other crimes. The Skaf brothers' crimes, together with their mates, were horrendous – what they did to those women. The [K. brothers' crimes were horrendous](#). There have been others. They are horrifying crimes which need to be punished. I have personally prosecuted some terrible criminals who are now in gaol for the rest of their lives, and should be, because they are a danger to all of us. [Katherine Knight, who chopped up her de facto and basically served him as a meal, got life](#). I defended that life sentence and won. [SLD, a young man of 13, murdered a three-year-old and got 20 years with 10 years non-parole because he couldn't get life](#). His doctor, Bruce Westmore, and our doctor, Professor Waters, both said that this fellow is dangerous and, if released, will probably commit further serious crimes. Well, he is now up for attempted murder in the prison system or in the detention centre system, and now the prison system. He has tried to strangle prison officers, so he won't get out before 20 years. There might be something in force by that time to keep him there, because he is dangerous. This is problematic for society. There are some people from whom we have to be protected.

Dangerous, but not on parole

Another fellow - I won't mention his name because I mentioned him recently at the Uniting Church at Waterloo and Brett Collins, who was in the audience, said – after I said that he killed a good friend of his with a hammer in his bed so he could drag away his 11-year-old daughter, whom he raped when he stayed over Christmas time, and took her away and kept on raping her – that he knew him and that he was a good bloke. This fellow had a long history of this sort of behaviour and a long history of not serving parole. He had never complied with the rehabilitation program, so he'd serve his full sentence, which means that, on release, he didn't have to be supervised by parole officers. So there is a problem in our system.

That's a real gap there where you have these people whom everyone knows are dangerous, who are released out into society, without parole. If you have a wise government, why don't they make laws about those sorts of people, rather than relying on some of the other cases which are not nearly as serious, but which, because they get more publicity, mean that they have to 'do something'?

More severe laws

There are these sorts of cases, but these issues are not limited to election campaigns. Look at what has been happening recently. [Anti-riot legislation; gang-rape penalties have gone up to life; covert search warrants are now authorised](#). They were originally brought in, for the exceptional cases, using [anti-terrorism laws](#). Now they are available for certain crimes punishable by seven years' gaol or more. The [anti-gang legislation](#) where, on the basis of criminal intelligence, which is often informer-based and where it could be an informant trying to put his opposition out of business – which is often the motive. It doesn't mean he is unreliable. (By the way, I apologise to women when I keep referring to criminals as men.)

You get the intelligence there and that's what the judge acts upon, in the same way as he acts when he is going to issue a warrant for telephone interception or for a listening device, going into a house or a car, or a search warrant. That is the sort of material which justifies those sorts of things.

Declared organisations

In this case, once your organisation is declared, then, if you are a member of it, your membership makes you subject to a control order: if you mix with someone else who has a control order, that is an offence punishable by two years' gaol. It is all done on criminal intelligence. At no stage, unlike with the telephone intercept, the listening device and the search warrant which gather evidence later used in a criminal prosecution, can it be tested by cross-examination, judicial discretion, legal argument, all of that sort of thing. If it proves to have

been illegally obtained, it can be rejected or it might not prove anything, but in this case the criminal intelligence warrants the actual conviction.

That's where those laws are exceptional. Now search warrants to do with bikies can be made available if there is a 'reasonable *suspicion*', which is a much lower test than a 'reasonable *belief*'. The case which brought that about was that four bikies were in a car in which one gun was found. The police tried to get search warrants for each of their homes. The magistrate said, "Hang on, we don't know who that gun belongs to, so you can't have a reasonable belief that it belongs to all of them", so they have to get the legislation watered down again to allow them to go in.

Let's face it, they probably could have gone to another magistrate who would have given them the warrants. Police have been locking up a lot of people and getting a lot of evidence from so-called bikies. It doesn't seem to have stopped them that much.

As the public were horrified about the murder of a bikie at a Sydney airport, it was clear that the public wanted tougher laws to combat bikies. That's why the Opposition backed the Government, because the public out there see the bikies like an invasion, even though they have been here and growing for over 20 years and lots of recommendations have been made to do something about them. Suddenly, when the airport disaster occurred and there was a murder, all previous civil libertarian principles which apply to the criminal law were pushed aside and we moved into this area. That legislation will probably be extended, as time goes on, to other offences and to other types of criminals.

Conclusion

I've discussed a bit of a hodge-podge of ideas, but basically I believe that we have to spend a lot of the money which is currently going into building gaols, feeding prisoners and paying prison officers, on trying to cut down recidivism, trying to genuinely rehabilitate and trying to make ours a more harmonious society.