

Sentencing Conference Speech
The Great Hall, University House, Australian National
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The Honourable Justice Ian G Harrison
Supreme Court of New South Wales

"One of the most salient features of our culture is that there is so much bullshit. Everyone knows this. Each of us contributes his or her share. But we tend to take the situation for granted. Most people are rather confident of their ability to recognise bullshit and to avoid being taken in by it. So the phenomenon has not aroused much deliberate concern, nor attracted much sustained enquiry".

Those are the opening words of a book I was given in the year I became the President of The New South Wales Bar Association. The book is entitled "On Bullshit" by Harry G Frankfurt, described in the author's notes as a "renowned moral philosopher and professor of philosophy emeritus at Princeton University". As with any gift, it is always better gratefully to receive it than to enquire too closely about the motives of the donor. I did take it to heart for a little while however. I shall attempt to return to the topic of bullshit shortly.

Before doing so I should thank the organisers of this important conference for doing me the honour of inviting me to speak this evening. After-dinner speakers at conferences invariably fall into one of two categories. They are either expert in the field of discourse at the conference - in this case sentencing - or they

know next to nothing about the topic at all. I am more than qualified in at least one of those categories.

I know at least that our own Chief Justice Jim Spigelman generally takes credit for introducing the concept of guideline judgments on sentencing in New South Wales. The idea is not original however. The earliest guideline judgments can be traced to early Jewish Penology - Deuteronomy 19:17-21, "life for life, eye for eye, tooth the tooth, hand for hand, foot for foot" - suggesting punishment ought to be reasonably proportional to the severity of the offence. Fortunately, some of the technical problems associated with this approach have not survived into the modern era. For example, it was found in ancient times that these guideline judgments often made rehabilitation difficult. People could not help but be reminded, even years later, when they looked at someone eating roast beef through a straw, that he was the one who hacked off both of Lenny Weinberg's arms with an axe!

One person who is of course recognised as pre-eminent in this field of sentencing is Justice Rod Howie. We will all have the benefit of his expertise on Sunday. I was speaking to Rod earlier today and I noticed that he seemed uncharacteristically morose. Not happy at all. Perhaps a little depressed. I did my best to try to get him to share what was troubling him. He was at first reluctant to do so. I finally prevailed. He said, "Harro, the reason I'm feeling down is that three months ago my great aunt in Scotland, who I barely knew, died and left me \$600,000. Then just last month my second cousin, who I had never even met, passed away and left

me over \$1 million." So I asked, "What's the problem?" He replied, "Well so far this month I've received nothing!"

I will have been a judge for 12 months next Tuesday. I have been in the job barely long enough to form opinions. The opinions I express tonight are not necessarily those of the management! And I should remind you that unless you are actually the speaker for this evening it is not appropriate to say "bullshit" out loud.

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

Let me attempt to explain what I mean. In passing or reviewing sentences we inevitably have to confront and accommodate the centuries old concept of deterrence. We speak of general deterrence. We speak of specific deterrence. We speak of it in a way that suggests to others that we know what we are talking about. We speak about deterrence in a way that suggests that

there is, and that we know there is, a relationship between the size or type of the sentence we impose and the likelihood that a convicted person will, or the community at large upon hearing of his or her fate will, make informed decisions about whether or not to commit like crimes in the future. We are required to operate upon the assumption that members of the community will be reliably and logically influenced by the severity or otherwise of the sentences we impose. We are obliged to re-affirm and thereby to institutionalise the notion that fear about a particular sentence for a particular crime will have some bearing upon later decisions about whether or not to commit it.

One could be forgiven for thinking that this sounds very much like bullshit. There is no reoccurring or worthwhile relationship, at least that I can discern, between the penalty prescribed for a particular offence and the likelihood that it will be committed. Again, subject to particular and sensible exceptions, such as spontaneous crimes, crimes of passion or crimes committed under the influence of, or as the result of an addiction to, drugs and alcohol, or other forms of mental or intellectual incapacity, the only fear that is relevant to deterring crime is fear of detection. I don't suggest that this is a new idea. I would like it to have been my idea. It seems by and large to be uncontroversial. In my view, however, a proper understanding and in particular a sensible and reasoned application of it would lead to significant changes in the product of the sentencing equation with cognate benefits to prisoners and the community.

We regularly see and make remarks on sentence such as "I am required in sentencing you to send a message to the community about the serious nature of this offence". Why! Does the parliament or the community really believe that imposing a sentence of four years upon a person convicted for breaking and entering to be served in a violent degrading environment will have any bearing at all upon him or her that more significantly influences the prospect of re-offending than a sentence of two years? It sounds terrific and has a sort of arithmetical and logical symmetry to it but in our quiet moments should we not all question whether or not it is just rhetoric?

What crimes do we see? With all of our accumulated knowledge and experience of the criminal law and the criminal justice system, let us just try to contemplate circumstances where an ultimately convicted person may be deterred by the prospect of sentence x as opposed to sentence y.

Driving a motor vehicle with the prescribed content of alcohol in the blood stream. We have all had experience with an appellant or applicant convicted of such an offence. Of how many of those offenders could it reliably be said that they gave even a momentary consideration to the range of penalties that applied. By way of contrast, does your experience permit you to conclude that the same group did not seriously contemplate the prospect of being apprehended, assessed the risk as one they were prepared to take, and drove accordingly.

Take another example. Three youths at a loose end come across a victim at midnight in an isolated beachside park. The air is alive with testosterone. One of the group punches the victim who falls backwards, striking his head on a low brick wall causing a cerebral haemorrhage from which he dies instantly. It is unnecessary to increase the strength of this example by the inclusion of alcohol as a contributing factor. "I am going to impose a sentence upon you that will teach you a lesson and serve as a warning to others like you". This really is very silly. Is it meaningful to operate upon the basis that at the time of the commission of this offence the accused person, who for the sake of the argument was a law student who had just completed criminal law, was in any way influenced in his criminal conduct by the penalties applying to murder or manslaughter. In this case, of course, it is also highly unlikely that he would have been influenced by any consideration of the prospect of detection or apprehension.

Finally, a syndicate of members of a motorcycle club proposes to set up facilities for the manufacture and production of amphetamines in a garage on the far western outskirts of Sydney. The penalties for offences related to this activity are very severe but the profits are potentially enormous. Does this group hold a board or executive committee meeting before doing so to evaluate the risks having regard to the severity of these penalties? Would the gang members be any more likely to engage in this activity if the maximum penalty were 10 years rather than 20 years?

Although there may be isolated instances of it happening at some time in the past, I am personally unaware of a concerted or

concentrated legislative initiative to reduce sentences for any crimes. Offences have occasionally been removed from the statutes. For example, when I was at law school, I think it was still an offence punishable by a fine of £20 to dump the carcass of a horse in Sydney Cove. For some reason, that offence has passed into history.

The parliaments are almost religiously fearful that sentence reductions, or more accurately, anything apart from sentence increases, will telegraph an unacceptable impression about where they stand on crime. This apparently has electoral significance. However, if you actually speak to electors – that is, members of the community who are, or whose loved ones are, facing the imposition of a sentence for some crime, concepts of retributive justice and deterrence are the furthest things from their mind. The same people who casually agree as a matter of theory, that child sex offenders should be cemented in their cells – a wholly barbaric concept if I may say so - do not think that their own son, who may have been the youth in the example I gave earlier about the assault in the beachside park, should be sentenced in a way that satisfies the cries for what is described as justice that come from the masses and social commentators. The community is fearful of light sentences but only if the convicted person is someone else's child or spouse. This is because the inescapable truth is that even the convicted person is a victim of crime.

The late Paddy McGuinness published an article in August 2002 in the shadow of some notorious gang rape trials in Sydney. These were indeed special and terrible crimes. Almost every journalist or

commentator has felt the need to write about these events. McGuinness' article was entitled, "[a] sentence's severity should first be judged against its intentions". He wrote:

" but the penalties for rape are not intended to punish misogyny but to punish the crime of rape and to deter others from committing like crimes. And the only relevant question in formulating sentencing policy, and considering whether a particular sentence is too severe, is whether it works in terms of its intentions.

There is however an additional element in sentencing, which is public opinion. It is clear that there is general approval of the heavy sentence, because of the peculiar nastiness of this episode of the serial gang rapes. A heavy sentence gratifies the natural feelings of the community and provides some psychological compensation to the victims.

The central policy issue in sentencing, however, is whether heavy sentences actually deter. As a number of economists have pointed out there is evidence that they do. To suggest otherwise is to suggest that criminals make no calculations of any kind as to whether what they are doing is worth the risk. There may be no calculation involved in a crime of passion, but in serial rape, especially planned - rather than opportunistic - gang rape, there must be some belief that the risks of punishment are low.

That the perpetrators of the recent rapes could have thought they could get away with them is worth investigation . . ."

It will not have been lost upon you that the author of this article, nominally an article about severity of sentences, has lapsed into phrases such as "worth the risk", "belief that the risks of punishment are low" and "thought they could get away with them". Clearly these concepts relate to fear of detection, and have nothing to do with severity of punishment. This tendency to conflate severity of penalties and the risk of being caught is clearly not limited to the population at large. In my opinion, it is a tendency that continues to work significant injustice.

It is self evident that the imposition of any penalty will not deter the commission of an offence for which it is being imposed. It also seems clear enough that in the case of repeat offenders, no sentences appear to have that effect. It is less clear whether one-time offenders are always or ever dissuaded from re-offending by the length of their sentence. And re-offending is clearly prevented during incarceration.

I should interrupt myself to say that my comments are not directed at those who impose the sentences. Nor is it my intention unduly to offend *any* particular sensibilities or passionate and valuable interest groups in expressing these views. I would not wish to say the wrong thing. I manage to do that enough in my private life. For example, I made a terrible Freudian slip at lunch last Sunday. My mother in law was visiting. It was all very pleasant. What I meant to say to her was, "excuse me Gwen, could you pass the butter please" but what I actually said was, "shut up you stupid old bat, you have ruined my life!"

Let me pose another hypothetical question. A man in his 60s has been employed by a mid-sized company for 20 years as its internal accountant. The man is a trusted employee. The man's son develops a heroin habit and his life takes the expected course. The father wishes to assist his son by sending him to a detox program but cannot afford to do so. He steals or embezzles a large sum of money over a period of 18 months or so to assist his son. None of the money is used for his own benefit. He is ultimately detected, admits the crime, mortgages his home to repay the money and is convicted. He is sentenced to two years to serve. He appeals to the Court of Criminal Appeal. What should happen to him?

He has no criminal history. He will clearly not re-offend. He has lost his employment and will be unlikely because of his age and the nature of his (now) criminal record to get work again. He is suffering from anxiety and depression. There has in the final analysis been no victim, apart from him. Precedent suggests a custodial sentence must apply.

Why? Deterrence? This must surely be irrelevant. Retribution? For what? What kind of society demands imprisonment of such a person! I think that the answer is, "a fearful society".

One consequence of all this is that we as judges have also become fearful. Somewhat counter-intuitively, we as a group have not demonstrated a fear of those whom we are required to sentence. The imposition of harsh sentences has historically and

in modern times not been something with which the judiciary appears to have had much of a problem. We are sworn to apply the law whatever our personal views might be. Fear of criticism for having gone too soft, however, is probably more of a concern than either it should be or we care to admit. It is rare that we go a week or two without a paper slamming some judge, with the benefit of emotional quotes from often carefully selected community representatives, for giving only 14 years for a sexual assault or only 20 years for a murder. I can almost guarantee that Justice David Kirby's sentence of Mr Burrell delivered this morning will attract this type of response in Sydney papers tomorrow. This does affect us. It is regrettable.

What would happen to civilisation, as we know it in this country, if we took a red pen to all sentences and cut them in half? All serving prisoners who had served more than 50 per cent of their non-parole periods would be set free. I appreciate that there are some prisoners whose actions have disentitled them to release on any terms. These cases are notorious and rare. Psychopathic and dangerous recidivists are in a special category and should remain so. Put them aside for the purposes of this example. What then is the answer? What terrible things would happen? I think the answer is, "probably not many".

When Ray Williams of HIH fame was recently released from prison, the editorial mood was to suggest that he got off lightly. What single consequence to anyone was there that is capable of being related to the amount of time he spent in prison? A well-known and well-publicised Crown Prosecutor was released

recently after having served six months on charges relating to child sex images on his computer. A similar outcry erupted. The same question can be asked. What economic, social or emotional benefits would have accrued to the community if he had remained incarcerated for two years or five years or whatever? Do we, as a community know what we are talking about when we express strident and absolute views about the appropriate length of sentences or are we really just speaking bullshit?

Jim Spigelman has spoken this morning about sentencing and consistency. Bruce DeBelle has talked about sentencing legislation and judicial discretion. Nothing that I am suggesting cuts across these areas. I am suggesting that we as a community look closely at reducing the tariffs. I propose that we as a civilised society should in effect re-evaluate and revalue the sentencing currency.

Professor Michael Tonry points to crime and imprisonment statistics from a number of first world countries over a 30 year period as support for Mark Mauer's (2006) proposition that 'crime does not cause punishment' - that incarceration rates are a matter of policy and do not have significant effects on the levels of crime. He suggests that imprisonment rates are chosen by politicians and are not the result of increased crime. He says that there is no evidence for the claim that mandatory / minimum sentencing has any impact on consistency of sentencing or levels of crime. The primary function of such sentences is political symbolism.

I spoke earlier of fear. My message I suppose is that whilst all of this is not new, for some reasons not necessarily understood or possibly even identified, our system is afraid to do anything about it. I know that a large proportion of you here tonight will have balked at my whimsical suggestion that serving prisoners' sentences could be halved. There are serious reasons why such a move would have to be looked at closely. But I suspect most people's response to such a suggestion would be predominantly influenced by fear. Fear of the unknown. It is largely uncharted territory. We often forget that in 18th and 19th century England, the death penalty was mandatory for about 150 crimes in the belief that this would reduce crime. Pick pocketing was one such crime, but no deterrent effect was apparent – rampant pick pocketing was reported at public executions of pickpockets!

I should emphasise that this is not a call for judicial delinquency. We are not legislators. We fall into error if we try to be. Nor are we free agents of change. Our discretions are highly circumscribed. We must observe the constraints of guideline judgments. I make absolutely no complaint about that. I just question whether or not *some* at least of the tools we are required to work with might not have become a little rusty.

I would like to conclude with some more wisdom from Professor Frankfurt:

"bullshit is unavoidable whenever circumstances require someone to talk without knowing what he is talking about. Thus the production of bullshit is stimulated whenever a person's

obligations or opportunities to speak about some topic exceed his knowledge of the facts that are relevant to that topic."

Finally, and almost unbelievably, I would like to thank and acknowledge the considerable assistance in the preparation of this speech given to me by Justice Rod Howie. When he heard that I was speaking tonight he said, "What on earth would you know about sentencing?" I said, "Rod, I know as much about it as you do!" He said, "Harro, that's bullshit!"
