
A Not So Rational Philosophy

A Critique of the Penalties and Sentences Act 1992 (Qld)

Brett Mason*

1. Introduction

Like political and economic theory, theories of punishment come in waves. Fashions change. In the 1960s and into the 1970s utilitarian theories dominated penal philosophy: deterrence, prevention, and rehabilitation were the philosophies driving corrections policy. But then came a wave of retributivism that all but washed away the legacy of utilitarianism.

“Just deserts” became the hope of the new retributivists who sought to ensure that offenders were treated with respect as autonomous free thinking individuals and punished according to a scheme of proportionality or tariff. In more recent years there has been a reaction against this individualist, desert-oriented retributivism. Some have sought to “connect” the offender with the community by facilitating the offender’s penance or by ensuring that the aim of punishment is to promote social freedom or “dominion”.¹

Others have sought to return to the utilitarian philosophies of yesteryear invoking spirits of the past to bolster claims that only recently had been put to bed. The Queensland Attorney-General, the Hon Dean Wells MLA, championed the *Penalties and Sentences Act 1992 (Qld)*² (“the Act”) as “... derived from the rational utilitarian philosophy of protecting society and its members from harm”.³ The Attorney-General sought to invoke John Stuart Mill as well as a bevy of

* Lecturer, Justice Studies, Faculty of Law, Queensland University of Technology.

1 See, for example, RA Duff *Trials and Punishments* Cambridge University Press Cambridge 1985; J Braithwaite and P Pettit *Not Just Deserts: A Republican Theory of Deserts* Clarendon Press Oxford 1990.

2 Which commenced 27 November 1992.

3 Queensland Legislative Assembly *Parliamentary Debates* 13 November 1992 at 703.

contemporary authorities to support his philosophy. The implications of the philosophy for sentencing practice are neatly summarised in the Preamble to the Act:

WHEREAS —

...

3. Society may limit the liberty of members of society *only* to prevent harm to itself or other members of society.⁴

This article examines the implications of this philosophy for the sentencing of offenders in Queensland. While on the surface this philosophy may seem progressive, or at least benign, it will be argued that if implemented this philosophy may have profound implications for sentencing policy in Queensland.

First, the philosophy is not consistent with common law sentencing principles. Of itself, this is not critical. But the ill considered implications of the reform and the demonstrated misunderstanding of the principles of just deserts are cause for concern.

Secondly, while it is conceded that initiatives were necessary to consolidate and reform the law relating to the sentencing of offenders, the “rational utilitarian philosophy” espoused by the Attorney-General and reflected in the Act is flawed. Not only is recourse to authorities such as John Stuart Mill highly problematic but the utilitarian philosophy underpinning the Act has distinct disadvantages in practice particularly as it relates to offences typically committed by the disadvantaged.

2. Common Law Sentencing Principles

The basic principle in sentencing at common law is proportionality.⁵ In short, sentencers are concerned that punishment should fit the crime. Of course, judges may also consider aggravating and mitigating circumstances in deciding the appropriate quantum of punishment. But the notion of proportionality limits the amount of punishment that can, in any case, be inflicted.

At common law it is clear that punishment beyond what is proportionate to an offence merely for the purpose of protecting society is not permitted. In *Veen v The Queen [No. 2]*⁶ the majority comprising Mason CJ, Brennan, Dawson, and Toohey JJ outlined the proper role of community protection as a consideration in sentencing at common law:

It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society;

4 Emphasis added.

5 A Von Hirsch and A Ashworth 'Not Not Just Deserts: A Response to Braithwaite and Petit' (1992) 12 *Oxford Journal of Legal Studies* 83.

6 (1988) 164 CLR 465.

it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.⁷

The minority of the Court came out strongly against any concept which would allow for sentences in excess of “just deserts” principles on the basis of forecast dangerousness to the community of an offender (often called “preventive detention”).⁸ In particular, Wilson J held that “A sentence can not represent appropriate punishment for the particular *offence* if by reason of a concern to protect the community it exceeds that sentence which is the maximum the circumstances of the offence, viewed objectively, will bear.”⁹

More recently, in *R v Chivers*¹⁰, the Queensland Court of Criminal Appeal also considered the issue. Cooper J¹¹ held that:

The common law does not sanction preventive detention and the principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from recidivism of the offender.¹²

Clearly, the common law sentencing principles operating in Queensland prior to the introduction of the *Penalties and Sentences Act 1992* (Qld) were grounded in proportionality. An offender was to receive a sentence commensurate with his offence adjusted, perhaps, to take account of certain aggravating and mitigating circumstances. The prospect of future harm was not *of itself* sufficient to warrant punishment in excess of that justified on the basis of proportionality.

3. “A Rational Utilitarian Sentencing Philosophy”?

In common with other Australian jurisdictions, the disparate sentencing options available under various legislative schemes emerged as an issue of public concern in Queensland in the late 1980s — particularly as they impacted upon fairness and consistency in sentencing. The then newly elected Labor government sought to reform sentencing practice as part of its overall reform of criminal law and

7 *Ibid* at 473.

8 Wilson, Deane and Gaudron JJ.

9 Wilson J *ibid* at 487–488.

10 [1993] 1 QdR 432.

11 Citing as authority *Veen v The Queen* [No.1] (1979) 143 CLR 458 at 467, 468, 482–483, 495; *Veen v The Queen* [No. 2] (1988) 164 CLR 465 at 472–474, 485–486; *Chester v The Queen* (1988) 165 CLR 611 at 618; *R v Aston* (No. 2) [1911] QdR 375 at 381.

12 *Supra* n.10 at 447.

criminal justice policy. Prior to the commencement of the *Penalties and Sentences Act 1992* (Qld), the Queensland Attorney-General, the Hon. Dean Wells MLA, explained that the aim of the new Act would be to consolidate into one statute the sentencing options available and to supplement them with additional options.¹³

Section 3 states that the purposes of the Act include:

- (a) collecting into a single Act general powers of courts to sentence offenders; and
- (b) providing for a sufficient range of sentences to balance protection of the Queensland community with appropriate punishment for, and rehabilitation of, offenders; and
- (c) promoting consistency of approach in the sentencing of offenders; and
- (d) providing fair procedures —
 - (i) for imposing sentences; and
 - (ii) for dealing with offenders who contravene the conditions of their sentence; and
- (e) providing sentencing principles that are to be applied by courts; and
- (f) making provision so that offenders are not imprisoned for non-payment of fines without the opportunity of obtaining a fine option order; and
- (g) promoting public understanding of sentencing practices and procedures; and
- (h) generally reforming the sentencing laws of Queensland.

Sentencing reform was long overdue in Queensland. As in other Australian states, reform of important aspects of the criminal justice system was not undertaken as politicians recognised only too readily that few votes were to be gained from such initiatives. The Attorney-General deserves credit for assuming the task of reforming and consolidating aspects of the law of sentencing.

The Attorney-General's agenda for reform was initiated against a backdrop of world wide disenchantment with rehabilitation as the overriding punishment principle. In recent years punishment has increasingly been justified by reference to retribution. As noted by the Australian Law Reform Commission, "In general it would appear that the Australian community subscribes to the view that retribution and deterrence should be the major goals of sentencing policy."¹⁴ Justice Nagle, in his landmark Royal Commission into New South Wales prisons observed that the aims of corrections should be "... imprisonment as punishment, retribution, deterrence and the protection of society".¹⁵ Rehabilitation and humane treatment were relegated by him to positions of secondary importance.

13 D Wells 'Sentencing Philosophy and Prison Reform in Queensland: Dangerous Offenders' Address to the Queensland Law Society, Brisbane, 2 November 1991.

14 As cited in M Findlay, S Odgers and S Yeo *Australian Criminal Justice* Oxford University Press Melbourne 1994 at 192.

15 J Nagle *Report of the Royal Commission into New South Wales Prisons* Government Printer Sydney 1978 at 380.

Policy makers returned to retribution, or its modern derivative “just deserts”, as it became increasingly difficult to justify rehabilitative schemes which showed no apparent improvement for attendees over offenders who did not receive the “benefit” of such schemes. In short, it seemed that “nothing worked”. In addition, it was argued that it was immoral to pursue a purely instrumental use of punishment to the detriment of individual rights. Utilitarian theories (such as deterrence and rehabilitation) were criticised as treating individuals as means rather than ends. By definition, utilitarian theories are not so concerned with justice as they are with social utility and harmony. The catch cry of modern retributivists was that no other punishment philosophy could be supported on empirical or moral grounds.¹⁶

The Queensland Attorney-General sought to break out of the barren terrain of retributivism and embrace a progressive and liberal policy grounded in the idea of limiting liberty only to prevent future harm to society or members of society. The Attorney was concerned that punishment should serve a social purpose and not simply be insisted upon for its own sake. Retributivists, argued the Attorney-General, suffer “... a kind of institutional but mindless action/reaction”.¹⁷ And, further, “... the retributivist proposition that society has no further business with an offender when it has hit back at him to an extent equivalent to the blow he dealt society is simply myopic”.¹⁸

During debate on the *Penalties and Sentences Act*, government spokesmen were quick to point out the considerable difficulties that beset retribution. Mr Welford MLA pointed out that retribution relies upon the idea of proportionality to determine the appropriate quantum of punishment. An assessment must be made to ensure that the punishment is proportionate to the crime. The difficulty, Mr Welford pointed out, is that it is often very difficult to determine proportionality: an eye for an eye might sound reasonably proportionate but what, for example, is an appropriate punishment for fraud.¹⁹

The Attorney-General and other members of the government were correct to revisit and reassess philosophies of punishment. Punishment is an integral aspect of any criminal justice system. The Attorney’s “rational utilitarian philosophy” is well intentioned and sincere. It is also flawed.

16 See, for example, the work of the early enthusiasts for just deserts; E Van den Haag *Punishing Criminals* Basic Books New York 1975 and A Von Hirsch *Doing Justice* Hill & Wang New York 1976.

17 *Supra* n.13 at 5.

18 *Ibid* at 7.

19 *Supra* n.3 at 709.

4. A Not So Rational Philosophy

(a) The Ghost of John Stuart Mill

Strangely, perhaps, but the Labor Attorney-General drew intellectual inspiration for his “rational utilitarian philosophy” from the great liberal John Stuart Mill. In particular, the Attorney relied on the following passage from Mill’s essay *On Liberty*:

The principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their members, is self protection.²⁰

What follows, the Attorney explained, is that, “... first ... if a punishment greater than that which can reasonably be expected to be required to protect society is imposed, then restraint has gone too far ... [And, second,] ... if the restraint which is imposed is not sufficient to protect society then restraint has not gone far enough.”²¹ On the face of it, such a philosophy has much merit. Punishment has a clear purpose — to protect society from offenders — and is referable to an important societal good — social harmony.

So confident was the Attorney of his new found philosophy that he had it incorporated into the Preamble to the *Penalties and Sentences Act*. Part 3 of the Preamble to the Act says:

Society may limit the liberty of members of society *only* to prevent harm to itself or other members of society.²²

In other words, penalties that limit liberty (such as imprisonment) may only be used for those offenders who are likely to harm others in the future. While superficially attractive, the philosophy of punishment does not allow for such simple answers.

First, let us return to basic principles. Mr Wells cites Mill from his work *On Liberty* as authority for his punishment philosophy. Mill sought to define, once and for all, “... the nature and limits of power which can be legitimately exercised by society over the individual”.²³ He did this by asserting

... one very simple principle, as entitled to cover absolutely the dealings of society with the individual in the way of compulsion and control ... That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with

20 JS Mill *On Liberty* London 1859. Reprinted in *Utilitarianism, Liberty and Representative Government*, Everyman’s Library no. 482 London 1910 at 72.

21 *Supra* n.13 at 4.

22 Emphasis added.

23 *Supra* n.20 at 65.

the liberty of action of any of their number, is self protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.²⁴

The core of this principle is that individuals must be allowed to pursue their own good in their own way. It was an attempt by Mill to define the appropriate limits of state power — in particular the power to punish. Specifically, Mill's principle seeks to address the question — what kinds of behaviour should be criminalised? It is a classical liberal statement setting broad limits on the power of society over the individual. It seeks to maximise the freedom of the individual — “to secure the citadel of freedom ... beyond which the law must not trespass.”²⁵

Strangely, however, the Labor Attorney-General adopts Mill's principle not as a classical liberal expression of the limits of state power to make laws but as a principle that relates to the appropriate role of imprisonment (“to limit the liberty”) as a punishment sanction. Whereas Mill seeks to develop a principle to limit and justify state sanctioned punishment and the boundaries of the criminal law, the Attorney-General seeks to develop a principle that relates to limit the type of punishment that the state can inflict after conviction. Mill's principle operates to define state power prior to the commission of any offence. It sets the boundary or province of the criminal law. Under the Wells view the scope of the criminal law is not considered. Mill's principle is applied only to the exercise of punishment options.

This is a creative exploitation of Mill's principle. More importantly, it is an interpretation that implies policy outcomes at odds with Mill's ideas of liberty and utility. Thus, adopting Mill's principle one would conclude that, for example, killing another should be considered a crime because the state is entitled to protect its members from harm. Punishment, according to Mill, could then follow for several utilitarian reasons: to deter, to rehabilitate, to denounce, to protect. Simple enough.

The Attorney-General, however, proceeds much further than Mill. He asserts that only if an offender is likely in the future to harm society or its members should the offender be deprived of liberty. Strictly, therefore, the murderer motivated by passion to kill his lover who can show that he poses no threat of harm in the future should not be imprisoned. This is a perversion of Mill's thesis.

The Attorney's mistake is to use Mill's principle, which seeks to define what sorts of behaviour should be criminalised, for a different purpose — namely, to define appropriate types of punishment assuming the commission of a crime. Unfortunately, the Attorney's reworking of Mill's principle does nothing to address

24 *Ibid* at 72–73.

25 P Devlin *The Enforcement of Morals* Oxford University Press Oxford 1965 at 103.

Mill's real concerns, such as ensuring that "victimless crimes" like prostitution and homosexuality are not the subject of criminal sanctions.

(b) The Common Law and Just Deserts

The "rational utilitarian philosophy" underpinning the *Penalties and Sentences Act 1992* (Qld) is not reflected in the common law. As discussed above,²⁶ the High Court held in the *Veen* cases that judges should not impose a sentence beyond what is appropriate to the crime merely to protect society from harm. Rather, in exercising their discretion within limits set by just deserts judges may consider, among other factors, the protection of society. What the High Court is suggesting therefore is that while the notion of just deserts does not dictate a specific punishment for a particular offence it serves to limit the range of permissible punishments.

Secondly, as Mason and Aickin JJ held in *Veen v The Queen [No 1]*²⁷, in practice it is rare that conflict will arise between the notions of public protection and just deserts in cases of serious violent crime where the offender has an established propensity for violence. The conflict is much more likely in cases involving less serious offences.

A leading English commentator on sentencing, Dr David Thomas cites such an example.²⁸ An offender was sentenced to life imprisonment for robbery "consisting of the theft of two pounds from a man accosted in the street and threatened with an air pistol." Medical evidence was given suggesting that the offender's limited ability to control his "abnormally high sexual drive" would very probably lead to his commission of violent sexual offences if he were released, and it was also thought that there was no prospect for an effective treatment. Clearly, the "rational utilitarian philosophy" espoused by the Attorney-General would endorse such an outcome.²⁹

Of itself, this may be of little concern. Governments are entitled to establish principles of sentencing. What is much more disturbing is the apparent lack of understanding of retributivist principles. For example, the Attorney-General argued that

The retributivist model sees the infliction of detriment from wrong wilfully done as morally good in itself. It says that the offender should be punished according to his just deserts. Consequently, questions of societal protection are irrelevant.³⁰

26 See above, n.11.

27 (1979) 143 CLR 458; per Mason J at 468 and Aickin J at 497.

28 D Thomas *Principles of Sentencing* Heinemann London 1979 at 301.

29 It is interesting to note, however, that the *Penalties and Sentences Act* may not allow this outcome. Offenders subject to an indefinite sentence must first have committed a serious violent offence (see ss. 162 and 163).

30 *Supra* n.13 at 5.

The Attorney is referring to an ancient and idealised version of retributivism. Modern just deserts theory is not quite so dismissive of questions of societal protection. As the High Court indicated in *Veen v The Queen [No. 1]*³¹ the general practice of the common law is that just deserts will set the outer limits of punishment. Within those outer limits societal protection is not irrelevant to the exercise of judicial discretion. It never has been.

Attacks on just deserts principles were also made in parliament during the Second Reading speech to the *Penalties and Sentences Act*. Mr Welford argued that “One thing is certain is that justice alone does not entail retribution, because justice entails concepts of equality of treatment.”³² Mr Welford added that equality of treatment was impossible because “... we can not measure individual responsibility.”³³

These are unusual claims. Just deserts is fundamentally concerned with equality of treatment; offences which do more objective harm deserve more punishment. On the other hand, the philosophy underpinning the *Penalties and Sentences Act* demands that punishment is assessed according to some assessment of future harm. Thus, punishment is based not on the offence but an assessment of the offender. While it is admittedly always difficult to measure individual responsibility it is at least capable of measurement. It is much more capable of measurement than future harm.

Equality of treatment under the Wells philosophy is a chimera. Treatment will start to depend more upon who an offender is rather than what an offender has done. Just deserts is not, as Mr Welford claims, simply emotional vengeance.³⁴ It involves an assessment of what an offender has done and demands punishment accordingly. The penalty is proportionate to the offence. Judges handing down punishments do so only after a considered weighing of the offence — they are not simply society’s vengeful mouthpieces.

The Attorney-General compounds this error by insisting that “Justice does not mean retributivism ... Notions such as the doctrine of proportionality, which is derived from the philosophy of retributivism, is not part of this Bill.”³⁵ It is difficult to conceive of a modern sentencing code that ignores retributivism as a justification to punish. And so it is with the *Penalties and Sentences Act*. For while the Attorney denies its existence as a sentencing principle it tops the list of authorised sentencing purposes in section 9 of the Act:

• Sentencing guidelines

s 9.(1) The only purposes for which sentences may be imposed on an offender are —
(a) to punish the offender to an extent or in a way that is just in all the circumstances;

...

31 (1979) 143 CLR 458.

32 *Supra* n.3 at 708.

33 *Ibid* at 709.

34 See, *ibid* at 709.

35 *Ibid* at 703.

This is a classic statement of just deserts. It does not draw upon rehabilitation, deterrence, disapproval or community protection for the justification to punish.³⁶

It is unclear how the Attorney-General sought to abolish just deserts and proportionality as sentencing justifications and yet seek to ensure a just sentencing system. By relying upon "public safety" as the benchmark for sentences of imprisonment, the Attorney-General is too ready to dismiss just deserts as a sentencing rationale. Whatever the weaknesses as a sentencing rationale of retribution, just deserts or proportionality (call it what you will), punishment can only *ever* be justified if it is *deserved*. To punish an offender in circumstances where they do not deserve the punishment (even where, as advocated by Mr Wells, it would add to the total sum of human happiness) is anathema to our sense of justice.

(c) Rational Utilitarianism and Social Justice

In advocating reform of the sentencing system the Attorney-General was keen to point out that an important goal of reform was a more benign and rational system.³⁷ He went further and prophesied that if imprisonment was not based upon predictions of future harm then "... we will be howled down by those advocating a return to capital punishment."³⁸ At some levels, however, the *Penalties and Sentences Act* may prove to be less than just in its application to the disadvantaged.

Policy ground in the utilitarian assertion that "Society may limit the liberty of members of society *only* to prevent harm to itself or other members of the community"³⁹ breaks the vital nexus between the offence and the sentence. Instead it maximises the link between the offender and the sentence. No longer can it be said that punishment fits the crime. Under this philosophy punishment will fit the criminal.

Thus, this policy has distinct implications for the *type* of criminal to be imprisoned under the Act. It will ensure that more often than justice dictates criminals imprisoned will be young, poor, disadvantaged and members of certain racial minorities. Less often than justice demands will the imprisoned criminal be affluent and corrupt — particularly as white collar criminals are often more able to show that they will not repeat their criminal activity. The Attorney-General's philosophy, as reflected in the Preamble to the Act, only contemplates future harm. That is not good enough. Offenders convicted of serious fraud offences, for example, may deserve to go to jail even if they no longer present a risk to society. The nexus between offence and punishment should not be extinguished.

More fundamentally, perhaps, what is future "harm"? What sort of harm are we talking of? While perhaps many people would allow that one legitimate function of punishment is to uphold the standards embodied in the criminal law, the

36 These principles are catered for in ss 9(1)(b), (c), (d) and (e) of the Act respectively.

37 *Supra* n.13 at 15.

38 *Ibid* at 15.

39 Preamble to the *Penalties and Sentences Act 1992* (Qld) (emphasis added).

concept of harm seems dangerously general. It is always possible that an assessment of an offender's likelihood to commit harm will depend on official belief in a degree of socialisation far broader than a mere willingness to conform to the criminal law. This must be resisted. While undoubtedly conceived in a generous spirit the Act's "rational utilitarian" underpinnings hold dangers for those offenders likely to be punished for who they are and not what they have done.

5. Conclusion

The Attorney-General's "rational utilitarian philosophy" suffers from its overstatement. By insisting upon threat to the public safety as the only grounds justifying imprisonment, Mr Wells ignores the necessity for just deserts. For example, what of the murderer who can somehow show that he will not reoffend? Should this necessarily mean that the murderer goes free. Conversely, the petty thief who, it is revealed in evidence, is very likely to commit a violent crime in the near future. Should the thief be locked up for years until the diagnosis is altered? What of some of Australia's notorious "failed entrepreneurs" or "crooked ex police commissioners" or "disgraced politicians". Let us assume that these white collar criminals will never harm the public again. Does this mean that they should never be imprisoned for their appalling past misdeeds? Surely not. The Attorney-General's hypothesis is too simple. It must, at some level, be subject to just deserts.

While citing John Stuart Mill in support of his philosophy Mr Wells has misunderstood the nature of Mill's support. Mill sought to develop a principle to limit and justify the boundaries of the criminal law. The Attorney-General has developed a principle that seeks to limit the *type* of punishment that the state may inflict after conviction. Unlike Mill, the Attorney's principle does nothing to narrow the province of the criminal law, but rather, only to limit its sanctions.

Mr Wells also drew upon more contemporary authorities in support of his position, including a leading authority in the area of the philosophy of punishment, Professor Nigel Walker. Once again, however, Walker's apparent support is misleading. While Professor Walker has advocated preventive detention to protect the community from possible future harm, he does not argue that imprisonment should *only* be used to prevent future harm. His argument is that imprisonment may be used to protect the community from possible future harm — but not only for that purpose.⁴⁰ Imprisonment may serve other purposes.

It is difficult to argue with the Attorney-General's suggestion that parliament is entitled to legislate to ensure the application by the judiciary of certain punishment principles. Such principles should, however, be consistent with justice. To suggest, as did the Attorney-General and other parliamentarians, that just deserts has no place in a rational sentencing structure, or further, is inconsistent with the

⁴⁰ See, N Walker 'Ethical Aspects of Detaining Dangerous People' in J Hamilton and H Freeman (eds) *Dangerousness: Psychiatric Assessment and Management* Gaskell London 1982 at 24.

demands of justice, is to misunderstand the nature of just deserts. Just deserts merely sets the outer limits of punishment. Within those outer limits set by just deserts courts are quite entitled to consider community safety as an important issue. Indeed, as the High Court held in *Veen [No. 1]*⁴¹, in practice it is rare that conflict will arise between the notions of public protection and just deserts in cases of serious violent offences where the offender has an established propensity for violence.

The Act's "rational utilitarian philosophy" also has implications for the type of offenders that will be imprisoned. The assertion that "Society may limit the liberty of members of society only to prevent harm to itself or other members of the community"⁴² breaks the vital nexus between the offender and the offence. Under this philosophy punishment will not fit the crime; rather, punishment will fit the criminal. This has implications for disadvantaged offenders and should have been foreseen by a government supposedly committed to an agenda of social justice. In short, the nexus between offence and punishment should not be extinguished as contemplated by the Act.

Perhaps the greatest weakness of the "rational utilitarian philosophy" was highlighted during the very debates that introduced the *Penalties and Sentences Act* into the Queensland Parliament. More than anything else it illustrates the practical weaknesses of the philosophy and its submission to political realities. The shadow Attorney-General and Minister for Justice, Mr Denver Beanland MLA, drew to Parliament's attention a case where a 28 year old bricklayer sexually assaulted his former fiancée's 23 month old daughter. Mr Beanland reported that "The judge sentenced the man to four years' gaol but suspended the sentence when he was satisfied that there was little likelihood of the man repeating that type of conduct. To the Minister's credit, the Crown appealed against the sentence on the ground of inadequacy and the decision was overturned."⁴³

Applying to this case the Minister's "rational utilitarian philosophy" that offenders should only go to gaol if they represent a future danger to the community, the offender should not have gone to gaol or, if he did, should only have gone to gaol for a very short time. As Mr Beanland stated, the judge found that there was little likelihood of repeat offences. Instead, the Crown appealed against sentence in direct contrast to the "rational utilitarian philosophy" espoused by the Attorney.

No doubt political expediency as well as the dictates of justice demanded that an appeal be launched. But what this simple example illustrates is that imprisonment can not be used only where there is evidence of future harm. Sometimes, as in this case, justice demands imprisonment even where there is no evidence that the offender will commit offences in the future. By appealing against the sentence the Crown understood this. And so did the minister. His rational utilitarian philosophy does not fit well with political realities nor practical justice.

41 *Supra* n.31 at 468 per Mason J; at 497 per Aickin J.

42 Preamble to the *Penalties and Sentences Act 1992* (Qld).

43 Queensland Legislative Assembly, *Parliamentary Debates*, 15 July 1993 at 3633.