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Sentencing aims from the perspective of a judicial officer

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(Transcript of presentation)

Sentencing aims from the perspective of a judicial officer

I was quite taken with the surveys that had been conducted that indicated that over 90% of people thought judges were not doing a particularly good job. Quite recently, my friend, John Coldrey, drew my attention to a survey conducted in the Herald Sun. It asked the question whether judges should receive a pay rise. 96% said not. John was absolutely delighted that there were at least 4% in the community that thought that we had some value. Whilst there was at least 4% all was not lost.

The other short comment that I would make before I commence my presentation relates to a story about a judge in my State who commenced his remarks on sentencing my saying to the person in the dock “it is my responsibility to sentence you, and while so doing make several random right-wing derogatory remarks concerning you and your general conduct”.

One indication of the significant sentencing role performed by judges and magistrates, and the character of media reporting of the work of the courts was provided in the early period following my appointment to the Court of Appeal. At that stage I was often asked whether I was retired. However after a relatively short time the matter ceased to be mentioned and I took it that it was assumed that I had retired. Eventually some realised that I was still on the bench when a decision to which I was a party, attracted the ire of certain sections of the media and talk-back complaints. I must confess that I learnt a great deal about myself from those programs. In particular, my lack of common sense, social responsibility and personal worldly experience. Generally I wondered how it was that I could have obtained my present age without either walking under a tram and yet being able to maintain this wonderful naivety

This brings me to what I personally regard as the three significant aims when sentencing or considering a sentence as an appellant judge. They can be expressed quite simply but they are actually deceitfully complex.

The first is to respond sensibly and in a principled fashion to the problem with which I am presented. The second is to express myself in a fashion that will enable a reasonably impartial reader to appreciate that that was my objective. And the third was to avoid learning my about my personal and intellectual inadequacies in the newspapers on the following day. The first two I can probably do something about. The third is well and truly beyond my control.

Although these remarks have been made facetiously I do not wish to convey that I am unappreciative of the concerns, legitimate or otherwise, of the community about the sentencing process with which I am intimately involved. We as judges have a responsibility to represent the community, to enforce its laws and to vindicate its values. The task that we undertake is of course not a simple one. I’ve certainly never found it so.

Mindful of the adage that a person who quotes himself is relying on the absolutely poorest of authority, I would like to refer to some remarks that I made at a sentencing seminar in Canberra in 1986. Very shortly after I was appointed, then as now, I was grappling with the system that of responses, dispositions and principles that has

developed haphazardly and often had little meaning or reality, either to those whose function it was to apply them or to those who were subject to their operation. I said at that time we employed a range of dispensations in the criminal justice system, yet the justification for most of them is at least unproven. In spite of all the changes that occurred in our society the people that fill the courts and penal institutions are still the poor and those who are socially disadvantaged whose options are reduced, whose moral culpability is probably of the lower order, or the individuals whose behaviour is not really influenced by the asteric concepts such as deterrence who probably only know about the criminal justice system from what they learn from watching the television or because they are subject of its operation. Many do not derive benefit from reading the learned judges' dissipations on these matters because they can't read anyhow. These are the people who then and now we are sentencing for the most part.

The criminal justice system in which judicial officers play an important part is ultimately a coercive mechanism. It involves the deception of an individual, the compulsory conduct of processes and the subjection ultimately of the individual to processes which we as a society determine. Neither the moral justifications for resort to the criminal justice system as a means of dealing with a particular societal problem, nor the dilemmas that are thereafter presented by the operation of the system have ever been satisfactorily faced. It is considerably less demanding to attribute responsibilities solely to the perpetrators of anti social conduct than it is to deal with the underlying issues that they reflect and represent.

We have, over recent times, seen a number of community disturbances. Those disturbances are being addressed in part at least through the criminal law. I trust that that won't be the end of the matter. I trust that there will be a more rational consideration than I have seen debated to the present time concerning the causes, the reasons for the underlying tensions which have emerged. But that's harder. That requires more analysis. That requires more honesty and integrity across our entire society and in particular at the level of our political leadership than we are accustomed to seeing demonstrated.

We have a system under which a certain measure of discretion is reposed in our sentencing judges. That discretion according to conventional theory properly expressed should advance the interests of justice, which encompasses the effecting of a proper balance of public and private rights. If poorly exercised this discretion can, as I have no doubt you are all aware, produce devastating results to the community and to the lives of the individuals affected by it. The process of social and personal recovery that we attempt to achieve in order to ameliorate the consequences of the crime can be impeded or facilitated by the response of the courts. The imposition of a sentence often constitutes both a practical and ritual completion of a protracted, painful period for many involved. It signifies the recognition by the society of the nature and significance of the wrong that has been done to affect members, the assertion of its values and the public attribution of responsibility of that wrong doing to the perpetrator. It's the balancing of values and considerations represented by the sentence, which of course, must include those factors that militate in favour of mitigation of penalty. It is capable of being perceived by a reasonably objective member of the community as a just process of recovery. If not, there will almost certainly be created a sense of injustice in the community generally. The damage is to the respect in which our criminal justice system is held and which may never be

removed. Indeed, from the victim's perspective, an apparent failure of the system to recognise the real significance of what has occurred in the life of that person, as a consequence of the commission of crime, may well aggravate the situation. In so far that it is possible to do so through the sentencing process, the judge or magistrate must endeavour to achieve that balance.

This is what I refer to when I use the expression 'doing something sensible'. It incorporates what I have been employing as a term for some years and it's a term called 'social rehabilitation'. This is viewing rehabilitation not from the perspective of the particular offender, although that person is incorporated within, but in a wider context as part of the healing process which the criminal justice system itself must regard as one of its aims.

The notion developed, as far as I was concerned, a long time ago. It had particular impact as far as I was concerned when dealing with a serial killer in the early 90's - a man called Dedner. For a period of several weeks or a couple of months, an entire section of Melbourne containing tens if not hundreds of thousands of women was held in fear. It was known that there was a serial killer who was stalking and killing women. When I came to deal with that person at the sentencing level, I began to contemplate the victims. Of course I had the three decisions, and of course I had their families and those who associated with them and in their intimate connections of a wide variety of different kinds. But there were actually thousands of women for whom the world had changed and for whom one would anticipate it would never be quite the same. How did one encompass this notion in the sentence?

It seemed to me only by indicating when dealing with the circumstances of the offence and so forth that I was as a sentencing judge conscious of what this particular event meant to the community. In the hope that that community would appreciate that the system itself understood the significance of what had occurred, had done what it could to address that situation and would do what it could if such a situation arose again in the future.

Over the time I've used this notion on two or three separate occasions. I must confess that it hasn't had the ringing endorsement of my fellow judges who are more comfortable with acting within the constraints of retribution, deterrence, denunciation and that sort, rather than looking on occasions at the broader notions - the underpinning values that those concepts made be seem as simply representing paths. It is inevitable that there will be occasions on which constrained by law and principle, the decisions of sentencers will disappoint those who have suffered pain and loss as a consequence of criminal conduct. Sometimes the law itself or the legal processes can be seen to be deficient and sometimes the lack of sensitivity may be demonstrated in the manner in which issues are approached or the communication of decisions and underlying reasoning processes occurs.

Regularly in my experience, one of the difficulties which judges have encountered in the sentencing area is the inadequacy and often inaccuracy of the material upon which they are expected to act. Sometimes it is hopelessly inadequate and on other occasions downright misleading. I became particularly conscious of this as the chair of the Victorian Parole Board for a number of years. In that capacity I had occasion to look at what was said to the sentencing judge at the time of the plea, the material on

which that judge acted and compare it with the social histories and the far more detailed information that was in the possession of the board. On occasion any relationship between what was said to the judge and the truth of the situation was purely coincidental. We can provide far more information, we can have a considerably better informed judiciary in a variety of respects and all of those things can go into the ultimate exercise of intuitive synthesis.

The next objective that I would have relates to the actual way in which sentences are dealt with. There are four constituencies that the judge or magistrate must address. First the person subjected to the sentence is not only entitled to know upon what precise factual and legal foundation the sentence has been imposed, but because it is a ritual attribution of responsibility, he has to be faced with what has occurred. That has both a practical and ritual significance and clearly identifies the foundation of the sentencing.

Second, the victims of an offence must be able to perceive that it's real significance and impact is clearly recognised and represented in the disposition. Many will never be able to get beyond the pain that they have experienced as a consequence of the crime, but we must never contribute to that distress by an apparent insensitivity. Many others will be assisted by the vindication of their rights and appreciation that there has been a formal acceptance of what actually happened even if they feel that a greater sentence should have been handed down.

Third, it must be apparent to any reasonably intelligent reader of the remarks, which presumably includes appellate judges, that the sentencer has directed attention in a proper fashion to the relevant sentencing principles. This has become more difficult over the years as the task has become more complex, but nevertheless, it ought to be there.

Finally, as there is a reasonable possibility that the decision maybe subject to reportage and public commentary, it is essential that sentencing remarks be simply expressed and crafted with considerable care to reduce the potential for misunderstanding or deliberate distortion. If in preparing the actual sentence itself those constituencies are considered then perhaps I might be able to achieve my objective of not learning about my personal inadequacies in the paper on the next day.