WHAT DOES CRIMINAL JUSTICE CONTRIBUTE?

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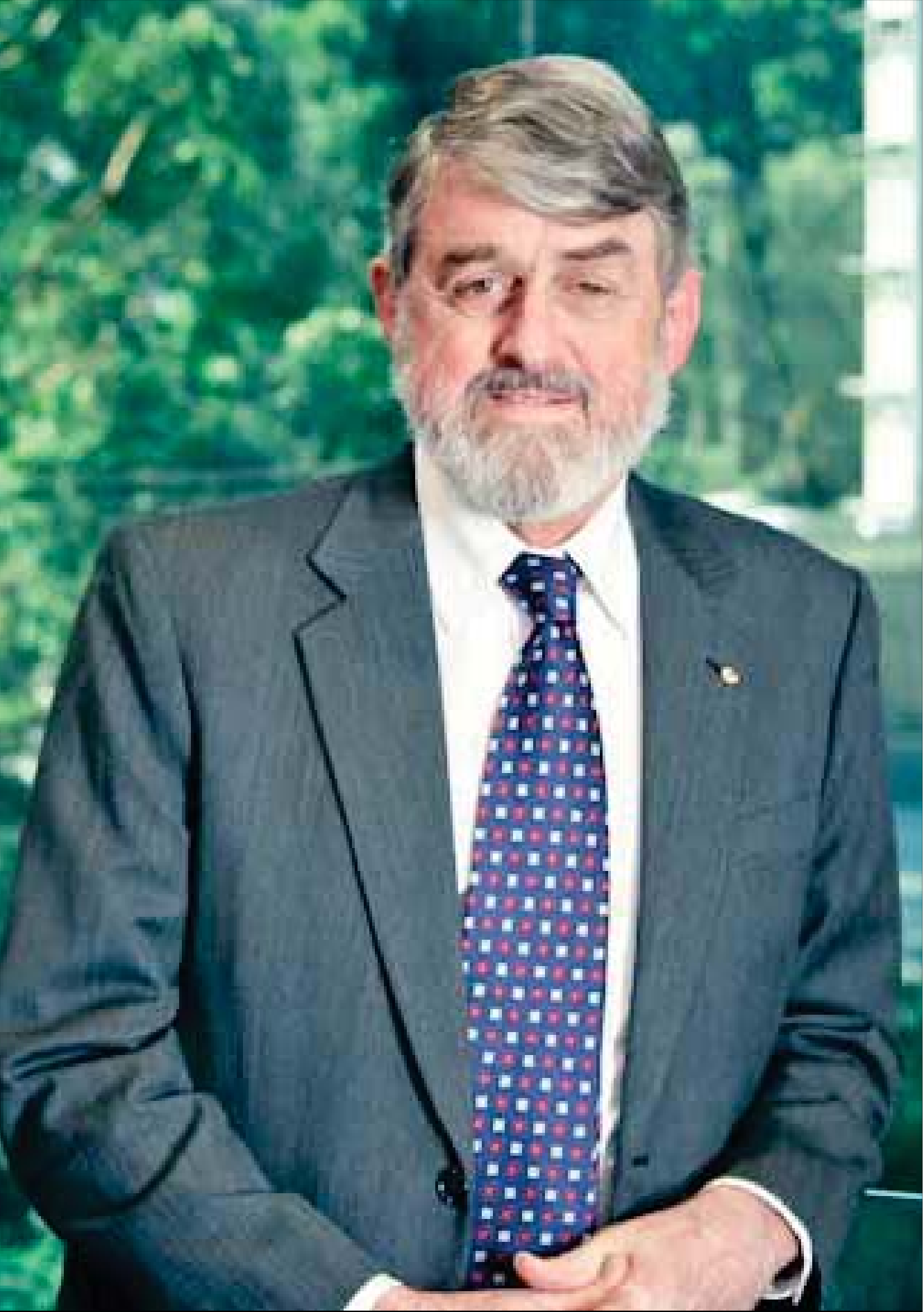
Criminal justice is an integral part of that large and complex beast we call government, which is intended to operate for our peace, order and social improvement. Asking the question: "How does the operation of criminal justice improve social outcomes?" leads to a consideration of the whole place and purpose of the criminal justice system in government, how it is performing now and what might be done to improve it – in some areas at least. The purpose of this article is to identify some of the features of criminal justice in NSW at present that might be improved to make a better contribution to social justice than presently occurs.

Our system of government is democratic and we adhere to the rule of law. We observe the separation of powers – between the legislature, the executive and the judiciary. Each arm contributes to criminal justice: the parliament, by making the substantive and procedural criminal laws; the executive, by administering them in practice; and the judiciary, by determining disputes and imposing punishment.

The criminal justice system serves the community and contributes to social outcomes in a representative capacity, by assuming various roles (investigation, prosecution, defence, adjudication and corrections) on our behalf when criminal harm is done. In that respect it is not unlike another socially valued contributor, the undertaker – it comes along after the crime and the harm have been done and tidies up as best it can, according to the rules developed for it over time and in a generally socially acceptable manner. It is not centred on the prevention of crime (subject to the comments below) and it cannot restore people



to the position they were in before the crime was committed. Nor can it magically transform offenders into law-abiding paragons of virtue. The limitations on the system must be realistically understood.

We use criminal justice to express our collective disapproval of what has been done – to denounce the criminal. We use it to exact retribution (or revenge) that we might otherwise be tempted to pursue individually. We do those things by authorising the courts to try, convict and punish offenders on our behalf.

We also (realistically or not) expect the criminal justice process to protect us from further offending – but experience and research findings show that we need to carefully manage that expectation. It is supposed to perform this function simply by virtue of the existence and operation of the system itself, ie. through general deterrence; and by its application to individuals through individual deterrence. But any evidence for such effects needs to be considered very carefully. It is also supposed to protect us by rehabilitating offenders, so that they become law-abiding members of society once more and so that the rate of reoffending (or recidivism) falls.

In some cases, however, it must be accepted that the criminal justice system and process can only provide such protection by separating offenders from society – by incapacitation in an institution.

In pursuing these various aims the criminal law addresses both the criminal conduct that brings the system into play and the process by which those aims are intended to be achieved. It also seeks to protect the human rights of all involved.

In light of these aims, how is New South Wales faring?

PUNITIVENESS - BAIL AND SENTENCING

The trend in lawmaking and political commentary in NSW for some time has been towards greater punitiveness in the disposition of criminal cases, notwithstanding the establishment of some very successful diversionary and restorative (or therapeutic) programs. More restrictive and intrusive procedures now apply to suspects and accused persons particularly (but not only) in relation to investigation, bail, sentencing and the extension of punishment beyond the sentences imposed by courts. NSW seems to lead the field in these areas.

On 2 June 2010 Chief Judge Blanch of the District Court of NSW spoke at a conference of Legal Aid Commission lawyers. He drew comparisons between NSW and Victoria. In 2009 there were 200 people in custody (on average each day) per 100,000 in NSW and half that in Victoria. In NSW for the 2008-09 financial year just over a billion dollars were spent on Corrective Services. If we did whatever is being done in Victoria, he said, we could save half that amount. If imprisonment reduces criminal offending, then NSW's crime rates should be significantly lower than those in Victoria – but they are not. Rates of personal assault, murder, robbery, break-ins, burglary and car theft, for example, are lower in Victoria.

Furthermore, in NSW 25% of the prison population is unsentenced – on remand. Most are people who are yet to be convicted and who still enjoy the presumption of innocence. In Victoria the figure is 18% (notwithstanding that in Victoria

the delays in coming to trial are significantly greater than in NSW).

The *Bail Act 1978* (NSW) was passed substantially to address a burgeoning number of prisoners on remand. Presumptions in favour of bail were enacted in relation to some offences, presumptions against in relation to others and in some cases no presumption applied. We seem to have come full circle with the progressively legislated removal of presumptions in favour of bail and increase of presumptions against – often in response to individual and atypical cases that have received publicity – leading to a growth in the remand population once more. Many people refused bail are ultimately acquitted and many who are convicted receive non-custodial dispositions of their cases. There is no recourse to compensation in such circumstances (as there is in some other countries, especially in Scandinavia).

A NSW Parliamentary Briefing Paper[1] examined the bail issue in great detail. It concluded: "Changes to bail laws since 2002 have followed the dominant trend of making it more difficult for accused persons to obtain bail: both in relation to a range of offences, and where the accused person is regarded as a 'repeat offender'. These changes have been justified on the basis that they provide greater protection for the community against the risk that such persons will commit offences while awaiting trial. However, critics have argued that the changes have largely been ad hoc responses to particular crime incidents, and that a good case has not been made out for reforms that have undermined an accused person's right to the presumption of innocence."

In December 2010, in response to these concerns, the NSW Bureau of Crime Statistics and Research (BOCSAR) published a report "Why does NSW have a higher imprisonment rate than Victoria?" It found:

"The NSW court appearance rate is 26 per cent higher than that in Victoria. The overall conviction rate in NSW is 85.7 per cent, compared with 79.0 per cent in Victoria. The overall percentage imprisoned is significantly higher in NSW (7.5%) than in Victoria (5.4%). The mean expected time to serve among prisoners dealt with by Victorian courts is slightly longer than the mean expected time to serve among prisoners dealt with by NSW courts. The NSW remand rate is approximately 2.5 times the Victorian remand rate.

Conclusion: The higher NSW imprisonment rate is attributable to a higher rate of court appearance, a slightly higher conviction rate, a higher likelihood of imprisonment and a higher likelihood of remand in custody."

Another reason for the growth in the prison population, according to Chief Judge Blanch, is the operation of the Standard Non-Parole Period regime which prescribes standard non-parole periods to be imposed for nominated offences falling in the middle of the range of objective seriousness. The stated objective of the scheme was limited to "promoting consistency and transparency in sentencing"[2], but the intention of its proponents must also have been to increase sentences for the offences listed. There is no reliable information about how offences were selected, but it is known that the standard non-parole periods were set by reference to the median non-parole periods historically imposed – ranging from 17% to 70%

Number of persons unsentenced and in full-time custody by jurisdiction : June 2010

of the maximum penalties prescribed. While, following the decision in *R v Way*[3], judges have skilfully avoided the worst effects of the regime, there is no doubt that it has resulted in more and longer sentences of imprisonment and serious questions need to be asked about whether it serves any useful purpose at all. In Monograph 33 (May 2010)[4] the NSW Judicial Commission reported that while uniformity and consistency of sentences did improve:

- the use of full-time imprisonment increased, at least in respect of items 9A and 9B (from 37.3% to 59.3% and from 57.1% to 81.3% respectively);
- lengths of non-parole periods and full terms increased in the 4 items measurable, the largest being of 125% and 60% respectively for offences against section 33 of the Crimes Act 1900;
- cases in which there had been pleas of guilty (for which the scheme was not designed) also showed increases in sentences (apparently as a result of an upwards shift in sentencing patterns generally).

On the length of sentences generally, the Chief Judge said: "40 years ago murderers received a life sentence but most were released after serving 10-15 years and that was generally regarded as the most serious of offences. It was unusual for a prisoner to spend more than 20 years in gaol. It was then generally accepted that prisoners became institutionalised after serving 5 years in gaol and that after 10 years, they would have extreme difficulty coping with living by themselves in the community. I suspect little has changed in that regard. We also should ask if our community is now any safer and less prone to crime because of the increase in sentences."

The upwards shift in sentencing began well before the Standard Non-Parole Period regime in 2002 with the Sentencing Act 1989 and the introduction of "truth in sentencing". The Act also brought in "true life" or "natural life" sentences, of which there are presently over 30 being served (and some lifers have died in custody).

The Chief Judge asked if we should review a number of practices, including amending or abolishing the Standard Non-Parole Period regime: "As I have said, gaol sentences must be imposed in many cases and in some the sentence should be substantial but the real question is how much is enough. You would have a good understanding of just how difficult serving time in gaol is. As you know, in the gaol population there is an over representation of people with mental disabilities, people with very low IQs, people with personality disorders and people from severely disadvantaged backgrounds. That is a difficult environment in which to live.

Sir Winston Churchill said in 1912: 'The mood and temper of the public in relation to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of a country. A calm, dispassionate recognition of the rights of the accused and even of the convicted criminal … (is a) sign and proof of the living virtue in it.'

The question how much is enough assumes real significance in the context of a prison budget of more than a billion dollars a year."

On 25 September 2011 the NSW Bureau of Crime Statistics and Research published Sentencing Snapshots reporting that, in relation to eight selected offences, NSW courts send more people

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to prison for longer periods than media reporting suggests. Such news reports, for example, fail to distinguish between minor and serious forms of particular offences and between first-time and repeat offenders so that a misleading picture is conveyed.

The newly elected NSW Government promptly announced on 9 June 2011 a review of bail laws, with a report due by November 2011. On 20 September 2011 it announced a review of sentencing laws, with a report due in October 2012. These are very welcome moves.

RECIDIVISM

Recidivism is a significant issue in NSW, as it is in other jurisdictions. Reoffending rates appear to be high. The 2011 Report on Government Services from the Productivity Commission cites 42.4% of NSW prisoners returning to prison within two years and 45.2% returning to Corrective Services care (in prison and in the community). There are some difficulties in the collection, interpretation and comparison of such figures; but nevertheless, both figures have been falling since 2001 while the increasingly punitive approach of NSW courts has been evident. Of course more needs to be done, but the conclusion may be drawn that Corrective Services has been achieving some success in its rehabilitation of prisoners even in the face of increased numbers of prisoners. The conclusion may also be drawn that, to a lesser extent, some progress is also being made with crime prevention measures in the community generally.

Prison per se is held up by politicians and the media as a general and individual deterrent to criminal conduct, but experience does not support that view. There are many different crimes, different ways in which the same crime may be committed and different individuals who commit them. Some crimes lend themselves to commission in circumstances of emotional or psychological disturbance, some need to be carefully planned and executed. Some criminals are serial offenders, some succumb to temptation only once. It would be a rare criminal, indeed, who would be aware of the possible consequences of apprehension, who would calculate the risk:reward ratio of offending and who would make a calculated decision whether or not to proceed. Most crime simply results from there being an offender predisposed to that type of offending (for a multitude of personal and external reasons), a suitable or available victim or target and there being a lack of "capable guardians" (persons or circumstances) to provide sufficient immediate deterrence. Studies have shown that, overall, the vast majority of criminal offences are not even reported. The length of the maximum sentence to which an offender could be sentenced, if caught and prosecuted, is irrelevant. The greatest deterrent effect is to be found in the fear of swift and certain detection, which is usually the last thing in an offender's mind at the time of committing an offence.

By the time an offender is in prison he knows that he has been caught. He knows that society does not approve of his conduct (he has been denounced). He knows he is being punished and that revenge is being taken against him. One day he will be released (save for those few who are too dangerous to be in the community). Steps need to be taken to try to ensure that he does not succumb to criminal temptation again. The emphasis should be on rehabilitation inside prison and support once released into the community and

that will need to be tailored to the nature and needs of the individual offender.

Ross Gittins in his column of 28 April 2010 in the *Sydney Morning Herald* said: "...how would you go about reducing recidivism? You'd do it by putting a lot more effort into rehabilitation, while people were in jail or after they'd been released.

Would it work? According to a big US study, yes it would. It finds (in descending order of cost-effectiveness) vocational education in prison, intensive supervision using treatment-oriented programs, primary – or secondary-level education in prison, cognitive behavioural therapy, and drug treatment in the community are particularly effective.

These programs would have a cost, but they'd end up saving a lot more than they cost. And, of course, as well as saving the taxpayer money they'd achieve a reduction in crime – the thing we supposedly care most about.

The one thing they wouldn't be is politically sexy – which may explain the public's, the media's and the politicians' lack of interest."

It remains the case, however, that prevention is always better than cure.

INVESTIGATORY POWERS

Problems in the system, however, really begin in the investigation phase. Heartened, no doubt, by Australia's necessary responses to the threat of terrorism, legislators have introduced or extended a good deal of covert and intrusive criminal investigation provisions. Australia has acquired anti-terrorism laws – 54 enactments – in the ten years since the "9/11" events and the Bali bombings. Anyone supportive of the just rule of law should have concerns about these laws. The Clarke Report into the *Haneef* case[5] identifies many of them and Professor George Williams has reported on them.[6]

However, this legislation at federal and state levels seems to have been received as a signal for the legislators to expand such measures from exceptional and clearly dangerous circumstances requiring exceptional responses into areas of what might be described as "ordinary" crime – to push the envelope of measures available to general law enforcement with the anti-terrorism laws as a guide.

Lawmakers have extended powers of search, seizure and examination to "ordinary" crime. Telephone intercepts, listening devices, surveillance and tracking devices, covert search warrants issued by "eligible" judges are being used more than ever before. These measures are often unnecessary, as even without them there is often adequate evidence on which to proceed. We might well query the desirability, effectiveness or legitimacy of such a course. As Professor George Williams has said, the anti-terrorism measures have been hasty and ill-considered and are in need of review. Do we want such laws to provide a platform for further intrusion into our rights by provisions relating to ordinary crime with which we deal quite effectively every day?

The International Bar Association has addressed the principles to be applied in the legal responses to the threat of terrorism in its report *International Terrorism: Legal Challenges and Responses*.[7] It

is possible to react even to the threat of terrorism in a principled and effective way while observing the principles of the just rule of law.

JUDGE ALONE TRIALS

Juries, which serve an essential function in the process of criminal justice, are now at risk of being excluded. In February 2011 the former government removed the requirement that the Crown consent to a judge alone trial in NSW when an accused requested it. Now either party may make the request and the court must decide whether it is in the interests of justice to dispense with a jury. Regrettably, at least in the former government's mind, "the interests of justice" seemed to be aligned with financial economy – dispensing with a jury makes a trial shorter and cheaper. It also requires comprehensive judgments from the judges sitting alone, especially if there are convictions. Since February we have seen significantly increased numbers of judge alone trials and of acquittals.

There is a place for judge alone trials – in cases where, for example, most of the evidence is not disputed and the issue is a narrowly-confined legal or technical one; or where the technical evidence to be considered is such that the time and effort required for a jury to fully comprehend and adjudicate upon it would be excessive; or where circumstances have arisen where a jury trial may not be able to be fairly conducted. But juries add legitimacy and community involvement and acceptance to the trial process. They allow the community to participate and to make decisions on the basis of general community values, standards and judgments where required: for example in relation to dishonesty, negligence and reasonableness. They may facilitate the granting of mercy in appropriate cases, a long accepted prerogative of juries of fellow citizens which judges alone are not permitted to exercise on verdict.

SUPER-SENTENCING

At the sentencing end of the process there is now a political urge to take over and expand upon the work of the courts by continuing detention beyond the sentences imposed or by imposing extended supervision in the community after release. We saw the bold (but thankfully ill-fated) beginnings of this in NSW with the *Kable* legislation (prior to 2001)[8] which has been followed through to serious sex offenders[9], fortified by anti-terrorism measures and the High Court's decision in *Fardon*.[10] The UN Human Rights Committee, in the *Tillott* and *Fardon* cases from NSW and Queensland,[11] reported in March 2010 that continuing detention or extended supervision constitute arbitrary detention and may be double punishment and retroactive punishment contrary to Articles 9(1), 14(7) and 15(1) respectively of the ICCPR. The Australian Government had 180 days in which to respond.[12]

The NSW government talked about extending such measures to serious violent offenders who do not satisfactorily participate in rehabilitation programs in gaol. The Premier at the time was reported to have ordered Corrective Services to begin an audit of the 750 "worst of the worst" prisoners in NSW. About 14 prisoners to whom such a scheme could apply were identified. The Council for Civil Liberties [CCL] said in response: "The rule of law requires politicians to set the framework of justice and for judges to deliver sentences away from political influence. The

prison system is there to encourage prisoners to reform but, if they know they can effectively be resentenced by the government, there is no incentive to reform."

One serious difficulty with legislation of this kind is the prediction of future offending or future dangerousness. Another difficulty (illustrated starkly by the case of Denis Ferguson) is the community and the media response to having such persons under extended supervision orders in the community.

"BIKIE" LAWS AND OTHER KNEE-JERKS

In South Australia , NSW and Queensland we have seen legislation described as laws against "bikie gangs" and as "gang laws". However, it is not confined in its terms to "outlaw motorcycle gangs" and its potential reach is much broader. It could apply, for instance, to political parties, labour unions, religious groups or charities (among many other possibilities) if the Commissioner of Police suspected them of serious criminal activity. The South Australian and NSW Acts have been found by the High Court to be unconstitutional, but for different reasons[15]. Certainly in NSW there are already effective anti-gang provisions in the *Crimes Act*.

The APEC legislation[16] was another recent example of a response to the perceived need for extraordinary measures for public control (remember the Chasers…). The World Youth Day legislation was another – when Ian Bryce rolled out his fake "Popemobile" he was charged with an inappropriate offence (causing unreasonable annoyance, after an even more inappropriate traffic charge was withdrawn) which ultimately was withdrawn, with the involvement and assistance of the CCL. The V8 Supercars arrangements for Homebush were another example of the compromise by government of the rights of sections of society for political expedience. One must question the need for such action and the expansion of executive power in these ways with potential penal consequences.

VICTIMS OF CRIME

Another measure of the social value of a system of general application in the community is its inclusiveness – the extent to which all those potentially affected by the process are included and in ways that may be beneficial. NSW is faring reasonably well in relation to victims of crime.

The move began with the UN's 1985 Declaration of *Basic Principles of Justice for Victims of Crime and Abuse of Power*. In 1993 these requirements, developed by Professors Theo van Boven and Sherif Bassiouni and known as the "van Boven Principles", were adopted in the Rome Statute establishing the International Criminal Court.

The 1985 UN Declaration included the minimum rights of victims. According to the Declaration, victims are to:

- be treated with compassion and respect for their dignity;
- have access to the mechanisms of justice and to prompt redress for the harm suffered;
- have access to procedures for redress that are expeditious, fair, inexpensive and accessible;
- be informed of their rights to seek redress;

- receive information on their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and they have requested such information;
- allow their views and concerns to be presented and considered at appropriate stages of the proceedings where their personal interests are affected;
- be provided with proper assistance throughout the legal process;
- have their inconvenience minimised , their privacy protected and, when necessary, their safety ensured from intimidation and retaliation, as well as that of families and witnesses on their behalf;
- avoid unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims;
- have access to informal mechanisms of conciliation and redress where available and appropriate; and
- have fair restitution for their harm and loss, from both the offender and the state.

In 1989 the NSW Government adopted a Charter of Victims Rights in non-statutory form. It became an appendix to the DPP's Prosecution Guidelines in 1995.

In 1993 the Standing Committee of Attorneys General (SCAG) of Australia adopted a National Charter on Victims Rights and that led to legislation around the country.

Now there is legislation in place on the rights of victims in all jurisdictions except Tasmania and the Commonwealth. Acts were passed in the ACT and Western Australia (1994), Queensland (1995), NSW (1996), South Australia (2001), the Northern Territory and Victoria (2006). Tasmania has made a commitment to observe the UN Declaration and the Commonwealth DPP has a Victims of Crime Policy. The emphasis around the country is on procedural rights, but the extent of compliance with legislation in the various jurisdictions (perhaps with the exception of South Australia, with its own Commissioner) is virtually unknown.

The NSW Act enacted and addressed the implementation of the 1989 Charter (including enacting a statutory Charter of Victims Rights), established a Victims of Crime Bureau to provide defined services to victims of crime and established a Victims Advisory Board to address policy considerations. A scheme for the support and financial compensation of victims was put in place by the related Victims Support and Rehabilitation Act 1996 and it works tolerably well (although there is always the threat of running low on funds).

The Act also provided for the introduction of victim impact statements, which was the culmination of a hesitant approach by the NSW Government which had seen legislation in 1987[18] for victim impact statements which remained unproclaimed, the informal acceptance of some victim impact statements by some courts, the wide application of the Charter of 1989 and the establishment in the Office of the DPP of the Witness Assistance Service in 1994. A fundamental problem for the courts remains the way in which they are to respond to victim impact statements, whether written or oral. It is an issue that continues to the present and the new Government is addressing it again in the context of a proposal for Family Victim Impact Statements and has received submissions from interested parties. Matters for broader

consideration include: whether or not a statement should be on oath; whether it should be subject to the laws of evidence; whether the maker may be cross-examined; whether rebuttal evidence should be admissible; the weight and significance to be given to a statement by the court; and any comparisons to be drawn with cases where no such statements are given.

For example, is the killing of a person who is not expressly and demonstrably missed to be treated any differently, on that account, from the killing of a community treasure whose loss impacts deeply upon individuals and society generally? We value every life – we are all equals – and the unlawful killing of a person is reprehensible, regardless of the victim's identity. But if that is so, what purpose then does a victim impact statement serve in such a case, other than to allow secondary victims to unburden themselves? Could this be done in some other way? Courts have said that these statements are allowable not to enable any kind of comparison to be made between cases, but so as to identify the loss to society from each individual case and to balance that in some way against the mitigating material introduced by the accused. But the questions remain. Courts have also said that victim impact statements must not be used to increase or decrease a sentence. The outcome of the government's inquiry is awaited.

> **IF PROHIBITION WERE LIFTED, ALL THE HARMS COULD BE ADDRESSED, LEADING TO A SITUATION WHERE USERS WOULD NO LONGER BE MARGINALISED AND DEMONISED - TO A SOCIETY WHERE THEY COULD BE TREATED THROUGH APPROPRIATE HEALTH AND SOCIAL SUPPORT.**

DRUG LAWS

The far-reaching social outcomes of the legal prohibition or criminalisation of certain drugs are undesirable. It cannot be denied that drugs are a problem for which there is no easy answer (or we would have solved it long ago). It must be acknowledged, however, that the present course is not effective and that there are better courses worth trying.

The core of the problem is the existence of a highly profitable market. Demand supports supply – it always has and always will – so there is a market. Because it is a black market there is risk in participation. That risk supports high prices and, if avoided, for the supplier ensures high profits. The profits can be substantially reduced by removing the risk; this can be achieved by removing the present legal prohibition.

Drugs can harm user health and social life. Beyond that, however, the harms that we associate with the use of illegal drugs are actually the product of

prohibition – criminal cartels, competition and violence, corruption, secondary crime (from users trying to 'afford' the high prices) and secondary disease. If prohibition were lifted, all the harms could be addressed, leading to a situation where users would no longer be marginalised and demonised – to a society where they could be treated through appropriate health and social support.

There is an alternative to prohibition; the decriminalisation of drugs is a better option that would greatly improve social outcomes for all concerned. The criminal law is not an appropriate mechanism for modifying a market – but it can be done by legalising, regulating, controlling and taxing the regime associated with illicit drugs, just as it is done for alcohol and nicotine. It is not a "one size fits all" solution, of course, and refinements would need to be developed. By removing the prohibition on drugs, the criminal law would still have a role at the margins, but it would be much reduced. And the criminals would need to diversify (as they have always done).

This is definitely one area where criminal justice does not contribute anything positive and where social outcomes would be very greatly improved by a different approach. But politicians will require the electorate to press for and support any reforms in this area before the laws will be changed.

Criminal justice has the opportunity to substantially contribute to social wellbeing by operating in ways that benefit the individuals with whom it deals and the community overall. It must do so fairly and by protecting the human rights of all concerned in ways that are generally accepted and supported by the community at large. In some of the areas discussed, much has been done to improve the situation – but in all areas more needs to be done.

The risk is that without such improvement, the fairness and balance expected of any civilised criminal justice system can be lost and human rights infringed for what are usually short term political motives fuelled by the tabloid media.

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