CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN TERRITORY

Sixth Biennial Conference

Bali Hyatt Hotel, Sanur Beach, Bali
22nd – 26th June 1997

"A Note on the Sentencing Act (NT)"

by

Suzan Cox

(NT Legal Aid Commission, Darwin)

A NOTE ON THE SENTENCING ACT (NT)

Expectations of Punishment

The Northern Territory Sentencing Act was introduced into Parliament as part of a reform package relating to "tougher bail laws", "Re-vamped sex offence provisions in the Criminal Code", and "Anti-stalking laws". The Act was introduced as a "get tough" measure aimed at those who "commit serious crimes of violence". Needless to say the policy stance for introducing such "reforms" was one placing great faith in the ability of punitive criminal justice measures to deliver community protection, an assumption often shared by the community. The Northern Territory politicians, not unlike some of their counterparts interstate, appear to assume that an escalation of punishment will necessarily provide greater community protection. The Territory took both positive and negative examples from interstate legislation (the indefinite detention provisions for example parallel the ill-considered reforms in Queensland and Victoria) and added some negative reforms of its own.

Although the Act assisted in providing a logical frame-work for sentencing orders and their breach as well as providing for explanations of certain sentencing orders the negative features of the Act such as minimum non-parole periods (50% of the head sentences for all offenders imprisoned for 12 months or longer and in cases of sexual assault not less than 70% of the head sentence) have sought to exclude from the sentencing options the necessary flexibility that experience has shown is required in order to impose a "just sentence".

Truth in Sentencing

As part of the sentencing package and as an attempt to result in "truth in sentencing" the Act abolished remissions. It is important to note that in the Northern Territory remissions only

applied to the head sentence and not to the non-parole period. Non-parole periods in the Northern Territory have traditionally not been more than two-thirds of the head sentence. It was recently argued in two cases which are presently awaiting decision by the Full Court that the effect of the abolition of remissions was a 50% increase in the maximum length of incarceration. This was in completely contrary to the stated intention of the Attorney-General in the second reading Speech of the Bill; who said:

> "while it is the intention of the government to see that offenders are properly punished for their offences, it does not intend that the sentences be effectively increased by reason of the abolition of remissions alone".

In fact, there has always been "truth in sentencing" in the Northern Territory because there were never any remissions on the minimum term. Although, the legislature purported to avoid the NSW experience (the dramatic escalation in the prison population), it was only limited to sentences of 12 months or less. So there is no requirement to take into account the abolition of remissions in respect of sentences greater than 12 months.

S.121(1) of the Sentencing Act states:

> Where an Act, including this Act, or an instrument of the legislative or administrative character increases the penalty or the maximum or minimum penalty for an offence, the increase applies only to an offence committed after the commencement of the provision affecting the increase.

It has been argued that this section ensures that any increase in sentence only applies to offences committed after 1 July 1996 when the Sentencing Act came into force. The crucial issue raised is whether a penalty for an offence may be taken to have been increased solely by the abolition of remissions otherwise attached to the penalty. This calls into play the interrelationship between s.54(1) which requires a non-parole period of not less than 50% of the head sentence and the requirement of s.121(1).

In the meantime what is the situation of defendants who committed offences before 1.7.96 but were sentenced after 1.7.97 and thus subject to the Sentencing Act? Could they sue members of the legal profession for not advising them to have their matters dealt with prior to 1.7.96 so as to avoid the requirements of the Act?

Furthermore, how are sentences to be adjusted, if at all, so as not to result in a 50% increase in respect to sentences greater than 12 months? Over the years the courts have built up a "tariff range" for particular sentences. Previously a person convicted of a Dangerous Act offence, for example, might have been sentenced to 4-1/2 years with a non-parole period of 18 months. Under the Sentencing Act. a 4-1/2 year head sentence requires a non-parole period of 2 years 3 months.

In reality, sentencing has not become more transparent, only tougher. No doubt ways to avoid an 'unjust' sentence will be pursued. A case which prior to the Act would have seen an accused released on parole and subject to stringent supervision within the community now, may well

have him/her released on a suspended sentence or partially suspended sentence so as to avoid the 50% or 70% minimum non-parole periods. We are presently awaiting the decision to clarify the interrelationship between the affect of the abolition of remissions, the requirement to set a non-parole period of 50% of the head sentence and the existence and meaning of s.121(1).

Mandatory Sentences for Property Offences

Just as we were trying to come to terms with what the Sentencing Act means, Parliament introduced an amendment to the Act requiring mandatory imprisonment for property offences. These extraordinary intrusive measures were introduced despite a great deal of opposition from the legal and wider community. They were introduced without any assessment of their justice, efficacy, cost, impact on victims, or conformity with international human rights standards. Needless to say as a result of this illconceived and poorly drafted legislation, there has already been a significant cost to the community as the issues are litigated. At the present time there are a significant number of cases in the Magistrates Court awaiting the decision of the Full Court in respect of two case stated's dealing with issues arising from the mandatory sentencing legislation. It is interesting that the cases were stated by Magistrates wanting assistance in interpreting the legislation. As these cases are presently awaiting decision it is not intended to do more in this note than summarise the problems that have arisen come to light through the submissions that have been mounted.

In the case of *Trenary v. Bradley*, issues centred around the true construction of s.78A of the Sentencing Act which purported to introduce compulsory imprisonment for property offenders.

The issue was whether or not the Section precludes the suspension of any term of mandatory imprisonment either wholly or partly.

The applicable rule of statutory construction was argued to be dependent upon the nature of the subject provisions and the overriding principle that where legislation purports to erode fundamental common law rights the most stringent test is to be applied:

> "such an intention must be clearly manifested by unmistakable unambiguous language"; *Coco v. R (1994) 179 CLR 427, at 437.* Accordingly, the principles in Coco apply to the determination of the question whether or not there was power to suspend the sentence given the respondent's right to a "just sentence".

The respondent further argued that the fundamental importance of the sentencing discretion is shown by authorities like *Cobiac v. Liddy (1968) 119 CLR 257, per Windeyer J. at 269; Sillery v. Queen (1980-81) 180 CLR 353.*

> "It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is the traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as the nature of the crime." *(Palling v. Corfield (1970) 123 CLR 52, at 58 per Barwick CJ.)*

The purported erosion by statute of this right is subject to the principles in *Coco* and in this respect, *Sillery* and *Cobiac* are examples of the application of the general principle in *Coco* to cases similar to the present. It was further submitted that if the court were to accept the argument advanced by the Crown, s.78A and s.78B have the affect of limiting the sentencing discretion in respect of certain property offences to only fixing a sentence of actual imprisonment, the court will have lost the power, for example to set non-parole periods or partially suspend longer than minimum sentences. The amendment to provide for compulsory imprisonment therefore would erode to a significant extent, if not abrogate, a defendant's right to a just sentence in this category of crime. The provisions must therefore meet the standards of clarity set out in *Coco*.

Alternatively, the principle in Beckwith v. The Queen (1976) 135 CLR 569 applied and if an ambiguity remains the interpretation that favours the respondent must be applied. Furthermore, while Parliament may contemplate the abrogation or curtailment of rights the law as passed may not be in terms effective to do so. As the court said in Coco:

> ".... curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights." *(179) CLR 437-8].*

So whilst their declared intention may have been to introduce a scheme of mandatory minimum prison sentences, the result may have been to introduce a scheme of mandatory prison sentences

which is a significantly different proposition. It was argued there could be no "constructive" abrogation of fundamental rights.

The Crown said that the court was precluded from suspending any minimum term of imprisonment and that s.78A was governed by s.78B. The Crown contended that the court was permitted to refer to Hansard and the proposing Minister's second reading speech in order to identify correctly the mischief the legislature is seeking to remedy or the purpose to be served by the legislation.

In the other case stated, *McMillan v. Price* which is also presently awaiting decision of the Full Court, the applicant had pleaded guilty to two property offences which the Magistrate found proved. The applicant admitted various previous convictions including two prior property offences. The stated case raises issues concerning inter alia, when property offences became "property offences" within the meaning of the mandatory sentencing legislation, as well as whether the doctrine of issue estoppel prevented the informant from characterising the two convictions on 13 March 1997 as "property offences" for the purposes of s.78A. Finally, it was asked to what extent, if any, in the circumstances of the case stated, is the Sentencing Act Amendment Act (No.2) 1996 retrospective.

The applicant argued that there is a strong common law presumption that Parliament does not intend legislation to operate retrospectively and this presumption is of greater force where a person's position is made worse by not applying the presumption. It was argued that in respect of penal sanctions the rationale is - that forbidden conduct is deterred by fear of a sanction

which is in existence at the time the person commits the forbidden conduct *[Samuels v. Songaila (1977) 16 SASR 397].* Accordingly, the Amendment Act must be presumed to operate prospectively in respect of offences committed after the coming into operation of the Amending Act (ie 8 March 1997). Accordingly, it was argued the relevant law to be applied is the Principle Act as amended by the Amending Act with prospective operation of the Amending Act. The transitional section s.130 (1) (which provided that the Act applies to a sentence imposed after the commencement of this section, irrespective of when the offence was committed) created transitional rules only for the effect or consequences of the Principal Act and not consequences of the Amending Act. In the alternative, it was argued that the words "property offence" were a term of art created for the first time by the Amending Act and consequently a person could only be found guilty of a" property offence "as defined after the act came into being (8 March 1997).

The applicant urged a construction of the Amending Act consistent with international law (*Waddington v. Miah (1974) 1 WLR 683; Mabo v. Queensland (No. 2) 1992 175 CLR 1*) and relied on the relevant statements of international law set out in Article 11 (2) of the Universal Declaration of Human Rights 1948 and Article 15(1) of the International Covenant on Civil and Political Rights 1966 (ICCPR).

Alternatively, it was argued that the Crown was prevented from characterising the offences as property offences because of the doctrine of issue estoppel. It was urged that the doctrine was part of the criminal law found in Australian jurisdictions; *Rogers v R (1994) 181 CLR 251.*

As to whether or not the court could order the suspension or part suspension of a term of imprisonment to be imposed under s.78A of the Amending Act, the applicant in *McMillan* adopted the arguments of the respondent in the previous case stated of *Bradley*

The Crown (Respondent) agreed that the term "property offence" would not include an offence committed prior to 8 March 1997. Essentially, what triggered the operation of the Sentencing Amendment Act according to the Crown submissions was the commission of a prescribed property offence after 8 March 1997. Once the operation was triggered, any prior finding of guilt for a prescribed property offence must be used by the court in determining the relevant operative sub-section of s.78A.

The Crown further argued that issue estoppel is not known to the criminal law relying on the same authority that the applicant had relied on for the opposite proposition. It is submitted that the question of the availability of issue of estoppel in criminal cases is, despite *Rogers*, unclear.

Although the litigation at this stage has mainly been directed at mandatory minimum sentences it is envisaged that problems in the drafting of the Principal Act, as well as the attempts to legislate greater punitiveness indicate the litigation is just beginning. As more and more cases raise sentencing issues, such as where is the power to back-date a minimum period when dealing with offenders transferred under sentence from interstate and the legitamacy of wide prosecutorial discretion in the decision to lay separate informations/indictments or one accusatory instrument, the serious philosophical issues with respect to fettering the judicial sentencing discretion will remain. The latter effectively amounts to arbitrary imprisonment.

Although there is no express constitutional prohibition against such punishment in Australia, there have been judicial hints that the courts may not be prepared to tolerate unfettered forms of punishment where punishment could be properly characterised as cruel or unusual. The possibility was alerted to in *Sillery v The Queen*. At this stage there have been no applications for an indefinite sentence but it is envisaged that it is only a matter of time.

In the meantime, a new wing at the Berrimah Prison built to accommodate the expected rise in the already very crowded NT prison population is almost finished. There is a new prison in Alice Springs. The NT media continues to give almost daily prominence to the reporting of crime and sadly the magistracy has shown itself not to be backward in the increasing use of actual custodial sanctions. Although this may be responding to the community views, ultimately as one writer recently noted "reflecting popular opinion may not be the same as acting in the public interest".*

SUZAN COX

* Ashworth, A Sentencing and the Climate of Opinion [1996] Criminal Law Review 776.

(b) for 12 months or longer, that is not suspended in whole or in part,

it shall, as part of the sentence, fix a period during which the offender is not eligible to be released on parole unless it considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a period inappropriate.

(2) Where a court sentences an offender to be imprisoned in respect of more than one offence, a period fixed under subsection (1) shall be in respect of the aggregate period of imprisonment that the offender is liable to serve under all the sentences then imposed.

(3) This section does not apply to or in relation to the sentencing of an offender for the crime of murder.

54. MINIMUM NON-PAROLE PERIOD

(1) Subject to this section, where a court sentences an offender to be imprisoned for 12 months or longer that is not suspended in whole or in part, the court shall fix a period under section 53(1) of not less than 50% of the period of imprisonment that the offender is to serve under the sentence.

(2) Subsection (1) does not permit a court to fix a period under section 53(1) of less than 8 months.

(3) Subsection (1) does not apply where the court under section 53(1) considers the fixing of a non-parole period is inappropriate.

55. FIXED NON-PAROLE PERIOD FOR CERTAIN SEXUAL OFFENCES

(1) Subject to this section, where a court sentences an offender to be imprisoned for an offence against section 192(3) of the Criminal Code that is not suspended in whole or in part, the court shall fix a period under section 53(1) of not less than 70% of the period of imprisonment that the offender is to serve under the sentence.

(2) Subsection (1) does not apply where under section 53(1) the court considers that the fixing of a non-parole period is inappropriate.

56. FIXING OF NON-PAROLE PERIOD OTHERWISE THAN BY SENTENCING COURT

(1) The failure of a sentencing court to fix a non-parole period under section 53(1) does not invalidate the sentence but the court may, on the application of the offender, the Director or the prosecutor, fix a non-parole period in accordance with that section in any manner in which the sentencing court might have done so.

(2) A court may fix a non-parole period under section 53(1) in respect of a term of imprisonment being served by an offender who, at the commencement of this subsection, is serving a sentence of imprisonment to which that subsection applies in respect of which a non-parole period had not been fixed.

(3) A court may fix a non-parole period under subsection (2) on the application of the offender, the Director or the prosecutor and it may do so as if it had just sentenced the offender to the term of imprisonment.

(4) Subsection (2) does not apply to a sentence of imprisonment imposed for the crime of murder.

57. FIXING OF NEW NON-PAROLE PERIOD IN RESPECT OF MULTIPLE SENTENCES

(1) Where -

(a) a court has sentenced an offender to be imprisoned for an offence and has fixed a non-parole period in respect of the sentence; and

(b) before the end of the non-parole period the offender is sentenced by a court to a further term of imprisonment in respect of which it proposes to fix a non-parole period,

it shall fix a new single non-parole period in respect of all the sentences the offender is to serve or complete.

(2) The new single non-parole period fixed at the time of the imposition of the further sentence -

(a) supersedes any previous non-parole period that the offender is to serve or complete;

(b) shall not be such as to render the offender eligible to be released on parole earlier than would have been the case if the further sentence had not been imposed; and

(c) shall not be less than the non-parole period required to be fixed under section 54 or 55, as the case may be, in respect of the further sentence.

58. COURT TO TAKE ABOLITION OF REMISSIONS INTO ACCOUNT

(1) When sentencing an offender to a term of imprisonment of less than 12 months a court shall consider whether the sentence it proposes would result in the offender spending more time in custody, only because of the abolition of remission entitlements by section 6

of the *Prisons (Correctional Services) Amendment Act (No. 2) 1994,* than he or she would have spent had he or she been sentenced before the commencement of that section for a similar offence in similar circumstances.

(2) If the court considers that the sentence it proposes would have the result referred to in subsection (1) it shall reduce the proposed sentence in accordance with subsection (3).

(3) In applying this section a court -

(a) shall assume that an offender sentenced before the commencement of section 6 of the *Prisons (Correctional Services) Amendment Act (No. 2) 1994* would have been entitled to the maximum remission entitlements; and

(b) shall not reduce a sentence by more than is necessary to ensure that the actual time spent in custody by an offender sentenced after that commencement is not greater, only because of the abolition of remissions, than it would have been if the offender had been sentenced before that commencement for a similar offence in similar circumstances.

(4) For the purposes of this section -

"remission entitlements" means a remission under section 92 of the *Prisons (Correctional Services) Amendment Act,* as in force before the commencement of section 6 of the *Prisons (Correctional Services) Amendment Act (No. 2) 1994,* that may have been granted to a prisoner under the determination made under that section that was in force immediately before that commencement;

"term of imprisonment" includes -

(a) a term that is suspended wholly or partly; and

(b) any non-parole period fixed in respect of the term.

(5) This section shall expire 5 years after its commencement.

(6) It is intended that the expiry of this section will not of itself have any effect on sentencing practices and that after the expiry a court will have regard to sentencing practices current immediately before then as if this section had not expired.

8. NEW DIVISION

The *Sentencing Act* is amended by inserting after Division 5 of Part 3 the following:

"*Division 6 - Custodial Orders for Property Offenders*

"*Subdivision 1 - Compulsory Imprisonment*

"78A. IMPRISONMENT FOR PROPERTY OFFENDERS

"(1) Where a court finds an offender guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 14 days.

"(2) Where a court finds an offender guilty of a property offence and the offender has once before been found guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 90 days.

"(3) Where a court finds an offender guilty of a property offence and the offender has 2 or more times before been found guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 12 months.

"(4) Where an offender is found guilty of more than one property offence specified in the same information, complaint or indictment, the findings of guilt are, for the purposes of this section, to be taken as a single finding of guilt, whether or not all the offences are the same.

"(5) Where an offender is found guilty of more than one property offence as part of a single criminal enterprise, all the property offences are together a single property offence for the purposes of this section, whether or not the offences are the same.

"(6) Where an offender is found guilty of a property offence, the offence is to be taken into account for the purposes of subsection (2) or (3) whether it was committed before or after the property offence in respect of which the offender is before the court.

"78B. ADDITIONAL ORDERS FOR PROPERTY OFFENDERS

"(1) In addition to the order required to be made under section 78A, the court may make a punitive work order or any other order it may make under this Act.

"(2) An order referred to in subsection (1) cannot be made if its effect would be to release the offender from the requirement to actually serve the term of imprisonment ordered under section 78A.