

**THE HON T F BATHURST
CHIEF JUSTICE NEW SOUTH WALES
KEYNOTE ADDRESS TO THE LEGAL AID CRIMINAL LAW
CONFERENCE 2012
BEYOND THE STOCKS – A COMMUNITY APPROACH TO CRIME
1 AUGUST 2012, SYDNEY**

- 1 “Beyond the Stocks – A Community Approach to Crime” is a timely conference theme. I am told it was selected to draw attention to that part of Legal Aid’s work that “goes beyond options of liberty or prison for an accused person.” It is no coincidence that the New South Wales Law Reform Commission is currently soliciting submissions on its review of the *Crimes (Sentencing Procedure) Act*, and that the final deadline closes in a few weeks. Attorney General Greg Smith commissioned the report with the express aim of encouraging “the use of more non-custodial and community-based sentences as a viable alternative to full-time incarceration for less serious offences.”¹ Prominent among the issues on which the commission is still accepting submissions are alternatives to gaol sentences. I therefore expect the next three days to be particularly productive.

- 2 The community focus of this conference theme is also well chosen because, despite our best intentions, law reform is often an industry-only exercise. This is by default. Wider community engagement can be frustrated by legal technicality and legal elitism (both real and perceived) and, especially when concerned with issues like crime and sentencing, a charged emotional and political atmosphere. Some of this is unavoidable. Conversations about the finer details of a legislative amendment are unlikely to capture the public imagination, and it is not elitist to expect that law reform should be informed by industry experts. Nevertheless, we should always strive to conduct legal reform with a view to the wider community it is meant to serve, and the ultimate aims it seeks to achieve.

¹ Greg Smith “Sentencing Laws to be Reviewed” (Media Release, 23 September 2011).

A forum such as this, in which the community is placed in the foreground and participants are drawn from a cross-section of the wider justice and public service sectors – from all branches of Legal Aid’s Criminal Division, from Prosecutions, Corrections and from diversionary programs - is exemplary. It may be a bit early in the day, but I would like to congratulate and thank you for your participation, which in itself serves a public good.

- 3 For my part, I cannot help but consider sentencing from the perspective of the judge or magistrate. Sentencing has been called one of the hardest things a judge can do. It is certainly among the most important. Its impact upon the lives of the guilty, their families and communities, as well as upon those of the victim, is manifest. However, its influence extends beyond this. The exercise of sentencing defines who we are and how we see ourselves as a society. It is often said that a society is defined by how it cares for the least among it. This is nevermore clearly illustrated than in the ways in which we condemn, punish, care for or integrate the many offenders caught in the complex nexus of crime, poverty, abuse and marginalisation. As Churchill put it:

“The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm and dispassionate recognition of the rights of the accused against the state, and even of convicted criminals against the state, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man, these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.”

- 4 When a judge sentences, therefore, he or she must balance an impossibly conflicted set of considerations. Judges must contend with the complex histories of offenders, the impact of crime upon victims, the expectations and protection of communities and the sometimes faintest of hopes that in pronouncing sentence some good may come from the worst of

circumstances. This is all done within an elaborately detailed framework of legislative and common law sentencing requirements, considerations and limitations.² It therefore bears repeating: *Sentencing is one of the hardest things a judge can do.* But believe me, they try very hard to get it right.

- 5 I would like, therefore, to use the remainder of my time this morning to highlight two areas identified for reform that have the capacity to directly impact upon the judges' sentencing process. These are first, the role of general deterrence in sentencing and second, the exercise of judicial discretion in sentencing.
- 6 I hope you will excuse the apparent self-interest. Judges are no more important to the success of a rehabilitative justice system than are advocates, community and corrective service providers, and, of course, the motivation of the convicted offenders to engage in rehabilitative services and help themselves. However, as the sentencing task determines, directly and indirectly, many of the rehabilitative and restorative options available to an offender, and as I appear to be the only judge on the conference speaking list, I decided it was acceptable to exploit this opportunity to bend the ears of such an important (and captive) audience.
- 7 First, I want to address the role of deterrence in sentencing. It may be time to reconsider the extent to which considerations of general deterrence (as opposed to specific deterrence) influence the sentencing of offenders to periods of imprisonment. In particular it is worth considering what importance should be attributed to deterrence in relation to crimes in areas where studies have long shown harsh sentences are ineffective to achieving that aim.
- 8 General deterrence has long been a key purpose of sentencing, and is typically considered in connection with the appropriate length of a gaol

² See McHugh J on judicial instinct not operating "in a vacuum of random selection" in *Makarjian* [2005] HCA 25; (2005) 228 CLR 357, 390 [84].

sentence.³ In *R v Wong*, Chief Justice Spigelman put it this way: “the fact that penalties operate as a deterrent is a *structural assumption* of our criminal justice system.”⁴ This comment is often quoted in defence of deterrence, even to the extent of suggesting that the criminal justice system would suffer a sort of existentialist crisis and collapse were we to concede that general deterrence often doesn’t work.

9 It is significant that in that passage in *Wong* my predecessor described the concept as a structural assumption. He did not expressly endorse the concept as correct. It behoves at least those conducting law reform to consider whether and to what extent general deterrence does or does not work. If the conclusion is that it does not work then it is at least worth considering whether it is appropriate to have a system founded on what is proving to be a false assumption.

10 By “doesn’t work”, I mean that the general deterrent effect of increasing gaol sentence lengths has, in most cases, been shown to be at the most marginal, if not entirely negligible, particularly when compared with the cost of maintaining an increased prison population and considered against what alternatives to incarceration and community-level prevention schemes could achieve with similar funding.⁵ The evidence also shows that while fear of apprehension is a powerful deterrent, and fear of incarceration of any length is a moderate deterrent, fear of a longer gaol sentences generally has little or no deterrent effect at all.⁶ A February 2012 study conducted by the New South Wales Bureau of Crime Statistics and Research (some of the authors of which I believe are in this room today) concluded that although Australian Governments “have generally acted as if the best way to control crime is to appoint more police and put

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more offenders in prison for longer... policies directed towards this end have rarely if ever been defended on the basis of evidence.”⁷

- 11 I am sure that few in this room are surprised by these results. Theories of general deterrence are based on the assumption that most offenders conduct a rational, considered analysis of their planned illegal behaviour, based on a balancing of the potential gain if they are successful on the one hand, and the potential penalty, assuming they are aware of what it is, and assuming they are caught, on the other. I believe it is uncontroversial to suggest that this rational analysis model bears little resemblance to reality for a great majority of offenders.
- 12 While it is true, as Spigelman CJ said, that general deterrence is currently an assumption of our system, the remainder of his comments in that oft-quoted passage are frequently overlooked. In addition to noting that deterrence is a structural underpinning, he recognised that “there are significant differences of opinion as to the deterrent effect of sentences, particularly, the deterrent effect of marginal changes in sentence... [and that] Legislation would be required to change the traditional approach of the courts in this matter.”⁸ In other words, that sentencing achieves deterrence is not a foregone conclusion, and change is not impossible. It would merely require legislative reform, such as that which occurs, *for example*, after a lengthy period of consultation and inquiry by a legislative reform body such as the New South Wales Law Reform Commission... In case you needed it for your reference, the Law Reform Commission’s Sentencing Review Question in relation to general deterrence is 1.6. It can be found on page 10 of question paper 1.
- 13 The ineffectiveness of longer gaol sentences on general deterrence has been recognised by the profession on both sides of the bench, anecdotally and in obiter. Justice Harrison of the New South Wales Supreme Court put it most forcefully in an address to the Judicial Commission Sentencing

⁷ Note 5 (2012), at 12.

⁸ *Wong* (1999) 48 NSWLR 340 at 363 [127].

Conference in 2008, when he said (speaking in relation to both general and specific deterrence):

[Judges] 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. ...

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 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 prospects 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?⁹

- 14 Justice Harrison’s views may not be universally shared, but they are worth considering, and I encourage you to seek out the remainder of his speech on the Supreme Court website should you find yourself having any “quiet moments” in the coming days. I suggest also a number of recent Bureau of Crime Statistics and Research studies the results of which challenge long-held assumptions about deterrence. For example, a 2009 study concluded that there is “no evidence full-time imprisonment exerts a greater deterrent effect than a suspended sentence”.¹⁰ And a 2010 study concluded that “there is no evidence that prison deters offenders convicted of burglary or non-aggravated assault... [and] some evidence that prison increases the risk of offending”.¹¹ If nothing else, these studies demonstrate, as the 2012 study concluded, that “the need for more Australian research on the effectiveness of the criminal justice system in controlling crime has never

⁹ Justice Ian Harrison, address to the Judicial Commission Sentencing Conference, Australian National University 8 February 2008, available at: http://intranet/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_speeches.

¹⁰ Lulham, Weatherburn and Bartels, “The recidivism of offenders given suspended sentences” (2009) 136 *Crime and Justice Bulletin, Contemporary Issues in Crime and Justice*.

¹¹ Weatherburn, “The effect of prison on adult reoffending” (2010) 143 *Crime and Justice Bulletin, Contemporary Issues in Crime and Justice*.

been more acute.”¹² This remains especially true as long as deterrence is applied as purpose of sentencing, without persuasive evidence that it works.

15 Recognising that deterrence is often not achieved through harsher sentencing must not be confused with a relaxed attitude towards crime, a failure to appreciate and condemn the conduct of the offender, an aversion to gaol sentences, or even a view that deterrence is not relevant to criminal justice at all. The purposes of sentencing that a judge must take into account, which are often confused with, and in many cases subsumed within, the concept of general deterrence but which stand independently, include punishment, offender accountability, community protection and expectations, denouncement and harm recognition. Some have been afraid to confront the failure of deterrence in sentencing because of the fear that it will seem as though they do not care about these other purposes. This fear is no longer a good enough reason (if ever it was), to increase a sentence length on the basis that it will achieve general deterrence, if, as the studies seem to suggest, it will not actually achieve this. Nor is it good practice to pronounce sentence on the basis of a fiction that it includes a component for general deterrence when in fact the sentencing judge believes the sentence is appropriate having regard to the other factors to which I have referred.

16 Further, deterrence is achieved in ways other than sentencing. For example, the mere existence of a criminal justice system that prescribes punishments is said to create a general deterrent effect.¹³ As I have already mentioned, the increased risk of apprehension has an appreciable deterrent impact on crime rates.¹⁴ Further, there are some categories of offence for which the Courts have held that general deterrence remains

¹² Note 5 (2012) at 15.

¹³ See, eg, P Robinson and J Darley, ‘Does Criminal Law Deter? A Behavioural Science Investigation’ (2004) 24 *Oxford Journal of Legal Studies* 173, 173; N Demleitner and others, *Sentencing Law and Policy: Cases, Statutes and Guidelines* (2003), 10; P Robinson and J Darley, ‘The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best’ (2003) 91 *Georgetown Law Journal* 949, 951, cited in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [4.6].

relevant, such as white-collar crimes like tax evasion, and highly organised drug trafficking.¹⁵ To this might be added offences under the *Corporations Act*, insider trading, market manipulation and cartel conduct under the *Commonwealth Competition and Consumer Act*. The passage of new legislation and the enforcement of criminal sanctions in this area of itself will have a deterrent effect and general deterrence in this area still almost certainly has a role to play in the sentencing process. But in areas where general deterrence has been shown by and large to be a fiction it may be appropriate to recognise that fact in the sentencing processes.

- 17 From a purely resource driven perspective, evidence also suggests that the public expense of those extra years of incarceration could be more effectively spent on policing and other methods of deterring crime through increasing the risk of apprehension.¹⁶ I think it may be time to trust in the well-informed public to prefer a criminal justice system that honestly and transparently seeks to reduce crime and protect communities. Political fear of being soft on crime should not immobilize our society from correcting or removing ineffective policies.
- 18 Further, change in this direction is not impossible. We regularly change criminal laws that lack relevance or have been shown not to work. A somewhat peripheral example, which I will utilize mostly for the sake of light relief, is that we've managed to lose some of the quirkiest relics of the Crimes Act in the last few years. I notice, for example, that the offence of not feeding your wife or servant dropped off the books in 2006. I think it is probably still a good idea to feed your wife when called upon (although I don't know about servants and I would not have the temerity to talk about feeding husbands), but the lack of contemporary relevance of that offence made it appropriate to remove it from the statute books. There has not, to my knowledge, been a corresponding outbreak of spousal food-withholding. Older versions of the Crimes Act also included such gems as

¹⁴ Note 5.

¹⁵ *R v Tait* (1979) 46 FLR 386 at 399 (drug trafficking), *Hili* [2010] HCA 45 at [63] (tax evasion).

¹⁶ *Ibid.*

“injuries to corn”, “stealing shrubs”, “wounding pigeons” and “damaging books in public library,” the latter of which required conviction before two Justices and, if done with intent to steal, carried a 1 year prison sentence.

- 19 It remains my opinion that, in the context of the broader review currently underway, it is worth *reconsidering* precisely what role deterrence should play in the determination of sentences, and whether it should be a mandatory consideration – particularly in circumstances where it is used as the sole or dominant consideration in favour of imposing or increasing the length of a gaol sentence.

Discretion

- 20 I will turn now to consider the exercise of discretion in sentencing. I know this is a well-trodden path: “Judge in favour of judicial discretion”, “dog bites man”. What else is new? So I will attempt to limit myself to one aspect of judicial discretion in sentencing that ties in particularly well with the “beyond the stocks” theme of this conference.
- 21 In discussing deterrence, I was concerned with what judge *must* take into account when sentencing. In relation to the exercise of discretion, I am concerned with what judges *must not* do, particularly when restrictions result in judicial hand tying that serves no practical purpose or evident social good. One particular example is the approach mandated by the *Crimes (Sentencing Procedure) Act* in relation to suspended sentences.
- 22 A suspended sentence can only be imposed after an offender has been sentenced to imprisonment, but an offender can only be sentenced to imprisonment if the court is satisfied “having considered all possible alternatives, that no penalty other than imprisonment is appropriate.”¹⁷ That is, a judge *must not* suspend an offender’s sentence without first determining that the only appropriate penalty is imprisonment. The

¹⁷ *Crimes (Sentencing Procedure) Act* 1999 s 5, s 12.

contradictory effect of the Act in this regard was summarised by Basten JA sitting in the Court of Criminal Appeal last year when he said:

“What mental exercise is the Court required to undertake in deciding that imprisonment is the only available option? If, as the first step, the Court decides that imprisonment is appropriate, that, in a practical sense, would involve the conclusion that the offender should spend a period in custody. Step two in this process involves the specification of the relevant period of imprisonment including, it must at that point be assumed, the specification of a non-parole period, being the minimum term for which the offender must be kept in detention... If after earnestly making the determination required at steps one and two, the Court, as step three, then suspends the execution of the sentence, so the person is under no immediate liability to serve the specified period in custody, the result appears incongruous. Even such an appearance tends to undermine the purposes of sentencing set out in s 3A of the *Sentencing Procedure Act*. The incongruity, however, is not merely an appearance, but a reality. Furthermore, it is unrealistic to suppose that the Court actually reaches its conclusion by proceeding mechanically from step one to step three.”¹⁸

23 His honour concluded that “unless a suspended penalty is treated as another possible option to imprisonment”, which, under the Act at present it is not, “it is unclear on what basis suspension is ever available. That is the result of the two (or three) step approach mandated by this Court.”¹⁹

24 The illogic of the Act extends a step further when the application of a s 12 good behaviour bond in circumstances where a suspended sentence has been deemed appropriate, is considered. A good behaviour bond imposed under s 12 cannot exceed the length of the suspended sentence. Justice Howie observed in 2009 that this limitation is “completely inappropriate” and “absurd”, because it means that the court can only impose a short good behaviour bond if it is considering a short period of imprisonment, which it then deems appropriate to suspend.²⁰

25 Similar limits and apparent incongruities apply to other custodial alternatives to full-time imprisonment, such as home-detention, for which an offender can only be assessed after a length of full-time imprisonment

¹⁸ *Ismael Amado v R* [2011] NSWCCA 197 at [5].

¹⁹ *Ismael Amado v R* [2011] NSWCCA 197 at [15].

has been determined. This is in contrast to the approach to intensive correction orders, for which an offender may be assessed prior to the determination of sentence. Also, although an intensive correction order is considered lower in the hierarchy of severity of custodial sentences, it may be imposed for a maximum length of 2 years, whereas a home detention order may be imposed for a maximum length of 18 months. And despite their practical similarity, there is a lack of consistency between the categories of offences for which an offender will be ineligible to serve their sentence by way of home detention or intensive correction.

- 26 In any event, in both cases, the alternative to full-time imprisonment can be imposed only if no sentence other than imprisonment is considered appropriate. Further, the alternative is to be imposed for a period equivalent to the term of full-time imprisonment initially determined, despite being “obviously a far less severe sanction.”²¹
- 27 The problems with the Act’s current structure in this regard have been widely recognised,²² but a fair question may be, so what? Who cares if judges have to navigate a counter-intuitive act, if they manage to achieve consistent sentencing outcomes? (Apart, of course, from the judges themselves. But as I am outnumbered in that department today, I will pretend that judicial disgruntlement is not a good enough reason to enact reform). Luckily, there are at least two additional answers to this.
- 28 The first is that the structure of the Act has, in some cases, prohibited a course of rehabilitative sentence that, in the words of a judge of the Court of Criminal Appeal, “had much to recommend it,” and that, before being overturned on appeal because it did not fit within the mandates of the Act, was achieving “its intended result.”²³ The idea that a poorly drafted statute

²⁰ *Bonsu v R* [2009] NSWCCA 316 at [22].

²¹ NSWLRC *Sentencing Question Paper 6: Intermediate custodial sentencing options* (June 2012) at 21.

²² See the NSW Sentencing Council’s background report into Suspended Sentences (December 2011), available at: <http://www.sentencingcouncil.lawlink.nsw.gov.au>, and the preliminary submissions in response to the NSWLRC Sentencing Review, available at:

http://www.lawlink.nsw.gov.au/lawlink/lrc/lr_cref130sub.

²³ *Ismael Amado v R* [2011] NSWCCA 197 at [15].

might stand in the way of rehabilitative sentencing options that work, is, I hope, quite plainly unacceptable.

29 The second answer to the question of “who cares” is that it must surely always be in the interests of justice that laws be clear, transparent and accessible. It is not always possible to avoid complexity in legislative drafting, but where complexity results in absurd processes or outcomes, it is time to have another go.

30 It is not clear which reform approach should be adopted to correct these anomalies. In Victoria, suspended sentences have recently been abolished for serious offences, on the basis that

“suspended sentences are a fiction that pretends offenders are serving a term of imprisonment, when in fact they are living freely in the community... Where a judge considers that a jail sentence is not appropriate, the judge will [now] openly sentence the offender to a non-custodial sentence rather than being forced to go through the legal fiction of sentencing the offender to a period of imprisonment.”²⁴

31 In New South Wales, Chief Magistrate Henson supports the phasing out of suspended sentences “subject to a holistic assessment being made of other current sentencing options,”²⁵ with broad support for alternatives to gaol and diversionary programs.

32 I do not yet have a firm view on the appropriate course to take. I expect that greater consensus will begin to emerge, to the extent it has not done so already, during the course of the NSW Law Reform Commission’s review. At the least, it seems to me logical to explore legislative avenues that will overcome or remove the artifice, anomaly and judicial hand-tying that currently affects some aspects of sentencing. There should be sufficient flexibility to permit a sentencing judge or magistrate to perform a holistic assessment of the potential outcomes of their sentencing exercise,

²⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 December 2010, 17 (Second Reading Speech).

²⁵ G Henson, *Preliminary Submission to the NSWLRC Sentencing Review*, 21 October 2011, at 6.

and to impose a sentence that is appropriate, taking into account the entirety of the offender's circumstances.

Conclusion

- 33 These two areas for reform, deterrence and judicial discretion, are by no means the only or even most pressing areas for reform that should be considered in the current review. But they are important, and I would like to further impose on those present here today by asking that you keep these issues in mind in the coming days.
- 34 I say “further impose” because you work in a sector already overburdened. Many of you work longer, harder hours than your civil law colleagues, for less reward and sometimes without thanks. Yet in so doing you embody the ideals of public service and civic duty.
- 35 The only fitting way I can think of, therefore, to both close my address and open this conference, is to say **thank you**. To those working for and with Legal Aid, and as Public Defenders, to those in corrections, diversionary and rehabilitation programs, those working with vulnerable and high-risk offenders, and to those conducting research, I want to say thank you. Thank you on behalf of the judges of the Supreme Court, the wider legal constituency, the clients and communities you serve, and on my own behalf as a private citizen. Please, keep doing what you do.

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- 12 While it is true, as Spigelman CJ said, that general deterrence is currently an assumption of our system, the remainder of his comments in that oft-quoted passage are frequently overlooked. In addition to noting that deterrence is a structural underpinning, he recognised that “there are significant differences of opinion as to the deterrent effect of sentences, particularly, the deterrent effect of marginal changes in sentence... [and that] Legislation would be required to change the traditional approach of the courts in this matter.”⁸ In other words, that sentencing achieves deterrence is not a foregone conclusion, and change is not impossible. It would merely require legislative reform, such as that which occurs, *for example*, after a lengthy period of consultation and inquiry by a legislative reform body such as the New South Wales Law Reform Commission... In case you needed it for your reference, the Law Reform Commission’s Sentencing Review Question in relation to general deterrence is 1.6. It can be found on page 10 of question paper 1.
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Conference in 2008, when he said (speaking in relation to both general and specific deterrence):

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- 14 Justice Harrison’s views may not be universally shared, but they are worth considering, and I encourage you to seek out the remainder of his speech on the Supreme Court website should you find yourself having any “quiet moments” in the coming days. I suggest also a number of recent Bureau of Crime Statistics and Research studies the results of which challenge long-held assumptions about deterrence. For example, a 2009 study concluded that there is “no evidence full-time imprisonment exerts a greater deterrent effect than a suspended sentence”.¹⁰ And a 2010 study concluded that “there is no evidence that prison deters offenders convicted of burglary or non-aggravated assault... [and] some evidence that prison increases the risk of offending”.¹¹ If nothing else, these studies demonstrate, as the 2012 study concluded, that “the need for more Australian research on the effectiveness of the criminal justice system in controlling crime has never

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16 Further, deterrence is achieved in ways other than sentencing. For example, the mere existence of a criminal justice system that prescribes punishments is said to create a general deterrent effect.¹³ As I have already mentioned, the increased risk of apprehension has an appreciable deterrent impact on crime rates.¹⁴ Further, there are some categories of offence for which the Courts have held that general deterrence remains

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relevant, such as white-collar crimes like tax evasion, and highly organised drug trafficking.¹⁵ To this might be added offences under the *Corporations Act*, insider trading, market manipulation and cartel conduct under the *Commonwealth Competition and Consumer Act*. The passage of new legislation and the enforcement of criminal sanctions in this area of itself will have a deterrent effect and general deterrence in this area still almost certainly has a role to play in the sentencing process. But in areas where general deterrence has been shown by and large to be a fiction it may be appropriate to recognise that fact in the sentencing processes.

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“injuries to corn”, “stealing shrubs”, “wounding pigeons” and “damaging books in public library,” the latter of which required conviction before two Justices and, if done with intent to steal, carried a 1 year prison sentence.

- 19 It remains my opinion that, in the context of the broader review currently underway, it is worth *reconsidering* precisely what role deterrence should play in the determination of sentences, and whether it should be a mandatory consideration – particularly in circumstances where it is used as the sole or dominant consideration in favour of imposing or increasing the length of a gaol sentence.

Discretion

- 20 I will turn now to consider the exercise of discretion in sentencing. I know this is a well-trodden path: “Judge in favour of judicial discretion”, “dog bites man”. What else is new? So I will attempt to limit myself to one aspect of judicial discretion in sentencing that ties in particularly well with the “beyond the stocks” theme of this conference.

- 21 In discussing deterrence, I was concerned with what judge *must* take into account when sentencing. In relation to the exercise of discretion, I am concerned with what judges *must not* do, particularly when restrictions result in judicial hand tying that serves no practical purpose or evident social good. One particular example is the approach mandated by the *Crimes (Sentencing Procedure) Act* in relation to suspended sentences.

- 22 A suspended sentence can only be imposed after an offender has been sentenced to imprisonment, but an offender can only be sentenced to imprisonment if the court is satisfied “having considered all possible alternatives, that no penalty other than imprisonment is appropriate.”¹⁷ That is, a judge *must not* suspend an offender’s sentence without first determining that the only appropriate penalty is imprisonment. The

¹⁷ *Crimes (Sentencing Procedure) Act* 1999 s 5, s 12.

contradictory effect of the Act in this regard was summarised by Basten JA sitting in the Court of Criminal Appeal last year when he said:

“What mental exercise is the Court required to undertake in deciding that imprisonment is the only available option? If, as the first step, the Court decides that imprisonment is appropriate, that, in a practical sense, would involve the conclusion that the offender should spend a period in custody. Step two in this process involves the specification of the relevant period of imprisonment including, it must at that point be assumed, the specification of a non-parole period, being the minimum term for which the offender must be kept in detention... If after earnestly making the determination required at steps one and two, the Court, as step three, then suspends the execution of the sentence, so the person is under no immediate liability to serve the specified period in custody, the result appears incongruous. Even such an appearance tends to undermine the purposes of sentencing set out in s 3A of the *Sentencing Procedure Act*. The incongruity, however, is not merely an appearance, but a reality. Furthermore, it is unrealistic to suppose that the Court actually reaches its conclusion by proceeding mechanically from step one to step three.”¹⁸

23 His honour concluded that “unless a suspended penalty is treated as another possible option to imprisonment”, which, under the Act at present it is not, “it is unclear on what basis suspension is ever available. That is the result of the two (or three) step approach mandated by this Court.”¹⁹

24 The illogic of the Act extends a step further when the application of a s 12 good behaviour bond in circumstances where a suspended sentence has been deemed appropriate, is considered. A good behaviour bond imposed under s 12 cannot exceed the length of the suspended sentence. Justice Howie observed in 2009 that this limitation is “completely inappropriate” and “absurd”, because it means that the court can only impose a short good behaviour bond if it is considering a short period of imprisonment, which it then deems appropriate to suspend.²⁰

25 Similar limits and apparent incongruities apply to other custodial alternatives to full-time imprisonment, such as home-detention, for which an offender can only be assessed after a length of full-time imprisonment

¹⁸ *Ismael Amado v R* [2011] NSWCCA 197 at [5].

¹⁹ *Ismael Amado v R* [2011] NSWCCA 197 at [15].

has been determined. This is in contrast to the approach to intensive correction orders, for which an offender may be assessed prior to the determination of sentence. Also, although an intensive correction order is considered lower in the hierarchy of severity of custodial sentences, it may be imposed for a maximum length of 2 years, whereas a home detention order may be imposed for a maximum length of 18 months. And despite their practical similarity, there is a lack of consistency between the categories of offences for which an offender will be ineligible to serve their sentence by way of home detention or intensive correction.

- 26 In any event, in both cases, the alternative to full-time imprisonment can be imposed only if no sentence other than imprisonment is considered appropriate. Further, the alternative is to be imposed for a period equivalent to the term of full-time imprisonment initially determined, despite being “obviously a far less severe sanction.”²¹
- 27 The problems with the Act’s current structure in this regard have been widely recognised,²² but a fair question may be, so what? Who cares if judges have to navigate a counter-intuitive act, if they manage to achieve consistent sentencing outcomes? (Apart, of course, from the judges themselves. But as I am outnumbered in that department today, I will pretend that judicial disgruntlement is not a good enough reason to enact reform). Luckily, there are at least two additional answers to this.
- 28 The first is that the structure of the Act has, in some cases, prohibited a course of rehabilitative sentence that, in the words of a judge of the Court of Criminal Appeal, “had much to recommend it,” and that, before being overturned on appeal because it did not fit within the mandates of the Act, was achieving “its intended result.”²³ The idea that a poorly drafted statute

²⁰ *Bonsu v R* [2009] NSWCCA 316 at [22].

²¹ NSWLRC *Sentencing Question Paper 6: Intermediate custodial sentencing options* (June 2012) at 21.

²² See the NSW Sentencing Council’s background report into Suspended Sentences (December 2011), available at: <http://www.sentencingcouncil.lawlink.nsw.gov.au>, and the preliminary submissions in response to the NSWLRC Sentencing Review, available at:

http://www.lawlink.nsw.gov.au/lawlink/lrc/lr_cref130sub.

²³ *Ismael Amado v R* [2011] NSWCCA 197 at [15].

might stand in the way of rehabilitative sentencing options that work, is, I hope, quite plainly unacceptable.

29 The second answer to the question of “who cares” is that it must surely always be in the interests of justice that laws be clear, transparent and accessible. It is not always possible to avoid complexity in legislative drafting, but where complexity results in absurd processes or outcomes, it is time to have another go.

30 It is not clear which reform approach should be adopted to correct these anomalies. In Victoria, suspended sentences have recently been abolished for serious offences, on the basis that

“suspended sentences are a fiction that pretends offenders are serving a term of imprisonment, when in fact they are living freely in the community... Where a judge considers that a jail sentence is not appropriate, the judge will [now] openly sentence the offender to a non-custodial sentence rather than being forced to go through the legal fiction of sentencing the offender to a period of imprisonment.”²⁴

31 In New South Wales, Chief Magistrate Henson supports the phasing out of suspended sentences “subject to a holistic assessment being made of other current sentencing options,”²⁵ with broad support for alternatives to gaol and diversionary programs.

32 I do not yet have a firm view on the appropriate course to take. I expect that greater consensus will begin to emerge, to the extent it has not done so already, during the course of the NSW Law Reform Commission’s review. At the least, it seems to me logical to explore legislative avenues that will overcome or remove the artifice, anomaly and judicial hand-tying that currently affects some aspects of sentencing. There should be sufficient flexibility to permit a sentencing judge or magistrate to perform a holistic assessment of the potential outcomes of their sentencing exercise,

²⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 December 2010, 17 (Second Reading Speech).

²⁵ G Henson, *Preliminary Submission to the NSWLRC Sentencing Review*, 21 October 2011, at 6.

and to impose a sentence that is appropriate, taking into account the entirety of the offender's circumstances.

Conclusion

- 33 These two areas for reform, deterrence and judicial discretion, are by no means the only or even most pressing areas for reform that should be considered in the current review. But they are important, and I would like to further impose on those present here today by asking that you keep these issues in mind in the coming days.
- 34 I say “further impose” because you work in a sector already overburdened. Many of you work longer, harder hours than your civil law colleagues, for less reward and sometimes without thanks. Yet in so doing you embody the ideals of public service and civic duty.
- 35 The only fitting way I can think of, therefore, to both close my address and open this conference, is to say **thank you**. To those working for and with Legal Aid, and as Public Defenders, to those in corrections, diversionary and rehabilitation programs, those working with vulnerable and high-risk offenders, and to those conducting research, I want to say thank you. Thank you on behalf of the judges of the Supreme Court, the wider legal constituency, the clients and communities you serve, and on my own behalf as a private citizen. Please, keep doing what you do.

THE HON T F BATHURST
CHIEF JUSTICE NEW SOUTH WALES
KEYNOTE ADDRESS TO THE LEGAL AID CRIMINAL LAW
CONFERENCE 2012
BEYOND THE STOCKS – A COMMUNITY APPROACH TO CRIME
1 AUGUST 2012, SYDNEY

- 1 “Beyond the Stocks – A Community Approach to Crime” is a timely conference theme. I am told it was selected to draw attention to that part of Legal Aid’s work that “goes beyond options of liberty or prison for an accused person.” It is no coincidence that the New South Wales Law Reform Commission is currently soliciting submissions on its review of the *Crimes (Sentencing Procedure) Act*, and that the final deadline closes in a few weeks. Attorney General Greg Smith commissioned the report with the express aim of encouraging “the use of more non-custodial and community-based sentences as a viable alternative to full-time incarceration for less serious offences.”¹ Prominent among the issues on which the commission is still accepting submissions are alternatives to gaol sentences. I therefore expect the next three days to be particularly productive.

- 2 The community focus of this conference theme is also well chosen because, despite our best intentions, law reform is often an industry-only exercise. This is by default. Wider community engagement can be frustrated by legal technicality and legal elitism (both real and perceived) and, especially when concerned with issues like crime and sentencing, a charged emotional and political atmosphere. Some of this is unavoidable. Conversations about the finer details of a legislative amendment are unlikely to capture the public imagination, and it is not elitist to expect that law reform should be informed by industry experts. Nevertheless, we should always strive to conduct legal reform with a view to the wider community it is meant to serve, and the ultimate aims it seeks to achieve.

¹ Greg Smith “Sentencing Laws to be Reviewed” (Media Release, 23 September 2011).

A forum such as this, in which the community is placed in the foreground and participants are drawn from a cross-section of the wider justice and public service sectors – from all branches of Legal Aid’s Criminal Division, from Prosecutions, Corrections and from diversionary programs - is exemplary. It may be a bit early in the day, but I would like to congratulate and thank you for your participation, which in itself serves a public good.

- 3 For my part, I cannot help but consider sentencing from the perspective of the judge or magistrate. Sentencing has been called one of the hardest things a judge can do. It is certainly among the most important. Its impact upon the lives of the guilty, their families and communities, as well as upon those of the victim, is manifest. However, its influence extends beyond this. The exercise of sentencing defines who we are and how we see ourselves as a society. It is often said that a society is defined by how it cares for the least among it. This is nevermore clearly illustrated than in the ways in which we condemn, punish, care for or integrate the many offenders caught in the complex nexus of crime, poverty, abuse and marginalisation. As Churchill put it:

“The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm and dispassionate recognition of the rights of the accused against the state, and even of convicted criminals against the state, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man, these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.”

- 4 When a judge sentences, therefore, he or she must balance an impossibly conflicted set of considerations. Judges must contend with the complex histories of offenders, the impact of crime upon victims, the expectations and protection of communities and the sometimes faintest of hopes that in pronouncing sentence some good may come from the worst of

circumstances. This is all done within an elaborately detailed framework of legislative and common law sentencing requirements, considerations and limitations.² It therefore bears repeating: *Sentencing is one of the hardest things a judge can do.* But believe me, they try very hard to get it right.

- 5 I would like, therefore, to use the remainder of my time this morning to highlight two areas identified for reform that have the capacity to directly impact upon the judges' sentencing process. These are first, the role of general deterrence in sentencing and second, the exercise of judicial discretion in sentencing.
- 6 I hope you will excuse the apparent self-interest. Judges are no more important to the success of a rehabilitative justice system than are advocates, community and corrective service providers, and, of course, the motivation of the convicted offenders to engage in rehabilitative services and help themselves. However, as the sentencing task determines, directly and indirectly, many of the rehabilitative and restorative options available to an offender, and as I appear to be the only judge on the conference speaking list, I decided it was acceptable to exploit this opportunity to bend the ears of such an important (and captive) audience.
- 7 First, I want to address the role of deterrence in sentencing. It may be time to reconsider the extent to which considerations of general deterrence (as opposed to specific deterrence) influence the sentencing of offenders to periods of imprisonment. In particular it is worth considering what importance should be attributed to deterrence in relation to crimes in areas where studies have long shown harsh sentences are ineffective to achieving that aim.
- 8 General deterrence has long been a key purpose of sentencing, and is typically considered in connection with the appropriate length of a gaol

² See McHugh J on judicial instinct not operating "in a vacuum of random selection" in *Makarjian* [2005] HCA 25; (2005) 228 CLR 357, 390 [84].

sentence.³ In *R v Wong*, Chief Justice Spigelman put it this way: “the fact that penalties operate as a deterrent is a *structural assumption* of our criminal justice system.”⁴ This comment is often quoted in defence of deterrence, even to the extent of suggesting that the criminal justice system would suffer a sort of existentialist crisis and collapse were we to concede that general deterrence often doesn’t work.

9 It is significant that in that passage in *Wong* my predecessor described the concept as a structural assumption. He did not expressly endorse the concept as correct. It behoves at least those conducting law reform to consider whether and to what extent general deterrence does or does not work. If the conclusion is that it does not work then it is at least worth considering whether it is appropriate to have a system founded on what is proving to be a false assumption.

10 By “doesn’t work”, I mean that the general deterrent effect of increasing gaol sentence lengths has, in most cases, been shown to be at the most marginal, if not entirely negligible, particularly when compared with the cost of maintaining an increased prison population and considered against what alternatives to incarceration and community-level prevention schemes could achieve with similar funding.⁵ The evidence also shows that while fear of apprehension is a powerful deterrent, and fear of incarceration of any length is a moderate deterrent, fear of a longer gaol sentences generally has little or no deterrent effect at all.⁶ A February 2012 study conducted by the New South Wales Bureau of Crime Statistics and Research (some of the authors of which I believe are in this room today) concluded that although Australian Governments “have generally acted as if the best way to control crime is to appoint more police and put

³ *Crimes (Sentencing Procedure) Act 1999* s 3A; *Veen [No 2]* [1988] HCA 14.

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⁵ See, for example, the 2012 study and literature summary contained in Wan, Moffatt, Jones and Weatherburn “The effect of arrest and imprisonment on crime” (2012) 158 *Crime and Justice Bulletin, Contemporary Issues in Crime and Justice*, and Weatherburn, Hua and Moffat “How much crime does prison stop?” (2006) 93 *Crime and Justice Bulletin, Contemporary Issues in Crime and Justice*.

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¹⁶ *Ibid.*

“injuries to corn”, “stealing shrubs”, “wounding pigeons” and “damaging books in public library,” the latter of which required conviction before two Justices and, if done with intent to steal, carried a 1 year prison sentence.

- 19 It remains my opinion that, in the context of the broader review currently underway, it is worth *reconsidering* precisely what role deterrence should play in the determination of sentences, and whether it should be a mandatory consideration – particularly in circumstances where it is used as the sole or dominant consideration in favour of imposing or increasing the length of a gaol sentence.

Discretion

- 20 I will turn now to consider the exercise of discretion in sentencing. I know this is a well-trodden path: “Judge in favour of judicial discretion”, “dog bites man”. What else is new? So I will attempt to limit myself to one aspect of judicial discretion in sentencing that ties in particularly well with the “beyond the stocks” theme of this conference.

- 21 In discussing deterrence, I was concerned with what judge *must* take into account when sentencing. In relation to the exercise of discretion, I am concerned with what judges *must not* do, particularly when restrictions result in judicial hand tying that serves no practical purpose or evident social good. One particular example is the approach mandated by the *Crimes (Sentencing Procedure) Act* in relation to suspended sentences.

- 22 A suspended sentence can only be imposed after an offender has been sentenced to imprisonment, but an offender can only be sentenced to imprisonment if the court is satisfied “having considered all possible alternatives, that no penalty other than imprisonment is appropriate.”¹⁷ That is, a judge *must not* suspend an offender’s sentence without first determining that the only appropriate penalty is imprisonment. The

¹⁷ *Crimes (Sentencing Procedure) Act* 1999 s 5, s 12.

contradictory effect of the Act in this regard was summarised by Basten JA sitting in the Court of Criminal Appeal last year when he said:

“What mental exercise is the Court required to undertake in deciding that imprisonment is the only available option? If, as the first step, the Court decides that imprisonment is appropriate, that, in a practical sense, would involve the conclusion that the offender should spend a period in custody. Step two in this process involves the specification of the relevant period of imprisonment including, it must at that point be assumed, the specification of a non-parole period, being the minimum term for which the offender must be kept in detention... If after earnestly making the determination required at steps one and two, the Court, as step three, then suspends the execution of the sentence, so the person is under no immediate liability to serve the specified period in custody, the result appears incongruous. Even such an appearance tends to undermine the purposes of sentencing set out in s 3A of the *Sentencing Procedure Act*. The incongruity, however, is not merely an appearance, but a reality. Furthermore, it is unrealistic to suppose that the Court actually reaches its conclusion by proceeding mechanically from step one to step three.”¹⁸

23 His honour concluded that “unless a suspended penalty is treated as another possible option to imprisonment”, which, under the Act at present it is not, “it is unclear on what basis suspension is ever available. That is the result of the two (or three) step approach mandated by this Court.”¹⁹

24 The illogic of the Act extends a step further when the application of a s 12 good behaviour bond in circumstances where a suspended sentence has been deemed appropriate, is considered. A good behaviour bond imposed under s 12 cannot exceed the length of the suspended sentence. Justice Howie observed in 2009 that this limitation is “completely inappropriate” and “absurd”, because it means that the court can only impose a short good behaviour bond if it is considering a short period of imprisonment, which it then deems appropriate to suspend.²⁰

25 Similar limits and apparent incongruities apply to other custodial alternatives to full-time imprisonment, such as home-detention, for which an offender can only be assessed after a length of full-time imprisonment

¹⁸ *Ismael Amado v R* [2011] NSWCCA 197 at [5].

¹⁹ *Ismael Amado v R* [2011] NSWCCA 197 at [15].

has been determined. This is in contrast to the approach to intensive correction orders, for which an offender may be assessed prior to the determination of sentence. Also, although an intensive correction order is considered lower in the hierarchy of severity of custodial sentences, it may be imposed for a maximum length of 2 years, whereas a home detention order may be imposed for a maximum length of 18 months. And despite their practical similarity, there is a lack of consistency between the categories of offences for which an offender will be ineligible to serve their sentence by way of home detention or intensive correction.

- 26 In any event, in both cases, the alternative to full-time imprisonment can be imposed only if no sentence other than imprisonment is considered appropriate. Further, the alternative is to be imposed for a period equivalent to the term of full-time imprisonment initially determined, despite being “obviously a far less severe sanction.”²¹
- 27 The problems with the Act’s current structure in this regard have been widely recognised,²² but a fair question may be, so what? Who cares if judges have to navigate a counter-intuitive act, if they manage to achieve consistent sentencing outcomes? (Apart, of course, from the judges themselves. But as I am outnumbered in that department today, I will pretend that judicial disgruntlement is not a good enough reason to enact reform). Luckily, there are at least two additional answers to this.
- 28 The first is that the structure of the Act has, in some cases, prohibited a course of rehabilitative sentence that, in the words of a judge of the Court of Criminal Appeal, “had much to recommend it,” and that, before being overturned on appeal because it did not fit within the mandates of the Act, was achieving “its intended result.”²³ The idea that a poorly drafted statute

²⁰ *Bonsu v R* [2009] NSWCCA 316 at [22].

²¹ NSWLRC *Sentencing Question Paper 6: Intermediate custodial sentencing options* (June 2012) at 21.

²² See the NSW Sentencing Council’s background report into Suspended Sentences (December 2011), available at: <http://www.sentencingcouncil.lawlink.nsw.gov.au>, and the preliminary submissions in response to the NSWLRC Sentencing Review, available at:

http://www.lawlink.nsw.gov.au/lawlink/lrc/lr_cref130sub.

²³ *Ismael Amado v R* [2011] NSWCCA 197 at [15].

might stand in the way of rehabilitative sentencing options that work, is, I hope, quite plainly unacceptable.

29 The second answer to the question of “who cares” is that it must surely always be in the interests of justice that laws be clear, transparent and accessible. It is not always possible to avoid complexity in legislative drafting, but where complexity results in absurd processes or outcomes, it is time to have another go.

30 It is not clear which reform approach should be adopted to correct these anomalies. In Victoria, suspended sentences have recently been abolished for serious offences, on the basis that

“suspended sentences are a fiction that pretends offenders are serving a term of imprisonment, when in fact they are living freely in the community... Where a judge considers that a jail sentence is not appropriate, the judge will [now] openly sentence the offender to a non-custodial sentence rather than being forced to go through the legal fiction of sentencing the offender to a period of imprisonment.”²⁴

31 In New South Wales, Chief Magistrate Henson supports the phasing out of suspended sentences “subject to a holistic assessment being made of other current sentencing options,”²⁵ with broad support for alternatives to gaol and diversionary programs.

32 I do not yet have a firm view on the appropriate course to take. I expect that greater consensus will begin to emerge, to the extent it has not done so already, during the course of the NSW Law Reform Commission’s review. At the least, it seems to me logical to explore legislative avenues that will overcome or remove the artifice, anomaly and judicial hand-tying that currently affects some aspects of sentencing. There should be sufficient flexibility to permit a sentencing judge or magistrate to perform a holistic assessment of the potential outcomes of their sentencing exercise,

²⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 December 2010, 17 (Second Reading Speech).

²⁵ G Henson, *Preliminary Submission to the NSWLRC Sentencing Review*, 21 October 2011, at 6.

and to impose a sentence that is appropriate, taking into account the entirety of the offender's circumstances.

Conclusion

- 33 These two areas for reform, deterrence and judicial discretion, are by no means the only or even most pressing areas for reform that should be considered in the current review. But they are important, and I would like to further impose on those present here today by asking that you keep these issues in mind in the coming days.
- 34 I say “further impose” because you work in a sector already overburdened. Many of you work longer, harder hours than your civil law colleagues, for less reward and sometimes without thanks. Yet in so doing you embody the ideals of public service and civic duty.
- 35 The only fitting way I can think of, therefore, to both close my address and open this conference, is to say **thank you**. To those working for and with Legal Aid, and as Public Defenders, to those in corrections, diversionary and rehabilitation programs, those working with vulnerable and high-risk offenders, and to those conducting research, I want to say thank you. Thank you on behalf of the judges of the Supreme Court, the wider legal constituency, the clients and communities you serve, and on my own behalf as a private citizen. Please, keep doing what you do.